

The European Commission's Proposal for a Directive on Collecting Societies and Cultural Diversity – a Missed Opportunity

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Preliminary remarks

At the beginning I would like to make a hypothetical statement concerning the Eurovision Song Contest: Those of you who would have wished more people singing in their native tongue will probably in the end agree with my position as presented here, whereas those of you who are insofar indifferent or even, for marketing or other reasons, prefer "English for all" will probably react more skeptically.

Keywords: Collecting societies, EU Directive, cultural diversity

1 Introduction

Why do we need copyright, why do we need collecting societies and what are their cultural functions? What follows is an attempt to answer these questions and, at the same time to demonstrate why the European Commission's Proposal for a Directive on Collecting Societies² has missed an opportunity.

Among other things the Proposal's "Explanatory Memorandum" starts with the important statement that collecting societies "*also play a key role in the protection and promotion of the diversity of cultural ex-*

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² Its official title is "Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market", of July 11, 2012, COM (2012) 372 final, 2012/0180(COD) (quoted as "Doc. 2012/0180(COD)"); the text of that Directive as adopted by the European Parliament and the Council in substantially amended form (Directive 2014/26/EU of 26 February 2014, OJ L 84/72 of 20 March 2014) could not be taken into consideration here; but see postscript below.

*pressions by enabling the smallest and less popular repertoires to access the market*¹³.

Even if this statement is justified it appears unconvincing if we ask the question whether the regulatory content of the Proposal corresponds with it in substantive terms; in other words, whether this statement fulfils its implicit promise. One can beg the question whether the provisions and general aims of the Proposal will rather achieve the opposite result by weakening the role of collecting societies, especially in relation to the smaller countries of the European Union and thereby weakening at the same time cultural diversity within the EU in favour of the large international repertoires.

This paper⁴ aims to examine that question as a great deal depends on it and it aims to critically evaluate the Commission's Proposal⁵. To enable this evaluation we will initially discuss the cultural function of copyright/authors' right law generally as well as that of the collecting societies in particular. This is a pre-requisite to understanding whether the declared aim of protecting cultural diversity through copyright law is in fact achieved or at least can be promoted by that Proposal.

³ See Doc. 2012/0180 (COD), p. 2; in the same sense recital 2 (at the end) of the Proposal see Doc. 2012/0180 (COD), p. 13.

⁴ Concerning three recent and much more profound studies, see *J. Heyde*, *Die grenzüberschreitende Lizenzierung von Online-Musikrechten in Europa*, Baden-Baden 2011; *S. Gräfin Grote*, *Europäische Perspektiven der Rechtswahrnehmung durch Verwertungsgesellschaften*, Baden-Baden 2012, as well as *S. Nérisson*, *La légitimité de la gestion collective des droits des auteurs en France et en Allemagne*, PhD thesis, Paris and Berlin 2011 (an updated version to be published in the near future).

⁵ See recently also the almost exclusively critical presentations concerning that Proposal, made by R. Staats, T. Holzmüller, T. Gerlach, V. Janik, C. Tiwisina, C. P. Krogmann, J. Maier-Hauff, S. Nérisson and M. Rehse during a seminar entitled "Europäischer Rechtsrahmen für Verwertungsgesellschaften" and organized on December 7, 2012 in Munich (see Nérisson 2013), as well as two equally critical documents of German expert groups, namely the Opinion (*Stellungnahme*) formulated by the German Association for Industrial Property and Copyright Law (*Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht* 2013) quoted here as "Opinion of the German Group" as well as the "Comments of the Max Planck Institute for Intellectual Property and Competition Law" (Drexel et al. 2013), which can be found at the website of the MPI – www.ip.mpg.de – under "*Stellungnahmen des Instituts*" (quoted here as "Comments of the MPI").

2 The cultural function of copyright law in general

Unfortunately, as we have tried to show elsewhere (Dietz 2005, 2006), in contrast to the United States Constitution and its *Copyright Clause* (Section 8 clause 8 of the Constitution of 1787⁶), most constitutions of European countries do not expressly guarantee copyright law or even intellectual property generally; still less do they provide a constitutional guarantee of the cultural function of copyright law.

Fortunately this troubling lacuna has been resolved, at least politically, by a series of recitals within the European copyright directives. Recitals 9 and several others thereafter in the Infosoc Copyright Directive⁷, underline in various aspects the importance of copyright law for the development of creativity and culture. Some of these recitals follow⁸:

(9) Any harmonization of copyright and related rights must take as a basis a high level of protection, since *such rights are crucial to intellectual creation*. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. ...

(10) *If authors or performers are to continue their creative and artistic work*, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. ...

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of *ensuring that European cultural creativity and production* receive the necessary resources and of safe-

⁶ "The Congress shall have power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

⁷ See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ EC no. L 167 of 22 June 2001, p.10.

⁸ Emphases by the author.

guarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subject matter of related rights is also of *great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.*

(22) *The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.*

As we can see, European legislators are clearly in favour of the promotion of culture and creativity as well as cultural diversity via copyright law; in other words they are in favour of its cultural function. The political importance of that statement is accentuated by the explicit reference in Recital 12 to Article 151(4) of the EU Treaty (this became Article 167(4) Treaty on the Functioning of the European Union – TFEU), which requires the Union to take cultural aspects into account in its action, in particular to respect and promote the diversity of its cultures⁹.

The statements in the above recitals as well as the "cultural aspects clause" within Article 167(4) TFEU become even more important given the Charter of Fundamental Rights of the European Union of December 7, 2000¹⁰ also refers to culture and cultural diversity. This is particularly evident in the third paragraph of the charter's preamble, as follows:

The Union contributes to the preservation and to the development of these common values *while respecting the diversity of the cultures and traditions of the peoples of Europe* as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels;¹¹...

⁹ See also Doc. 2012/0180 (COD), p. 3; in the same sense recital 2 (at the end) of the Proposal, see Doc. 2012/0180 (COD), p. 13.

¹⁰ OJ EC no. C 364/01, of 18 Dec. 2000.

¹¹ Emphasis added.

Additionally Article 22 of the charter simply states that the Union shall respect cultural, religious and linguistic diversity.

Clearly when doing legislative work in the field of copyright law and particularly in the field of collecting societies legislation, the Commission (as with all other EU bodies) is strictly bound to respect the principle of cultural diversity. It cannot escape that obligation by simply postulating that it has done so¹² at the margin of the relevant Proposal. On the contrary the commission should have introduced far more concrete and explicit explanations and provisions to demonstrate how the principle of respect for cultural diversity would be realised. There may be a need for compromises with other principles such as the free movement of services under the Services Directive¹³, the application of which to collecting societies, is very dubious (Heine & Eisenberg 2009; Heyde 2011; Scholz 2011; Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht 2013; Drexl et al. 2013). The latter is true, in particular since, according to Article 17 no. 11 of that Directive, a specific derogation from the principle of freedom to provide services is foreseen for copyright and neighbouring rights, a term which, of course needs interpretation; as we will see, in our view that term must be interpreted in a holistic and comprehensive way.

Finally, the apparent lack of interest from the competent services of the European Commission in the cultural role and functions of copyright law generally and collecting societies particularly is in striking contrast to the position adopted by of the European Parliament. The latter, in no less than three Resolutions¹⁴ has admonished the Commission, unfortunately in vain¹⁵, to more concretely respect the cultural diversity and the cultural and social functions of collecting societies and not to over accentuate the application of antitrust law to them (Dietz 2004, Nérissou 2011: 1019, 1074).

¹² See footnote 10.

¹³ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376 of 27 Dec. 2006, p. 36.

¹⁴ Resolutions of 15 January 2004, 13 March 2005 and 25 Sept. 2008.

¹⁵ A true "dialogue of dumbs" ("dialogue de sourds"; see Nérissou 2011: title before p. 1019).

This lack of interest from the Commission is also in contrast to its deep involvement in the preparation and ratification of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions¹⁶, adopted by the General Conference of UNESCO on October 20, 2005, and ratified on May 18, 2006, by a decision of the Council¹⁷ on the basis of a corresponding proposition of the Commission of December 21, 2005¹⁸.

In its explanatory memorandum the Commission explains the importance of the implementation of that Convention of UNESCO for the Community (now the European Union) from the aspect of European cultural diversity, underlining that *"[a]t European level this diversity of situations is already the dominant reality and has been enriched by the recent historic enlargement, which brought in ten new Member States. Globalization, although it introduces new possibilities for exchanges between cultures, can also threaten the more vulnerable cultures and give rise to standardization phenomena which are likely to jeopardise cultural diversity"*. Who would not think of copyright situations here?

Summing up the political reasons behind the whole issue the Commission came to the following conclusions:

The full participation of the European Community and its Member States in implementing the Convention will in particular contribute to:

- establishing a new pillar of world governance with the aim of ensuring protection and promotion of cultural diversity;

- emphasising the specific and dual (cultural and economic) nature of cultural goods and services;

¹⁶ See annex 1.a) of Doc. 2006/515/EC as well as already of Doc. 2005/0268 (CNS); see the following notes.

¹⁷ See Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2006/515/EC), OJ EU no. L 201/15 of July 25, 2006.

¹⁸ See Proposal for a Council Decision on the conclusion of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 21 Dec. 2005, COM (2005) 678 final, Doc. 2005/0268 (CNS).

- recognising the role and legitimacy of public policies in the protection and promotion of cultural diversity;

- recognising the importance of, and promoting, international cooperation to respond to cultural vulnerabilities, in particular with regard to developing countries;

- defining appropriate links with other international instruments that enable the Convention to be implemented effectively.

We cannot elaborate more on this UNESCO Convention and on the corresponding original position of the EU Commission (see in general Dietz 2008), but we should remind ourselves that not much else seems left from its worthy stance on cultural diversity when it comes to initiating new legislative steps in the field of copyright and in particular of collecting societies.

We should however consider that the ratification documents themselves established a narrow relationship between cultural diversity and copyright law. In Annex 1b, both documents¹⁹ contain a list of Community Acts [EU Acts] illustrating the extent of the area of the corresponding competence of the Community. Almost all copyright directives (with the exception of the Software Directive and the Database Directive) are mentioned within them, which underlines their cultural relevance. Is this narrow relationship between copyright law and the protection of cultural diversity as shown above also not equally true for the collecting societies sector? The collecting societies are, as we will see, an integral aspect of copyright law.

3 The cultural functions of collecting societies

In most countries, in particular those of Continental Europe, regulation of collecting societies law is integrated within copyright law. The latter can be best understood as a whole system of regulation (Dietz 2003,

¹⁹ See Commission Doc. 2005/0268 (CNS), p. 26, and again Council Doc. 2006/515/CE, p. 28.

2012) that rests upon at least five "pillars" or subsystems of equal importance, namely: a) substantive copyright law (protected works, owners, moral and pecuniary content, duration and limitations of copyright); b) neighbouring or related rights (in particular the rights of performers, producers of phonograms and videograms as well as of broadcasting organizations); c) copyright contract law (including performers' contracts), d) enforcement of copyright (i.e. civil, criminal and administrative sanctions for copyright infringements); and e) last, but certainly not least, collecting societies law.

If copyright law as a whole has a cultural purpose this certainly applies to its subsystems, in particular to the collecting societies. Given this view copyright legislators, if they are to take that cultural mission seriously, should adopt a positive attitude towards the collecting societies. This means without, of course, neglecting necessary control of the societies, assisting them in carrying out their tasks, rather than undermining them.

In certain cases, especially as far as societies in smaller countries are concerned, we must consider public financial assistance, at least during the formation of such societies, without which they would perhaps never be founded. This is in fact one of the reasons why in a number of countries institutions of public law and/or multi-competent societies have been allowed or even prescribed by the law, at least in the past (Dietz 1978: 563).

As a consequence, the requisite controls and supervision of collecting societies must come from within the system and should ensure collective management of copyright achieves its aims, which are intimately related to the aims of copyright law itself, including, of course protection and promotion of creativity and, through it, of culture and cultural diversity. This approach characterises the provisions that apply to collecting societies within most modern copyright laws (Dietz 2002).

Controls exercised outside the system, for example through rigorous application of anti-trust rules, appear too negative. These push the societies to compete, which is not appropriate in this sector (Nérisson 2011: 782, 1104). These controls weaken them and, at the same time,

inhibit them from fully complying with their mission, namely to strengthen protection for all creative people and to procure adequate revenues for them as compensation for their creative input.

Generally, the cultural mission of collecting societies is embodied in their role in efficiently organising the collective administration of the relevant rights and the impartial and rapid as possible distribution of the revenues they have generated. This is particularly true where, as the Proposal acknowledges, "*negotiations with individual creators would be impractical and entail prohibitive transaction costs*"²⁰. If, under the supervision of the regulatory authorities, they fulfil that role effectively and transparently, the collecting societies almost automatically fulfil the general aims of copyright law, namely, to promote creativity and culture and, as far as possible, to generate corresponding revenues for the creators, the vast majority of whom need them so much.

But, this important and indeed original role only represents half of the story. To appreciate the full cultural purpose of collecting societies we must take account of the territorial aspects of what they do. The societies do not operate as it were in a neutral area – nationally, regionally (i.e. European) or internationally –, but their primary responsibility is for the creative people of "their" country or of "their" linguistic culture.

This is especially true for societies from the smaller countries with a cultural minority position within the European context²¹, administering "the smallest and less popular repertoires"²² in the outside world. Based on their statutes and sometimes also under strict legal obligation, these societies have a specific cultural mandate to fulfil reaching far beyond the usual remit of collective management.

We should now mention the social or cultural funds²³ of collecting societies, which are sometimes strictly prescribed or at least strongly recommended by national legislations (Dietz 2002: 912; Nérissou 2011: 756) These funds have the function of "equalizing" or correcting, at least

²⁰ See Doc. 2012/0180 (COD), p. 2.

²¹ We have to think here especially of the repertoires of the Scandinavian, Slavic or Baltic or else the Romanian, Hungarian etc. etc. languages and cultures.

²² See Doc. 2012/0180 (COD), p. 2.

²³ See also footnote 46.

partly, the imbalances that exist even domestically, between exploitation of the large international repertoires²⁴, on the one hand, and their own smaller repertoires, on the other hand.²⁵

This territorial aspect is certainly one of the reasons why, despite a number of attempts to harmonise at the international and/or European level, copyright law, as a comprehensive whole, is still regulated on the national level. In my view, this underlying preference for a territorial approach, even when not directly anchored in national laws, is easily understandable through the long history of those laws and the very political sense, namely to primarily serve the creators as well as the cultural industries of their own countries. In effect, what else can the old formula "*To promote the Progress of Science and useful Arts*"²⁶ mean but precisely that? The more the original culture of a country is in a minority, the more the principle of "*Erstzuständigkeit*" (first responsibility) of the collecting societies for the creative people of their own country should apply.

4 The Proposal of the EU Commission for a Directive on Collecting Societies and Cultural Diversity – pure lip service?

Of course, the general objectives of this Proposal, namely "*to ensure the adequate provision of services using works or other subject-matter protected by copyright and related rights in the internal market*", and to stimulate collecting societies "*to adapt their methods of operation for the benefit of creators, service providers, consumers and of the European economy as a whole*", also by "*encouraging and facilitating the multi-territorial licensing of the rights of authors in their musical works by col-*

²⁴ See also Heyde (2011: 243), who analyses "*the privileges of the big music publishers with Anglo-American repertoire*".

²⁵ For more details, in particular concerning the possible means to at least partially correct these imbalances, see A. Dietz, Cultural Functions of Collecting Societies, contribution to a study on collecting societies to be published by the Munich Max Planck Institute, a preliminary version of which being available at http://www.ip.mpg.de/shared/data/pdf/2_dietz_-_cultural_functions.pdf; pre-published in Japanese and English by Geidankyo (Japan Council for Performers' Organizations), Tokyo 2010.

²⁶ See footnote 14.

*lecting societies representing authors"*²⁷, aim far beyond protection of cultural diversity.

But the erroneous, or in any case partial and one-sided approach of the Proposal is manifested precisely through the formulation of those objectives. They are aimed primarily towards the internal market and the European economy as a whole as well as towards the multi-territorial licensing of rights.

In order to realise these objectives a relatively small number of powerful collecting societies of "European competence" are to be created, known as "hubs" (Nérisson 2013: 72). If necessary, these shall represent the smaller and less powerful societies within a competitive market, in particular when granting multi-territorial licenses for online rights in musical works²⁸, based on unconditional but rather dubious, (see Heine & Eisenberg 2009; Heyde 2011; Scholz 2011; Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht 2013; Drexel et al. 2013) application of the Services Directive²⁹, as that is clearly expressed in recital 3 of the Proposal.

This notion of representation of smaller collecting societies by the larger ones suggests that there is less interest which societies – the bigger representing or the smaller represented ones – administer *"the smallest and less popular repertoires"* allowing them *"to access the market"*³⁰. But this apparently neutral and detached position reflects the negation or at least a neglect of the cultural role – the *"key role in the protection and promotion of the diversity of cultural expressions"*³¹ – of the smaller collecting societies. This is particularly true since a far less radical solution had already been found by the European collecting societies themselves (Heyde 2011: 96; Nérisson 2011: 1009). This was unfortunately hindered and frustrated by an application of antitrust rules that was too strict and inadequate.

²⁷ See Doc. 2012/0180 (COD), p. 2.

²⁸ See articles 13ff, 28ff of the Proposal.

²⁹ See footnote 21.

³⁰ See footnote 10.

³¹ See Document 2012/0180 (COD), p. 2.

Title II of the Proposal, specifies the "*Member States shall ensure that collecting societies act in the best interest of their members and do not impose on rightsholders whose rights they manage any obligations which are not objectively necessary for the protection of the rights and interests of these rightsholders*".³² That principle may be inarguable but could accompany the weakening of the collecting societies' legal position as a result of their members gaining too great a freedom of action as provided in the following provisions.

In effect, the rightsholders shall be free to choose in all directions³³ including the right to authorise a collecting society of their choice to manage the rights, categories of rights or types of works and other subject matter of their choice, for the Member States of their choice, irrespective of the Member State of residence or of the location or the nationality of either the collecting society or the rightsholders.

In addition, the rightsholders shall have the right to terminate the authorisation to manage rights, categories of rights or types of works and other subject matter granted to a collecting society or to withdraw from a collecting society any of the rights or categories of rights or types of works and other subject matter of their choice, for the Member States of their choice.

One must question how the smaller collecting societies can continue to exist when confronted with such uncertainties. They will always have to fear their best "clients" (those also known outside the country concerned, perhaps already Europe-wide) will leave them in favour of the large societies established, already on the European level. They will be left with modest national repertoires, eventually consisting only of high risk low earning works and members and diminished by the small number of "low risk", high earning ones. As a consequence, the chances to cover even their administrative costs, let alone generate adequate monies to distribute would be very reduced.

³² See Article 4 of the Proposal

³³ See Article 5(2) and (3) of the Proposal.

Furthermore, the proposed rules³⁴ on the effective participation of the members of the collecting societies within the decision-making process, on the supervision by a supervisory body (consisting of representatives of members of the societies) and on the activities of the societies in the management of rights will become stricter. This will also be true for their relationships with the users of the works³⁵. This creates an impression of a great imbalance with strict obligations imposed on the collecting societies whilst the rightsholders obligations and especially those of the users regulated only very superficially.

Initially the interests of the smaller societies seem to have been taken into account through provisions in Article 8(3) and Article 20(5) of the Proposal. These articles liberate the smaller societies³⁶ from the application of certain rules on supervision and on information to be provided in the annual transparency report. But all the other obligations remain unchanged, which appears too demanding for the relevant societies, in particular when considering specific provisions on representation agreements in the field of multi-territorial licensing³⁷, as contained in Title III of the Proposal.

In effect, the obligation of the requesting (the represented, i.e. the original) collecting society to make available the relevant information in accordance with Article 29(3) of the Proposal to the requested (the representing) collecting society is a heavy burden for the former in particular when it is a smaller or a very small society. If it is incapable of fulfilling these strict obligations this could result in the society not being represented at all in the European market with its "*smallest and less popular repertoire*" and therefore it would be totally excluded from the market.³⁸ As a consequence, we think this represents the greatest risk in the weakening of the smaller societies. Therefore, it is not at all clear

³⁴ See Articles 6ff of the Proposal.

³⁵ See Articles 15 and 18 of the Proposal.

³⁶ This concerns collecting societies which on their balance sheet date do not exceed the limits of two of the three following criteria: (a) balance sheet total: EUR 350,000; (b) net turnover: EUR 700,000; (c) average number of employees during the financial year: ten.

³⁷ See Articles 28 and 29 of the Proposal; see also the commentary given by Staats et al. (Nérison 2013: 171).

³⁸ See Article 29(3) and the commentary given by Staats et al. (Nérison 2013: 171).

what the "privileges" granted to the very small societies under Article 8(3) and Article 20(5) of the Proposal really mean.

Last, but not least, the provisions aimed at the cultural aspects are again very strict and restrictive. These concern *"the deductions made for any purpose other than management fees, including those that may be required by national law for the provision of any social, cultural or educational services in the period concerned"*.³⁹ The expression *"that may be required by national law"* signifies the Commission has made a large concession to national laws, without being really convinced of the value of these deductions and, even less, of the necessity to – *horribile dictu* – prescribe them within the European framework.⁴⁰ Nonetheless, those deductions, where they exist, are a characteristic element of the cultural functions of collecting societies, at least on the European continent (Nérisson 2011: 756). It is questionable why Commission did not see a good opportunity here to emphasise and substantiate the contents of the Explanatory Memorandum as well as Recital 2 of the Proposal, namely the cultural role of the collecting societies.

In fact in relation to national practices, the Proposal in contrast intervenes in a rather negative and restrictive manner, as it prescribes⁴¹ that, within relationships between two societies, deductions for any social, cultural or educational services must be governed strictly by express mutual consent.

However we should consider the impact of this on the smaller societies. Their bargaining power has been substantially reduced and their overheads are relatively high yet their own national repertoire is often in a minority position even in their own country. Is it really acceptable that the relevant deductions only apply to the national rightsholders? In many cases obligatory deductions are prescribed by national law and do not apply just to national rightsholders (Austria is a good example here). Could such deductions not form a welcome means of rectifying the im-

³⁹ See Article 16 litt. f); see also Article 7(5) litt. d), Article 11(2), Article 14(1), Article 17 litt. b), Article 19(1) litt. f), Article 20(3) (referring to point 3 of Annex I) and Article 26(2) litt. b) and c) of the Proposal.

⁴⁰ See also the critical remarks made by Staats et al. (Nérisson 2013: 162, 164)

⁴¹ See Article 14(1) of the Proposal.

balance between national and international repertoire, as it currently exists in many countries? (Dietz 2010, 2013).

This example demonstrates the Proposal was never intended to ameliorate the financial and cultural position of the collecting societies in the smaller countries. On the contrary, one has the impression that the provisions of its Title II on collecting societies is aimed only at preparing the field for which its Title III on multi-territorial licensing of rights will have to be applied. This appears to be the true objective of the Proposal and in my view, the passing reference to the cultural role of collecting societies⁴² is purely lip service.

5 The frustration of a practical solution

Paradoxically a practical solution for the online use of musical works had already been found by the collecting societies themselves, in the form of the Santiago Agreement (concerning the right of public communication) and the Barcelona Agreement (concerning the mechanical reproduction right) (Heyde 2011: 96; Nérissou 2011: 1009). It could be summarized (Nérissou 2011: 1029) as "*a system where all the societies concerned offered the same and unique repertoire, combining its own repertoire with those of the other contracting societies, forming in this way a one-stop-shop in the sense that one single authorization is necessary to acquire the relevant right for the whole comprehensive repertoire*", and that for use within the whole of the EU (and beyond).

One important element of this solution antagonised the anti-trust lawyers, namely the "*economic residence clause*". This meant territorial exclusivity and demanded that a commercial user only could get a multi-repertoire and multi-territorial license from the society of the country where it was headquartered (Heyde 2011: 97; Nérissou 2011: 1009). Had the EU Commission not rejected this elegant solution on the grounds it violated competition law, it might well have enabled even the smallest societies of the smallest countries to remain within the market for the online exploitation of musical works. In such a situation they

⁴² See footnote 10.

themselves could grant such multi-repertoire and multi-territorial licenses to (probably not that many) commercial users headquartered in their respective country or, at least, the independently fixed price for the use of the repertoire on their own territory could be added to the aggregated tariff of all the societies bound by those agreements. As a consequence, the principle of the *one-stop-shop* was retained for the benefit of the commercial users (Heyde 2011: 97) and this principle was defended by the Commission itself (Nérisson 2011: 951, 1109).

In a world where online exploitation of copyright works is increasing the question has to be raised whether, in political terms, the existence of the small societies from the smaller countries can be guaranteed, especially when considering the protection of cultural diversity. Once more, the Commission, having frustrated and hindered the application of the Santiago and the Barcelona Agreements, is acting contrary to its own commitments, made at a time when it had engaged itself in fighting for the protection of cultural diversity on the international scene.

The Commission's Proposal has not helped, as we have tried to show but, in fact, has weakened or, even contributed to the elimination of, the smaller European societies from the field of the most promising sector for the exploitation of copyright works in the future.

6 Conclusion

So many voices have been raised against the Proposal for a Directive on Collecting Societies of July 11, 2012. It is time for the Commission to think again and to be made aware that its position has become untenable, because of the politically and democratically intolerable manner it ignored the will of the European Parliament. Consequently, we hope that the legislators, the Council and the Parliament reject this proposal, in its current version. From the point of view of the protection of cultural diversity it represents a substantial missed opportunity.

7 Postscript

In the intervening time between first presenting this paper in Vienna and publishing it now, a whole series of substantial amendments to the original directive have been drafted and discussed by several bodies, leading to the final adoption, in February 2014, of the "Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market" (Directive 2014/26/EU of 26 February 2014, OJ L 84/72 of 20 March 2014)., One can argue that many of the criticisms of the original Proposal have been taken account of in the final text of the final directive. Indeed, for example, it is now more positive about cultural and social deductions, especially those required by national laws. It also explicitly sets out the information obligations of users as well as eliminating the small societies exceptions, the meaning of which is not yet very clear. Nevertheless I fear the main question on how far European cultural diversity in all its dimensions can be secured and maintained within the whole system of multi-territorial online licenses, remains very much unanswered.

8 References

Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht (2013) "Stellungnahme zum Vorschlag einer Richtlinie des Europäischen Parlaments und des Rates über die kollektive Wahrnehmung von Urheber- und verwandten Schutzrechten und die Vergabe von Mehrgebietslizenzen für die Online-Nutzung von Rechten an Musikwerken im Binnenmarkt – COM (2012) 372 –2012/0180 (COD)", *Gewerblicher Rechtsschutz und Urheberrecht*, vol. 115, no. 2, pp. 155-156.

Dietz, A. (1978) *Copyright Law in the European Community. A comparative investigation of national copyright legislation, with special reference to the provisions of the treaty establishing the European Economic Community*, Sijthoff & Noordhoff, Alphen aan den Rijn.

Dietz, A. (2002) "Legal Regulation of Collective Management of Copyright (Collecting Societies law) in Western and Eastern Europe", *Journal of the Copyright Society of the USA*, vol. 94, no. 4, pp. 897-916.

- Dietz, A. (2003) "Die fünf Säulen des Urheberrechts und ihre Gefährdungen", in Musik hat ihren Wert. 100 Jahre musikalische Verwertungsgesellschaft in Deutschland, ed. A. Dümling, ConBrio, Regensburg 2003, pp. 336ff.
- Dietz, A. (2004) "European Parliament versus Commission: How to Deal with Collecting Societies?", International Review of Intellectual Property and Competition Law, vol. 35 no. 7, pp. 809-820.
- Dietz, A. (2005) "The Place of Copyright Law within the Hierarchy of Norms: the Constitutional Issue. Constitutional and Quasi-Constitutional Clauses for Justification of Authors' Rights (Copyright) - from Past to Future", in conference proceedings of ALAI Congress, Exploring the Sources of Copyright, September 18-21, 2005, Paris, p. 55ff.
- Dietz, A. (2006) "Verfassungsklauseln und Quasi-Verfassungsklauseln zur Rechtfertigung des Urheberrechts – gestern, heute und morgen", Gewerblicher Rechtsschutz und Urheberrecht International, no. 1/2006, pp. 1-8.
- Dietz, A. (2008) "Der Einbruch der kulturellen Vielfalt ins Urheberrecht", in Das Recht und seine historischen Grundlagen. Festschrift für Elmar Wadler zum 70. Geburtstag, eds. T. J. Chiusi, Th. Gergen & H. Jung., Duncker & Humblot, Berlin, pp. 91-110.
- Dietz, A. (2010) "Cultural Functions of Collecting Societies", in Japanese and English by Geidankyo (Japan Council for Performers' Organizations), Tokyo.
- Dietz, A. (2012) "Comparative Analysis of the Polish Law on Collecting Societies after the 2010 Copyright Reform", Revue internationale du droit d'auteur, no. 233 (July 2012), pp. 38-101.
- Dietz, A. (2013) "Cultural Functions of Collecting Societies, contribution to a study on collecting societies", a preliminary version is at http://www.ip.mpg.de/shared/data/pdf/2_dietz_-_cultural_functions.pdf
- Drexler, J., Nérison, S., Trumpke, F., & Hilty, R. M. (2013) Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012), Munich.
- EU Commission (2005) Proposal for a Council Decision on the conclusion of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 21 Dec. 2005, COM(2005) 678 final, Doc. 2005/0268 (CNS).
- EU Commission (2012) Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market", of July 11, 2012, COM(2012) 372 final, 2012/0180(COD)

EU Council (2006) Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2006/515/EC), OJ EU no. L 201/15 of July 25, 2006.

EU Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ EC no. L 167 of 22 June 2001.

EU Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376 of 27 Dec. 2006.

Gräfin Grote, S. (2012) *Europäische Perspektiven der Rechtswahrnehmung durch Verwertungsgesellschaften*, Nomos, Baden-Baden.

Heine, R. & Eisenberg, S. (2009) "Verwertungsgesellschaften im Binnenmarkt. Die kollektive Wahrnehmung von Urheberrechten nach der Dienstleistungsrichtlinie", *Gewerblicher Rechtsschutz und Urheberrecht International*, no. 4/2009, pp. 277-282.

Heyde, J. (2011) *Die grenzüberschreitende Lizenzierung von Online-Musikrechten in Europa*, Nomos, Baden-Baden.

Nérisson, S. (2011) *La légitimité de la gestion collective des droits des auteurs en France et en Allemagne*, PhD thesis, Paris and Berlin.

Nérisson, S. (2013) "Europäischer Rechtsrahmen für Verwertungsgesellschaften: Die hochfliegenden Pläne der Europäischen Kommission in ihrem Richtlinienvorschlag – Ein Beitrag aus der Wissenschaft", *Zeitschrift für Urheber- und Medienrecht*, vol. 57, no. 3, pp. 185-191.

Scholz, M.P. (2011) "Dienstleistungsrichtlinie und Verwertungsgesellschaften – Kann die Dienstleistungsrichtlinie das nationale Monopol der Verwertungsgesellschaften aushebeln?", *medien und recht*, no. 2/2011, pp. 73-79.
