

## The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments

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Copyright collecting societies are at once powerful and fragile: powerful in that they may administer "the world repertoire" in one particular rights domain, fragile in that their governance structures are of Byzantine complexity, reflecting uncertainties about the property rules underlying collective administration. This article shows that there is no convincing rationale for the historical shape of collecting societies (acting, for example, for both authors and publishers) from a premise of copyright as an individual, exclusive and transferable property right. Yet this premise is implicit in most recent attempts at institutional reform: such as the GEMA decisions of the European Commission<sup>1</sup> the SABAM<sup>2</sup> and SACEM<sup>3</sup> rulings of the European Court of Justice, the investigation by the British Monopolies and Mergers Commission into the trading practices of the U.K. Performing Right Society PRS,<sup>4</sup> the Cannes Agreement between the major multinational music firms and the European collecting societies (1997)<sup>5</sup> and some analyses emanating from the Single Market and Competition

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1 [1971] O.J. L134, June 20, 1971; [1972] O.J. L166/22, July 24, 1972.

2 Case 127/73, *BRT v. SABAM* [1974] E.C.R. 313.

3 Case 395/87, *Ministere Public v. Tournier*, [1989] E.C.R. 2521.

4 Monopolies and Mergers Commission ("MMC"), *Performing Rights* (1996) H.M.S.O. Cm 3147.

5 cf. R. Wallis, C. Baden-Fuller, M. Kretschmer, G. M. Klimis, "Contested Collective Administration of Intellectual Property Rights in Music: The challenge to the principles of Reciprocity and Solidarity" (1999) 14/1 *European Journal of Communication* 5-35.

Directorates of the European Commission. Comparing institutional traditions in Germany and the United Kingdom in the field of music copyright, it is argued that collecting societies may have to evolve into a regulatory instrument rewarding creative activity, or disappear altogether.

Copyright collecting societies occupy a dominant market position in at least two respects:

- (1) towards the users of protected works who may have just one legitimate supplier of licences, and
- (2) towards the individual owners of protected works who may have no alternative provider of a rights administration infrastructure.

In consequence, market prices cannot form either for licences to users nor for services to rightholders.<sup>6</sup> This appears to leave copyright collecting societies in control of the terms of access to "the world repertoire" in their particular rights domain. Most Western legislators have subjected the collecting societies to close regulatory scrutiny in order to mitigate the temptations of monopolistic behaviour. This article suggests that policy attention should focus on the conflicting property rules underlying an increasingly fragile regime of collective administration.

The argument is structured in five parts. First, the article will critically introduce the conventional economic rationale for collective administration as a response to market failure in the individual contracting over property rights. Secondly, some illustrative material will be provided with a brief detour through the origins of two regimes of collective administration, focusing on the conflicting interests of publishers and authors. Thirdly, the concept of private property is revisited from legal, economic, and philosophical perspectives. Fourthly, some characteristic features of collective administration are discussed in more detail these being at variance with individualised property rules: i.e. the distribution formulae for fees collected, compulsory representation, compulsory licences, cultural and social deductions, and the organisational dynamics of bureaucracy. Finally, some principles for the reform of collective administration are formulated.

The exposition will be limited to the collective administration of one particular domain, music copyright, in two different institutional settings: the copyright approach prevalent in common law jurisdictions,

6 e.g. *Green Paper: Copyright and Related Rights in the Information Society*, July 19, 1995, COM (95) 382 final; the ambition to incorporate the regulation of copyright societies into the Information Society Directive was dropped from the Proposed Directive "on the harmonisation of certain aspects of copyright and related rights in the Information Society" (COM (97) 628 final, December 10, 1997) and its later incarnations. J. Temple Lang, "Media, Multimedia and European Community Antitrust Law" (1998) 21 *Fordham International Law Journal* 1296.

7 Collecting societies have been characterised in these terms by numerous national competition authorities: cf. the language of the German Bundeskartellamt (Verfügung vom 18.11.1960: GEMA as "marktbeherrschendes Unternehmen"; Hübner, and K. Stern, "Zur Zulässigkeit der Aufsicht des Deutschen Patentamtes über die Verwertungsgesellschaften" (1978), reprinted in *Im Auftrag der GEMA: Gutachtensammlung 1952-1985* (E. Schulze and D. Meirer ed., 1997), pp. 223-250, at p. 225; and the British Office of Fair Trading ("OFT") (referral of the PRS to the Monopolies and Mergers Commission, November 30, 1994, *Managing Intellectual Property*, Feb 1995, pp. 10-11).

exemplified by the U.K. societies PRS and MCPS-and the author rights approach prevalent in civil law environments, exemplified by the German society

### The Position of Authors and Publishers in Collective Administration

According to copyright society folklore, the invention of collective administration was a straightforward response to a problem of transaction costs. An evocative story often cited recounts the visit of Ernest Bourget, a French composer of popular musical *chansons* and *chansonnettes comiques*, to the Paris cafe Ambassadeurs in 1847 where, among other pieces, his music was being played without permission. He then refused to settle the bill for his drink of sugared water, at the time a fashionable beverage. In the resulting brawl, M. Bourget argued "you consume my music, I consume your wares"-an argument he won before the Tribunal de Commerce de la Seine, which upheld a revolutionary law of 1793, recognising, for the first time, a right to public performance.<sup>9</sup>

Ernest Bourget understood that as an individual composer he should not devote his life to chasing unauthorised performances of his music. Vice versa, each *etablissement* performing popular music would incur considerable costs in tracking the various holders of the relevant performing rights. The solution to the failures of individual contracting was collective administration, combining a comprehensive monitoring service of music usage with a facility to issue licences, *i.e.* permissions to play against remuneration. Ernest Bourget, his colleagues Victor Parizot and Paul Henrion as well as the publisher Jules Colombier founded an Agence Centrale, the direct predecessor of the first modern collecting society Societe des Auteurs et Compositeurs et Editeurs de Musique ("SACEM"). SACEM, established in 1851, became the European model, collecting at times even in Switzerland, Belgium and the United Kingdom. Its characteristic features include the representation of both authors (composers and lyricists) and publishers-enforced by a governance structure under which changes to membership and distribution rules could only be implemented by mutual consent of both groups-and some functions of a socio-cultural charity. These will be discussed below.

Although there may be good economic arguments for mutual membership organisations (e.g. spreading the risk of ill fortune) and even charitable activity (support

of music education, for example, securing the supply of future members and users) it is less than obvious why these socio-cultural activities should be performed under the umbrella of rights administration. Thus economists tend to accept the transaction cost rationale as a remedy to market failure only for the rights representational element of collecting societies.<sup>10</sup>

The transaction cost argument does indeed support some form of collective administration but not remotely in the shape of a traditional, membership-based collecting society, even if we strip out all the socio-cultural functions. Consider the role of publishers and authors respectively as characterised in a publication of the World Intellectual Property Organization<sup>11</sup>:

Under a publishing contract signed with an author, the publisher is authorized to reproduce the work and to sell copies to the public. He will also try to have riders written into the contract granting him the rights of performance and broadcasting, in the hope that this "second serving" of rights will add to his income.

If music publishers are kept out of the collective management of rights of performance and broadcasting, the collective management organization will not have access to the music publishing rights, which are in the nature of "extras" in the hands of publishers. This makes for serious gaps in the collective management, because published works have a vastly greater audience than handwritten works. Experience has shown that collective management without the incorporation of publishers quickly stagnates and loses its meaning. All the copyright societies of Europe and North America have therefore incorporated publishers who-as members or clients-assign all these "extra" rights to their collective management organisation.<sup>12</sup>

From an economic perspective this is a strange argument. Either the publisher offers commercial value to the author and thus acquires his/her performance and broadcasting rights in a market transaction (then the publisher should be free to administer these rights as s/he sees fit); or the author sees no commercial value in employing a publisher for the management of his/her performance and broadcasting rights (in which case publishers should have no say on (and share in) the collective administration of those rights).<sup>13</sup>

As the market-place for music has evolved over the last 250 years, the latter case (of the composer as self-publisher) has remained the exception. The puzzling

<sup>8</sup> Music copyrights are the oldest and most valuable domain of rights to be administered collectively. Germany's GEMA is the world's biggest collecting society, with annual revenues exceeding €600 million. Germany and the United Kingdom are the third and fourth largest global music market. The United Kingdom is the largest net exporter of music: royalties to the size of \$100 million per annum are repatriated via the international collecting society network linked by reciprocal agreements; *MBI (Music Business International)* (October 1996 and 1997), "The Collecting Societies" (special reports).

<sup>9</sup> cf. Melichar, Ferdinand, *Die Wahrnehmung von Urheberrechten durch Verwertungsgesellschaften* (1983); M. Kretschmer, "Intellectual Property in Music: A historical analysis of rhetoric and institutional practices", special issue: "Cultural Industry" (ed. P. Jeffcutt) (2000) 6 *Studies in Cultures, Organizations and Societies* 197-223.

<sup>10</sup> e.g. J. Kay, "The Economics of Intellectual Property Rights" (1993) 13 *International Review of Law and Economics* 337-348; R. Towse, "Copyright and Economic Incentives: An Application of Performers' Rights in the Music Industry" (1999) 52/3 *Kyklos* 369-390; J. Thorpe, "Regulating the Collective Exploitation of Copyright", in special issue: "Trade and Intellectual Property" (ed. P. Drahos) (1998) 16/3 *Prometheus* 317-329.

<sup>11</sup> WIPO, *Intellectual Property Reading Material* (1998), 6.144-6.145, pp. 374-375.

<sup>12</sup> WIPO's preferred terminology for "collective administration" is "collective management".

<sup>13</sup> In industry jargon, "performing right" refers to both the exclusive rights to perform, show or play a work in public (U.K. Copyright, Designs and Patents Act ("CPDA") 1988, s.19) and to broadcast a work or include it in a cable programme (CDPA 1988, s.20). See Appendix I for a comparative list of exclusive rights and their administration in the United Kingdom and Germany.

question then becomes not: "What is the position of publishers in collective administration?", but "What is the position of authors in collective administration?" The changing interests of publishers in music copyrights may be summarised pointedly: an eighteenth-century publisher sold sheet music, a progressive nineteenth-century publisher sought to promote performances for the music he published, an entrepreneurial early twentieth-century music publisher would secure recordings (and broadcasts) for the music he published, a typical late twentieth-century music publisher is a small part of a media group (that is, the composer conducts his first commercial transaction with what used to be secondary exploitation, a recording company, a broadcaster, a TV or film producer)." In each case, the publishing company would seem to add enough value to command a full transfer of copyrights, perhaps sweetened by a royalty arrangement."

A good example of the poor position of the author towards market intermediaries is the current practice of media companies to make the commissioning of media music, such as sound-tracks, conditional on the assignment of copyrights to a "publisher" set up solely for this purpose. This publishing house is not "publishing" anything; rather it is a passive vehicle, owned by the media company, for receiving royalties mainly from public performance and broadcasting rights." Composer associations have termed this practice "copyright coercion" though it is done freely, merely reflecting the actual bargaining power of the parties involved in bringing a piece of music to the market. The media company adds most value in this process, and will thus command a

transfer of property rights. In market economies, bargaining power is not necessarily coercion.

The author is not defending this practice here. The point is that it is a natural consequence of conceiving of copyright as individualised property, a view this article will later seek to expose as at variance with the tradition of author societies. In order to further develop material for the contention, set out in this section, that the currently prevalent forms of collective administration are *not* built on a property premise of copyright, one can consider two case studies of the origins of the German and British regime of music copyright societies.

### Performing and Mechanical Rights from a Historical Perspective: GEMA, PRS and MCPS

Music copyright was first recognised in law following an English court case of 1777. It was ruled that music was "a writing within the Statute of the 8th of Queen Anne", the first statutory copyright of 1710 that protected newly published books from unauthorised reprinting for 14 years (renewable once). The French law "sur le droit d'auteur" of 1793 included for the first time a right to public performance, following a persuasive intervention by Pierre Augustin Caron Beaumarchais. Prussian (1837) and British (1842) legislation acknowledged such a performing right in principle, but failed to provide for suitable enforcement mechanisms.

The Prussian Act of 1837 made a crucial distinction between works of art and lesser products<sup>14</sup> which received weaker protection. The successor legislation of the Norddeutscher Bund (1870) distinguishes between unconditionally protected dramatic works of music (operas, musicals) and musical work (symphonies, songs, dances, marches) for which performing rights had to be explicitly reserved. The German Law of 1901 clarifies an automatic exclusive public performance right. In 1903, a Genossenschaft Deutscher Tonsetzer ("GDT") was established under the chairmanship of Richard Strauss. Its explicit aims were "to preserve and enhance the professional interests of composers" which, apart from political lobbying, included providing legal advice and social services to members.

In practice, the formation of a composers' interest group and national representation was an attempt to counter moves by some publishers to establish an "agency for the collective exploitation of musical performance rights" in Leipzig. GDT set up a composer-dominated Anstalt für musikalisches Aufführungsrecht ("AFMA"), incorporated on the same day as GDT (April 7, 1903). Richard Strauss, a star composer with considerable market leverage, had cleverly co-opted four influential German publishers, Bock (Strauss' own

<sup>14</sup> The author has discussed this transformation elsewhere in more detail (M. Kretschmer, G. M. Klimis, R. Wallis, "The Changing Location of Intellectual Property Rights in Music: A Study of music publishers, collecting societies and media conglomerates" (1999) *17/2 Prometheus* 163-186; Kretschmer, n. 9 above). Of course there remain pockets of independent promotional publishers. But 80 per cent of the fees being processed by the major music collecting societies come from or flow to only five media companies: Universal (including what was Polygram), Warner, Bertelsmann, EMI and Sony (R. Kreile, and J. Becker "Collecting Societies in the Information Society: Economic and legal aspects", in *GEMA Jahrbuch 1996-7* (1997)).

<sup>15</sup> See Towse, n. 10 above, p. 376 for a lucid analysis of the circumstances under which royalty schemes may be an economically efficient arrangement.

<sup>16</sup> In a large study on the global music industry, conducted between 1996 and 1999, the author found this practice to be prevalent in Japan and the Common Law countries, especially the United States and the United Kingdom (M. Kretschmer, G. M. Klimis, R. Wallis "Music in Electronic Markets" (2001) *3/4 New Media & Society* 417-441). Some civil law countries appear to avoid it by a contested clause in the terms of membership to collecting societies administering the performing rights. Membership or mandate terms might require an author to assign their rights to *future* works from the moment of membership, thus guarding against possible contractual pressures from third parties. Pressure from media producers, for example, will not work since the composers have no valuable rights left to sign away. From a competition perspective, however, the assignment of future rights must be problematic. In the United Kingdom for example, exclusive publishing and recording contracts for "prolonged periods" have been found to be "in restraint of trade": *ZTT Records Ltd v. Holly Johnson*, *Independent Law Reports*, August 2, 1989 (the *Frankie Goes to Hollywood* case); *Silverstone Records v. Mountfield*, *Zomba Music Publishers v. Mountfield*, May 20, 1991, unreported (the *Stone Roses* case).

<sup>17</sup> cf. British Academy of Composers and Songwriters, [www.britishacademy.com](http://www.britishacademy.com).

<sup>18</sup> "Zeichnungen und Abbildungen, welche nach ihrem Hauptzwecke, nicht als Kunstwerke . . . zu betrachten sind" (section 18, quoted from Kawohl, "Music Copyright in the Prussian Copyright Act of 1837", in *Nineteenth-Century Music: Selected Proceedings of the Tenth International Conference* (Jim Samson and Bennett Zon ed., 2001). See also E. Wadle, "Das Preußische Urheberrechtsgesetz von 1837 im Spiegel seiner Vorgeschichte", in *Woner kommt das Urheberrecht und wohnen geht es?* Robert Dittrich ed. 1988), pp. 55-98 (reprinted in E. Wadle, *Geistiges Eigentum* (1996)).

publisher), Challier, Lienau and Simrock, with a promise of royalties from collected licence fees.

Unsurprisingly, the publishers were not impressed with distribution rules which insured that 10 per cent of licence fees collected went directly into the social funds of the composers' association GDT. Publisher Hugo Bock eventually challenged Strauss with the establishment of a rival society: GEMA ("Genossenschaft zur Verwertung musikalischer Aufführungsrechte, 1915) opening membership to three groups, composers, lyricists and publishers. In 1916, Bock persuaded the Austrian composers' society AKM which administered the works of countless famous and successful names (including Brahms, Bruckner, Korngold, Lehar, Mahler und Johann Strauß) to have its repertoire represented in Germany by GEMA. In 1929, AFMA/GDT's performing rights income barely covered its administration costs and finally agreed to a merger with GEMA.<sup>19</sup>

The new society incorporated in 1930 as STAGMA (Staatlich genehmigte Gesellschaft zur Verwertung musikalischer Urheberrechte) functioned for only three years before becoming an instrument of national-socialist *Gleichschaltung* in 1933. It is noteworthy that Richard Strauss, when Goebbels offered him the presidency of the *Reichsmusikkammer*, couldn't resist the temptation to reassert (albeit briefly: 1933-1935) his influence over copyright policy."

For mechanical copyrights (i.e. the right to record a work of music—a sub-category of the reproduction right) publishers have always had the upper hand. Until the Copyright Act of 1901, publishers had routinely asked composers to sign a *Urheberschein* in which all copyrights, including publishers' rights (i.e. publication, reproduction and distribution) and performing rights "for all countries and states of the earth" were fully assigned against a one-off fee." The record industry enjoyed a privilege that permitted the recording of protected music without permission or remuneration of the rightholder. With the commercial value of recorded music rising sharply, the publishers lobbied successfully for a change in the Act of 1901 (revision of 1910) and entered inter-industry negotiations with record producers. Although many composers had become accustomed to royalty arrangements for public performances (particularly for the *droit grand* of dramatic works performed in Germany's more than 80 opera houses), the culture of the *Urheberschein* meant that the composers' association GDT did not have sufficient repertoire for its mechanical collecting arm *Mechanische Abteilung*, founded in 1910. The publishers' society *Anstalt für mechanisch-musikalische Rechte* ("AMMRE") of 1909 carried the day. In 1938, AMMRE transferred its shares to STAGMA, the predecessor of post-war GEMA.

19 This account of the early days of collective administration in Germany draws on material provided by E. Schulze, *Geschätzte und geschützte Noten* (1995) and R. Kreile, and J. Becker, "Wesen der Verwertungsgesellschaften", in *Handbuch der Musikwirtschaft* (1997) pp. 621-647.

20 M. H. Kater, *The Twisted Muse: Musicians and Their Music in the Third Reich* (1997), pp. 203 *et seq.*

21 E. Ulmer, "Zur Rechtsstellung der Musikverlage in der GEMA", *Rechtsgutachten* reprinted in E. Schulze, and D. Meier, Dieter eds., *Im Auftrag der GEMA: Gutachtensammlung 1952-1985* (1997), pp. 203-221, at p. 206.

Mechanical and performing rights however retained a different distribution formula. For performing rights, the composer would receive 8/12, the publisher 4/12 of collected licence fees, minus administration costs and deductions of 10 per cent for the socio-cultural fund. For mechanical rights, the split was 50:50 between composers and publishers until 1954; thereafter a 6/10 versus 4/10 formula was adopted in favour of the composer. "Classical works" (Ernst Musik) received a significantly higher distribution per performance or mechanical reproduction than popular music.

The story in the United Kingdom shows significant parallels but also significant differences. Similar to the German experience, the public performance right to musical works (granted with the Copyright Act of 1842) was not in fact exploited outside the field of staged works. For most of the nineteenth century, concerts, often promoted by the publishers themselves, served as a stimulant to sheet sales. Since the performing right was not normally enforced, the Copyright (Musical Compositions) Acts of 1882 and 1888 required the explicit reservation of the right on the title page of every printed copy.

With Britain's accession to the Berne Convention in 1886, works published in foreign (Berne member) countries received the same protection as was granted to nationals—the so-called principle of national treatment." The French collecting society SACEM soon employed an agent in the United Kingdom to collect royalties for the performance of French repertoire. British publishers continued to use the right to public performance in a purely defensive manner to prevent performances from unauthorised copies of sheet music. This was to safeguard opportunities for profit from concert promotions.

In April 1905, the British Music Publishers Association ("MPA") dramatically announced that they would accept no more music for publication until the law afforded more adequate protection, in particular summary penalties against piracy. This was accompanied by strenuous lobbying "to drive the fact into the heads of the general public, and simultaneously into the heads of several very dense Members of Parliament, that composers were not able to live upon suction but required as much nourishment to keep body and soul together as any other member of the community".<sup>22</sup>

The publishers' effort eventually resulted in the Copyright Act of 1911 and the setting up of the Performing Right Society ("PRS"), the U.K. pendant to SACEM in 1914. Note that, contrary to the German experience, the campaign was led by publishers (William Boosey became president of the PRS) who used the rhetoric of authors' "nourishment" to foster their own ends." Although earlier contractual practices, similar to the German *Urheberschein*, required composers to assign the whole of their copyright to the publisher, publishers agreed to share the revenues collected by the PRS. The British distribution formula amounts to a 50:50 split between the combined share of the creative

22 cf. S. Ricketson, *The Berne Convention 1886-1986* (1987).

23 W Boosey, *Fifty Years of Music* (1931), p. 115.

24 See Kretschmer, n. 9 above.

parties (composer/lyricist) and the share of publisher and sub-publisher. The PRS did not make any official socio-cultural deductions but recognised different distribution weightings for different kinds of music.<sup>25</sup>

The minimum standards of the Berne Convention initially did not protect the mechanical reproduction of copyrighted works. The notion was tested in the English Appeal Court in 1899 who concurred with that notion. The Berlin revision of the Berne Convention in 1908 eventually required signatories to report musical works against reproduction by mechanical means. In Britain, this was implemented with the notorious section 19 of the Copyright Act of 1911 which required rightholders, if they had granted a licence to record a work, to grant a licence to any other person to record the same work on payment of a statutory royalty. In 1914, the level of the compulsory licence was set at 5 per cent of the ordinary retail price of the record. This was raised in 1928 to 6.25 per cent.<sup>26</sup>

Mechanical licences were administered from 1924 by the Mechanical Copyright Protection Society Ltd ("MCPS"), a publishers' agency." No fixed formula was set for the distribution of mechanical royalties between composers and publishers. The composer's share depended on their individual contractual arrangements. This led to the formation of separate composers organisations, such as the Composers' Guild and Songwriters' Guild (Predecessors of the current professional body British Academy of Composers and Songwriters), promoting "approved" contracts for their members. Today, a 60:40 split of mechanical royalties in favour of the composer is seen as standard. In 1998, MCPS and PRS formed a joint venture, the Music Alliance, with a view to sharing the cost of administration through common information systems.

## Property Conceptions Revisited

We all have some conception of ownership. This enabled the author to conduct much of the introductory discussion with a concept of individualised or private property without giving a satisfactory definition, or any definition at all. Indeed, legal, economic and philosophical discussion appears to be unduly certain about a unified notion of property modelled on "things" - a

*reification* of property relations.<sup>28</sup> Surveys of anthropological and ethnographic studies on property regimes have indicated that "although property rights exist everywhere, what is necessary about them is just that some exist. It appears that many specific systems of ownership are compatible with any set of environmental conditions and social structures."<sup>29</sup> This section will briefly sketch concepts of property as they are prevalent in three disciplines.

## Legal conceptions

The most prominent expression of property concepts in law is the constitutional guarantee to private property, as we find for example in Germany, France and Spain. Anglo-Saxon influenced common law appears to have converged on an equally strong concept of liberal private ownership as "possession, enjoyment of use, and transfer". There is a suspicion that this is tautological, since property is a legal construction, *i.e.* it may not be definable apart from the concrete entitlements it gives rise to. Property is that to which we afford protection, not vice versa.

This is not sophistry but of immediate practical importance. Consider the ownership of a piece of land. Does that include the entitlement to build on it? Does the redefinition of a sketch of land into green belt constitute expropriation, *i.e.* a violation of private property rights?<sup>31</sup> Does a legal ban on possession (e.g. handguns), on trade (e.g. fireworks), or on use (e.g. chlorofluorocarbons ("CFCs", landmines) infringe constitutional or fundamental conceptions of private property?

The legal classification of copyrights as intellectual property has opened the door for claims of expropriation, for example for exemptions to copyright, such as fair dealing (United Kingdom), fair use (United States) or *Schranken* (Germany), *i.e.* limits to the rightholder's control of review and criticism, private use, educational use, current affairs reporting, time-limits to the terms of protection, compulsory licences, etc. In a landmark decision of July 7, 1971,<sup>33</sup> the German Constitutional Court tried to strike a balance between what it conceived of as core property entitlements (the allocation of the basic economic value of creative endeavour to the author and his/her freedom to determine the mode of

25 For more details on the history of the PRS, see A. Peacock, and R. Weir, *The Composer in the Market Place* (1975), G. MacFarlane, *The Development and Exercise of the Performing Right*, (1980) C. Ehrlich, *Harmonious Alliance: A History of the Performing Right* (1989).

26 The compulsory licence was revoked with the Copyright, Designs and Patents Act of 1988 and left to tariff negotiations.

27 In the United Kingdom the chief practical difference between an assignment and an agency agreement is that the assignee can legally act to protect his/her rights. In Germany, great play has been made of a "monistic" theory of *Urheberrecht* according to which author rights cannot be transferred, only rights of use (*Nutzungsrechte*) e.g. H. Schack, *Urheber- und Urhebervertragsrecht* (1997), pp. 140-141. In the author's view, this debate is a red herring. The copyright industries are structured in much the same way in the United Kingdom and Germany, whether the sale of rights is based on rights to exploitation or full copyrights.

28 D. Vaver, "Intellectual Property: The State of the Art" (2000) 116 *Law Quarterly Review*, 621 at 633 describes the process of *reification* as "treating intellectual property as a thing and deducing principles from its "thing-ness". For a critique, see C. W. Maughan, "The Economics of Property Rights" (1995) 1/2 *New Zealand Business Law Quarterly* 78-91.

29 L. C. Becker, "The Moral Basis of Property Rights", in special issue: "Property" (ed. Pennock and Chapman), (1980) *Nomos* xxii, at 200.

30 A. Story, "Compensation for Banned Handguns: Indemnifying 'Old Property'" (1998) 61/2 188 at 189.

31 E. Marbach, and E. Riva, "Zur sogenannten 10% Regel im Urheberrecht", Rechtsgutachten bezüglich des bundesrätlichen Entwurfs vom 19. Juni 1989 für ein neues Urheberrechtsgesetz, reprinted in R. M. Hilty, ed., *Die Verwertung von Urheberrechten in Europa* (1995), p. 70.

32 *cf.* Story, n. 30 above, at 189-190.

33 BVerfGE 31, p. 240 *et seq.*

exploitation) and the privilege of legislators to determine in a social context what that should mean."

### Economic conceptions

In economic history, the standard explanation for the evolution of well-defined, secure, individualised property rights is that they are an efficient response to scarce resources." Private property rights prevent the over-exploitation of a resource by those with no incentive to conserve it (the so-called "Tragedy of the Commons").<sup>36</sup> Private property rights allow the formation of prices, and make resources travel to their most valuable use.

The characteristics of private property implied by these economic functions are: exclusivity (that is, whoever has a property claim over something can prevent others from using it), transferability (that is, whoever has a property claim over something can pass on that title to anyone of his/her choosing), universality (that is, a complete set of property relationships between all parties is specified) and enforceability (that is: these rights can be reliably asserted and are not subject to rapid or arbitrary changes)."

The legal expressions of intellectual property exhibit these features to varying degrees. The underlying economic rationale, however, is more doubtful. While land, human labour and machinery are scarce in that if they are put to some purpose they may not be used for any other, knowledge, ideas and information will proliferate with usage. The main economic justification for intellectual property rights, therefore, has to be a market failure argument. In the case of copyright, it has been

claimed that without the artificial scarcity introduced by property concepts, the costs of production of creative works will remain above the costs of copying. Creative production therefore would not take place."

### Philosophical conceptions

The economic notion of private property suggests that one particular regime of individualised rights is the most efficient. This view has, in philosophical terms, utilitarian and contractarian roots. Contractarian, in that each individual might have an interest in having a system of private entitlements rather than no system at all. (This rationale, however, does not determine the concrete shape of the system). Utilitarian, in that society as a whole appears to be best off if it agrees on a particular system of individual, transferable rights (the "general welfare" approach).

In liberal political philosophy, a third rationale for private property rights derives from John Locke's concept of "natural" property as arising from "mixing" one's labour with the products of nature (under the condition that one leaves "enough and as good" for others)." Many have thought Locke's notion to be incoherent, denying for example the social character of labour. In the case of intellectual property rights, a "natural" entitlement to the fruits of one's labour (if it exists) may take either the form of exclusive, transferable rights or of a system of equitable rewards.

A fourth philosophical conception of private property evolved in German idealism. It derives from Kant's notion of rights as the expression of one's personality (*Persönlichkeitsrechte*) and was further developed in Hegel's philosophy of law. It is rather elusive but the thought runs roughly like this: property connects a person to his freedom. Without property, a person is not conceivable at all." Again, it is not clear whether this notion should give rise to legal expressions of intellectual property which are exclusive or transferable, but we may observe that the continental European development of authors' right (with its inseparable connection between the author and the work through a *droit moral*) owes much to Hegelian thought."

<sup>34</sup> These are the relevant passages: "Art. 14 Abs 1 Satz 1 GG [Eigentumsgarantie] gewährleistet zunächst das Privateigentum als Rechtsinstitut, das im wesentlichen durch die Privatnützigkeit und grundsätzliche Verfügungsfähigkeit über das Eigentumsobjekt gekennzeichnet ist . . . Das bedeutet für das Urheberrecht: Zu den konstituierenden Merkmalen des Urheberrechts als Eigentum im Sinne der Verfassung gehört die grundsätzliche Zuordnung des vermögenswerten Ergebnisses der schöpferischen Leistung an den Urheber im Wege privatrechtlicher Normierung und seine Freiheit, in eigener Verantwortung darüber verfügen zu können. Das macht den grundgesetzlich geschützten Kern des Urheberrechts aus.

Diese grundsätzliche Zuordnung der vermögenswerten Seite des Urheberrechts an den Urheber zur freien Verfügung bedeutet aber nicht, dass damit jede nur denkbare Verwertungsmöglichkeit verfassungsrechtlich gesichert sei. Die Institutsgarantie gewährleistet einen Grundbestand von Normen, der gegeben sein muss, um das Recht als 'Privateigentum' bezeichnen zu können. Im einzelnen ist es Sache des Gesetzgebers, im Rahmen der inhaltlichen Ausprägung des Urheberrechts nach Art. 14 Abs. 1 Satz 2 GG sachgerechte Massstäbe festzulegen, die eine der Natur und sozialen Bedeutung des Rechts entsprechende Nutzung und angemessene Verwertung sicherstellen."

<sup>35</sup> D. C. North and R. Thomas, *The Rise of the Western World: A New Economic History* (1.973); D. C. North, *Structure and Change in Economic History*, (1981).

<sup>36</sup> The phrase "Tragedy of the Commons" was coined by biologist Garrett Hardin in an article of the same title (1968) *162 Science* 1243-1248.

<sup>37</sup> A thoughtful analysis of the economics of property rights along these lines may be found in Maughan, n. 28 above. See also C. W Maughan, "Property and Intellectual Property: Foundations in Law and Economics", paper presented at Symposium "A New Feudalism of Ideas?", Centre for Intellectual Property Policy and Management, Bournemouth University, June 26, 2001 (available at [www.cippm.org.uk](http://www.cippm.org.uk)).

<sup>38</sup> The orthodox expression of this argument is by N. Landes and R. Posner, "An Economic Analysis of Copyright Law" (1989) *18 Journal of Legal Studies* 325-366.

<sup>39</sup> Second Treatise of Government (1690), chap. five, section 27.

<sup>40</sup> G. W. F. Hegel, *Vorlesungen über Rechtsphilosophie* (K. H. Ilting ed., 1818-1831), Vol II: Die "Rechtsphilosophie" von 1820, § 41: "Die Person muß sich eine äußere Sphäre ihrer Freiheit geben, um als Idee zu seyn." and "Form ... ist . . . eben ein Zeichen, daß die Sache mein sein soll" (quoted in Kawohl, n. 18 above). See also J. Waldron, *The Right to Private Property* (1988); J. Hughes, "The Philosophy of Intellectual Property" (1988) *77 Georgetown Law Journal* 287-366.

<sup>41</sup> The *droit moral* was introduced internationally with the Rome revisions (1928) of the Berne Convention: Art. 6bis provides for the right to claim first authorship of a work (paternity right) and the right to object to any distortion, mutilation or other modification which would be prejudicial to the honour or reputation of the author (integrity right). The *droit moral* is distinct from copyright in that it cannot not be transferred or waived, reflecting the somewhat mysterious Hegelian bond between the author and his/her work. The United Kingdom's idiosyncratic implementation of moral rights with the CPDA 1988 (ss.77-83) states that the paternity right must be asserted,

Finally, the coherence of the notion of property itself may be contested. This may arise from an alternative "communal" premise (closely associated with Karl Marx), or it may take the form of a reduction of property to bilateral relations (an ambition pursued by the American legal theorist W N. Hohfeld). From a Hohfeldian perspective there is to be no underlying, unified concept of private property apart from its concrete expressions, some exclusive, others not, some transferable, others not. Property, here, is short hand for a bundle of rights, privileges, powers, immunities, duties and liabilities that can be made explicit in various relational settings.<sup>42</sup> From a Marxist perspective, land and the means of production will be assigned to the community as a whole after the system of private ownership under which labour has been treated as a commodity-alienated and exploited in search of surplus-has collapsed.<sup>43</sup>

In the following section, it will be argued that the collective administration of music copyrights does not straightforwardly reflect a single underlying concept of private property—perhaps not even a notion of copyright as property.

### Property Conceptions Underlying the Copyright Societies

The most thorough study of the internal workings and competitive environment of a collecting society was conducted by the British Monopolies and Mergers Commission (MMC)<sup>43a</sup> in 1994-5, following a complaint by pop stars U2 that they were forced, under the terms of membership, to assign all performing rights to the PRS. As a result, U2 had to pay performing right fees for concerts where they performed their own music, leading to dual deductions, for example for live performances abroad (one to the foreign society linked by reciprocal agreements, one to the PRS). Other composers complained about a new distribution formula for live performances favouring popular music, administrative inefficiency and high administrative costs.

The MMC report in effect recommended that the administration of copyright, and by implication copyright itself, be moved towards a conception based on exclusive transferable property rights. For example, the distribution of revenues should directly reflect the actual usage of copyrighted material; the costs of administration should be more directly allocated to the cost incurred in collecting revenues for particular works; and members should be free to administer particular categories of rights themselves.

European law has intervened in a number of cases involving collecting societies under the Treaty of Rome

(1957, the founding treaty of the European Community which overrules national legislation). The so-called "rules of competition" are embedded in two Articles, concerning agreement and concerted action (Art. 85) and concerning the acquisition and exercise of market power (Art. 86). (Following the Amsterdam Treaty of 1997, the Articles have been renumbered: Art. 85 is now 81, and Art. 86 has become 82.)

In the GEMA decisions,<sup>44</sup> the European Commission ruled (among other points) that under Article 86 members should be free to assign only particular categories of rights and to withdraw their administration if they so wish. In particular, individual rightholders should be able to join foreign societies to manage their rights in countries where the national society merely acts through a reciprocal contract.

In *Belgische Radio en Televisie v. SABAM*,<sup>45</sup> the question before the European Court of Justice ("ECJ") was whether the Belgian copyright society was acting contrary to Article 86 by requiring assignment of all present and future copyrights as a condition of admitting a potential member to collective administration. The Court explicitly stated that a copyright society is not entrusted by any public authority with giving "services of general economic interest" (which might have exempted it from the E.C. competition rules: Art. 86 (2) [ex 90 (2)], E.C. Treaty). A copyright society purely manages private, individual property interests. Collective administration has to leave maximum freedom to rightholders to manage their rights. To retain rights for five years after a member withdrew was ruled to be "unfair".

In a dispute between some French discotheques and SACEM,<sup>46</sup> the French collecting society was accused of imposing excessively high licence fees and insisting on a blanket licence, *i.e.* refusing to license separately only the (foreign) repertoire that the discos were interested in. The ECJ held that the refusal of a licence of only some rights would restrict competition if there was an efficient way to administer such groups of copyrights separately. It was however for national courts to decide whether this was the case.<sup>47</sup>

The new regulatory emphasis on a market analysis of individual property rights already has had practical consequences. The four major media companies accounting (as rightholders and users) for 80 per cent of royalties collected and distributed by European collecting societies have discovered a commercial logic for withdrawing from the current regime of collective administration altogether. Polygram (now part of Universal) reported in 1996 that it had identified potential savings of \$2.5 million per annum if royalties payable from Polygram Records to Polygram Publishing were processed directly.<sup>48</sup> In South East Asia, multinational music publishers have signed a Memorandum of Understanding which allows the major players to collect

and both the paternity and integrity rights can be waived, introducing and removing Hegelianisms at the same time.

<sup>42</sup> *cf.* W N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919, ed. W W Cook, 1966).

<sup>43</sup> *cf.* K. Marx, *Das Kapital* (1867). Reference reviews of property theories in the context of intellectual property include P. Drahos *A Philosophy of Intellectual Property* (1996) and W Fisher, "Theories of Intellectual Property", in *New Essays in the Legal and Political Theory of Property* (Stephen R. Munzer ed., 2001) pp. 168-199.

<sup>43a</sup> See n. 4, above.

<sup>44</sup> n. 1 above.

<sup>45</sup> n. 2 above.

<sup>46</sup> n. 3 above.

<sup>47</sup> The collecting society rulings of the E.C.J. are discussed in I. Cherpillod, "Die Aufsicht über die Verwertungsgesellschaften im Gemeinschaftsrecht", in Hilty, n. 31 above; I. A. Stamatoudi, "The European Court's Love-Hate Relationship with Collecting Societies" [1997] E.I.P.R. 289-297; Temple Lang, n. 6 above.

<sup>48</sup> *Music & Copyright*, No. 94, July 17, 1996.

mechanical royalties themselves without having to support a system of copyright societies along European lines."

In Europe, the multinationals' strategy has been to tilt the current system slowly in favour of the major players by making societies compete against each other for so-called Central European Licensing ("CEL") deals. CEL agreements allow any record company to acquire a licence from a central point (i.e. one collecting society) for all the European shipments of international product. Under the GEMA decisions, rightholders are free to assign their repertoire to the society offering the best terms. Faced with this threat, the European collecting societies agreed at the Midem trade fair in 1997 to cut administrative charges for handling mechanical royalties from CEL from 8 to 6 per cent (so-called Casino or Cannes Agreement). According to industry sources, this has led to a sharp increase in commission on royalties collected from smaller record labels.<sup>49</sup> Since the most valuable uses of music are now quite easy to monitor (e.g. record sales for the mechanical reproduction right; broadcasters' playlists for the performing right), there is no reason why the trend should stop here. It may be simply too costly to monitor niche repertoire and process small sums of royalties.<sup>51</sup> Large rightholders individually will choose where and when it is economic to license; vertically integrated media companies may even grant free licences to themselves.

According to John Temple Lang, director in the Competition Directorate of the European Commission:

The assumption that no member or group of members of a society could negotiate licences is no longer true, if it ever was, of big sound reproduction companies which can and do enter into individual negotiations, in particular reproduction rights, when the size and importance of the licensee makes it worthwhile to do so.... It seems unlikely that the Commission would allow any arrangements which denied rightholders the substantial benefits of direct distribution."<sup>52</sup>

In short, the transaction cost argument for collective administration from the cost of individual contracting may support *not a* universal rights administration system (to which all rightholders have access on similar terms), but a system where the major rightholders selectively decide, supported by sophisticated information technology, whether collecting licence fees is worthwhile.

This article will now discuss five features of the current membership system of collective administration

49 MBI Report, (1996), n. 8 above, p. 17.

50 n. 5 above, at 23.

51 Performing right income is roughly equally split between income from broadcasting and from general performance (i.e. music at pubs, clubs, shops, aircrafts, concerts). The costs of collecting, however, are much higher for the latter. For 1999, the PRS reported income of £75.54m from general licensing (of which 24.5 per cent disappeared as administrative commission) and £79.58m from broadcasting (with 14.6 per cent deducted for administrative expenses), leaving a net distribution of £57m and £68m respectively (PRS yearbook 2000/01).

52 J. Temple Lang, n. 6, above.

that will resist reform along the lines of exclusive transferable property rights.

## Publisher and author members

In the second section, it was suggested that it is surprising that authors have any say in the collective administration of copyrights since the publishing company, as market intermediary, should have asserted its bargaining power to achieve a full transfer of rights. In a submission of 1976, German avant-garde composer Peter Ruzicka (who later became a well-known impresario) turned this argument on its head. Copyright societies, he said, are necessarily associations whose members can only be those that are "rightowners" (*Berechtigte*). Since GEMA's terms of membership require the assignment of all future rights, publishers normally have no rights left to assign to the collecting societies—unless a contract was initiated before a composer applied for membership. In a formal representation, Ruzicka asked the patent office as regulator to exclude publishers from full membership, thus enabling changes to GEMA's distribution formula that would run counter to the publishers' economic interest.<sup>53</sup>

Ruzicka's request was refused on complex legal grounds (decision of Deutsches Patentamt, June 6, 1977). How, though, could Ruzicka have thought that such an intervention on the market distribution of property rights was what the legislator had intended in the 1965 German Acts defining copyright (*Urheberrechtsgesetz*— "UrhG") and regulating the copyright societies (*Urheberwahrnehmungsgesetz*— "UrhWG")? In its promotional literature, GEMA claims that its aim "is nothing less than securing the economic, social and cultural existence of all creators".<sup>54</sup>

In article 7 and 8 of the *Urheberwahrnehmungsgesetz*, the legislator expects Of collecting societies—due to their character as a solidaric community (*Solidargemeinschaft*)—to perform cultural and social tasks: through their charitable pension and subsistence funds and through the support for culturally important works and contributions. In Germany, therefore, collecting societies are not only royalty processing centres (*Inkassoorganisationen*) but have a statutory duty to foster and protect creators (*Schöpferische Menschen*). They take on a considerable part<sup>55</sup> Of the State's social and public responsibility.

53 cf. Ulmer, n. 21 above; Hübner and Stern, n. 7 above.

54 H. H. Geyer, "GEMA-Kommunikation", in *Handbuch der Musikwirtschaft* (1997) pp. 648-661, at p. 647-648: "Prinzipiell ist heute der Schutz des geistigen Eigentums gesellschaftlich unumstritten und insbesondere in Deutschland in beispielhafterweise auch gesetzlich verankert. Sein Ziel ist nichts Geringeres als die Sicherung der wirtschaftlichen, soziale und kulturellen Existenz aller kreativen Menschen."

55 Kreile and Becker, n. 19 above, p. 628. Translated by the author from the original: "der Gesetzgeber (weist) in §§ 7 und 8 UrhWG den Verwertungsgesellschaften in ihrer Eigenschaft als Solidargemeinschaften kulturelle und soziale Aufgaben zu, die diese, namentlich durch ihre Vorsorge- und Unterstützungseinrichtungen sowie durch die Förderung kulturell bedeutender Werke und Leistungen erfüllen. Verwertungsgesellschaften sind deshalb in Deutschland nicht nur Inkassoorganisationen, sondern sie haben darüber hinaus auch den gesetzlichen Auftrag, die schöpferischen Menschen zu fördern und zu schützen. Dem Staat nehmen sie damit einen nicht unbeträchtlichen Teil seiner sozialen und öffentlichen Verantwortung ab."

The common law tradition of freedom of contract on individual property rights clashes with this interventionist understanding of the role of the state."

### Compulsory representation, compulsory assignments and compulsory licences

Collecting societies typically will represent any right-holder above a minimum threshold. For a composer to become a member of the PRS, for example, she must have three works either commercially recorded, broadcast within the past two years, or performed in public on at least 12 occasions within the past two years (and be commercially published). In Germany, the law regulating collective administration even prescribes a so-called "compulsory representation" (*Wahrnehmungszwang*, § 6 Abs 1 UrhWg). In providing a service to all rightholders, the larger players in effect subsidise the system, since it is more costly to set up accounts, collect and distribute small amount of royalties.

If rightholders wish to be represented by a collecting society, they typically have to assign all rights in the relevant domain, *i.e.* they cannot "cherry pick", for example administering high-turnover products themselves while leaving cost-intensive licensing to the society. Again, this practice is sanctioned by the German *Urheberwahrnehmungsgesetz*.<sup>57</sup> The new opt-out clause for certain categories of rights adopted by the PRS after the MMC inquiry requires rightholders to carry the costs of their opt-out to the system."

For some legally granted rights (such as the German blank tape levy-§ 54 UrhG), the only exploitation available is via collecting societies. In collectively administered right domains, again, the collecting society is obliged to license any user under equitable conditions (§ 11 UrhWG). In these cases, collective administration overrides the right to exclusivity.

### Socio-cultural deductions

Collective administration may also be viewed as a form of unionisation. Composers no longer enter the market as individuals." This enables them to extract better terms than contracting individually with music publishers. The step to provide other collective services to the profession is therefore small.

<sup>56</sup> Note that the current chief executive of the MCPS-PRS music alliance is a former VISA executive with an understanding of collecting societies as efficient collection and distribution agents. Still the statutes of the PRS regulate the position of publishers in a similar way to the continental societies (see second section).

<sup>57</sup> *cf.* Kreile and Becker, n. 19 above, p. 640.

<sup>58</sup> It may be possible to characterise compulsory representation and compulsory assignments as efficient following, for example, a model of component pricing (W. J. Baumol, and J. Gregory Sidak, *Towards Competition in Local Telephony* (1994)). Bypassing a system of collective administration would be a socially efficient solution only if the saving in costs in the collecting society was greater than the increase in costs that would have to be incurred if the individual owner was to deal directly with the user (*i.e.* "cherry picking"). This would be an instance where economic reasoning overrides individual property rights for desirable outcomes.

<sup>59</sup> *cf.* Peacock and Weir, n. 25 above, p. 41.

Under the guidelines of CISAC (Confederation Internationale des Societes d'Auteurs et Compositeurs), the international umbrella organisation of the performing right societies, up to 10 per cent of collected licence fees may be channelled into socio-cultural funds. The German law regulating copyright societies (*Urheberwahrnehmungsgesetz*) explicitly demands that they should foster "culturally important works and contributions" (§ 7) and set up pension and social funds (§ 8). Anglo-American rightholders are enraged by these deductions. They feel that their exported property subsidises foreign social and cultural policy."

### Distribution formula

At GEMA, so-called "evaluation committees" weight the distribution of royalties to authors from considerations of length of membership, past income, artistic personality and overall contribution of an *oeuvre*. In the United Kingdom, the classical music subsidy in the royalty distribution formula was finally phased out following the MMC report of 1996. In 1999, a PRS foundation was established for the support of new music, regardless of genre.

### Self-organising actors and governance

Organisations are self-organising actors that develop their own dynamic. If an organisation is to act in the conflicting interests of third parties, complex principal-agent problems arise." For collecting societies, there has been a tendency towards empire-building and inefficient bureaucracy. The cost of collection in many areas of usage amount to a quarter of revenues distributed -while for other complex services (such as health insurance) administrative deductions of five per cent are seen as high. Governance structures are often less than transparent. Notorious is § 14 of GEMA's terms of association according to which the "board" may consist of only one person (under this clause, Vorstand Erich Schulze ruled GEMA from 1947-95 when he awarded himself an annual pension of DM546,000).<sup>62</sup> Another doubtful practice must be hereditary succession (French society SACEM has been controlled by the Tournier dynasty for most of the twentieth century).

The five examples in this section show that collecting societies in their current form cannot be analysed as an efficient response to the problem of individual contracting over property rights. Powerful other rationales are at work, more prominently in the civil law countries of continental Europe, but irreducible also in common law environments. In summary, membership-based collecting societies, offering a universal service appear to lean towards a "reward" rationale of copyright (and an uncertain conception of property), rather than a notion

<sup>60</sup> A. Harcourt, "The Unlawful Deduction Levied upon U.K. Composers' Performing Rights Income" (1996) *64 Copyright World* 15.

<sup>61</sup> M. Hutter, "On the Construction of Property Rights in Aesthetic Ideas (1995) *19 Journal of Cultural Economics* 177-185 at 181.

<sup>62</sup> GEMA yearbook (1996/7), p. 67.

of market-efficient administration of exclusive, transferable rights."

It is an entirely different question whether the collecting societies actually fulfil their ambition to be a "league for the protection of creators" (GEMA's self-description: "*Schutzorganisation für den schöpferischen Menschen*"). Figures provided in the Monopolies and Mergers Commission report on the PRS<sup>64</sup> show that 80 per cent of author members earned less than £1,000 from performance royalties for 1993 received in 1994, and that 10 per cent of author members receive 90 per cent of the total distribution. According to GEMA's yearbook 1996/7,<sup>65</sup> 5 per cent of members received roughly 60 per cent of the distribution. As Breyer has suggested,<sup>66</sup> copyright appears mainly to benefit high-turnover products which would have been commercially viable anyway. In the final section, the author will propose some principles for the reform of collective administration.

## Reforms

This article has argued that the transaction cost approach to collective administration begs many questions that go to the heart of the Western copyright regime itself. The current emphasis on copyright as an exclusive and transferable property right has led to an inherently unstable situation, littered with governance problems. Reform may come through a more thorough application of economic analysis and competition law (accepting an individualised property entitlement premise<sup>67</sup>) or through a re-thinking of the "substance of the law of copyright itself".

The first position requires that cultural aims and the reward of creativity should not be pursued within the framework of rights management." This would leave

collective administration as much as possible to the market, perhaps allowing publisher-dominated societies and competition for the services of rights administration. Since under the private property approach, the dominant justification of intellectual property rights is as a response to market failure in the production and distribution of creative products, the terms of exclusive, transferable protection would have to be shortened following detailed empirical analysis of the supply of creative products. The product cycle of the cultural industries appears to suggest a term of protection somewhere between five and 20 years."

This policy option has been finally closed with the Agreement on Trade-related Aspects of Intellectual Property Rights ("TRIPs", 1994) integrating copyright into the global free trade zone. Any shortening of the copyright term now appears illusory."

An alternative solution would re-focus collecting societies on a different rationale for copyright under a principle that, wherever commerce is generated through the use of creative content, a share of revenues should flow back into creative production. (For example, it appears inequitable that the only parties earning substantial revenues from internet usage are hardware and software companies, telephone companies and internet service providers.)<sup>72</sup> Such a principle may be built on a non-exclusive reward concept of private property or, more radically, may nudge copyright away from the sphere of property altogether. The effect of this approach would be something akin to a tax system on the users of culture. It may entail a complete reassessment of the membership, licence and distribution rules of the collecting societies, and a review of their statutory supervision. Certain culturally desirable categories of copyright usage, such as live music, may have to be exempted.<sup>73</sup> Licensing tariffs which encourage the use

63 In the terminology contrasting property rules, liability rules and inalienability as basic legal entitlements (G. Calabresi, and A. Douglas Melamed (1972), "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089), claims to reward or compensation can be characterised as liability rules. According to R. P. Merges, "Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations" (1996) 84 *California Law Review* 1293, the liability rules implicit in collective rights administration may evolve as an efficient response to individual property entitlements if high volumes of licences need to be negotiated. This is just another form of the transaction cost rationale that was rejected in the second section above. The author tends to agree with Streecher that the specific form of liability enforced by copyright societies is akin to a form of taxation; see T. Streecher, "Broadcast Copyright and the Bureaucratization of Property", (1992) 10 *Cardozo Arts & Entertainment Law Journal* 567.

64 n. 4 above, pp. 65-67.

65 n. 62 above, p. 50 *et seq.*, reporting figures for 1995.

66 S. Breyer, "The Uneasy Case for Copyright" (1970) 84, *Harvard Law Review* 281-351.

67 Merges, n. 63 above.

68 H. L. MacQueen, *Copyright, Competition and Industrial Design*, (1995), Hume Papers on Public Policy, 3(2): pp. 1-111, at p. 23.

69 At the parliamentary reading of the new Swiss copyright law in 1989, the government advised explicitly that the "material needs of creators" ought to be satisfied not through copyright legislation but direct subsidies M. Kretschmer, "Die Mythen des Urhebers: Geistiges Eigentum in der Musik-eine historische Übersicht und Kritik"/"Le Mythe de L'Auteur-La propriété intellectuelle dans la musique: aperçu historique et critique"

(1998) 57 *Dissonanz* 4-13), a suggestion supported by A. Plant, "The Economic Aspects of Copyright in Books" (1934), *Economica* 167-195, R. Hurt, R. and R. Schuchman "The Economic Rationale of Copyright", (1966) 56 *American Economic Review* 421-432 and Beyer, n. 66 above. Contrast A. Dietz, "Die sozialen Bestrebungen der Schriftsteller und Künstler und das Urheberrecht" [1972], G.R.U.R. 11.

70 *cf.* M. Kretschmer, G. M. Klimis and C. J. Choi, "Increasing Returns and Social Contagion in Cultural Industries (1999). *British Journal of Management* S61-S72; Kretschmer, n. 9 above.

71 Arguably, the existing international copyright obligations under the Berne (1886) and Universal (1952) Conventions were hardly open to fundamental re-negotiation.

72 In the words of GEMA executives Kreile and Becker, n. 19 above: "The Commission as well as the European Court of Justice must ensure that not only the major producers and the users benefit from the digital boom in Europe, but in particular the creative community, without whose works the digital highways would remain mere spectral, empty ghost tracks."

73 Some publishers initially argued against an exclusive right to public performance. William Boosey: "I considered that the payment of a fee for the performance of new music, and even established music, was calculated to injure seriously the sales of established favourites, and was very detrimental to the popularizing of new works." Novello (*Musical Times*, December 1, 1929, p. 1072): "As the chief object of the publication of music is to ensure performance, it does not seem reasonable to tax the performer for doing the very thing the publisher wants him to do. Messrs Novello therefore do not belong to the Performing Right Society." Both statements are quoted in Peacock and Weir, n. 25 above, p. 46 and p. 72).

Again TRIPs poses an obstacle here, confining exceptions to

of low-quality "muzak" material not administered by collecting societies should be re-visited." The collection basis could be broadened to include works out of copyright (*domaine public payant*).<sup>75</sup> Already there is legislation pending in several European countries extending an existing copyright levy on blank tapes to flat fees on computer components that can be used in copy-

ing—such as hard disks, scanners, CD burners and printers. Details of these proposals are highly contentious. Yet all in some ways go beyond the private property premise of copyright. The arguments in this article suggest that these proposals should be part of a coherent move, transforming collecting societies into regulatory instruments."

exclusive rights to cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder (Art. 12, taken from Art. 9 (2) of the Berne Convention (Stockholm revision 1967) where it defines possible limitations to the reproduction right).

74 P. Lupton, and P. Drahos, *Copyright Collecting Societies: Towards a Regulatory Balance of Public and Private Interests - A Response to the Simpson Report*, Australian National University, Canberra, August 1996.

75 A. Dietz, "Term of Protection in Copyright Law and Paying Public Domain" [2000] E.I.P.R. 506-511.

76 A similar argument is implicit in P. Drahos, "Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Bio-Collecting Society the Answer?" [2000] E.I.P.R. 245-250, who proposes the creation of a Global Bio-Collecting Society ("GBS") which would act as a repository for community regis-

ters of indigenous knowledge, monitor the use of indigenous knowledge by, say, pharmaceutical firms in the development of new products, and facilitate and mediate contractual negotiation between indigenous groups and third parties. Such a society would not administer individual property rights but foster, as a regulatory mechanism, the distribution and reward of indigenous knowledge. Compare also Graff and Zilberman's proposal for an intellectual property clearing-house for agricultural biotechnology: see G. Graff and D. Zilberman "An Intellectual Property Clearing House for Agricultural Biotechnology", background paper prepared for workshop *Intellectual Property Clearinghouse Mechanisms for Agriculture*, University of California, Berkeley, February 16, 2001 (proceedings available at <http://www.cnr.berkeley.edu/csrd/technology/ipcmec/Summary-Berkeley-2-16-2001-AgBio-IP-Clearinghouse-Workshop.pdf>, visited January 7, 2001).

## APPENDIX: Collective administration of music copyright in the United Kingdom and Germany

### Exclusive rights (U.K.): Copyright, Designs and Patent Act, CDPA 1988

- copy the work (reproduction)  
CDPA 1988, s. 17
- issue copies of the work (distribution), s. 18
- rent or lend the work to the public, s. 18A
- perform, show or play the work in public (public performance), s. 19
- broadcast the work/include it in a cable programme, s. 20
- make an adaptation of the work, s. 21

### Verwertungsrechte (exclusive rights) (D) Urheberrechtsgesetz UrhG 1965

Vervielfältigungsrecht (reproduction)  
§§ 15-16

Verbreitungsrecht (distribution) § 17

Vermietrecht (rental)  
§ 17.11, III

Ausstellungsrecht (exhibition) § 18  
Vortrags- und  
Aufführungsrecht; Vorführungsrecht (public performances)  
§ 19  
Senderecht (broadcasting, including cable & satellite) § 20

Zweitverwertungsrechte (secondary exploitation, e.g. repeat performance, music box) §§ 21-22  
Bearbeitungsrecht (adaptation) § 23

### Vergütungsrechte (equitable remuneration rights)

Audio & Video Vermietung und Verleih (rental)  
Bibliothekstantieme (library levy) § 27  
Geräte, Leerkassetten-und Betreiberabgabe (blank tape levy) § 54

### Collective administration music (U.K.)

For two sub-categories, MCPS acts as exclusive agent:

Mechanical reproduction  
Synchronisation (music copied on to film)  
[save to the extent that the right is administered by PRS, whose writer Members assign to it "the film synchronisation right in every work composed or written by the Member primarily for the purpose of being recorded on the soundtrack of a particular film or films in contemplation when such work was commissioned"]

MCPS acts as exclusive agent  
MCPS acts as exclusive agent (where mandated by copyright owners)

assigned to PRS (with the exception of certain staged *works-Grand Rights*)

assigned to PRS (with the exception of certain staged *works-Grand Rights*)

### Collective administration music (D)

Two sub-categories:  
(1) Mechanisches Vervielfältigungs- und Verbreitungsrecht (mechanical reproduction and distribution right)  
and (2) Filmherstellungsrecht (synchronisation) assigned to GEMA  
[subject to a resolatory condition "if the rights owner informs GEMA in writing that he wishes to exercise the rights in his own name"]

Assigned to GEMA:  
Angemessene Entlohnung (equitable remuneration)-  
cf. § 27

assigned to GEMA (with the exception of certain staged *works-Grand Rights*)

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