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20 THESES OF MUSIC COLLECTING SOCIETIES AND CREATIVE COMMONS

Abstract

Music collecting societies have been considered to benefit society by lowering transaction costs between music users and copyright holders. The benefit has justified societies to legally act in ways that otherwise would be deemed anticompetitive and thus illegal. Creative Commons is an innovative open content licensing system that has emerged in last four years.

Creative Commons has several obstacles to overcome before its acceptance to current collective copyright management system. The biggest challenge is to make licenses precise and internationally compatible. This is needed for automated licensing of collecting societies. Collective societies have also defended their current position by saying that individual- and collective licensing are not interoperable. The success of the Creative Commons licenses brings about questions of the validity and state of current collective copyright management.

As a solution for adoption of open content to collective licensing, this paper suggests three alternative options. Firstly, the voluntary changes to collecting societies' policies or governmental intervention with regulation or possibility for authors to get unused rights back from the rights holders. Secondly, technology that enables the building of universal copyright registry where right holders could set licensing terms to each of their works individually. Copyright societies' role would be to manage the database, collect the license fees and enforce the licenses. The proposed system would foster healthy competition among music producers and right holders sovereignty. Or thirdly the authors could get back their rights that have not been used in commercial activity.

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1 Introduction

Licensing of literary and artistic works is a complex task. Individual authors haven't traditionally handled copyright management, except for some computer hobbyists. Publishers and collecting societies have helped authors to take care of the licensing and the collection of license fees.²

Because of historical, legal, economic and cultural diversity among countries, regulation of collecting societies and the markets where they act vary from one country to another. The underlying idea of collective copyright management is widely shared and collecting societies have a key role in all developed countries. They negotiate and collect license fees for public performance and copying of music, distribute collected royalties among their members and act as an interest group that enforces and lobbies their member's interests.

In Europe authors and right holders are obliged to transfer ownership in all of their present and future copyrights all of their works to a collecting society when they join it. In this case United States and Canada have less restricting rules. Right holders maintain their rights simultaneously with collecting societies. Most of the observations made later

² Authors have a lot better bargaining power with publishers than with collecting societies. Open content publishing has seen few successful titles like award-winning Sci-fi author and copyright activist Cory Doctorow's first novel "Down and out in magic kingdom". The book was downloaded over 20,000 times, 24 hours after launching the site: <http://www.craphound.com/download/> from where the novel is available for downloading for free. Lawrence Lessig's "Free culture" has sold several printed editions, albeit the books are available online for free. Later on this article concentrates only to music collecting societies.

on in this paper apply to all collecting societies but this article concentrates on the legal challenges of European style system, where all rights are administered by collecting society.

At the same time Open Content³ licenses, that broaden users' rights from copyrights all rights reserved default, have won ground. One of the most prominent open content license authority Creative Commons has defined its mission: "to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules." While Creative Commons licenses have grabbed mostly the attention of amateur creators and academia⁴, most of European collective society's rules don't allow their members to use them.

The first part of the paper describes collecting societies, their rules, and economic rationale. It also introduces Creative Commons licensing system's background, goals and ideology. The second part of the paper describes some of the major obstacles Creative Commons licenses have with collective societies. It answers the questions: Are there any reasons why collecting societies couldn't accept Creative Commons licensed works as part of their catalogue? What could collecting societies benefit from lessons learned with Creative Commons? The final part concludes by examining some of the alternatives for combining royalty collecting and Creative Commons licensing.

³ Wikipedia defines open content as: "any kind of creative work including articles, pictures, audio, and video that is published in a format that explicitly allows the copying of the information."
http://en.wikipedia.org/wiki/Open_content

⁴ Some companies have come up with new publishing business models that are based on open content licensing.

1.1 Collecting societies

Individual management of copyrights would be extremely costly for users and inefficient to generate significant revenues for right holders. Generally transaction costs for use of work in individual management would be greater than the value of the right in question. Collective management is justified as efficient mechanism to minimise transaction costs of searching and contracting between intermediary distributors like iTunes or BBC and copyright holders. Collecting societies generally benefit copyright owners, users and society at large more than if licensing would be done individually. Collective administration spreads the cost of administration over all members of collecting society. The collective management of rights is not a goal in itself. It is a way to manage rights among others, i.e. mainly a service supplied to the right holders and a benefit for users.

Collecting societies are collective managers of authors' copyrights. Most of them are organized as associations or societies. Collecting societies need a mandate from the members to license their works for users in predefined terms. The content of the mandate is decided among the members and if voted, decided by the majority rules. Society's terms are imposed on every member.

The strong role of collecting societies as the protectors of authors' interests has been easy to defend in the past. Collecting societies are a parallel phenomenon to labour trade agreements and labour unions. Their ratio has been to create balance, cut extravagant and exploitative licensing clauses and lower transaction costs. The era of vast trade unions has been replaced by a world of outsourcing and flexible work force. Collecting societies can be seen as relics from the bygone days of strong industry cartels. Today the transaction costs have been emphasised. In many cases the law requires efficient administration of rights in order to obtain authorisation for the society. This has excluded authorisation of competing collecting societies. In Europe

monopoly positions of collecting societies are rather the rule than the exception. It has also led to a situation where authors can't choose competing society if they don't like the terms of the membership.

After a member joins and transfers all rights, collecting society has exclusive right to 1) transfer non-exclusive rights for the use of works; 2) collect authors' royalties 3) distribute collected royalties to authors; and 4) enter into reciprocal arrangements with foreign collecting societies to collect and distribute local royalties to foreign rights holders and to receive and distribute royalties collected abroad to local rights holders 5) enforce authors' rights before courts. Societies' operating cost is covered by administrative overheads that are subtracted before the royalties are distributed. This administrative overhead is typically some where between 12-20 percent.

Music industry is one of the few industries where a legal horizontal venture of producers (i.e. cartel) exists and there is virtually no price competition among producers as producers have usually only one common sales agency selling their licenses. In general, each national collecting society for authors' rights enjoys *de jure* and *de facto* monopoly in its territory,⁵ where practically all significant composers' and songwriters' are members of the organization.⁶

Collecting societies sell *blanket licences*, which authorise copyright users to use for a specific period of time all works for which the licensing body is representing (and sometimes other too). Such a licence might for example provide a broadcaster with a single annual authorisation encompassing many thousands of songs owned by thousands of composers, lyricists and publishers. 'Blanket licensing' reduces the cost to consumers, with users paying a single fee for access to the whole of a society's repertoire.

⁵ European p. 7.

⁶ Vinje, Paemen, Romelsjö p. 16

Collecting societies also sell *individual licenses* for users that distribute copies of copyrighted music. Downloads have typically one price and license fees are collected according to the download reports provided by websites. One-stop shop eliminates high transaction costs of clearing rights with every individual author, publisher, composer, lyricist, artist, performer and record company.

Collecting societies' status is usually tied to copyright laws. Sometimes law can broaden rights of collecting society from purely contractual limits. In Scandinavia collecting societies have also right to grant licenses for music of non-member artists. This is unless the copyright holder has specifically forbidden the collection of royalties with specifically designed form. Non-members have to apply for their royalties from collecting societies while members receive their payments automatically. Collecting societies collect the non-member royalties only from radio and TV broadcasters that for example in Finland are around 60% percent of all the collected license fees. In this way the members are in better situation because they are also entitled to royalties collected from users that are not broadcasting to the public like live music played at concerts and background music played in bars.

1.2 Creative Commons

A non-profit organization Creative Commons was started in 2001 as an initiative to standardize open content licensing terms. Creative Commons has produced a set of open content licenses and web interface that allows content producers to tailor copyright licenses that give away some of the exclusive rights that come by default with copyright. Version 1.0 of Creative Commons' core licensing suite was launched in December 2002 and by August 2005 CC licenses have reached license version number 2.5.

Creative Commons has 6 basic licenses and few customized licenses that allow specific

uses use such as sampling. All Creative Commons licenses are royalty free⁷ and require attribution. The website enables creators to choose a license that is suitable for specified need and produces accordingly a suitable license. Creators can choose from three license options: (1) whether others may make commercial use of their work; (2) whether others may make derivatives works based on the work; and, (3) if derivative use is allowed, whether others must license the derivative use on the same terms (share alike).

With this website and licenses Creative Commons provides right holders legal and technological tools to structure their private rights into limited public goods. The licenses allow free copying and performing for certain uses, consistent with the creator's specific intent. The licenses come also in computer readable form. Yahoo! has developed a Creative Commons-specific search engine and currently reports over 17 million link backs to the licenses.⁸ The works licensed are ranging from violin music to movie trailers and from MIT courses of electronic engineering to photographs of dead people.

⁷ Although all the licenses are royalty free, it doesn't mean that all uses are royalty free. The rights that are reserved by rights owner can be subject to for example statutory royalty collection.

⁸ Creative Commons comments to WIPO online forum June 7, 2005, p. 1.
http://www.wipo.int/roller/comments/ipisforum/Weblog/theme_two_the_intellectual_property

2 Collecting societies and Creative Commons

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

Marc Guez, Managing Director of SSCP
French collecting society of record companies.⁹

2.1 Challenges of Creative Commons and collective societies

While Creative Commons has enabled creators to tailor copyright licenses, they are not compatible with collecting societies' systems. Incompatibilities can be divided to two groups (1) problems with CC license texts and the licensing system (2) general problems related of combining individual and collective administration of copyrights.

2.1.1 Interpretation of CC licenses is not automatic

Collecting societies work is based on automated work. Collecting societies are used to sell licenses from barber shops to girl scouts singing song at camp fire. Licenses are required for all use not covered by copyright restrictions, like fair use and first sales doctrines.

All of the Creative Commons licenses grant royalty free permission to copy and perform the work for non commercial use. Creators

can choose to reserve the rights for commercial use:

You may not exercise any of the rights ... in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation.

Clause 4c of Attribution-Non-Commercial-ShareAlike 2.5 license

Unlike the rest of the CC license clauses, the non-commercial license clause isn't derived from copyright system and it is open to interpretation. The interpretation is not tied to international copyright system but to legal systems, individual cases and circumstance around them. Pawlo (2004) has concluded that the non-commercial clause may have different meanings in different cases when interpreting the same license.¹⁰

The problems rise when collecting society has to enforce right holders right to collect royalties. Users and collecting society has to make a decision whether the use of a work is commercial in a way described in Creative Commons license. In most cases making such decision is trivial but generally it requires decisions based on individual circumstances. Copyright societies are based to highly automated mass licensing. Changing system for Creative Commons would require manual labour which means higher administrative overheads and smaller royalties to artists. Why is this? The CC public licenses act as an estoppel document. The licensee can claim that the non-commercial use is covered under the license and refuse to pay for the license. If the collecting society has the information about the artist using the CC public license, is it obliged to share it with a potential licensee? The answer should be yes. The main task of collecting societies is to take care of the licensing for the right owner. If the right owner has decided that the content should be licensed with royalty free to some uses, then the collecting society has to respect that. This

⁹ Hearing on collecting societies European Parliament 7.10.2003
<http://www.europarl.eu.int/hearings/20031007/juri/guez.pdf>

¹⁰ What is the Meaning of Non-Commercial? Mikael Pawlo, in a book "International Commons at the Digital Age", p. 79.

means that collecting societies have to explain that the work is under CC and that certain use of it is royalty free. They would also have to make a decision whether the use is something that would require a license from the collecting society.

Around two thirds¹¹ of the content licensed with CC license has a non-commercial clause. Collective system relies on automated licensing practise which guarantees low administrative overheads. Collecting societies can't investigate and enforce licensing terms that are open to interpretations, require judgement and discriminate against a field of endeavour.

2.1.2 Diverse license terms make licensing and enforcement complex

Creative Commons offers 6 main licenses and four special licenses. 21 countries have adapted licenses to their legal system. There are over 40 countries that are localising licenses and over hundred official Creative Commons licenses. According to Creative Commons the number is to double in a year. While most of these licenses seem as interoperable and have similar license terms some of them have clauses that cant be found in other licenses.

CC licenses don't have rules for international license selection. Or as Creative Commons states on their website "Our current licenses are jurisdiction-agnostic: they do not mention any particular jurisdiction's laws or statutes or contain any sort of choice-of-law provision."¹² Unlike the rest of the licenses the "sharealike" licenses have clauses allowing mixing of international licenses that have the same license elements.

¹¹ 25.2.2005 out of 10 million licensed works 72% had NonCommercial element: Attribution – NonCommercial 7%, Attribution – NonCommercial – NoDerivatives 28% and Attribution – NonCommercial – ShareAlike 37%.

<http://creativecommons.org/weblog/entry/5293>

¹² <http://creativecommons.org/worldwide/>

You may distribute, publicly display, publicly perform, or publicly digitally perform a Derivative Work only under the terms of this License, a later version of this License with the same License Elements as this License, or a Creative Commons iCommons license that contains the same License Elements as this License (e.g. Attribution-ShareAlike 2.5 Japan).

Attribution-NonCommercial-ShareAlike 2.5
Clause 4b

The rest of the licenses don't mention the possibility of international license replacement. The rationale of international license adaptation was to adapt the licenses to suit the needs of local legal systems and to make them easier to understand. It seems the objective would require use of interchangeable licenses. This is not the fact though. One can only come to an interpretation that all the licenses are separate and non interchangeable unless otherwise noted. This means that a Finnish court can't use Finnish version of the license for interpretation if the original work is licensed with French license. It will be demanding task for courts to enforce the licenses according to international private law. Collecting societies simply can't manage such task where they would have to manage content licensed with over 100 individual licenses.

2.1.3 Right holders aren't informed to make their decisions

"No one should let artists give up their rights"
Andy Frazer songwriter of "All Right Now"¹³

The collecting society lawyers have heavily criticised Creative Commons website and licensing procedure.¹⁴ CC web service enables copyright holders to let go their rights with few mouse clicks. Licenses can be only be revoked if the licensee is breaching the

¹³ Reuters 2005.

¹⁴ Péter Benjamin Tóth; Creative Humbug
http://www.indicare.org/tiki-read_article.php?articleId=118

license. In such case the license is terminated only for the licensee. Choose License web page has as a default rule of the most liberal license that reserves only the right for attribution. The choose license web page doesn't advise the licensor of the restrictions that using CC license has nor does it have any information of the possible incompatibility of CC licenses and collecting societies.

The choose license web page also fails to inform creators clearly enough that CC licenses are royalty free and offer no remuneration through collecting societies, run for the entire duration of copyright of the work, apply to the whole world and cannot be revoked. The commons deed, which is a "human readable" expression of some of the key terms of the license, is designed for the users of the work. Most of the information is available behind a link of the legal code that Creative Commons calls "lawyer-readable".

Creative Commons has tried to clarify and facilitate the license acceptance with collecting society by adding clauses that clear the use of statutory royalties and collective licensing organizations with licenses that permit only non-commercial use. This doesn't fix the problems that collecting societies have with the licenses. It can merely mislead the authors to believe that they have opportunity to use the services of collecting societies while this is not the case. Some of the European projects like CC-France have left the collecting society clause out from its licenses. This is because it isn't possible for users of the CC licenses to collect royalties from collecting societies.

Even if the licensor decides to change her mind, the courts have seen that licenses that are compared to gifts that can't be revoked once they are available to public. In *Hadady Corp. v. Dean Witter Reynolds, Inc* court decided that: "abandonment of copyright can occur regardless of owner's intent to preserve copyright".¹⁵ From collecting society's point

artist using a public license that allows commercial use is a similar act, than letting major part of the rights pass to public domain. Creative Commons licenses can be viewed effectively as a restricted abandonment of some of the copyrights where right holder gives up with a license a limited group of rights to the benefit of public at large.

2.1.4 The scope of CC licenses is not clear

All the Creative Commons licenses fail to accurately define what is being licensed. CC licenses define work as:

"work means the copyrightable work of authorship offered under the terms of this License."

First the copyrightable works vary from country to country. The scope of copyright is defined in different ways in different countries, which may lead to different outcome of legal disputes even if the basic principles are harmonized by the Berne and WTO conventions. In US there is very limited copyright protection for artists' right to performance or so called neighbouring rights like e.g. performers' rights. In most of European countries the performance is also protected by similar rights under copyright law and performers have their own copyright societies. Same applies to protection of databases. In Europe databases enjoy *sui generis* protection typically under copyright law. Databases are not copyrightable works in USA.

Secondly the rights offered are not defined. For example if a concert recording is licensed with Creative Commons license it is unclear whether the license applies to lyrics, underlying composition, performance, video, background art or all of them? These problems occur because of the mass market nature of the licenses. The licenses are predefined and they offer only limited options for defining the scope of the licenses. Making individual changes to the licenses is against the whole

¹⁵ See: *Hadady Corp. v. Dean Witter Reynolds, Inc.*, 739 F. supp. 1392 (C.D. Cal. 1990)

idea of standardisation of open content licenses. Altering the licenses and calling them Creative Commons licenses breaches the trademark owned by Creative Commons.¹⁶

8e “*This License constitutes the entire agreement between the parties with respect to the Work licensed here. There are no understandings, agreements or representations with respect to the Work not specified here.*”

The licenses have a requirement to “keep intact all copyright notices for the Work” and to provide link that refers to “the copyright notice or licensing information”. The link can be to Creative Commons web site where the official licenses are posted or link can point to the right holder’s web page where additional information is provided. Having separate license information that can be changed by the licensor goes against the idea of perpetual, non revocable license. Licensor can alter the copyright information and it will up to licensee to prove the existence of license and its scope if an infringement claim is later made.

2.1.5 Higher administration costs

Most of the copyright societies in Europe are run by author/composer members. Right to vote is given only to members who receive enough royalties. It can be hard to convince them of the benefits of Creative Commons and free competition. Creative Commons artist don’t necessary generate income but require updates to administration systems and manual work. There is a risk that CC is perceived as a *burden and useless expenditure* to revenue generating right holders. Getting voting members’ approval for policy changes that decrease royalties or even getting the matter to agenda might turn out to be impossible.

Because of the recent mergers of the media industry, broadcast and record industry is

concentrated to the hands of few companies. If there are no benefits, but rather higher administration, there is a risk that biggest names and users may start their own collecting body that serves them better. New exclusive copyright society could cover the majority of music played on commercial radio and TV. This, in fact, was the motivation for the formation of BMI. 1941 American broadcast companies started their own collecting society after a dispute with artist run society. If the individual licensing doesn’t benefit all the players, it may end up harming small creators.

2.1.6 License collisions

In Scandinavia and in most of other European countries copyright societies administer exclusively all their members rights. Copyright holder has to transfer all the rights to collecting society at the beginning of the membership. This means that a member composer has to get license from collecting society to be able to even use her own work. Currently users can’t rely on the license granted by the author, because they have no way of knowing if the right holder is part of collecting society.

USA has different situation. Societies don’t have an exclusive right to license their members’ works. Right holders obtain a power to grant individual licenses to users. Right holders in USA can use Creative Commons licenses and reciprocity treaties oblige European collecting societies to enforce and license sister organizations members’ rights. This leads to a situation where licensees can claim to have a license granted by right owner while collecting society has no way of knowing this.

The problems related to the collisions could be solved by registry operated by collecting societies. The registry would include global licensing information of members of collecting societies. It could also have a guaranty funktion of the authenticity of CC licensed works and of the will of the right holder.

¹⁶ See Välimäki & Hietanen discussing license changes. p. 174.

2.1.7 Transformation has to be global

Most of the collecting societies have reciprocal contracts that enables them to collect royalties for artist that are members of their sister organizations. Getting the system to work requires a global change. It would not just require the policy change of collecting societies who are representing composers but also ones that are representing lyricist and performers and producers.

The change is possible because the international conventions regulate collecting societies very loosely. Collecting societies are collecting among others broadcasting royalties granted according 11bis(2)¹⁷ of the Berne Convention.¹⁸ 11bis (2) clause allows countries to grant broadcasters a statutory license to use copyrighted material, rather than permitting the author to grant or deny the license. The convention doesn't limit the permission. Creating a prerequisite for the use of limited public domain dedication could open a door for Creative Commons use.

2.1.8 One-stop shop is not for cherry picking

Collecting societies have one-stop shop policy. Users who need a license can depend that collecting society can provide them with a license on predefined terms. Having a set of different licenses and exemptions would ruin the collective system. The European court of justice stated that there must be: "A balance between the requirement of maximum freedom for authors, composers, and publishers to

¹⁷ (2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed.

¹⁸ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, 1161 U.N.T.S. 3.

dispose of their works and that of the effective management of their rights by an undertaking which in practice they avoid joining."¹⁹ This balance can't be managed if members are allowed to pick all the lucrative licensing deals and leave the rest to collecting societies.

Societies can't limit individual licensing just to one group i.e. users of Creative Commons licenses. Opening individual licensing flood gate would change the very nature of collective licensing. It might lead to a situation that economist call "negative choice". Artist that have lucrative royalties would license and collect the deals them self leaving less productive song into hands of collecting societies. Societies would collect fewer royalties and their overheads thus would grow. This would make the societies even less appealing and more authors would handle licensing and collecting them selves. Also the interests of users could be harmed because of the fragmentation of the field.

2.1.9 Creative Commons doesn't benefit big music licensees

Radios and TV-channels are among mass users of copyrighted works. They negotiate blanket licenses for their use of works. Companies get billed usually certain percent of their profits. They are also obliged to report the use of licensed music to collecting societies. These reports enable rightful distribution of royalties to right holders.

Non-commercial license has a twisted impact mostly to public government funded broadcasters. The artists that use Non-commercial licenses could be blocked from collecting royalties for public radio performances, because of the non-commercial nature of these users. Public radios for their part are required to pay license fees even if they play Creative Commons licensed works because of the nature of the annual blanket

¹⁹ ECR 127/73 Belgische Radio en Televisie v SV SABAM and NV Fonior, 8 paragraph.

licenses they have. If the royalty free Creative Commons music starts to form a measurable part of music played, it should be accounted in the license fees.

Introducing Creative Commons licensed music to collecting societies would make a difference unless the users could get discounts for royalty free music they play. This could be implemented by creating new license fee categories for free music. For example radio channel could get its annual license 20 percent cheaper if minimum of 10 percent of its music would be Creative Commons licensed. Having such regulation on content is reality for example in France where certain percent of music must be domestic.

Radio stations are not only at the paying side of the music equation. Record companies are also paying radio stations to play their artist's music. This "payola" institution benefits radio stations and introducing new free Internet based marketing channels could hurt payola institution and radio stations' incomes.²⁰ Thus radio stations might see Creative Commons as a competition.

2.1.10 Collecting societies need to keep their status

Cartel can be defined as a group of producers involved with each other for the purpose of controlling production, distribution and price. Collecting societies are one of the few remaining legal cartels in western legal systems. They are a horizontal ventures of copyright holders; a common sales agency that is selling with one preset price. This is tolerated by governments because of the benefits. Introducing cross border competition among societies has met fierce opposition among the societies in EU.

Collecting societies don't have reason to give up their cartel. Their role is to negotiate best

possible contract for their members. The joint administration of copyrights by collecting societies can be seen as a counterweight to the market power of users of works. The mergers that have led to concentration of media industry emphasise this need for stronger collective societies who will negotiate balanced deals with users. Question arises whether small song writers and performers need organization to negotiate with powerful collecting societies.

2.2 10 lessons for music collecting societies from Creative Commons

2.2.1 Technology has changed the economics

Originally copyright was individual and exclusive right of the author. Collective licensing is compromise because of the technology. Many natural monopolies have had to change because of technology: Long distance land lines are replaced by satellites and long distance calls are almost replaced by mobile phones and voice over IP telephony. Consumers have benefited from the changes and services.

Old corporate giants that could not transform their businesses to changing environments have been bought off by new innovative companies.²¹ Record companies have struggled to make the change along with collecting societies. Software industry has had to adapt to the open source movement and big corporate giants like IBM have learnt to benefit from the new opportunities of open source licensing and of the community around it.

²⁰ See the analysis of Payola DEMISE OF COPYRIGHT pp. 49-61.

²¹ AT&T was acquired by Cingular wireless that was a wireless spin off originally owned by AT&T.

2.2.2 “Copyright licensing is hard”- argument is dead!

Denying right holders their right to dispose of their own property is like saying “investing in to stock market is hard. We won’t let you do it. Writing a copyright license is hard and requires costly expertise. Creative Commons has showed that tailoring a license with the help of a web service can be nearly automated. If the flaws of the licenses are fixed and further options added, the system could serve as general purpose online licensing machine.

2.2.3 Licensing needs to be automated

Collecting societies’ reluctance to act as administrative intermediaries for Creative Commons right holders has opened a business window for new Internet based companies. Record companies like Magnatune who operate purely online have found their place in music business. Magnatune makes its repertoire available with non-commercial CC licenses. The artists and the record company make their money by selling high quality downloads, commercial licenses and CDs. Magnatune has 190 artists and almost 5000 songs in their repertoire.²² Magnatune shares half of its income with artists. Even with the administrative overhead over 30% higher than with collecting society, the artists are well off. The average annual royalty income of the Magnatune artists are similar (about 1500 \$, Buckman 2004) than for average royalty income (900€ Teosto 2004) of member of Finnish collecting society.

Magnatune has managed to create a truly one-stop shop where licensing is made as easy as it can be. Licensees can listen to the music before they make up their mind, buy licenses instantaneously online and download high quality music in from the site. The service is available globally and round the clock.

²² <http://magnatune.com/info/stats/>

2.2.4 Competition with illegal downloads

Reducing prices and streamlining operations can help music producers to compete with free illegal downloads. Using legal download to lure customers back from darknets is way to get them exposed with services approved by right holders. Having legal music websites that have some rights reserved music that has rights clearly stated can also help to educate users to acknowledge the copyrights involved in music.

EUCD (55) is urging copyright holders to label their digital works. This has nothing to do with digital restrictions or DRM. Creative Commons is educating public to respect copyrights.

2.2.5 Authors can do some of the licensing more effectively

Monopoly doesn’t in principle pose a problem for competition, provided that they do not impose unreasonable restrictions on their members or on access to rights by prospective clients. Transferring all rights exclusively to collecting societies limits right holders’ ability to use and invest their intellectual property. Paternalistic attitude toward right holders doesn’t take into account their different motives. Some times the right holders can make better deals with users by individually licensing the rights. This model has worked in USA where right holders get to simultaneously keep their rights while they are members of collecting society. American system has not diluted collecting societies’ ability to work and it has ensured right holders’ ability to invest their intellectual property the way they see fit.

European Court of Justice concluded in it’s SABAM case: “the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of article 86 imposes on its members obligations which are not absolutely

necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse.”²³ This case might be a major precedent to test the collecting societies' right to limit competition and free flow of creative works of its members.

1995 the British pop group U2 and their publisher demanded the right to administer their live concerts themselves, which PRS (The Performing Right Society) rejected on the grounds of its statutes. U2 claimed that the assignment of all categories of performing rights was not necessary for PRS's operations and objectives. They also claimed that rights owners obtained more money more quickly when they exercised these rights themselves. British Monopolies and Mergers Commission investigated the claims and its ruling said:

*“We were not persuaded that the PRS's present practice of exclusivity was so essential that no further exceptions could be allowed. Nor were we convinced that any considerable additional costs would necessarily fall on the PRS. If members consider that they can administer live performances themselves at least as effectively as the PRS then they should be free to choose, but should bear any reasonable additional costs caused to the PRS.”*²⁴

First part of deciding about the opening of the collecting societies to Creative Commons licensing should be an economic study which would answer the questions of cost efficiency. What are the economic benefits of CC licensing? Are there benefits to collecting society or just expenses? Who should bear the expenses? By having a fee to cover the expenses of manual work of rights clearing with Creative Commons could reduce the opposition of other members of collecting society.

²³ ECR 127/73 Belgische Radio en Televisie v SV SABAM and NV Fonior, chapter 15.

²⁴ http://www.competition-commission.org.uk/rep_pub/reports/1996/378performing.htm#summary

2.2.6 17 million works can't be wrong

The availability of cheap sophisticated consumer electronics has led to a situation where almost every household has not just means to consume digital content but to produce and refine it by remixing it. The motivations of amateur artists and composers are not always compatible with traditional theories of exclusive rights. Sharing and building on top of others work are just as important values to culture as economic rights. Creative Commons licenses foster these values that the right holders of 17 million works have chosen to support.

The technology is used by the teenagers and young people that are the artist of the future. Finding a path from more free Creative Commons culture to commercial culture is a challenge that collective society has to face in the future. The free and open source movement has shown that there are several functioning economic models to support the development of free software.

Collecting societies are effectively an organization handling the outsourced function of right management. Given that the popularity of Creative Commons is not going a way, the collecting society should find new ways to serve the new customer base. They should move their opposition of digital distribution into creation of new business models that are enabled by them. The up going curve of Creative Commons licensing rate will mean that there is a parallel market forming. The quality and sophistication of content doesn't match the “all rights reserved” market yet, but eventually it might form a considerable competitor. Just like free software has captured some parts of the market from proprietary software, open content will compete and replace some of the commercial content. Supporting this new creativity should be one of the primary tasks of any cultural institution.

2.2.7 CC reserves vital role for collecting society

While Creative Commons licenses are permissive compared to traditional copyright licenses, right holders reserves some rights that may be transferred to societies administration.

It is notable that majority of the Creative Commons licensed works are licensed only for non-commercial use. Commercial use is exclusively reserved by right holder and all the rules governing compulsory license and the authority of collecting society are valid. Below is table showing the tasks that collecting societies would manage and the license they could sell to users if they would adopt Creative Commons licensed content.

Creative Commons version 2.5 Licenses:

License characteristics	Synchronization	Making of derivative works	Reproduction	Public performance
	No license required	No license required	No license required	No license required
 	Seperate license required	Seperate license required	No license required	No license required
  	Seperate license required	Seperate license required	License for commercial purposes	License for commercial purposes
 	License required for commercial use	License for commercial purposes	License for commercial purposes	License for commercial purposes
  	License required for commercial purposes and dual licensing	License required for commercial purposes and dual licensing	License for commercial purposes	License for commercial purposes
 	Possibility of dual licensing	Possibility of dual licensing	No license required	No license required

Explanation of symbols:

 No Derivatives

 Share alike

 Non Commercial

 Attribution

2.2.8 Endorsement is big part of the business

In the world of music being famous and having a fan base relates straight to sales figures and playtime. Creative Commons is a tool for free flow of works. It enables Internet marketing for beginning artists that don't have the resources needed for expensive marketing campaigns. Second use for the licenses is loss leader approach where works that have

past the high point of their product life cycle are reintroduced to public with less restrictive license terms with the hope of rediscovery. In such case the licenses that allow non-commercial use can be used to generate demand for commercial licenses. The demand of the material distributed online could boost the sales of concerts, products sales, sales of commercial licenses and record sales. This way the commercial lifespan of the work would be longer.

In Finland out of 16 110 only 190 artists received more than 20.000 euros royalties from Teosto during the year 2004. At the same time over half of the members didn't receive any royalties.²⁵ The numbers suggest that the biggest part of the members' income must come from somewhere else. The trend is global. The court in *Buffalo Broadcasting v. ASCAP* found that in USA 1979, only 13% of publishers received any television distributions from ASCAP or BMI. Less than 0.8% received more than 75% of all ASCAP and BMI television performance royalties. An inquiry made in the UK by the Monopolies and Mergers Commissions found that in 1993 the highest-earning 1.3 per cent of the Performing Rights Society (PRS) writer members received nearly 41 per cent of the royalty distributions, and the highest-earning 19.5 per cent accounted for some 92 per cent.

Music business is like movie business very much a super star economy. Success is directly related to the amount of advertising is invested to the product. According to MPAA 2004 market statistics average negative costs (like production costs, studio overhead and capitalized interest) for a movie were 63.6 million dollars and average marketing costs of new feature films were 34.35 million dollars.²⁶

It is difficult to argue why a collecting society should paternalistically guard its member of using the Internet as a marketing and distributing medium. Mark Nadel (2004)²⁷ states that "copyright law's prohibition against unauthorized copying and sales may, counter to the law's purported goal, have an overall negative impact on the production and

dissemination of creative content". One may disagree with Nadel's point but it is hard to deny that prohibiting authorised copying has extremely negative effect on our culture.

2.2.9 Legislators demand free markets

As in all intellectual property rights regulation, antitrust and competition law control is present. The control aspect must be taken into account, since collecting societies often act on the basis of monopoly positions. Competition law limits collecting societies' hands. They can't license domestic music with different terms than foreign music. It also means that the fees must be discriminatory for everyone. It doesn't mean that collecting societies couldn't grant free licenses to public at large.

The Santiago Agreement²⁸ was signed by several collecting societies. It provides that users of online services should obtain a license for the music repertoire of all collecting societies participating in the Agreement from the collecting society of their Member State. The license would be valid all over Europe. However, since the Santiago Agreement insists that companies wishing to purchase music rights do so from a collecting society in their own country, the Commission sees that the system is anti-competitive. The European Commission has opened proceedings against sixteen European collecting societies in the field of music copyrights. A company looking to sell music online should be allowed to purchase rights from any licensing body in the EU rather than from only the domestic body that sells rights. The opening of proceedings against European collecting societies on the subject of the Santiago Agreement is another measure of the European Commission to break down the monopolies of national collecting societies and to create competition in the field of

²⁵ Annual report of Teosto 2004, p. 9.

²⁶ MPAA 2004 market statistics pp. 17-21.

²⁷ Nadel contends that the prohibition against unauthorized copying may actually reduce the production of new works. "This arises because of the development of new technologies and the emergence of many, if not most, current media markets as lottery-like, "winner-take-all" markets, where promotional efforts may be more important than content." p. 789-790.

²⁸ COMP/38.126 - GEMA + SACEM + 9

http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_76.html#i38_126

collective management of copyrights. The Commission also considers that online-related activities must be accompanied by an increasing freedom of choice by consumers and commercial users throughout Europe as regards their service providers, such as to achieve a genuine European single market. If the true European “one stop shop” would be implemented, the collecting societies could compete with online licensing terms and policies. The lack of competition between national collecting societies in Europe is one reason of unjustified inefficiencies as regards the offer of online music services.

2.2.10 CC will eat its way out

US and Canadian authors don't transfer away their rights to collecting society. They reserve the right to individually license their works. Some of the major artists have used Creative Commons licenses to distribute their songs. On Wired CD some big names like Beastie Boys, David Byrne, Chuck D and Gilberto Gil used CC sampling license to allow public to remix their songs. Sampling is an activity normally covered under copyright and thus under collecting society's mandate. In this case samplers have a royalty free license granted by right holders but collecting society might not have this information.

Societies have to deal with CC music in one point. They can not turn down new artist with cc licensed material. This material will be part of their catalogue. Creative Commons licenses are perpetual for the duration of copyright in the work. Author, copyright holder or collecting society can't revoke the license. Eventually collection society will have Creative Commons content in their catalogue, which can be used with CC licenses or with the terms that the society poses. If the user has a CC-licensed copy of the work he can use it according to the license terms. Collecting society can also distribute the work with more restricting license.

Right holder can always resign, license and rejoin. Societies can't pose quarantine periods after member withdrawal. The Court, in BRT/SABAM II, stated that "a compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal"²⁹ The requirement of resignation and rejoining seems to be unfair condition and at least a non-economic way to administer rights.

As mentioned before some of the European countries have given collecting societies authority to collect limited royalties also for non-members. If they want to relinquish the royalties, they have to do it in a written form to a collecting society. This might lead to a situation where royalties are collected against Creative Commons license agreement unless right holder signs special form with all collecting societies. But then again this could mean that collecting societies would have to collect some specified royalties for those non-members using Creative Commons licenses. It also means that non-member CC licenses users are entitled for royalties collected by the societies.

²⁹ BRT/SABAM II, [1973] ECR 313, paragraph 12.

3 Conclusion

The changed needs of creators of copyrighted works call for changes in the ways we administer copyrights. By limiting their clients licensing power, collecting societies are using their legal cartel position in a way that may require action from legislator. The role of the collecting societies must be reconsidered. The paper has lead us to the practical question of how could one apply more liberal licenses such as Creative Commons to works governed by collecting societies.

3.1 *Solutions for copyright societies to adopt open content*

First option would be for publishers and collecting societies to change their policies. The policy change would require a thorough economic research of the benefits and cost of allowing member to use Creative Commons licensing.

If the societies would change their position they could create services for open content licensors and users. They could provide to register the Creative Commons works and provide a verification server for checking that content is legally licensed. The register would enable to verify right holder's permission. Users would also get used to legal metadata and get educated to respect copyrights. Verification server could also include pricing information of the commercial rights, peer evaluation of the music, recommendations links to similar music and an ecommerce site where commercial rights would be for sale.

“Landes and Posner [2003] argue the case for an indefinite but renewable copyright term. As they point out, a system for renewals would require the government to maintain an upto-date copyright registry. Since copyright registration is not currently required of

authors, it can be very costly to locate the legal holders of a copyright. The availability of a registry would dramatically reduce the transactions costs of licensing. Surely a registration requirement is a minor burden on authors in exchange for a likely very substantial benefit to those who seek to republish that author's work. Given today's technology, the creation of a "universal" copyright registry, perhaps in exchange for some incremental benefits to authors, would be highly attractive.³⁰

Second option would be to force policy reforms on collecting societies. Forcing copyright societies to allow right holders to decide of licensing their content to free distribution would serve the general ratio of copyright protection. This could help to solve central problem in copyright law; correcting the balance between public access and authors' incentives.³¹ Free distribution could be justified by right holders sovereignty and the effect to competition. The public could have limited free access to works and right holders would still get compensation for commercial use of works. After saying this, it should be emphasised that the final decision of letting the works to free distribution should lie on the rights owner.

Third option would be to develop the copyright law in a way that the author can get his copyright back in limited cases for re-licensing under reasonable circumstances. Germany has recently enacted a law on copyright contracts with an intention to balance the negotiation power between individual authors and publishers.³² Under certain conditions, it is even possible for an author to terminate the publishing contract and republish the work under new terms. – Such an exception in copyright law is not necessarily a good idea, though. It would only hurt more liberal licensing systems if it could

³⁰ Hal Varian Copying and copyright p. 7.

³¹ Landes, Posner, p. 326

³² Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern, 22.03. 2002, BGBI I, 1155-1158.

also be possible to withhold from "CC-publishing contract" for example because the public has too much power over the work and because the license is perpetual.³³

References:

Ariel Katz: The potential demise of another natural monopoly: new technologies and the future of collective administration of copyright, University of Toronto; law and economics research paper no. 04-02

BELL T.W.: Fair use vs. fared use: the impact of automated rights management on copy-right's fair use doctrine, N.C. Law Review, 7

REPORT on a Community framework for collecting societies for authors' rights (2002/2274(INI)) Committee on Legal Affairs and the Internal Market Rapporteur: Raina A. Mercedes Echerer, 557-620.

Music biz wary of copyright sharing movement Fri May 20, 2005, Reuters
http://today.reuters.com/news/newsArticle.aspx?type=industryNews&storyID=2005-05-21T002601Z_01_N20591559_RTRIDST_0_I_NDUSTRY-MUSIC-COPYRIGHT-DC.XML
 Last visited 26th of May 2005

Mark S. Nadel: how current copyright law discourages creative output: the overlooked impact of marketing Berkeley technology law journal Vol. 19:2 2004

Mikko Välimäki, Herkko Hietanen: Challenges of Open Content Licensing in Europe, Computer Law Review 12:2004

Reinhold Kreile, Jürgen Becker; The new key role of collecting societies, Gema yearbook, year 1996/97

³³ Välimäki, Hietanen 2004