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## **REPORT**

on a Community framework for collecting societies for authors' rights  
(2002/2274(INI))

Committee on Legal Affairs and the Internal Market

Rapporteur: Raina A. Mercedes Echerer

PR\_INI

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## PROCEDURAL PAGE

At the sitting of 16 January 2003 the President of Parliament announced that the Committee on Legal Affairs and the Internal Market had been authorised to draw up an own-initiative report under Rule 163 on a Community framework for collecting societies for authors' rights and the Committee on Culture, Youth, Education, the Media and Sport had been asked for its opinion.

At the sitting of 6 November 2003 the President of Parliament announced that he had also asked the Committee on Economic and Monetary Affairs for its opinion.

The Committee on Legal Affairs and the Internal Market appointed Raina A. Mercedes Echerer rapporteur at its meeting of 28 May 2003.

The committee considered the draft report at its meetings of 7 October, 17 November, 26 November and 2 December 2003.

At the last meeting it adopted the motion for a resolution unanimously.

The following were present for the vote: Willi Rothley (acting chairman), Ioannis Koukiadis and Bill Miller (vice-chairmen), Raina A. Mercedes Echerer (rapporteur), Paolo Bartolozzi, Maria Berger, Ward Beysen, Brian Crowley, Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Fiorella Ghilardotti, José María Gil-Robles Gil-Delgado, Malcolm Harbour, Lord Inglewood, Hans Karlsson, Sir Neil MacCormick, Toine Manders, Manuel Medina Ortega, Angelika Niebler (for Kurt Lechner), Marcelino Oreja Arburúa (for Klaus-Heiner Lehne), Anne-Marie Schaffner, The Earl of Stockton, Astrid Thors, Marianne L.P. Thyssen, Ian Twinn (for Rainer Wieland) and Stefano Zappalà.

The opinions of the Committee on Economic and Monetary Affairs and the Committee on Culture, Youth, Education, the Media and Sport are attached.

The report was tabled on 11 December 2003.

## DRAFT EUROPEAN PARLIAMENT RESOLUTION

### on a Community framework for collecting societies for authors' rights 2002/2274(INI))

*The European Parliament,*

- having regard to the Treaty establishing the European Community, in particular Articles 95 and 151,
- having regard to Articles 17, 22 and 41 of the Charter of Fundamental Rights of the European Union,
- having regard to Article III-181 of the draft Treaty establishing a Constitution for Europe,
- having regard to its resolution of 15 May 2003 on the protection of audio-visual performers<sup>1</sup>,
- having regard to the various international agreements in force in this field, namely the Rome Convention of 26 October 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the Berne Convention of 24 July 1971 for the Protection of Literary and Artistic Works, the Geneva Convention of 29 October 1971 for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, the WIPO Copyright Treaty of 20 December 1996, the WIPO Performances and Phonograms Treaty of 20 December 1996, and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994,
- having regard to the body of EC law (*acquis communautaire*) in this area, namely Directive 91/250/EEC<sup>2</sup> on the legal protection of computer programs; Directive 92/100/EEC<sup>3</sup> on rental right and lending right and certain related rights; Directive 93/83/EEC<sup>4</sup> on satellite broadcasting and cable retransmission; Directive 93/98/EEC<sup>5</sup> on the term of protection; Directive 96/9/EC<sup>6</sup> on the legal protection of databases; Directive 2001/29/EC<sup>7</sup> on copyright in the information society; Directive 2001/84/EC<sup>8</sup> on the resale right of the author of an original work of art,
- having regard to Rule 163 of its Rules of Procedure,
- having regard to the report of the Committee on Legal Affairs and the Internal Market and the opinion of the Committee on Culture, Youth, Education, the Media and Sport (A5-0478/2003),

1. Notes that the exercise and management of copyright and neighbouring rights have been

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<sup>1</sup> P5\_TA(2003)0221.

<sup>2</sup> OJ L 122, 17.5.1991, p. 42.

<sup>3</sup> OJ L 346, 37.11.1992, p. 61.

<sup>4</sup> OJ L 248, 6.10.1993, p. 15.

<sup>5</sup> OJ L 290, 24.11.1993, p. 9.

<sup>6</sup> OJ L 77, 27.3.1996, p. 20.

<sup>7</sup> OJ L 6, 10.1.2002, p. 70.

<sup>8</sup> OJ L 272, 13.10.2001, p. 32.

discussed at EU level since 1995;

2. Underlines that collective management has been recognised and sanctioned as a valid form of rights management by the EC legislator since 1992; notes that Directive 92/100/EEC of 19 November 1992 on rental and lending rights and certain neighbouring rights expressly gives authors and performers the possibility to entrust the administration of their unwaivable right to receive equitable remuneration for rental to collecting societies representing them; points out that Directive 93/83/EEC of 27 September 1993 on satellite broadcasting and cable retransmission provides for mandatory collective management for cable retransmission rights and that Directive 2001/84/EC on resale right expressly refers to the possibility for Member States to provide for compulsory or optional collective management of the right for authors of an original work of art to receive royalties; whereas these directives constitute the *acquis communautaire*;
3. Notes that the management of copyright and neighbouring rights is, together with the recognised rights themselves and the provisions on their enforcement, the third and indispensable element in the sphere of copyright and neighbouring rights;
4. Draws attention to the fact that some 5-7 % of EU gross domestic product is earned by goods and services protected by copyright and neighbouring rights;
5. Notes that Directive 2001/29/EC is a significant step towards the establishment of an internal market for copyright, in which the adjustments made necessary by digitalisation may also lead to adjustment in the area of management, without prejudice to the substance of the rights in question and focusing in particular on the protection of neighbouring rights through digital rights management systems;
6. Notes that, in the area of copyright and neighbouring rights, the proper and fair participation of all concerned throughout the chain of exploitation and the rapid, fair and professional acquisition of rights are crucial for financial as well as cultural success;
7. Supports the call for any use to be properly rewarded in accordance with the law applicable and the three-step test, more particularly, those deriving from cases for which the law makes provision, thereby creating an entitlement to remuneration (compulsory licence, private copy, library royalties);
8. Considers that, in view of the enlargement of the European Union, suitable action may be needed in the area of collective exercise of rights;
9. Recalls that the technical assistance programmes PHARE and TACIS settled by the EU in the intellectual property area helped and enabled the development of collective management societies in the countries of Central and Eastern Europe and the CIS, and especially, as part of the pre-accession strategy, in the new countries;
10. Points out that in the new Member States collective management societies are still lacking for some sectors, right-holders and repertoires, that existing societies remain tentative and are encountering difficulties in collecting the remuneration due from their members and that therefore the specific assistance support programmes for the collecting societies of these countries, as employed under PHARE and TACIS as part of the pre-

accession strategy, should be retained with a view to increasing the circulation of works, enhancing the European heritage and increasing legal certainty; requests the Commission to draw up a proposal accordingly;

## **1. INTERNAL MARKET**

11. Points out that the exercise and management of rights are based on the principle of territoriality and international treaties; notes also that the adjustments which have taken place so far as a result of digitalisation (above all global distribution mechanisms) in the area of rights management are not yet sufficient;
12. Believes that a Community approach in the area of the exercise and management of copyright and neighbouring rights, in particular of effective collective rights management in the Internal Market, must be pursued while respecting and complying with the principles of copyright and competition law and in accordance with the principles of subsidiarity and proportionality;
13. Asks the Commission to ensure that while collecting societies, to the extent that they are service providers, are encompassed in the forthcoming proposal on the Internal Market for Services, due account should be taken of their functions as trustees and their particular responsibility for cultural and social aspects and society as such;

## **2. COMPETITION**

14. Notes that the *de jure* and *de facto* monopolies which the collecting societies generally enjoy do not in principle pose a problem for competition, provided that they do not impose unreasonable restrictions on their members or on access to rights by prospective clients; recognises that that collecting societies carry out tasks in the public interest and in the interest of right-holders and users and therefore require a degree of regulation; emphasises the importance of competition law for examining possible abuses of monopoly by collecting societies in individual cases so as to be able successfully to ensure rights management also in the future;
15. Notes, on the other hand, that the increasing vertical concentration of the media is the real challenge in the area of access to and dissemination of works and services protected by copyright or neighbouring rights, as also the exercise and exploitation of such works and services; calls therefore on the Commission to monitor the vertical concentration of the media and its effect on the exercise of rights and, where necessary, take the necessary measures;
16. Calls for a critical analysis by the Commission of the vertical concentration of the media and its effect on the exercise of rights;
17. Considers that straightforward, rapid and reliable clarification of rights is in the interest of right-holders, users and consumers of works and performances and that a Community approach should take full account of the specific features of the ownership and exercise

of copyright and neighbouring rights in order to avoid both economic and cultural misallocations;

18. Calls accordingly for the restriction of competition law to cases of abuse, subject to introduction and supervision of the necessary transparency, to be able to safeguard rights management effectively both now and in the future;

### **3. THE INFORMATION SOCIETY**

19. Notes that the present discussions surrounding collective claims to remuneration and DRMs have implications for the exercise and management of rights; notes further that DRMs may develop into a useful tool for improved rights management;
20. Recognises that introducing DRMs may result in an income which is more individually attributable but for the time being will not automatically replace collective remuneration for private copying; notes further that a large part of the collecting societies' sphere of activity cannot be replaced by DRM systems;
21. Points out, with regard to DRMs, that they are usable with success only if the principles of authorship and related rights and inter-operability are the basis for their application, in which, particularly, the equal opportunities of right-holders must be upheld and there need to be uniform coding standards and strict compliance with the relevant data protection provisions;
22. Considers that as regards the claims to remuneration which must be collected and where a system of authorisations or licences cannot be applied, there is a need for an examination of the market under Directive 2001/29/EC, in particular to avoid confusion and unnecessary administrative costs for consumers and to create a fair balance between sectors;

### **4. COLLECTIVE MANAGEMENT SOCIETIES**

23. Points out that the protection and collective management of intellectual property rights are important factors in stimulating cultural creativity and influencing the growth of cultural and linguistic diversity;
24. Stresses the importance of finding a balance between the rights and interests of the artists and right-holders on the one hand, and the need to ensure the optimal dissemination of their work for the benefit of their potential audience on the other hand; recognises that, in this regard, collective management societies present a greater advantage in facilitating users' access to the content and circulation of works, for the benefit of the entire chain;
25. Points to the fact that copyright comprises two main sets of rights: economic rights which are the rights of reproduction, communication to the public (including broadcasting), distribution etc., and moral rights which include the author's and performer's right to object to any distortion, mutilation or other modification of his work;
26. Recognises the important role of collective management societies which are an indispensable link between creators and users of copyrighted works, because they ensure

that artists and right-holders receive payment for the use of their works, since technological developments have led to new forms of protected works, especially in the multimedia sector, and have increased the possibilities for international exploitation of intellectual property rights, and individual artists and right-holders find it impossible to track the new difficulties by themselves;

27. Calls on the European Commission, when examining the issue of collective management societies, to take due account of the cultural dimension of the collective management of rights, since the rights of artists and right-holders are protected by national legislation, by the Berne Convention, the TRIPS and the WIPO treaties and by several EU Directives, whereas collective management societies are governed at national level in conformity with the existing national, European and international regulations, and the rules regulating collective management societies vary from one EU Member State to another because of historical, legal, economic and, above all, cultural diversity among Member States;
28. Points out that the practice of certain collective management societies (chiefly in the field of music) to use the distribution rules to promote non-commercial but culturally important works contributes to the development of culture and cultural diversity; recognises also the cultural and social activity of the collective management societies which also makes them vehicles of public authority;
29. Signals that future European Directives from the Commission on the regulation of television, radio, communication, transmission and telecommunications in the digital area must recognise and include provisions of ownership and protection based on the principles of the author's rights so that the EU would enhance European art and culture and strengthen the confidence of artists, including writers, musicians and film makers, by creating new work which they know will be properly protected from piracy as well as by ensuring moral rights and financial incentives;
30. Points out that the lack of procedural facilities for the collective management societies and the absence of rapid dispute settlement mechanisms result in ineffective protection for creators and increased management costs; stresses that the nature and role of the management societies mean that they must be managed and controlled by the right-holders;
31. Stresses that collective management societies are the most significant option for the efficient protection of the copyright of the artist and must operate according to the principles of transparency, democracy and the participation of creators; stresses that the institution of reasonable levies as compensation for free reproduction for personal use constitutes the only means of ensuring equitable remuneration for creators and easy access by users to intellectual property works and cannot be replaced by Digital Rights Management Systems (DRMS);
32. Greets initiatives like ISAN (International Standard Audiovisual Number), recognised by the UN organisation ISO (International Organisation for Standardisation), which is able to use software to identify the time and place an audiovisual work is used, and is generally in favour of promoting international cooperation in this sector;

33. Points out that one important criterion, but not the only one, for the representation of right-holders in the management and control bodies of collective management societies must be the financial value of the rights which each right-holder contributes to the collective management society, and that the freedom of creators to decide for themselves which rights they wish to confer on collective management societies, and which rights they wish to manage individually, must also be safeguarded by legislation;
34. Proposes that the potential offered by new technologies and distribution networks with regard to the exercise of copyright and neighbouring rights be utilised in a creative way;
35. Considers it imperative that, where they perform public functions from a position of monopoly, collective management societies in the field of copyright and neighbouring rights are appropriately regulated, in order to ensure the transparency required under competition law;
36. Notes that the various laws and provisions, and the statutes and practices, of collecting societies differ too widely, owing to the fact that every country has its own traditions and specific historical, legal, cultural and economic characteristics;
37. Underlines the freedom of the right-holders to opt for individual or collective management in accordance with the applicable legislative and contractual provisions; points out in this connection that considerations as to appropriateness may also have a bearing;
38. Notes that collective management societies have taken very different shapes in their manner of organisation from one category of right-holder to another, one sector to another and one country to another, in which the main and crucial issue for the exercise of rights in the EU internal market is that the societies fulfil their functions as trustees;
39. Calls for the creation of common tools and of comparable parameters and the coordination of collective management societies' areas of activity, to improve cooperation between societies and take the development of the Information Society into account;
40. Notes that internal democratic structures of collective management societies are fundamental for legitimising their activity and for them to operate effectively; calls, therefore, for the establishment of minimum standards for organisational structures, transparency, accounting and legal remedies;
41. Calls for all those entitled to exercise rights to be able to send representatives of their choice with voting rights to members' meetings, and believes that such right-holders should be taken into consideration when members of management bodies are being appointed;
42. Calls for the participation, on the basis of equal entitlement, of all the various member groups and – in view of the vertical concentration of the media – particular attention when appointing members to management bodies; this must, however, be fully compatible with the establishment of internal operating and management standards in management societies which apply other reasonable criteria (number of works or

- interpretations, amount of revenue, etc.) for participation in such bodies, the final result being a principle of identical treatment in identical circumstances;
43. Calls for an end to conflicts of interest (when right-holders and users are the same person) in the operation of collecting societies;
  44. Recognises that reciprocal agreements between collective management societies have been explicitly recognised as admissible by case-law, provided that they are not contrary to provisions laid down in competition law; also recognises that while the establishment of an efficient national one-stop shop is wholly desirable, where unequal rights exist between the constituent right-holders, the equitable operation of a one-stop shop facility is put in jeopardy; considers that, in such circumstances, the separate right-holding groups should be able to negotiate the licensing and administer the collection and distribution of the revenue accruing from the exploitation of their rights separately;
  45. Calls for an end to giving preference to national repertoires over non-qualified recordings, without prejudice to the respect for the international treaties applicable, and in particular the Rome Convention of 26 October 1961 for the protection of performers, producers of phonograms and broadcasting organisations and the Berne Convention of 24 July 1971 for the protection of literary and artistic works;
  46. Calls for 'B agreements' to be discontinued;
  47. Starts from the premise that cultural and social activities, and tasks in the public interest, are justified in so far as they are democratically legitimised in the society and/or laid down by law and provided that they benefit all member groups equitably; considers in this connection, that all member groups must be equally represented;
  48. Notes, with regard to the control mechanisms of collective management societies, first that there are major structural differences and second that the efficiency of such controls differs greatly between Member States;
  49. Calls for efficient, independent, regular, transparent and expert control mechanisms in all Member States – incorporating all the legal, social, financial and cultural aspects;
  50. Calls for comparable and compatible arbitration mechanisms throughout the EU, access to which is affordable to small users and small authors, for disputes between right-holders and collective management societies, between one collecting society and another, and between collective management societies and users;
  51. Also calls for efforts to seek an appropriate procedure for the cross-border settlement of conflicting decisions in the member countries;
  52. Wishes to see a graduated requirement for collective management societies to provide information, internally and externally, and so calls for the publication, on the Internet as well as in other forms, of tariffs, distribution keys, annual accounts and information on reciprocal agreements;

53. Considers it necessary to establish, in the event of a Community approach, a framework for minimum standards for the calculation of tariffs, thereby contributing to introducing the transparency required in accordance with competition law;
54. Calls for the listing of appropriate management costs, comprehensible to those entitled to benefit;
55. Calls for uniform coding standards for works, to simplify the exercise of rights and improve the efficiency of controls, and for inter-operability in the market, including that between collective management societies; notes that collective management societies are participating in international fora in order to promote the development of common, inter-operable and secure standards;
56. Supports the desire for EU promotion to implement uniform coding standards;
57. Calls for the efficient exchange of information between collective management societies, and, as regards data confidentiality standards, for clear provision to be made for collective management societies to enjoy access to each other's economic data and, furthermore, to seek audits with a view to ensuring that reciprocal representation agreements are properly applied and enhancing transparency in their management;
58. Supports the call for the central pooling of the necessary information about the substantive competence of collecting societies, that is to say the right-holders represented by them and the rights granted by the latter with regard to management negotiations, and their competence *ratione materiae*, i.e. the works and other related protected goods; takes the view that this will constitute a further contribution to transparency, legal certainty and practical access to management;
59. Calls for a legally-binding requirement on the licence-holder to provide relevant information on use;
60. Calls for the Member States and the EU to adopt more stringent rules on compliance and supervision of national law on copyright and neighbouring rights, above all in those individual cases in which the corresponding remuneration for the use of the protected works and services is not paid;
61. Calls on the Commission to monitor implementation of the *acquis* on authorship law and check that its application complies with Community law;
62. Urges the Commission to examine, three years following the adoption of this resolution, whether the desired harmonisation, democratisation and transparency in relation to the management of copyright and neighbouring rights by collective management societies have been achieved and, if not, to take additional measures;
63. Calls for a binding definition of the subject matter protected, taking into account new audiovisual media and products, provided that they constitute original, creative effort;
64. Calls – following the example of the MEDIA Plus programme – for a regulated term for reversion of rights (three years), in particular in the field of television, in order to strengthen independent producers and improve the movement of European works;

65. Instructs its President to forward this resolution to the Council and Commission, and the Member States.

## EXPLANATORY STATEMENT

Copyright and neighbouring rights have a long history in the legislation of Europe. They safeguard creativity, investment, growth, jobs, cultural diversity and access to quality products, so they also mark a significant step on the way to the positive further development of the Information Society. They are not purely an end in themselves but are also in the public interest. Technological development and the convergence of the media are confronting all concerned with global challenges, which are gradually calling for European and global solutions. The Member States can no longer take account of these requirements in the appropriate way on their own<sup>1</sup>.

While the national provisions in the fields of practical copyright, under the first pillar, have been increasingly effectively brought into line<sup>2</sup>, and there is currently discussion on approximation of the law in the field of enforcement of rights, under the second pillar<sup>3</sup>, there has so far been no approximation in the field of the third pillar of copyright law – the exercise of rights.

On the exercise of copyright and neighbouring rights<sup>4</sup>, the Commission has been holding consultations since 1995<sup>5</sup> and during 2002 promised to produce a Communication. This has

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<sup>1</sup> The EU still has no originating legislative competence, but since the early 1990s it has been the Community's declared political aim to adopt arrangements governing the law of copyright.

- Green Paper on Copyright and the challenge of technology – copyright issues requiring immediate action, COM(1988) 172 of 17 June 1988;
- Follow-up to the Green Paper – working programme of the Commission in the field of copyright and neighbouring rights, COM(90) 584 of 17 January 1991;
- 'Europe and the global Information Society. Recommendation to the European Council', 26 May 1994 (Bangemann report);
- 'Europe's way to in the Information Society. An action plan' – communication from the Commission to the Council, European Parliament, the Economic and Social Committee and the Regional Committee, COM(1994) 347 of 19 July 1994;
- Green Paper 'Copyright and related rights in the Information Society', COM(1995) 382 of 19 July 1995;
- initiatives on the Green Paper on copyright and related rights in the Information Society, Commission Communication, COM(1996) 568 of 20 November 1996;
- Green Paper on media convergence, 1997.

<sup>2</sup> Seven directives have been adopted so far: Directive 91/250/EEC on the legal protection of computer programs; Directive 92/100/EEC on rental right and lending right and certain related rights; Directive 93/83/EEC on satellite broadcasting and cable retransmission; Directive 93/98/EEC on the term of protection; Directive 96/9/EC on the legal protection of databases; Directive 2001/29/EC on copyright in the information society; Directive 2001/84/EC on the resale right of the author of an original work of art.

<sup>3</sup> The proposal for a directive on measures and procedures to ensure the enforcement of intellectual property rights, COM(2003) 46 of 30 January 2003, is currently being discussed in Parliament.

<sup>4</sup> The European Court of Justice points out that orderly management is an essential element in the rule of law of the shared constitutional traditions of the Member States (Professor Dr Jürgen Schwarze, ZUM 1/2002, p. 22). This political credo has also found expression in Article 41(1) of the Charter of Fundamental Rights.

<sup>5</sup> A series of hearings and international conferences have been held in recent years, including the hearings organised by the European Commission on copyright and related rights in the information society and on collective management on 8-9 January 1996 and 13-14 November 2000, the international conference on copyright and related rights on the eve of the 21st century, Florence, 2-4 June 1996, the International Conference held on 12-14 July 1998 in Vienna on Creativity and Intellectual Property Rights: Evolving Scenarios and Perspectives; the Colloquium organised by the Portuguese Presidency on 22-23 March 2000 in Evora on the Collective Management of Copyright and Neighbouring Rights in the Digital Environment – Situation and Perspectives, and the International Conference held in Strasbourg on 9-11 July 2000 on Management and the Legitimate Use of Intellectual Property.

not yet materialised. Parliament is now taking the initiative<sup>1</sup>. This report will concentrate mainly on the area of the collective exercise of rights.

## 1. The internal market

The free movement of goods and services or freedom of establishment do not at first sight seem compatible with the prohibitive provisions of copyright law, with their territorial limitations. And yet seven directives have so far been adopted (see footnote 2). At the same time, Community legislators have repeatedly reminded the Member States, right-holders and users of the importance of collective exercise for a rights management system that will function throughout Europe<sup>2</sup>.

To complete the internal market in copyright a conceptual approach is required. The basic principles of copyright law, enshrined in international law and the laws of the EU Member States, provide the foundation for all forward-looking notions on rights management in the EU, whether they are collective (by means of collective management societies) or individual, in a balanced relationship between right-holders and licence-holders in the marketing of rights. The 'European way' has already been embarked upon and must be continued<sup>3</sup>.

Article 95 of the EC Treaty provides the necessary legal basis for a Community regulatory framework, with due regard for the basic principles of the law protecting authorship and performance.

## 2. Competition

As a rule both the individual author and the practising artist, and other right-holders, are in a weaker position compared with the financially more powerful user, and therefore depend on the collective protection of collective management societies (CSs)<sup>4</sup>. At the same time the collective exercise of rights serves the purpose of making it easier for users to acquire them. The argument that CSs would impede free competition by their de facto dominant position in the market is legitimate from the point of view of representing individual interests, but does not give the full picture<sup>5</sup>. It is precisely because of their exclusive position that CSs provide a safeguard to prevent any further concentration of intellectual property. Under the Commission's far-sighted decision of October 2000, which approved the merger of AOL Time Warner only subject to conditions, the Commission should be continuing to take an equally critical look at the various forms of media concentration. The monopoly of CSs

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<sup>1</sup> A by no means small number of problems between right-holders and users arise from questions that do not directly concern authorship and performing rights. These 'marginal' problems, such as the definition of 'public' and 'private', can regrettably not be considered here.

<sup>2</sup> In various directives (see footnote 2) there are references to collective exercise, which is a mandatory provision in the Cab/Sat directive.

<sup>3</sup> Initial endeavours in this direction include the Simulcast Agreement of the IFPI, the Santiago Agreement of the collecting societies and Online-Art (OLA).

<sup>4</sup> ECJ, judgment of 21 March 1974 in Case 127/73, SABAM, ECR (1974) 313, notes 9 and 10: '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... For an association effectively to protect its rights and interests it must enjoy a position based on the assignment in its favour, by the associated authors, of their rights to the extent required for the association to carry out its activity on the necessary scale.'

<sup>5</sup> ECJ judgment of 6 April 1995 in the Magill case: '... so that refusal to grant a licence ... cannot in itself constitute abuse of a dominant position'.

should not be replaced by a monopoly of the media industry<sup>1</sup>.

On the other hand, stringent criteria and conditions – provided they are always based on a conceptual approach – and the nature of the material could possibly justify restricting competition law, even warranting an exception to it<sup>2</sup>. What use is a position that is recognised and safeguarded by law, if it cannot be exploited because of the need to protect competition? A misguided insistence on competition would also lead to further fragmentation of the markets, chaos in the clarification of rights and dumping tariffs.

### **3. The Information Society**

Digital Rights Management Systems (DRMs) undoubtedly are an enormous convenience for right-holders, users and the Information Society when it comes to making rights accessible as well as managing them. DRMs are primarily delivery and accounting systems. But transparency, supervision, equal opportunities and free access to a comprehensive repertoire can be overlooked, particularly when DRMs are the property of the company concerned. So they can replace neither existing management mechanisms nor copyright and media policy; but they are an essential instrument for perfecting the European management of rights.

Hence it is clear that introducing DRMs will not automatically make the levies for blank recording media and copying machines<sup>3</sup> redundant for private copying purposes. Approximating the technologically neutral levies (in accordance with Directive 2000/29/EC) at European level, and establishing a fair balance between sectors is therefore a sensible and necessary step.

Further, in the Information Society at least the rights required for online use should be provided and obtainable throughout the EU. The first common ‘one-stop shops’ have already been established by collective management societies for this purpose (for instance by the Santiago Agreement, the Simulcasting Agreement or OLA/OnLine Art), but still certainly ought to be improved. Sharing facilities for the collective management of rights throughout the EU, democratic structures for collective management societies, supervision, transparency or efficient arbitration agencies, compliance with the principles of copyright and the principle of fair distribution between CSs are the solid basis for developing European one-stop shops.

### **4. Collective management societies**

CSs are voluntary associations of authors, interpreters and other right-holders for the purpose of protecting their conceptual and financial interests in an intellectual property or in their services at home and abroad<sup>4</sup>. This corporate activity always has, in addition to providing collective protection and trustee operations, a cultural function as well. The purposes involved

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<sup>1</sup> For instance, audio and video producers and the like are often shareholders of radio and broadcasting entities, distribution systems, cable/satellite companies, and appliance manufacturers. Or music publishers are shareholders of audio corporations.

<sup>2</sup> The President of the ECJ, Rodrigues Iglesias, has taken a similar view: competition law may be considered, if IPD all, only in ‘exceptional circumstances’ (decision of the President of the ECJ of 11 April 2002, Case 481/01 P(R) IMS Health, point 64). This point of view can also arguably be applied to the management of authorship rights (Dr J Schwarze, ZUM, 1/2003, p. 25).

<sup>3</sup> Three EU countries have voluntary levy systems; 12 EU countries and four accession countries have statutory levies; their introduction is in preparation in other accession countries.

<sup>4</sup> The formation of so-called ‘unopposed’ CSs is a fairly recent development.

in trusteeship are best served if the following criteria are properly fulfilled. The differing laws and provisions of the Member States, and the statutes and practices of the individual CSs, are too diverse in the enlarged EU and are often not compatible. The landscape of rights management in an enlarged EU urgently needs simplifying, reforming and comparable parameters.

The essential points are:

- **organisational forms of CSs:** these range from statutory monopolies through profit-making or non-profit making associations to cooperatives, limited companies and so on. The form of organisation is in itself irrelevant, provided there is an assurance that the societies fulfil their trustee function, in the sense described above;
- **conditions for authorisation:** the different rules for taking up operation as a collecting society (internally and externally) – on supervision of their enforcement see below – are certainly laid down by law in some cases, but even then with differing content;
- **areas of activity:** these should be coordinated at least to ensure that CSs can cooperate with one another and across the various frontiers without problems.
  - Clarification of rights, including partial rights, particularly for forms of use previously unknown when agreements were concluded;
  - obtaining appropriate remuneration for use<sup>1</sup>;
  - providing rapid and simple access to rights;
  - remittance income and rapid disbursement of monies received to all entitled persons, after deduction of management costs;
  - supervision of use;
  - cultural and social functions and activities in the public interest;
  - provision of information, both internally and externally and between CSs;
  - action to combat piracy;
- **internal structure:** the activities of CSs acquire legitimacy in so far as they are democratically decided by the right-holders themselves and should therefore be respected. But there is frequently a democratic deficit in the structures of CSs throughout the European Union. The great majority of entitled persons are the ‘foot-soldiers’ without voting rights – and without much influence on the continuing expansion of exploitation agreements or the form they take. Threshold levels are often too high for becoming a full member and there are often different levels for the different professional groups within a collecting society. Or again, there are CSs which, although they consist of two professional groups, are de facto in the ‘possession’ of one. The management and control bodies must be staffed on an equal basis. ‘Mixed appointments’ (with the same person in management and control bodies of several CSs) should be prohibited. It is also important to pay due heed to the vertical integration of the media industry when members of management and control bodies are being appointed (see footnote 12);

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<sup>1</sup> For instance, the following directives make this aspect a central point for the processing of certain forms of exploitation: Directives 93/83/EC on satellite broadcasting and cable re-transmission, 92/100/EEC on rental right and lending right and certain related rights, and 2001/29/EC on copyright in the information society.

- **reciprocal agreements:** the management of rights is – like copyright itself – based on the principle of territoriality and international agreements. By concluding bilateral agreements any appropriate collecting society in any country is able to grant the rights to the international repertoire within their country's borders. It is thus a (national) one-stop shop. These reciprocal agreements<sup>1</sup> have been explicitly recognised as admissible by case-law<sup>2</sup>. A system could operate by extending existing licences to include the digital domain; this is more difficult in the case of multi-media works, where there has been no clear classification in the traditional sense or the clearance of rights (on demand, ring tones etc.) is blocked by individuals<sup>3</sup>. Unfair practices, such as giving preference to national repertoires over 'non-qualified recordings'<sup>4</sup> (including 'non-qualified performers') entail a significant financial disadvantage for non-resident EU right-holders (right-holders from another EU Member State) and must therefore be ended<sup>5</sup>;
- **cultural/social operations and functions in the public interest:** solidarity levies, promotions, social assistance, cultural subsidies, scholarships, prizes etc. – whether from the general fund, from non-distributable monies or from revenue from the levies for blank media and copying equipment – are justified in so far as they have democratic legitimacy and are open to all persons entitled to payment;
- **supervision/control over CSs and their activities:** in some countries this is non-existent, in others it is only now developing, in many it is exemplary. The ideal form of control would be an interplay between voluntary control by those entitled to payment, and control by an efficient, independent, transparent and informed body of experts, taking account of all the aspects: financial, cultural, social and legal;
- **arbitration mechanisms:** in the Member States, right-holders, users and CSs should have the possibility of access to both arbitration agencies and the courts. The mandate, composition and procedure of national arbitration agencies should be compatible throughout the EU;
- **transparency:** this is important to all concerned and should be welcomed from the point of view of competition law, whence the need for the following measures:
  - publication of tariffs, allocation formulas, annual accounts and information on reciprocal agreements – on the Internet as well;
  - information on management costs: costs depend on the source of earnings and the

<sup>1</sup> There are two kinds of reciprocal agreements:

A-agreements: proper exchange of data and licences, incorporation in the IPD (international databank), reciprocal payment;

B-agreements: no data or licence exchange, monies remain in the country of licensing and use and is credited to the local distribution fund.

Preference should be given to A-agreements on grounds of transparency.

<sup>2</sup> ECJ, judgment of 13.7.1989, Case 395/87, Tournier, ECR(1989) 2565, note 20.

<sup>3</sup> The often mentioned problem of online rights clearance is in many cases and due to the dominance of publishers and producers within a collecting society and their blockade. For instance music publishers are reluctant to assign the exercise of all relevant rights to collecting societies in full because the individual exploitation of some rights could be a realistic alternative in the long term and promises to generate higher earnings. Again, the recording industry gives preference to its own exploitation and has blocked Internet use (see also MMR 10/2002, Stefan Ventroni/Günther Poll: Acquiring music licences through online services) – in any case the result is an undeserved loss of earnings for creative artists.

<sup>4</sup> Mainly productions from beyond the national frontiers.

<sup>5</sup> See judgment of the ECJ, C 92/92 and C 326/92, ECR(1993) 5145 – Phil Collins.

amount of work for the right concerned (for instance, supervision of discotheques). All costs must be comprehensible to the persons entitled to benefit. The management costs of an efficient CS average 10-15 %;

- introduction of a uniform work coding standard<sup>1</sup> and inter-operability: a uniform coding system for works provides better control, traceability and automated calculation, reducing management time and costs. The so-called ‘black box’ problem (not attributable, not allocated, not distributable income) can also be minimised with the help of ISO standards. CSs would need to supervise the codes and take action against any abuse – including enforcement through the courts;
- the exchange of information between CSs (in particular to prevent unilateral dumping conditions).

## **5. Concluding remarks**

As guardian of the Treaties the Commission must monitor the implementation of, and compliance with, Community treaties in the field of copyright law, and not only in the new countries, for otherwise many rights will not in practice be administrable. It is also in the interest of an effective internal market for copyright that the Commission should be taking efficient action against the circumvention or abuse of rights for the protection of authorship and performance.

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<sup>1</sup> ISWC: work code, ISRC: recording code, IPI: performer code.

25 November 2003

## OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

for the Committee on Legal Affairs and the Internal Market

on a Community framework for collecting societies for authors' rights  
(2002/2274(INI))

Draftsman: Othmar Karas

### PROCEDURE

The Committee on Economic and Monetary Affairs appointed Othmar Karas draftsman at its meeting of 22 October 2003.

It considered the draft opinion at its meetings of 4 and 24 November 2003.

At the last meeting it adopted the following suggestions by 26 votes to 2, with 2 abstentions.

The following were present for the vote: Christa Randzio-Plath (chairwoman), José Manuel García-Margallo y Marfil, Philippe A.R. Herzog, John Purvis (vice-chairmen), Hans Blokland, Renato Brunetta, Hans Udo Bullmann, Robert Goebbels, Lisbeth Grönfeldt Bergman, Mary Honeyball, Christopher Huhne, Giorgos Katiforis, Christoph Werner Konrad, Alain Lipietz, Astrid Lulling, Alexander Radwan, Karin Riis-Jørgensen, Olle Schmidt, Bruno Trentin, Theresa Villiers, Richard A. Balfe (for Jonathan Evans), Manuel António dos Santos (for Pervenche Berès), Harald Ettl (for David W. Martin), Wilfried Kuckelkorn (for Fernando Pérez Royo), Werner Langen (for Piiä-Noora Kauppi), Erika Mann (for Peter William Skinner), Simon Francis Murphy (for Bernhard Rapkay), Elly Plooij-van Gorsel (for Carles-Alfred Gasòliba i Böhm), Herman Schmid (for Armonia Bordes), Ieke van den Burg (for Helena Torres Marques), Klaus-Heiner Lehne (for Othmar Karas pursuant to Rule 153(2)), Marie-Thérèse Hermange (for Ingo Friedrich pursuant to Rule 153(2)).

## SUGGESTIONS

The Committee on Economic and Monetary Affairs calls on the Committee on Legal Affairs and the Internal Market, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Emphasises that competition must be the fundamental rule in the internal market and that monopolies may be tolerated only by way of justified and clearly regulated exceptions;
2. Calls therefore, having regard to experience in the film industry, for competition also to be strengthened wherever possible in other areas of copyright and neighbouring rights;
3. Calls in particular for individual authors fundamentally to have the choice between collective and individual exercise of their rights according to legal and contractual provisions;
4. Calls for existing territorial monopoly structures to be reviewed and if appropriate confined to those sectors in which it can be shown that the necessary protection of authors' interests allows no alternative;
5. Notes that neither the dissemination of media products nor the exploitation of copyright and neighbouring rights represent natural monopolies, and that the competition law should be broadly applied in order to counter increasing media concentration and the associated dominance of commercial interests in negotiations regarding the management and exploitation of works protected by copyright or neighbouring rights;
6. Proposes that, to that end, the potential offered by new technologies and distribution networks with regard to the exercise of copyright and neighbouring rights be utilised in a creative way;
7. Considers it necessary to introduce, as soon as possible, full transparency on the part of collective management societies; this includes showing administrative and licence costs separately in the accounts, creating clearer, more comprehensible structures in connection with the exercise of rights, taking into account economic effects when setting tariffs, introducing transparency in respect of the flow of fees between collective management societies and establishing more effective supervision;
8. Advocates, in this connection, a public register, which can be accessed by electronic means, listing all right-holders represented by collective management societies;
9. Suggests that, where there are high transaction costs as a result of fragmentation in the area of rights, a one-stop shop system be introduced for users and exploiters of rights;
10. Considers it imperative that, where they perform public functions from a position of monopoly, collective management societies in the field of copyright and neighbouring rights are appropriately regulated, in order to ensure the transparency required under competition law;

25 November 2003

## OPINION OF THE COMMITTEE ON CULTURE, YOUTH, EDUCATION, THE MEDIA AND SPORT

for the Committee on Legal Affairs and the Internal Market

on a Community framework for collecting societies in the field of copyright

Draftsman: Alexandros Alavanos

### PROCEDURE

The Committee on Culture, Youth, Education, the Media and Sport appointed Alexandros Alavanos draftsman at its meeting of 21 January 2003.

It considered the draft opinion at its meetings of 4 and 25 November 2003.

At the latter meeting it adopted the following suggestions unanimously.

The following were present for the vote: Michel Rocard (chairman), Vasco Graça Moura (vice-chairman), Mario Mauro, (vice-chairman), Theresa Zabell (vice-chairwoman), Alexandros Alavanos (draftsman), Pedro Aparicio Sánchez, Juan José Bayona de Perogordo (for Francis Decourrière), Christopher J.P. Beazley, Marielle de Sarnez, Raina A. Mercedes Echerer, Säid El Khadraoui (for Lissy Gröner), Cristina Gutiérrez Cortines (for Domenico Mennitti), Ruth Hieronymi, Ulpu Iivari, Juan Ojeda Sanz, Doris Pack, Roy Perry, Christa Prets, Stavros Xarchakos, Phillip Whitehead (for Barbara O'Toole), Eurig Wyn and Sabine Zissener.

## SUGGESTIONS

The Committee on Culture, Youth, Education, the Media and Sport calls on the Committee on Legal Affairs and the Internal Market, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Welcomes the initiative taken by the Committee on Legal Affairs and the Internal Market to debate the role of collective management societies in the field of copyright and related rights;
2. Points out that the protection and collective management of intellectual property rights are important factors in stimulating cultural creativity and influencing the growth of cultural and linguistic diversity;
3. Stresses the importance of finding a balance between the rights and interests of the artists and right-holders on the one hand, and the need to ensure the optimal dissemination of their work for the benefit of their potential audience on the other hand; recognises that, in this regard, collective management societies present a greater advantage in facilitating users' access to the content and circulation of works, for the benefit of the entire chain;
4. Points to the fact that copyright comprises two main sets of rights: economic rights which are the rights of reproduction, communication to the public (including broadcasting), distribution etc., and moral rights which include the author's and performer's right to object to any distortion, mutilation or other modification of his work;
5. Recognises the important role of collective management societies which are an indispensable link between creators and users of copyrighted works because they ensure that artists and right-holders receive payment for the use of their works since technological developments have led to new forms of protected works, especially in the multimedia sector, and have increased the possibilities for international exploitation of intellectual property rights and individual artists and right-holders find it impossible to track the new difficulties by themselves;
6. Calls on the European Commission, when examining the issue of collective management societies, to take due account of the cultural dimension of the collective management of rights since the rights of artists and right-holders are protected by national legislation, by the Berne Convention, the TRIPS and the WIPO treaties and by several EU Directives whereas collective management societies are governed at national level in conformity with the existing national, European and international regulations and the rules regulating collective management societies vary from one EU Member State to another because of historical, legal, economic and, above all, cultural diversity among Member States;
7. Points out that the practice of certain collective management societies (chiefly in the field of music) to use the distribution rules to promote non-commercial but culturally important works contributes to the development of culture and cultural diversity; recognises also the cultural and social activity of the collective management societies which also makes them vehicles of public authority;
8. Calls on the European Commission, on the occasion of the publication in a few months

time of its communication on the future of EU audiovisual policy, to define exactly what is meant by the term European Audiovisual Work, as there are many examples of powerful broadcasters refusing to pay the collective management societies the author's rights, denying that TV programmes are "creations" (even though they have been scripted) and imposing unfair contractual agreements;

9. Points out that the pursuit of profit is at odds with the character of the collective management societies as trustees of other people's property and creates clashes of interest; points out, furthermore, that while the monopolistic character of collective management societies secures substantial benefits for right-holders and users, it also means that there is a risk of abuse and that collective management societies may operate ineffectively and in an unjustifiably expensive manner;
10. Signals that future European Directives from the Commission on the regulation of television, radio, communication, transmission and telecommunications in the digital area must recognise and include provisions of ownership and protection based on the principles of the author's rights so that the EU would enhance European art and culture and strengthen the confidence of artists, including writers, musicians and film makers, by creating new work which they know will be properly protected from piracy as well as by ensuring moral rights and financial incentives;
11. Points out that the lack of procedural facilities for the collective management societies and the absence of rapid dispute settlement mechanisms result in ineffective protection for creators and increased management costs; stresses that the nature and role of the management societies mean that they must be managed and controlled by the right-holders;
12. Draws attention to the fact that collective management societies do not always exist in the new Member States in all sectors for all right-holders and all repertoires; urges that a specific aid programme be set up for the societies of these countries so as to increase the dissemination of works, strengthen the European heritage and enhance legal certainty; calls on the Commission to submit a proposal to this end;
13. Stresses that collective management societies are the most significant option for the efficient protection of the copyright of the artist and must operate according to the principles of transparency, democracy and the participation of creators; stresses that the institution of reasonable levies as compensation for free reproduction for personal use constitutes the only means of ensuring equitable remuneration for creators and easy access by users to intellectual property works and cannot be replaced by Digital Rights Management Systems (DRMS);
14. Greets initiatives like ISAN (International Standard Audiovisual Number), recognised by the UN organisation ISO (International Organisation for Standardisation), which is able to use software to identify the time and place an audiovisual work is used, and is generally in favour of promoting international cooperation in this sector;

15. Points out that one important criterion, but not the only one, for the representation of right-holders in the management and control bodies of collective management societies must be the financial value of the rights which each right-holder contributes to the collective management society and that the freedom of creators to decide for themselves which rights they wish to confer on collective management societies and which rights they wish to manage individually must also be safeguarded by legislation;
16. Repeats its concern of 20 November 2002<sup>1</sup> that the technological evolution in the media sector, where unregulated, might lead to dangerous concentrations and jeopardise pluralism, democracy and cultural diversity.

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<sup>1</sup> EP Resolution on media concentration.