

# Collecting Societies and Competition Law

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## I. Introduction

It is conventional wisdom that competitive markets serve the interests of customers and consumers better than monopolies. Whether, however, this also holds true for collective societies is highly disputed.<sup>1</sup> Some EU Member States, like Italy and Austria, even provide for a legal monopoly.<sup>2</sup> Apart from such legislation, collective administration of copyright is usually considered to lead to a natural monopoly.<sup>3</sup> This view seems to be opposed by the European Commission, whose Recommendation on the management of online rights in musical works<sup>4</sup> is clearly based on the vision that competition between different collecting societies for right-holders is possible.

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<sup>1</sup> In general, see *Ruth Towse & Christian Handke*, Economics of copyright collecting societies, 38 IIC (2007) (forthcoming) (arguing that the monopoly should be maintained if the transaction costs savings of the monopoly outweigh its costs).

<sup>2</sup> See, in particular, on the recent Austrian Federal Act on Collecting Societies: Bundesgesetz über Verwertungsgesellschaften, Bundesgesetzblatt für die Republik Österreich I Nr. 9, of 13 January 2006, p. 1. The new law entered into force on 1 July 2005; see also *Christian Handig*, Das neue österreichische Verwertungsgesellschaftsgesetz (VerwGesG 2005), 2006 GRUR Int. 365; *Michael Enzinger*, Der europäische Rechtsrahmen für die kollektive Rechtewahrennehmung, 2006 GRUR Int. 985 (on the conformity of the new Austrian law with EC law).

<sup>3</sup> This is also the underlying assumption of the European Parliament expressed in its Resolution of 15 January 2004 on a Community framework for collective management societies in the field of copyright and neighbouring rights (2002/2274(INI)), [2004] OJ EC No. C 92, para. 14 = <http://www.aepo.org/usr/docs%20coll%20man%20of%20rights/resolution%20Echerer%2015%20January%202004.pdf#search=%22European%20Parliament%20resolution%20on%20a%20Community%20framework%20for%20collective%20management%20societies%20in%20the%20field%20of%20copyright%20and%20neighbouring%20rights%22>.

<sup>4</sup> Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, [2005] OJ EC No. L 276, p. 54; Corrigenda, [2005] OJ EC No. L 284, p. 10. Adoption of this Recommendation was preceded by a Commission Staff Working Document of 7 July 2005 – Study on a Community initiative on the cross-border collective management of

From a Community perspective, the behaviour of collecting societies has so far been addressed predominantly from a traditional competition policy perspective. DG Competition, fulfilling its duties of acting against anticompetitive behaviour, reacted to the existence of national monopolies of collecting societies by applying Art. and 82 EC. In particular with regard to reciprocal representation agreements between collecting societies from different EU Member States, the Commission also applied the prohibition on restrictive agreements in Art. 81 EC.<sup>5</sup>

Application of EC competition law to collecting societies and the regulation of collecting societies, be it on a domestic or a European level, are closely intertwined. Of course, domestic legislation has to respect EC competition law. European secondary legislation may not exempt collecting societies from EC competition law. Beyond these purely legal considerations, European legislation is expected to establish an internal market. In this regard, internal market legislation relating to collecting societies has to pursue two market-oriented objectives, namely of enabling collecting societies to provide services across borders on the

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copyright, [http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf), which opened a new, though very short, public consultation that finally proved to have little effect on the Commission position; on this document, see *Manuela Maria Schmidt*, Die kollektive Verwertung der Online-Musikrechte im Europäischen Binnenmarkt, 2005 ZUM 783; *Pavel Tuma*, Pitfalls and Challenges of the EC Directive on the Collective Management of Copyright and Related Rights, 28 EIPR 220, at 227 et seq. (2006). The later Commission Staff Working Document of 11 October 2005 – Impact assessment reforming cross-border collective management of copyright and related rights for legitimate online music services, SEC(2005) 1254 = [http://ec.europa.eu/internal\\_market/copyright/docs/management/sec\\_2005\\_1254\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf), which accompanies and explains the policy of the Recommendation, is in line with the working paper of July 2005. As to the Commission's policy, see *Tilman Lüder*, Working toward the next generation of copyright licenses, presented at the 14<sup>th</sup> Fordham Conference on International Intellectual Property Law and Policy, April 20-21, 2006, [http://ec.europa.eu/internal\\_market/copyright/docs/docs/lueder\\_fordham\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/docs/lueder_fordham_2006.pdf); *Ludwig Majer*, Handlungsoptionen der EU-Politik im Bereich der Verwertungsgesellschaften, in: Karl Riesenhuber (ed.), Wahrnehmungsrecht in Polen, Deutschland und Europa, 2006, p. 147; *Torben Toft*, Collective rights management in the online world – A review of recent Commission initiatives, 2006, [http://ec.europa.eu/comm/competition/speeches/text/sp2006\\_008\\_en.pdf](http://ec.europa.eu/comm/competition/speeches/text/sp2006_008_en.pdf).

<sup>5</sup> See, in particular, Decision of 8 October 2002, COMP/C2/38.014 – *IFPI Simulcasting*, [2003] OJ EC No. L 107, p. 58, in which the Commission granted an individual exemption under Art. 81(3) EC. On this decision, see *Ernst-Joachim Mestmäcker*, Agreements of reciprocal representation of collecting societies in the Internal Market – The related rights of phonogram producers as a test case (simulcasting), 203 RIDA 62 (2005).

one hand and establishing a level playing field of undistorted competition between collecting societies to the extent possible on the other hand. Both objectives are clearly anchored in Art. 14(2) EC, relating to the fundamental freedoms, and the definition of the goal of ensuring undistorted competition in the internal market laid down in Art. 3(g) EC. Yet, simply to focus on the conduct of collecting societies would be a too narrow. The internal market also needs to be established for those economic actors who deal with collecting societies. This includes the commercial users of copyright and neighbouring rights licensed by collecting societies, the undertakings of the copyright industry and, not to forget, the authors and performing artists as original right-holders, who are most important for creating a culturally diverse market for copyrighted works in the EU.

Economic – and competition-oriented – thinking is frequently seen as a threat by those who are afraid that the economy “overrules” different, namely cultural and social considerations that play an important role in the framework of current domestic legislation on collecting societies. Such worries, however, do not necessarily have to be justified for mostly two reasons. Firstly, the “economic” constitution of the internal market only establishes a framework that allows the European legislature to pursue cultural and social objectives to the extent that specific rules do not collide with the economic objectives. Therefore, the question rather is the one of choosing the competition-oriented policy on the European level. Secondly, competition policy as such is not in collision with cultural and social objectives as such. Whereas classical economics of industrial organisation, usually applied in competition policy, focuses on price and output, one might also develop a competition policy that focuses on the dynamic factors of competition, which, in conformity with the objectives of copyright law, promotes creativity and cultural diversity as important assets of the European society and economy.

The foregoing considerations argue for an integrative approach. This section, therefore, transcends the narrow scope of competition policy and aims at developing a European policy for collecting societies which, of course, also includes application of EC competition law to the conduct of collecting societies. In the following, the analysis will firstly clarify different options for the legislature with regard to the constitution of collecting societies as monopolies (at II. below). As a yardstick for the choice of the legislature, the analysis will propose application of a dynamic concept of “creative competition” in contrast to traditional

approaches of promoting allocative efficiency (at III. below).<sup>6</sup> It will be explained why such a system will necessarily lead to a monopoly for collective administration. Then, it will be shown that the practice of applying EC competition law to collecting societies actually promotes “creative competition” (at IV. below). This analysis will also demonstrate that using collecting societies as a means to protect creative authors and performing artists against large exploiters of the copyright industry is in full conformity with the concept of “creative competition”. Such analysis provides a justification for maintaining a system of collective administration even with regard to online exploitation, although individual exploitation using digital rights management systems (DRMs) may technically replace collective administration (at V. below).

## **II. Collecting Societies as a Legal or Natural Monopoly**

### **1. Defining the relevant market**

Whether a monopoly exists can only be assessed for a given relevant market. Collective societies are rather peculiar in this regard. Collective societies are active as service providers in two different markets: Firstly, they provide services to right-holders in regard to the administration of their rights. This market for collective management of rights in the interest of the right-holders was the major concern of the Commission in drafting the Recommendation on management of online rights in musical works.<sup>7</sup> In its definition of “collective rights managers”, the Recommendation only refers to services provided to right-holders. No. 1(e) of the Recommendation reads: “Collective rights manager means any person *providing the services* set out in point (a) to several right-holders.”<sup>8</sup> Secondly, this first market presupposes existence of the other market in which collecting societies license rights to the users (licensing market). Strangely enough, the Recommendation lists the licensing of rights as one activity of the collective rights managers under No. 1(a) as part of the service

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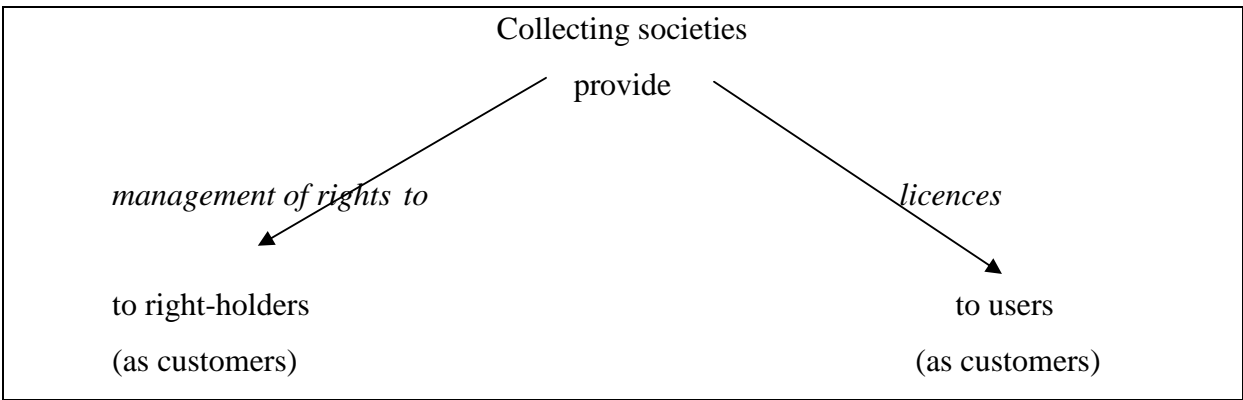
<sup>6</sup> The concept of “creative competition” as an objective for such a competition policy for copyright markets has been developed and described in a most recent article; see *Josef Drexl*, Competition in the field of collective management: Preferring “creative competition” to “allocative efficiency” in European copyright law, in: Paul Torremans (ed.), *Handbook on European copyright law*, 2007 (forthcoming).

<sup>7</sup> See n. 4 above.

<sup>8</sup> Emphasis added by the author.

provided to right-holders along with the auditing and monitoring of rights, the enforcement of copyright and related rights and the collecting of royalties and the distribution of royalties to the right-holders.

Of course, these two markets are closely interrelated. Still, the two markets should not be seen as vertically related, i.e. with an upstream market for the service of collective administration and the licensing market as a downstream market, since the collecting societies provide services both to right-holders and users. This relationship may be depicted in the following way:



The two markets are interrelated in several regards: Firstly, the product a collecting society can provide to users in the licensing market depends on the rights entrusted by the right-holders to this society. A collecting society that is not able to assemble an attractive repertoire for the public will not be considered an interesting provider for licences by users.<sup>9</sup> If, however, the collecting society manages to attract all the rights a user is interested in, this society will dispose of a monopoly.

Secondly, a monopoly of a collecting society in the licensing market would have specific advantages for right-holders. The ability of charging monopoly prices vis-à-vis users may well generate higher income for the right-holders. However, such a monopoly simultaneously creates specific risks for the right-holders, too. Keeping administrative costs low and the quality of the services high are objectives that can be better guaranteed by competition among

<sup>9</sup> See *Ariel Katz*, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, 1 J. of Comp. L. & Econ. 541, at 580 (2005) (arguing that only a collecting society that has a repertoire that is large enough to please users will be able to enter the market).

several collecting societies for right-holders than by a monopoly. This is the very argument of the Commission in favour of introducing competition among collecting societies in the Recommendation on the management of online rights in musical works.

Whether competition exists in a given market is often assessed in view of the number of firms active in that market and their respective market shares. However, market shares can only “indicate” market power and do not substitute a more thorough analysis of the relevant market. Whereas having only one firm in a market clearly demonstrates a monopoly situation, activity of several firms in a market does not necessarily mean that these firms compete. Even without restrictive agreements, specific market circumstances may cause firms not to compete. In an oligopolistic market in particular, the limited number of firms may well behave just like a monopolist. EC competition law takes account of this phenomenon by also banning the abuse of “collective” market dominance under Art. 82 EC. This distinction between the number of firms active in a market and the question of whether these firms actually compete is most relevant for the discussion on collective societies.

Economic writing on collective administration discusses whether several collecting societies can be active in the same market.<sup>10</sup> Still, this writing does not sufficiently take into account that the mere number of actors might not be a sufficient guarantee for competition.

## **2. Different options for the legislature**

Different countries have different market structures with regard to collecting societies. In European countries, existence of domestic monopolies is clearly prevalent. As pointed out at the beginning of this chapter, some countries even provide for a legal monopoly. The Austrian Federal Act on Collecting Societies<sup>11</sup> adopted in 2005 constitutes a very recent example for such legislation. This act explicitly states that only one society will be granted the necessary authorisation to administer a specific category of right.<sup>12</sup>

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<sup>10</sup> In this regard, see the seminal article by *Stanley M. Besen, Sheila N. Kerby & Steven C. Salop*, *An Economic Analysis of Copyright Collective*, 78 *Virginia Law Review* 383, at 397-405 (1992).

<sup>11</sup> See n. 2 above.

<sup>12</sup> § 3(2), 1st sentence, of the Act on Collecting Societies. The provision reads as follows: „Für die Wahrnehmung eines bestimmten Rechts darf jeweils nur einer einzigen Verwertungsgesellschaft eine

In other countries, the law does not provide for such a legal monopoly. Yet, as experience shows, natural monopolies developed. Germany is a striking example of this other group of countries. According to § 1(1) German Act on Collective Administration<sup>13</sup> a collecting society is in need of an administrative authorisation for starting its operation. This authorisation may only be rejected for very limited reasons listed in § 3(1) of the Act, which does not include prior grant of such an authorisation to a competing society.<sup>14</sup> Yet German law takes precautions against abusive behaviour by a natural monopoly<sup>15</sup> by basically two provisions. These provisions stipulate a duty to contract on the part of the collecting society vis-à-vis the right-holders on the one hand (§ 6 of the Act) and vis-à-vis commercial users requesting a licence on the other hand (§ 11 of the Act). Application of these provisions, however, does not depend on the existence of a monopoly; even new entrants that still have to acquire a considerable repertoire in competition with an incumbent would have to accept all right-holders and license to all users without discrimination.<sup>16</sup>

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Betriebsgenehmigung erteilt werden.“ The previous act of 1936 did not include such a provision. Nevertheless, the legislature of 1936 had made clear in the legislative documents that collecting societies should enjoy a monopoly in their respective area of activity; see *Handig*, n. 2 above, p. 167.

<sup>13</sup> Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten und verwandten Schutzrechten (Urheberrechtswahrnehmungsgesetz) of 9 September 1965, [1965] BGBl. (Official Journal) vol. I p. 1294 (revised several times).

<sup>14</sup> The provision mentions three reasons: (i) the charter of the society is not in conformity with the Act on Collective Administration; (ii) indications that the persons representing the society do not have the reliability required for the activity of collective administration; (iii) the economic situation of the society endangers effective administration of the rights.

<sup>15</sup> In Germany, several collective societies may be counted. However, they are active in different sectors. They are specialised in different categories of works, like music, writings, films, the arts and photography or administer copyright or neighbouring rights only. On the structure of collecting societies in Germany, see in: *Jörg Reinbothe*, in: Gerhard Schricker (ed.), *Urheberrecht, Kommentar*, 3<sup>rd</sup> ed. 2006, Vor §§ 1 ff. *WahrnG* para. 14; *Haimo Schack*, *Urheber- und Urheberverlagsrecht*, 3<sup>rd</sup> ed. 2005, para. 1159.

<sup>16</sup> Attempts to enter a market in which an incumbent is already active are very rare. In 2004, the new collecting society *VG Werbung + Musik GmbH* began its business in competition to GEMA in the music sector. This society has remained in the market, though it is not quite clear whether it was able to attract a considerable repertoire. It is more specialised in the licensing of music for advertising.

Still, there are countries in which several collecting societies coexist. Such an example is provided by the USA where ASCAP and BMI have been active in the same market since 1940. This example is referred to by *Besen, Kerby and Salop*, in their seminal economics article on collective administration,<sup>17</sup> as evidence that competition between collecting societies is actually possible. However, as will be seen below, successful market entry of a new competitor depends on specific legislative requirements.

### **3. Allowing discrimination as a requirement for successful market entry of new collecting societies**

*Besen, Kerby and Salop* argue that entry of a new society in the market would only be possible if the incumbent society did not apply a policy of open membership on a non-discriminatory basis.<sup>18</sup> Their arguments seem convincing. Without any regulation, collecting societies would follow a purely economic rationale. Therefore, they would be expected to accept only those right-holders that produce more income than costs and reject others. In such a situation, new societies may have a good chance to attract a considerable number of right-holders and finally to build up an attractive repertoire.<sup>19</sup>

These authors' arguments shed a different light on German legislation. Accordingly, the legal duty of collective societies to contract with all interested right-holders does not appear as "preventive" legislation, responding to the God-given natural monopoly,<sup>20</sup> but rather as the very cause of such a monopoly. Under such legislation, a new entrant has little chances to attract a repertoire that is large and attractive enough for a very simple reason. Right-holders would be ill-advised if they cancelled their contract with the incumbent in order to contract with the new entrant. The incumbent would continue to generate much higher income for the right-holders because of the mere size of its repertoire and overwhelming attractiveness of that repertoire for users. In an open system, like the U.S. one, which does not provide for a

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<sup>17</sup> *Besen, Kerby & Salop*, n. 10 above, at 401 et seq.

<sup>18</sup> *Besen, Kerby & Salop*, n. 10 above, at 397-405.

<sup>19</sup> *Besen, Kerby & Salop*, n. 10 above, at 401 et seq., illustrate their argument by hinting at the successful creation of BMI in 1940 by broadcasters in the US who wanted to break ASCAP's monopoly.

<sup>20</sup> This is the general justification for this duty to contract; see *Reinbothe*, n. 15 above, § 6 WahrnG para. 1.

duty of collecting societies to contract with right-holders on a non-discriminatory basis, accepting all right-holders without regard to the costs they cause would in contrast well have to be considered as an anti-competitive strategy to exclude the new competitor from the market under Sec. 2 of the U.S. Sherman Act, the prohibition on monopolisation. A similar argument can hardly be made in Europe. Practice under Art. 82 EC confirms that an incumbent collecting society holding a market dominant position in a Member State would violate this very provision if it discriminated between different right-holders. In particular, the ECJ has held that a collecting society abuses its market dominant position in its domestic territory if it refuses to administer the rights of a citizen of another Member State.<sup>21</sup> According to a similar argument, German law would violate Art. 12 EC, the rule banning any discrimination on grounds of nationality, if it provided only for a duty of collecting societies to contract with German right-holders. Therefore, § 6 of the German Act on Collective Administration provides today for a duty to administer all rights for the German territory that belong to German nationals or the nationals or residents of other EU and EEA Member States.<sup>22</sup>

The analysis by *Besen, Salop and Kerby* also helps to evaluate the Commission Recommendation on the management of online rights in musical works.<sup>23</sup> At first glance, the Commission's approach seems to be in line with this economic evaluation by aiming at introducing competition between different domestic collecting societies for right-holders. The Commission should have a good chance to introduce such competition given the fact that already a considerable number of collecting societies exist in different Member States. The Commission expects these societies to compete for the online rights of right-holders and to grant multi-territorial licences directly to users. The Commission hopes to achieve this goal by postulating a "right" of the right-holder "to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, irrespective of the Member State of residence or the nationality of either the collective

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<sup>21</sup> Case 7/82, *GVL v. Commission*, [1983] ECR 483, para. 56.

<sup>22</sup> A previous version was limited to right-holders with German nationality or residence in Germany. Former § 6 was amended in order to bring it in conformity with Community law; see *Reinbothe*, n. 15 above, § 6 WahrnG para. 9. The current provision seems to discriminate against right-holders from third states. However, such discrimination should be considered to be excluded as a matter of the national treatment obligation of the Berne Convention.

<sup>23</sup> See n. 4 above.

rights manager of the right-holder.” Such a “right”, however, seems to require a duty to contract on the part of the “collective rights managers” on a non-discriminatory basis. Yet, such a duty, which would amount to a serious restriction on the freedom of economic activity of the collective rights managers, does not only lack any justification since, in the internal market, no domestic collective society could be considered market dominant. Such right also contradicts the logic that, at a long run, sustainable competition between the collective rights managers would only be possible if they were allowed to refuse administration of individual rights and right-holders.

And in fact, the Recommendation, not being binding on the Member States, does not introduce any duty to contract. On the contrary, the Commission itself implicitly admits that the collective rights managers are free to reject the administration of individual rights by arguing that collective rights managers will and should specialise in certain categories of music.<sup>24</sup> Such specialisation obviously requires that the collective rights managers are able to select music according to their preferences. Hence, the Recommendation’s language referring to a right of right-holders to choose freely among collective rights managers amounts to a non-fulfilling prophecy. Right-holders will only be able to rely on the principle of contractual freedom, which is the fundamental private law principle governing competitive markets after all and which safeguards the freedom of collective rights managers to reject contracting with individual right-holders or with regard to individual rights. As a consequence, the Commission model entails the risk of excluding individual right-holders from access to the system of collective administration.

Hence, from a perspective of competition policy, one might be tempted to conclude that it would be better to prefer the U.S. system that does not oblige collective societies to administer the rights of all interested right-holders on a non-discriminatory basis. However, in this chapter, we will demonstrate that, actually, the opposite may well be true.

#### **4. Why several collecting societies doing business in a market do not necessarily guarantee competition**

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<sup>24</sup> See Commission Staff Working Document of 7 July 2005, n. 4 above, p 36.

According to the preceding analysis, the Commission seems to be right in assuming that competition between collecting societies may be established. However, with regard to the market for collective management of rights, such competition only works to the benefit of the rights in music that is most liked by consumers. Therefore, the Commission Recommendation on the management of online rights in musical works promotes most the interest of the right-holders that control the rights in mainstream popular music that predominantly relies on the use of the English language and is liked across national borders within the European Union. In contrast, music based on less widely used languages will most likely be administered by the dominant collecting society in the country where the specific language is spoken. Hence, only the Hungarian society will manage rights in Hungarian music; the Greek society will administer rights in Greek music. Music only liked by minorities may have problems finding an interested collecting society. And there is no guarantee that “innovative” music, often paving new grounds for popular music, will find a collective rights manager at all, given the specialisation the Commission advocates. To sum up: Competition as promoted by the Recommendation will work for some but not all right-holders.

Still, these concerns do not necessarily contradict that the Commission has developed a sound competition policy with regard to collecting administration. In its defence, it may well be argued that competitive markets have to serve consumer interests after all and that the legislature should not impose tastes on consumers in a paternalistic way. Accordingly, the system promoted by the Commission seems to lead to a most efficient system of marketing rights which are most liked by consumers. However, we will see later that this is not the complete picture. A system of “creative” competition requires different rules.<sup>25</sup>

In addition, the kind of competition the Commission tries to implement by its Recommendation only concerns the market for collective administration in the interests of right-holders. It does not sufficiently take into account the effects of this model on the licensing market. Given potential competition between a number of collecting societies, it seems that users will have the similar advantage of being able to choose between different societies that directly grant multi-territorial licences. However, the Commission model also gives rise to specific disadvantages for users.

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<sup>25</sup> See section III. below.

Users who want to use specific music titles will have to face considerable search costs. This disadvantage is highlighted by a comparison of the Commission model with the so-called IFPI Simulcasting Agreement,<sup>26</sup> a model for reciprocal representation agreements that was developed with the objective of enabling the collecting societies to grant multi-territorial licences for online rights.<sup>27</sup> The IFPI Simulcasting Agreement applies to licences for the neighbouring rights of phonogram producers with regard to the activities of simulcasting<sup>28</sup> and webcasting.<sup>29</sup> In contrast to the Commission model promoted in the Recommendation of 18 October 2005, the advantages of the IFPI Simulcasting Agreement are not limited to the grant of multi-territorial licenses. The collecting societies bound by reciprocal representation agreements of this model also empower each other to grant licenses for their respective repertoires. Hence, whereas the Commission Recommendation only promotes multi-territorial licences, the IFPI Simulcasting Agreement also enables multi-repertoire licenses. In doing so, the IFPI Simulcasting Agreement provides users with the obvious advantage of the “one-stop shop”. Users only have to address one collecting society to be granted one blanket licence for all national territories and all repertoires of the societies participating in the network. In contrast, in the framework of the Commission model, commercial users will have to find out which collecting society actually holds the rights in the music they want to use. The Commission tries to reject this argument by recommending collective rights managers to inform commercial users on the rights they represent and on changes in their repertoires.<sup>30</sup> However, such principles of transparency may only lower search costs without providing a sufficient substitute for the advantage of the one-stop shop. In addition, the Commission even argues that its model is in the very interest of collecting societies. According to the

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<sup>26</sup> The IFPI Simulcasting agreement is not available on the internet. Its rules are thoroughly explained in the Commission decision granting an exemption under Art. 81(3) EC; see n. 5 above, and *Nils Bortloff*, *Internationale Lizenzierung von Internet-Simulcasts durch die Tonträgerindustrie*, 2003 GRUR Int. 669.

<sup>27</sup> For a more detailed analysis of different models of cross-border licensing of online rights, see *Josef Drexl*, *Auf dem Weg zu einer neuen europäischen Marktordnung der kollektiven Wahrnehmung von Online-Rechten der Musik? – Kritische Würdigung der Kommissionsempfehlung vom 18. Oktober 2005*, in: Karl Riesenhuber (ed.), *Wahrnehmungsrecht in Polen, Deutschland und Europa*, 2006, p. 193, 204-220.

<sup>28</sup> Simulcasting is defined as the simultaneous terrestrial and online transmission of broadcasts.

<sup>29</sup> Webcasting is independent from terrestrial broadcasts. Webcasting licences in musical works are especially requested by exclusive internet radio station. Whereas, initially, the IFPI Simulcasting agreement only applied to simulcasting licences, it was later extended to webcasting.

<sup>30</sup> No. 6 and 7 of the Recommendation, n. 4 above.

Commission, collecting societies are only interested in certain types of music and do not need access to all music. Therefore, the Commission thinks that commercial users benefit from the specialisation of collective rights managers, providing them with more targeted repertoires.<sup>31</sup> Still, this argument does not solve the problem that commercial user have to find out which collective rights manager in a competitive system administers which rights.

More importantly from the point of view of competition, even in a model in which several collecting societies compete for right-holders, there will not be much or even any competition for commercial users. Competition in the licensing market will largely be excluded by the so-called “superstar phenomenon” in the market for music. *Katz*<sup>32</sup> hints at this phenomenon in order to describe a specific benefit of the blanket license. Users of music, like radio stations, do not know in advance which songs are going to be most successful and which are not. The blanket license guarantees that users will have immediate access to superstar music. Of course, the argument may be extended to the repertoires of several collecting societies specialised in the same category of music. Let us imagine that four major collecting societies are active in the field of mainstream popular music mostly using the English language. An internet radio station that wants to make sure that it will be allowed to webcast the superstar music of tomorrow will have to request blanket licenses from all of these societies. Obviously, in such a market, there will be no competition with regard to the users despite the number of collecting societies in the market. Each single collecting society will dispose of a market dominant position since the repertoires of their counterparts do not constitute sufficient substitutes from the point of view of the commercial users. The latter are in need of access to all repertoires. This analysis is confirmed by experience in the USA. It seems that most users of public performance rights acquire licences from both ASCAP and BMI.<sup>33</sup>

From this analysis, several important conclusions can be drawn for the evaluation of the Recommendation on the management of online rights for musical works: Firstly, the Commission proclaims a competitive system that only has a chance to become reality for the holders of rights in most popular mainstream music, whereas the right-holders of other types

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<sup>31</sup> In this sense, see Commission Staff Working Document of 7 July 2005 – Study on a Community Initiative, n. 4 above, at para. 3.3 (p. 36).

<sup>32</sup> *Katz*, n. 9 above, at 574.

<sup>33</sup> See *Michael Einhorn*, Intellectual Property and Antitrust: Music Performing Rights in Broadcasting, 24 Columbia-VLA Journal of Law and the Arts 349, at 362 (2001)

of music and the commercial users would continue to face a monopoly of collective administration. Some right-holders might even have problems finding a collective rights manager interested in administering their music. Secondly, the Recommendation does not take any measure to control the new European monopoly of collecting societies. On the contrary, by recommending the grant of cross-border licences, the Commission creates incentives for collecting societies to simply disregard the domestic law on collective administration in different EU Member States that possibly has the very function to control such monopolies.<sup>34</sup> Thirdly, the IFPI Simulcasting Agreement provides a much higher level of competition in the licensing market by allowing commercial users to choose which collecting society will grant the multi-territorial and multi-repertoire license. Whereas, according to this Agreement, the level of royalties will be calculated according to the volume of use and the tariffs fixed by the different collecting societies in the country of destination, the royalties fixed by the society granting the licence may still diverge with regard to the part charged for its administrative costs in particular.<sup>35</sup> Such advantages convinced the Commission to exempt the IFPI Simulcasting agreement from the cartel prohibition under Art. 81(3) EC,<sup>36</sup> whereas the Santiago and Barcelona Agreement<sup>37</sup> as a model for cross-border licensing of copyright,

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<sup>34</sup> For an analysis of the conflict between the Recommendation and German law, see *Josef Drexler*, *Le droit de la gestion du droit d'auteur en Allemagne après l'adoption de la Recommandation européenne sur la gestion collective des droits en ligne dans le domaine musical*, 2007 *Propriétés intellectuelles* 33.

<sup>35</sup> The Commission, in its IFPI Simulcasting decision, n. 5 above, para. 68, also argues that the society granting the licence may dispose of flexibility with regard to rebates and the tariffs for the use of the licensed rights in its own country.

<sup>36</sup> However, the Commission, n. 5 above, paras 99-107, only granted the exemption after the IFPI Simulcasting Agreement had been changed to the effect that the society granting the licence would always distinguish, in setting up its tariffs, between the "copyright royalty" and the "administration fee". The Commission thereby tried to introduce more transparency into the licensing practice in favour of users. Nevertheless, the Commission's approach was very much criticised in legal writing; see *Mestmäcker*, n. 5 above, at 113-121.

<sup>37</sup> The two agreements are not available on the Internet either. They are reprinted in *Paolo Spada* (ed.), *Gestione collettiva dell'offerta e della domanda di prodotti culturali*, 2006, p. 253 and p. 261; see also *Antonio Capobianco*, *Licensing of Music Rights: Media Convergence, Technological Developments and EC Competition Law*, 26 *EIPR* 113, at 119 (2004).

which only empowered the society of the country of the commercial user's residence (so-called economic residence clause), had to face considerable criticism by the Commission.<sup>38</sup>

## 5. Choosing between a natural and a legal monopoly

As the preceding analysis demonstrates, the natural monopoly cannot be avoided altogether. Countries, like Germany, that provide for a duty of collecting societies to accept all right-holders on a non-discriminatory basis, will almost automatically end up in a natural monopoly. Still the question therefore is whether countries are better advised to opt for a legal monopoly.

Several arguments can be discussed in favour of a legal monopoly:

Copyright lawyers sometimes fear that replacing the monopoly of collective administration by a competition-oriented system may reduce income for authors.<sup>39</sup> From an economic point of view, this seems to be a necessary consequence. However, there is no legal justification for guaranteeing monopoly rents for authors. Collecting societies only have the function of saving transactions costs when it comes to mass use of rights but not of enabling collecting societies to impose monopoly prices on users. Equally, copyright protection only aims at solving a public goods problem by enabling right-holders to charge for the costs of the production of works<sup>40</sup> but does not aim at conferring monopoly rents to authors. In addition, imposing

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<sup>38</sup> When it became apparent that the Commission would not exempt the two agreements under Art. 81(3) EC, the collecting societies simply decided not to extend their validity beyond the end of 2004. Consequently, as of 1 January 2005, multi-territorial copyright licenses were no longer possible. Commercial users rather had to request individual territorial licences from the different domestic collecting societies. This situation finally caused the Commission to think about a new approach which was then implemented by the Recommendation of 18 October 2005.

<sup>39</sup> See, for instance, *Silke von Lewinski*, Gedanken zur kollektiven Rechtswahrnehmung, in: Ansgar Ohly, Theo Bodewig, Thomas Dreier, Peter Götting, Maximilian Haedicke & Michael Lehmann (eds.), *Perspektiven des Geistigen Eigentums und Wettbewerbsrechts*, Festschrift für Gerhard Schricker, 2005, p. 401, at 405 et seq.

<sup>40</sup> See, for instance, *William M. Landes and Richard A. Posner*, An economic analysis of copyright law, 18 J. of Legal Studies 325, at 326 (1989).

monopoly prices by collecting societies in fixing royalties has been considered unlawful under Art. 82 EC by the ECJ.<sup>41</sup>

Yet, legal protection of the monopoly was to be held superfluous if the market anyhow ended up in a natural monopoly. It would rather seem sufficient to implement rules that control the use of monopoly power. In fact, providing for a legal monopoly contradicts the principle of proportionality and limits the freedom of economic action too much. At least formally, the law should leave room for competition and should nevertheless take into account the risk of the emergence of a natural monopoly by specific regulation of the conduct of collecting societies.

Having a legal monopoly may still make sense as a reaction to the unavoidable natural monopoly. Markets may not necessarily select the best, *i.e.* most efficient collecting society, whereas regulation of the legal monopoly can identify criteria for selecting the best society and provide for a specific procedure to be taken when potential competitors request to replace the incumbent. Such regulation can actually be found in the new Austrian law. A society that has been granted the “single” authorisation for the administration of a given right cannot expect to hold this authorisation for ever. Later application by a newcomer obliges the competent authority to invite existing societies to apply for the same authorisation.<sup>42</sup> Whether, however, newcomers have good chances to contest the authorisation once granted to another collecting society is quite questionable. In case of no other indications, as the main criterion for selection, Austrian law provides for a presumption according to which existing collecting societies better fulfil their duties and obligations under the law.<sup>43</sup>

### III. “Creative competition” instead of allocative efficiency

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<sup>41</sup> See Case 395/87, *Tournier*, [1989] ECR 2521, paras. 34-46; Joint Cases 110, 241 and 242/88, *Lucazeau et al. v. SACEM*, [1989] ECR 2811, paras. 21-33.

<sup>42</sup> § 3(3), 2nd sentence of the Act on collecting societies.

<sup>43</sup> *Id.* The said rule obviously favours domestic firms to new comers from other Member States. Therefore, this rule seems problematic in the light the free movement principles of the EC Treaty. This is the more true with regard to the requirement of a commercial residence in Austria for granting the authority; see *Enzinger*, n. 2 above, at 992 et seq.

## 1. Competition as a means to promote allocative efficiency?

The preceding discussion on collective administration as a monopoly left open the question of whether the legislature should try to achieve a maximum of competition by allowing collecting societies to reject administration of rights and even discriminate between different right holders according to the market value of such rights. *Besen, Salop and Kerby* argue in this very sense.<sup>44</sup>

In a recent article, *Ariel Katz* reviewed all potential benefits of a monopoly in the field of collective management of copyrights.<sup>45</sup> As a general conclusion, *Katz* admits that collecting societies, by granting blanket licences for their respective repertoires, achieve economies of scale and scope, but still he is critical about the assumption that such benefits can only be achieved by a monopoly.<sup>46</sup> By economies of scale, *Katz* refers to the benefit of allocating fixed administrative costs among a larger number of managed rights.<sup>47</sup> By economies of scope, *Katz* describes the advantage to the users and licensees of having access to a larger repertoire.<sup>48</sup> Still, *Katz* identifies reasons for the emergence of a natural monopoly.<sup>49</sup> For instance, he mentions the costs of enforcement. Co-existence of several collecting societies in a market would namely increase such costs by the simple fact that, in infringement proceedings, an individual society would be required to prove that the rights that had been used illegally actually belong to its repertoire.<sup>50</sup> As to said economies of scope, *Katz* accepts the “one-stop shop” argument about saving search and negotiating costs but, nevertheless, he questions whether these benefits are really worth the cost of opting against a market that

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<sup>44</sup> See *Katz*, n. 9 above.

<sup>45</sup> *Katz*, n. 9 above.

<sup>46</sup> *Katz*, n. 9 above, at 590.

<sup>47</sup> *Katz*, n. 9 above, at 554.

<sup>48</sup> *Katz*, n. 9 above, at 581.

<sup>49</sup> See *Katz*, n. 9 above, at 591.

<sup>50</sup> *Katz*, n. 9 above, at 556 et seq. and 559. A good example of justifying the argument is provided by German case-law. German courts have established the so-called “GEMA Vermutung”, a presumption based on the monopoly position of the German GEMA according to which, in an infringement litigation, the user has the burden of proof as to the fact that works used by him are not managed by GEMA; see ##. This presumption also relates to the repertoire of foreign collecting societies that are administered by GEMA in the framework of reciprocal representation agreements.

comprises several collecting societies.<sup>51</sup> Most interestingly, *Katz* argues that these cost-saving benefits of the monopoly are overstated given the high concentration of the music industry, with the major publishing companies controlling 80% of the market and each of them holding large portfolios of rights.<sup>52</sup> Although *Katz*, in principle, accepts the argument according to which blanket licences granted by monopolistic societies reduce the risk of infringement on works users publicly perform, he still argues that an alternative competition-oriented solution could be found, for instance, by insurance companies offering coverage for the risk of infringement.<sup>53</sup> Apart from those potential benefits, *Katz* also asks whether monopolies held by collecting societies are contestable.<sup>54</sup> Here, he admits that new entrants would only be successful if they could offer a repertoire that is large enough to offer a reasonable substitute.<sup>55</sup> Obviously, *Katz* does not question the natural monopoly assumption as such. He rather argues in favour of a solution according to which regulation would have to replace the natural monopoly by a more competition-oriented form of collective administration.

The two economics articles, by *Besen, Kerby and Salop* on the one hand and *Katz* on the other hand, provide interesting insights in the working of the markets of collective management of copyright. Still, they both seem to pursue allocative efficiency as the goal of regulation and thereby do not take into account the essential copyright goal of promoting creativity.

*Besen, Kerby and Salop* very much aim at identifying the conditions of a copyright system that offers the optimal volume of copyrighted works at lowest prices. They therefore criticise a regulatory system that requires collecting societies to accept all right-holders as members, since such a system would lead to the production of a larger than efficient volume of works.<sup>56</sup> Whereas *Besen, Kerby and Salop* evaluate collective administration of copyrights only in terms of quantity and price for existing markets (allocative efficiency), copyright is, above all, meant to promote creativity in the sense of dynamic competition. In contrast to the model of allocative efficiency, modern competition policy should focus more on the dynamic aspect of

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<sup>51</sup> *Katz*, n. 9 above, at 571.

<sup>52</sup> *Katz*, n. 9 above, at 575 et seq.

<sup>53</sup> *Katz*, n. 9 above, at 576 et seq.

<sup>54</sup> *Katz*, n. 9 above, at 578-582.

<sup>55</sup> *Katz*, n. 9 above, at 580.

<sup>56</sup> See *Besen, Kerby & Salop*, n. 10 above, at 397.

competition than on pure price competition. The European Commission has best explained this concept of dynamic competition as a goal of its policy in the Guidelines on Transfer of Technology, where IP law and competition law are described as two complementary elements of a coherent regulatory framework that triggers sustainable competition for innovation.<sup>57</sup> Of course, these Guidelines only refer to technology, including software, and not to copyright in general. Still, there is no reason why the same philosophy should not apply to copyright.<sup>58</sup> The question, therefore, would be how to conceive a market for collective management that best enhances creativity.

The approach applied by *Katz* meets similar criticism. His analysis is very much inspired by the concern that the natural monopoly assumption “seriously distorts the pricing system for music” by not taking into account available competition-oriented options.<sup>59</sup> *Katz* thereby overlooks the fact that price competition may matter less than dynamic, creativity enhancing competition. Nevertheless, *Katz* himself gives hints as to how such dynamic competition may best be implemented. Very convincingly, he alludes to the already mentioned<sup>60</sup> “superstar phenomenon” to describe a specific benefit of the blanket licence.<sup>61</sup> Yet, *Katz* does not ask the actually “preliminary” question of how a collecting society, or an intermediary, like a large music publishing company, can know what kind of music will be liked most by the public. This question, however, seems essential if one allows collecting societies to refuse to manage the rights for individual works as a condition for making competition possible. The reason why *Katz* does not ask this question seems quite obvious. In his model of allocative efficiency, he only tries to guarantee access to already existing works. Pre-selection of works by collecting societies and music publishing companies, however, could exclude very creative works that are still unknown to the public.

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<sup>57</sup> Para. 7 of the Commission Notice – Guidelines on the application of Article 81 of the Treaty to technology transfer agreements, [2004] OJ EC No. C 101, p. 2.

<sup>58</sup> Also the Commission intends to apply the same principles set out for technology transfer agreements also to the licensing of copyright for the purpose of reproduction and distribution of protected works; see TT Guidelines, n. 57 above, para. 51.

<sup>59</sup> *Katz*, n. 9 above, at 591.

<sup>60</sup> At n. 32 above.

<sup>61</sup> *Katz*, n. 9 above, at 574.

This is a strong argument in favour of a system of collecting administration based on a principle of open and non-discriminatory access of all works. Whereas according to *Besen, Kerby and Salop* such a system would promote the emergence of a natural monopoly, it would allow maximum access of all works to the market in which ultimately the consumer will decide on who becomes the “superstar” for a certain time. Non-discriminatory access of works to the market should however not only be preferred for mainstream music. The same principle would in particular promote market access for highly innovative forms of music and music with a stronger minority character, whereas, motivated by maximising income, competing collecting societies would predominantly pre-select in the light of the existing average taste of the public.<sup>62</sup> Hence, imposing an obligation on collecting societies to accept all right-holders on a non-discriminatory basis is not exclusively mandated by already existing market dominance but also by the need to establish “creative competition between works”. As shown by *Besen, Kerby and Salop*, such a system, however, would directly lead to a natural monopoly.

## **2. Sketching a model of “creative competition” for collective administration of rights**

The term of “allocative efficiency” refers to a static competition policy that focuses on price and output. Economic theory, however, tells us that dynamic competition for better products and innovation may promote wealth and consumer interests much more than does the mere optimal allocation of existing resources through the price mechanism of markets.<sup>63</sup> The concept of “dynamic competition” was mostly developed in the light of the patent paradigm. Copyright, however, at least as far as rights administered by collecting societies are

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<sup>62</sup> See also *Drexel*, n. 34 above (with more arguments on the negative effects of the Commission’s model for competition between collecting societies on cultural diversity).

<sup>63</sup> These ideas on dynamic competition were first developed by *Joseph R. Schumpeter*, *Capitalism, Socialism, and Democracy*, 1946 – new edition 1976, p. 81-86, who created the nowadays oft-cited concept of “creative destruction”. According to this concept, monopolies are not so bad after all, since they will always be overturned after a while by competitors offering more innovative products. Modern economists sometimes question the validity of the neoclassical static model of perfect competition altogether as unrealistic, and refer to dynamic competition as the only convincing model; see, e.g., *Mark Blaug*, *Is Competition Such a Good Thing? Static Efficiency versus Dynamic Efficiency*, 19 *Review of Industrial Organization* 37, 44 et seq. (2001).

concerned, is not technology-related and does not aim at promoting innovation but creativity. This is why we use here the term of “creative competition” instead of “dynamic competition”.

It is worth to be noted that the Commission, in its documents preparing and explaining the Recommendation of October 2005, does not distinguish between the two concepts of static and dynamic competition. The arguments put forward by the Commission, namely the objective of improving the quality of the services provided by collective rights managers and of keeping administration costs low, underline the Commission’s emphasis on allocative efficiency. The effect of the Recommendation on creativity is hardly taken into account. With a rather superficial argument, the Commission only argues that transfer of higher royalties to the right-holders may increase investment in creativity.<sup>64</sup>

In the Commission model, as in any more competition-oriented model that allows collecting societies to reject the administration of individual rights, collecting societies have to identify the music they want to offer to commercial users. In such a system, collecting societies, as regular market participants, have to base their decision on a business rationale. Given the superstar phenomenon, they face the difficult task of predicting what kind of music will be successful in the future. Specialisation in regard to a specific category of music, as advocated by the Commission in its Recommendation, would not suffice. “Collective rights managers”, in the terminology of the Recommendation, would still have to distinguish attractive from non-attractive music within a given category. Therefore, collective rights managers will tend to make a decision on the basis of existing tastes of the public. Such an approach would be in perfect harmony with the concept of allocative efficiency. Businesses are expected to satisfy the needs of consumers. Whereas existing tastes may be identified, it is almost impossible to know what consumers might like in the future. Collective rights managers that accept music that deviates from the existing average taste take economic risks. Therefore, collecting societies that now bring their business strategies in line with the Recommendation have a strong incentive to concentrate on popular music that is liked throughout the EU.

Obviously, specialisation as a specific feature of the Commission model for the Recommendation of October 2005 plays a major role for assessing the impact of the

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<sup>64</sup> Whereas the Commission seems to hope for higher income as a consequence of lower administrative costs and more effective administration, income may be reduced by the search costs imposed on users as a consequence of the departure from the one-stop shop.

Commission model on creative competition.<sup>65</sup> Specialisation of collecting societies splits up a comprehensive market for all music in separate relevant markets for different categories of music. These separate markets will have their own specific structures. For mainstream popular music liked across national borders, several collecting societies may well try to compete and acquire an attractive repertoire for cross-border licensing. To the extent that competition for right-holders is sustainable, and does not end up in a natural monopoly, the Commission model would actually generate large income, which, under the pressure of competition, would be passed to the right-holders. The situation would be very different, however, for music relying on less spoken languages and for which there is a real danger that only one society, namely the relevant domestic society, will exercise market dominance to the disadvantage of users and right-holders. Instead of protecting the interest of right-holders vis-à-vis such a monopoly, the Commission only relies on an unjustified principle of free choice of the right-holder. The situation may well be worst for most creative and “innovative” music that still has to prove its market viability, but will not find a collective rights manager at all. Hence, the Recommendation favours mainstream popular music most, whose market value can be judged best, and tends to create market-access barriers for music serving minority tastes and innovative music.

In contrast, a competition-oriented system that promotes cultural diversity and creativity would have to guarantee non-discriminatory market access for all categories music and then leave it to consumers which music they like most. Such a system would actually require a duty to contract for the individual collecting societies with regard to all right-holders.

In the light of the preceding analysis, such “creative competition” requires exclusion of competition between collecting societies as a condition for equal market opportunities of all works. “Creative competition”, however, should not be misunderstood as an “exclusion” of competition as such. It actually promotes competition between a larger number of works and culturally more diverse works at the price of restraining competition between collecting societies. In addition, equal market access does not cause anticompetitive effects to the disadvantage of more popular works of music. Only the principle of equal market access guarantees that consumers will decide on the popularity of works, without being restricted in their choice by pre-selection by collecting societies. Accordingly, the model of “creative competition” provides a much more open and dynamic market for copyrighted works.

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<sup>65</sup> See already at n. 24 above.

#### **IV. EC competition law as a means to promote “creative” competition**

After having analysed and criticised the Commission policy regarding the 2005 Recommendation on the managing of online rights in musical works, it is time to return to the application of EC competition law. It is interesting to see that, in applying EC competition law, the practice of the Commission and the ECJ, without being explicit about it, and maybe without being completely aware of it, is quite in line with the model of “creative competition”.

As mentioned before, EC competition law addresses the behaviour of collecting societies under two aspects: Firstly, collecting societies as undertakings holding a dominant position in their relevant market of individual Member States are prohibited to abuse that position under Art. 82 EC. Secondly, collecting societies may not restrict competition in violation of Art. 81 EC when they conclude agreements, be it with the right-holders, the users, or between each other when it comes to reciprocal representation agreements.

##### **1. Specific emphasis of applying Art. 82 EC to exploitative behaviour**

Application of 82 EC is most central. In conformity with many domestic laws regulating collective administration, EC institutions apply Art. 82 EC with the objective of protecting the other party, be it the right-holder or the commercial user, against abusive behaviour of the collecting society. Accordingly, the ECJ tries to control excessive royalties imposed on commercial users, like the operators of night clubs.<sup>66</sup> With regard to right-holders, the ECJ held that imposing any obligation which is not absolutely necessary for the attainment of the object of collective administration and which thus encroaches unfairly upon a member’s

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<sup>66</sup> See Case 395/87, *Tournier*, [1989] ECR 2521, paras. 34-46; Joint Cases 110, 241 and 242/88, *Lucazeau et al. v. SACEM*, [1989] ECR 2811, paras. 21-33. Whether prices are “unfair” in the sense of Art. 82 lit. a) EC is most difficult to assess. The ECJ, in these decisions, refers to the royalties fixed by collecting societies in other countries as an indication. On abusive royalties, see also the decision of the Cour d’appel de Bruxelles of 3 November 2005, [2006] E.C.C. 195 (holding that the Belgian collecting society has violated Art. 82 c) EC and Belgian competition law by granting a 50% royalty discount only to large commercial users).

freedom to exercise her copyright, has to be considered an abuse in the sense of Art. 82 EC.<sup>67</sup> These decisions share a common, however, very rare feature within the case law on Art. 82 EC: they specifically relate to exploitative practices and not to exclusionary practices.

When the ECJ talks about the “object” of collective administration, the Court refers to the function of collecting societies to protect right-holders against the power of large exploiters. In *BRT*, the ECJ clearly states:<sup>68</sup>

“To determine whether, in these circumstances, the practices mentioned in the referring judgment constitute an abuse within the meaning of Article 86 of the Treaty [now: Art. 82 EC] account must however be taken of the fact that an undertaking of the type envisaged is an association whose object is to protect the rights and interests of its individual members against, in particular, major exploiters and distributors of musical material, such as radio broadcasting bodies and record manufacturers.”

Hence, the ECJ accepts a privileged position of collecting societies to the extent that collecting societies compete with the copyright industry for the transfer of rights. In this regard, the exercise of the market dominant position of the collecting society is not controlled in view of maintaining a maximum of competition but only for the sake of protecting the freedom of right-holders to administer their rights individually. Accordingly, in *BRT*, the Court goes on to state:<sup>69</sup>

“Consequently, it is desirable to examine whether the practices in dispute exceed the limit absolutely necessary for the attainment of this object, with due regard also to the interest which the individual author may have that his freedom to dispose of his work is not limited more than need be.”

This philosophy also underlies the more recent decision of the Commission in the so-called *Daft Punk* case. Here, the Commission held that, because of the ability of author to enter into direct contact with potential users over the Internet, collecting societies abuse their market-

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<sup>67</sup> See Case 127/73, *BRT v. SABAM*, [1974] ECR 313, para. 15.

<sup>68</sup> Case 127/73, *BRT v. SABAM*, [1974] ECR 313, para. 9.

<sup>69</sup> Case 127/73, *BRT v. SABAM*, [1974] ECR 313, para. 11.

dominant power in the sense of Art. 82 EC if they force authors to license their rights to any collecting society.<sup>70</sup> This clearly shows that even in a situation in which a given collecting society does not exclude competition with other societies, it still abuses its dominant situation if it does not allow individual administration by the author. Still, the Commission also admits that many authors will decide to administer their online rights through collecting societies. It therefore only advocates a system in which collective administration competes with individual administration by the authors themselves and argues that such competition will control the behaviour of the collecting societies.<sup>71</sup> We may conclude that the Commission only bans an obligation imposed by collecting societies to use the system of collective administration, whereas authors who are not able to administer their rights themselves should have the possibility to use this system.

In the light of the above-mentioned literature, especially the writing of authors – *Besen, Salop and Kerby*<sup>72</sup> on the one hand and *Katz*<sup>73</sup> on the other hand – who highlight the importance of competition between collecting societies, such little weight given to potential exclusionary effects of the conduct of dominant collecting societies by the Commission and the ECJ seems at least surprising. This policy on collecting societies also seems to contradict the overall current trend in competition policy. Nowadays, banning exclusionary practices is usually considered to be much more important than banning exploitation. The EC Commission currently reviews its application of Art. 82 EC to exclusionary practices in the light of a new economic approach,<sup>74</sup> and thereby only *en passant* confirms that the EC law also covers other

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<sup>70</sup> Decision of 12 August 2002, Case COMP/C2/37.219 *Banghalter & Homem Christo gegen SACEM*, <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37219/fr.pdf> (only available in French); see also *Toft*, n. 4 above, p. 11-13. According to its rules, the French SACEM denied membership to the two composers Banghalter and Homem Christo, working for the punk group Daft Punk. SACEM's rules required that certain rights would have to be administered by a collecting society, not necessarily SACEM. The composers wanted to exclude certain rights from the contract with SACEM. Whereas some of these rights were administered by the British PRS, the composers intended to administer the remaining rights individually.

<sup>71</sup> Explicitly, in this sense, Commission, n. 70 above, p. 11.

<sup>72</sup> See n. 10 above.

<sup>73</sup> See n. 9 above.

<sup>74</sup> See DG Competition discussion paper of December 2005 on the application of the Treaty to exclusionary abuses, <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

forms of abuses, namely exploitative and discriminatory practices.<sup>75</sup> In the U.S., practice requires exclusion as a necessary requirement for its application of Sec. 2 Sherman Act, thereby reducing the scope of the U.S. prohibition on monopolisation to exclusionary practices.

Yet, it would be wrong to reject the traditional focus on exploitation in Europe. By accepting collecting societies with their function of protecting right-holders, authors and performing artists in particular against the bargaining power of large undertakings of the copyright industry, EC institutions apply Art. 82 EC in order to control exploitative abuses to the disadvantage of right-holders and commercial users. Although such an approach may reduce competition between collecting societies, it establishes a much better level playing field of competition between different works by promoting their access to the market. Hence, traditional application of Art. 82 EC to collecting societies is in line with the model of “creative competition”.

## **2. Promoting competition between collective societies in different Member States under Art. 81 EC**

Already the early *GEMA* decisions in which the Commission applied Art. 81 EC (ex-Art. 85 ECT) to the standard agreement of the German collecting society GEMA mirrors the central idea of the case law under Art. 82 EC, namely that collecting societies should not force right-holders to transfer rights beyond what is necessary for the protection of right-holders against large exploiters.<sup>76</sup> However, at the same time, the Commission tried to establish more competition between collecting societies in different Member States by enabling right-holders to entrust their rights to the collecting societies of other countries. These decisions found implicit support by the ECJ holding that a collecting society abuses its market dominant position if it refuses the administration of the rights of a national of another Member State.<sup>77</sup>

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<sup>75</sup> Para. 3 DG Competition discussion paper, n. 74 above.

<sup>76</sup> See Commission Decision 71/224/EEC of 2 June 1971, Case IV/26.760 – *GEMA I*, OJ L 134, p. 15 (no German version available); Commission Decision 72/268/EEC of 6 July 1972, Case IV/26.760 – *GEMA II*, OJ 24/07/1972 L 166, p. 22 (no English version available).

<sup>77</sup> Case 7/82, *GVL v. Commission*, [1983] ECR 483, para. 56.

This very approach of promoting competition between collecting societies of different Member States was then extended to the area of controlling reciprocal representation agreements under ex-Art. 85(1) ECT (Art. 81(1) EC). In the *Tournier* and *Lucazeau* judgments, the ECJ held that reciprocal representation agreements do not violate that provision unless the collecting societies, in these agreements, exclude direct access to their repertoires by users established abroad.<sup>78</sup> By banning such exclusivity clauses, the Court hoped to promote competition among collecting societies with regard to licences for the use in other national territories. However, this attempt was quite unsuccessful since Art. 82 EC does not prohibit unilateral refusal of a collecting society to grant licenses for a foreign territory where it does not hold a market dominant position and where it will be most difficult to enforce the rights entrusted to this society.

We may conclude that, in the framework of Art. 81 EC, Community institutions apply the same policy considerations as developed for the application of Art. 82 EC but also try to establish competition between different national collecting societies by enabling right-holders to contract with collecting societies of other EU Member States and by excluding exclusivity clauses in reciprocal representation agreements. Hence, practice under Art. 81 EC does not depart from the concept of “creative competition”. This is also true for the more recent Commission decision exempting the IFPI Simulcasting Agreement according to Art. 81(3) EC in view of allowing the commercial users to decide which collecting society will grant the multi-territorial and multi-repertoire license<sup>79</sup> and most recent action of the Commission regarding persisting exclusivity clauses in the CISAC that still undermined cross-border licensing of rights for online, satellite and cable services.<sup>80</sup>

## **V. Protecting authors and performing artists and systemic competition between collective and individual administration**

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<sup>78</sup> Case 395/87, *Tournier*, [1989] ECR 2521, para. 21; Joint Cases 110, 241 and 242/88, *Lucazeau et al. v. SACEM*, [1989] ECR 2811, para. 14.

<sup>79</sup> See n. 5 above.

<sup>80</sup> The Commission investigation ended with binding commitments of CISAC and its member societies according to Art. 9 Implementation Regulation 1/2003 responding to the competition concerns of the Commission; see Notice published pursuant to Article 27(4) of Council Regulation No 1/2003 in Case COMP/38698 – CISAC, [2007] OJ EC No. C 128, p. 12.

As was indicated in the preceding chapter, the idea that collecting societies have the object of protecting authors against large exploiters characterises the application of Art. 81 and 82 EC to collecting societies. It was also shown that such a policy is in line with the concept of “creative competition”, which should be preferred to a competition policy for collecting societies that is merely based on allocative efficiency.

Of course, these features of EC competition law are also important when it comes to regulating collective administration of rights outside the area of competition law. This highlights again the critique on the Commission Recommendation of 18 October 2005 on the management of online rights in musical works.<sup>81</sup> The Recommendation departs from the very idea of using collecting societies as entities to protect right-holders against large exploiters. By defining a “right-holder” as “any natural or legal person that holds online rights”,<sup>82</sup> the Commission actually promotes a system in which large undertakings of the copyright industry, who acquired rights from authors and performing artists, can use the system for their own needs.

In addition, as can be seen from the analysis, the Commission model serves best the interest of those who hold the rights in internationally popular mainstream music. Typically, these rights are held by major music publishing companies that, hence, will benefit most from the Commission policy whereas, as a consequence, authors and performing artists that produce music in which the major companies are not interested will feel competitive disadvantages with regard to their possibilities to enter the online music market.

In addition, for the online market, it is quite questionable whether large companies holding rights would need the “service” of the collecting societies in the first place. The Internet considerably facilitates direct transactions between the right-holder and the users. Large Internet music platforms may replace the functions of collecting societies and even allow multi-territorial licensing to commercial users world-wide.<sup>83</sup> Of course, online rights also

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<sup>81</sup> See sections II. and III. above.

<sup>82</sup> No. 1(g) of the Recommendation (n. 4 above).

<sup>83</sup> See also *Ariel Katz*, *The Potential Demise of Another Natural Monopoly: Digital Right Management and the Future of Collective Licensing*, 2 J. of Comp. L. & Econ. 245, 247 et seq. (2006), describing the example of the Canadian Rights Clearing House (RCH) as a tool for licensing copyright online.

require a system of monitoring and enforcement. Whether, however, a local control system is still required for the enforcement of online rights is quite doubtful. Adoption of the IFPI Simulcasting Agreement, which explicitly gives a right to users to request a multi-territorial licence from a collecting society abroad, confirms that at least some collecting societies think that cross-border licences can be monitored.<sup>84</sup> In the light of these differences, it may well be possible to replace collective administration of online rights completely by individual administration, at least to the extent that important right-holders, such as large music publishers, can run their own Internet platforms for the licensing of such rights and can monitor the respect of the rights themselves.<sup>85</sup> Hence, collective administration also has to compete with the individual administration of online rights by large institutional right-holders, like the music publishing companies in particular.

In the light of this analysis, one wonders why large music publishing companies – as right-holders – would be interested in dealing with collecting societies in the first place. Although it is certainly too early to make definite statements on the practical consequences of the Recommendation,<sup>86</sup> it can be seen that the major publishing companies were first to react. The development seems to tend toward the establishment of Internet platforms that are established in cooperation between individual major companies and collecting societies. The advantage of this business model seems to be the bundling of repertoires that may prove more attractive for commercial users than single repertoires of individual major companies.<sup>87</sup>

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<sup>84</sup> Accordingly, the Commission, in its decision of 8 October 2002 exempting the IFPI Simulcasting agreement from Art. 81(1) EC, has held that online monitoring is actually possible; see Case COMP/C2/38.014 *IFPI Simulcasting* [2003] OJ EC 2003 No L 107, p 38 para. 17, and, in general, on the view of the Commission, *Toft*, n. 4, at 7. Other collecting societies doubt this and indicate that a user, in the case of simulcasting, is also in need of a licence for terrestrial broadcasting. Since the latter can only be granted by the local collecting society, it is further argued that the IFPI Simulcasting Agreement has not really changed the practice of licensing. However, with the extension of the application of the IFPI Simulcasting Agreement to webcasting, i.e. without simultaneous terrestrial broadcasting, this counter-argument has lost its weight.

<sup>85</sup> Cf. *Katz*, n. 83 above, at 252, who reviews new technologies for monitoring the use of rights online and points out that such technologies could of course also be used for individual administration.

<sup>86</sup> For a first assessment of the consequences, see *Tilman Lüder*, Working toward the next generation of copyright licenses', presented at the 14<sup>th</sup> Fordham Conference on International Intellectual Property Law and Policy, April 20-21, 2006, [http://ec.europa.eu/internal\\_market/copyright/docs/docs/lueder\\_fordham\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/docs/lueder_fordham_2006.pdf)

<sup>87</sup> This policy holds especially true for EMI Music Publishing, who, at the beginning of 2006, entered into a contract with the British collecting society MCPS-PRS Alliance and the German GEMA in view of

In line with the model of “creative competition”, and in line with EC competition law as applied to collecting societies, there is a strong argument that also for online rights authors and performing artists should enjoy protection by collecting societies. If individual administration of online rights dominated by large companies and using DRMs would finally manage to exclude collecting societies from the market, such a development would not only harm creative authors and performing artists, it would also be highly detrimental to a dynamic market for musical works that promotes cultural diversity.

## **VI. Conclusions**

Several conclusions can be drawn from the preceding analysis:

- (1.) Collecting societies tend to hold natural monopolies provided that they are obliged to administer the rights of all interested right-holders on a non-discriminatory basis.
- (2.) In a system which allows collecting societies to refuse the administration of individual rights, there is a chance that several collecting societies can coexist in a market. However, this does not mean that collecting societies would actually compete. In the licensing market, commercial users would still have to request licences from all collecting societies that hold a large enough repertoire.
- (3.) Collecting societies that would be allowed to reject the administration of individual rights will specialise for specific categories of works taking into account the market value of such works. Collecting societies in the European market would therefore specialise in the administration of works which address the mainstream taste. Such a system promotes the interests of those who hold the rights in internationally popular mainstream music.

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establishing such a platform for the licensing of EMI’s Anglo-American repertoire. This platform became known as CELAS; see <http://www.celas.eu>.

- (4.) Such a market is in conformity with general principles of competition policy that only focuses on price and output in the sense of allocative efficiency. However, such a policy neglects the very goal of copyright law of promoting creativity.
- (5.) European competition policy would therefore be better advised to adopt a concept of dynamic competition for copyright markets (“creative competition”).
- (6.) The concept of creative competition should guarantee equal market access of all works to copyright markets, which allows consumers to choose between a maximum of culturally diverse works and excludes pre-selection by institutional right-holders of the copyright industry that tend to produce only for the average taste of consumers in international markets.
- (7.) The concept of “creative competition” argues for a system of collective administration, which obliges collecting societies to accept all users on a discriminatory basis. Such a system will tend to lead to a monopoly of collecting societies.
- (8.) Application of Art. 81 and 82 EC to collecting societies by Community institutions is in line with the concept of “creative competition”. However, EC competition law is not sufficient to respond adequately to the monopoly of collecting societies. Special regulation is needed so to safeguard effectively the rights and interests of the right-holders and the commercial users.
- (10) The European Union is in need of a system for multi-territorial and multi-repertoire licences with regard to online rights in music that corresponds to the concept of “creative competition”. The Commission Recommendation for the management of online rights in musical works does not adequately respond to these challenges. The “competition-oriented” model advocated by the Recommendation is uniquely based on the concept of allocative efficiency, impedes equal access of all works to the system of collective administration, promotes the market value of mainstream music and thereby harms cultural diversity in the European Union.