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## Collecting Societies and Creative Commons Licensing

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### *Abstract*

This paper scrutinizes the relationship of the Creative Commons licensing and collective licensing institution. The interplay of the collective, private and public licensing is turning out to be somewhat problematic. The paper describes the general framework that collecting societies are operating in and analyses the potential issues that might affect the interoperability of the Creative Commons licensing with collective management bodies. This paper is the final chapter of the dissertation: “The Pursuit of Efficient Copyright Licensing How *Some Rights Reserved* Attempts to Solve the Problems of *All Rights Reserved*” – which will be examined in Fall 2008.

# 1 *Collecting Societies and Creative Commons Licensing*

Collecting society licensing is a successful method of garnering royalties from broadcasters and other licensees who use massive amounts of copyrighted works.<sup>1</sup> However, this system is not designed to support noncommercial or royalty-free licensing. The focus of this paper is to describe the functions and the scope of collective licensing and to examine the overlap among the individual, collective and the Creative Commons (“CC”) public licensing procedures, and to determine whether such institutions can coexist. Just as collecting societies were solutions to the cultural and industrial revolutions of the past, the online licensing initiatives seem to provide answers to the post-industrial network economy.<sup>2</sup> However, many rights owners are also interested to combine the two licensing models and this raises a question of in what ways do these systems cooperate? The CC licenses have included a clause 4e that clarifies that the rights owner reserves rights to collect royalties from the uses that are not covered by the license. Nevertheless, the licenses also recognize that in some jurisdictions, the right to collect royalties cannot be waived.

The question of the interoperability of the two licensing models includes a bigger question: Can the collecting societies combine the collective and individual licensing, and in such a case, how does the market equilibrium change? In addition, the question of a rights owner’s autonomy has to be examined in a world where the collective management may have restrictions that constrain rights owners’ freedom to govern their rights. Some believe that the paternalistic approach to authors creates a negative effect on authors’ autonomy,<sup>3</sup> while the societies see it as a bargaining position. Should the authors be allowed to manage their rights, even if it could lead to negative consequences?

## 1.1 *Collecting Societies*

The underlying idea of collective copyright management is widely shared, and collecting societies have a key role in all developed countries.<sup>4</sup> In cases where the

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<sup>1</sup> See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 116 (2003).

<sup>2</sup> Saara Taalas & Alf Rehn, *Omistamisen murros -jälkitekollinen talous ja lain vastuu*, in TEKEMISEN VAPAUS 72 (Karo and Lavanpuro ed., 2007).

<sup>3</sup> See, e.g., JOHN STUART MILL, *ON LIBERTY* 148 (1863) (“*Considerations to aid his judgment, exhortations to strengthen his will, may be offered to him, even obtruded on him, by others; but he himself is the final judge. All errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good.*”).

<sup>4</sup> Birgitte Andersen, Zeljka Kozul-Wright and Richard Kozul-Wright, *Copyrights, Competition and Development: The Case of the Music Industry*, UNCTAD/OSG/DP/145 23 (2000), [http://www.unctad.org/en/docs/dp\\_145.en.pdf](http://www.unctad.org/en/docs/dp_145.en.pdf) (“*In most developing countries, collecting societies (and particularly those dealing with mechanical and synchronization rights) are lacking or very weak*”). See, e.g., EHRlich, *supra* note 6 (describing thoroughly the birth of UK’s PRS collecting society); see also Lucie Guibault & Stef van Gompel, *Collective Management in the European Union*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 117-152 (Daniel Gervais ed. 2006) (describes the

rights cannot be enforced vis-à-vis individual members of the public or where individual management would not be appropriate given the number and type of uses involved and the high transaction costs of individual licensing, rights owners are instead granted a remuneration right.<sup>5</sup> Collecting societies manage these rights. The importance of collecting societies to rights owners can be compared to a banking institution. Collecting societies administer many of the rights owner's rights and the system enables industrial-scale licensing. These societies can be seen as an answer to industrial-age copyright markets, born in a time when the demand for sheet music and music records was growing.<sup>6</sup> The societies currently collect and distribute royalties for nearly every conceivable public performance and reproduction of creative works.<sup>7</sup> In 2006, the royalty collections of collecting societies around the world equaled over 7 billion Euros.<sup>8</sup>

Collective management is used especially in music licensing where a group of collecting societies manage the rights of composers, performers, lyric writers, and arrangers. Collective management is also used for photocopying and broadcast retransmission in many countries. Because of the historical, legal, economic, and cultural diversity among countries, regulation of collecting societies and the markets where they act varies from one country to another. At the international level, articles 11bis(2) and 13(1) of the Berne Convention<sup>9</sup> and article 12 of the Rome Convention,<sup>10</sup> lay out a very loose framework for collective management and state that Member States may determine the conditions under which certain rights may be exercised. In Europe, collecting societies require their members to transfer exclusive administration rights of all of their works to them.<sup>11</sup> United States antitrust law has placed restrictions on exclusive representation.<sup>12</sup> Collecting societies in the U.S. and Canada have less restricting rules as members maintain their rights simultaneously

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European legislation); DAVID SINACORE-GUINN, *COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS* (1993) (offers a good overview of collective licensing).

<sup>5</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social – Committee, *The Management of Copyright and Related Rights in the Internal Market* COM (2004) 261 final, 6; see also LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF COMMONS IN CONNECTED WORLD* 201 (2001); Thomas Streeter, *Broadcast Copyright and the Bureaucratization of Property*, 10 *CARDOZO ART & ENT. L.J.* 567, 570-576 (1992); MIKKO HUUSKONEN, *COPYRIGHT, MASS USE AND EXCLUSIVITY, ON THE INDUSTRY INITIATED LIMITATIONS TO COPYRIGHT EXCLUSIVITY, ESPECIALLY REGARDING SOUND RECORDING AND BROADCASTING* 72 (2006) (Discussing the economic rationale of such arrangement); LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 270 (2nd ed. 2004). Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV.L.REV.* 1089, 1105 (1976) (presents the idea of replacing “liability rule” for a “property rule”).

<sup>6</sup> CYRIL EHRLICH, *HARMONIOUS ALLIANCE, A HISTORY OF THE PERFORMING RIGHT SOCIETY* 5-9 (1989).

<sup>7</sup> *E.g., id.* at 162 (showing a graph of the steady growth of the UK's Performing Rights Society incomes).

<sup>8</sup> Amanda Mac Blane, *CISAC Members Collections Top 7bn Euros and Membership Grows* (2008), <http://www.cisac.org/CisacPortal/listeArticle.do?numArticle=911&method=afficherArticleInPortlet>.

<sup>9</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *reprinted in* *WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* (Paris Act, 1971) 177 (1978).

<sup>10</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of October 26, 1961.

<sup>11</sup> See, e.g., *KKO 1942 II 192* (AKM GmbH) (author who had signed his performing rights to an organisation to monitor could not grant separate licenses).

<sup>12</sup> See also HUGH LADDIE, PETER PRESCOTT, MARY VITTORIA, ADRIAN SPECK & LINDSAY LANE, *THE MODERN LAW OF COPYRIGHT AND DESIGN* 977 (3rd ed. 2000) (discussing UK's copyright tribunal's antimonopoly functions).

with collecting societies.<sup>13</sup> Various U.S. courts have concluded that direct licensing is a realistic alternative for the users of musical works.<sup>14</sup> For the past century, legislators in Europe have determined that the benefits of collecting societies outweighed the anticompetitive disadvantages they have created.<sup>15</sup> As technology has made it easier to distribute works online and license directly with the rights owners, collective licensing also has faced scrutiny. Recently, the European Union Commission started an investigation into European copyright societies.<sup>16</sup> Charlie McCreevy, the European Commissioner for Internal Market and Services, stated in his speech that “Europe’s model of copyright clearance belongs more to the nineteenth century than to the 21st. Once upon a time it may have made sense for the member state to be the basic unit of division. The internet overturns that premise”.<sup>17</sup> The Commission was worried that national societies might stifle the online sale of music. In 2005, it issued a recommendation on cross-border management of copyrights.<sup>18</sup> Its full impact to collective societies’ competition is still unclear.<sup>19</sup> However, it is apparent that European collecting societies are facing changes in the near future.

Open Content licenses that broaden users’ rights from copyrights’ “all rights reserved” default, have seen big growth in the past five years.<sup>20</sup> The most prominent

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<sup>13</sup> E.g., U.S. collecting society BMI Songwriter agreement clause 5 (c) (“[You], the publisher and/or your co-writers, if any, retain the right to issue non-exclusive licenses for performances of a Work or Works in the United States, ... provided that ... we are given written notice thereof and a copy of the license is supplied to us.”); Koenigsberg, *supra* note 25, at 379; see also James Kendrick, *The American Experience*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 30 (James Kendrick ed. 2002); Andre Schmidt, *Contracts and Powers of Representation of Collecting Societies*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 54, 57-58 (1989) (description of why performing rights can never be assigned on an exclusive basis in the United States).

<sup>14</sup> Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights* 1 J. COMPETITION L. & ECON. 541, 546 (2005) (discussing the cases brought by state) and *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917, 928-29, cert. denied, 469 U.S. 1311 (1985); *Columbia Broadcasting Sys. v. ASCAP*, 620 F.2d 930, 937, cert. denied, 450 U.S. 970 (1981). See also PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY, FROM GUTENBERG TO THE CELESTIAL JUKEBOX*, 59 (2003).

<sup>15</sup> See, e.g., VEIJO PÖNNI & ARTO TUOMOLA, ANNA MULLE TÄHTITÄIVAS, SELVITYS SUOMALAISEN MUSIIKKITOIMIALAN TALOUDESTA JA TULEVAISUUDESTA 67 (2003); Case 127/73 BRT v. SABAM [1974] ECR 313, [1974] 2 CMLR 238 at paras 8-15; see also Nanette Rigg, *The European Perspective*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 18-30 (James Kendrick ed. 2002) (for the history of European collecting societies).

<sup>16</sup> Notification of cooperation agreements (Case COMP/C2/38.126 — BUMA, GEMA, PRS, SACEM) OJ C 145/2 (17.5.2001); *Commission opens proceedings into collective licensing of music copyrights for online use*, IP/04/586 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/586&format=HTML&aged=1&language=EN&guiLanguage=en> (May 3, 2004); *Study on a Community Initiative on the Cross-Border Collective Management of Copyright*, [http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf); see also Thomas Vinje & Ossi Niiranen, *The Application of Competition Law to Collecting Societies in a Borderless Digital Environment*, in EUROPEAN COMPETITION LAW ANNUAL 2005: THE INTERACTION BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY LAW, 399 (2007).

<sup>17</sup> Charlie McCreevy, *Music Copyright: Commission Recommendation on Management of Online Rights in Musical Works*, Speech/05/588, 2, (October 10, 2005) available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/588&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>18</sup> Commission Recommendation (EC) No. 737/2005 of 18 June 2005, 2005 O.J. (L 276) 54 (on collective cross-border management of copyright and related rights for legitimate online music services).

<sup>19</sup> At the time of writing (September 2008), the Finnish collecting society Teosto had not made any changes to its rules.

<sup>20</sup> Wikipedia: Open Content, [http://en.wikipedia.org/wiki/Open\\_content](http://en.wikipedia.org/wiki/Open_content) (Wikipedia, an open encyclopaedia, defines open content as: “any kind of creative work including articles, pictures, audio, and video that is published in a format that explicitly allows the copying of the information”).

Open Content License authority, the CC,<sup>21</sup> has defined its mission: “to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.”<sup>22</sup> While the CC licenses have grabbed the attention of creators and academia, only a few collecting societies are starting licensing experiments<sup>23</sup> as the rest of the societies are currently not allowing their members to grant individual CC licenses.<sup>24</sup> This paper examines the arguments that collecting societies have identified for refusing the CC licensing from their members.

Individual management of copyrights has been seen as costly for users and an inefficient way to generate significant revenues for rights owners.<sup>25</sup> Generally individual transaction costs are greater than the value of the rights in question. Collective management is justified as efficient mechanism to minimize searching and contracting transaction costs between intermediary distributors like online retailers<sup>26</sup> or public broadcasters and copyright owners. Having a “one-stop shop” that represents all rights owners eliminates the high transaction costs of clearing rights with every individual author, publisher, composer, lyricist, artist, performer and record company.<sup>27</sup> Collective management is a practical way of administering high volume, low value usage of rights. Collective systems spread the cost of administration over all members of the collecting society. The costs of administration are covered by an overhead, typically between 12–20 percent of collected royalties.

Most of the collecting societies are organized as associations or societies.<sup>28</sup> Societies receive an annual mandate from their members where the terms for licensing and administration are approved. The content of the mandate is decided among the members and passed by a simple majority. The same terms are imposed on all members.

Collecting societies are effectively an organization handling the outsourced function of rights management. Rights owners transfer to collecting society rights to: 1) sell non-exclusive licenses; 2) collect royalties; 3) distribute collected royalties; 4) enter into reciprocal arrangements with other collecting societies;<sup>29</sup> and to 5) enforce

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<sup>21</sup> Creative Commons, [www.creativecommons.org](http://www.creativecommons.org).

<sup>22</sup> “Some Rights Reserved”: Building a Layer of Reasonable Copyright, <http://wiki.creativecommons.org/History>; see also LAWRENCE LESSIG, *FREE CULTURE* 282 (2004).

<sup>23</sup> Henrik Moeltke, *KODA-medlemmer kan nu bruge Creative Commons*, <http://creativecommons.dk/?p=11> (2008) and Anne Sophie Gersdorff Schrøder *KODA og Creative Commons*, <http://koda.dk/medlemmer/musikverker/creative-commons/koda-og-creative-commons>.

<sup>24</sup> ANDREW GOWERS, *GOWERS REVIEW OF INTELLECTUAL PROPERTY* § 5.66 (2006), available at [http://www.hm-treasury.gov.uk/media/6/E/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf). (“*Collecting Societies in the U.K. generally hold an exclusive license to collect royalties for the copyright works that they represent. Therefore, artists who are members of collecting societies are generally unable to license Creative Commons licensed individual works.*”); Tilman Lüder, *The Next Ten Years in E.U. Copyright: Making Markets Work* 18 *FORDHAM INTEL. PROP. MEDIA & ENT. L.J.*, 1, 38 (2007).

<sup>25</sup> *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc* 441 U.S. 1, 20 (1979) (“*Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers*”).

<sup>26</sup> E.g., iTunes, <http://www.apple.com/itunes/>.

<sup>27</sup> Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 *CAL. L. REV.* 1293, 1294 (1996).

<sup>28</sup> See, e.g., LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 268 (2nd ed. 2004).

<sup>29</sup> SINACORE-GUINN, *supra* note 4, at 645 (describes the contracts in detail).

their rights. Collecting societies also negotiate license fees for public performance and reproduction, as well as act as lobbying interest groups.<sup>30</sup>

Collecting societies sell blanket licenses, which grant the right to use their catalogue for a period of time.<sup>31</sup> Such a license might for example provide a broadcaster with a single annual authorization encompassing thousands of songs owned by thousands of composers, lyricists and publishers. The societies also sell individual licenses for users who reproduce and distribute music. The larger individual and blanket licensees have to report their use of works for accurate royalty payments while usage of the smaller users is estimated by occasional sampling.<sup>32</sup>

The status of collecting societies is usually tied to copyright law. Compulsory licensing schemes broaden collecting societies' power from purely contractual limits. Compulsory licenses allow societies to represent non-members, unless they have specifically opted out.<sup>33</sup> In Finland, for example, collecting societies collect non-member royalties for radio and TV broadcasting,<sup>34</sup> but members also receive additional compensation for mechanical music played in bars from levies collected on some blank storage media. Some collection societies also have a 'black box' of unclaimed royalties. This money is owed to writers, performers and labels that are named on royalty paperwork but cannot be traced. The money is typically kept for certain period of time and then given to other organizations (*e.g.*, Musicians' Union) or distributed among the local music publishers.<sup>35</sup>

## 1.2 Combining the Two Systems

"Ideally, the management of copyrights should be exclusively individual, because it is a great freedom for all acting parties and specifically creators, who are individuals."

-Marc Guez, Managing Director of French collecting society of record companies.<sup>36</sup>

The free and open source movement has shown that it is possible to find several distribution and business models to support the development of freely available content. Collecting societies need to find a way to foster this sort of innovative creativi-

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<sup>30</sup> Andersen et al., *supra* note 4, at 21 ("Collective agencies can often play a larger role in the industry, lobbying policy makers on music-related issues, providing information on the business to their members, promoting musical talent, through scholarships."); see also HUSKONEN, *supra* note 5, at 193.

<sup>31</sup> See, *e.g.*, BENTLY & SHERMAN, *supra* note 28, at 269.

<sup>32</sup> See, *e.g.*, HUGH LADDIE, PETER PRESCOTT, MARY VITTORIA, ADRIAN SPECK & LINDSAY LANE, *THE MODERN LAW OF COPYRIGHT AND DESIGN* 969 (3rd ed. 2000).

<sup>33</sup> See also Lucie Guibault & Bernt Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, Report of the Institute for Information Law 31 (2002), available at: <http://www.ivir.nl/publications/other/final-report2002.pdf> (analyzes whether author can waive a right for remuneration).

<sup>34</sup> 2004 Teosto Annual Report 12 (broadcaster royalties for in Finland add up to 60 percent of all the collected license fees).

<sup>35</sup> See Press Release of New York State Attorney General, *\$50 Million in Royalties Returns to Artists, Deal with Record Industry Sets New Procedures for Recovery of Unclaimed Asset*, [http://www.oag.state.ny.us/press/2004/may/may4a\\_04.html](http://www.oag.state.ny.us/press/2004/may/may4a_04.html) (2004).

<sup>36</sup> Marc Guez, *Hearing on Collecting Societies European Parliament*, (Oct. 7, 2003), <http://www.europarl.europa.eu/hearings/20031007/juri/guez.pdf>.

ty and to serve their future customer base that is looking to use open licensing models.

The CC seems to be creating parallel open content markets where only “all rights reserved” markets used to exist. The quality, sophistication and number of open content works is nowhere close to the “all rights reserved” market, but as the strong adoption of open source software has shown the open production model may create a parallel open market to proprietary products.<sup>37</sup> This development began to show in the software sector in early 1990 where free and open source software products started to compete for users. Just as the Free Software has captured some parts of the software market, it is possible that open content will compete with, replace, and complement commercial content. It is clear that no set of property rights work equivalently in all types of settings.<sup>38</sup> Amateurs and professionals, including those who are in different stages of their careers, have different expectations for the protection that copyright provides. Using open content licenses may not be a wise decision for an established author, just like holding on to all rights is not necessarily the best business strategy for new and upcoming or long forgotten artists. Currently rights owners have to make decisions whether they want to use the individual, collective, or public licensing schemas. The CC licenses and website are instructing licensors and licensees about the potential incompatibility issues of the licensing systems.<sup>39</sup>

Non-waivable Compulsory License Schemes. In those jurisdictions in which the right to collect royalties through any statutory or compulsory licensing scheme cannot be waived, the Licensor reserves the exclusive right to collect such royalties for any exercise by You of the rights granted under this License<sup>40</sup>

Only a few collecting societies have reacted to the CC licensing and most European collecting societies do not have any policy for CC-licensed material. A few collecting societies have started pilot projects to see how the two licensing systems could live side by side. The goal is to give authors more control of their works in a non-commercial field, while at the same time, provide them with royalty collecting services. The results from these pilot projects are not available at the time. However, there are several concerns that collecting society executives have expressed before the pilot projects have started. The next section addresses these concerns in greater detail.

### 1.2.1 *Interpretation of CC Licenses*

All the CC licenses grant royalty-free permission to copy and use the work for non-commercial use. Approximately two-thirds of the content licensed with a CC license has a clause that reserves commercial use: “4c You may not exercise any of

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<sup>37</sup> See, e.g., DON TAPSCOTT, ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* (2006).

<sup>38</sup> Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 *LAW AND CONTEMP. PROBS.* 127 (2003).

<sup>39</sup> Before Licensing, [http://wiki.creativecommons.org/Before\\_Licensing](http://wiki.creativecommons.org/Before_Licensing).

<sup>40</sup> E.g., Attribution 3.0 Unported, term 3ei, <http://creativecommons.org/licenses/by/3.0/legalcode>.

the rights ... in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation.”<sup>41</sup>

This non-commercial clause is not derived from the international copyright system and its interpretation must be made according to national legal systems, individual cases, and individual circumstances.<sup>42</sup> The clause may have different meanings in different cases even when interpreting the same license.<sup>43</sup>

The problems arise when collecting societies enforce their rights to collect remuneration. They have to make a decision about whether the use is covered by a license separate from the collecting society. Collective systems rely on automated licensing practices which guarantee low administrative overheads. The societies have sold licenses for many years to a range of groups from super markets that play muzak in the background to girl scouts singing songs around the campfire. Licenses are required to make the work available and for public performances of the work. Collecting societies have objected to individual license terms because they cannot efficiently enforce licensing terms that require judgment, interpretation, and may discriminate a field of endeavor. As a counter argument, it can be noted that collecting societies have successfully interpreted the vague line between private use and public performances for decades. Danish Koda, the only European collecting society that enables CC licensing, has created a document that their members must accept in order to use non-commercial CC licenses.<sup>44</sup> The document specifies the meaning of the non-commercial clause. This document can be linked to the copyright information page that is linked to every copy of the work that is licensed with the CC license. In the end, it is the licensee that has the risk of showing that the use is covered with the license.<sup>45</sup> In such a case, the licensee will have to show where he got the license and why the use of the work falls within the non-commercial license grant and not the rights holder.

Collective licensing relies on transparency. The system can reduce transaction costs only if the licensees know what they are licensing. If the potential licensee does not have clear information about the conditions under which they are allowed to use works, in this case the CC licenses, they would be more likely to pay the royalty fee rather than start a legal process to determine whether the CC license covers their use. In a sense, collecting societies might help to reduce problems of license interpretation. A licensee could simply avoid the problematic license interpretation by buying a license from a collecting society.

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<sup>41</sup> License Distribution - Creative Commons, <http://creativecommons.org/weblog/entry/5293> (Feb. 25, 2005) (out of 10 million licensed works 72% had NonCommercial (NC) element: Attribution-NC 7%, Attribution-NC-No Derivatives 28% and Attribution-NC-Share Alike 37%).

<sup>42</sup> Herkko Hietanen, *Analyzing the Nature of Creative Commons Licensing*, Nordisk Intellectual Property Review 6 NIR 517 (2007) (discussing the interpretation of the licenses).

<sup>43</sup> Mikael Pawlo, *What is the Meaning of Non-Commercial?*, in INTERNATIONAL COMMONS AT THE DIGITAL AGE 69, 79 (Danièle Bourcier, Mélanie Dulong de Rosnay eds., 2004); also **intra Error! Reference source not found...**

<sup>44</sup> *Vilkår for brug af Creative Commons-licenser for KODA-medlemmer*, available at <http://koda.dk/medlemmer/pdf-mappe-medlemmer/serskilt-aftale-om-anvendelse-af-cc.pdf>; Cameron Parkins, *Tone Releases Small Arm of Sea*, CREATIVE COMMONS BLOG, <http://creativecommons.org/weblog/entry/7988> (2008).

<sup>45</sup> KKO 1977 II 78 (Pettäjän tie) (Licensee X bought a license from a collecting society which had made a contract to represent B not knowing that B was not the rights owner. X had to pay the real rights owner A compensation for the use of the work).

### 1.2.2 Diverse License Terms

Collecting societies typically represent both local and international authors and composers. The societies form a network that has reciprocal co-operation agreements. The agreements provide, for example, the Finnish society Teosto a right to collect royalties and represent American composer Irving Berlin. In this sense, the catalogue of collecting societies is truly global.

The CC has six generic licenses and a few customized licenses that allow specific use such as sampling. As of January 2008, the licenses reached version 3.01. Forty-three countries have translated and adapted the licenses to their legal systems and several countries are in the process of localizing the licenses.<sup>46</sup> There are currently over three hundred official CC licenses and the number is most likely to double in a year as the new 3.01 licenses are localized. While most of these licenses seem interoperable and have similar license terms, some contain unique clauses that are not found in other licenses. The CC faces the problem of license proliferation.<sup>47</sup> While the goal of the CC in translating the licenses was to provide a set of licenses that have common terms, the devil, as always, hides in details. Users seeking to avoid interference with copyright are faced with dozens of licenses in languages they cannot understand. The users are not alone. Collecting societies who are in charge of enforcing the rights of their clients should at least understand the licenses. Elkin-Koren's point that the multiplicity of the licenses does increase the external information cost<sup>48</sup> is especially valid when it comes to collecting societies.

Most of the CC licenses do not have rules for international license selection.<sup>49</sup> Unlike the rest of the licenses, "share alike" licenses have clauses allowing mixing of international licenses that have the same license elements.<sup>50</sup> The rest of the licenses make no mention of the possibility of international license replacement. The rationale of international license adaptation was to adjust the licenses to suit the needs of local legal systems and to make them easier to understand. Although it seems that the objective would require the use of interchangeable licenses, this is not the case.<sup>51</sup> One can only conclude that all the licenses are separate and non-interchangeable unless otherwise noted. Accordingly, a French court cannot use a French version of the license even for interpretation, if the original work is licensed with a Swedish

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<sup>46</sup> *Creative Commons International*, <http://creativecommons.org/international>.

<sup>47</sup> Niva Elkin-Koren, *Creative Commons: A Skeptical View of a Worthy Pursuit*, in *THE FUTURE OF THE PUBLIC DOMAIN* 325, 341 (Bernt Hugenholtz & Lucie Guibault eds., 2006).

<sup>48</sup> *Id.* at 342.

<sup>49</sup> Creative Commons Worldwide, <http://creativecommons.org/worldwide/> ("Our generic licenses are jurisdiction-agnostic: they do not mention any particular jurisdiction's laws or statutes or contain any sort of choice-of-law provision. ... it is at least conceivable that some aspect of our [generic] licenses does not jibe with a particular jurisdiction's laws.").

<sup>50</sup> "4b You may distribute, publicly display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this License, a later version of this License with the same License Elements as this License, or a Creative Commons iCommons license that contains the same License Elements as this License (E.g., Attribution-NonCommercial-ShareAlike 2.5 Japan)." Attribution-NonCommercial-ShareAlike 2.5 license.

<sup>51</sup> Axel Metzger, *Free Content Licenses under German Law*, Talk given at the Wissenschaftskolleg, Berlin (2004), <http://lists.ibiblio.org/pipermail/cc-de/2004-July/000015.html> (discusses the interchangeability of different license versions).

license. It will be a demanding task for courts to enforce the licenses according to international private law. It is difficult to see how collecting societies could manage content licensed with over 100 licenses.

The CC has discussed the possibility of including an international choice of law clause to its licenses. The CC anticipates that the clause would enable licensors to choose the applicable law. However, it also would be beneficial to have a clause allowing courts to interpret the nationally translated and localized license instead of the license originally chosen. A clause granting the licensors power to choose a local license instead of the original non-local license could alleviate the license proliferation problem and potentially limit the licenses from hundreds to just a few. The solution would significantly reduce the licenses, making international licensing manageable. However, the changes to the license should be done carefully while taking into account potential forum shopping and the minor differences in license translations. Interchangeable licenses open a question of consent. Arguably, the licensor has not consented to use of foreign or future licenses and to interpretations that may diverge from the original license. The international choice of law clause may also mean that the license might turn into a contract that requires contractual formation from both parties.

### 1.2.3 *Scope of CC Licenses*

The CC licenses define licensed works very broadly: “Work means the copyrightable work of authorship offered under the terms of this License.”<sup>52</sup> This broad definition creates two problems. First, copyrightable works vary from country to country. The scope of copyright is defined in different ways in different countries, which may lead to different outcomes in legal disputes even if the basic principles are harmonized by the Berne and World Trade Organization conventions. The U.S. has limited copyright protection for artists’ rights to performance or so-called neighboring rights.<sup>53</sup> In Europe, performance is protected by neighboring rights under copyright law and performers have their own collecting societies. It is unclear whether the neighboring rights are included in the “copyrightable work.” Many of the European localized CC licenses include neighboring rights which clarify the license scope.

Second, the work offered under the license is not defined. For example, if a concert recording is licensed with a CC license, it is unclear whether the license applies to lyrics, underlying composition, performance, video, background art, or all of them. These problems occur because of the mass market nature of the licenses. Making changes to the licenses is against the idea of standardization of open content licenses.<sup>54</sup> Altering the licenses and labeling them as “creative commons” may also breach the trademark owned by CC.<sup>55</sup>

The licenses have a requirement to “keep intact all copyright notices for the Work” and to provide a link that refers to “the copyright notice or licensing infor-

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<sup>52</sup> Term 1f in the unported 3.0 versions.

<sup>53</sup> Databases also enjoy *sui generis* protection in Europe under copyright law but are not copyrightable.

<sup>54</sup> The license also discourages modifications outside the license: 8e “This License constitutes the entire agreement between the parties with respect to the Work licensed here. There are no understandings, agreements or representations with respect to the Work not specified here.”

<sup>55</sup> Mikko Välimäki & Herkko Hietanen, *Challenges of Open Content Licensing*, 6 CRi 172, 174 (2004).

mation.”<sup>56</sup> The link can point to the CC web site, where the official licenses are posted, or to the rights owner’s web page where additional information is provided. This information provides clarification as to which elements of a recording are licensed and whether they are being licensed as a set of indivisible rights or whether every element is individually licensed.

However, separate license information that can be changed by the licensor goes against the idea of perpetual, non-revocable license. The licensor can alter the copyright information and force the licensee to prove the existence of the license and its scope if an infringement claim is later made. The existence of a public registry of licensed works could help to reduce the legal uncertainty of the online CC licenses. The same function could be offered by a private company, or better yet, by a collecting society.

#### 1.2.4 Fully Automated Licensing

"No one should let artists give up their rights."  
-Andy Frazer, songwriter of “All Right Now.”<sup>57</sup>

Two lawyers of collecting societies, Tóth<sup>58</sup> and Pike,<sup>59</sup> have criticized the CC website and its licensing procedure. Pike is concerned that creators may not be aware that the CC licenses are “royalty free and offer no remuneration, run for the entire duration of copyright of the work, apply to the whole world and cannot be revoked.” Tóth points out that, unlike collecting societies, the CC does not help rights owners to enforce their rights. Both Pike and Tóth criticize the ease with which rights are given away with CC licenses.

The concern of irrevocability may be justified.<sup>60</sup> CC licenses are practically irrevocable and can only be revoked if the licensee breaches the license. In such a case, the license is terminated only for the licensee breaching the license. Even if the licensor decides to change his or her mind, courts have held that licenses are comparable to gifts and cannot be revoked once they are available to public. In *Hadady v. Dean Witter Reynolds*, the court decided that: “abandonment of copyright can occur regardless of owner's intent to preserve copyright.”<sup>61</sup> Some CC licenses may be compared to the partial abandonment of copyrights because of the permanent and public nature of the licenses. From the collecting society’s perspective, a public license that allows commercial use is effectively the same as releasing the work into the public domain. This critique about the lack of information has led the CC to modify

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<sup>56</sup> Term 4c in unported 3.0 versions.

<sup>57</sup> Susan Butler, *Music Biz Wary of Copyright Sharing Movement*, Entertainment-news.org (Reuters), <http://www.entertainment-news.org/breaking/27446/music-biz-wary-of-copyright-sharing-movement.html> (2005).

<sup>58</sup> Péter Tóth, *Creative Humbug; Personal Feelings About the Creative Commons Licenses*, [http://www.indicare.org/tiki-read\\_article.php?articleId=118](http://www.indicare.org/tiki-read_article.php?articleId=118) (2005).

<sup>59</sup> Emma Pike, *What You Need to Know about Creative Commons*, M issue 15 (2005).

<sup>60</sup> Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001) (talking about the need for the sphere of cooperation enhancing exit that is important for commons).

<sup>61</sup> *Hadady Corp. v. Dean Witter Reynolds, Inc.*, 739 F. Supp. 1392 (C.D. Cal. 1990) (The copyright owner posted a notice on copies of its works disclaiming copyright after two days. The copyright owner later sued a nonsubscriber to its newsletter who copied it after two days. The copyright owner submitted a declaration of an alleged intent not to abandon, which the court rejected.).

its licensing web page. It now includes detailed information on the restrictions of CC licensing and of the possible incompatibility of the licenses and collecting societies.

Collecting societies' reluctance to act as administrative intermediaries for CC rights owners has opened a business window for new Internet companies. Online record companies, such as Magnatune, have found a place in the music business. Magnatune has made its repertoire available online with non-commercial CC licenses. It has managed to create a truly one-stop shop where licensing is made easy. Anyone can listen to the music before they decide to buy licenses and download hi-fi quality music instantaneously online.

Magnatune makes money by selling high-quality downloads, commercial licenses, and records. It has 190 artists and almost 5,000 songs in its repertoire.<sup>62</sup> Even with the administrative overheads 30 percent higher<sup>63</sup> than with collecting societies, the artists benefit greatly. The average annual royalty income (approximately \$1,500)<sup>64</sup> of a Magnatune artist equals the royalty income (717€)<sup>65</sup> of a member of a collecting society. While the income from Magnatune is not directly comparable to royalties provided by a collecting society, it provides a comparison of how private companies could take the role of collecting societies in niche markets. In fact, there is nothing preventing Apple from selling licenses to businesses through its iTunes store. It could truly provide a one-stop shop where licensees could obtain both songs and the licenses to publicly perform them. Combined with subscription service, Apple could even consider selling blanket licenses to its catalogue.

### 1.2.5 License Monitoring

Unlike their European counterparts, U.S. collecting societies' members can license their works with CC licenses because they retain the right to grant individual licenses to users. Some major U.S. artists have used CC licenses to distribute their songs. On a CD<sup>66</sup> distributed by *Wired* magazine,<sup>67</sup> artists such as the Beastie Boys, David Byrne, and Chuck D used CC sampling licenses to allow the public to remix their songs. Several front row artists like Pearl Jam,<sup>68</sup> Nine Inch Nails,<sup>69</sup> and Radiohead<sup>70</sup> have also experimented with CC distribution. The U.S. societies are not alone in providing CC-licensed material in their catalogues. Reciprocity agreements oblige European collecting societies to enforce and license member rights of sister

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<sup>62</sup> Magnatune Statistics – what sells?, <http://magnatune.com/info/stats/>.

<sup>63</sup> See John Buckman, *Magnatune, an Open Music Experiment*, 118 *LINUX JOURNAL* (2001), available at <http://new.linuxjournal.com/article/7220> (Magnatune shares half of its income with artists).

<sup>64</sup> *Id.*

<sup>65</sup> Commission working document on a community initiative on the cross-border collective management of copyright and related rights, Comments by TEOSTO, Finnish Composers' Copyright Society (2005), available at [http://europa.eu.int/comm/internal\\_market/copyright/management/contributions\\_en.htm](http://europa.eu.int/comm/internal_market/copyright/management/contributions_en.htm).

<sup>66</sup> *Rip. Sample. Mash. Share*, The WIRED CD, <http://creativecommons.org/wired>.

<sup>67</sup> Thomas Goetz, *Sample the Future*, WIRED magazine (2004) (The Wired CD was included with magazine) <http://www.wired.com/wired/archive/12.11/sample.html>.

<sup>68</sup> Eric Steuer, *Pearl Jam Releases Its First Music Video in Eight Years under a Creative Commons License* (2006), <http://creativecommons.org/press-releases/entry/5912>.

<sup>69</sup> Eric Steuer, *Nine Inch Nails releases Ghosts I-IV under a Creative Commons license* (2008), <http://creativecommons.org/weblog/entry/8095>.

<sup>70</sup> RA DIOHEA\_D / HOU SE OF\_C ARDS - Google Code, <http://code.google.com/creative/radiohead/>

organizations. Globally granted CC licenses have, in fact, found their way into the catalogues of all collecting societies which are hardly aware what content is CC-licensed. However, CC licenses act as an estoppel document. The licensee can state that his non-commercial use is covered under the license and refuse to pay for the license. There are two cases from Spain where a bar refused to pay royalties because the music it played was licensed with CC licenses which granted royalty-free permission to publicly perform the work. In *SGAE v. Luis*,<sup>71</sup> the Spanish collecting society SGAE managed to convince the court that their employee had heard the defendant playing non-CC licensed works in a bar. In another similar case<sup>72</sup> the court held that the defendant had the personal and technical ability to find royalty-free music and play it in his establishment and, in fact, had done so. The court dismissed the case.

Eventually collecting societies will have local CC content in their catalogues, and right owners, who have CC licensed works, will become their members. CC licenses are perpetual for the duration of copyright in the work and no one can revoke the license. Rights owner can also evade the licensing ban by resigning, licensing and then rejoining. For example, Finnish Teosto's termination of the customer account is enforced from the beginning of a year. This means that the termination period can be from one to 365 days long. The requirement of resignation and rejoining seems an unfair and non-economic way to administer rights.

In *BRT/SABAM II*, the court held that societies cannot impose quarantine periods after member withdrawal. As explained by the court:

A compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal.<sup>73</sup>

The European Commission has accepted the detachment of some rights from collective administration. In the *Daft Punk* case,<sup>74</sup> the Commission decided that a collecting society may retain its rules against individual management provided derogations can be granted. Any refusal by a collecting society to grant such derogation would have to be exceptional and based on objective reasons. The Commission considered it legitimate for a collecting society to retain the means to monitor artists wishing to manage certain rights individually and the reasons behind it. Having a public trusted registry would offer safeguards for the potential licensees against fraudulent licensing.

Many collecting societies have the authority to collect royalties also for non-members. If non-members want to relinquish royalties, they have to submit a writ-

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<sup>71</sup> *SGAE v. Luis*, Spanish Provincial Court of Pontevedra, Nov. 29, 2005 (3008/2005) English translation Thomas Margoni, available at <http://mirrors.creativecommons.org/wp-content/uploads/2007/02/luis-cc-spanish-decision-final.pdf>.

<sup>72</sup> *SGAE v. Fernández*, Badajoz Sixth court of First instance, (15/2.006.) English translation Leon Felipe Sánchez Ambía et al., available at <http://mirrors.creativecommons.org/judgements/SGAE-Fernandez-English.pdf>.

<sup>73</sup> *BRT/SABAM II* 1973 ECR.

<sup>74</sup> *Banghalter et Homem Christo v Sacem* COMP/C2/37.219 (so-called "Daftpunk" Decision). (Daft Punk was given right to individually manage the rights needed for Internet and CD-Rom distribution) also *Gema I*, OJ L 134/15 (1971). Philippe Gilliéron, *Collecting Societies and the Digital Environment*, 8 IIC 939, 949 (2006) (pointing that the rights of authors to assign their rights to any society since GEMA I was never really used).

ten form to each collecting society. Collecting societies are collecting also royalties for non-member CC licensors against the CC license agreement. The collision problem could be solved by a registry of individually managed works and rights. The registry could well be operated by collecting societies. The voluntary registry would include global licensing information and it would have a guarantee function by authenticating licensors and their works.

### 1.2.6 Administration Costs

Most of the copyright societies in Europe are run by author/composer members. The right to vote is given typically only to members who receive royalties.<sup>75</sup> At first it would look like that accepting CC licensors as members would not generate income to the collective, but on the contrary, it would burden societies' administrative systems. There is a risk that CC is perceived as a burden and useless expenditure to revenue-generating right owners. Rochelandet describes the problem:

Beyond their common goal of individual revenues maximization, all members have not the same interest: from the large members' viewpoint, CCS [copyright collecting society] have to specialize on the collection of the most valuable rights, i.e. those that are the less costly to administrate, whereas less important members expect their organization to collect any right, even if it proves to be costly for a CCS to adopt such a development strategy. In fact, the conflict here is centred on the cross-subsidies between highly valuable copyrights and costly-to-collect copyrights. However, in the spirit of the copyright law, copyright is not aimed to favor some copyright holders to the detriment of others. So copyrights should tend to their social value for all kind of copyrighted uses and CCS should maximize the sums they collect and distribute.<sup>76</sup>

Obtaining voting members' approval for policy changes that might decrease their royalties or even placing the matter on the agenda might turn out to be impossible. The administration system is rigged in a way that the decisions are made by established creators who oppose new business models.

Because of recent mergers, the broadcast and record industries are concentrated among a few companies. If there are no benefits, but only higher administrative costs, there is a risk that the biggest names and users may start their own collecting body that better serves their needs. Such a new and exclusive copyright society could cover the majority of music played on commercial radio and TV. This was one the motivations when American collecting society BMI was formed. In 1941, American broadcast companies started their own collecting society after a dispute with artist run ASCAP society.<sup>77</sup>

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<sup>75</sup> See, e.g., JUKKA KEMPPINEN, DIGITAALIONGELMA, KIRJOITUS OIKEUDESTA JA YMPÄRISTÖSTÄ 424 (2006); BENTLY & SHERMAN, *supra* note 28, at 268.

<sup>76</sup> Fabrice Rochelandet, *Are Copyright Collecting Societies Efficient? An Evaluation of Collective Administration of Copyright in Europe* 7 (2002), available at <http://www.serci.org/2002/rochelandet.pdf>.

<sup>77</sup> See Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 401-402 (1992); Alfred Schlesinger, *Collecting Societies and United States Anti-Trust Law*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 85 et seq. (1989).

After the Commission started examining the cross border licensing, the European collecting societies expressed fear of a race to bottom.<sup>78</sup> Their fear scenario is more than likely as there are nearly five dozen music collecting societies in Europe for a population that is roughly twice as big as in U.S. One concern is that the major record companies and music publishers will find a common licensing and collection body that would not accept “small” unprofitable authors as clients or at least that their special needs would not be viewed as important.<sup>79</sup> Big organizations might be able to utilize the economies of scale and reduce the administrative overhead. However, a central exclusive licensing organization might mean that licensing the long tail of non-hit music would be more difficult and expensive.<sup>80</sup> The small collecting societies also fear that big inter-European collecting societies would not take into account the special national circumstances and would eventually impoverish the supply of national music.

The biggest cost incurred by collecting societies from CC licensing probably would be to implement a registry of CC-licensed works. It is hard to argue why rights owners who do not use CC licenses should subsidize the members who do use them. One solution would be to introduce higher administrative overheads for CC licensed works. However, placing the financial burden on licensors and discriminating against rights owners who are giving rights to the public might be considered unfair. Collecting societies have also enforced their members’ rights. Moreover, having a CC license will not likely complicate litigation. There are few historical examples of open licensing where the licenses were part of litigation.

The cost of CC-licensed content should fall on licensees who get the benefit of the license. Users are in best position to assess if they need to buy a separate license or pay royalties. They also carry the liability of possible infringement which creates incentive to do copyright due diligence thoroughly. The determination of whether to buy a license would be managed by lawyers and case law interpretation of the licenses would eventually be developed. Leaving the enforcement of the CC licenses out of collecting societies’ assignments would be both practical and cost-saving. Free and open source licensing has shown that the community is successful in finding infringers and that peer pressure can force infringers to respect open licenses.<sup>81</sup> By shifting the risk of license assessments to licensees and enforcement to rights owners and the community, the CC licensors would not create extra administration costs

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<sup>78</sup> See GESAC, WORKING DOCUMENT OF 7 JULY 2005 FROM THE DIRECTORATE-GENERAL FOR THE INTERNAL MARKET ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT – Gesac’s Preliminary Comments, July 2005, at <http://www.gesac.org/eng/positions/download/GCOLLECT094ipen05.doc>.

<sup>79</sup> Press Release, EMI, GEMA, MCPS-PRS Alliance cement licensing partnership, 22 January 2007, [http://www.mcps-prs-alliance.co.uk/about\\_us/press/latestpressreleases/mcpsprsalliance/Documents/EMI,%20GEMA,%20MCPS-PRS%20Alliance%20cement%20licensing%20partnership%2022.1.07.pdf](http://www.mcps-prs-alliance.co.uk/about_us/press/latestpressreleases/mcpsprsalliance/Documents/EMI,%20GEMA,%20MCPS-PRS%20Alliance%20cement%20licensing%20partnership%2022.1.07.pdf) (EMI’s Anglo-American songs available in one place for licensing).

<sup>80</sup> GESAC, *supra* note 78, at 19.

<sup>81</sup> Open source licenses have even suffered from the lack of litigations in courts. The most used free and open source license, the General Public License, has only been tested once in court. See Landgericht München I, [District Court of Munich I] May 19 2004 file reference: 21 0 6123/04, *unofficial translation available at* [http://www.oii.ox.ac.uk/resources/feedback/OIIFB\\_GPL2\\_20040903.pdf](http://www.oii.ox.ac.uk/resources/feedback/OIIFB_GPL2_20040903.pdf). Most of the free and open source license cases have been settled. One reason for the high settlement rate is the fear of infringers getting labelled by the free and open source community. See Wikipedia *SCO v. IBM at* [http://en.wikipedia.org/wiki/SCO\\_v.\\_IBM\\_Linux\\_lawsuit](http://en.wikipedia.org/wiki/SCO_v._IBM_Linux_lawsuit).

for other members of the collecting society. Granting a license for performing rights involves some fixed costs and proposed licensing of CC material would mean almost no cost for each additional song.<sup>82</sup>

### 1.2.7 *The Problem of Cherry-Picking*

A one-stop shop depends on collecting societies' ability to provide every user a license with predefined terms. In *BRT v SABAM*, the European Court of Justice stated that there must be: "A balance between the requirement of maximum freedom for authors, composers, and publishers to dispose of their works and that of the effective management of their rights by an undertaking which in practice they avoid joining."<sup>83</sup>

Balance may be undermined if members are allowed to manage lucrative licensing deals and leave the rest to collecting societies.<sup>84</sup> It is hard to argue why societies should limit individual licensing to just one group, *i.e.*, users of CC licenses. Opening the individual licensing flood gate would change the very nature of collective licensing<sup>85</sup> and might lead to a situation economists refer as adverse selection.<sup>86</sup> Artists would manage lucrative deals themselves, leaving low income rights to collecting societies. Societies would collect fewer royalties and their overheads would grow. This would make the societies even less appealing and more authors would handle licensing and collecting themselves.<sup>87</sup>

Transferring all rights exclusively limits rights owners' ability to use and invest their intellectual property. Sometimes better deals can be made directly with users. The model has worked in the U.S. where it has not diluted collecting societies' ability to work and it has ensured that rights owners have the ability to invest their intellectual property the way they choose. It is somewhat perverse that the European copyright system, which is based on the idea of authors' sovereignty, is limiting authors' power to administer their rights.

The European Court of Justice has considered collecting societies' rights to limit competition and the free flow of the creative works of its members in several cases. In *BRT v. SABAM*, the court concluded that:

The fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of article 86 [abuse of dominant position]<sup>88</sup> imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfair-

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<sup>82</sup> Besen et al., *supra* note 77, at 408.

<sup>83</sup> *BRT v SABAM*, 1974 E.C.R. 313.

<sup>84</sup> Reinhold Kreile, Jürgen Becker; *The New Key Role of Collecting Societies*, in GEMA YEARBOOK (1996/97) Chapter 4, available at [http://www.gema.de/engl/communication/yearbook/jahr\\_96\\_97/vidi4.shtml](http://www.gema.de/engl/communication/yearbook/jahr_96_97/vidi4.shtml); see also PÖNNI & TUOMOLA, *supra* note 15, at 72 (discussing the solidarity of author-members).

<sup>85</sup> See Besen et al., *supra* note 77, at 407-411 (discussing the possibility of competitive license pricing).

<sup>86</sup> See, e.g., George Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 (3) Q. J. ECON. 488, 495 (1970).

<sup>87</sup> PÖNNI & TUOMOLA, *supra* note 15, at 73 (discussing the possibility of such a vicious circle).

<sup>88</sup> Consolidated version of the treaty establishing the European community, 2002 O.J. (C 325) 1 (EC) of 24 December 2002 (After 2002 revision EC Treaty abuse of dominant position has been moved as article 82).

ly upon a member's freedom to exercise his copyright can constitute an abuse.<sup>89</sup>

The court reached the same conclusion in two other cases, *Ministere Public v. Tournier* and *Lucazeau v. Sacem*.<sup>90</sup> In *Tournier*,<sup>91</sup> the court ruled that copyright management societies pursued a legitimate aim when they endeavored to safeguard the rights and interests of their members vis-à-vis the users of recorded music. The court also held that the action was legitimate unless the practice exceeded the limit of what was necessary for the attainment of that aim. *Tournier* and *Sacem* both stand for the proposition that monopoly in principle is not a problem for competition, as long as collecting societies do not impose unreasonable restrictions on their members or on access to rights by prospective clients.

National antitrust bodies have gone even further. In 1995, the Irish pop group U2 and its publisher wanted the right to administer U2's live concerts themselves, which the Performing Rights Society (PRS) rejected on the grounds of its statutes.<sup>92</sup> U2 claimed that the assignment of all categories of performing rights was not necessary for the PRS's operations and objectives. They also claimed that rights owners obtained more money more quickly when they exercised these rights themselves. The British Monopolies and Mergers Commission investigated the claims and stated:

We were not persuaded that the PRS's present practice of exclusivity was so essential that no further exceptions could be allowed. Nor were we convinced that any considerable additional costs would necessarily fall on the PRS. If members consider that they can administer live performances themselves at least as effectively as the PRS then they should be free to choose, but should bear any reasonable additional costs caused to the PRS.<sup>93</sup>

The U2 case was settled and as a result, PRS amended its statutes and introduced a general policy under which it would grant each member a license for live performances upon request.

It may be that the concerns of collecting societies are overstated. The American collective management system enables rights owners to individually license their rights in conjunction with membership of collecting societies. There is no evidence that the delicate balance in the U.S. has tilted or suffered increased costs. It is hard

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<sup>89</sup> Case 127/73 BRT v SABAM 1974 E.C.R 313 chapter 15.

<sup>90</sup> Case 395/87 *Ministere Public v Tournier*, 1989 E.C.R 2521; Joined cases 110/88, 241/88 and 242/88 *Lucazeau v Sacem*, 1989 E.C.R. 2811.

<sup>91</sup> Case 395/87 *Ministere Public v Tournier*, 1989 E.C.R 2521.

<sup>92</sup> Crispin Evans & Nathalie Larrieu, *Collective Licensing Today (non digital media) Performing Rights: The Licensor Experience – Live Performances: the PRS Experience*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 61 (James Kendrick ed. 2002); Euan Lawson, *Collective Licensing Today (non digital media) – Performing Rights: The Licensee Experience – Live Performances: Collecting Societies and the Public Performance Right*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 89 (James Kendrick ed. 2002).

<sup>93</sup> See *Performing Rights: A Report on the Supply in the UK of the Services of Administering Performing Rights and Film Synchronisation Right*, summary available at [www.competition-commission.org.uk/rep\\_pub/reports/1996/378performing.htm](http://www.competition-commission.org.uk/rep_pub/reports/1996/378performing.htm).

to say if the individual licensing has positive effect on American music industry because the U.S. market is so different from the European ones.

### 1.2.8 *No Benefit for Blanket Licensees*

Collecting societies achieve a further reduction of bargaining costs with “blanket licenses”. Blanket licensees are granted a “bundle” of rights. The license includes the right to use the entire repertoire.<sup>94</sup> Blanket licensees usually get billed a certain percentage of their profits. For example, a radio station might pay 20 percent of its advertising income to collecting society if it plays over seven hours of music daily.<sup>95</sup> The station is also obliged to report the use of licensed music to collecting societies. These reports enable fair distribution of royalties to right owners. A majority of collecting societies’ royalty income comes from blanket licenses.<sup>96</sup>

Introducing CC-licensed music to collecting societies would require users to get discounts for the royalty-free music they play. This could be implemented by creating new license fee categories for free music. For example, a radio channel could obtain its annual license 20 percent cheaper if a minimum of 15 percent of its music was royalty-free. Having to categorize played works might sound cumbersome, but radio stations already fill out detailed reports of the music they play and categorization could be done automatically by collecting societies.

The royalty system serves another goal as well. Public broadcasters funded by tax payers’ money have a duty to support local arts and culture. The public support for culture is more accurately distributed to authors through collective licensing than with a general grant system. Thus, in many European countries where public broadcast radio is strong, “discount CC radio” is unnecessary. The argument doesn’t take into account the commercial and small amateur broad and webcasters who have hard time living with the license fees.<sup>97</sup> The question boils down to whether the copyright system should serve big users, small users, or individuals. Finding a balance that serves them all is harder than it looks at first glance.

### 1.2.9 *Competition*

European competition law has three policies that affect collective management of copyrights.<sup>98</sup> First, community competition recognizes the need to promote creativity and cultural diversity. Second, the EU is based on a Europe without internal fron-

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<sup>94</sup> RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES? 164 (2000); *see also* Buffalo Broadcasting Co v. ASCAP, 744 F.2d 917 (2nd Cir. 1984)(blanket licenses were not an unreasonable restraint on trade where the opportunity to acquire individual rights with a license were realistically available); SARL Le Xénon v. SACEM, Cass. civ. I, decision of April 16, 1985 (in France the court saw that SACEM did not amount to an abuse of dominant position); Société Générale de la Ferme c. SACEM, Cass. civ. I, decision of June 23, 1987.

<sup>95</sup> The flow of money is not one way. Big licensees, mainly broadcasters, have long enjoyed a form of bribery -Payola- from right owners to broadcast their works. *See, e.g.,* Katz, *supra* note 14, at 582-585 (talking about the role of Payola to the broadcasters and right owners).

<sup>96</sup> Teosto Vuosikertomus 2007, 10 (2007) (Finnish society Teosto’s annual report shows that 42% of its incomes came from Radio, TV and movies where the use of blanket licensing is typical).

<sup>97</sup> *See* WILLIAM W. FISHER III, PROMISES TO KEEP, TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 102-110 (2004) (explaining the problems with webcasting royalty negotiations in United States).

<sup>98</sup> David Wood, *Collective Management and EU Competition Law*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 159 (James Kendrick ed. 2002).

tiers. The artists and services should be able to move freely and there should be no discrimination on grounds of nationality. Third, the EU is developing a European information society<sup>99</sup> and tries to stimulate Internet services and e-commerce.

The strong role of collecting societies as the protectors of authors' interests has been easy to defend in the past. The collecting society institution can be compared to labor trade agreements and labor unions. Collecting societies justify their position with a need to negotiate the best possible contract for their members. The joint administration of copyrights by collecting societies can be seen as a counterweight to the market power of the users of works. The mergers that have led to the concentration of the media industry<sup>100</sup> emphasize the need for stronger collecting societies which can negotiate balanced deals. Collecting societies like to pose as institutions that create balance, cut extravagance, guard against exploitative terms, and lower transaction costs. However, the era of vast trade unions has been replaced by a world of outsourcing and a flexible work force. Collecting societies can be seen as relics from the bygone days of strong industry cartels. In a world where dynamic companies move their factories and work force from country to country to satisfy consumers' need for cheap goods, the creative sector has managed to protect itself against global competition rather well. This is partly because of the local nature of cultural goods that are sold. Nevertheless, the whole cultural sector is starting to face the realities of the digital revolution. Consumers demand new services that provide more freedoms than local record stores. Legal online services have found it hard to compete with illegal file sharing services, as online licensing practices are still developing. The monopoly position that collecting societies have enjoyed has also meant that there have been few incentives to develop their services which has hampered the development of new digital services.<sup>101</sup>

The music industry is one of the few industries where a legal horizontal venture of producers (*i.e.*, cartel) exists and there is virtually no price competition among producers, as they usually have only one common sales agency selling their licenses.<sup>102</sup> Posner uses collecting societies as an example of a few cases of "benign cartels" and concludes that: "So high are those [transaction] costs that it is nearly certain that the output of the song industry is greater than it would be if the BMI and ASCAP cartels were outlawed."<sup>103</sup> In general, each national collecting society for authors' rights enjoys *de jure* and *de facto* monopoly in its territory,<sup>104</sup> where

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<sup>99</sup> *eEurope, Information society for all* website, [http://ec.europa.eu/information\\_society/eeurope/2005/index\\_en.htm](http://ec.europa.eu/information_society/eeurope/2005/index_en.htm). eEurope was updated in 2006 to *i2010 - A European Information Society for growth and employment*, [http://ec.europa.eu/information\\_society/eeurope/i2010/index\\_en.htm](http://ec.europa.eu/information_society/eeurope/i2010/index_en.htm).

<sup>100</sup> See *e.g.*, SINACORE-GUINN, *supra* note 4, at 766.

<sup>101</sup> Commission opens proceedings into collective licensing of music copyrights for online use IP/04/586 of May 3, 2004; Commission of the European Communities, Study on a Community Initiative on the Cross-Border Collective Management of Copyright, 5 at [http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf) (the study found that the gap between US and Europe services was primary due to the structure of collecting societies, which limited the scope of licensing by territory); see also Gilliéron, *supra* note 74, at 947 (notices that at the point of Commissions report, iTunes, which generates 80% of online revenues, was not yet opened in Europe).

<sup>102</sup> Katz, *supra* note 14, at 9; See also Kilpailuneuvoston ratkaisut, Oct. 5, 1995, in KILPAILUNEUVOSTON RATKAISUJA (Petri Kuoppamäki ed.) 413 (1996).

<sup>103</sup> RICHARD A. POSNER, ANTITRUST LAW 30-31 (2nd ed. 2001).

<sup>104</sup> Report by the EP on a Community framework for collecting societies for authors' rights, 2002/2274 (INI) Committee on Legal Affairs and the Internal Market 7 (2003).

practically all significant composers' and songwriters' are members of the organization.<sup>105</sup>

As in all intellectual property rights regulation, antitrust and competition law control is present. The control aspect must be taken into account, since collecting societies often act on the basis of monopoly positions. Competition law partly ties collecting societies' hands. The licensing of domestic music must be done on the same terms as foreign music. This also means that discriminatory pricing is banned. Collecting societies have to sell hit music for the same price as any other music. The regulator has to take into account several factors. The intervention to licensing should not be done if it raises the overall cost of licensing. On the other hand, the low cost of licensing should not justify anticompetitive behavior. The regulation of the collecting societies is not purely utilitarian. There are cultural aspects that have to be considered as well. Some otherwise anticompetitive actions and policies may be tolerated if they progress cultural diversity.<sup>106</sup>

In many cases, the law requires efficient administration in order to obtain authorization for the society which has caused a barrier for entry and the societies have enjoyed their natural monopoly status.<sup>107</sup> Many natural monopolies have disappeared because of technology. Long distance land-lines are being replaced by satellites and long distance phone calls face competition from mobile phones and voice over IP telephony. While technology has changed natural monopolies, consumers have typically benefited from the competition and new services.

The competition law is relevant in three cases: 1) the level of fees that societies collect; 2) the relationship between collecting societies; and 3) the relationship between members and their collecting society. The Commission has acted lately in the second category in so called Santiago Agreement case. The Santiago Agreement, signed by several collecting societies, provides that users of online services should obtain a license for the music repertoire of all collecting societies participating in the Agreement from the collecting society of their member state.<sup>108</sup> The license would be valid all over Europe. However, since the Santiago Agreement insisted that an entity wishing to purchase music rights must buy them from a collecting society in their own country, the European Commission saw the system as anti-competitive. The central problem was that online users want more choice as to which collective rights manager can grant a multi-territorial licenses.<sup>109</sup>

In 2004 the Commission opened proceedings against sixteen European collecting societies as another measure to break down the monopolies of national collecting societies and to create competition in the field of collective management of copy-

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<sup>105</sup> Thomas Vinje, Dieter Paemen, Jenny Romelsjö, *Collecting Society Practices Retard Development of Online Music Market: a European Perspective* 20 No. 12 CILW 14, 16 (2003).

<sup>106</sup> E.g., SINACORE-GUINN, *supra* note 4, at 477 (describes pension and welfare plan systems funded with royalties collected for foreign authors).

<sup>107</sup> PÖNNI & TUOMOLA, *supra* note 15, at 67 (noticing that in order for collecting society to provide effective management it has to enjoy monopoly); CARL SHAPIRO AND HAL VARIAN, *INFORMATION RULES* 301 (1999) (discusses monopoly efficiencies); RICHARD WATT, *COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES?* 164 (2000) (questions whether collecting societies have natural monopoly).

<sup>108</sup> 2005 O.J. (C 200) 11 (EC). *See also* Gilliéron, *supra* note 74, at 944.

<sup>109</sup> Commission Staff Working Document; Impact Assessment Reforming Cross-Border Collective Management Of Copyright And Related Rights For Legitimate Online Music Services SEC(2005) 1254, 5, *available at* [http://ec.europa.eu/internal\\_market/copyright/docs/management/sec\\_2005\\_1254\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf).

rights.<sup>110</sup> The Commission considered that online-related activities should be accompanied by an increasing freedom of choice by consumers and commercial users throughout Europe as regards their service providers, such as to achieve a genuine European single market. If the true European one-stop shop were to be implemented, the collecting societies could compete with online licensing terms and policies. The lack of competition between national collecting societies in Europe may be one reason for the inefficiencies of European online music services. The Commission recommended that: “right-holders should be able to determine the online rights to be entrusted for collective management.”<sup>111</sup>

Collecting societies have opposed the Commission’s recommendation. They felt that there were insufficient justifications leading to the recommendation. CISAC’s model contract was modified in 2004. New provisions remove restrictions for rights holders to join the society of their choice.<sup>112</sup> The Commission’s recommendation follows the lines of the previous court decisions of *GEMA I* and *U2* with an added Internet twist. At first glance, the recommendation seems to make little change to the current situation. Yet, as the cost of changing collecting society is reduced to few mouse clicks, the globalization and competition in the cultural field might suddenly become reality. At best, the competitive advantage could include lower administrative overhead and creator-friendly licensing such as CC licenses that enable wide distribution and endorsement. The second option is a race to the bottom, where collecting societies compete with low administrative overhead by trimming all extra services.<sup>113</sup> Such development could lead to few large central licensing societies and boutique societies that would cater with innovative services.<sup>114</sup> The small collecting societies fear that their most productive members would flee to large, low-overhead societies. Such development would lead to small societies combining their force as joint ventures.<sup>115</sup> The need for national societies would not disappear as the effective enforcement of members’ rights requires national presence.<sup>116</sup> The Commission’s recommendation may have far-reaching impacts to European online licensing including the CC licensing. The change is present as European societies are in the process of reforming their policies and rules. Whether the CC is seen as competitive advantage or hindrance remains to be seen. Considering that the ultimate goal of the Commission was to increase the competition at the level of the rights holders,<sup>117</sup> it is

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<sup>110</sup> Commission opens proceedings into collective licensing of music copyrights for online use, IP/04/586 (2004).

<sup>111</sup> See Commission recommendation of on collective cross-border management of copyright and related rights for legitimate online music services, 5, [http://europa.eu.int/comm/internal\\_market/copyright/docs/management/rec\\_crm\\_en.pdf](http://europa.eu.int/comm/internal_market/copyright/docs/management/rec_crm_en.pdf) (2005).

<sup>112</sup> Antitrust: Commission Market Tests Commitments from CISAC and 18 EEA Collecting Societies Concerning Reciprocal Representation Contracts, IP/07/829 (2007).

<sup>113</sup> *Lucazeau v. SACEM*, decision of July 13, 1989, cases 110/88 and 241/88, ECR (1989) 2811 (the European Court of Justice ruled that the imposition of significantly higher tariffs than those applicable in other Member States would constitute an abuse of dominant position, unless the differences are justified by objective and relevant factors) This may limit big differences in pricing.

<sup>114</sup> See also Commission Staff Working Document; Impact Assessment Reforming Cross-Border Collective Management Of Copyright And Related Rights For Legitimate Online Music Services SEC (2005) 1254, 30, available at [http://ec.europa.eu/internal\\_market/copyright/docs/management/sec\\_2005\\_1254\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf).

<sup>115</sup> Gilliéron, *supra* note 74, at 950.

<sup>116</sup> *Id.* at 951.

<sup>117</sup> *Id.* at 946.

not impossible that the Commission would intervene again if it believed that societies' discrimination of CC licensing is anti-competitive.

### 1.2.10 Endorsement

It can be hard to argue why the collecting societies should paternalistically guard its members from using the Internet as a marketing and distributing medium. Nadel<sup>118</sup> states that "copyright law's prohibition against unauthorized copying and sales may, counter to the law's purported goal, have an overall negative impact on the production and dissemination of creative content." One may easily disagree with Nadel, but it is hard to deny that prohibiting rights owners from authoring copying on their own terms has a negative effect on our culture.

The music business is like the movie business; both are superstar economies.<sup>119</sup> Success is directly related to the amount of advertising invested in the product.<sup>120</sup> The CC may enable Internet marketing for new artists who do not have the resources for promotion. Additionally, use for the licenses is a loss leader approach,<sup>121</sup> where works that have passed the high point of their product life cycle are reintroduced to the public with CC license terms in the hope of rediscovery, *i.e.*, non-commercial licenses could be used to generate demand for commercial licenses. Online distribution could also boost the sales of concerts, products, and records.<sup>122</sup> Through this process, the commercial lifespan of protected works may be extended.

## 1.3 The Future Role of the Collecting Society

While the CC licenses are permissive, as compared to traditional copyright licenses, rights owners reserve some rights that may be transferred to societies' administration. It is notable that the majority of the CC-licensed works are reserving rights for commercial use. Below is table 1 showing the tasks that collecting societies would manage and the rights they could sell if they adopt CC-licensed content. The tasks can be divided in to three categories. Selling licenses that enable 1) commercial use, 2) making derivative works, and 3) creation of derivative works without share-alike terms (dual licensing).<sup>123</sup>

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<sup>118</sup> Mark Nadel, *How Current Copyright Law Discourages Creative Output: the Overlooked Impact of Marketing*, 19:2 BERKELEY TECH. L.J. 785, 789 (2004) (contending that the prohibition against unauthorized copying may actually reduce the production of new works: "This arises because of the development of new technologies and the emergence of many, if not most, current media markets as lottery-like, 'winner-take-all' markets, where promotional efforts may be more important than content.").

<sup>119</sup> Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845-58 (1981).

<sup>120</sup> U.S. Entertainment Industry, *2006 Market Statistics, MPA Worldwide Market Research & Analysis 15*, <http://www.mpa.org/USEntertainmentIndustryMarketStats.pdf> (average negative costs (production costs, studio overhead and capitalized interest) for a Motion Picture Association of America movie were 65.8 million dollars and average marketing costs of new feature films were 34.5 million dollars).

<sup>121</sup> ERIC S. RAYMOND, *THE CATHEDRAL & THE BAZAAR, MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* 162 (2001) (Raymond defines loss leader model: "In this model, you use open-source software to create or maintain a market position for proprietary software that generates a direct revenue stream.").

<sup>122</sup> 2004 Annual Report of Finnish Copyright Society Teosto, 9 (Royalties are only small part of artist income. In Finland only 190 Finnish song writers out of 16.110 received more than 20.000 € in annual royalties and half of the members did not get any.).

<sup>123</sup> See, e.g., Mikko Välimäki, *Dual Licensing in Open Source Software Industry*, Systemes d'Information et Management (2003), available at <http://opensource.mit.edu/papers/valimaki.pdf>.

Most of the works licensed with CC licenses have a non-commercial clause that reserves the commercial use of the work. All the commercial users need to buy a separate license in order to use the work. Having one common location where the works are for sale would benefit the rights owner and the buyer as well. CC licenses also enable dual licensing. Duality means that both the CC distribution mechanism and traditional content production business are combined. There is technically only one core product but two licenses: one for the free distribution and share-alike modifications, and another with more traditional terms. Because of the viral nature of the share-alike license,<sup>124</sup> some users might find it compelling to buy a separate license not possessing restrictions for distribution of derivative works.

Consider a film production that would want to use non-commercial, share-alike licensed music. If the production is commercial, they would have to get a separate license that permits the commercial use of music. If the production is non-commercial but they do not want to license the final movie with the CC license, they would need to get a separate license that does not include the share-alike term. The collecting societies would be a natural institution to sell the licenses to users willing to pay for them. Having a one place to clear the rights of the whole movie and its songs would benefit the producers.

**Creative Commons version 2.5 Licenses:**

Licenses	Synchroni- zation	Derivative works	Reproduc- tion	Public per- formance
	No license	No license	No license	No license
	Separate license	Separate license	No license	No license
	Separate license	Separate license	License for commercial use	License for commercial use
	License for commercial use	License for commercial use	License for commercial use	License for commercial use
	Commercial use & dual licensing	Commercial use & dual licens- ing	License for commercial use	License for commercial use
	Dual licens- ing	Dual licensing	No license	No license
License symbols:	No Deriva- tives	NonCommercial	Share alike	Attribution

**Table 1) Table showing the licensing options of CC works.**

<sup>124</sup> “You may distribute, publicly display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this License” Clause 4b Attribution-ShareAlike 2.5, <http://creativecommons.org/licenses/by-sa/2.5/legalcode>.

## 1.4 Conclusion

It is possible that centralized intermediaries can operate side-by-side with amateurs, and both can profit from the experience.<sup>125</sup>

This paper has examined the collective copyright management institute. The institute was born, just like CC licensing, to solve market inefficiencies. Traditionally collecting societies have served authors by collecting royalties, acting as negotiators and as a lobbying power for strong author's rights. The collective management can be seen as the industrial age's answer to market demand. However, the needs of the post-industrial network society have changed. The shift to a world where rights owners want to share their works in non-commercial markets has been a hard one. This is visible with some of the societies' attitudes to the CC licensing.

While the CC is based on a strong copyright system, it is not compatible with collecting societies' licensing structures. Incompatibilities can be divided into two areas: (1) problems with the CC licenses and the licensing system; and (2) general problems related to combining individual and collective administration of copyrights.

The changed needs of the creators of copyrighted works call for changes in the ways we administer copyrights. By limiting their clients' licensing power, collecting societies are using their legal cartel position in a way that may require action from legislators. The role of the collecting societies must be reconsidered. This paper has led us to the practical question of how one could apply more liberal licenses such as those provided by the CC to works governed by collecting societies. Three options arise, that could be also used simultaneously.

The first option would be for publishers and collecting societies to change their policies. Such a change would require thorough economic research of the benefits and costs of allowing member to use CC licensing. Reducing collecting societies' role to bare license collection would eliminate some of the costs related to interpretation and enforcement of the licenses. The cost of licensing would be on licensee and the enforcement on the licensor.

According to Landes and Posner, given today's technology, the creation of a "universal" copyright registry in exchange for incremental benefits to authors would be highly attractive. The burden on authors is minor in exchange for what is likely to be a very substantial benefit to those who seek to republish that author's work.<sup>126</sup> The registry could enable licensees to check that the content is legally licensed by verifying rights owner's permissions. Users would eventually get used to legal metadata and learn to respect copyrights. A verification server could also include pricing information of the commercial rights, peer evaluation of the music, links to similar music and an e-commerce site where commercial rights and fan products would be for sale. A registry would dramatically reduce the transactions costs of licensing. It

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<sup>125</sup> Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1028 (2004).

<sup>126</sup> WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 215 (2003).

would also serve users who could verify that content is legally distributed and thus reduce risk of infringement.

A second option would be to force reforms on collecting societies. The European Commission has lately shown interest in dismantling all barriers to competition for copyright societies. The Commissions' decisions have not had the desired effect on competition and legislation seems inevitable. The European Parliament has started to recognize 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."<sup>127</sup>

The third option would be to develop copyright law in a way that gives the author the ability to get his copyright back in limited cases for re-licensing under reasonable circumstances. Germany has recently enacted a law on copyright contracts with the intention of balancing the negotiation power of individual authors with publishers.<sup>128</sup> Under certain conditions, it is even possible for an author to terminate the publishing contract and republish the work under new terms. Such an exception in copyright law might hurt liberal licensing systems if it was possible to withhold from CC licenses because the public had too much power over the work and because the license was perpetual.<sup>129</sup>

The collecting societies as well as the open content licenses serve the public by lowering transaction costs.<sup>130</sup> Finding a way to combine the two institutions could mean all the artists receiving payments for the use of their works, and at the same time, consumers would have more culture available on creators' terms. In order to reach the goal, both institutions must make changes. The CC must clarify its licenses and modify them to fit to the automatic licensing scheme of the collecting societies. The collecting societies on their behalf have to open their paternalistic administration systems to reflect the changed motivations of rights owners and the new business models they are using.

If we consider property law as a liberal concept that emphasizes an individual's freedom to manage the rights any way he or she sees fit, the state and other actors should only intervene if there are market failures. During the late 19<sup>th</sup> century, collecting societies were formed as a fix for market failure. They have been developed into collective licensing agencies that license nearly all public performance rights to major users like radio and TV. At the same time, they have become anticompetitive by reducing the price discrimination between artists. The one-stop shop arrangement has profited both rights owners and users as transaction costs are relatively high and

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<sup>127</sup> Report by the EP on a Community Framework for Collecting Societies for Authors' Rights, 2002/2274(INI), Committee on Legal Affairs and the Internal Market 10 (2003).

<sup>128</sup> Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern, 22.03. 2002, BGBl I, 1155-1158.

<sup>129</sup> See Välimäki & Hietanen, *supra* note 31, at 176.

<sup>130</sup> Stephen M. McJohn, *The Paradoxes of Free Software*, 9 GMLR 25, 43 (2000) ("..the response of the property theorists is that market mechanisms will arise to overcome such transaction cost problems--for example, performing rights organizations like the American Society of Composers, Authors & Publishers (ASCAP) and Broadcast Music, Inc. (BMI) have made it possible for thousands of copyright music holders to negotiate licenses with millions of potential users. Likewise, the open source licenses solve a similar collective action problem. By using open source licenses to coordinate the diverse group of open source developers, their common goals can be reached efficiently. Ironically, then, the open source movement, with its early roots in a decidedly socialist view of software, appears to vindicate a rather free-market view of intellectual property--that market mechanisms are more efficient in overcoming market failure than corrective legal measures.").

transaction values low. Additionally, state approved paternalism in the form of a collecting society cartel is hindering rights owners' liberty to control their works freely. The problem has become evident with content licensing. New business models have emerged that are reliant on public licenses granted directly by rights owners. Collecting societies' position depends on individual state legislation. The situation in the U.S. with three competing collecting societies differs from the European arrangement where there is no competition between the societies. In the U.S., the legislature has balanced the societies' power by requiring that their representation is not exclusive. The European societies have opposed the Commissions interference with the exclusive representations of their clients. Their arguments for exclusivity may not bear closer scrutiny as the Internet has lowered the transaction costs of copyright licensing. The paper examined the problems that European collecting societies have had with individual and CC licensing.