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Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at a Crossroads

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ABSTRACT

In the digital networked environment, user's expectations of getting easy access to digital content all the time and through a multitude of devices clash with the territorial structure of copyright and the complications of the licencing process. Under these circumstances, systems of collective rights management (CRM) offering a one-stop shop for rights clearance would seem to be an attractive solution to simplify cross-border licencing and save on transaction costs. In the European Union (EU), the Commission has made many attempts over the last decade not only to make collective management organisations (CMOs) work more efficiently but also to bring them from a system of national licences granted by national monopolies to a system of EU-wide authorisations. The European Commission's Proposal of 12 July 2012 for a directive on CRM is a confirmation of this policy. However, it is questionable whether these regulatory attempts are compatible with cultural diversity interests. This paper discusses the role of CRM in ensuring cultural diversity and how a purely competition-orientated approach can impinge on this. It does so through analysing EU case law and the Commission's Proposal.

KEY WORDS

Copyright, collective rights management, Directive, European Commission, collective management organisations, copyright licences, one-stop shop, competition law, cultural diversity.

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COLLECTIVE RIGHTS MANAGEMENT, COMPETITION POLICY AND CULTURAL DIVERSITY: EU LAWMAKING AT A CROSSROADS

1. INTRODUCTION

Digital technology and the internet have deeply changed the ways in which cultural content is created, disseminated, accessed and enjoyed. Over time, with the internet becoming the pivot of the information society, consumers have come to expect easy access to digital content at all times, anywhere and through a multitude of devices. Copyright, which remains the foundation of most of the creative economy's business models, is challenged by these developments in at least two respects. First, the premise of copyright law that a licence is required for every use of a work makes the exploitation of certain works rather clumsy. For audiovisual or multimedia works, for example, licences from a multitude of right-holders (authors, performers and producers) would be required. Second, for exploitation of works on the internet, worldwide licences would be necessary. In contrast to the needs of a globalising digital culture, copyright remains grounded in a view of the world where the territorial state is the main structural principle. Overall, these structural flaws of global copyright law throttle the establishment of a licit online market for audiovisual media services and may at least partly explain why illicit file-sharing is still thriving.

Under these circumstances, systems of collective rights management (CRM) offering a one-stop shop for global rights clearance would seem to be an attractive solution, in particular where negotiations between users and individual creators would be impractical and entail prohibitive transaction costs. The reality, however, tells a different story. In the European Union (EU), where collective rights management organisations (CMOs) are widespread, they have been put into question by the European Commission, as a consequence of complaints concerning their transparency, governance and the distribution of royalties collected on behalf of right-holders. Legal proceedings, communications and recommendations bear testimony to the many attempts the Commission has made over the last decade, not only to make CMOs work more efficiently, but, also to bring them from a system of national licences granted by national monopolies to a system of EU-wide authorisations available from CMOs competing for the most lucrative rights to administer. The question is whether these regulatory attempts at a paradigm change in CMO licensing structures are compatible with cultural diversity interests.

This paper aims to briefly reconstruct the main stages of the EU's CRM policy and lawmaking process and then criticise the European Commission's position from a cultural diversity perspective. In a third step, the paper will ask to what extent the recent Proposal of the Commission for a CRM directive would be able to neutralise this critique.

2. NATIONAL CMOS AND THE CHALLENGES OF EU LAW AND POLICYMAKING

2.1 CRM AND THE PUBLIC INTEREST

The idea of collective rights management originated in France at the end of the 18th century, when playwrights organised themselves as a pressure group, fighting

against theatres for the recognition of their economic and moral rights.[1] This movement led to the foundation of the *Bureau de législation dramatique* in 1777, which later was succeeded by the still existing *Société des auteurs et compositeurs dramatiques* (SACD).[2] As a consequence of technological development, over the course of time, new collecting societies (today more commonly known as CMOs) came into covering every sector of artistic creation, including music, visual art, literature and audiovisual works as well as productions and performances.[3] The early French CMOs served as a model for a network of national authors' societies that eventually spread throughout large parts of the world. By concluding bilateral agreements with sister-organisations in the more than 120 countries that are members of CISAC, the International Confederation of Societies of Authors and Composers,[4] CMOs eventually became able to offer users a one-stop shop for (national) licenses related to a global repertoire. For the administration of works like audiovisual and multimedia works, which are composed of several types of works (including text, music, image, software etc.) and thus require a great number of authorisations, collaboration between CMOs operating in different sectors of artistic creation became necessary. With the advent of a global networked digital environment, CMOs are now facing one of the biggest challenges of their history: to cope with the contradictions between national orders of copyright law and global digital business expectations. Together with a few media companies that are granting licenses directly to individual consumers, CMOs have assumed the role of a major guarantor for a licit online market to build up in the sectors of audiovisual and multimedia. As a counter weight to the global oligopoly of vertically integrated transnational entertainment giants, CMOs may offer a scheme of rights management that better respects the specific interests of independent authors and thus promotes the diversity of cultural expressions.

CMOs provide services that are useful to both authors/right-holders and users. For authors/right-holders, CMOs are useful since they act as trustees that usually administer, monitor, collect and distribute the payment of royalties for all right-holders that are directly or indirectly represented by the CMO. Beyond economic functions, CMOs also have important cultural and social roles: The trade union-like spirit of solidarity that was crucial at the beginning of their history[5] is still present in the cultural and social funds that are operated by most CMOs. These funds are fed out of deductions of approximately 10 per cent from the total revenues of a CMO[6] and are used to subsidise creative projects of (particularly young) artists or to help members in need of welfare aid. Moreover, the organised power of a CMO assures its members an important bargaining position which can be employed to defend old rights or to strive for the acknowledgment of new ones, if technological development would make this necessary. Users, on the other hand, benefit from CMOs since a

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1 For an illustrative account of the history of CMOs, see Mihály Ficsor, *Collective Management of Copyright and Related Rights*, Geneva: World Intellectual Property Organization, 2002, at pp. 18–19 and 57–58.

2 Ibid., at p. 18. See also Daniel J. Gervais, 'The Evolving Role(s) of Copyright Collectives', in Christoph B. Graber et al. (eds), *Digital Rights Management: The End of Collecting Societies?*, Berne: Staempfli, 2005, pp. 27–56, at p. 28.

3 For a detailed analysis of CMO's main fields of activity, see Ficsor, supra note 1, at pp. 37–89.

4 CISAC, was funded in 1926 as an umbrella organisation for CRM. Today the membership of CISAC encompasses 232 authors' societies from 121 countries.

5 See Ficsor, supra note 1, at p. 20.

6 The CISAC model contract for reciprocal representation agreements between CISAC members provides the possibility to reserve up to 10 per cent of the collections for social or cultural ends, see Article 8 II CISAC model contract, available in Harald Heker (ed.), *GEMA Jahrbuch 2011/2012*, Baden-Baden: Nomos, 2011, pp. 9–508, at pp. 246–247.

centralised rights-clearance facility helps to cut down on transaction costs. The availability of a global one-stop shop for global repertoires would be particularly important for internet intermediaries that are out to launch new business models online.

As required by statutory law in many (particularly) European countries, CMOs operate under a double constraint serving the public interest.[7] First, in relation to creators, they are required to administer all rights falling into their area of competence. Second, in relation to users, they are obliged, on request, to grant exploitation rights or authorisations to any person on equitable conditions in respect of the rights they administer.[8] Moreover, arbitration mechanisms provide access to users and CMOs alike, and supervision procedures serve to prevent possible abuses, where CMOs enjoy a *de iure* or *de facto* monopoly position.[9] In practice, a *de iure* or *de facto* monopoly position of CMOs is the rule in the EU, since there is generally only one CMO per Member State to administer the rights of a specific group of right holders.

2.2 CRM AND COMPETITION LAW

In consideration of these monopolistic structures, the European Court of Justice (ECJ) has further detailed the room to manoeuvre for CMOs from a competition law perspective. That is to say that the ECJ does not consider CMOs to be undertakings entrusted with the operation of services of general economic interest in the sense of Article 106 of Treaty on the Functioning of the European Union (TFEU),[10] regardless of the cultural functions they fulfil. Consequently, CMOs are not exempt from the competition rules provided by the TFEU and must comply with antitrust rules (Article 101 TFEU) and not abuse the dominant position that is implied by a *de iure* or *de facto* monopoly (Article 102 TFEU). From ECJ case law, the following main governance standards for CMOs emerged regarding the relationship (1) between a CMO and its members (internal relations), (2) the CMO and users (external relations) and (3) between two or more CMOs.

First, with regard to internal relations, the ECJ held in *BRT v SABAM* (1974)[11] that Article 102 TFEU imposes fair trading obligations on a CMO enjoying a *de facto* monopoly for the management of copyright in a EU Member State. The contract concluded between a CMO and its individual members may thus limit the freedom of the member only to the extent that this would be necessary for effective rights management by the CMO. In *GVL v Commission* (1983), the Court ruled that Article 102 TFEU prevents a CMO enjoying a *de facto* monopoly from excluding nationals of another EU Member State from membership.[12] The principle of non-discrimination –

7 Daniel J. Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', in Daniel J. Gervais (ed.), *Collective Management of Copyright and Related Rights*, Alphen aan den Rijn: Kluwer Law International, 2010, pp. 1–28, at p. 6.

8 See Thomas Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?', in Rochelle C. Dreyfuss et al. (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford: Oxford University Press, 2001, pp. 295–316, at p. 301, footnote 14 and accompanying text.

9 Christoph B. Graber, 'Copyright and Access – a Human Rights Perspective', in Christoph B. Graber et al. (eds), *Digital Rights Management: The End of Collecting Societies?*, Bern: Staempfli, 2005, pp. 71–110, at p. 73; see also Ficsor, supra note 1, at pp. 144–146.

10 See European Court of Justice, *GVL v Commission*, 1983, Case C-7/82, ECR-483, at para. 32, and European Court of Justice, *BRT v SABAM (BRT II)*, 1974, Case C-127/73, ECR-313, at point 23.

11 *BRT v SABAM (BRT II)*, supra note 10.

12 *GVL v Commission*, supra note 10.

implicit in this decision and now enshrined in Article 18 TFEU – was eventually generalised for the whole of EU copyright law in *Phil Collins* (1993).[13]

Second, concerning external relations, the ECJ held in *Basset v SACEM* (1987)[14] that a CMO enjoying a *de facto* monopoly is not allowed, under Article 102 TFEU, to impose unreasonably high tariffs on users wanting to licence rights in its repertoire. According to *Ministère Public v Tournier* (1989),[15] a CMO may refuse direct access to its repertoire to users established in other EU Member States or may refuse granting licenses for only parts of their repertoire if this is necessary for reasons of an efficient monitoring and management of contracts.

Finally, concerning the relationship between CMOs, the ECJ decided in *Ministère Public v Tournier* (1989) and *Lucazeau v SACEM* (1989)[16] that reciprocal representation agreements between CMOs are bound by the antitrust rules of Article 101 TFEU. A reciprocal representation agreement providing (directly or indirectly) that users established in Member State B are prevented from direct access to the repertoire of a CMO in Member State A may be considered 'concerted practice' within the meaning of Article 101 TFEU, if it leads to conditions of trade which do not correspond to the normal conditions of competition. However, if the parallel behaviour is justified by legitimate reasons including reasons of efficient monitoring, the agreement does not violate Article 101 TFEU.[17]

It is noteworthy that the ECJ, in this case law, has duly recognised that CMOs serve multiple public-policy interests and never squeezed them into a one-sided economic approach.

2.3 SIMULCASTING AND CHALLENGES OF THE INTERNET

While this case law evolved under pre-internet conditions, the establishment of a digital networked environment challenged the conventional system of CRM as far as reciprocal representation agreements between CMOs are concerned. A first step in this development was the so-called Simulcasting agreement, a model contract concluded between the International Federation of the Phonographic Industry (IFPI) and a considerable number of CMOs with the aim to facilitate the granting of multi-repertoire and multi-territory licenses. Accordingly, the Simulcasting agreement provided for each participating CMO to grant, for its represented repertoire, simulcasting [18] licenses to the other participating CMOs. [19] As a novelty, the agreement stipulated reciprocal repertoire licensing that was not limited to the individual CMOs territory but encompassed the whole world. This agreement required the European Commission to reassess the legitimacy of representation contracts under conditions of the internet. In its 2002 *Simulcasting decision*,[20] the Commission exempted the agreement from the antitrust rules of Article 101 TFEU, after the participating CMOs had agreed to clearly separate copyright royalties from administrative fees. The Commission's intention was that a requirement of making

13 European Court of Justice, *Phil Collins v Imtrat*, 1993, Cases C-92/92 and C-326/92, ECR I-5145.

14 European Court of Justice, *Basset v SACEM*, 1987, Case C-402/85, ECR-1747.

15 European Court of Justice, *Ministère Public v Tournier*, 1989, Case C-395/87, ECR-2521.

16 European Court of Justice, *Lucazeau v SACEM*, 1989, Case C-110/88, C-241/88 and C-242/88, ECR-2811.

17 *Ministère Public v Tournier*, supra note 15, at para. 24.

18 Simulcasting is defined as the simultaneous transmission by radio and TV stations via the internet of a sound recording that is included in the broadcasts of radio and/or TV signals.

19 Commission Decision No. COMP/C2/38.014 – IFPI 'Simulcasting' of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, at para. 19.

20 Ibid.

administrative fees transparent would enhance competition between CMOs. Furthermore, the Commission was concerned with a clause in the agreement providing that royalties are to be calculated as the aggregate of the royalties the participating CMOs would charge individually for their respective territory. Although this solution prevented the grantor CMO from freely determining of the royalty level and thus excluded competition between CMOs, the Commission refrained from requiring the clause to be changed. The reason was that a unilateral determination implicated the danger that a participating CMO would engage in a kind of 'royalty dumping' in order to attract users.[21]

The *Simulcasting* case leaves us with the impression that the Commission, although having reservations against the existing CRM systems in terms of efficiency and competition, was ultimately unable to present an alternative model that would promise a better solution. However, unabated and fast technological development and the drive of new internet-based business models imposed pressure on the Commission to come up with a solution for a more efficient and user friendly system that would spur growth of the digital economy and restrain piracy in Europe. As a reaction to these pressures, the Commission published a Recommendation on music licensing in 2005 that is briefly introduced in the next section.

2.4 THE 2005 COMMISSION RECOMMENDATION AND THE CISAC CASE

In October 2005, the Commission published Recommendation 2005/737/EC on collective rights management for music services on the internet.[22] The main purpose of this recommendation was to propose a system for cross-border licensing in the online environment that would stimulate competition among CMOs in Europe. To this end, the Commission recommended that right-holders should be empowered to freely choose (1) the CMO in charge, (2) the rights to be mandated and (3) the territorial reach of the mandate. In addition, CMOs should be prevented from distinguishing between different categories of right-holders.

The Recommendation, a non-binding instrument of EU law, is clearly favouring a system for the enhancement of competition in the cross-border exploitation of music rights online that is driven by right-holders rather than users. The system of reciprocal representation agreements between CMOs shall eventually be replaced by a system based on CMOs offering multi-territorial licences for their repertoire only. CMOs would no longer be under an obligation to represent all rights falling into their area of competence and could accept or reject the administration of certain rights according to their own preferences. The likely consequence of such a system would be that CMOs will specialise in the representation of the most lucrative rights and aggrandise the repertoire in their field of specialisation. Such a concentration process will allow these CMOs to keep administration costs low and make them attractive to online users who are interested in buying licences as cheaply as possible. While CMOs will compete for works of mainstream music (i.e. pop music in the English language), the situation will become more difficult for less popular music and music in languages that are less widely-used.

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21 Ibid., at para. 111.

22 Commission Recommendation 2005/737/EC of 21 October 2005 on the collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276.

The Commission confirmed the basic principles of the Recommendation in the 2008 CISAC decision.[23] In this case, the commission found that the representation agreements concluded between CISAC[24] members within the European Economic Area (EEA) violated Article 101 TFEU. The case was appealed by the involved CMOs to the General Court of the EU, where it was still pending when this paper went to press.

Overall, the Commission's CRM policy raises strong concerns from a cultural diversity perspective, as several critics have pointed out.[25] As a major flaw, the Recommendation looks at CMOs exclusively from an economic perspective and does not care about their cultural and social functions. The only goal of the Commission's initiative seems to be improving the efficiency of the administration services that CMOs provide to right-holders. It does not consider, however, that under conditions of competition, CMOs would have difficulties to fulfil their public interest functions. A further shortcoming is that the Recommendation treats all right-holders the same and does not distinguish between those who create and perform works (the creators) and those who merely exploit the rights which they have acquired from creative people (the derivative right-holders). As we have seen above, CRM provides for an institutional structure that is intended to strengthen the position of independent authors and performers in their business relations with users. The privileges conceded to creators through this structure are justified because users (often big media companies) are generally the stronger partners in these business relationships. Accordingly, the CRM mechanism would be perverted if it were to entail benefiting derivative right-holders, which are often transnational entertainment conglomerates. From a cultural diversity perspective, it would thus be important to make sure that the creative people may continue to play an important role also in the process of rights exploitation online and prevent the transnational entertainment business from further expanding its dominance in this area.

3. THE PROPOSED CRM DIRECTIVE

3.1 MAIN FEATURES OF THE PROPOSAL

While the Commission announced a directive on CRM already in a 2004 Communication,[26] it took eight more years to eventually come up with a proposal for such an instrument in July 2012.[27] The length of the Proposal's 'birth process' is in itself a reflection of the difficulties posed by a project that is intended to remedy at

23 Commission Decision COMP/C2/38.698 – CISAC of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, C(2008) 3435 final.

24 On CISAC, see supra note 4.

25 See in particular the comment by the Max Planck Institute for Intellectual Property Rights and Competition law, available in (2006) *Gewerblicher Rechtsschutz und Urheberrecht International (GRUR Int.)*, 3, pp. 179–272, at pp. 222–225; see also Manuela Maria Schmidt, 'Die kollektive Verwertung der Online-Musikrechte im Europäischen Binnenmarkt' (2005) *Zeitschrift für Urheber- und Medienrecht*, 11, pp. 783–789; Peter Gyertyánfy, 'Collective Management of Music Rights in Europe after the CISAC Decision' (2010) *International Review of Intellectual Property and Competition Law*, 41, pp. 59–89, at pp. 70–75.

26 See European Commission Communication of 16 April 2004 on the management of copyright and related rights in the internal market, COM(2004) 261 final, at pp. 22–23.

27 European Commission Proposal for a Directive of the European Parliament and of the Council of 11 July 2012 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372 final [hereinafter European Commission Proposal].

least some of the contradictions between territorial copyright law and a global market.

The proposed directive pursues two objectives. First, it aims at providing for a general framework of regulation for collective rights management in the EU assuring that all CMOs under the jurisdiction of EU Member States observe minimal standards of governance and transparency (Titles I and II of the Proposal). Second, the Proposal aims at encouraging and facilitating 'the multi-territorial licensing of the rights of authors in their musical works by collecting societies representing authors' (Title III).[28]

Titles I and II contain general provisions (including on scope, definitions, governance, transparency and internal and external relations) that apply to any CMO that is based in Europe, irrespective of the sector where it is active. According to Article 5 of the Proposal, right-holders have the right to mandate a CMO of their choice with the administration of the rights of their choice for the Member States of their choice. This provision extends the Commission's credo that CMOs should compete from the market of online music to all content markets. The obligation (enshrined in Article 6) for CMOs to accept right-holders as members if they fulfil the membership requirements merely codifies confirmed case law of the ECJ. The Proposal breaks new ground in providing detailed rules for cultural and social funds. In this regard, Article 11 requires that deductions from revenues must be specified in the agreements governing the relationship of the CMO with its members and right-holders. Decisions on the deduction of amounts reserved for cultural, educational or social purposes must be made in a general meeting of all members (Article 7). Article 11 further states that right-holders are entitled to have access to the CMOs cultural, educational and social services on fair conditions and Article 13 prohibits a CMO from discriminating between its members and the members of a represented CMO. According to Article 14, CMOs may not apply deductions for cultural etc. purposes from the revenues derived from the rights it manages on the basis of a representation agreement unless the other CMO consents to these deductions.

Title III then provides for specific rules on multi-territorial licensing that apply only to the management of online rights in musical works. Beyond these specific rules, CMOs that carry out multi-territorial licensing are also bound by the provisions of Titles I and II.

Among the obligations under Title III, the following stand out in the context of this paper: A CMO may mandate another CMO to grant multi-territorial licences for the works in its repertoire. The mandated CMO is required under Article 26(4) to transfer the collected royalties to the mandating CMO, which is in charge to distribute the amounts to the right-holders. According to Article 26(2), any CMO is required to provide information on the amounts of royalties collected, deductions made and amounts distributed by the CMO. Article 28 provides that representation agreements between CMOs shall be concluded on a non-exclusive basis. The mandated CMO may accumulate repertoires since it may also be mandated by other CMOs for the same purpose. Article 29 provides a duty to contract for CMOs engaging in representation agreements for multi-territorial licensing under two conditions. First, there must be a request to do so from a CMO that is not itself engaging in multi-territorial licensing and, second, the requested CMO must have been representing the same category of online rights in musical works in the repertoire of one or more other collecting societies.

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28 Ibid., at para. 1.1.

3.2 COMMENTS FROM A CULTURAL DIVERSITY PERSPECTIVE

The proposed directive provides in Titles I and II for a framework of regulation concerning issues of governance and transparency that applies to all CMOs in Europe. It is an important step that has been long awaited. There have been failures in the regulation of CMOs in several EU Member States that must be remedied if CRM is supposed to assume an important role in future copyright licensing.

From a cultural diversity perspective, however, the Proposal is disappointing. The Commission continues to treat CMOs merely as providers of services to right-holders and without distinguishing between creators and derivative right-holders.[29] Despite all the criticism that has been expressed against its previous policy steps, the Commission does not seem willing to learn that CMOs fulfil important non-economic functions. Article 5, the pivot for the establishment of competition between CMOs in all sectors, interferes with EU Member States' sovereignty in the field of cultural policy. Indeed, many Member States have adopted an alternative model of CRM as part of their cultural policy. Quite a few Member States have opted for a scheme of mandatory collective management for certain rights that is not compatible with Article 5. Statutory law in many EU Member States provides for a (full or partial) monopoly of CMOs that correlates with their specific obligations in the public interest, including in matters of cultural diversity. According to the EU's constitutional order, which is contained in its treaties, the Union possesses only limited competences in the area of cultural policy.[30] Culture is the domain of the EU's Member States and the Union is obliged under Article 167 TFEU to take aspects of the diversity of its cultures into account whenever it becomes active under other provisions of the treaties. Accordingly, when the Union is aiming at establishing an internal market for the exploitation of rights that are protected under (national) copyright law, it must not derogate policy decisions that have been made at Member State level in the field of culture. Several Member States of the EU consider CRM being an important component of their national policies aiming at the protection and promotion of the diversity of cultural expressions on their territory. An essential requirement of cultural diversity policy is to secure that diverse cultural content is supplied by the market beyond mainstream offers. CRM systems that are based on reciprocal cooperation between national monopoly CMOs contribute to this end since those CMOs are obliged to represent all repertoires (and thus secure an income also to less-popular creators) rather than cherry-pick popular works. Consequently, under the regime of the EU treaties, measures of CRM policy that have been taken by Member States as an embodiment of their cultural sovereignty, must be respected by the Commission. Considering the Proposal's policy decisions that ignore the EU Member States' cultural sovereignty, its recital 2, explicitly recalling the Union's obligations under Article 167 TFEU,[31] appears to be rather cynical.

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29 Whereas the Explanatory Memorandum and the Recitals speak a few times of 'authors' rather than 'right-holders', the term 'author' does not appear in the Proposal's 44 Articles.

30 According to Article 4(1) of the Treaty on European Union (TEU), the Union may legislate and adopt legally binding acts only in those areas where the treaties confer it exclusive or shared competences. Articles 3 and 4 TFEU, regulating exclusive and shared EU competences respectively, do not mention either culture or copyright. In the field of culture, according to Article 6 TFEU, the Union may only carry out actions to support, coordinate or supplement the actions of the Member States. This order of competences is confirmed in Article 167 TFEU, providing that the Union shall contribute to the flowering of the cultures of the Member States.

31 See also para. 1.2 of the Explanatory Memorandum introducing the Proposal.

Recital 2 contains more noble words recognising that those CMOs which represent 'the smallest and less popular repertoires' have an important role to play in promoting the diversity of cultural expressions. At first glance this seems to be an (implicit) acknowledgement of the problem that commercially less interesting repertoires are being left out by a policy that is singularly focused on maximising competition between CMOs. The question is how far these concerns for the diversity of cultural expressions have been effectively implemented in the Articles of the Proposal. Whereas nothing in Titles I and II of the Proposal contributes to this end, Article 29 provides for interesting language as far as multi-territorial licensing of music online is concerned. Article 29 states that CMOs aggregating repertoires across borders may not reject concluding a representation agreement with a CMO that is active in 'the same category of online rights in musical works'. The crucial question is what 'the same category' means. The aim of helping those CMOs to survive which represent the smallest repertoires is only furthered if rights in popular music and rights in non-mainstream music are considered belonging to the same category of online rights. However, the Proposal fails to clarify this point. To end on a good note, the provisions in the Proposal acknowledging the legitimacy of CMO funds for cultural, educational and social purposes are in principle a positive contribution to the promotion and protection of cultural diversity in Europe. It should, however, not be overlooked that the requirement of Article 14, that a represented CMO must consent to deductions operated by a representing CMO, is likely to have the effect that well-established right-holders will choose not to be represented by a CMO engaging in cultural, educational and social services.[32]

4. CONCLUSION: THE UNEASY RELATIONSHIP BETWEEN COMPETITION POLICY AND CULTURAL DIVERSITY

The Proposal of 12 July 2012 for a directive on CRM is the expression of the European Commission's conviction that CMOs should compete in a EU-wide market for the administration of copyrights. The Proposal is based on the (implicit) assumption that an oligopoly of CMOs is to be preferred over a system of national-monopoly CMOs that are globally co-operating in a close-mesh net of reciprocal representation agreements. At this point it would be necessary to more fundamentally reflect on the relationship between competition policy and cultural diversity. On this complex topic the limited scope of this paper only allows making three brief remarks that are all related to the fact that the Commission's view is confined to the European market while a more comprehensive perspective of economic and cultural energies interacting in a digital networked environment of global dimension would be required.

First, competition law is one-sidedly economy-oriented whereas audiovisual media are important cultural vectors as well. In this realm it is sufficient to recall that the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions explicitly recognises the dual nature of cultural goods and services as objects of trade and cultural artifacts.[33] Second, the competition problem

[32] Warner, for example, is assigning its rights within the PEDL network (see infra note 35) exclusively to CMOs that fulfil its IT-standards and are willing to accept a prohibition of social and cultural deductions.

[33] UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 1440 UNTS 311 (adopted on 20 October 2005, entered into force 18 March 2007), at para. 18 of the Preamble and Article 1(g).

posed by the dominance of a few entertainment giants on the global market for audiovisual content must not be ignored.[34] While the Commission carves this problem out,[35] the European Parliament emphasised in its seminal Echerer Report that 'it is precisely because of their exclusive position that [CMOs] provide a safeguard to prevent any further concentration of intellectual property'.[36] The Parliament warned that a 'misguided insistence on competition would also lead to further fragmentation of the markets, chaos in the clarification of rights and dumping tariffs.'[37] Third, the Commission's attitude towards CMOs is merely negative and overlooks the potential of CRM as a contribution to tackle some of the challenges posed by the internet. In this context it was premature for the Commission to outright exclude from further investigation the establishment by CMOs of a centralised portal to pool their repertoire and offer a one-stop-shop type of global licenses because of competition law concerns.[38] Rather than seeing EU competition law as carved in stone, the Commission should learn from the European Parliament, which has emphasised that a restriction of or even exception to competition law could be considered, provided that stringent criteria and conditions of governance, transparency and accountability would regulate monopolistic CMOs and their reciprocal representation agreements.[39] Since the Parliament has the power to ask for changes in the Commission's Proposal there is still a fair chance that things will improve down the track of the lawmaking process.

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34 Lawrence Lessig has pointed out that 'never in our history have fewer had a legal right to control more of the development of culture than now'. See Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York: Penguin Books, 2004, at p. 170.

35 What is more, the Commissions CRM policy is playing into the hands of the US music majors who control large parts of the European market. The Commission's 2005 Recommendation has triggered the establishment of a number of new companies, including CELAS, PEACOL, DEAL and PEDL that are specialising in pan-European music licensing. Strikingly, these new companies are joint ventures between a few European CMOs and US music majors, designed for the representation of rights owned by EMI (cooperating with GEMA and PRS for Music in CELAS), Sony (cooperating with GEMA in PEACOL), Universal (cooperating with SACEM in DEAL) or Warner (cooperating with every CMO accepting Warner's conditions in PEDL) on the European market.

36 European Parliament, Committee on Legal Affairs and the Internal Market, Raina A. Mercedes Echerer (Rapporteur), 'Report of 11 December 2003 on a Community Framework for Collecting Societies for Authors' Rights (2002/2274(INI))', A5-0478/2003 (final), at p. 15 [hereinafter Echerer Report]. This important report was adopted by the Plenary Session of the European Parliament on 15 January 2004.

37 Ibid., at p. 16.

38 European Commission Proposal, supra note 27, at p. 7.

39 Echerer Report, supra note 36, at p. 8, para. 18.