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Diversity in Online Music:  
A European Union Debate on Cultural Diversity and  
the Collective Management of Authors' Rights

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PhD Law

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## Table of Contents

Table of Contents.....	III
Declaration.....	IX
Acknowledgements .....	XI
Table of Abbreviations.....	XIII
Abstract.....	XVII
Part I: The Ambit of the Thesis .....	I
1    Background.....	1
2    Research Questions .....	3
3    Methodology .....	7
4    Limits .....	9
4.1    Focus on Authors' Economic Rights in Music.....	9
4.2    Focus on the Cultural Activities Undertaken by GEMA.....	11
4.3    Focus on the Impact of the Practical Consequences of Collective Licensing and EU Interventions on the Diversity of Online Music.....	12
Part 2: Developing a Notion of Diversity in Online Music Applicable under EU Law.....	15
5    The Notion of 'Culture' under EU Law.....	17
5.1    The Lack of a Definition of 'Culture' in the EU Treaties.....	17
5.2    The Ordinary Meaning of 'Culture' .....	19
5.2.1    Culture as Intellectual Activity .....	20
5.2.2    The Evaluative View of Culture .....	20
5.2.3    The Anthropological View of Culture .....	22
5.3    The Concept of 'Culture' in International Law and Intergovernmental Practice .....	24
5.4    The Concept of 'Culture' in EU Practice .....	29
5.5    Assessment of the EU Concept of Culture .....	30
6    The Notion of 'Cultural Diversity' under EU Law.....	35
6.1    Cultural Diversity in the EU Legal Framework.....	36
6.1.1    The Mainstreaming Requirement in TFEU Article 167(4) .....	36

6.1.2	The Increased Importance of Cultural Diversity in EU Law.....	37
6.2	The Descriptive Dimension of Cultural Diversity.....	38
6.3	The Normative Dimensions of Cultural Diversity under International Law and in Intergovernmental Practice.....	39
6.3.1	Cultural Diversity and Its Changing Connotations: From Cultural Plurality to Cultural Pluralism.....	40
6.3.2	Intercultural Dialogue as the Preferred Means to Manage Cultural Diversity .....	48
6.3.3	Cultural Diversity and Free Trade.....	55
6.3.3.1	Background to the Debate: Conflicts about Trade in Cultural Goods and Services.....	56
6.3.3.2	The 2000 CoE Declaration on Cultural Diversity.....	61
6.3.3.3	The 2001 UNESCO Universal Declaration on Cultural Diversity.....	63
6.3.3.4	The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.....	65
6.3.3.5	The Effects of Employing Cultural Diversity in the 'Trade vs Culture' Debate .....	71
6.3.4	The Relationship between Cultural Diversity and Cultural Rights.....	76
6.4	The Normative Dimensions of Cultural Diversity under EU Law .....	81
6.5	Conclusion.....	84
Part 3: Diversity in Online Music as a Guideline to Direct or Assess Policy Choices in the Design of the EU Framework for the Licensing of Authors' Rights in Online Music.....		
7	The Obligation to Respect and Promote the Diversity of the EU's Cultures (TFEU Article 167(4)).....	89
7.1	The Scope of the Term 'to Take Cultural Aspects into Account' in TFEU Article 167(4).....	89
7.2	The Scope of the Terms 'to Respect and to Promote the Diversity of [the EU's] cultures' in TFEU Article 167(4).....	92
7.2.1	The Ordinary Meaning of the Terms 'to Respect' and 'to Promote' in TFEU Article 167(4).....	92
7.2.2	The Scope of the Obligation to Promote the Diversity of Cultural Expressions (Article 7 of the 2005 Convention) .....	94
7.2.3	The Need for a Harmonious Interpretation of TFEU Article 167(4) in Light of Article 7 of the 2005 Convention.....	102

7.2.4	The Effects of a Harmonious Interpretation .....	105
8	Regulating the EU Framework for the Licensing of Authors' Rights as a Means to Promote Diversity in Online Music .....	109
8.1	Potential Points of Impact between the EU Framework for the Licensing of Authors' Rights and the Diversity in Online Music.....	110
8.1.1	The Creation of Music .....	110
8.1.2	Producing and Disseminating / Distributing Sound Recordings .....	111
8.1.3	Access to Online Music .....	114
8.2	Regulating the EU Legal Framework for the Licensing of Authors' Rights as an Unsuitable Means to Promote the Diversity of Online Music through Positive Discrimination.....	115
8.3	Conclusion.....	119
9	The Impossibility of Statistically Measuring Diversity in Online Music .....	121
9.1	Diversity as the Interplay of Variety, Balance and Disparity.....	121
9.1.1	The Properties of Variety, Balance and Disparity.....	121
9.1.2	The Application of <i>Stirling's</i> Indicators to the Diversity of Cultural Expressions.....	127
9.2	Literature on Musical Diversity beyond the <i>Stirling</i> Model.....	132
9.3	Assessment.....	139
Part 4: The Contributions of Authors' Societies' Cultural Functions to the Diversity of Online Music.....		145
10	Introduction to the Collective Management of Authors' Rights through Collecting Societies .....	147
10.1	Rationale and Functions of Collecting Societies .....	147
10.1.1	The Economic Rationale of Collecting Societies.....	147
10.1.2	Strengthening the Authors' Voice through Collectivisation.....	148
10.1.3	Built-in Features of Mutual Solidarity.....	149
10.1.4	Explicit Cultural and Social Functions.....	150
10.2	Collecting Societies in the Area of Music.....	151
11	Cultural Considerations in the Distribution of Royalties: GEMA as an Example of Authors' Societies' Explicit Cultural Functions.....	153
11.1	The Cultural Redistribution in the Allocation Procedure.....	155
11.1.1	Provenance of the Funds for the Cultural Redistribution in the Allocation Procedure .....	158

11.1.2	Cultural Considerations in the Allocation of the Royalties from Public Live Performances.....	159
11.1.2.1	The Usage Element: Performance Points .....	159
11.1.2.2	The Cultural Element: Cultural Points.....	160
11.1.3	Cultural Considerations in the Allocation of the Royalties from Broadcasting.....	162
11.1.3.1	The Usage Element: Broadcasting Points .....	162
11.1.3.2	The Cultural Element: Cultural Points.....	163
11.1.4	Implications for the Diversity in Online Music .....	164
11.1.4.1	The Concept of ‘Cultural Importance’ in the Allocation Procedure .....	164
11.1.4.2	The Inappropriateness of the Cultural Redistribution in the Allocation Procedure for Promoting Diversity in Online Music.....	166
11.1.4.3	The Redistribution of Royalties as a Potential Means for Promoting Diversity in Online Music .....	172
11.2	The Promotion of Culturally Important Works through Evaluation Payments .....	179
11.2.1	Provenance of the Funds for the Evaluation Procedure .....	180
11.2.2	Evaluation Payments for Authors of Works of Serious Music.....	183
11.2.2.1	The Usage Element: Applicable Earnings .....	184
11.2.2.2	The Cultural Element: Evaluation Points .....	185
11.2.3	Evaluation Payments for Authors of Works of Light Music.....	189
11.2.3.1	The Usage Element: Applicable Earnings .....	189
11.2.3.2	The Cultural Element: Evaluation Points .....	190
11.2.4	Implications for the Diversity in Online Music .....	193
11.3	The Promotion of Culturally Important Works through Adjustment Funds .....	197
11.3.1	Compensation for Hardship.....	197
11.3.2	Promotion of Contemporary Music.....	198
11.4	Other Forms of Cultural Support.....	202
11.4.1	The German Music Authors’ Award.....	202
11.4.2	<i>Initiative Musik</i> .....	203
11.5	Concluding Remarks and Broader Outlook .....	204

Part 5: The State of Diversity in Online Music after EU Intervention .....	211
12 The 2005 European Commission Recommendation .....	213
12.1 The Context of the 2005 Recommendation .....	213
12.2 The Regulatory Scope of the 2005 Recommendation .....	217
12.3 The Practical Effects of the 2005 Recommendation .....	221
12.3.1 The Creation of Central Pan-European Licensing Initiatives .....	222
12.3.1.1 Publisher-controlled Initiatives .....	223
12.3.1.1.1 Initiatives of the Four Major Music Publishers .....	223
12.3.1.1.2 Initiatives of Large Independent Music Publishers .....	226
12.3.1.1.3 Initiatives for Small and Medium-sized Independent Music Publishers .....	227
12.3.1.2 Pooling Initiatives of Collecting Societies .....	229
12.3.2 The Undue Preferential Treatment of Some Right Holders .....	231
12.3.2.1 The Publishers' Control over Anglo-American Online Reproduction Rights .....	232
12.3.2.2 The Publishers' Ability to Amend Their Sub-publisher Agreements .....	235
12.3.2.3 The Joint Licensing of the Making Available Right through the Publisher-Controlled Central Pan- European Licensing Initiatives .....	239
12.4 Conclusion .....	242
13 The 2008 <i>CISAC</i> Decision .....	245
13.1 The Context of the 2008 <i>CISAC</i> Decision .....	245
13.1.1 The 1989 <i>Lucazeau</i> and <i>Tournier</i> Cases before the European Court of Justice .....	246
13.1.2 The Simulcasting Agreement and Its Variants .....	247
13.1.3 The Santiago / Barcelona Agreements .....	251
13.2 The Regulatory Scope of the 2008 <i>CISAC</i> Decision .....	252
13.3 The Practical Effects of the 2008 <i>CISAC</i> Decision .....	259
13.4 Conclusion .....	265
Part 6: Main Research Results .....	267
Annex: Questionnaires Sent to GEMA .....	275
First Questionnaire (Responses Received on 26 March 2012) .....	275



Second Questionnaire (Responses Received on 6 April 2012).....	280
Bibliography .....	285

## **Declaration**

I declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where stated otherwise by reference or acknowledgment, the work presented is entirely my own.

Tobias Bednarz

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## Table of Abbreviations

2001 Universal Declaration	UNESCO Universal Declaration on Cultural Diversity (2001)
2005 Convention	UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)
AEPI	Elleniki Etairia pros Prostasia tis Pnevmatikis Idioktisias AE (Hellenic Society for the Protection of Intellectual Property)
AG	Advocate General
AKKA/LAA	Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība (Copyright and Communication Consulting Agency/Latvian Authors Association)
AKM	Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mit beschränkter Haftung
ARTISJUS	Magyar Szerzői Jogvédő Iroda Egyesület (Hungarian Bureau for the Protection of Authors' Rights)
B	Belgium
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
BIEM	Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique
CDPA	Copyright, Designs and Patents Act 1988
CFI	Court of First Instance
CFREU	Charter of Fundamental Rights of the EU
CISAC	Confédération International des Sociétés d'Auteurs et Compositeurs
CMO	Collective Management Organisation
CoE	Council of Europe
D	Germany
E	Spain
EAÜ	Eesti Autorite Ühing (Estonian Authors' Society)
EC	Treaty Establishing the European Community
ECJ	European Court of Justice
ECR	European Court Reports
EEA	European Economic Area
EGC	European General Court

EMAS	European Music Author's Scholarship of GEMA
EU	European Union
F	France
Florence Agreement	Agreement on the Importation of Educational, Scientific and Cultural Materials
fn	footnote within a cited document
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (German Society for Musical Performing and Mechanical Reproduction Rights)
GESAC	Groupement Européen des Sociétés d'Auteurs et Compositeurs
GVL	Gesellschaft zur Verwertung von Leistungsschutzrechten
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
<i>ibid</i>	<i>ibidem</i>
ie	<i>id est</i>
IFPI	International Federation of the Phonographic Industry
IMRO	The Irish Music Rights Organisation Ltd
KODA	Komponistrettigheder i Danmark (Danish Authors' Society)
LATGA-A	Lietuvos Autorių Teisių Gynimo Asociacijos Agentūra (Lithuanian Authors' Society)
N	footnote within this thesis
NL	The Netherlands
OJ	Official Journal of the European Union
OSA	Ochranný svaz autorský pro práva k dílům hudebním (Czech Authors' Society)
OSCE	Organisation for Security and Co-operation in Europe
P	Portugal
para(s)	paragraph(s)
PRS	Performing Right Society Ltd
s(s)	section(s)
SACEM	Société des auteurs, compositeurs et éditeurs de musique (French Society of Authors, Composers and Music Publishers)
SAZAS	Združenje skladateljev, avtorjev in založnikov za zaščito avtorskih pravic Slovenije (Society of Composers, Authors and Publishers for the Protection of Their Copyrights of Slovenia)

SGAE	Sociedad General de Autores y Editores de España (General Society of Authors and Publishers of Spain)
SIAE	Società Italiana degli Autori ed Editori (Italian Society of Authors and Publishers)
SOZA	Slovenský ochranný Zväz Autorský pre práva k hudobným dielam (Slovak Performing and Mechanical Rights society)
SPA	Sociedade Portuguesa de Autores CRL (Portuguese Society of Authors)
STEF	Samband tónskálda og eigenda flutningsréttar (The Performing Rights Society of Iceland)
STIM	Föreningen Svenska Tonsättares Internationella Musikbyrå (Swedish Authors' Society)
TEOSTO	Säveltäjien Tekijänoikeustoimisto Teosto (Finnish Composers' Copyright Society Teosto)
TEU	Treaty on EU
TFEU	Treaty on the Functioning of the EU
TONO	TONO forvalter komponisters, tekstforfatters og musikkforleggeres rettigheter i musikkverk (Norwegian Performing Right Society)
TV	television
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UNESCO	United Nations Educational Scientific and Cultural Organization
UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)
UrhWG	Urheberrechtswahrnehmungsgesetz (German Law on the Administration of Copyright and Neighbouring Rights)
USA	United States of America
ZAiKS	Stowarzyszenie Autorów ZAiKS (Polish Authors' Society)
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty





## **Abstract**

For more than a century, the collective management of authors' rights has greatly facilitated the licensing of music to the benefits of right holders and commercial users alike. In the online realm, however, the rationale of the collective administration of copyright has been challenged and its functioning re-configured. At a moment in time where the Internet has made the cross-border distribution of recorded music easier than ever, right holders are yet to find licensing solutions appropriate for multi-territorial online uses. This, in turn, slows down the uptake of legal online music services and prevents the realisation of the Digital Single Market, pursued within the EU. The European Commission has intervened twice, first in 2005 in the form of a non-binding Recommendation, and later in 2008, when it held that the collecting societies' practice of restricting their activities to their respective domestic territory was anti-competitive. Arguably, the contradictory effects of EU action have exacerbated rather than remedied the existing difficulties that cross-border online music services face in clearing the necessary authors' rights.

This thesis proposes to re-contextualise this problem around cultural diversity, which is a recurring buzzword in the ongoing debates and which EU institutions are legally obliged to promote and to respect. Despite this seeming acknowledgment of the concept, no sound legal analysis of its scope or its implications for the field of online music has yet been proposed. Pursuing such analysis, this thesis first examines the meaning of cultural diversity under EU law to submit an understanding of it as intercultural pluralism. It then assesses the boundaries of the EU obligation to promote cultural diversity in view of the goals of the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions. An analysis of the relationship between the two sets of norms suggests interpreting the EU mandate of promoting cultural diversity in light of the scope of the international obligations wherever EU action affects cultural creations. Applied to the context of online music, this novel interpretation implies that cultural diversity is promoted if all groups within the EU (a) have the ability to express their cultural identity through online music; and (b) are in a position to access online music expressing different cultures from within

and outside the EU. Cultural diversity thus calls for the licensing regime to be re-organised so that online music services may, in a simple and effective way, clear the rights necessary for the online use of the entire available EU repertoire as well as a diverse foreign and, ideally, the entire worldwide repertoire.

Finally, this thesis assesses the current online licensing mechanisms in a practical application of these findings, testing the commonly raised argument that collective rights management promotes cultural diversity and investigating, in parallel, whether the practical consequences of the EU interventions have promoted the diversity of online music.

## **Part I: The Ambit of the Thesis**

### **I Background**

The research proposed in this thesis examines the intersection of two specific areas of EU law – culture and copyright. In the cultural field, the focus is on the obligation of EU institutions to mainstream cultural considerations into their action and, more specifically, to promote and respect cultural diversity (TFEU Article 167(4)). In the field of copyright, this thesis concentrates on the system of collective management of authors' rights in music and its continuing struggle to find satisfactory solutions to license the use of online music across national borders.

This research was sparked by a curious observation that emerged from the debate on what EU legal framework would be appropriate to facilitate multi-territorial licences for online music and, more specifically, what role it should hold for authors' societies: both proponents and opponents of the collective licensing through authors' societies argued that their respective proposals promoted cultural diversity. This observation is symptomatic of the widespread practice of employing the term 'cultural diversity' as a buzzword rather than to base its use on a shared conceptual understanding. This is all the more surprising if one bears in mind the obligation of TFEU Article 167(4) and the increase in importance that the principle of cultural diversity has received with its inclusion in TEU Article 3(3) and CFREU Article 22.

Against this background, the objective of this thesis is two-fold. On the one hand, it seeks to propose elements of a conceptual framework for the notion of cultural diversity under EU law that could (and, as we will later argue, should) guide the EU institutions in their task to take cultural diversity into consideration when adopting a primarily non-cultural measure. On the other hand, this research aims to apply this theoretical groundwork to the practical area of multi-territorial licensing of online music.



## **2 Research Questions**

With this objective in mind, this study seeks to respond to several, more concrete, questions. In order to determine elements of a conceptual framework for cultural diversity, it starts by asking: What is cultural diversity? What does cultural diversity mean in relation to online music? As will be shown in part 2, these seemingly innocuous questions are difficult to answer – in particular, due to the lack of precision and the various connotations with which the term ‘cultural diversity’ is used. The analysis concludes that cultural diversity is to be understood in the sense of intercultural pluralism and a working concept of diversity in online music is formulated accordingly.

Part 3 seeks to develop the concept into a more workable guideline for analysing the multi-territorial licensing of authors’ rights in online music. This part is transitional in the sense that it applies the abstract and theoretical findings of part 2 to the concrete and practical characteristics of and changes to the framework for the licensing of authors’ right in online music that will be addressed in parts 4 and 5. Its objective is to equip us with more tangible legal, practical and economic criteria to assess whether the way in which authors’ rights in online music are licensed promotes the diversity in online music. The first step is an enquiry into the exact scope of the obligation to respect and promote the diversity of the EU’s cultures in TFEU Article 167(4) and how it applies to online music. Most importantly in this regard, the analysis of the interplay between this norm and Article 7 of the 2005 Convention suggests a harmonious interpretation of TFEU Article 167(4) in light of Article 7 of the 2005 Convention wherever an EU measure affects the diversity of cultural expressions. The discussion then turns to the value chain of online music and explores at which points in that value chain the way in which authors’ rights in music are licensed has the potential to influence diversity in online music. Finally, we review the existing economic literature on diversity in order to determine whether it would be possible to measure diversity in online music.

Parts 4 and 5 look at the licensing of authors' rights in online music across the EU, focusing on distinct practical aspects with a view to determining whether those aspects promote diversity in online music. In particular, part 4 scrutinises the collective licensing of authors' rights in music, before part 5 turns to the instances in which the EU intervened in the past, notably with the 2005 Commission Recommendation on Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services<sup>1</sup> and the 2008 Commission Decision in the CISAC case.<sup>2</sup> The choice to assess these particular aspects as to whether they have promoted diversity in online music is motivated by the hope that the findings could also make a useful contribution to the larger debate on the appropriate EU legal framework to facilitate multi-territorial licensing. This is most obvious in relation to the two recent EU interventions: if the conclusion is that they did not promote diversity in online music, this should be an argument for the EU to change its focus in addressing the problem of multi-territorial licensing. But an argument as to the future direction of fostering multi-territorial licensing can also be deduced from the analysis of the collective licensing system. Unlike the EU institutions, collecting societies are not the addressees of TFEU Article 167(4). This notwithstanding, should the way in which they collectively license their members' rights be found to promote diversity in online music, this would be a strong argument to strengthen the role of collective rights management in the future framework for multi-territorial licensing.

Against this background, part 4 asks whether the cultural functions of collecting societies promote diversity in online music, using the German collecting society GEMA as an example. Finally, part 5 seeks to determine whether the practical changes that have been prompted by the 2005 Recommendation and the 2008 CISAC Decision promoted diversity in online music. While the question that guides the research in both parts is the same, the object of the analysis differs in so far as the efforts of the collecting societies are directed at incentivising musical creation, whereas

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<sup>1</sup> European Commission, *Commission Recommendation of 18 October 2005 on Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* [2005] OJ L 276/54.

<sup>2</sup> CISAC (COMP/C2/38.698), Decision C(2008) 3435 final (European Commission, 16 July 2008) <[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38698/38698\\_4567\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf)>.

the recent changes after the EU interventions have a bearing on how easily already created music can be licensed for online uses.





### **3 Methodology**

The research presented in this thesis is the result of both desk-based as well as qualitative empirical analysis.

The enquiry into the meaning of cultural diversity in part 2 is predominantly based on a review of international standard-setting instruments and policy documents adopted by UNESCO and the CoE. This approach takes into account that an internationally agreed concept of cultural diversity first emerged in two Declarations adopted in the fora of the two organisations and was further shaped by the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The analysis is deliberately broad in the sense that it seeks to trace the origins of the cultural diversity discourse as well as its broad lines of development. To this end, it not only takes into account the three mentioned instruments but, in addition, other relevant materials with references to cultural diversity that have been adopted under the aegis of UNESCO and CoE since the inception of these organisations. This is motivated by the desire to counter today's lack of conceptual consensus in the use of the term with a solid understanding of the various dimensions that have historically been ascribed to cultural diversity and continue to shape it. Notwithstanding the emphasis on the development of the concept in international law and intergovernmental practice, the results are also cross-checked as to whether they can validly apply under the EU legal order. This ensures the focus that is necessary to then apply the deduced working concept of cultural diversity in the context of multi-territorial music licensing in the EU. While the EU legal framework does not contain any definition of cultural diversity, the validity of the results is confirmed by the political practice of the EU institutions.

Part 3 aims to develop legal and practical as well as economic criteria that allow the concept of diversity in online music to be used as a workable policy guideline. Chapter 7 - the legal analysis - takes the form of expository research, analysing the scope of TFEU Article 167(4) and its relationship with the 2005 Convention, in

search of legal guidance as to when EU measures promote cultural diversity and, more precisely, the diversity of online music. Chapter 8 presents the practical application of these findings in that it places the results of the legal analysis into the context of the licensing of online music, exploring at which point in the value chain of online music measures regulating the licensing framework could have an impact on the diversity of online music. Chapter 9, finally, is the result of a desk-based analysis of the existing economic literature on the measuring of diversity, the diversity of cultural expressions and diversity in music.

Methodologically, the research presented in part 4, assessing whether GEMA's cultural functions promote diversity in online music, is carried out in two steps. Notably, we first describe the characteristics of GEMA's cultural functions. Applying the earlier developed criteria for diversity in online music to the thus expounded factual situation, we are able to deduce a result. The factual exposition of GEMA's cultural functions relies on a review of the relevant GEMA statutes and pre-existing legal writing. Most importantly, however, it also finds its basis in a qualitative assessment of empirical data gathered by way of two questionnaires to which GEMA kindly agreed to respond.<sup>3</sup> Without the additional information received, it would not have been possible to make informed assertions as to how GEMA's cultural functions influence diversity in online music with the same degree of certitude.

The analysis of the practical consequences of the two types of EU intervention, carried out in part 5, follows patterns similar to that of GEMA's cultural functions. Here, the factual presentation of how EU cross-border music services obtain the necessary licences in the aftermath of EU intervention is facilitated by a review of legal writing, public consultation documents, news articles and press releases. In addition, it is most usefully informed by some of the empirical data received from GEMA.

As this research was originally submitted on 1 March 2013, in principle it does not engage with academic writing, court decisions or legislative changes that occurred after that date.

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<sup>3</sup> The responses were received on 26 March and 6 April 2012. The wording of the questionnaires is reproduced in the Annex.

## 4 Limits

In addressing the described research questions, it was necessary to limit the research in various respects. The following paragraphs explain the rationale behind the most important of these choices.

### 4.1 Focus on Authors' Economic Rights in Music

Copyright law grants the creators of protected subject matter the exclusive right to exploit their works or authorise others to do so. Within the typical value chain of online music, the law provides for both authors' as well as related rights.<sup>4</sup> On the one hand, the authors of musical works are granted exclusive rights in their composition or lyrics. However, in order for a musical work to be exploited online it must have been performed and, moreover, this performance must have been recorded. While both of these acts depend on the authors' permission, the resulting performances and sound recordings enjoy protection in themselves. Importantly, the authors' exclusivity also encompasses secondary uses of their works.<sup>5</sup> As a consequence, the online exploitation of recorded music affects both the related rights of the performer and the producer of the sound recording as well as the copyright in the musical work embodied in the recording. The following illustration visualises this relationship.<sup>6</sup>

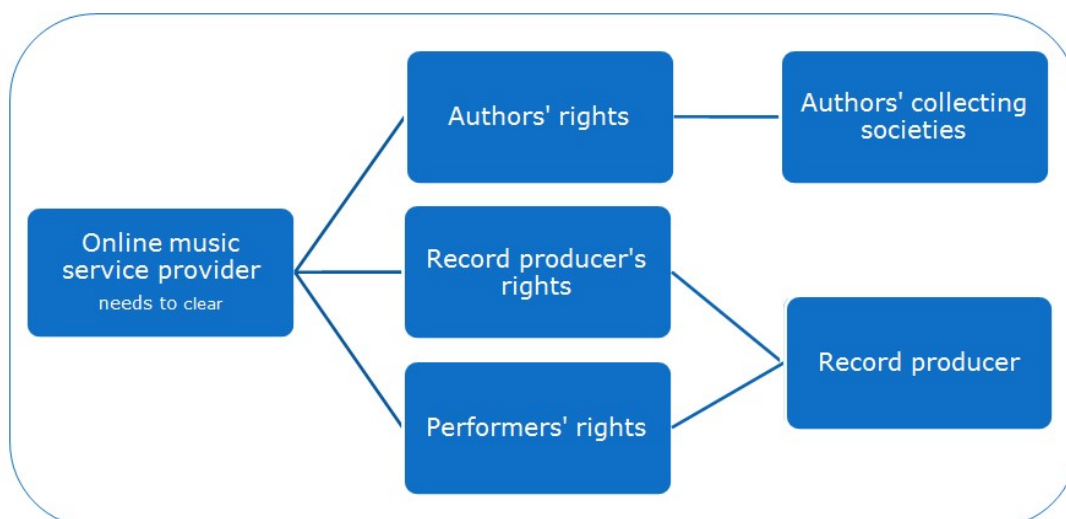
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<sup>4</sup> The terms 'copyright' and 'authors' rights' underline the different rationale for protection in common and civil law systems. Whereas the former primarily encourages the production of new works, the latter in addition stresses the natural rights of authors in their creations. Authors' rights differ from related right in that the protection of authors aims at rewarding or incentivising creation, whereas the law accords related rights to producers of works that are typically derived from the authors' creations in recognition of the entrepreneurial efforts and technical and organisational skills involved; see Bently and Sherman, *Intellectual Property Law* (3rd edn, 2009) 32.

<sup>5</sup> Schovsbo 170.

<sup>6</sup> Taken from European Commission, *Proposed Directive on Collective Management of Copyright and Related Rights and Multi-territorial Licensing*, 7.

## Example of licensing of music rights for online uses



To offer online music, a service provider must clear both the authors' rights and the related rights. This notwithstanding, the present analysis limits itself to the former. This is a consequence of the structure of the licensing market for related rights; they are typically in the hands of record companies, who pursue the business model of creating or acquiring the rights in sound recordings in order to promote and exploit them.<sup>7</sup> Given that one of our research questions is whether collective licensing and, more specifically, the cultural functions that collecting societies promote the diversity of online music, the analysis can only be conducted in an environment that possesses such collective structures. In stark contrast to the way that authors' rights are licensed, however, the management of related rights is collectivised to a very small extent only – notably where this serves the record companies' business interests.<sup>8</sup> The licensing of related rights, therefore, largely escapes the scope of the present study.

Moreover, our analysis is limited to authors' economic rights and does not concern itself with the moral rights that authors of musical works equally enjoy (such

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<sup>7</sup> Garnett and others, *Copinger and Skone James on Copyright* (15th edn, 2005) para 27-142. As to the contractual arrangements with performers and producers of sound recordings, see Hertin and Klages, 'Tonträgerlizenzvertrag/Bandübernahmevertrag' in Schütze and Weipert (eds) *Münchener Vertragshandbuch* (6th edn, 2009) 982, 955-961, 982-986.

<sup>8</sup> Record producers rely on collecting societies for certain uses. Yet even where this is the case, the societies are not appointed exclusively and thus lack the bargaining power that typically characterises authors' rights societies; see Gerlach, *AEPO-Artis Seminar 2010: Performers' Rights in Today's European Environment: How to Adapt the Existing Rights to the New Uses of Performances?* (2010).

as the right of paternity or the right of integrity). This choice also finds its rationale in the fact that this research proposes to contextualise cultural diversity in the practical area of multi-territorial licensing of authors' rights. As moral rights cannot be transferred or assigned, however, they are not the object of any such licences and an online music service provider is always under the obligation to observe an author's moral rights irrespective of whether or not it has entered into a licensing agreement covering the authors' economic rights.

## **4.2 Focus on the Cultural Activities Undertaken by GEMA**

Part 4 aims to assess whether the system of collective rights management promotes diversity in online music. More concretely, the objective is to analyse what collecting societies themselves portray as cultural functions and thereby confirm or disconfirm the commonly raised claim that these functions enhance cultural diversity.<sup>9</sup> Given that collecting societies in at least 24 EU member states runs explicit cultural and social schemes, it is impossible to provide a complete picture within the boundaries of this thesis. Instead, part 4 closely analyses a particularly suitable example of such cultural activities, notably those undertaken by GEMA.

The choice of GEMA is motivated by two reasons. On the one hand, its ten per cent deduction from the performing royalties to cultural and social ends<sup>10</sup> is typical of a widespread practice amongst authors' societies. On the other hand, an analysis of the society's cultural contributions is facilitated by the fact that they are governed by the detailed rules of its published Distribution Plans.<sup>11</sup> In contrast, cultural support by the UK Performing Rights Society, for example, is practiced on a much smaller scale and within complete discretion of the PRS Board.<sup>12</sup> While it is clear that the analysis

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<sup>9</sup> See below at 11, on page 147.

<sup>10</sup> See below at 11.2.1, on page 174.

<sup>11</sup> The General Principles and the Implementing Provisions of the three Distribution Plans are reproduced in GEMA, *GEMA-Jahrbuch 2011/2012* (2011) 291-347.

<sup>12</sup> While the PRS constitution allows for a maximum cultural deduction of one per cent, in practice, in 2005 the society only used less than half of the permitted maximum and donated it entirely for the support of new music; KEA European Affairs 128. Moreover, the amount spent this way seems to

of GEMA's cultural support mechanisms cannot be seen as representative of all EU societies in this respect, it allows us to draw more general conclusions about the way that cultural measures would need to be designed in order to promote diversity in online music.

In addition, there is much to suggest that the result of our analysis may even be more generally valid. Notably, GEMA fails to promote the diversity of online music because it bases its cultural functions on evaluative criteria in reference to the musical work or its author in question. It appears likely that collecting societies who distribute parts of their revenues according to cultural considerations will do so based on perhaps different but equally evaluative criteria, in which case their schemes would neither promote cultural diversity in online music as deduced from TFEU Article 167(4) in light of Article 7 of the 2005 Convention. While it cannot be excluded that there may be a collecting society with cultural schemes based on the ideas of cultural pluralism, this would be unlikely as the collecting societies' explicit cultural schemes developed from the idea of supporting the 'national arts' and thus stand in a different conceptual tradition.<sup>13</sup>

#### **4.3 Focus on the Impact of the Practical Consequences of Collective Licensing and EU Interventions on the Diversity of Online Music**

Finally, we chose to limit the scope of the examination of the 2005 Recommendation and the 2008 CISAC Decision in part 5 to the assessment of whether the practical consequences of these interventions have promoted the diversity of online music.

It would also have been possible to focus on the interventions themselves and assess their legitimacy and appropriateness. In that case, the interventions would have had to be examined by reference to their primary aims to create a single market and to

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fluctuate frequently; for the year 2001, for example, it was reported to have been equalled only one tenth of the permitted maximum; Winghardt, *Gemeinschaftsrechtliches Diskriminierungsverbot und Inländerbehandlungsgrundsatz in ihrer Bedeutung für urheberrechtliche Vergütungsansprüche innerhalb der Europäischen Union* (2001) 54.

<sup>13</sup> See below at 11.5, on page 198.

safeguard free competition. The decision not to follow this route was motivated by the fact that legal research already exists proposing this type of analysis. Moreover, it would have shifted the centre of gravity of the study too far away from the diversity of online music.

Likewise, one could have also enquired whether the EU Commission, in adopting the measures, fulfilled its obligation to take cultural considerations into account. As TFEU Article 167(4) obliges the EU institutions to adopt the most culturally-friendly amongst several equally effective measures, this would have required an analysis of whether the primary goals of a single market and free competition could have been attained in a more culturally-friendly way, thus again taking us too far away from our main objective.

As a consequence of these deliberate choices, our research does not put us into a position from which we could assert, in any well-informed manner, what the EU legal framework for the cross-border licensing of authors' rights in online music should look like. What our research does show, however, is that it is possible to conceptualise a working concept of the diversity of online music and how that notion can be used as a guideline to direct or assess policy choices in this practical area of copyright licensing. It is therefore hoped that this insight may also be deemed a helpful contribution to the ongoing debate on multi-territorial licensing.





## **Part 2: Developing a Notion of Diversity in Online Music Applicable under EU Law**

Although ‘cultural diversity’ is an omnipresent claim in the debate on the future organisation of music licensing for online uses and although TFEU Article 167(4) obliges the EU institutions to promote cultural diversity, there is hardly any substantive discussion of the legal meaning of the term or explanation of how it applies to online music. Providing such analysis is the two-fold aim of this part. The endeavour is underpinned by the belief that the debate on online music and, in particular, multi-territorial licensing, would benefit from a more focused approach and that cultural diversity, once substantiated as diversity in online music, must be a guiding factor for the European legislator when regulating in the area.

We first analyse the meaning of ‘culture’ under EU law (chapter 5). In an attempt to discern the meaning of cultural diversity under EU law, the descriptive and the normative dimensions of cultural diversity must be distinguished (chapter 6). The analysis of the meanings that the EU legal order ascribes to the terms ‘culture’ and ‘cultural diversity’ will allow us to formulate a working concept of diversity in online music that is able to serve as the basis of the research in the subsequent parts of the thesis.

During our quest for an appropriate understanding of culture and cultural diversity, we analyse the meanings that have been attributed to these terms in international law and intergovernmental practice and, more precisely, in the work of the two international organisations with a particular mandate in the cultural field and thus the most important impact on the cultural policies of the EU and its member states: the United Nations Educational Scientific and Cultural Organization (UNESCO)<sup>14</sup> and the Council of Europe (CoE).<sup>15</sup>

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<sup>14</sup> Established in 1946, UNESCO is a specialised UN agency with the task ‘to contribute to peace and security by promoting collaboration among the nations through education, science and culture’; *Constitution of the United Nations Educational, Scientific and Cultural Organization* in UNESCO (ed), *Basic Texts* (2010) 5, Article I(1).

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<sup>15</sup> The CoE was founded in 1949 with the aim ‘to achieve a greater unity between its members’ ‘by discussion of questions of common concern and by agreements and common action’ and is open to any European state; *Statute of the CoE*, 1 ETS, Articles 1(a)-(b), 4.

## **5 The Notion of ‘Culture’ under EU Law**

We start our enquiry into the meaning of cultural diversity by determining how ‘culture’ is understood under EU law. In so doing, we acknowledge the widespread agreement that the ordinary meaning of ‘cultural diversity’ should be equated with ‘diversity of cultures’. In the EU legal framework, for example, both variants are used; Articles 3(3) of the TEU, 165(1) of the TFEU and 22 of the CFREU speak of ‘cultural diversity’, whereas TFEU Articles 167(1) and (4) as well as the Preamble of the CFREU paraphrase this as ‘diversity of cultures’<sup>16</sup>.

Certainly, such definitions, in reality, relocate the problem, immediately raising the question ‘what is culture?’ As a starting point for a deeper analysis of the exact contours of cultural diversity, they are nevertheless useful as they clarify that one’s understanding of the concept is largely shaped by the way in which one defines culture.

### **5.1 The Lack of a Definition of ‘Culture’ in the EU Treaties**

TFEU Article 167 establishes the EU’s competences in the field of culture. Paragraph 1 spells out a double task: to ‘contribute to the flowering of the cultures of the member states, while respecting their national and regional diversity’ and ‘at the same time bringing the common cultural heritage to the fore’. Paragraph 2 then lists specific areas in which the EU may take action, namely the ‘improvement of the knowledge and dissemination of the culture and history of the European peoples’, the ‘conservation and safeguarding of cultural heritage of European significance’, ‘non-commercial cultural exchanges’, and the ‘artistic and literary creation, including in the audiovisual sector’. This enumeration may be taken to indicate that the EU’s cultural

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<sup>16</sup> Another example can be found in the 2001 UNESCO Universal Declaration on Cultural Diversity, which speaks of the ‘diverse forms across time and space [that] culture takes’ (Article 1). Similarly, in its 2009 World Report on cultural diversity, the UNESCO Secretariat defines ‘cultural diversity’ as ‘the wide range of distinct cultures’; UNESCO, *Investing in Cultural Diversity and Intercultural Dialogue* (2009) 4.

competences are limited. What is more, they do not purport to replace the member states' competences. The wording of Paragraph 2 underlines this very strongly, stating that EU action must encourage the cooperation between member states and – only if necessary – may support and supplement their action. Accordingly, TFEU Article 6(c) lists culture as one of the areas in which the EU is competent 'to carry out actions to support, coordinate or supplement the actions of the Member States'. Cultural competences are therefore shared between the EU and its member states – with the EU, however, only taking a subsidiary role while the cultural prerogatives remain with the member states.<sup>17</sup> This is also expressed by TFEU Article 167(5), which specifically excludes any harmonisation of domestic laws in the area of culture.

While the first two Paragraphs establish explicit internal competences *vis-à-vis* the member states, TFEU Article 167(3) adds the explicit external competence to 'foster cooperation with third countries and the competent international organisations in the sphere of culture'.

Despite these limited competences in the cultural field that TFEU Article 167 confers upon the EU, the exact boundaries of the concept of culture in the EU remain vague: the EU treaties neither provide a definition of the term nor prescribe a particular theoretical framework for 'culture'.

As a result of this open-ended construction of culture, the concept remains dynamic, thereby allowing the EU a considerable degree of leeway to pursue a cultural policy that responds to the needs of the time, be they social, technological or political.<sup>18</sup> Moreover, not defining culture at the EU level can also be seen as a contribution to cultural diversity in itself. A 2007 Eurobarometer survey, commissioned by the European Commission's Directorate General Education and Culture, demonstrated that the perceptions of the term 'culture' vary considerably

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<sup>17</sup> Ress and Ukrow, Art. 151 EGV, paras 28-36. See also TFEU Article 2(5), which states that in areas where the EU has the competence to carry out actions to support, coordinate or supplement the actions of the member states it may not supersede the member states' competences.

<sup>18</sup> Craufurd Smith, 'The Evolution of Cultural Policy in the European Union' in Craig and de Búrca (eds) *The Evolution of EU Law* (2nd edn, 2011) 869, 874–875; the dynamic character of the European concept of culture is also emphasised by Ress and Ukrow, Art. 151 EGV, para 86, and Frenz, *Handbuch Europarecht* (2011) para 4091.

among member states. Representative sample groups of the population of all 27 EU member states at the time were asked to choose from 15 possible options in order to respond to the request: ‘Please tell me what comes to mind when you think about the word “culture”’. In Sweden, 75 per cent of the questioned participants answered ‘arts’, whereas in the UK this option was chosen by only 20 per cent. In Poland, 44 per cent picked the answer ‘life style and manners’, which in France was only associated with culture by 4 per cent of the participants.<sup>19</sup> A top-down approach that uses a uniform interpretation of culture across the entire EU would disregard the fact that the member states took great care to retain their cultural prerogative and violate the principle of subsidiarity.

Given this lack of a legal definition, we will now turn to the ordinary meaning of the word ‘culture’, in an attempt to more easily discern the contours of the concept.

## **5.2 The Ordinary Meaning of ‘Culture’**

Determining the ordinary meaning of the word ‘culture’ is a difficult task. In 1976 Raymond Williams wrote that ‘culture is one of the two or three most complicated words in the English language’.<sup>20</sup> The fact alone that until this day his quote is regularly included in studies on the topic indicates that the concept of culture has not become easier to explain since then. On the contrary, one can observe a proliferation in the use of the terms ‘culture’ and ‘cultural’ not only within academic spheres but in all corners of society. It has thus been remarked that the term culture ‘has escaped all academic control and has undergone a marked inflation of usages’.<sup>21</sup>

The term culture carries a multitude of varied connotations – many of which, in addition, have changed over time. This section traces back the most commonly adopted explanations of culture, discerns the broad trends in the interpretation of

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<sup>19</sup> European Commission, *European Cultural Values* (2007) table QA2; see also Langen, *EU Cultural Policy 1974-2007* (2010) 31–32.

<sup>20</sup> Williams, *Keywords: A Vocabulary of Culture and Society* (1976) 76; see also Daswani, *Management of Cultural Pluralism in Europe* (1995) 7–8.

<sup>21</sup> Isar, ‘Cultural Diversity’ (2006) 23 *Theory, Culture & Society* 372, 373; similarly Sewell, ‘The Concept(s) of Culture’ in Bonnell and Biernacki (eds) *Beyond the Cultural Turn* (1999) 35, 38.

culture, and endeavours to illustrate the bearing these different interpretations have on the notion of cultural diversity. To do so, an extensive approach is taken that transcends the merely legal field. Two broad concepts can be contrasted: the evaluative (5.2.2) and the anthropological view of culture (5.2.3). A third perspective is sometimes distinguished from these two, the view of culture as intellectual activity (5.2.1).

### 5.2.1 Culture as Intellectual Activity

This relatively narrow view describes culture as an intellectual and artistic activity.<sup>22</sup> To a large extent, this sense of culture represents the common understanding of the term in today's everyday language. Within this understanding, culture can be broken down into culture as a product and culture as a process.<sup>23</sup> The former aspect then refers to the creative works produced through intellectual and artistic activity while the latter focuses on the creative process. To embrace this definition of culture does not, however, exclude adherence to either the evaluative or the anthropological view of culture, nor does it advocate one over the other. Conversely, the extent of what intellectual and artistic activity can be considered as culture differs in the evaluative and anthropological views; the former displaying a tendency of favouring so-called high culture and the latter adopting a more permissive approach that includes and even goes beyond popular culture.

### 5.2.2 The Evaluative View of Culture

The origin of the term 'culture' lies in the Latin word *cultura* signifying the cultivation or tending of natural growth.<sup>24</sup> In today's language, this meaning is still alive in biological expressions such as 'bacterial culture'.<sup>25</sup> From the 16<sup>th</sup> century onwards, the

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<sup>22</sup> Williams, *Keywords: A Vocabulary of Culture and Society* (2nd edn, 1983) 90.

<sup>23</sup> Shaheed, *Report of the Independent Expert in the Field of Cultural Rights* (2010) para 5.

<sup>24</sup> For a more detailed etymological explanation see Williams, *Keywords 1983*, 87–89.

<sup>25</sup> Barnard and Spencer, 'Culture' in Barnard and Spencer (eds) *The Routledge Encyclopedia of Social and Cultural Anthropology* (2nd edn, 2010) 168, 168.

term was also used to describe individual human development – be it physical or intellectual.<sup>26</sup> It was then in the late 17<sup>th</sup> century that it came to stand for improvement of society as a whole.<sup>27</sup> At that time the evaluative view of culture developed where the notion represented higher standards of human wholeness or perfection.<sup>28</sup> Matthew Arnold offered an early encapsulation of this idea in 1873 when he wrote: ‘culture, the acquainting ourselves with the best that has been known and said in the world’.<sup>29</sup> The decision as to what constitutes the best is, of course, highly judgmental and adds a claim of universality to the concept. Notably, it implies the existence of a ‘single, grand evolutionary scale’: some people, or indeed societies, have more culture than others and some human products are more cultural than others.<sup>30</sup> Those intellectual and artistic activities that in today’s language could be summarised as ‘high culture’ were regarded as particularly cultural, such as visual art, music, dance and literature.

In today’s world, the evaluative interpretation of culture remains rather hypothetical. Although the distinction between ‘high culture’ and the rest is still made by many, the claim that such ‘high culture’ is the only type of intellectual and artistic creation that can claim cultural value is no longer widely supported.<sup>31</sup> Furthermore, it is incompatible with the principle of equality of all cultures that is proclaimed in many

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<sup>26</sup> Williams, *Keywords 1983*, 87; Bennett, ‘Culture’ in Bennett and others (eds) *New Keywords (2005)* 63, 65.

<sup>27</sup> In this sense, the term was initially used interchangeably with that of ‘civilisation’. The late 19<sup>th</sup> and early 20<sup>th</sup> century, however, saw an increasing tension between the two, with ‘civilisation’ standing for material and mechanical progress brought about by industrialisation and ‘culture’ for higher moral, spiritual and human standards; see Bennett, *Culture*, 65–66, and Williams, *Keywords 1983*, 89–90, who notes that sometimes, complicating matters further, the same distinction was made with an exact reversal of the terms. A more thorough account of the term ‘civilisation’ is given by Tsing and Hershatter, ‘Civilization’ in Bennett and others (eds) *New Keywords (2005)* 35. On the relationship between the notions of culture and civilisation see also Kaempfer ‘Culture, civilisation et diversité culturelle’ in UNESCO (ed), *Déclaration universelle de l’UNESCO sur la diversité culturelle: commentaires et propositions (2003)*, 93–96.

<sup>28</sup> Bennett, *Culture*, 65.

<sup>29</sup> Arnold, *Literature & Dogma: An Essay towards a Better Apprehension of the Bible (1873)* xiii.

<sup>30</sup> Barnard and Spencer, *Culture*, 171 and 168.

<sup>31</sup> Bennett, *Culture*, 64.



recent international standard-setting instruments on cultural diversity embracing a less restrictive understanding of culture.<sup>32</sup>

### 5.2.3 The Anthropological View of Culture

It was in the early 20<sup>th</sup> century that an anthropological sense of culture started to develop, which is commonly portrayed as seeing culture as a particular way of life or identity of a society.<sup>33</sup> The consensus evoked by this simplification, however, is deceptive; in reality, the 20<sup>th</sup> century was marked by numerous debates amongst (mostly Northern American) anthropologists about the correct definition of culture. Traditionally, the way of life of a society was seen by many as being embodied in its particular ensemble of customary behaviour, institutions and artefacts. Others, however, put the emphasis on each society's shared system of concepts or mental representations, established by convention and reproduced by traditional transmission.<sup>34</sup> In 1952, the width of the different approaches was strikingly demonstrated by Kroeber and Kluckhohn when they provided a survey of 152 different definitions of culture.<sup>35</sup> For the purposes of our study, however, suffice it to emphasise the common traits of all the different variants of the anthropological view of culture.<sup>36</sup> Proponents of the anthropological view condemn the ethnocentric evolutionism that the evaluative interpretation of culture embodies and replace it with a pluralistic vision. They began to speak of 'cultures' instead of 'culture': the world was thus no longer seen as being informed by one culture but as made up of lots of different cultures. Moreover, advocates of this current of thought refused to continue to judge any of these different cultures according to a supposedly universal but in

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<sup>32</sup> See below at 6.3, on page 34.

<sup>33</sup> Bennett, *Culture*, 67.

<sup>34</sup> Ingold, 'Introduction to Culture' in Ingold (ed) *Companion Encyclopedia of Anthropology* (1994) 329, 329; Godelier, 'La diversité culturelle du point de vue de l'anthropologie' [2010] *Les Cahiers du Musée des Confluences* 11, 15.

<sup>35</sup> Kroeber and Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (1952).

<sup>36</sup> A detailed analysis of the most important schools of thought in anthropology and social sciences is provided by Ingold; Sewell; Barnard and Spencer, *Culture, and - with a particular emphasis on the conceptual history of culture in Germany - Klein, 'Kultur' in Baur and others (eds) Handbuch Soziologie* (2008) 237.

reality strongly Eurocentric scale of progress. Rather, they explained it by the values and standards prevalent in that society itself,<sup>37</sup> thus adopting a position of cultural relativism in which every culture is worthwhile in its way.<sup>38</sup> Such relativistic tendencies also had a bearing on what was regarded as cultural production and consumption. Increasingly, the boundaries between ‘high culture’, ie those works or processes of intellectual and artistic activity that according to the evaluative view of culture represent ‘the best that has been known or said’ and the rest have blurred with the result that today ‘high culture’ looks more and more like one cultural market amongst others.<sup>39</sup>

In general, the anthropological view led to a significantly broadened understanding of culture. In its most extreme form, it could be argued that ‘everything is culture’. Whether such an approach is to be welcomed appears doubtful. Where everything is culture, the term culture surrenders all accuracy and loses the capacity to be meaningfully employed in the political debate.<sup>40</sup>

During recent decades, the anthropological sense of culture has increasingly been qualified with a view to the dynamic nature of culture. In fact, the definition of culture as a particular way of life, often used synonymously with the word society, has been criticised for having favoured a taxonomising attitude in which culture is fixed with distinct and separate entities. This logic, it has been argued, led to “billiard-ball” representations of cultures as neatly bounded wholes<sup>41</sup> in which humanity at large is ‘parcelled up into a multitude of discrete cultural capsules’.<sup>42</sup> However, it ignores the fact that the different cultures are interconnected and that cultural distinctions are fluid and impermanent.<sup>43</sup> Against these pitfalls, it is increasingly emphasised that

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<sup>37</sup> Ingold 329.

<sup>38</sup> Barnard and Spencer, *Culture*, 168. It is important to note that cultural relativism has a related but distinct meaning in the debate on the universal application of cultural rights; see below n 242.

<sup>39</sup> Bennett, *Culture*, 67.

<sup>40</sup> For a more detailed description of the ‘everything is culture’ phenomenon, see Ellmeier, ‘EU-Kulturpolitik – Europäische Kulturpolitik? Ökonomie, Politik und Kultur im Kontext’ in Ellmeier and others (eds) *Kulturpolitik in Europa - Europäische Kulturpolitik?* (1997) Teil 2, text after fn 27.

<sup>41</sup> Isar 372.

<sup>42</sup> Ingold 330.

<sup>43</sup> Bennett, *Culture*, 68.

culture is ‘a living process, historical, dynamic and evolving’.<sup>44</sup> This attitude is also reflected in the current usage of culture, which stresses the processes of differing rather than being different.<sup>45</sup> In order to accentuate this shift of emphasis, it has been proposed to ‘say that people *live culturally* rather than that they *live in cultures*’<sup>46</sup> or to speak of cultures in difference rather than different cultures.<sup>47</sup> In recent political practice, this shift has been mirrored by the emphasis of intercultural dialogue within the cultural diversity debate.<sup>48</sup>

If we link this rather theoretical discussion back to online music, the concrete object of our study, the observation emerges that this field would be regarded as cultural under all three perspectives of culture: music is the product of intellectual creativity, has traditionally been conceived as a way by which cultivation can be achieved, and is an expression of the author’s way of life and thus his or her cultural identity. Still, the evaluative and the anthropological views of culture would differ in the extent to which they would consider music as a cultural form. From an evaluative perspective, some music is more cultural than others; common lines of demarcation might, for example, be drawn between serious and light music. Under an anthropological approach to culture, however, there is no such abstract hierarchy.

### **5.3 The Concept of ‘Culture’ in International Law and Intergovernmental Practice**

Additional insight into how the notion of culture should be interpreted at the EU level can also be gained by looking at the way in which it has been used in international law and intergovernmental practice and, more specifically, within UNESCO and the CoE.

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<sup>44</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights)* (2009) para 11.

<sup>45</sup> Bennett, *Culture*, 68.

<sup>46</sup> Ingold 330 (original emphasis).

<sup>47</sup> Bennett, *Culture*, 68.

<sup>48</sup> See in more detail below, at 6.3.2, on page 43.

The principle that domestic legal norms should be construed in so far as possible in conformity with international law is a common method of interpretation in domestic legal orders. Its application in EU law has been postulated in legal literature,<sup>49</sup> and on several occasions, the ECJ has interpreted EU norms in light of international law.<sup>50</sup> Moreover, TFEU Article 167(3) grants the EU the explicit external competence to foster cooperation in cultural matters with third countries and international organisations. It follows that where the EU adopts international instruments in pursuing this competence – the 2005 Convention being a case in point – it would be contradictory not to take them into account.<sup>51</sup> Third, accommodating notions of international law and intergovernmental practice does not necessarily violate the prerogative in cultural matters that EU member states were careful to retain. Notably, where EU member states elaborate on the way in which they see culture or cultural diversity in international fora, this should contribute to a common understanding amongst them, and also be taken into account when interpreting EU law.

Within UNESCO, the understanding of culture has changed considerably over the last 60 plus years. To a large extent, this development mirrors the evolution of the theoretical approaches to culture described in 5.2.2 and 5.2.3. In the first years of its existence, UNESCO's main efforts had been on the increase and spreading of knowledge and culture throughout the world. Culture, in these early times, was understood in the sense of intellectual and artistic activity comprising mainly works of

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<sup>49</sup> See, for example, Uerpmann, *International Law as an Element of European Constitutional Law: International Supplementary Constitutions* (2003) 25.

<sup>50</sup> In *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany*, Case C-70/94 [1995] ECR I-3189 (ECJ, 17 October 1995) para 23 and in *Criminal Proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, Case C-83/94 [1995] ECR I-3231 (ECJ, 17 October 1995) para 24 the Court interpreted a Community provision in light of a GATT provision. In *Hermès International v FHT Marketing Choice BV*, Case C-53/96 [1998] ECR I-3603 (ECJ, 16 June 1998) para 28 and in *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*, Joint Cases C-300/98 and 392/98 [2000] ECR I-11307 (ECJ, 14 December 2000) para 47 the Court endorsed an interpretation in light of a provision in the TRIPS agreement. A more detailed overview of how the Court of Justice incorporates international human rights law, WTO law, and UN Security Council Resolutions is given by Petersen, *The Reception of International Law by Constitutional Courts through the Prism of Legitimacy* (2009) 12–21.

<sup>51</sup> Ress and Ukrow, Art. 151 EGV, para 44.

art and monuments of history.<sup>52</sup> Soon, however, this narrow understanding gave way to a more anthropological definition of culture.<sup>53</sup> A broader understanding of culture underpins, for example, the 1966 Declaration of Principles of International Cultural Co-operation, which sees cultural co-operation as a means to mitigate ‘ignorance of the way of life and custom of peoples’ (Paragraph 4 of the Preamble).<sup>54</sup> In 1982, a definition of culture in anthropological terms was included in an international, albeit non-binding, instrument. The Preamble of the Mexico City Declaration on Cultural Policies defines culture in its widest sense as:

‘the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs’.<sup>55</sup>

To date this remains, with slight variations, the way in which UNESCO and its member states see culture.<sup>56</sup> It also underpins the 2005 UNESCO Convention on the Diversity of Cultural Expressions.<sup>57</sup> In that binding instrument, cultural content ‘refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities’ (Article 4(2)) and the focus is on the cultural identities of individuals, groups and societies (Article 4(1) and (3)).

A very similar development can be traced within the CoE. Although the Statute of the CoE lists ‘cultural matters’ amongst the fields of

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<sup>52</sup> Stenou, *UNESCO and the Question of Cultural Diversity* (2007) 81–82.

<sup>53</sup> *Ibid* 76–77.

<sup>54</sup> *Declaration of the Principles of International Cooperation* in UNESCO (ed), Records of the General Conference, 14th session, Paris, 1966 (1967) 86. Article I proclaims: ‘1. Each culture has a dignity and value which must be respected and preserved. 2. Every people has the right and the duty to develop its culture. 3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind’.

<sup>55</sup> *Mexico City Declaration on Cultural Policies* in UNESCO (ed), World Conference on Cultural Politics, Mexico City, 26 July - 6 August 1982 (1982) 41.

<sup>56</sup> The definition was, for example, re-iterated in the Action Plan adopted by the Intergovernmental Conference on Cultural Policies for Development in 1998 and in the Preamble of the *UNESCO Universal Declaration on Cultural Diversity* in UNESCO (ed), Records of the General Conference, 31st session (2002) 62.

<sup>57</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 2440 UNTS, 311. For a more detailed analysis, see below at 6.3.3.4, on page 60, and in chapter 7, on page 84.

agreements and common action in Article 1(b), it does not define the term.<sup>58</sup> Since 1955, cultural co-operation within the CoE has been governed by the European Cultural Convention; with the aim to ‘safeguard and encourage the development of European culture’.<sup>59</sup> Two objectives are stipulated: the promotion of the common cultural heritage of Europe (Articles 1 and 3) and the promotion of mutual understanding amongst the CoE member states (Articles 2 and 4). Although the convention does not offer any definition, a fairly narrow, evaluative view of culture is implicit.<sup>60</sup> For once, cultural heritage, at the time, was understood in the restricted sense of objects of art.<sup>61</sup> Moreover, the means by which mutual understanding was to be fostered had a confined outlook, namely ‘the study of the languages, history and civilisation’ of the other members (Para 4 of the Preamble and Article 2). Over time, however, a broader anthropological view of culture also gained momentum in the CoE. This is already obvious in the fact that during the last 50 years five broader sub-areas of cultural co-operation have emerged under the framework of the European Cultural Convention: culture, heritage, education, sport and youth.<sup>62</sup> But also in the cultural field proper, the notion of culture was widened in the early 1970s to accommodate the concepts of cultural democracy and cultural development.<sup>63</sup> The shift towards a more anthropological conception of culture is also visible in the declarations and resolutions of the conferences of the member states’ ministers responsible for culture, which have taken place on an ad hoc basis since 1976. At the time of the first conference, the Secretary General described culture as

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<sup>58</sup> Notwithstanding this explicit mention of cultural matters, cultural co-operation remained on a ‘very sporadic and one-off basis’ until the entry into force of the European Cultural Convention; Grosjean, *Forty Years of Cultural Co-operation at the CoE 1954-94* (1997) 2.

<sup>59</sup> *European Cultural Convention*, 18 ETS, Para 4 of the Preamble.

<sup>60</sup> The CoE Secretariat itself describes the convention’s understanding of culture as ‘traditional, an artistic and intellectual heritage that should be transmitted, interpreted, enriched and enjoyed by as many as possible’; CoE, *The Secretary General’s Report on 50 Years of the European Cultural Convention* (2004) 6.

<sup>61</sup> *Ibid* 3.

<sup>62</sup> A detailed overview of the actions taken in all of these areas is offered by Grosjean, *Forty Years of Cultural Co-operation* 9-94. A more recent review is presented in CoE, *Report on European Cultural Convention*.

<sup>63</sup> Grosjean, *Forty Years of Cultural Co-operation*, 38-40, and CoE, *Report on European Cultural Convention*, 6-7. The concepts are described in more detail below at 6.3.1, on pages 38-39.

‘everything which enables the individual to situate him or herself vis-à-vis his environment, his society and his heritage; all those factors which contribute to a better understanding of man’s position and destiny and make it possible for him in given circumstances to modify them’.<sup>64</sup>

The ministers for culture themselves declared in Article III of Resolution No. 1 on the Challenge to Cultural Policy in our Changing Society that

‘cultural policy can no longer limit itself exclusively to taking measures for the development, promotion and popularisation of the arts; an additional dimension is now needed which by recognising the plurality of our societies, reinforces respect for individual dignity, spiritual values and the rights of minority groups and their cultural expressions’.<sup>65</sup>

In 2004, the CoE Secretariat summarised that the idea of culture within the CoE had been broadened to include ‘all of the values that give human beings their reasons for living and doing’.<sup>66</sup> This broad understanding of culture also underpins recent CoE standard-setting instruments. One example can be found in the Declaration on Intercultural Dialogue and Conflict Prevention, adopted by the European ministers responsible for cultural affairs in 2003, when defining culture in the context of intercultural dialogue in the appendix: ‘Intercultural dialogue must extend to every possible element of culture, without exception, whether these be cultural in the strict sense or have a political, economical, social, philosophical or religious dimension’.<sup>67</sup>

In conclusion, the understanding of culture, as displayed in UNESCO and CoE legal instruments and policy documents, has gradually broadened to embrace the anthropological view of culture.

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<sup>64</sup> CoE, *Ad Hoc Conference of European Ministers with Responsibility for Cultural Affairs Oslo 1976* (1976) 15.

<sup>65</sup> *Resolution No. 1 on the Challenge to Cultural Policy in Our Changing Society* in CoE (ed), *Ad Hoc Conference of European Ministers with Responsibility for Cultural Affairs Oslo 1976* (1976) 151. On a similar note, it was later highlighted that ‘all human and social activity should take place within a cultural framework’ in the Preamble of the *Declaration on the Economics and Funding of Culture* in CoE (ed), *5th Conference of European Ministers Responsible for Cultural Affairs - Sintra, 15-17 September 1987* (1988) 41.

<sup>66</sup> CoE, *Report on European Cultural Convention*, 6.

<sup>67</sup> *Declaration on Intercultural Dialogue and Conflict Prevention* in CoE (ed), *Conference of European Ministers Responsible for Cultural Affairs on ‘The New Role and New Responsibilities of Ministers of Culture in Initiating Intercultural Dialogue, with Due Regard for Cultural Diversity’ (Opatija/Croatia, 20-22 October 2003)* (2004) 5, Appendix Definition of Intercultural Dialogue.

## 5.4 The Concept of 'Culture' in EU Practice

The tendency to understand culture in an anthropological sense can also be observed in the political practices of the EU.

The Commission, for its part, has taken care not to limit the notion of culture in any way. Sometimes, it explicitly abstained from substantiating the term arguing that 'no one expects the Community to become involved in academic argument over the definition, purpose and substance of culture, or to arrogate any executive powers or even the slightest guiding function'<sup>68</sup> or that it is 'not for an institution to define the content of the concept of culture'.<sup>69</sup>

In its very first communication on culture, however, it had already understood culture in a broad anthropological sense as comprising

'in addition to the aesthetic side, i.e. literature, music, plastic arts, a scientific side (sciences, technology), a physical side (sports, open-air life) and a social side: man in his working environment, in the context of everyday living, the economy and politics'.<sup>70</sup>

Also, in recent times, the Commission has stressed the anthropological view of culture continuously. In 2003, the Commission formulated that

'the concept of culture which constitutes the basis for the Community action ... is understood in the anthropologic and social sense, embracing all of which concurs to the identity and dignity of people. Such concept enables one to fully grasp cultural diversity in a dynamic way in its relation to the Other'.<sup>71</sup>

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<sup>68</sup> Commission of the European Communities, *Stronger Community Action in the Cultural Sector - Communication to Parliament and the Council* (1982) 3. In the same vein, there is no definition of culture in Commission of the European Communities, *Commission Communication to the Council and Parliament - A Fresh Boost for Culture in the European Community* [1987] Bulletin of the European Communities Supplement 4/1, or Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee - New Prospects for Community Cultural Action* (1992).

<sup>69</sup> European Commission, *1st Report on the Consideration of Cultural Aspects in European Community Action* (1996) 3.

<sup>70</sup> Commission of the European Communities, *Community Action in the Cultural Sector - Commission Communication to the Council* [1977] Bulletin of the European Communities Supplement 6/1, 24-25.

<sup>71</sup> European Commission, *Communication from the Commission to the Council and the European Parliament - Towards an International Instrument on Cultural Diversity* (2003) 6.



In 2007, it argued – very much along the lines of the definition of culture in the Mexico City Declaration on Cultural Politics in 1982<sup>72</sup> – that

‘culture should be regarded as a set of distinctive spiritual and material traits that characterize a society and social group. It embraces literature and arts as well as ways of life, value systems, traditions and beliefs’.<sup>73</sup>

## **5.5 Assessment of the EU Concept of Culture**

This review has contrasted the evaluative sense of culture with the broader anthropological understanding of the term. It has become clear that the former view cherishes works and practices of what could be called highbrow culture, while mass or everyday culture is disregarded. Culture in the latter sense, on the other hand, is considerably broader and, in its extreme form, leads to an ‘everything is culture’ stance.<sup>74</sup> To a third, more pragmatic view, culture is the sum of the products and processes of intellectual creation. But which of these understandings underpins the concept of culture under EU law and, more specifically, TFEU Article 167(4)?

Clearly, to endorse any one of these views on culture also predetermines certain elements of a larger concept of cultural diversity. If one adopts the pragmatic approach to culture, cultural diversity designates the spectrum of different intellectual and artistic works and their production processes in a given society or group. If the concept of cultural diversity is based on an understanding of culture in the anthropological sense, it describes the spectrum of different ways of life of societies or groups. Developing an interpretation of cultural diversity based on the evaluative perspective on culture is a more difficult task. Arguably, cultural diversity would be seen as the spectrum of different degrees of culture of all the people within one society; the different levels they have reached on the evolutionary scale to human perfection. In notable contrast to the other two views, which are not inherently partial

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<sup>72</sup> See above at 5.3, on page 22.

<sup>73</sup> European Commission, *Commission Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation of the European Agenda for Culture* (2010) 2.

<sup>74</sup> See above n 40.

as to whether cultural diversity has a positive or negative value, from the evaluative perspective, culture diversity would not be seen as something positive: after all it is the goal for all members of society to reach the highest standards of human existence.<sup>75</sup> Moreover, cultural diversity would be highly subjective, depending on the cultural elite's interpretation of what these higher standards of culture are.

Our initial difficulty in conceptualising cultural diversity based on the evaluative view of culture might be seen as a first indication that the two concepts do not make a good match. More importantly, a review of relevant international standard-setting instruments and both EU and international political practice has revealed a clear trend to embrace the broader, anthropological view of culture, which could be understood as suggesting the anthropological view as the basis for the interpretation of cultural diversity in TFEU Article 167(4) and EU law in general.

This might appear inconsistent with the sometimes articulated view that the cultural concept in the EU is to be interpreted restrictively. One argument in favour of a restrictive interpretation is systematic in nature and highlights that the areas of education and science, which, from a broader view could also be seen as elements of culture, are governed by specific provisions of their own in Titles XII and XIX of the TFEU.<sup>76</sup> In addition, one could argue that only a restrictive interpretation reflects the vision of shared competences of TFEU Article 167 in which EU member states retain the cultural prerogative and the EU is only called upon to support and supplement member state activity. From this perspective, the scope of the EU concept of culture should be based on a comparison of the existing domestic concepts of culture. While the autonomy of the European legal order prohibits interpreting the concept of 'culture' in the EU treaties by simply resorting to national standards, the ECJ uses a form of normative comparison as a method of interpretation.<sup>77</sup> Some have therefore

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<sup>75</sup> Quite on the contrary, in these intellectual environment cultural institutions flourished from the middle of the 19<sup>th</sup> century onwards with the goal of diffusing the higher standards of culture through broader society; see Bennett, Culture, 66.

<sup>76</sup> Berggreen-Merkel, *Die rechtlichen Aspekte der Kulturpolitik nach dem Maastrichter Vertrag* (1995) 3; Ress and Ukrow, Art. 151 EGV, para 85.

<sup>77</sup> Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies*, 5-7.

suggested that the European concept of culture should encompass all the areas that traditionally have been the object of the EU member states' national cultural policies.<sup>78</sup> Culture would then be interpreted to cover areas such as literature, music, visual art, performing art, film, audiovisual art, monument preservation, customs, radio, television and Internet.<sup>79</sup> Others have proposed to define the concept of culture in accordance with the specific fields of action mentioned by TFEU Article 167(2).<sup>80</sup>

Yet, there are also good reasons to oppose any restrictive interpretation of the EU cultural concept. Not only is the language of TFEU Article 167(1) fairly broad, but also the list of specific areas of action enumerated in TFEU Article 167(2) could be seen as indicative only. A restrictive interpretation becomes all the more doubtful in the particular context of TFEU Article 167(4). Even if, in principle, one were to agree on a restrictive EU cultural concept in TFEU Article 167(1) and (2), this would not necessarily mean that the same restrictive view of culture should apply when interpreting the mainstreaming clause of Paragraph 4. Would the EU be obliged to take into account cultural aspects only in so far as they relate to the traditional areas of national cultural policy when adopting a measure that is based on a non-cultural treaty provision but has incidental cultural objectives? Or would a broader view of culture be appropriate here? The nature of Paragraph 4 as a safeguard against cultural blindness on the part of the EU legislator would probably militate in favour of the latter. The explicit use of the term 'cultural diversity' in TFEU Article 167(4) can also be seen as pointing in the same direction. For since cultural diversity is now also mentioned in TEU Article 3(3) and CFREU Article 22, it could be argued that it has become a general principle of EU law that transcends the restrictions allegedly inherent in TFEU Articles 167(1) and (2). Its inclusion in TFEU Article 167(4) could, therefore, be understood to command a broader interpretation of culture for the purposes of that Paragraph.

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<sup>78</sup> Ress and Ukrow, Art. 151 EGV, para 86; see also Loman and others, *Culture and Community Law: Before and after Maastricht* (1992) 3.

<sup>79</sup> Ress and Ukrow, Art. 151 EGV, para 86.

<sup>80</sup> Frenz para 4089. Somewhat inconsistently with this premise, he then goes on to equally include mass and everyday culture. Yet this, it could be argued, eventually results in a not particularly restrictive scope.

But even if one were to endorse a restrictive vision of the EU cultural concept, this, it is submitted, would only at first glance seem in contradiction with an anthropological underpinning. This becomes clearer if one realises that the two pairs of antipodes, namely, on the one hand, the evaluative and the anthropological theoretical paradigms of culture and, on the other, the restrictive and the extensive practical implementation of culture, belong to two different and distinct categories. Both the evaluative and the anthropological theories of culture are simplified archetypes, which, in reality, allow for a multitude of different embodiments, all of which are restrictive or extensive to a variable degree. The converse question of whether a restrictive interpretation of the EU concept of culture implies an evaluative justification would be more telling in our view. That this cannot be the case is evidenced by the fundamental importance of the principles of equality and pluralism in EU law. TEU Article 4(2) postulates that the ‘Union shall respect the equality of member states before the Treaties as well as their national identities’ and Paragraph 3 of the Preamble of the CFREU mentions the respect of national identities of member states alongside the respect for the diversity of cultures. These ideals, however, could not be reconciled with the judgmental element inherent in the evaluative view of culture, according to which some cultural products and practices are more valued than others.

It can, therefore, be concluded that the EU cultural concept is principally infused by an anthropological view of culture as encompassing everything that embodies the particular identity or way of life of a society or group.



## 6 The Notion of 'Cultural Diversity' under EU Law

The present chapter seeks to establish how the notion of cultural diversity is to be understood under EU law and, more specifically, TFEU Article 167(4).

The analysis starts with a review of the instances in which cultural diversity is mentioned in the EU legal framework (6.1). While the concept of cultural diversity has steadily gained importance for the EU, this is only of limited help in our quest to substantiate the term. In fact, EU statutory texts do not contain any legal definition of the term 'cultural diversity' or any indication of how it should be interpreted. It is, therefore, necessary to explore its contours from different angles.

Based upon the EU understanding of the term 'culture'<sup>81</sup>, we can establish a first definition of cultural diversity that highlights the descriptive dimension of the concept (6.2).

It is clear, however, that the term is seldom used in such a strictly analytical sense but very often with various normative connotations. To track these additional dimensions of cultural diversity, we review the ways in which the concept has been applied in international law and the political practice of UNESCO and the CoE (6.3). The resulting analysis is extensive, deliberately going beyond binding law and even transcending the legal sphere. First, this approach is motivated by the recognition that the concept of cultural diversity has developed in sociology rather than law. In addition, however, there is a broader point to make: because of the variety of meanings that continue to be ascribed to the term cultural diversity, it is prone to misunderstanding and can easily be used to cloud rather than enlighten discussions. It is, therefore, all the more important to be transparent about the assumptions that underlie its use.

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<sup>81</sup> Chapter 5, on page 13.

It will then be determined whether the normative dimensions of cultural diversity found in international law and intergovernmental practice will have to be taken into account when interpreting the term under EU law (6.4).

Finally, the concluding remarks highlight some of the pitfalls in interpreting the concept of cultural diversity that may explain why the use of the term so often proves ambiguous and vague (6.5).

## **6.1 Cultural Diversity in the EU Legal Framework**

### **6.1.1 The Mainstreaming Requirement in TFEU Article 167(4)**

The so-called mainstreaming clause of TFEU Article 167(4) provides that the EU ‘shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures’. EU action may affect culture. While this is self-evident in cases of measures with primarily cultural objectives, the provision also recognises that measures that have the explicit goal of serving non-cultural purposes and are therefore adopted under one of the other areas of EU competence<sup>82</sup> may also affect culture.

In light of the impact that EU measures, even where not enacted under TFEU Article 167, may have on the cultural sphere in general and on the member states’ cultural prerogative in particular, member states felt the necessity to include TFEU Article 167(4) in order to prevent undue damage to their cultural objectives.<sup>83</sup> Its

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<sup>82</sup> The Court of Justice in *European Parliament v Council of the EU* has confirmed the legitimacy of such measures. Deciding on the right legal basis for a council decision that pursued both economic and cultural objectives, the Court noted that ‘not every description of the cultural aspects of Community action necessarily implies that recourse must be had to Article 128 [now TFEU Article 167] as a legal basis, where culture does not constitute an essential and indissociable component of the other component on which the action in question is based but is merely incidental or secondary to it’; *European Parliament v Council of the European Union*, Case C-42/97 [1999] ECR I-869 (ECJ) para 24. With a view to the Court’s subsequent decisions in the *Tobacco* cases, it has been suggested that TFEU Article 167(4) even allows the adoption of harmonising legislation primarily intended to attain cultural policy goals; see Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (2008) 73.

<sup>83</sup> Cunningham, ‘In Defense of Member State Culture: The Unrealized Potential of Article 151(4) of

purpose is to alert the European legislator already in the planning stage of any given measure to the possible cultural implications that its adoption might entail.<sup>84</sup> The EU is therefore required to take into account ‘cultural aspects ... in order to respect and to promote the diversity of its cultures’. Given that the EU is addressed in its entirety, one has to conclude that this obligation is incumbent on all EU organs and institutions.<sup>85</sup>

Despite this explicit mention of cultural diversity in TFEU Article 167(4), the norm does not contain any definition of the term.

### 6.1.2 The Increased Importance of Cultural Diversity in EU Law

In the last twenty years, the use of the term ‘cultural diversity’ has proliferated in the EU legal order. The earliest references were introduced by the Treaty of Maastricht (entered into force on 1 November 1993) in order to limit the newly created Community competences in the areas of education and culture. TFEU Article 165(1) [then EC Article 126(1)] guarantees that when exercising its educational competences, the Union fully respects its member states’ ‘linguistic and cultural diversity’. Similarly, TFEU Article 167(1) [then EC Article 128(1)] asserts that the Union must respect the national and regional diversity of the cultures of its member states when acting in the area of culture. With the Treaty of Amsterdam (entered into force on 1 May 1999), the mainstreaming clause of TFEU Article 167(4) [then EC Article 128(4)] was specifically amended to include the respect and promotion of cultural diversity. While prior to the amendment, Paragraph 4 had only stipulated that the EU shall take ‘cultural aspects’ into account, this was now supplemented by the inclusion of the subphrase ‘in particular in order to respect and to promote the diversity of its cultures’. Proclaimed in 2000, the CFREU mentions cultural diversity twice. First, its Preamble contains the postulate for the EU to contribute ‘to the preservation and to the development of (its) common values while respecting the diversity of the cultures and

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the EC Treaty and the Consequences for EC Cultural Policy’ (2001) 34 Cornell International Law Journal 119, 137.

<sup>84</sup> Psychogiopoulou 129.

<sup>85</sup> See also Röss and Ukrow, Art. 151 EGV, para 141.



traditions of the peoples of Europe'. Second, according to CFREU Article 22, 'the Union shall respect cultural, religious and linguistic diversity'.<sup>86</sup> With the Lisbon Treaty, these provisions have come into full legal effect (see TEU Article 6(1)) on 1 December 2009. That Treaty also made the latest inclusion of cultural diversity in EU law; in a prominent position, the fourth Sub-paragraph of TEU Article 3(3) now contains the general principle that the EU 'shall respect its rich cultural and linguistic diversity'.

Remarkably, in spite of the increased attention that the concept of 'cultural diversity' seems to have been given at the EU level in recent years, none of the mentioned norms attempt to define the term.

## **6.2 The Descriptive Dimension of Cultural Diversity**

The enquiry into the meaning of 'culture' under EU law evinced an anthropological understanding of the term as everything that characterised the identity or the way of life of a group or an individual. Upon this basis, a first approximation to the concept of cultural diversity may be formulated. Cultural diversity would then determine the spectrum of different cultural identities or ways of life in society. Given that a cultural identity may express itself through virtually limitless forms, the notion has a very broad outlook.

In debates on a particular marker of identity, it would, therefore, appear sensible to narrow down this understanding of cultural diversity. Serving as a vehicle for the cultural identity of its authors, music is a good case in point. Musical diversity would thus be the spectrum of different cultural identities as they are conveyed in a given society through music. More specifically still, diversity in online music would then denote the spectrum of different cultural identities as conveyed through music distributed online.

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<sup>86</sup> *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389.

Irrespective of whether the focus is on cultural identities in the abstract or a concrete maker of identity, this understanding of cultural diversity is a simple statement of fact: a given society, or online music in a given society, may be more or less diverse. However, the term is seldom applied in this descriptive sense. On the contrary, where cultural diversity is used as an argument in societal or political discourse, it usually serves to convey a broader political idea or objective.

### **6.3 The Normative Dimensions of Cultural Diversity under International Law and in Intergovernmental Practice**

To analyse the dimensions of cultural diversity that go beyond mere factual description, research into how the concept has been politicised in various international initiatives, both binding and non-binding, is proposed, illustrating how ideas of cultural pluralism and exchange permeate the interpretation of cultural diversity at the international level.

We find that as early as 1945, UNESCO prescribed in its constitution ‘the fruitful diversity of cultures’.<sup>87</sup> Although this would generally be seen as a mere *obiter dictum*, already in 1947 the then Director-General Julian Huxley listed cultural diversity as a working principle of great importance for UNESCO.<sup>88</sup> Since then, one can discern commitment to cultural diversity as a continuous thread in the activities of the organisation.<sup>89</sup>

Another early example can be found in the co-operation between CoE member states, which started with the adoption of the European Cultural Convention in 1954. Mindful of the differences between European nations, it obliges each party to ‘encourage the study by its own nationals of the languages, history and civilisation of the other Contracting Parties’ (Article 2(a)). Although the term ‘cultural diversity’ is

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<sup>87</sup> *Constitution of the United Nations Educational, Scientific and Cultural Organization* Article I(3). It reads: ‘With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States Members of the Organization, the Organization is prohibited from intervening in matters which are essentially within their domestic jurisdiction’.

<sup>88</sup> Huxley, *Report of the Director-General on the Activities of the Organization in 1947* (1947) 12–13.

<sup>89</sup> Stenou 75.

not used, this provision contains the seeds of one of the main characteristics of the principle of cultural diversity, namely the respect for different cultural practices in order to foster mutual understanding.<sup>90</sup> In contrast to today's understanding, however, it saw each member state as an entity with its own proper cultural identity, thus disregarding intra-state cultural diversity. Later, the respect for cultural diversity was increasingly recognised and established itself as an important principle,<sup>91</sup> as demonstrated by numerous declarations and resolutions of the European ministers for cultural affairs. Naturally, the growing recognition of the importance of cultural diversity has not developed at a constant pace. There are times at which the organisations' commitment to cultural diversity has been expressed more strongly than at others. Today, the protection and promotion of cultural diversity are apprehended as a transversal theme that runs through virtually all of the two organisations' activities.<sup>92</sup>

The evolution of the concept of cultural diversity can be presented across four different axes: its underpinning as cultural pluralism (6.3.1); its intercultural aspect (6.3.2); its conceptualisation as a means to counter free trade in cultural goods and services (6.3.3); and finally the justification and limits it finds in cultural rights (6.3.4).

### **6.3.1 Cultural Diversity and Its Changing Connotations: From Cultural Plurality to Cultural Pluralism**

The first phase in the development of the concept of cultural diversity in the international arena is characterised by a growing awareness of its importance in the work of UNESCO and the CoE. Until the early 1990s, the notion has been invoked in different contexts and as an argument for different political goals, depending on the circumstances of the times. All these initiatives, however, have a common starting

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<sup>90</sup> Along the same lines, the European ministers responsible for cultural, education, youth and sport declared, in 2004, that the goal of the Convention was the 'peaceful harmony of diverse cultures'; *Wroclaw Declaration on Fifty Years of European Cultural Cooperation* (2004).

<sup>91</sup> See for an overview Grosjean, *Forty Years of Cultural Co-operation*, 117–123, and CoE, *Report on European Cultural Convention*, 8–9.

<sup>92</sup> See, in particular as to its own work, UNESCO, *Investing in Cultural Diversity*, 187–250.

point in that cultural diversity is understood as the existence of different cultures in the sense of what we would today call cultural pluralism.<sup>93</sup> Over time, the focus changed: the pluralistic co-existence of different states, strongly emphasised in the early times, gradually gave way to the recognition of different cultural groups within states.

### *Political Liberation*

In the forum of UNESCO, cultural diversity began to be seen in the context of political liberation during the period of decolonisation in the 1950s and 1960s as an argument to support independence and self-determination on an international scale. Cultural rights, as well as the notion of cultural diversity, were used as arguments for societies to assert their distinct cultural identity, which in turn became a strong political justification for independence movements, resistance to colonialism and liberation or, for newly established states, a guarantee of their very existence.<sup>94</sup>

### *Cultural Cooperation*

Towards the end of this period, cultural diversity first appeared in a UNESCO standard-setting instrument. The 1966 Declaration on the Principles of International Cultural Cooperation stressed the importance of cultural diversity as a guiding principle in cooperation ‘on all aspects of intellectual and creative activities relating to education, science and culture’.<sup>95</sup> The cornerstone of cultural cooperation was seen in the fact that ‘each culture has a dignity and value which must be respected and preserved’ and that ‘every people has the right and the duty to develop its culture’.<sup>96</sup> In line with the prevalent view at the time, culture, a concept of national uniqueness across international variety, was equated with that of the nation-state. Cultural diversity was thus one of the principles upon which cultural co-operation between

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<sup>93</sup> The Oxford English Dictionary defines ‘pluralism’ as: ‘the presence or tolerance of a diversity of ethnic or cultural groups within a society or state; (the advocacy of) toleration or acceptance of the coexistence of differing views, values, cultures, etc.’; Simpson, *The Oxford English Dictionary* (3rd edn) ‘pluralism’ <<http://oed.com/view/Entry/146193>>.

<sup>94</sup> UNESCO, *Medium-Term Plan, 1977-1982*, para 1201; Stenou 87, 90.

<sup>95</sup> *Declaration of the Principles of International Cooperation* Article II.

<sup>96</sup> *Ibid* Article I(1) and (2).

nations was to be based; it was used in the sense of cultural pluralism implying that – although nations are different – they are all equal and have to be respected.

The view that cultural co-operation must be guided by considerations of cultural diversity has been equally prevalent in the work of the CoE, as exemplified by the 1981 Resolution on European Cultural Co-operation:

‘European cultural co-operation must be conducted on as broad as possible a basis, serving the objectives of cultural development and consistent with the principles of freedom of expression, cultural diversity and recognition of the rights of the individual’.<sup>97</sup>

Here, however, cultural diversity connotes more than international equality. The position of cultural diversity in this list alongside the principle of freedom of expression and the rights of the individual suggest that the term relates to the diversity also within and not only amongst nations. Its mention serves as a reminder that cultural co-operation in the CoE should also be mindful of intrastate cultural pluralism.

### *Endogenous and Integrated Development*

With the emphasis on cultural cooperation, the notion of cultural diversity started to be used in a different context in the arena of UNESCO in the 1970s. By that time it had become clear that the newly independent countries were in need of international solidarity in order to develop. Against this backdrop, cultural diversity justified calls for endogenous and integrated development. These notions stood for strategies which allowed developing countries to determine their own development path based on their distinctive cultural identity; with the aim of reaching not only economic but also cultural growth.<sup>98</sup> Again, cultural diversity underlined the equality of and the respect for all nations.

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<sup>97</sup> *Resolution No 1 on European Cultural Co-operation* in CoE (ed), 3rd Conference of Ministers with Responsibility for Cultural Affairs; Luxembourg, 5-7 May 1981 (1983) 185.

<sup>98</sup> Stenou 88; UNESCO, *Medium-Term Plan, 1977-1982*, paras 1203-1204.

## *Cultural Democracy and Cultural Development*

The CoE, at the same time, emphasised the related concepts of cultural democracy and cultural development, for the creation of which cultural diversity, again understood in the sense of intrastate pluralism, was regarded indispensable. The notion of cultural democracy is based on a broad, anthropological understanding of culture and aims at enabling everybody to participate actively in cultural life. It goes beyond the mere democratisation of culture, the process of making the traditional forms of culture accessible to as many people as possible and as equally as possible.<sup>99</sup> An active participation of everybody in the sense of cultural democracy, however, can only be attained if a society respects and encourages expressions of cultural identities even if they diverge from the cultural identity of the majority.<sup>100</sup>

In the following years, the CoE was concerned with the broadening of the concept of cultural democracy into that of cultural development. This was born out of the recognition that cultural considerations should not only be a complementary or even optional activity to economic development,<sup>101</sup> and that cultural values and objectives should be taken into account in all sectors of national or regional policy.<sup>102</sup> In 1984, the European Declaration on Cultural Objectives proposed the mainstreaming of 18 cultural objectives into broader policies.<sup>103</sup> Several objectives are concerned with cultural diversity: objective 7, for example, asserts the need to ‘develop opportunities for creative activity and self expression ... so that everyone may utilize their abilities and make their contribution to the development of society by realizing their full potential’ whereas objective 12 states the need to ‘promote recognition of the cultures of regions, migrants and minorities and their participation in the community,

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<sup>99</sup> Grosjean, *Forty Years of Cultural Co-operation*, 100.

<sup>100</sup> *Resolution No. 1 on the Challenge to Cultural Policy in Our Changing Society* Articles III and IV note that ‘an additional dimension is now needed which, by recognising the plurality of our societies, reinforces respect for individual dignity, spiritual values and the rights of minority groups and their cultural expressions’.

<sup>101</sup> Grosjean, *Forty Years of Cultural Co-operation*, 103.

<sup>102</sup> *Resolution No II on The European Declaration on Cultural Objectives* in CoE (ed), 4th Conference of European Ministers Responsible for Cultural Affairs ~ Berlin, 23-25 May 1984, 98.

<sup>103</sup> *European Declaration on Cultural Objectives* in CoE (ed), 4th Conference of European Ministers Responsible for Cultural Affairs ~ Berlin, 23-25 May 1984, 93.

so that our society – mindful of such diversity – will allow the emergence of new forms of social cohesion’. Further, the role of communities such as family, the local community and voluntary groups is emphasised (objective 13). Cultural pluralism within states was thus seen as necessary in order to attain both cultural democracy and cultural development.

*From the Protection of Migrants, National and Other Cultural Minorities ...*

Thus, while the connotation of cultural diversity as the intrastate co-existence of different cultural groups was largely recognised within the CoE even in the 1970s, it started to be acknowledged within UNESCO from the 1980s onwards. At this time, efforts were undertaken to stimulate a debate on the cultural policies within individual states in order to foster plurality and, ultimately, democracy. This is evident from the Mexico City Declaration on Cultural Policies, which was adopted by the 1982 World Conference on Cultural Policies (MONDIACULT) and emphasised the connection between cultural diversity and democracy (Paragraphs 17-22).<sup>104</sup> The Conference called for the elimination of inequalities in the participation of all individuals in cultural life (Paragraph 22) and the establishment of ‘absolute respect for and appreciation of cultural minorities and the other cultures of the world’ (Paragraph 8). The recognition of the respect for cultural minorities shifted the focus: from cultural diversity between nations to that within individual nations.<sup>105</sup> During the course of the 1980s and 90s, the concept of cultural diversity as an argument to enhance intrastate democracy was to become even stronger to the benefit of cultural minorities. Recognising that societies or nation-states could no longer be viewed as monolithic

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<sup>104</sup> *Mexico City Declaration on Cultural Policies*. In addition, the Declaration also picks up a number of already familiar themes. It understands cultural diversity as inseparable from cultural identities (Paragraph 5) and emphasises the ‘equality and dignity of all cultures’ (Paragraph 9), from which follows the ‘duty to ensure that the cultural identity of each people is preserved and protected’ (Paragraph 7). Another major concern of the Declaration is the cultural dimension of development (Paragraphs 10-16).

<sup>105</sup> The Declaration was equally progressive in the area of cultural heritage, where the Conference proposes a wide definition, which includes ‘both the tangible and intangible works through which the creativity of [a] people finds expression’ (Paragraph 23). Before, the preservation of cultural heritage was mostly centred on places and monuments. As to the relationship between cultural diversity and cultural heritage, see below, on page 62.

blocs but rather were made up of culturally different groups, UNESCO's efforts moved towards the prevention of conflicts and the implementation of constructive pluralism within states.<sup>106</sup>

At the European level, the CoE continued to address questions of intrastate diversity and adopted several instruments specifically concerned with migrants and national minorities. Long before objective 12 of the 1984 European Declaration on Cultural Objectives proclaimed the promotion of the culture of migrants,<sup>107</sup> the European ministers of education had already acknowledged, in 1975, the need to give 'migrants and their children, through the necessary incentives, an opportunity to acquire an adequate knowledge of the language and culture of both the host country and the country or origin with a view to developing their personalities'.<sup>108</sup> Although the 1992 Convention on the Participation of Foreigners in Public Life at Local Level<sup>109</sup> does not refer to the principle of cultural diversity, it foresees consultative bodies to represent foreigners at the local level, which may be seen as a step to the recognition of the foreign cultures and thus towards cultural pluralism.<sup>110</sup>

Two specific CoE treaties are concerned with the cultural aspects of national minorities.<sup>111</sup> The 1992 European Charter for Regional and Minority Languages

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<sup>106</sup> Stenou 113-118.

<sup>107</sup> See above, on page 38.

<sup>108</sup> *Resolution No 2 on Migrants' Education* in CoE Parliamentary Assembly (ed), Information Document on the Standing Conference of European Ministers of Education, Ninth Session (Stockholm, 9-12 June 1975) (1975) 16. This principle was later enshrined in *European Convention on the Legal Status of Migrant Workers*, 93 ETS, Article 14(2), and in *European Social Charter (revised)* 163 ETS, Article 19(11)-(12). These instruments, however, are not predominantly concerned with the cultural life of migrants.

<sup>109</sup> *Convention on the Participation of Foreigners in Public Life at Local Level*, 144 ETS.

<sup>110</sup> Creating links between local authorities and foreign residents, these bodies aim to provide a forum for discussion and to foster the general integration of foreign residents into the life of the community (Article 5(1)(a)).

<sup>111</sup> In international law, the term 'national minority' is predominantly understood as covering autochthonous minorities only, ie minorities that are native to a particular region once independent or belonging to a neighbouring state. Immigrants, however, have decided to leave their home territory and are therefore not protected as national but ethnic minorities. Malloy provides a detailed explanation in *National Minority Rights in Europe* (2005) 18-14. Note, however, that the *Framework Convention for the Protection of National Minorities*, 157 ETS, does not define the term 'national minority' as it was deemed that 'it is impossible to arrive at a definition capable of mustering general support of all CoE member States'; see CoE, *Explanatory Report to the Framework Convention for the Protection of National Minorities* (1995) para 12.



obliges the parties to the charter to protect and promote the use of regional and minority languages.<sup>112</sup> The 1995 Framework Convention for the Protection of National Minorities provides for the promotion of

‘the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage’

and condemns ‘policies or practices aimed at assimilation of persons belonging to national minorities against their will’.

### *... To the Safeguarding of the Cultural Identities of All Groups within Society*

Accompanying these treaties that catered for the needs of particular parts of society was an initiative to foster cultural diversity in a less confined but more open-ended way. In 1990, the Declaration on Multicultural Society and European Cultural Identity<sup>113</sup> marked the transition to both the coming emphasis of cultural products<sup>114</sup> as well as the aspect of intercultural dialogue<sup>115</sup> within the cultural diversity debate. Most importantly, it called for the preservation and promotion of cultural diversity. First, the importance of cultural pluralism is emphasised when it affirms that the ‘richness of European culture stems from the diversity and vitality of its national, regional and local cultures’ (Paragraph 2 of the Preamble). The Declaration then argues for the ‘scope for all individuals, all communities to have a way of life, of self-expression that gives free rein to their own identities’ (Paragraph 13). This opportunity of each and every one to express his difference does not only cover ‘his spiritual, religious, political or philosophical opinions’ but also ‘his way of life and

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<sup>112</sup> *European Charter for Regional or Minority Languages*, 148 ETS. In 1981, the Committee of Ministers had already considered that ‘the rich heritage of diverse languages and cultures in Europe is a valuable common resource to be protected and developed, and that a major educational effort is needed to convert that diversity from a barrier to communication into a source of mutual enrichment and understanding’; *Recommendation No. R (82) 18 of the Committee of Ministers to Member States Concerning Modern Languages* (1982).

<sup>113</sup> *Declaration on Multicultural Society and European Cultural Identity* in CoE (ed), 6th Conference of European Ministers Responsible for Cultural Affairs – Palermo, 25-26 April 1990 (1990) 60.

<sup>114</sup> See below at 6.3.3, on page 50.

<sup>115</sup> See below at 6.3.2, on page 43.

mode of expression' (Paragraph 6). Such opportunity corresponds, as Paragraph 7 clarifies, to a duty on the part of the people of Europe 'to preserve and promote what makes them different one from the other'. This illustrates very clearly how the focus during the previous decades has changed in relation to the object of cultural diversity: from nations to regional and local cultures down to the individual. It also underlines that cultural groups must have the opportunity to freely express their cultural identity.

### ***Conclusions***

Some conclusions can be drawn from this overview of initiatives on cultural diversity undertaken by UNESCO and the CoE.

First, the inclusion of cultural diversity was not proclaimed as a goal of its own but an argument for a particular political objective: within UNESCO, for example, the political liberation of suppressed nations, the attainment of cultural co-operation or the realisation of endogenous and integrated development; at the CoE, one could name the goals of cultural co-operation, cultural democracy and cultural development. Common to all of these objectives, however, is an understanding of cultural diversity as cultural pluralism that recognises the differences between cultures: first cultures understood as different nations, then as different cultural groups within nations. Later, the protection of minorities gained wide support and eventually first fragments of a more comprehensive framework for 'all individuals, all communities' were formulated.<sup>116</sup>

From very early the interdependence of cultural diversity and cultural identity was emphasised and legal commentary has suggested that it is this connection that differentiates cultural diversity, understood as cultural pluralism, from related

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<sup>116</sup> *Declaration on Multicultural Society and European Cultural Identity.*

concepts.<sup>117</sup> Its theoretical justification was found in the assumption that although cultures were different they were all of equal dignity and value.<sup>118</sup>

Once cultural diversity is appreciated as cultural pluralism, its significance transcends the simple stating of a fact and becomes a value to be aspired to on its own, a claim for the recognition of differentness.<sup>119</sup> To implement cultural diversity then postulates that every group in a given society should be able to assert, express and practise its cultural identity and that this should be accepted by the other cultural groups.

Using the term musical diversity in this normative sense therefore not only describes the spectrum of different identities that are conveyed through music in a given society but also implies that all cultural identities should be able to be conveyed through music. Accordingly, diversity in online music would call for these identities to be conveyed through music that is available online.

### **6.3.2 Intercultural Dialogue as the Preferred Means to Manage Cultural Diversity**

To acknowledge the existence of different cultural groups does not yet say anything about their relationship and the way in which they interact in a given country or society. The management of diverse groups, however, is important to avoid alienation, to limit conflict and to secure a smooth functioning of society.<sup>120</sup> Three theories can be distinguished broadly: assimilationism, multiculturalism and interculturalism. At the height of the nation-state, where nations were seen as monolithic cultural entities, it was assumed that all those who lived within a state boundary should assimilate to its predominant ethos.<sup>121</sup> Given that the declared aim of assimilationism is homogeneity, it is in opposition to the idea of cultural pluralism. With growing awareness of human

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<sup>117</sup> Von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship' (2008) 19 *The European Journal of International Law* 241, 246.

<sup>118</sup> This also shows that cultural diversity - if understood in the sense of cultural pluralism - is built on an anthropological view of culture; see above 5.2.3, on page 18.

<sup>119</sup> Isar 373.

<sup>120</sup> Vertovec, 'Towards Post-multiculturalism? Changing Communities, Conditions and Contexts of Diversity' (2010) 61 *International Social Science Journal* 83, 84.

<sup>121</sup> CoE, *White Paper on Intercultural Dialogue - "Living Together as Equals in Dignity"* (2008) para 52.

rights and, particularly, equality, western democracies, from the mid-1970s until the mid-1990s, sought to accommodate cultural differences more strongly. Collectively termed multiculturalism, such initiatives aimed at cultural recognition, economic redistribution and political participation.<sup>122</sup> The objective was to construct public spaces in which diversity was made apparent and visible.<sup>123</sup> From the end of the 1990s onwards, however, a turn against multiculturalism formed. In particular, the view was widely endorsed that the mainstreaming of cultural difference had neither been able to create sufficient respect or tolerance for minorities, nor to avoid segregation and communalism.<sup>124</sup> It was argued that multiculturalism was nothing more than a superficial ‘feel-good celebration of ethno-cultural diversity’<sup>125</sup> that failed to achieve real comprehension amongst different cultural groups. Although commentators argue that the critique of multiculturalism is overstated,<sup>126</sup> it led to a serious retreat from the concept. Today, the term multiculturalism appears politically burnt, as is witnessed from a wide-ranging CoE consultation in 2007, which revealed that member states believed that the policy approach of multiculturalism was no longer adequate.<sup>127</sup> One concept to fill the gap of post-multiculturalism is that of interculturalism,<sup>128</sup> also often called intercultural dialogue.

Intercultural dialogue inflates the understanding of cultural diversity as the ‘differences between and within cultural groups’<sup>129</sup> through the ideology that these

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<sup>122</sup> Kymlicka, ‘The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies’ (2010) 61 *International Social Science Journal* 97, 100–102. Kymlicka distinguishes three waves of multiculturalism: the empowerment of indigenous people, new forms of autonomy and power-sharing for sub-state national groups, and new forms of multicultural citizenship for immigrant groups. It should be noted that the term multiculturalism is an oversimplification and, in reality, encompasses very divergent measures. Hall provides a nuanced classification in *The Multicultural Question* (2001) 3–4.

<sup>123</sup> Robins, *The Challenge of Transcultural Diversities: Transversal Study on the Theme of Cultural Policy and Cultural Diversity* (2006) 35.

<sup>124</sup> Ang, ‘Multiculturalism’ in Bennett and others (eds) *New Keywords* (2005) 226, 27; Vertovec 85–86; CoE, *White Paper* para 55.

<sup>125</sup> Kymlicka 98.

<sup>126</sup> Kymlicka; Vertovec 94.

<sup>127</sup> CoE, *White Paper*, para 15.

<sup>128</sup> Bouchard provides an overview of the concept in ‘What Is Interculturalism?’ (2011) 56 *McGill Law Journal* 435.

<sup>129</sup> *Declaration on Intercultural Dialogue and Conflict Prevention*, definition of ‘cultural diversity’ in the

differences must be taken into account and the otherness be respected.<sup>130</sup> Perceiving cultures not as static wholes but as dynamic constructs that evolve constantly,<sup>131</sup> intercultural dialogue is claimed to incorporate the best of assimilation and multiculturalism:

‘It takes from assimilation the focus on the individual; it takes from multiculturalism the recognition of cultural diversity. And it adds the new element, critical to integration and social cohesion, of dialogue on the basis of equal dignity and shared values’.<sup>132</sup>

The need for a new strategy for managing cultural diversity had emerged with some of the effects of globalisation.<sup>133</sup> Already in 1990, it had been recognised that the increased fluxes of migrants, either from non-European countries into Europe or those within Europe, needed a targeted political response and that migration trends would only exacerbate in the years to come.<sup>134</sup> The Yugoslav dissolution and the associated wars put the spotlight on the importance of the protection of minorities and the prevention of conflicts. Finally, the urgent need for strategies of conflict prevention was again evidenced by the global acts of Islamist-legitimised terrorism on 11 September 2001 and thereafter. Against this background, the CoE promotes the concept of intercultural dialogue as an explicit counter model to Huntington’s theory of a clash of civilisations:<sup>135</sup>

‘We reject the idea of a clash of civilisations and firmly believe that, on the contrary, increased commitment to cultural cooperation – in the broad sense of the term – and intercultural dialogue will benefit peace and

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Appendix.

<sup>130</sup> *Ibid*, explanation of the principle of ‘cultural diversity’ in the Appendix.

<sup>131</sup> See above, on page 19.

<sup>132</sup> CoE, *White Paper*, para 56. The white paper elaborates further: ‘Unlike assimilation, it recognised that public authorities must be impartial, rather than accepting a majority ethos only, if communalist tensions are to be avoided. Unlike multiculturalism, however, it vindicates a common core which leaves no room for moral relativism. Unlike both, it recognises a key role for the associational sphere of civic society where, premised on reciprocal recognition, intercultural dialogue can resolve the problems of daily life in a way that governments alone cannot’ (para 63).

<sup>133</sup> For a more detailed overview of the real-world challenges that triggered the popularity of intercultural dialogue see Endres, *Das Konzept des «interkulturellen Dialogs» bei Europarat, Europäischer Union und UNESCO* (2010) 17–22.

<sup>134</sup> CoE, *6th Conference of European Ministers Responsible for Cultural Affairs – Palermo, 25-26 April 1990* (1990) 59.

<sup>135</sup> Huntington, *The Clash of Civilizations and the Remaking of World Order* (1997).

international stability in the long term, including with respect to the threat of terrorism.<sup>136</sup>

A review of the development of the concept of interculturalism at the CoE illustrates that multiculturalism and interculturalism both strive for the realisation of cultural pluralism, but differ in degree and accentuation.<sup>137</sup> That the concepts are highly related (and that the critique of multiculturalism might indeed be overstated) could already be seen from a 1990 CoE Declaration. In line with contemporary political fashion, the document is entitled Declaration on Multicultural Society and European Cultural Identity, yet the promulgated values are cornerstones of what from the early 2000s onwards would be called ‘intercultural dialogue’: ‘cooperation and reciprocal enrichment between cultures’ (Paragraph 14) based on an ‘openness to spiritual, intellectual and artistic trends from other parts of the world’ (Paragraph 3) and a ‘positive dialogue and fruitful exchange of ideas’ (Paragraph 9).<sup>138</sup> While previous instruments on cultural diversity had only set the target in that cultural diversity was to be understood in the sense of cultural pluralism without specifying the means by which to achieve such pluralism, the 1990 Declaration started a trend of ascribing more specific forms to manage cultural diversity.

Subsequently, a coherent vision of intercultural dialogue was offered by the 2003 CoE Declaration on Intercultural Dialogue and Conflict Prevention<sup>139</sup> and

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<sup>136</sup> *Faro Declaration on the CoE's Strategy for Developing Intercultural Dialogue* (2005) para 1 of Part 1.

<sup>137</sup> The main points of differences, although very strongly situated in the context of Quebec, are listed by Bouchard 463–465.

<sup>138</sup> The Resolution itself does not explicitly mention the term intercultural dialogue. In the same year, however, ‘intercultural dialogue’ between the majority culture and ethnic or linguistic minorities was encouraged in *Resolution No. 1 on Initiatives, Ways and Means Likely to Promote a Dialogue between Cultures* in CoE (ed), 6th Conference of European Ministers Responsible for Cultural Affairs – Palermo, 25-26 April 1990 (1990) 63, para 8. Further, intercultural dialogue was seen as one of the means to protect national minorities in *Framework Convention for the Protection of National Minorities* Article 6(1).

<sup>139</sup> *Declaration on Intercultural Dialogue and Conflict Prevention*. The commitment to intercultural dialogue was reassured by the European ministers responsible for cultural affairs in their 2004 *Wroclaw Declaration*, their 2005 *Faro Declaration*, as well as their 2008 *Baku Declaration for the Promotion of Intercultural Dialogue* and confirmed by the Third Summit of Heads of State and Government of the CoE in their 2005 *Warsaw Declaration* in CoE (ed), Third Summit of Heads of State and Government of the CoE (Warsaw, 16–17 May 2005) 10.

further refined in the 2008 CoE White Paper on Intercultural Dialogue.<sup>140</sup> The concept is understood as the ‘open and respectful exchange of views between individuals and groups with different ethnic, cultural, religious and linguistic backgrounds and heritage, on the basis of mutual understanding and respect’,<sup>141</sup> as a tool to promote cultural democracy and all the tangible and intangible elements of cultural diversity.<sup>142</sup> This requires ‘free expression’, the creation of conditions to allow ‘cultural identities to flourish and reach out to other communities’<sup>143</sup> and the condemnation of all forms of violent or forced assimilation.<sup>144</sup> ‘Synonymous with exchange’ and ‘new forms of cultural expressions’, cultural diversity is understood as a source of mutual enrichment.<sup>145</sup> From a subjective perspective, to promote cultural diversity is thus to create the necessary conditions so that ‘each person can develop from his or her own heritage and that of others’.<sup>146</sup> Objectively, stopping cultural diversity from becoming a source of tension and conflict, intercultural dialogue is intended to establish a balance between cultural diversity and social cohesion.<sup>147</sup> The ultimate goal is to create harmonious relations between all groups in society, prevent conflicts, control conflicts and foster post-conflict reconciliation.<sup>148</sup>

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<sup>140</sup> The 2008 CoE *White Paper* lists five policy approaches to foster cultural diversity (sections 4.1 – 4.5): democratic governance of cultural diversity; democratic citizenship and participation; learning and teaching of intercultural competences; establishment of physical and virtual spaces for intercultural dialogue; and strengthening of intercultural dialogue in international relations in order to facilitate mutual understanding between Europe and its neighbouring regions and the rest of the world.

<sup>141</sup> *Ibid* 17.

<sup>142</sup> See the definition of ‘intercultural dialogue’ in *Declaration on Intercultural Dialogue and Conflict Prevention*, Appendix.

<sup>143</sup> *Ibid* Articles 1.1 and 1.2. Both objectives had, albeit in different wording, already been included in the *Declaration on Multicultural Society and European Cultural Identity* paras 13-14.

<sup>144</sup> *Declaration on Intercultural Dialogue and Conflict Prevention* Article 1.4. In the context of minority protection, this had already been proclaimed in *Framework Convention for the Protection of National Minorities* Article 5(2).

<sup>145</sup> The aspect of mutual enrichment is also taken up in *Faro Declaration* para 3 of Part 1 and *Warsaw Declaration* para 6, which affirms to foster ‘European identity and unity, based on shared fundamental values, respect for our common heritage and cultural diversity. We are resolved to ensure that our diversity becomes a source of mutual enrichment’.

<sup>146</sup> *Wroclaw Declaration* 4.

<sup>147</sup> *Declaration on Intercultural Dialogue and Conflict Prevention* under heading ‘Diversity and dialogue’ and *Action Plan* in CoE (ed), *Third Summit of Heads of State and Government of the CoE* (Warsaw, 16–17 May 2005) 13, section III.5.

<sup>148</sup> *Declaration on Intercultural Dialogue and Conflict Prevention* under heading ‘Diversity and dialogue’ and

At the global level, the year 2001 was declared the ‘United Nations Year of Dialogue among Civilizations’<sup>149</sup> and in November 2001 the UN General Assembly adopted a Global Agenda for Dialogue among Civilizations.<sup>150</sup> Within this process, UNESCO was assigned a lead role and adopted a number of projects to further the aims of the Agenda.<sup>151</sup> A particular form of intercultural dialogue, namely that between the Western and the Muslim societies, was promoted through the United Nations Alliance of Civilizations programme, launched in 2005.<sup>152</sup> Likewise, the international instruments addressing the global imbalances of the flow of cultural goods and services equally affirm intercultural dialogue.<sup>153</sup>

The concept of intercultural dialogue is likely to remain at the centre of international attention. In the realm of the CoE, the so-called Group of Eminent Persons released its report ‘Living together: Combining diversity and freedom in 21<sup>st</sup>-century Europe’ in May 2011 and suggested a ‘regular process of follow-up or assessment of the development of intercultural dialogue in CoE Member States’.<sup>154</sup> Moreover, the 2009 UNESCO World Report recommended that ‘support should be given to networks and initiatives for intercultural and interfaith dialogue at all levels’.<sup>155</sup> Likewise, intercultural dialogue is included in UNESCO’s mission statement for the medium-term strategy for 2008-2013.<sup>156</sup> The UN General Assembly embraced

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the definition of ‘intercultural dialogue’ in the Appendix.

<sup>149</sup> *Resolution 53/22 on the United Nations Year of Dialogue among Civilizations* (1998).

<sup>150</sup> *Resolution 56/6 on the Global Agenda for Dialogue among Civilizations* (2001). Cultural diversity was seen as a pre-requisite (Article 2) and, at the same time, one of the aims of that dialogue (Article 1). See, more generally, on the Dialogue among Civilizations Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (2007) 34–35.

<sup>151</sup> UNESCO, *Investing in Cultural Diversity*, 58.

<sup>152</sup> See for more detail <<http://www.unaoc.org>>.

<sup>153</sup> See below at 6.3.3, on page 50.

<sup>154</sup> CoE, *Living Together* (2011) 62 (para 35).

<sup>155</sup> UNESCO, *Investing in Cultural Diversity*, 55.

<sup>156</sup> UNESCO, *Medium-Term Strategy, 2008-2013*, 7. UNESCO’s mission is stated as follows: ‘As a specialized agency of the United Nations, UNESCO contributes to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information’. Further, strategic programme objective 10 reads ‘demonstrating the importance of exchange and dialogue among cultures to social cohesion and reconciliation in order to develop a culture of peace’.



intercultural dialogue in 2010 as a means to promote cultural diversity,<sup>157</sup> and discussions are ongoing on the proclamation of a United Nations decade for interreligious and intercultural dialogue.<sup>158</sup>

In conclusion, two aspects of intercultural dialogue in particular add to the understanding of cultural diversity. First, the concept further stresses the focus of cultural diversity on the individual. This is motivated by the recognition that the classification of a society in different cultural groups all sharing a common cultural identity no longer fits the reality of our times. The 2003 CoE Declaration on Intercultural Dialogue and Conflict Prevention had already acknowledged that cultural diversity manifested itself in ‘multiple identities, whether individual or collective’.<sup>159</sup> The 2008 CoE White Paper reiterates this perspective when it states that ‘in contemporary modern democracies everyone can enrich his or her own identity by integrating different cultural affiliations’.<sup>160</sup> In 2010, UN Independent Expert for Cultural Rights *Farida Shaheed* remarked that ‘each individual is the bearer of a multiple and complex identity, making her or him a unique being and, at the same time, enabling her or him to be part of communities of shared culture’.<sup>161</sup>

The most important trait of the concept of intercultural dialogue, however, seems to be the intended enrichment of all groups and individuals of society, be they in the cultural majority or minority. Yet, this benefit pre-supposes a readiness to embrace differences.

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<sup>157</sup> In *Resolution 64/174 on Human Rights and Cultural Diversity* (2010) the General Assembly expresses its determination ‘to prevent and mitigate cultural homogenization in the context of globalization, through increased intercultural exchange guided by the promotion and protection of cultural diversity’ (Paragraph 5).

<sup>158</sup> *Resolution 65/138 on the Promotion of Interreligious and Intercultural Dialogue, Understanding and Cooperation for Peace* (2011) para 13.

<sup>159</sup> *Declaration on Intercultural Dialogue and Conflict Prevention*, definition of ‘cultural diversity’ in the Appendix.

<sup>160</sup> CoE, *White Paper*, para 50. The paper concludes: ‘intercultural dialogue is therefore important in managing multiple cultural affiliations in a multicultural environment’ (para 51).

<sup>161</sup> Shaheed para 23. She goes on to explain that ‘individuals identify themselves in numerous ways, simultaneously participating in several cultural communities, on the basis of grounds such as ethnicity, descent, religion, beliefs and convictions, language, gender, age, class affiliation, profession, ways of life and geographical location’.

If one applies this connotation to the area of music, musical diversity would not only argue for enabling all cultural identities within society to express themselves through music but also advocate intercultural exchange. To elaborate on this, the engagement with music that does not convey one's own cultural identity has the potential to inspire the creation of new and innovative music. In addition to the individual readiness to engage in intercultural dialogue, such engagement would also require that music expressing the cultural identity of others was readily available. To realise this goal in the realm of online music, it would appear necessary to provide a licensing framework that allows online music providers to easily obtain licences covering as broad a repertoire as possible.

It is the characteristic of openness of cultural diversity in the sense of intercultural dialogue that may appear to be in contradiction with the way in which cultural diversity has been used as an argument in the context of trade liberalisation and the next section analyses this seeming contradiction.

### **6.3.3 Cultural Diversity and Free Trade**

In the context of international trade law, it was a novel reading of cultural diversity, which, accentuated since the late 1990s, has sparked a hitherto unknown degree of interest, debate and criticism. According to this narrative, the processes of globalisation endanger cultural diversity. Increasingly, the view that the augmented worldwide interconnectedness – to use a common anthropological definition of globalisation<sup>162</sup> – not only had a bearing on economics but also radically changed the cultural sphere, has gained momentum. Diverging views on how this change should be managed culminated in the culture and trade debate. In this context, cultural diversity often carries a repressive connotation in that it has usually been evoked to justify domestic limitations to the import of foreign cultural goods and services. In what follows we look deeper into how well the focus on cultural products and trade

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<sup>162</sup> Nederveen Pieterse, *Globalization and Culture: Global Mélange* (2nd edn, 2009) 16-18, who also lists other definitions of globalisation. The different conceptions are also laid out by Guillén, 'Is Globalization Civilizing, Destructive or Feeble?' (2001) 27 *Annual Review of Sociology* 235, 236-237.

liberalisation in this new narrative of cultural diversity sits with the longer established dimensions of pluralism and intercultural dialogue.

After exploring the background of the 'trade vs culture' debate (6.3.3.1), we examine the three most important international instruments on the topic (6.3.3.2 - 6.3.3.4). The question will be how they balance the new trade-motivated recourse to cultural diversity with the understanding of cultural diversity as intercultural pluralism. Eventually, it will be argued that cultural diversity is better able to reconcile both aspects than it may appear at first glance, but that the appropriation of the notion of cultural diversity by the advocates of a preferential trade regime for cultural products has had ambivalent effects (6.3.3.5).

### **6.3.3.1 Background to the Debate: Conflicts about Trade in Cultural Goods and Services**

Concerns regarding the imbalances in the global flow of mass media had already spurred the New World Information and Communication Order movement in the late 1970s and early 1980s. In this movement, a number of non-aligned developing countries promoted a more equitable exchange of information between rich and poor nations in the forum of UNESCO.<sup>163</sup> The discussions led to the installation of the International Commission for the Study of Communication Problems. Although the Commission finally endorsed many of the movement's ideas,<sup>164</sup> their political realisation failed due to the strong resistance displayed by the United States and the UK.<sup>165</sup> In contrast to the New World Information and Communication Order

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<sup>163</sup> Craufurd Smith, 'The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?' (2007) 1 *International Journal of Communication* 24, 25. For a more complete picture of the movement's goals see Masmoudi, *The New Information Order* (1978).

<sup>164</sup> International Commission for the Study of Communication Problems, *Many Voices One World* (1980) 253-272. An overview of the work of the Commission is provided by Bogdan Osolnik who himself was one of the Commission's members; Osolnik, 'The MacBride Report - 25 Years Later: An Introduction' (2005) 12 *Javnost - The Public* 5.

<sup>165</sup> This rejection was also an important factor in these countries' decision to leave UNESCO in 1984 (USA) and 1985 (UK); Craufurd Smith (n 163) 25. The UK re-joined UNESCO in 1997 and the USA in 2003.

movement, in the current 'trade vs. culture' debate, industrial countries have been instrumental in claiming the need for protection from cultural imperialism.

Trade conflicts regarding cultural products have been a recurring phenomenon since the 1920s when several European countries imposed screen quotas to stop the influx of American films.<sup>166</sup> At the heart of these conflicts has always been the question of whether international trade liberalisation should encompass cultural goods and services just as any other, or whether they required a different treatment. Underlying the view that cultural goods and services should be treated differently is the belief that an uncontrolled influx of foreign cultural goods and services could negatively affect domestic culture in states with less powerful cultural industries or even lead to cultural hegemony by the most successful exporters of cultural goods and services, ie the United States of America. From the proponents of free trade, on the other hand, a different treatment for cultural goods and services is nothing more than a detrimental protectionist measure.

When the General Agreement on Tariffs and Trade (GATT) entered into force in 1948,<sup>167</sup> Article IV authorised, and under GATT 1994 continues to do so,<sup>168</sup> screen quotas for cinematographic films though constraining them to negotiations.<sup>169</sup> Beyond this, cultural goods are subject to all the usual GATT disciplines.<sup>170</sup> The GATT system contains some flexibilities in that general exceptions are provided for national measures that are 'necessary to protect public morals' (Article XX(a)), necessary to secure compliance with national law (Article XX(d)), or that are 'imposed for the protection of national treasures of artistic, historic or archaeological value'.<sup>171</sup>

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<sup>166</sup> For an overview see Bernier, 'Trade and Culture' in Macrory and others (eds) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) 748, 748-753.

<sup>167</sup> *General Agreement on Tariffs and Trade*, 55 UNTS, 188.

<sup>168</sup> *General Agreement on Tariffs and Trade 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS, 190.

<sup>169</sup> More detailed information on the rationale and history of GATT Article IV is provided by Neuwirth, "'United in Divergency": A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 819, 826-827, and Bernier, *Trade and Culture*, 753-755.

<sup>170</sup> Bernier, *Trade and Culture*, 756.

<sup>171</sup> *Tania Voon* also highlights that 'GATT 1994 offers additional leeway for Members imposing cultural

Yet, these exceptions have proved too limited to be able to accommodate some WTO members' cultural concerns.<sup>172</sup> In the 1960s, the question of whether television broadcasting fell under GATT sparked heated discussions. The debate reignited when the European Community provided for quotas in favour of European TV programming in Article 4 of the Television Without Frontiers Directive.<sup>173</sup> The US claimed that TV broadcasting was a product and argued that the quotas violated GATT. The European Community, on the other hand, contended that it was a service falling outwith the ambit of GATT.<sup>174</sup> Although GATT consultations addressed this topic, the matter was ultimately dropped and it was agreed that the question should become part of the wider debate on services in the Uruguay Round negotiations (1986-1994).<sup>175</sup>

During these negotiations, the battle to establish the right balance between culture and trade was fiercely fought. The high intensity of the debate can be explained by the special mandate of the Uruguay Round to create the new institutional structure of the WTO.<sup>176</sup> The dividing lines were clear: while the European Community and Canada advocated a cultural exception that would exempt all cultural goods and services from the rules of the WTO agreement, the US strongly

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policy measures on these products through generally applicable provisions, such as the allowance for emergency safeguard measures under Article XIX and the exemption from the national treatment requirement of certain kinds of subsidies under Article III:8(b)'; Voon, 'A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS' (2007) 14 *UCLA Entertainment Law Review* 1, 5.

<sup>172</sup> Graber, 'Trade and Culture' in Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law*, para 14; Cahn and Schimmel, 'The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPS?' (1997) 15 *Cardozo Arts and Entertainment Law Journal* 281, 284-289.

<sup>173</sup> *Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities* [1989] OJ L 298/23 (now replaced by *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive)* [2010] OJ L 95/1).

<sup>174</sup> See, in more detail, Voon 6-10.

<sup>175</sup> Bernier, *Trade and Culture*, 748-749 with further references to more detailed analyses.

<sup>176</sup> Burri, 'Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects' (2010) 2 *Diversity* 1059, 1061.

opposed this.<sup>177</sup> The discussions came to a deadlock and the creation of the WTO was only made possible by an ‘agreement to disagree’.<sup>178</sup> Although this did not change the treatment of cultural goods under GATT, proponents of the *exception culturelle* were successful in shaping the General Agreement on Tariffs and Services (GATS)<sup>179</sup> in a way that, to a large extent, allowed cultural services to be shielded from international trade liberalisation. GATS Articles XVI:1 and XVII:1 provide for a positive list approach in that a contracting party is only under market access and national treatment obligations to the extent of what it has inscribed in its schedule of commitments. In relation to the most-favoured-nation clause, GATS Article II:2 follows a negative list approach, allowing contracting parties to specify exemptions from that obligation. In addition, the provisions on domestic legislation also only apply insofar as commitments have been undertaken (GATS Article VI:1), and no multilateral instrument on subsidies has yet been developed in the GATS context that is comparable to the Agreement on Subsidies and Countervailing Measures<sup>180</sup> applying to GATT 1994.<sup>181</sup> WTO members wary of the special nature of cultural products have largely made use of these flexibilities: the EU and its member states, Canada and Switzerland, amongst others, did not make commitments in cultural sectors and approximately 50 WTO members have listed exemption from the most-favoured-nation treatment in the field of audiovisual media.<sup>182</sup> Yet, there is also a flipside to

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<sup>177</sup> Bernier, *Trade and Culture*, 749; Burri 1061. Between these extreme positions, several mediating proposals were made. A more detailed account of the debate is provided by Cahn and Schimmel 293–297; Footer and Graber, ‘Trade Liberalization and Cultural Policy’ (2000) 3 *Journal of International Economic Law* 115, 119–122.

<sup>178</sup> Neuwirth 828. More details are provided by Cahn and Schimmel 297–304.

<sup>179</sup> *General Agreement on Trade in Services, Annex 1B to the Marrakesh Agreement Establishing the World Trade Organization*, 1869 UNTS, 183.

<sup>180</sup> *Agreement on Subsidies and Countervailing Measures, Annex 1B to the Marrakesh Agreement Establishing the World Trade Organization*, 1869 UNTS, 14.

<sup>181</sup> See, however, *Tania Voon*, who highlights that at the same time GATS is less flexible than GATT 1994 in some regards; Voon 5–6.

<sup>182</sup> Graber, *Trade and Culture*, para 10. A more thorough overview of some of the typical measures listed as exemptions from the most-favoured-nation treatment is given by Footer and Graber 122–126.

this solution, notably the principle of progressive liberalisation, which meant that the liberalisation of cultural markets would become a recurring theme in trade talks.<sup>183</sup>

The debate resurfaced in 1997, when the WTO Dispute Settlement Body held Canada responsible for measures in favour of its domestic magazine industry, although some saw these measures as protecting Canada's cultural identity.<sup>184</sup> At that time, the proponents of a culture-sensitive trade policy started to look for solutions in political fora other than the WTO and the debate changed direction. It was no longer only about how cultural goods and services should be treated in trade agreements, but – taking the conflict to a higher level – the impact of trade liberalisation on cultural identity in general,<sup>185</sup> as voices that demanded a strengthening of the principle of cultural diversity became stronger.<sup>186</sup> The new battle call for 'cultural diversity' had the advantage of being more conceptually neutral in that it avoided the 'negativism and latent "anti-Americanism" of the "cultural exception" rhetoric'.<sup>187</sup> In the following years, the idea to counterbalance trade under the buzzword of 'cultural diversity' was increasingly embraced in international policy and standard-setting instruments. In 2000, for example, the final Communiqué of the G8 Summit in Okinawa dedicated a section to cultural diversity that it saw as having the 'potential to enrich human life in the 21st century, as it inspires creativity and stimulates innovation'.<sup>188</sup> In its Cotonou Declaration of 2001, the International Organisation of La Francophonie underlined that cultural goods and services needed to be treated differently and that policies that promoted cultural diversity were as legitimate and necessary as ever (Article 6).<sup>189</sup> The most influential instruments were adopted under the aegis of the CoE and, to a larger

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<sup>183</sup> Graber, Trade and Culture para 4.

<sup>184</sup> Canada - Certain Measures Concerning Periodicals (Complaint by the United States) (1997), WT/DS31/R; confirmed by the Appellate Body, WT/DS31/AB/R.

<sup>185</sup> Bernier, Trade and Culture, 780.

<sup>186</sup> Neuwirth 829-830.

<sup>187</sup> Graber, 'The New UNESCO Convention on Cultural Diversity' (2006) 9 Journal of International Economic Law 553, 555. He goes on to state that 'diversity in audiovisual trade is something that can be analysed statistically – free from ideology and protectionist ulterior motives'. This conclusion should be met with caution in light of the difficulties and inherent limits of any attempt to measure diversity; see below at 8.3, on page 113.

<sup>188</sup> Para 39 of the G8 Communiqué Okinawa, 23 July 2000 <<http://www.g8.utoronto.ca/summit/2000okinawa/finalcom.htm>>.

<sup>189</sup> Organisation de la Francophonie, Déclaration de Cotonou, 14/15 June 2001.

extent, UNESCO, and culminated in the adoption of the 2005 Convention on the Diversity of Cultural Expressions.<sup>190</sup>

### 6.3.3.2 The 2000 CoE Declaration on Cultural Diversity

In December 2000 the CoE Committee of Ministers devoted its attention to the ‘free trade vs. culture’ debate and adopted the Declaration on Cultural Diversity. Although the title suggests otherwise, it is not a comprehensive instrument that addresses cultural diversity in its many forms. It is only concerned, as the Preamble explains, with the challenges to cultural diversity posed by the new information technologies, globalisation and multilateral trade policies (Paragraph 3).<sup>191</sup> Article 1.3 proclaims that these developments, even if they

‘occur to meet the needs of the present, [must] not compromise the ability of future generations to meet their needs with respect to the production, provision and exchange of culturally diverse services, products and practices’.

The Preamble eloquently expounds the new challenge for states in the context of a global market to develop ‘policies for assuring the recognition and expression of forms of cultural diversity coexisting within their jurisdictions’ (Paragraph 8) and affirms that it is a legitimate objective of states to develop international agreements in favour of cultural diversity (Paragraph 11). Article 2.1 then goes further by stating that ‘cultural and audiovisual policies, which promote and respect cultural diversity, are a necessary complement to trade policies’. Moreover, Article 2.2 provides a supporting argument presenting a counter vision to that of cultural uniformity feared from global free trade when it emphasises that cultural diversity itself must be viewed as an ‘essential economic factor’ in that strong cultural industries, ‘when reflecting genuine diversity, have a positive impact on pluralism, innovation, competitiveness and employment’. The Committee of Ministers’ scepticism as to the application of free

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<sup>190</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions.*

<sup>191</sup> *Declaration on Cultural Diversity.* In relation to information technologies, it merely states that ‘culturally diverse forms of production and practices should not be limited but enhanced by technological developments’ (Article 2.3), suggesting that a ‘wide distribution of diverse cultural products and services, and exchange of cultural practices in general, can stimulate creativity, enhance access to and widen the provision of such products and services’ (Article 2.4).



trade rules to cultural goods finally also finds expression in Article 3.3, which urges CoE member states not to make commitments in other international fora that prejudice cultural diversity.

The CoE Declaration can, therefore, be seen as a self-affirmation on the part of European states not to make further trade liberalising concessions when it comes to cultural goods and services. Although a declaration is not legally binding, it nevertheless carries authority. To express such self-affirmation in a declaration might therefore also have been hoped to alleviate some of the pressure to liberalise the influx of non-European audiovisual products and services that European states were confronted with during international trade negotiations. Furthermore, it adds to the momentum that emerged at that time in favour of an international agreement on cultural diversity in order to counterbalance the free trade movement.

Of more importance here is the exact definition of ‘cultural diversity’ that underpins the Declaration. The Declaration offers a palpable approximation to the term ‘cultural diversity’, stating that ‘cultural diversity is expressed in the co-existence and exchange of culturally different practices and in the provision and consumption of culturally different services and products’ (Article 1.1). The use of the wording ‘cultural diversity is expressed in’ implies that what follows is not to be understood as an exhaustive definition but rather as examples of particular aspects of cultural diversity. On the one hand, the definition re-iterates the idea of inner-state cultural pluralism already familiar from earlier UNESCO and CoE initiatives. ‘Co-existence’ implies that different cultural groups can freely express their cultural identity and the term ‘exchange’ indicates that a segregated side-by-side existence of culturally diverse groups is not sufficient to achieve social cohesion and peace, but that co-existence must be accompanied by intercultural engagement. On the other hand, the declaration mentions, as a secondary aspect of cultural diversity, the ‘provision and consumption of culturally different services and products’. Cultural products and services express different cultural identities and their ready availability is, therefore, one example of the co-existence and exchange of different cultural practices. By pairing this particular element (and not others) with the broad understanding of

cultural diversity as cultural pluralism, the Committee of Ministers stresses its particular importance.

### 6.3.3.3 The 2001 UNESCO Universal Declaration on Cultural Diversity

The growing concerns about the effects of globalisation on cultural diversity also led to the adoption of the UNESCO Universal Declaration on Cultural Diversity by the UNESCO General Conference on 2 November 2001.<sup>192</sup> Compared to the 2000 CoE Declaration on Cultural Diversity, the UNESCO instrument offers a much more comprehensive framework. It sets forth the main principles for the preservation and promotion of cultural diversity, while also dealing with national cultural policies on cultural goods or practices. Amongst the issues addressed are the need to understand development in cultural terms (Article 3), the guarantee of human and cultural rights (Articles 4-6), the development of new information and communication technologies to the benefit of all cultures (Article 6),<sup>193</sup> and the preservation of cultural heritage (Article 7).<sup>194</sup>

In relation to the increasing economic integration, the Declaration shows concerns about new imbalances bound to arise if the free circulation of ideas and works benefits some more than others. In particular, Article 8 underlines that there must be diversity of the supply of cultural works.<sup>195</sup> With respect to national policies on cultural goods and services, the Declaration shows some ambivalence. On the one hand, it emphasises the ‘specificity of cultural goods and services which, as vectors of

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<sup>192</sup> UNESCO *Universal Declaration on Cultural Diversity*.

<sup>193</sup> Notably, Article 6 calls for ‘access for all to cultural diversity’ and lists inter alia as a necessary precondition ‘equal access to art and to scientific and technological knowledge, including in digital form’ as well as the ‘possibility for all cultures to have access to the means of expression and dissemination’; see also *Main Lines of an Action Plan for the Implementation of the UNESCO Universal Declaration on Cultural Diversity* in UNESCO (ed), Records of the General Conference, 31st session (2002) 64, paras 9-11.

<sup>194</sup> In this regard, the Declaration was accompanied by the (non-binding) commitment of UNESCO member states to formulate policies for ‘oral and intangible cultural heritage’; *ibid* para 13. This, in turn, provided the necessary impetus for the adoption of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2368 UNTS, 3.

<sup>195</sup> A precondition for such diversity is seen in the existence of viable and competitive cultural industries in particular in developing countries and countries in transition, which is to be established through international co-operation and solidarity; UNESCO *Universal Declaration on Cultural Diversity* Article 10.

identity, values and meaning, must not be treated as mere commodities or consumer goods' (Article 8),<sup>196</sup> which implies that market forces alone will not be able to sufficiently cater for the necessary diversity of supply. Article 9 reinforces this position by specifying that each state should put in place cultural policies that create 'conditions conducive to the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level'. In doing so, states may act through 'operational support or appropriate regulations'. On the other hand, however, all such policies must ensure the 'free circulation of ideas and works' as well as 'regard for international obligations'.

This ambivalence can also be discerned in the underlying concept of cultural diversity, which is generally hailed as 'the common heritage of humanity'<sup>197</sup> that 'should be recognized and affirmed for the benefit of present and future generations' (Article 1).<sup>198</sup> Although the Declaration at several instances underlines the importance of diversified cultural goods and services the connection to intercultural pluralism is equally highlighted. Article 2, for example, argues in favour of cultural pluralism that fosters cultural exchange and harmonious interaction, and Paragraph 9 of the Preamble refers to 'cultural exchange' and expresses the hope for 'renewed dialogue among cultures and civilizations'. Moreover, the Declaration particularly underscores cultural diversity as a driver for creativity.<sup>199</sup>

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<sup>196</sup> The *Action Plan on Cultural Policies for Development* in UNESCO (ed), Final Report (1998) 12, had already promoted the idea 'that cultural goods and services should be fully recognized and treated as being not like other forms of merchandise' (para 3 of Objective 3).

<sup>197</sup> On the related notions of 'common heritage of mankind' and 'common concern of humankind', see Blake, 'On Defining the Cultural Heritage' (2000) 49 *International and Comparative Law Quarterly* 61, 70-71.

<sup>198</sup> Culture is understood in an anthropological sense; Paragraph 5 of the Preamble states that 'culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs'. This is, in fact, a slightly modernised wording of the definition in the *Mexico Declaration* (as to the latter see above, on page 22).

<sup>199</sup> Article 1 refers to cultural diversity as 'a source of exchange, innovation and creativity'. The link between cultural diversity and artistic creation is equally underlined by the fact that Articles 7-9 bear the heading 'Cultural Diversity and Creativity'.

Although lacking legally binding value,<sup>200</sup> the Declaration sets out an international consensus as to the main features and characteristics of cultural diversity, which adds to the understanding of the concept and paved the way for the adoption of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>201</sup>

#### 6.3.3.4 The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 Convention)<sup>202</sup> was adopted on 20 October 2005. With the US and Israel opposing the Convention, it was voted for by 148 countries, while four countries abstained.<sup>203</sup> Entering into force on 18 March 2007,<sup>204</sup> it had 125 contracting parties at the time of submission.

Underlying the Convention are the same concerns that had already informed the 2001 Universal Declaration, as Paragraph 19 of the Preamble clarifies:

‘while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries’.

Yet although the two instruments share the same rationale, they differ in several respects. Whereas the 2001 Universal Declaration on Cultural Diversity is of purely exhortatory character, it sets out a comprehensive overview of all aspects of

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<sup>200</sup> The Resolution which adopted the Declaration nevertheless urges member states to ‘take appropriate measures to promote the principles set forth in this Declaration together with the main lines of an action plan, and to facilitate their application’; UNESCO, *Records of the General Conference, 31st session (2002)* 61.

<sup>201</sup> In particular the fact that it was adopted by consensus shows the UNESCO member states’ favourable attitude towards the adoption of a legally binding instrument; see Obuljen, ‘From *Our Creative Diversity* to the Convention on Cultural Diversity: Introduction to the Debate’ in Obuljen and Smiers (eds) *UNESCO’s Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (2006) 19, 28.

<sup>202</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.

<sup>203</sup> A detailed account of the drafting history of the Convention is provided by Obuljen, Introduction to the Debate.

<sup>204</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* Article 29(1).

cultural diversity. The 2005 Convention, for its part, focuses on only some of these aspects and fleshes them out in a legally binding manner. In particular, it seeks to nurture the creation and dissemination of cultural expressions on a global level, to reinforce the dual economic and cultural nature of cultural goods and services, and to strengthen international solidarity, specifically for the benefit of developing countries. To achieve these goals it calls for new partnerships with the private sector and civil society. It is not the aim of this study to provide a detailed overview of the 2005 Convention by analysing its strengths and weaknesses; such accounts have been given elsewhere.<sup>205</sup> The aim, for the purposes of this section, is to determine the understanding of cultural diversity that it is based upon.<sup>206</sup>

The 2005 Convention frequently uses the term ‘cultural diversity’ and Article 4(1) states that, for the purposes of the 2005 Convention

“‘cultural diversity’ refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used’.

Yet, the key concept is that of the ‘diversity of cultural expressions’. It determines the scope of application of the Convention, which, according to Article 3, covers ‘policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions’. Article 4(3) defines ‘cultural expressions’ as those ‘that result from the creativity of individuals, groups and societies, and that have cultural content’. Cultural content, according to Article 4(2)

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<sup>205</sup> See, for example, Graber; Neuwirth; Ruiz Fabri, ‘Reflections on Possible Future Implications of the Convention’ in Obuljen and Smiers (eds) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (2006) 73. In light of these weaknesses, Rachael Craufurd Smith offers a sobering conclusion: ‘even an autocratic state that does nothing to support cultural diversity might consequently consider signing up to the Convention a relatively unproblematic exercise’; Craufurd Smith (n 163) 39.

<sup>206</sup> The 2005 Convention will be under further scrutiny in chapter 7, on page 84, where we examine the rights and obligations it establishes.

‘refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities’.

These definitions raise a number of questions, in particular with regard to the exact scope of the notions of ‘cultural expressions’ and ‘cultural diversity’ as they are defined in Article 4 of the 2005 Convention and how they relate to the concept of ‘cultural diversity’ established by the 2001 Universal Declaration.

The first thing that one notices in analysing the given definitions is that Article 4(1) and (3) are self-referential in the sense that the conception of ‘cultural diversity’ in Paragraph 1 is developed by drawing on the notion of ‘cultural expressions’. In other words, cultural diversity is construed as the sum of cultural expressions.<sup>207</sup>

If one attempts to distil the exact meaning of ‘cultural expression’, one finds that the term picks up aspects that previous international instruments on cultural diversity had underlined. In particular, cultural expressions convey the cultural identity of individuals, groups and societies. Further, the reference to ‘individuals, groups and societies’ affirms the importance of achieving cultural pluralism within UNESCO member states.<sup>208</sup> From the statement, contained in Article 4(1), that cultural expressions are passed on within and among groups and societies, one can draw two additional conclusions. First, in order to be able to be passed on, a cultural expression must have been externalised, must be perceptible to the members of the relevant cultural group or society; mere internal reflections of an individual’s cultural identity do not appear to qualify as cultural expressions. Second, the emphasis on the transmittance of cultural expressions among groups and society bears testimony of the Convention’s aim to create an intercultural environment.

The concept of cultural expression, however, is more restrictive than the common understanding of cultural diversity in that it appears to exclude cultural

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<sup>207</sup> The definitions, therefore, have sometimes been criticised to be circular; Burri, *Keeping Promises: Implementing the UNESCO Convention on Cultural Diversity into EU's Internal Policies* (2010) 15.

<sup>208</sup> Likewise, the Preamble declares that cultural diversity ‘is embodied in the uniqueness and plurality of the identities ... of the peoples and societies making up humanity’.

heritage. Article 4(3) focuses on the creative origin of cultural expressions, the fact that they ‘result from the creativity of individuals, groups and societies’. Emphasising the creation of new cultural expressions, it seems to delimit the scope of application of the convention from cultural heritage.<sup>209</sup> Moreover, the conception of cultural diversity in Article 4(1) does not encompass cultural heritage as such, but only ‘the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions’. Accordingly, cultural heritage may be a possible source of inspiration for cultural expressions but not a cultural expression in itself.<sup>210</sup>

Whether the distinction between cultural expressions and cultural heritage is practicable appears doubtful. The concept of cultural heritage itself is in a process of transition. Since its first mention in international law in 1907,<sup>211</sup> the notion has gradually broadened in the arenas of UNESCO<sup>212</sup> and the CoE.<sup>213</sup> In the beginning,

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<sup>209</sup> This, at least, is the understanding of UNESCO itself when it states that the 2005 Convention only deals with certain aspects of cultural diversity and that cultural diversity today rests on three pillars: the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention under review here; see UNESCO, ‘Ten Keys to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions’ in UNESCO, *Information Kit Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2006) Key 4; UNESCO, ‘30 Frequently Asked Questions Concerning the Convention on the Promotion and Protection of the Diversity of Cultural Expressions’ in UNESCO, *Information Kit Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2006) Question 5. This view would be in line with the Operational Guidelines, which suggests that measures to protect the diversity of cultural expressions can only be taken if the parties are able to ‘determine that the situation cannot be subject to action under other UNESCO Conventions’; ‘Operational Guidelines for Articles 7, 8 and 17 of the Convention’ in UNESCO (ed) *Conference of the Parties to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions; Second Session, Paris, 15-16 June 2009* (2009) 17, Articles 8 and 17, para 5.1.

<sup>210</sup> Such a view is not without precedence. Within the CoE, this distinction has been applied, for example, in the *Wroclaw Declaration* which, under the heading ‘Promoting Cultural Diversity and Building up Shared Values’, lists ‘diversity of our heritages and artistic creations’ side by side.

<sup>211</sup> In Article 23, the *Regulations Respecting the Laws and Customs of War on Land, Annex to Convention (IV) Respecting the Laws and Customs of War on Land* (1907) provide that ‘in sieges and bombardments all necessary steps must be taken to spare ... historic monuments’.

<sup>212</sup> Within UNESCO, relevant standard-setting instruments dealing with the protection of cultural heritage include the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 249 UNTS, 240, the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 823 UNTS, 232, the *Convention for the Protection of the World Cultural and Natural Heritage*, 1037 UNTS, 151, the *Convention on the Protection of the Underwater Cultural Heritage* in UNESCO (ed), *Records of the General Conference, 31st session* (2002) 50, and the *Convention for the Safeguarding of the Intangible Cultural Heritage*.

<sup>213</sup> Within the CoE, relevant standard-setting instruments dealing with the protection of cultural

only physical objects were considered as cultural heritage:<sup>214</sup> at first only monuments and ‘elements of “high culture”’, but later also ‘often mundane cultural artefacts’.<sup>215</sup> Furthermore, the dynamic interaction between cultural heritage of the past and its reception in the present is increasingly understood as a process of constant renewal. Notably, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage specifies that

‘intangible cultural heritage, transmitted from generation to generation, is *constantly recreated* by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity’.<sup>216</sup>

This could be seen as an ongoing tendency towards convergence of the concepts of cultural diversity and cultural heritage.

But even if one wanted to delineate the creations of present-day individuals, groups and societies from what was inherited by them as a given,<sup>217</sup> in practice, it would be difficult to draw the line. Much of what today is perceived as cultural heritage has been created at some point in time. According to which criteria should conveyors of cultural identity that predominantly have been inherited be distinguished from those that have been created? Conversely, would it not be a consequence of this

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heritage include the *European Convention on the Protection of the Archaeological Heritage*, 66 ETS, the *Convention for the Protection of the Architectural Heritage of Europe*, 121 ETS, the *European Convention on the Protection of the Archaeological Heritage (Revised)* 143 ETS, the *European Landscape Convention*, 176 ETS, and the *CoE Framework Convention on the Value of Cultural Heritage for Society*, 199 ETS.

<sup>214</sup> See, for example, the definition of cultural property in *Convention for the Protection of Cultural Property in the Event of Armed Conflict* Article 1.

<sup>215</sup> Blake 72.

<sup>216</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage* Article 2(1) (emphasis added). The Convention has enlarged the concept of cultural heritage to equally encompass intangible elements. Intangible cultural heritage is defined as ‘the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage’. Within the CoE, the notion of cultural heritage has even further expanded with the adoption of *CoE Framework Convention on the Value of Cultural Heritage for Society* Article 2(a).

<sup>217</sup> UNESCO itself apparently sustains this view; see UNESCO, *Investing in Cultural Diversity*, 30. After having explained the scope of the UNESCO conventions on cultural heritage, the report goes on to state that ‘the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in 2005, deals more specifically with cultural expressions produced, circulated and shared by *contemporary means*’ (emphasis added).



logic that what qualifies as a cultural expression today might be seen as cultural heritage in the future, therefore falling outside the field of application of the 2005 Convention?<sup>218</sup>

By excluding cultural heritage from the definition of cultural diversity, the language of the 2005 Convention departs somewhat from the general cultural diversity discourse, which encompasses cultural heritage.<sup>219</sup> This raises the question of whether, in concluding the 2005 Convention, the contracting parties wanted to change the notion of cultural diversity as such and steer the debate on cultural diversity as it has developed in the preceding decades into a new and more narrowly defined direction.

The more appropriate view, however, is that the scope of the concepts of cultural diversity and cultural expressions in Article 4(1) and (3) merely determines the extent to which the 2005 Convention deals with cultural diversity. Support for this view is provided by Article 4(1), which does not purport to offer a generally valid definition of cultural diversity but only explains what cultural diversity ‘refers’ to ‘for the purposes of this Convention’. Likewise, the concepts of cultural diversity and cultural expressions are explained in Article 4 after Article 3 limits the scope of application of the Convention to ‘policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions’. Arguably, Article 4 then describes the term ‘cultural diversity’ only insofar as it applies within the ‘protection and promotion of the diversity of cultural expressions’. Regard should also be had to Paragraph 7 of the Preamble. This provision recalls that ‘culture takes diverse forms across time and space and that this diversity is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies of humanity’. This, in essence, re-iterates the description of cultural diversity contained in Article 1 of the 2001 Universal Declaration. In particular, the notion of cultural diversity as ‘diverse forms of culture across time and space’ is broader than the concept of cultural diversity described in Article 4(1) and can comfortably embrace the concept of cultural heritage. The main difference between Paragraph 7 of the

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<sup>218</sup> Arguably, this would be difficult to reconcile with Article 8, which aims to safeguard cultural expressions from extinction.

<sup>219</sup> See, for example, *UNESCO Universal Declaration on Cultural Diversity* Article 7.

Preamble of the 2005 Convention and Article 1 of the 2001 Universal Declaration is that the words ‘and cultural expressions’ are inserted as another form of embodiment of cultural diversity, after the reference to the uniqueness and plurality of identities. This makes it clear that, rather than aiming to change the international concept of cultural diversity, the 2005 Convention sees itself in the tradition of this debate and simply introduces a new subcategory, namely cultural expressions resulting from creativity.<sup>220</sup>

Already in the way in which cultural diversity has been termed in the 2001 Universal Declaration, the concept was multi-faceted and complicated. The definitions of ‘cultural expressions’ and ‘cultural diversity’ in the 2005 Convention do little to mitigate this; on the contrary, given the ambiguity and vagueness that has been demonstrated in this section, they are likely to cause further confusion. This seems to be supported by a 2010 study, which, based on questionnaires responded to by 15 UNESCO member states, found that ‘the diversity of cultural expressions’ is interpreted differently.<sup>221</sup> It is, therefore, all the more regrettable that the Conference of the Parties to the 2005 Convention so far has not made a decision as to whether operational guidelines should be developed for Article 4.

#### **6.3.3.5 The Effects of Employing Cultural Diversity in the ‘Trade vs Culture’ Debate**

Its frequent use in the course of the ‘trade vs culture’ debate led to several refinements in the international understanding of cultural diversity.

#### ***The Re-contextualisation of Cultural Diversity as a Counter Argument to Trade Liberalisation***

One has to acknowledge that a new element has been introduced to the concept by emphasising cultural diversity as the diversity of cultural goods and services (in the case

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<sup>220</sup> Paragraph 21 of the Preamble, which makes explicit reference to the 2001 Universal Declaration, equally confirms this.

<sup>221</sup> Schramme and van der Auwera, ‘The UNESCO Convention in EU’s Internal Policies’ in Germann Avocats, *Implementing the UNESCO Convention of 2005 in the European Union* (2010) 259, 276.

of the two Declarations) or rather as the diversity of cultural creations (in the case of the 2005 Convention). This clearly mirrors the political will to establish a legal framework which counters what is perceived as an imbalance in the global flow of cultural products bound to arise under the sole reign of international trade liberalisation.

Yet, this new dimension was an addition to, and not a replacement of, the established one. In fact, all three instruments explicitly aspire to the realisation of intercultural pluralism. This is expressed most pointedly by the statement that ‘cultural pluralism gives policy expression to the reality of cultural diversity’ and secures ‘harmonious interaction among people and groups with plural, varied and dynamic cultural identities’.<sup>222</sup>

While the idea to support cultural products under the *topos* of cultural diversity has thus been embraced by international law, concomitantly the latter remains true to the traditional interpretation of cultural diversity. Therefore, the two dimensions are not in contradiction with each other. On the contrary, if cultural diversity is understood in the sense of intercultural pluralism it appears to also include the diversity of cultural products and creations. Intercultural pluralism not only acknowledges the existence of different cultures in a given society but also aspires to enable them all to freely express their cultural identity. As cultural products and services are conveyers of cultural identities, their assured production and dissemination will help groups and individuals to actively take part in cultural life, which in turn implements the postulate of cultural pluralism. If the ability of groups to express their cultural identity in cultural goods and services is imbalanced, there may be situations in which it appears appropriate to restrict the way one group expresses its cultural identity in order to make it possible for the other groups to assert their cultures.<sup>223</sup>

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<sup>222</sup> UNESCO *Universal Declaration on Cultural Diversity* Article 2.

<sup>223</sup> The 2005 Convention expressly recognized this in its Article 8(2), which allows parties to the Convention to take all appropriate measure to protect and preserve cultural expressions in special situations where on the territory of that party they are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.

At the same time, however, to deduce an understanding of cultural diversity as the spectrum of different cultural creations from the broader notion of cultural pluralism, also means to have to accept the limits inherent in the latter concept. The aim for all groups to freely express their identity also sets limits to restricting particular cultural expressions. Moreover, the continually emphasised intercultural aspect calls for dialogue among the different groups and openness to other cultures. In practical terms, this means that those who use cultural diversity as an argument to claim preferential legal treatment for a particular type of cultural product, may legitimately only do so if they accept that such preferential treatment is limited by the requirement that products embodying other cultural identities must also be readily available. This is the inevitable consequence of exchanging the rhetoric of *exception culturelle* for that of *diversité culturelle* and the price that one has to pay for exploiting the ‘apple pie connotations’<sup>224</sup> of cultural diversity. It is also a price that proponents of a special trade regime for cultural products should be happy to pay, as it rebuts the other side’s allegations of plain protectionism.

The mediating function of cultural diversity can also be understood as a result of the fact that there was no clear agreement in the international community as to the direction that the instruments on cultural diversity and free trade should take. Already the 2000 CoE Declaration on Cultural Diversity was a political compromise. For example, the statement that ‘the legitimate objectives of Member States to develop international agreements for cultural co-operation, which promote cultural diversity, must be respected’<sup>225</sup> could easily be interpreted as a claim that local and national audiovisual products and services must be protected from the uncontrolled influx of foreign competing products and services. But those who wished to see the concept of cultural diversity recognised at the international level in order to foster the development of intercultural societies and who would not, necessarily, have agreed to a plain statement in favour of protectionist measures could also endorse it. In relation to the 2001 Universal Declaration and the 2005 Convention, it is well documented

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<sup>224</sup> See, in the context of diversity generally, Stirling, ‘A General Framework for Analysing Diversity in Science, Technology and Society’ (2007) 4 *Journal of the Royal Society Interface* 707, 708.

<sup>225</sup> CoE, *Declaration on Cultural Diversity*, para 11 of the Preamble.

that UNESCO member states were primarily split into two camps over the question of why an international instrument was needed.<sup>226</sup> The 2005 Convention, for example, was seen by some as a further step to affirm cultural rights and as a possibility to attain a new level in the debate on cultural development and intercultural dialogue. On the other hand, however, there was the vision of the Convention as a countermeasure to free trade and international economic law, as a ‘culture-friendly trade treaty’.<sup>227</sup> While the economic rationale was widely shared and certainly explains the extraordinarily short elaboration process, the final version of the Convention is a political compromise that addresses both motifs. The scope of the 2005 Convention is therefore not confined to cultural expressions as commodities but protects the diversity of cultural expressions irrespective of their commercial value.<sup>228</sup> Obuljen therefore rightly argues that it would be

‘a mistake to look at the Convention as an instrument whose only goal is to ensure special treatment of culture in trade negotiations or to confirm the sovereign right of states to adopt cultural policies. While these aspects are important, in assessing the possible impact of the Convention it is important to look at the broader debates that have been taking place over the past decade or more, which go well beyond trade concerns’.<sup>229</sup>

If we relay the present analysis to the field of music, the first thing that is obvious is that music may be both a cultural activity as well as a cultural product. One may think of situations in which the influx of musical goods that embody foreign cultural identities may be restricted to the benefit of local musical genres, for example

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<sup>226</sup> UNESCO, *Report by the Director-General on the Progress of the UNESCO Draft Declaration on Cultural Diversity* (2011) 3.

<sup>227</sup> Obuljen, Introduction to the Debate, 19; Schramme and van der Auwera, The UNESCO Convention, 260. In the early stages of the discussions on the future Convention, two other options had been discussed: an instrument to strengthen the status of creators and artists and an additional Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials to govern the circulation of cultural goods and services; UNESCO, *Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-setting Instrument on Cultural Diversity* (2003) 5–6. Craufurd Smith (n 163) 30–32 provides a more nuanced description of the different UNESCO member states’ interests in a legally binding instrument on cultural diversity.

<sup>228</sup> See, in particular, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* Article 4(4).

<sup>229</sup> Obuljen, Introduction to the Debate, 20. Compare also Ferri, ‘Legal Aspects of the Implementation of the UNESCO Convention in EU Policies’ in Germann Avocats, *Implementing the UNESCO Convention of 2005 in the European Union* (2010) 209, 215–218.

through radio quotas for music in the national language. It would be more difficult to conceive of instances of such restrictions in the area of online music. Unlike any form of offline exploitation, online music typically does not have the problem that shelf space is limited. Most importantly, however, as has been shown, the concept of cultural diversity cannot justify imbalanced restrictions that would not result in a state of musical pluralism and exchange.

As a concluding thought, one may wonder whether it was fortunate that the notion of 'cultural diversity' was appropriated by the 'trade vs culture' debate. The assessment must be ambivalent. From one point of view, it seems that the combined force of proponents of cultural diversity from both camps, whether harking from the cultural rights or the 'trade vs culture' context, has made it possible to adopt the 2005 Convention as a binding legal instrument on cultural diversity. From another standpoint, there are certain downsides. First, as has emerged from the discussion of the concept of cultural diversity in the 2005 Convention, this treaty has added more complexity and even inconsistencies to the already tortuous task of defining or interpreting the notion. Second, the review of the literature on the 2005 Convention has revealed a certain lack of understanding on both camps of proponents of cultural diversity for the respective other co-ally's sensitivities. Accordingly, legal commentators of international economic pedigree usually fail to acknowledge the wider human rights aspects of the concept of cultural diversity, while authors with a background in the cultural rights movement struggle with the intricacies of WTO law. Given that the use of cultural diversity as a battle call against Anglo-American mainstream culture has created a hitherto unknown level of attention in the wider public, there is also a danger that the public reduces the concept of 'cultural diversity' to this single aspect.

### *The Diversity of Cultural Expressions as a Subset of Cultural Diversity*

The 'trade vs culture' debate, and more specifically the 2005 Convention, has also introduced a new dimension of cultural diversity, namely the diversity of cultural expressions. As a subset of the broader notion of cultural diversity, it encompasses

creations that express cultural identity and distinguish themselves, perhaps not entirely convincingly, from cultural heritage.

The new category does not alter the established theoretical underpinning in the sense of intercultural pluralism but blends with it somewhat symbiotically: in one sense, the availability of cultural creations enhances the possibilities for interaction between different cultures and, concurrently, such interaction influences the future development of the cultures interacting in that dialogue and so incites new cultural creations. This interplay is sometimes characterised as ‘creative diversity’ – this is, as has been explained somewhat esoterically, the ‘dynamic vision of a culture endlessly recreated and renewed, one which invents and reinvents itself following the rhythm of the life of the societies to which it belongs’.<sup>230</sup> In this sense, a large spectrum of different available cultural creations is conducive to innovation and creativity.

Music, and thus also online music, is both; a result of creativity and an expression of its authors’ cultural identity and thus cultural expression falling within the scope of the 2005 Convention. An assessment of how the diversity of online music may be promoted will therefore also need to accommodate the principles and boundaries of that instrument.<sup>231</sup>

#### **6.3.4 The Relationship between Cultural Diversity and Cultural Rights**

Finally, to fully understand the normative dimensions of cultural diversity, it is useful to briefly examine the relationship between cultural diversity and cultural rights. The latter is of fundamental importance for cultural diversity as they underpin but also concurrently limit the scope of the concept.

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<sup>230</sup> Stenou 136.

<sup>231</sup> Given that the 2005 Convention distinguishes cultural expressions and cultural heritage, one might wonder whether music could not also be seen as a form of the latter and thus fall outside of the scope of the Convention. It seems, however, that at least the type of music relevant for the present argument cannot. More precisely, this study aims to explore the extent to which the EU is bound to take into account the diversity of online music when adopting measures altering the legal framework for the licensing of musical works. This means, however, that only those musical works are relevant for this endeavour for which the authors’ rights have not expired. Across the EU the copyright term has been harmonised and set at 70 years after the author’s death. Arguably, these works are too young to be reasonably considered cultural heritage.

## *Cultural Rights as the Justification of Cultural Diversity*

In the cultural diversity discourse, the relationship between cultural diversity and cultural rights is not always clear. A number of recognised human rights indeed deal with culture. UDHR Article 27(1) provides that ‘everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’.<sup>232</sup> Cultural rights were also addressed when the Declaration was supplemented by the two international covenants on human rights. Article 15(1) of the ICESCR<sup>233</sup> repeats the right of everyone ‘to take part in cultural life’ and Article 27 of the ICCPR<sup>234</sup> provides that ‘in States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right ... to enjoy their own culture, to profess and practice their own religion, or to use their own language’. In addition, many of the fundamental freedoms and other human rights have cultural content or a cultural dimension.<sup>235</sup> Given that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly include a right to take part in cultural life, cultural rights are less clearly articulated at the European level.<sup>236</sup> This notwithstanding, the European Court of Human Rights has gradually recognised what substantially are cultural rights through a dynamic interpretation of the Convention.<sup>237</sup>

Cultural diversity is not a cultural right itself. In particular, it is suggested, there are functional differences between the two concepts. As human right instruments, cultural rights are subjective rights that every human being is endowed with. Cultural diversity, on the other hand, is not a subjective right but rather a programmatic goal intended to guide a state’s cultural policy. Cultural diversity is

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<sup>232</sup> *Universal Declaration of Human Rights*.

<sup>233</sup> *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS, 3, 3.

<sup>234</sup> *International Covenant on Civil and Political Rights*, 999 UNTS, 171, 171.

<sup>235</sup> Meyer-Bisch, *The Realisation of Cultural Rights, a New Challenge for Europe* (2011) para 8. A much more detailed account of the various forms of cultural rights is provided by Stamatopoulou 107–162, Donders, ‘Do Cultural Diversity and Human Rights make a Good Match?’ (2010) 61 *International Social Science Journal* 15, 18–21; Shaheed paras 11–20.

<sup>236</sup> Meyer-Bisch paras 35 and 60.

<sup>237</sup> European Court of Human Rights, *Cultural Rights in the Case-law of the European Court of Human Rights* (2011).



concerned with the sum of particular cultural rights of all groups and individuals within a state's territory.

This notwithstanding, cultural rights and human rights more generally provide the 'moral and legal framework' for cultural diversity.<sup>238</sup> Today, it is widely acknowledged that cultural diversity and cultural rights are mutually supportive.<sup>239</sup> On the one hand, as confirmed by Articles 4 and 5 of the 2001 Universal Declaration, this means that the full implementation of cultural rights is a prerequisite for and, at the same time, a guarantee of cultural diversity. Furthermore, Article 2(1) of the 2005 Convention asserts that 'cultural diversity can be protected and promoted only if human rights and fundamental freedoms ... are guaranteed'. On the other hand, the respect, protection and promotion of cultural diversity are essential for ensuring the full respect of cultural rights.<sup>240</sup> As a consequence of this mutual supportiveness, a state's obligation to guarantee cultural rights and protect cultural diversity is interconnected.<sup>241</sup>

### *The Limits of Cultural Diversity*

Cultural rights are not only the theoretical justification for cultural diversity; they also set limits to the concept. In the realm of cultural rights, there have sometimes been claims for cultural relativism. According to this theory, cultural rights do not apply universally but need to be interpreted differently according to the values prevalent in different cultures.<sup>242</sup> To a certain extent, this is a radical consequence of the anthropological view that cultures cannot be judged from an evaluative perspective but that each culture is worthwhile in its own way.<sup>243</sup> Given that cultural diversity implies that every group be able to practice their cultural identity, the question arises how

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<sup>238</sup> Donders 31.

<sup>239</sup> *Human Rights and Cultural Diversity Resolution* para 10. See also Shaheed paras 24-31; Meyer-Bisch para 8.

<sup>240</sup> Shaheed para 26.

<sup>241</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life*, para 50.

<sup>242</sup> Donders 16. For a broader explanation on the alleged relativism of cultural rights, see Stamatopoulou 18-28.

<sup>243</sup> See above, on page 18.

much tolerance the concept affords to cultural practices which are not necessarily consistent with cultural and human rights; the practice of female genital mutilation, for example, would be an extreme but pertinent case in point. International instruments of cultural diversity have responded to these questions unambiguously. Article 4 of the 2001 Universal Declaration asserts that ‘no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’; a principle that was reiterated in Article 2(1) of the 2005 Convention.<sup>244</sup>

As a first result, the respect for cultural and human rights thus establishes absolute boundaries to the accommodation of particular cultural practices within the concept of cultural diversity. One might, however, wonder whether there are not additional limits, maybe below the threshold of cultural and human rights. In fact, the place and importance of common values within the concept of cultural diversity are as old as the concept itself. It is sometimes described as the dialectic between the particular and the universal, meaning that although different cultures should be promoted (the particular) all different cultures must share some common values (the universal) in order to prevent conflict. Already in 1947, the problem was pointedly described by then UNESCO Director-General Julian Huxley. He argued that

‘we must not merely recognize this cultural diversity as a fact, but welcome it as making for a greater richness of human achievement and enjoyment; thus we must not endeavour to impose any standardized uniformity of culture, but on the contrary should aim at encouraging the free development of divergent and characteristic cultural expressions in different regions and countries. On the other hand, this cultural diversity must obviously not be allowed to become a source of incomprehension between the nations, still less of friction. Accordingly we must try to ensure mutual understanding of the cultural tendencies and achievements of different peoples, and indeed to aim at an eventual integration or orchestration of separate cultures, not into uniformity, but into a unity-in-diversity, so that human beings are not imprisoned in their separate cultures, but can share in the riches of a single diversified world culture’.<sup>245</sup>

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<sup>244</sup> It provides that ‘no one may invoke the provisions of the Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof’. It should be noted, however, that this does not imply that cultural and human rights may not be limited where such limitation is provided for in international law; see Shaheed para 35.

<sup>245</sup> Huxley 12-13.

The quote also introduces the ‘unity-in-diversity’ parlance, nowadays ubiquitous in fora concerned with cultural diversity. Often in this context, diversity is highlighted as a valuable asset, a ‘cultural richness’.<sup>246</sup> Where ‘unity-in-diversity’ is evoked, it is not always clear to what ends. Usually, the notion signifies a compromise between the two antipodes unity and diversity. In its extreme form, unity would describe a society sharing a uniform culture intolerant of deviances and diversity in a society made up of different and separate cultures. Arguably, ‘unity-in-diversity’ implies more than merely accepting the differences of cultural groups. Given that the two terms seem to be given the same weight, such ‘unity-in-diversity’ also needs a common core in the sense of shared values. One might even argue that it is the common values that only make it possible to tolerate different cultures.

With the emphasis on intercultural dialogue as the preferred strategy to achieve cultural pluralism, there has also been a more pronounced stress on the necessity of common values, most particularly in the CoE. The 2003 CoE Declaration on Intercultural Dialogue and Conflict Prevention stated that cultural practices must comply with the ‘fundamental principles upheld by the CoE’.<sup>247</sup> The 2008 CoE White Paper on Intercultural Dialogue enumerates human rights, democracy and the rule of law as the universal values upheld by the Council and Europe,<sup>248</sup> but notes that successful intercultural dialogue also depends on equality and mutual respect.<sup>249</sup> Most recently, it has been highlighted that, in addition to human rights standards, further elements, such as mutual respect, need to exist in people’s hearts and minds.<sup>250</sup> The enforcement of these desired elements, however, cannot be a matter of law.<sup>251</sup>

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<sup>246</sup> *European Declaration on Cultural Objectives*: ‘diversity provides the cultural richness which is the basis of progress towards European unity’.

<sup>247</sup> *Declaration on Intercultural Dialogue and Conflict Prevention* Article 1.1.

<sup>248</sup> CoE, *White Paper*, paras 57-61.

<sup>249</sup> *Ibid* paras 62-64. Note that already the *Declaration on Multicultural Society and European Cultural Identity* had emphasised that where difference is expressed, this must be done ‘in a way that accords with a society based on respect for the individual, tolerance and solidarity’ (para 6) and that the expression of everyone’s identity must observe ‘respect for others’ (para 13).

<sup>250</sup> CoE, *Living Together Report*, 34.

<sup>251</sup> *Ibid*: ‘It goes without saying that respect should also be reflected in [people’s] outward behaviour, but it is not practicable, and may be counterproductive to treat it as a right which can be claimed and enforced by law. People should show respect for each other, but failure to do so is a subjective

## 6.4 The Normative Dimensions of Cultural Diversity under EU Law

Having determined the scope of the concept of cultural diversity in international law and intergovernmental practice, we now have to address the question of whether cultural diversity in EU law and, more specifically, the notion of ‘diversity of [the EU’s] cultures’ in TFEU Article 167(4) should be interpreted accordingly. Thus, can it be understood in the normative sense of intercultural pluralism that argues for all cultural groups to express their different identity and engage in intercultural dialogue?

### *The Relevance of the Normative Dimensions of Cultural Diversity in International Law and Practice*

First, the arguments in favour of the prevalent view in international law and intergovernmental practice that culture should be understood in an anthropological sense apply *mutatis mutandis*.<sup>252</sup> More precisely, the EU, being a party to the 2005 Convention, would act inconsistently if it interpreted cultural diversity in that instrument and the EU legal order differently. Furthermore, the 2001 Universal Declaration was adopted unanimously and the 2005 Convention ratified by all EU member states. All EU member states have thus demonstrated their common understanding of cultural diversity in the sense of intercultural pluralism. Arguably, such a common position must be taken into account when interpreting the notion in EU law as an exercise of the prerogative that EU member states have in cultural matters.

In addition, there is much to suggest that, since the concept of cultural diversity was introduced in the Treaty of Maastricht in 1992, the notion has been understood in the sense of cultural pluralism. At that time, cultural diversity was already widely perceived in the sense of intercultural pluralism in international law and politics<sup>253</sup> and, within the forum of the CoE, the EU member states were working

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matter, except when it goes so far as to infringe clearly defined rights, violations of which can be objectively determined’.

<sup>252</sup> See above, on page 20.

<sup>253</sup> In this context, the *Declaration on Multicultural Society and European Cultural Identity* should be

together towards an enhanced protection of minorities. It is, therefore, no coincidence that (then) EC Article 126(1) was amended to guarantee respect for the member states' 'linguistic and cultural diversity' only some months before the CoE European Charter for Regional or Minority Languages was adopted

Beyond the drafting history, the term 'linguistic diversity' in itself implies an intrastate protection of linguistic minorities. Likewise, the fact that the diversity of regions within a state is specifically highlighted alongside national diversity in (then) EC Article 128(1) equally implies the underlying goal to achieve intrastate pluralism.

### ***Cultural Diversity in the Political Practice of the EU***

A final albeit less forceful argument to interpret cultural diversity in TFEU Article 167(4) in the sense of intercultural pluralism can be drawn from the fact that the EU in its political practice adopts this interpretation and embraces the concepts of cultural pluralism and intercultural dialogue.

Even before cultural diversity was enshrined in the EU legal order it was an important factor in the European Communities' policy practice.<sup>254</sup> In fact, the European Commission even considers that the 'preservation and promotion of cultural diversity are among the founding principles of the European model'.<sup>255</sup> Without any explicit reference to culture in the Treaty of Rome,<sup>256</sup> such claims appear exaggerated. What is commonly accepted, however, is that culture as a factor in European integration started to be recognised in the early 1970s<sup>257</sup> and with it the

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recalled. In this instrument, the European ministers for culture strongly asserted both the view of cultural diversity as cultural pluralism as well as the enrichment between cultures through dialogue and exchange. See, in detail, above on page 41.

<sup>254</sup> Langen provides a detailed overview of the broader - indirect and direct - cultural policy in the EU from 1974 until 2007.

<sup>255</sup> European Commission, *2003 Communication on an International Instrument on Cultural Diversity*, 3.

<sup>256</sup> Mere allusions to culture were contained in the references to 'non-discrimination' and to the 'protection of national treasures possessing artistic, historical, or archaeological value' in EC Articles 7 and 36; see also Shore, "In uno plures" (?) EU Cultural Policy and the Governance of Europe' (2006) 5 *Cultural Analysis* 7, 12. In addition, EC Article 131 specified that the association of third countries should serve their 'economic, social and cultural development'.

<sup>257</sup> Shore 14; Barnett, 'Culture, Policy, and Subsidiarity in the European Union: From Symbolic Identity to the Governmentalisation of Culture' (2001) 20 *Political Geography* 405, 409.

concept of cultural diversity. At the Copenhagen European Summit in 1973, for example, the heads of state of the then nine member states adopted the Declaration on European Identity with the aim of ‘reviewing the common heritage’ and the ‘degree of unity so far achieved within the Community’. They also expressed their wish to ‘preserve the rich variety of their national cultures’ and the belief that ‘the diversity of cultures within the framework of a common European civilization ... give(s) the European Identity its originality and its own dynamism’.<sup>258</sup> Later in the mid-1980s, the European institutions aimed for a ‘People’s Europe’ in order to mitigate the Community’s democratic deficit. At that time, the emphasis was on symbolic initiatives to foster a common European identity rather than on cultural diversity.<sup>259</sup> With the explicit inclusion of cultural diversity in the EC, the use of the term ‘cultural diversity’ in policy papers multiplied.<sup>260</sup> From the late 1980s onwards,<sup>261</sup> the EU has actively endorsed the motto ‘unity in diversity’ to describe itself. The Commission explains as follows:

‘The originality and success of the EU is in its ability to respect Member States’ varied and intertwined history, languages and cultures, while forging common understanding and rules which have guaranteed peace, stability, prosperity and solidarity – and with them, a huge richness of

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<sup>258</sup> *Declaration on European Identity* [1973] Bulletin of the European Communities 12/118. The idea that the European languages and cultures constitute the common heritage was also taken up in the Tindemans Report as an argument to foster ‘a citizen’s Europe’; see Tindemans, *Report on European Union* [1975] Bulletin of the European Communities Supplement 1/11, 28. In its 1977 Communication on Community Action in the Cultural Sector, the Commission did not use the term ‘cultural diversity’ but proposes the preservation of architectural heritage and cultural exchange, both of which specific forms of expression of cultural diversity; see Commission of the European Communities, *Community Action in the Cultural Sector*, 21–25. The preservation of architectural heritage is also a concern in the 1982 follow-up Communication. In addition, the Commission invokes the member states’ ‘wide cultural and linguistic diversity’ when arguing in favour of enhancing the conditions of cultural workers in the regions; see Commission of the European Communities, *Stronger Community Action*, 13, 18–22.

<sup>259</sup> For example, neither the two Adonnino Reports nor the ensuing Commission communication mention cultural diversity; see Ad hoc Committee ‘on a People’s Europe’, *Report from the ad hoc Committee on a People’s Europe* [1985] Bulletin of the European Communities 3/111; Ad hoc Committee ‘on a People’s Europe’, *Report to the European Council* (1985). See also Collins, ‘Unity in Diversity? The European Single Market in Broadcasting and the Audiovisual, 1982–92’ (1994) 32 *Journal of Common Market Studies* 89, 95.

<sup>260</sup> The Commission’s 1992 communication, for example, does not only make four references to cultural and linguistic diversity but explicitly includes ‘national, regional and local diversity’; see Commission of the European Communities, *New Prospects for Community Cultural Action*, 4.

<sup>261</sup> Collins 99.

cultural heritage and creativity to which successive enlargements have added more and more. Through this unity in diversity, respect for cultural and linguistic diversity and promotion of a common cultural heritage lies at the very heart of the European project'.<sup>262</sup>

Encapsulating the notion of cultural pluralism, the slogan has gained wide recognition not only within the Commission but also across the different European institutions.<sup>263</sup> Equally, the concept of intercultural dialogue has been firmly embraced in the political practice of the EU.<sup>264</sup>

In light of these aspects, one can thus safely conclude that also at the level of the EU, cultural diversity is more than a mere factual statement, but also contains the normative goals of cultural pluralism and intercultural dialogue.

## 6.5 Conclusion

It has become apparent that cultural diversity is a concept of many meanings that can be 'used in different, even diametrically opposed, senses'.<sup>265</sup> It is an umbrella term, which is used to convey what – in reality – are largely distinct concepts. This causes difficulties when, as often is the case, the term is employed with the underlying distinctions being made in an only implicit or, even worse, unconscious way. The conclusion to be drawn, from the survey of diverging ideas on cultural diversity, is that

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<sup>262</sup> Commission of the European Communities, *European Agenda for Culture in a Globalizing World*, 2. This interpretation has been re-iterated in European Commission, *Commission Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation of the European Agenda for Culture* (2010) 2. The idea of Europe being united through its cultural diversity is also a cornerstone of the 'Europe for Citizens' programme 2007-2013; *Decision No 1904/2006/EC of the European Parliament and of the Council of 12 December 2006 Establishing for the Period 2007 to 2013 the Programme 'Europe for Citizens' to Promote Active European Citizenship* [2006] OJ L 378/32, Article 1(2)(a).

<sup>263</sup> It has, for example, been embraced by the European Parliament and the Council as a cornerstone of the 2007-2013 programme 'Europe for Citizens'; *ibid.*

<sup>264</sup> For example, 2008 had been declared the European Year of Intercultural Dialogue. For an assessment of all activities in this context, see European Commission, *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Evaluation of the 2008 European Year of Intercultural Dialogue* (2010). For a thorough analysis of the importance of intercultural dialogue in the political practice of the EU, see Endres 23-29.

<sup>265</sup> Von Bogdandy 247.

any attempt to formulate a theory of cultural diversity must, in order to avoid ambiguity, openly address and disclaim two key points.

First, when speaking of cultural diversity, one must be clear whether one means cultural diversity at large or only the diversity of a particular cultural marker. While the former paints an overall picture of the spectrum of different cultures in a given society the latter addresses the different cultures conveyed through this particular marker only, such as, in our case, online music. Such a clarification, however, is seldom made. On the contrary, the notion of 'cultural diversity' is often used as *totum pro parte*. Yet, such malpractice may be deceiving as it suggests that it was possible to make predictions as to cultural diversity at large based on an analysis of the diversity of a particular cultural marker only. The example of music may illustrate that such a conclusion would be inaccurate: even if a society displays a large spectrum of different musical creations, its cultural diversity at large would *probably* still be low if other forms of cultural creations, such as cinema, literature or theatre, shared largely uniform characteristics. Even under these circumstances, this would only *probably* be so; one could not be certain because culture is even more than just cultural creation. We might, for example, imagine a society where all forms of cultural creation are largely uniform but which possesses highly diverse cultural heritage.

Things are further complicated by the various normative connotations with which cultural diversity may be used. Any theory of cultural diversity, be it concerned with culture at large or only a particular cultural marker, must, therefore, be clear whether it uses the notion of cultural diversity as a statement of fact or in one of its normative guises. Arguably, whenever cultural diversity is used in order to express more than just a simple statement of fact, this should be made explicit.

Any reliable argument based on cultural diversity, therefore, needs to be clear about the exact extent of the concept that it relies upon. This finding, however, is in stark contrast to the way the term is used in political or academic debate without making such distinctions. One explanation for this may be found in the obvious temptation to deliberately remain vague and derive benefit from the positive aura with which the term cultural diversity is surrounded. Who, after all, would state opposition



to cultural diversity? Ultimately, such sleight of hand is only possible because of the prevalent anthropologic view of culture. If culture is determined by virtually anything, it is easy to focus on one specific aspect and use the result of that analysis as an argument for a less visible agenda.

That this is potentially harmful to the further development of the concept can be seen from the way in which cultural diversity was appropriated by the 'trade vs culture' debate. When, suddenly, the concept is widely used in only one of its particular connotations, there is a clear danger that the public at large will associate the concept with this aspect only and lose sight of its overarching determinants.

The analysis carried out in this chapter has evidenced an overarching perception of cultural diversity in the sense of what in shorthand could be termed intercultural pluralism that pervades international law and intergovernmental practice and is equally discernible in the use of the term at EU level. Cultural Diversity then determines the extent to which groups or individuals in society are able to express their way of life or cultural identity. Implicit in this concept is the conviction that there is an optimal degree of diversity; notably that every group or individual in society should be able to freely practice their culture. In addition, the aspect of intercultural dialogue stresses the need for cultures to be able to interact with each other in the interest of mutual enrichment.

Applying our findings to online music allows us to define diversity in this field. Conscious of the normative underpinning, it would call for all groups or individuals in society to be able to express their cultural identities through online music and to be able to engage with online music that expressing other cultures.

### **Part 3: Diversity in Online Music as a Guideline to Direct or Assess Policy Choices in the Design of the EU Framework for the Licensing of Authors' Rights in Online Music**

Based on the working concept of cultural diversity formulated in the previous section, part 3 seeks to develop the concept into a workable guideline to direct or assess policy choices in relation to the licensing of authors' rights in online music. It may be recalled that part 4 will focus on the way in which authors' societies operate and, more specifically, their dedicated cultural functions, while part 5 will address the consequences of two specific EU interventions that changed the dynamics of the licensing of authors' rights in online music. This part aims to develop more tangible criteria to assess whether these practical characteristics of and changes in the system of licensing authors' rights in online music promote the diversity of online music. It thus seeks to link the abstract and theoretic concept of diversity in online music to the concrete and practical area of multi-territorial licensing of online music.

In *chapter 7* we approach this task by analysing the cultural mainstreaming clause of TFEU Article 167(4) with a view to determining the exact scope of that obligation and its application to online music.

We first assess the scope of the terms 'to take cultural aspects into account' (7.1) and 'to respect and promote the diversity of [the EU's] cultures' (7.2). Given that the ordinary meaning of the latter is not sufficiently conclusive (7.2.1), it is proposed to apply a harmonious interpretation in light of Article 7 of the 2005 Convention whenever an EU measure may affect the diversity of cultural expressions. In order to substantiate this proposal the conceptual advantages of the promotion of the diversity of cultural expressions, as envisaged in Article 7 of the 2005 Convention, are demonstrated; notably, the latter did not develop in isolation but placed itself into a broader framework of coherent guidelines, principles and values (7.2.2). After presenting additional arguments in favour of the proposed harmonious interpretation (7.2.3) the effects of such an approach are highlighted (7.2.4). More specifically, it is argued that a harmonious interpretation will lead to a uniform approach cultural

diversity in the EU and a more systematic implementation of the 2007 Convention on the part of the EU.

Analysing the various stages in the value chain of online music, *chapter 8* explores the extent to which the framework for the licensing of authors' rights in music may influence diversity in online music. We submit that the framework for the licensing of authors' rights in music would promote diversity in online music if it allowed the diversity of created music to be carried over to the online distribution stage and if online music services could clear, in an easy and efficient manner, the necessary authors' rights in online music in the entire EU repertoire as well as a diverse foreign, ideally the entire worldwide repertoire (8.1). Contrariwise, legal as well as practical reasons argue against the use of licensing regulation to balance out any disadvantages that some cultural groups might experience in the upstream creation of music (8.2).

We then explore several of the suggestions that have been made outside of the legal sphere with a view to statistically measuring diversity (9). These theories provide useful suggestions as to how diversity can be conceptualised and contribute to determining whether a certain measure is appropriate to promote the diversity in online music.

## **7 The Obligation to Respect and Promote the Diversity of the EU's Cultures (TFEU Article 167(4))**

### **7.1 The Scope of the Term 'to Take Cultural Aspects into Account' in TFEU Article 167(4)**

TFEU Article 167(4) requires the EU to 'take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures'. But which concerns exactly do the EU organs and institutions have to take into account? What particular steps must be taken for such concerns to be taken into account?

Shortly after the cultural mainstreaming clause came into existence through the Maastricht Treaty, some commentators argued that it was no more than a declaratory statement, a merely political appeal to consider culture.<sup>266</sup> This view, however, appears difficult to reconcile with the strong wording that the EU shall take cultural aspects into account. The same language is employed in the other sections of the provision: 'shall contribute' (Paragraph 1), 'action shall be aimed' (Paragraph 2), 'shall foster' (Paragraph 3) and 'shall adopt' (Paragraph 5). In all of these instances, there is no doubt that legally binding rules are established and nothing in Paragraph 4 suggests that the same was not intended for the mainstreaming clause. The recent reinforcement of the protection of cultural diversity by the Lisbon Treaty provides an additional argument against the interpretation of TFEU Article 167(4) as a merely political statement. As a principle of EU law, it is now legally binding and enshrined not only in TEU Article 3(3) but also in the Preamble and Article 22 of the CFREU. All of this suggests that TFEU Article 167(4) contains a binding legal obligation and, as far as can be seen, claims to the contrary have not been re-iterated in recent times.

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<sup>266</sup> Berggreen-Merkel 19; Lane, 'New Community Competences under the Maastricht Treaty' (1993) 30 *Common Market Law Review* 939, 978.

The term ‘aspects’ is relatively open in comparison with the term ‘requirements’, which is used in other mainstreaming clauses.<sup>267</sup> This suggests that considerations must be taken into account not only if they are necessary for but also if they are merely conducive to the protection and improvement of the cultural field.<sup>268</sup> While it has sometimes been argued that the cultural aspects to be taken into account should be interpreted as the distinct national cultural policy objectives of the member states so that they are protected from overflowing EU intervention,<sup>269</sup> nothing in the mainstreaming clause suggests that EU cultural policies and objectives should not be seen as necessary considerations.<sup>270</sup> On the contrary, if the EU has explicit, albeit limited, cultural competences then there might be situations in which the secondary effects of EU action not only conflict the objectives of domestic but also EU cultural objectives. In those cases, a balancing of the competing cultural and non-cultural objectives at the EU level is equally needed.

Turning to the exact scope of the term ‘to take into account’, the natural meaning of the words suggests that the EU is required to include cultural considerations in the assessment of proposed action and to balance it with all other applicable objectives. It does not, however, prescribe a particular outcome of such assessment.<sup>271</sup> TFEU Article 167 proclaims no abstract supremacy of culture over other objectives. Likewise, no minimum level of protection of culture is prescribed. Such precisions are sometimes made in other mainstreaming clauses. For example, the EU is bound to take into account requirements linked to a high level of education (TFEU Articles 9 and 147(2)), a high level of education and training (TFEU Article 9) or a high level of human health protection (TFEU Articles 9 and 168(1)). Yet, TFEU

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<sup>267</sup> TEU Article 9 speaks of the ‘requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’, TEU Article 11 of ‘environmental protection requirements’, TEU Article 12 of ‘consumer protection requirements’, and Article 13 of the ‘welfare requirements of animals’.

<sup>268</sup> Ress and Ukrow, Art. 151 EGV, para 142.

<sup>269</sup> Schmid, ‘Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing’ (2000) 8 European Review of Private Law 155, 163–164; Ress and Ukrow, Art. 151 EGV, para 145.

<sup>270</sup> Psychogiopoulou 57.

<sup>271</sup> *Ibid* 76.

Article 167(4) does not contain any such prescription. In fact, it does not even oblige the EU to always accommodate cultural concerns in any given action.<sup>272</sup>

But although the EU thus has a wide margin of discretion when assessing cultural aspects in relation to actions based on non-cultural treaty provisions, there are certain minimum standards that such an assessment must follow. This is in line with the general view in legal literature that the application of Article 167(4) is amenable to judicial review.<sup>273</sup> Usually, this minimum threshold is said to require the EU to attain the goals in the various fields of EU policy ‘in the most culturally-friendly way’.<sup>274</sup> In practical terms, this would mean that if a certain measure could be implemented in two different ways, both of which reach its non-cultural objectives equally effectively, the EU has to choose the implementation with the least negative effect on culture. Further, if between two possible implementations the one with more negative effects on cultural objectives is chosen, this must be proportionate to the non-cultural aim pursued.<sup>275</sup> In addition to such relative limits, the principle of culturally-friendly implementation is understood by some in a more restrictive sense as to equally encompass absolute limits. These commentators envisage situations in which the adoption of a given measure would seriously impair the development of the cultures in the member states and argue that such a measure could only legitimately be adopted if either the measure itself addressed cultural concerns or if the measure was accompanied by flanking measures aimed at mitigating the foreseeable damage to cultural goals.<sup>276</sup>

Whatever the correct standard may be, it can be reasoned that TFEU Article 167(4) imposes a legal obligation on all EU organs and institutions. Applied to the object of our study this means that the European Commission, when regulating the legal framework for the licensing of online music, must be guided by concerns

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<sup>272</sup> *Ibid.*

<sup>273</sup> Ress and Ukrow, Art. 151 EGV, para 147; Frenz para 4097.

<sup>274</sup> Psychogiopoulou 59; Ress and Ukrow, Art. 151 EGV, para 147; Frenz para 4094.

<sup>275</sup> See Christianos, ‘The Effective Judicial Protection of Culture in EC Law’ in Rodriguez Iglesias (ed) *Problèmes d’interprétation* (2004) 21, 43.

<sup>276</sup> Ress and Ukrow, Art. 151 EGV, para 147.

about cultural diversity and that, even if these concerns have no precedence over any other objectives, the Commission must balance all applicable interests in the most culturally-friendly way.

## **7.2 The Scope of the Terms ‘to Respect and to Promote the Diversity of [the EU’s] cultures’ in TFEU Article 167(4)**

Linking the analysis of the scope of the obligation ‘to take into account’ to the supplementary clause ‘in particular in order to respect and to promote the diversity of [the EU’s] cultures’, one can conclude that the EU, when adopting a predominantly non-cultural measures, must respect and promote cultural diversity to the largest extent possible while attaining the non-cultural objective.

This, however, does not say much about the concrete ways in which cultural diversity is to be respected and promoted. In order to determine the scope of these terms more adequately, the ordinary meaning of the terms ‘to respect’ and ‘to promote’ will first be assessed (7.2.1). Given that this only leads to very limited substantiation, a harmonious interpretation will be drawn from what Article 7 of the 2005 Convention prescribes for promoting the diversity of cultural expressions. Such a harmonious interpretation is suggested for all cases in which a non-culturally motivated EU measure would affect the diversity of cultural expressions (7.2.2-7.2.4). As music is a cultural expression,<sup>277</sup> the harmonious interpretation would be relevant for any EU measure that would affect musical diversity or, more specifically, the diversity in online music.

### **7.2.1 The Ordinary Meaning of the Terms ‘to Respect’ and ‘to Promote’ in TFEU Article 167(4)**

Our search for the appropriate interpretation of ‘to respect’ and ‘to promote’ starts with a look at the ordinary meaning of the terms. According to the Oxford English

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<sup>277</sup> See above, on page 71.

Dictionary, 'to respect' is to be understood as to treat or regard with deference, esteem, or honour and to uphold, maintain, refrain from violating.<sup>278</sup> 'To promote' means to further the growth, development, progress, or establishment of (a thing); to advance or actively support (a process, cause, result, etc.); to encourage.<sup>279</sup> The first conclusion that can be drawn from these definitions is the contrast between the passive character of 'to respect' and the term 'to promote', which implies progressive action.

Furthermore, it is clear that the scope of the obligations depends largely on what it is that should be respected and promoted, namely the diversity of the EU's cultures. It has already been shown that cultural diversity has both a descriptive as well as a normative dimension.<sup>280</sup> Applying the former sense, to promote cultural diversity would be to further the spectrum of different cultural identities. Given that in its descriptive sense, cultural diversity is a mere statement of fact; it is unclear how it could be furthered. This contradiction, however, may be solved if the normative dimensions of cultural diversity in the sense of cultural pluralism and intercultural dialogue are consulted. Then, cultural diversity would be promoted if a situation were furthered in which every group in society should be able to assert, express and practise its cultural identity and in which there was an exchange between the different groups. Accordingly, to promote diversity in online music would be to further a situation in which every group is able to express its cultural identity through music distributed through online means and in which online music was a means of dialogue between the groups.

To respect cultural diversity could then be understood as to take care that the already existing level of cultural pluralism and intercultural dialogue is not undercut. Correspondingly, respect for diversity in online music would show in preserving the extent to which groups express their culture and interact with each other through online music.

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<sup>278</sup> Simpson (ed) 'respect' <<http://oed.com/view/Entry/163780>>.

<sup>279</sup> Simpson (ed) 'promote' <<http://oed.com/view/Entry/152468>>.

<sup>280</sup> See above 6.2, on page 33, and 6.3, on page 34.



TFEU Article 167 does not provide any further details how the obligation to promote and respect cultural diversity should be implemented.<sup>281</sup> It is thus left to the EU institution or organ to decide, on a case-by-case basis, how these goals should best be achieved. This has the unfortunate consequence of defying the purpose of TFEU Article 167(4). Although the norm was designed to mainstream cultural diversity into all EU policies, the lack of guidance prevents a uniform and consistent application.

Arguably, a harmonious interpretation of this obligation in light of Article 7 of the 2005 Convention would remedy this shortcoming. To further demonstrate the need for the proposed harmonious interpretation, we analyse the exact scope of the obligation to promote the diversity of cultural expressions (7.2.2), lay out the grounds arguing in favour of such interpretation (7.2.3), and determine its practical effects (7.2.4).

## **7.2.2 The Scope of the Obligation to Promote the Diversity of Cultural Expressions (Article 7 of the 2005 Convention)**

Article 7 of the 2005 Convention reads:

- ‘1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:
  - a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples;
  - b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.
2. Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions’.

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<sup>281</sup> Neither do those provisions that mention cultural diversity elsewhere in the EU treaties; see, as to these norms, above at 6.1.2, on page 32.

## *Guidelines for the Interpretation of the 2005 Convention*

Before analysing the provision more closely, it is important to note that Article 7 cannot be seen in isolation. Rather, there are certain general constraints that contracting parties need to observe when implementing the 2005 Convention.

The first of these constraints can be found in Article 5(1), according to which the contracting parties must act in conformity with ‘universally recognized human rights instruments’ when implementing cultural policies and adopting measures to protect and promote the diversity of cultural expressions. As one of the guiding principles of the Convention, Article 2(1) further specifies that ‘cultural diversity can be protected and promoted only if human rights and fundamental freedoms ... are guaranteed’ and adds that ‘no one may invoke the provisions of this Convention in order to infringe human rights or fundamental freedoms’.<sup>282</sup>

Second, Article 5(2) stipulates that

‘when a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention’.

All measures taken by the parties, therefore, must conform to the letter and the spirit of the Convention. Most relevant in this regard are Articles 1 and 2. The former enumerates the Convention’s nine objectives, and the latter contains eight guiding principles, which may be seen as limitations to the rights established in the Convention.<sup>283</sup> Beyond the already mentioned respect for human rights and fundamental freedoms (Article 2(1)), four other principles are particularly relevant in the context of the parties’ internal measures. First, the principle of equal dignity of and respect for all cultures (Article 2(3)) calls for an equal treatment by the parties of

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<sup>282</sup> See also above at 6.3.4, on page 71. Most human rights are not absolute but allow for restrictions under strict conditions. Often one such condition is the principle of proportionality. Where this is the case, Article 5(1) therefore makes sure that the contracting parties’ measures are necessary and proportionate; see Craufurd Smith (n 163) 44.

<sup>283</sup> Neil, ‘The Convention as a Response to the Cultural Challenges of Economic Globalisation’ in Obuljen and Smiers (eds) *UNESCO’s Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (2006) 39, 53. The exact way in which the principles limit these rights, however, is not entirely clear.

all cultures, which aims for cultural pluralism in that the expressions of all cultures in a party's territory are to be promoted and protected. Second, the principle of equitable access (Article 2(4)) asserts a two-fold access right for cultures: access to the means to express culture as well as access to diversified cultural expressions 'from all over the world'. This latter aspect gives life to the principle of openness (Article 2(8)). According to this third principle, states 'should seek to promote ... openness to other cultures of the world'. Such openness is a prerequisite for the dialogue amongst cultures and interculturalism, both of which figure amongst the objectives of the Convention (Article 1(d)-(e)). Lastly, Article 2(8) also provides that 'parties should seek to ... ensure that [their] measures are geared to the objectives pursued under the present Convention'.<sup>284</sup>

Finally, the parties' discretion to act under the Convention is also constrained by Article 20(2) which provides that the 2005 Convention does not modify the rights and obligations of the parties under any other international treaties.

### *The Three Objectives Listed in Article 7 of the 2005 Convention*

Examining the scope of measures to promote the diversity of cultural expressions, the first thing that one notices is that Article 7 lists three specific objectives for such measures to serve. The first objective is contained in Article 7(1)(a), which calls on the parties to create an environment that encourages cultural groups to engage in expressions of their cultural identity and thus stresses the link between cultural diversity and cultural pluralism. Such an engagement can take the form of the active provision of cultural expressions (creation, dissemination) or their passive reception (access to provided cultural expressions). As cultural groups and societies can only do

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<sup>284</sup> The exact scope of this remains opaque, in particular as the cited wording does not add anything more than is expressed in Article 5(2). From the fact that the Convention itself entitles this the 'principle of balance', however, one might infer that a party's measure should ideally satisfy all guiding principles. Yet, this might not always be possible if principles conflict with each other or further provisions in the Convention. In such situations, it is submitted that a party is not free to arbitrarily choose one over the other but must strive for a balanced solution. See also Neil 53, who notices that 'the concept of "balance" in an international instrument normally prevents states from introducing a measure wildly disproportionate to the scope of the problem they are addressing, using the instrument as a justification'.

so if they have the possibility to freely express themselves, the provision presupposes respect for human rights and fundamental freedoms (Article 2(1)).

Article 7(1)(b) proclaims the second objective. The norm extends the call for access to cultural expressions: while Sub-paragraph (a) only requires for cultural groups to have access to their own cultural expressions, Sub-paragraph (b) goes further and proclaims that they should equally have access to expressions of other cultural groups, whether these are located within or outside of the territory of the relevant party. This implements the notion of openness (Article 2(8)) and shows that equal dignity and respect for all cultures (Article 2(3)) are of potentially global reach.<sup>285</sup> Taken together, both Article 7(1)(a) and (b) implement one of the two aspects of the principle of equitable access (Article 2(7)) in so far as they advocate access to cultural expressions.

Third and finally, Article 7(2) underlines the importance of creators of cultural expressions and demands that their contribution be recognised by the contracting parties. At first sight, the additional emphasis on the importance of the creative process appears somewhat redundant as this aspect is already mentioned in Article 7(1). However, Article 7(2) is broader in that it is not only concerned with individuals and social groups but – in addition to artists – enumerates *inter alia* ‘others involved in the creative process’. This can be seen as a reference to the cultural industries, those producing and distributing cultural goods and services.<sup>286</sup> In addition, Article (7)2 also mentions organizations that support the work of artists, which is to be seen as including collecting societies; after all, these are associations of authors with the aim of furthering the authors’ interests. Given its open formulation, the obligation established by Article 7(2) appears quite broad; in particular because ‘to recognize’ in its ordinary meaning often denotes a merely internal process. It is only in

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<sup>285</sup> With the emphasis on the principle of openness it is also made clear that trade and culture are no natural enemies but that culture, quite on the contrary, needs trade to flourish; see Germann, ‘Towards a Global Cultural Contract to Counter Trade Related Cultural Discrimination’ in Obuljen and Smiers (eds) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (2006) 277, 287–288. Being one of the eight guiding principles, the requirement of openness is thus one of the safeguards against unduly broad protectionist measures under the 2005 Convention.

<sup>286</sup> Wiedemann, ‘Empowering Audiovisual Services for the Future’ in Obuljen and Smiers (eds) *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (2006) 89, 104.

its sense of ‘to show appreciation’ or ‘to reward’<sup>287</sup> that the act of recognising has external effects.<sup>288</sup> Article 7(2) is, therefore, best understood as encompassing all measures that aim at supporting those involved with cultural creation. In practice, Article 7(2) enlarges the scope of the beneficiaries of the measures that are foreseen by Article 7(1) to encourage the creation of cultural expression to more indirectly involved players, such as the creative industries and collecting societies.

### *Guidance for Putting the Objectives into Practice*

When more closely analysing Article 7, the first thing that one notices is the indirectness that it prescribes to state measures to promote the diversity of cultural expressions. The main focus of Article 7 is on ‘individuals and social groups’ as those who, by creating or having access to cultural expressions, directly influence the diversity of cultural expressions. In contrast, promotive state measures are to establish conditions that ‘encourage’ such behaviour and thus play a rather contributory role. The decision whether to create or have access to cultural expressions remains for the various cultural groups to make.

Moreover, Article 7 stipulates that promotive measures must pay ‘due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples’. The groups mentioned have a common trait that their cultural rights are not fully guaranteed in many territories of the world; where this is the case, they are prevented from expressing their cultural identity. If measures to encourage cultural expression are intended to accommodate these specific circumstances, this suggests that a broad understanding be given to the term ‘encourage’. In its ordinary meaning, to encourage is understood as to inspire someone with the courage or confidence to do something or to stimulate someone to do something by approval or help.<sup>289</sup> Where women,

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<sup>287</sup> Simpson (ed) ‘recognize’ <<http://oed.com/view/Entry/159656>>.

<sup>288</sup> Given that action under Article 7 must have an impact on the diversity of cultural expressions, it is submitted that it must have such external effect. See, in this regard, the interpretation of the notion of ‘cultural expression’ above, on page 62.

<sup>289</sup> Collins English Dictionary, ‘encourage’ <<http://www.collinsdictionary.com/dictionary/english/>>

minorities, or indigenous peoples are prevented from expressing their cultural identity, any encouragement would be moot if it was limited to stimulation or inspiration. In such situations measures to promote the diversity of cultural expressions would rather need to be directed at removing the legal or factual obstacles. The express reference to the mentioned groups, therefore, clarifies that ‘to encourage’ must be understood as encompassing ‘to enable’.

Importantly, this enabling effect of promotive measures is not limited to the three specified groups. Notably, minorities and indigenous peoples are not mentioned in isolation but as examples of ‘various cultural groups’ that may be in ‘special circumstances’. This can only be understood as a more general commitment to cultural pluralism<sup>290</sup> and a reminder of one of the guiding principles for achieving the objectives of the Convention, namely the equal dignity of and respect for all cultures (Article 2(3)). Article 2(3) stipulates that the recognition of equal dignity of and respect for all cultures is a precondition of the protection and promotion of the diversity of cultural expressions. Consequently, one would have to conclude that wherever social groups face obstacles in expressing their cultural identity, promotive measures must be targeted at removing such obstacles. At the same time, this illustrates that although promotive state measures may only be of a contributory character, such contribution is crucial where social groups would otherwise be unable to express their identities.

Furthermore, Article 2(3) reveals another important element of promotive measures to observe. If all cultural groups have equal dignity and are to be shown equal respect, states are not free in deciding which cultural groups to support. On the contrary, state measures could only promote the diversity of cultural expressions if they enabled and encouraged *all* groups in society to express their cultural identities. This, in turn, implies that no particular cultural group may be unduly favoured and clarifies

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encourage>.

<sup>290</sup> See also Recital 7 of the Preamble of the 2005 Convention highlighting that ‘diversity is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies’.

that it is not a particular cultural expression that is to be promoted but the diversity of cultural expressions.<sup>291</sup>

This assertion for equal treatment of all cultural groups requires a number of precisions. First, a cultural group may face special circumstances that promotive measures must be directed at. It would be inaccurate to assume that equal treatment required that each cultural group be provided with the same quantitative and qualitative support. On the contrary, if the goal is to encourage all social groups to express their cultural identity through cultural activities, products and services, then measures aimed at a particular group have to be carefully tailored to its individual situation and needs. As a result, cultural support can differ considerably depending on the social group targeted. This, however, does not constitute an infringement of the equal dignity of all cultural groups but is rather a practical aspect of its implementation. An environment that encouraged cultural expressions by all social groups would put the principle of equal dignity into practice; it would then be the free decision of each group whether and by which means to express its cultural identity. Where the goal is to create such level playing field, measures necessarily have to consider the level of cultural pluralism already achieved amongst the various groups. If a group, for example, receives more cultural support than others, this could still promote the diversity of cultural expressions if that group faced particular difficulties in expressing its cultural identity. Where, on the other hand, a one-sided cultural policy is implemented simply to consolidate an already existing hegemony of the cultural majority, that policy could not be justified under the goals of cultural pluralism and equal dignity of and respect for all cultures.

Second, the principle of equal dignity of and respect for all cultures would also be misinterpreted if it were construed as suggesting that the cultural expressions of various social groups had to attain equal importance in society as a whole. Such

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<sup>291</sup> In this regard, it is unfortunate that Article 7 is entitled ‘measures to promote cultural expressions’. Given, however, that Articles 5 and 6 speak of measures that promote and protect ‘the diversity of cultural expressions’, the title must be seen as a simple short-hand for the same concept. That this is the only possible interpretation is apparent from Article 3, according to which the 2005 Convention ‘shall apply to policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions’.

consolidation tendencies would disregard the indirect effect that Article 7 lays down for promotive measures; while such measures should create an environment that encourages all social groups to express their cultural identity, each social group must be free to decide if and how to express its cultural identity.

Third, the emphasis on equal treatment is less pronounced in the context of foreign cultural expressions. Article 7(1)(b) argues in favour of access to cultural expressions 'from other countries in the world' only and does not use the wording 'from all other countries' which would have demonstrated a strict equal treatment of foreign cultural groups. From a practical point of view, the sheer unlimited number of diverse worldwide cultural expressions would make it impossible to treat them strictly equally. Rather than a prohibition to favour some foreign cultural expressions over others, the postulate of equal treatment should, therefore, be understood as a programmatic goal that requires states to aim for access to foreign cultural expressions on a scale as diverse as possible and, ideally, of worldwide coverage.

In conclusion, the analysis has shown that the diversity of cultural expressions is promoted through measures that encourage all groups and individuals in society to create expressions of their cultural identity. It is also promoted through measures enhancing access to the expressions of these groups and individuals as well as those of others irrespective of their location. Such encouragement may also be promoted indirectly through the support of those who facilitate cultural creation or organizations that support the work of the creators, such as collecting societies.

At the same time, it has also become clear that Article 7 does not take a neutral stance towards the diversity of cultural expressions but rather shows the normative conviction that there is a desirable degree of diversity, pre-determined by an understanding of cultural diversity in the sense of intercultural pluralism. If all groups in society are free to express their cultural identity, the resulting body of cultural expressions will be diverse. It is for this objective that Article 7 strives and states that measures need to be implemented in order to promote the diversity of cultural expressions.



### 7.2.3 The Need for a Harmonious Interpretation of TFEU Article 167(4) in Light of Article 7 of the 2005 Convention

A number of arguments can be made in order to advocate the type of harmonious interpretation proposed. From the perspective of international law, Article 20(1)(b) of the 2005 Convention asserts that the contracting parties shall take the Convention into account when interpreting and applying other treaties to which they are a party.<sup>292</sup> Moreover, in legal commentary, there is the view that agreements to which the EU is a party have to be taken into account when interpreting TFEU Article 167.<sup>293</sup>

But good reasons can also be based on internal EU legal considerations. Most importantly, only a harmonious interpretation guarantees consistency between the different legal instruments. By adopting the 2005 Convention, the EU accepted a theoretical framework for dealing with the diversity of cultural expressions. It would put itself in contradiction to this decision if the underpinning normative values did not apply in the context of TFEU Article 167(4) to cases where the diversity of cultural expressions was an issue.

On the other hand, some might raise the objection that a harmonious interpretation could impinge upon the autonomy of the EU legal order. This argument might be based on two points, more specifically the hierarchy of EU norms and the particular context and objective of Article 167(4).

As far as the hierarchy of EU norms is concerned, it might be seen as problematic that Article 167(4) is a norm of primary EU law whereas the 2005 Convention as an international agreement ranks lower, notably, as is generally accepted,<sup>294</sup> between primary and secondary norms. Furthermore, it is a well-

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<sup>292</sup> In *Unión de Televisiónes Comerciales Asociadas (UTECA) v Administración General del Estado*, Case C-222/07, Opinion of AG Kokott [2009] ECR I-1407 (ECJ), 4 September 2008) paras 95-102, AG Kokott clarified that this also applied when interpreting the EC. In the case at hands, she used the guidance of the 2005 Convention as one argument to conclude that a national measure that restricted the fundamental freedoms pursued a legitimate aim when its objective was linguistic diversity. In the final decision, the ECJ referred to the 2005 Convention in its interpretation of the proportionality of the measure; *Unión de Televisiónes Comerciales Asociadas (UTECA) v Administración General del Estado*, Case C-222/07 [2009] ECR I-1407 (ECJ), 5 March 2009) paras 32-33.

<sup>293</sup> Ress and Ukrow, Art. 151 EGV, para 44.

<sup>294</sup> Tiedje, 'The Status of International Law in the European Legal Order: The Case of International

established principle that norms of primary law, in general, cannot be interpreted by reference to secondary law norms, as indeed it would be circular to determine the compatibility of a secondary law norm with higher primary law by interpreting the latter in view of the former.<sup>295</sup> In analogy to this principle, one might be tempted to argue that interpreting TFEU Article 167(4) in light of the 2005 Convention would equally violate the hierarchy of EU norms. Yet, in the present context, the argument is not convincing. First, where primacy between norms is an issue usually this concerns questions as to which one of two provisions prevails if they are inconsistent and cannot be reconciled. There are no indications, however, that the 2005 Convention was not consistent with EU primary law. Second, the aim of our harmonious interpretation is not to determine the scope of application of TFEU Article 167(4), which is broader than that of the 2005 Convention, but only to help implement it by shaping certain aspects wherever a measure would fall under the ambit of both TFEU Article 167(4) and the 2005 Convention. This, however, does not jeopardise the autonomy of the EU legal order but rather accommodates the fact that the EU legislator is concurrently faced with two different legal rules. Both apply

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Treaties and Non-binding International Instruments' in Wouters and others (eds) *The Europeanisation of International Law* (2008) 55, 57-58; *European Central Bank v Federal Republic of Germany*, Case C-220/03, Opinion of AG Stix-Hackl [2005] ECR I-10595 (ECJ, 13 September 2005) para 71. That norms of primary EU law have primacy over international norms can be inferred from the fact that according to TFEU Article 218(11) the ECJ may be called upon to issue an opinion whether an envisaged international agreement is compatible with the treaties and that, where the answer is in the negative, the agreement may not be concluded unless either the agreement or the treaties are amended; see Wouters and De Meester, *The Implementation by the European Community of the UNESCO Convention on Cultural Diversity* (2008) 3-4; *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P ECR I-6351 (ECJ, 3 September 2008) para 307. That international agreements have primacy over secondary EU law, on the other hand, can be derived from the fact that TFEU Article 216(2) provides that agreements concluded by the EU are binding on the EU institutions; *International Dairy Arrangement*, Case C-61/94 [1996] ECR I-03989 (ECJ, 10 September 1996) para 52; *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* para 306-307. As a consequence, there are several ways to challenge the validity of a secondary norm that is incompatible with a binding international agreement; see Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (2004) 274-324.

<sup>295</sup> Leible and Domröse, 'Die primärrechtskonforme Auslegung' in Riesenhuber (ed) *Europäische Methodenlehre* (2nd edn, 2006) 184, para 66. Note, however, that notwithstanding these methodological reservations the ECJ sometimes uses such an interpretation to confirm a result arrived at by resort to other methods of interpretation; see for an overview Nettessheim, 'Normenhierarchien im EU-Recht' (2006) 41 *Europarecht* 737, 753-757.

to measures affecting diversity of cultural expressions and both bind EU institutions in their policy or legislative action. In this case, however, the coherence of the EU internal order dictates that they be interpreted as far as possible in light of each other.

What is more, the harmonious interpretation proposed here finds confirmation in the European Commission's view on the matter. In 2007, on behalf of the Commission, (then) Commissioner for Education, Training, Culture and Multilingualism *Ján Figel'* stated in response to a parliamentary question on the relationship between (then) EC Article 151 and the 2005 Convention that 'the Convention is pertinent for any Community activity launched with a view to implementing Article 151(4) of the EC Treaty'.<sup>296</sup> In the same vein, *Xavier Troussard*, Head of the Culture Policy, Diversity and Intercultural Dialogue Unit at the Directorate-General for Education and Culture of the European Commission, noted in 2010 that

'concerned to ensure a broader consideration of cultural diversity in the development of state policies, it could be argued that in effect, the Convention replicates the cultural mainstreaming obligation of Article 167(4) at the international level. From this perspective, it strengthens the need to make more explicit and visible the implementation of Article 167(4)'.<sup>297</sup>

Compared to this, the proposed interpretation seems even less ambitious as it is not argued that the principles of the 2005 Convention should always be taken into account when interpreting TFEU Article 167(4). The aim is not to enlarge the field of application of the 2005 Convention through the back door of Article 167(4), but rather to ensure that the normative guidelines for dealing with cultural expressions are

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<sup>296</sup> *Answer to Parliamentary Written Question P-5554/07 (DE) by Ruth Hieronymi (PPE-DE) to the Commission (8 November 2007) on the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2007)*. The uniformity of the two obligations 'to promote' is also highlighted in Council of the European Union, *Council Decision of 18 May 2006 on the Conclusion of the Convention for the Protection and Promotion of the Diversity of Cultural Expressions* [2006] OJ L 201/15, Recital 3: 'The UNESCO Convention constitutes a relevant and effective pillar for promoting cultural diversity and cultural exchanges, to which both the Community, as reflected in Article 151(4) of the Treaty, and its Member States, attach the greatest importance'.

<sup>297</sup> European Commission, *Questionnaire for Study IP/B/CULT/IC/2009\_057 Commissioned by the European Parliament* (2010) 3.

always taken into account under Article 167(4) when the measure under review affects cultural expressions.

In light of the foregoing, the coherence of EU action requires an interpretation of TFEU Article 167(4) in light of Article 7 of the 2005 Convention.

#### **7.2.4 The Effects of a Harmonious Interpretation**

The effects of the proposed harmonious interpretation are two-fold. On the one hand, it offers a uniform approach in the implementation of TFEU Article 167(4). On the other hand, it more strongly favours reaching the objectives of the 2005 Convention than would otherwise be the case.

#### ***The Appropriate Standard for Promoting the Diversity of Cultural Expressions under TFEU Article 167(4)***

Using the 2005 Convention as a tool to interpret TFEU Article 167(4) offers the EU recourse to a coherently developed and internationally accepted system of values, principles and objectives. Its application makes the somewhat opaque mainstreaming clause not only more workable but also enhances its visibility as an instrument of checks and balances in European policy making.<sup>298</sup>

In more concrete terms, wherever a predominantly non-cultural measure may affect the diversity of cultural expressions, the EU would ‘promote the diversity of its cultures’ if it created an environment that enabled and encouraged all groups and individuals

- to create expressions of their cultural identities; and
- to have access to their own cultural expressions and the expressions of cultural identities of other groups and individuals, irrespective of their location.

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<sup>298</sup> See also *ibid.*

Moreover, it could equally build such environment by supporting intermediaries that help groups and individuals to express their cultural identity.

Arguably, it would 'respect' cultural diversity if the measure in question did not make it more difficult for cultural groups and individuals to assert their identity through cultural expressions or to access cultural expressions of their own or other groups.

Applied to the specific area of online music, one would have to conclude that wherever a predominantly non-cultural measure may affect the diversity of online music, the EU would 'promote the diversity of its cultures' if it created an environment that enabled and encouraged all groups and individuals to express their cultural identities through online music and to have access to online music expressing their cultural identities of those as well as those of others, irrespective of their location. It would 'respect' cultural diversity if the measure in question did not make it more difficult for cultural groups and individuals to assert their identity through online music or to access online music expressing their own cultural identities or those of other groups or individuals.

### *The Broader Consequences for Attaining the Goals of the 2005 Convention*

A harmonious interpretation would also considerably strengthen the implementation of the 2005 Convention. This is a result of the fact that TFEU Article 167(4) and Article 7 of the 2005 Conventions are of different binding value.

Article 7 is only loosely binding in that the parties 'shall endeavour' the implementation of measures to promote the diversity of cultural expressions. This type of best-endeavour obligation has rightly been described to disguise a soft law obligation in a hard law form.<sup>299</sup> While the word 'shall' implies binding force, the obligation only extends to endeavour to achieve the prescribed objective. Although the parties must, therefore, attempt to implement Article 7, the 2005 Convention does not offer any guidance as to the scope of such attempts, and the precise extent of

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<sup>299</sup> Jiang, *An Evaluation of Soft Law as a Method for Regulating Public Procurement from a Trade Perspective* (2009) 63-64.

the 'shall endeavour' obligation remains unclear. Yet, it has to be assumed that it leaves the ultimate decision as to whether or not to adopt promotive measures to the contracting parties. TFEU Article 167(4), on the other hand, obliges the EU to assess all its envisaged measures as to their impact on cultural diversity and to choose the one which best promotes cultural diversity, from several options all equally able to achieve the non-cultural objective.

Under the harmonious interpretation, the EU would thus be obliged to mainstream the goals of the 2005 Convention into all measures affecting the diversity of cultural expressions. In practice, this changes the dynamics that underpin the promotion of the diversity of cultural expressions. The degree to which the EU is bound to implement increases from a best-endeavour obligation to a requirement to take into account. Arguably, this is even exacerbated by the fact that the concept of diversity in cultural expressions, as has been seen, is very broad. Under a best-endeavour obligation such a broad definition in effect increases a contracting party's discretion: not only is it obliged merely to endeavour to promote the diversity of cultural expressions, but it would also be free how to do that. It could, for example, implement Article 7 of the 2005 Convention by promoting the diversity of any chosen marker of cultural identity. If, however, the diversity of cultural expressions is mainstreamed into the adoption of non-cultural measures, the broad notion of the concept of diversity of cultural expressions rather increases the instances in which the goals of the 2005 Convention have to be considered. Notably, they would have to be taken into account where the diversity of every possible marker of cultural identity may be affected.



## **8 Regulating the EU Framework for the Licensing of Authors' Rights as a Means to Promote Diversity in Online Music**

In practice, measures under Article 7 of the 2005 Convention take manifold forms; useful examples have been collected by *Danielle Cliche* based on a survey of already existing cultural measures in Europe.<sup>300</sup> In this chapter, however, we explore the connection between the diversity of cultural expressions and the licensing regime for authors' rights. More particularly, we aim to establish how diversity in online music may be affected by changes in the licensing framework.

This assumes that the licensing of authors' rights has an influence on the diversity of cultural expressions at all. Music is an archetypal form in which cultural groups express their identity and the particular object of our study, online music, is a subset thereof; namely recorded music which is distributed through digital networks. Further, the licensing of authors' rights is able to exert an influence on online music because the law provides musical authors with exclusive rights in their works; during the term of protection, any restricted use of their music thus depends on obtaining a licence. Without such a licence, no recorded music can be made, distributed or accessed. The licensing system can, therefore, be seen as a gatekeeper at every point in the value chain where a licence is needed: any efforts to promote the diversity of online music are therefore doomed to fail if the necessary licences cannot be obtained. As a general interim conclusion it seems plausible that, depending on the specific design, the legal framework for the licensing of authors' rights may be more or less conducive to the diversity of online music.

But how exactly would the licensing system need to be designed to achieve the objectives identified in TFEU Article 167(4) interpreted in light of Article 7 of the 2005 Convention?<sup>301</sup>

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<sup>300</sup> Cliche, *Article 7: Measures to Promote the Diversity of Cultural Expressions* (2008).

<sup>301</sup> See above, on page 100.



## **8.1 Potential Points of Impact between the EU Framework for the Licensing of Authors' Rights and the Diversity in Online Music**

The EU framework for the licensing of authors' rights can help contribute to the creation of an enabling environment, as envisaged by TFEU Article 167(4) interpreted in light of Article 7 of the 2005 Convention, at each of the steps in the value chain of online music where authors' rights are affected and thus need to be cleared.

### **8.1.1 The Creation of Music**

The first step in the value chain of online music is the creation. Two distinct creative acts determine the existence of recorded music: (1) the writing of the musical composition and the lyrics and (2) the performing of these for recording purposes.<sup>302</sup> However, these creative acts usually do not affect any pre-existing authors' rights. As far as the musical composition and the lyrics are concerned, it is only with their creation that authors' rights spring into life. Moreover, the performance of the composition and the lyrics for the purposes of making a recording, for its part, is not an act restricted by the authors' rights.<sup>303</sup>

This is not to say that copyright may not have a bearing on the creation; after all its economic function is to incentivise creation through monetary reward.<sup>304</sup> Yet, this reward is accorded irrespectively of the cultural affiliation of the musical author. As copyright offers the same incentive to all, it is inapt to encourage a particular cultural group to express themselves through music more vigorously than other cultural groups. As measures to promote the diversity of cultural expressions need to be tailored to the particular context of the targeted social group, copyright as such does

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<sup>302</sup> It is suggested not to regard the recording itself as a creative act, but rather as part of the production stage. This is in line with the generally held view that copyright in sound recordings is not accorded in order to reward creativity but rather entrepreneurial efforts; see Suthersanen, 'Copyright Law: A Stakeholders' Palimpsest' in Macmillan (ed) *New Directions in Copyright Law* (2007) 119, 130.

<sup>303</sup> Only performances in public are acts that a musical author may prohibit; see CDPA 1988 s 19(1) and UrhG § 19(2).

<sup>304</sup> MacQueen and others, *Contemporary Intellectual Property: Law and Policy* (2nd edn, 2010) para 2.18.

not promote musical diversity.<sup>305</sup> On the contrary, there is much to conclude that where authors are primarily motivated by the promise of monetary gains from royalties they will tend to create music that is likely to best realise this promise and thus concentrate on music that appeals to the majority.

The collective management of authors' rights may nevertheless have an indirect effect on the diversity of musical compositions and lyrics. Notably, it is a widespread practice amongst authors' societies to use part of the royalties they collect to fulfil cultural goals and, in particular, to promote the creation of culturally important works. Using the example of the German collecting society GEMA, chapter 11 will explore in greater detail whether these practices are able to promote musical diversity. Although authors' societies are not state entities and thus not the addressees of the 2005 Convention, states would indirectly promote the creation of diverse music if they acknowledged and supported the authors' societies' cultural functions, provided that the latter indeed prove to achieve the objective of Article 7.

Beyond copyright and the licensing of authors' rights, a state also has numerous other instruments to stimulate a diverse musical creation through more targeted measures such as, for example, artists' grants, awards and prizes or artists-in-residency programmes.<sup>306</sup>

### **8.1.2 Producing and Disseminating / Distributing Sound Recordings**

The creation of the musical composition and lyrics is followed by the production stage. At this step, record companies or independent production companies contracted by them use a performance of the musical composition and lyrics to produce a sound recording. Given that to copy is defined as a reproduction in any material form (CDPA 1988 s 17(2) and UrhG § 16(1)) the underlying musical and literary works are

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<sup>305</sup> As to the relationship of copyright and diverse musical creation, see also below at 11.1.4.3, on page 166, as well as at 11.5, on page 200.

<sup>306</sup> Cliche 5.

reproduced when a performance thereof is recorded and thus the authors' authorisation needs to be sought by the producer of the sound recording.<sup>307</sup>

Once a sound recording has been produced, the next step in the value chain would be for them to be disseminated and distributed.<sup>308</sup> In the case of online music, typically there are digital music retailers that distribute the recorded music to the end user.<sup>309</sup> Where they distribute recorded music in the form of downloading or streaming, the digital music retailer must clear what in a non-technical form is called the authors' 'online rights'. In reality, two distinct branches of the authors' exclusive rights are affected: the reproduction right to the extent that the recording is copied when it is uploaded to the retailer's servers and downloaded to the end user's computer as well as the making available right. That the necessary authors' rights must be cleared in addition to the rights controlled by the record companies (the rights in the sound recordings and the performers' rights) is due to the fact that the holder(s) of the authors' rights only grant the record companies non-exclusive licences that are

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<sup>307</sup> Parker, *Music Business: Infrastructure, Practice and Law* (2004) para 28–23. In addition to the authors' rights, the producer of the sound recording must equally clear the performers' right to make a recording of their performance; CDPA 1988 s 182(1)(a) and UrhG § 77(1).

<sup>308</sup> It is not entirely clear in what way Article 7(1)(a) the 2005 Convention distinguishes between these two largely overlapping terms. While 'to disseminate' is not defined, Article 4(5) uses the term 'to distribute' to describe the activities of the cultural industries. Given that the notion is a commonly used technical term in the area of trade, one could conclude that 'to distribute' designates activities of the cultural industries related to cultural goods and services and that it covers all steps in the value chain between the others specifically mentioned, namely the production of a cultural good and its enjoyment by the end user. Correspondingly, 'to disseminate', would be the activities of individuals to further publicise cultural activities that are not exploited commercially.

<sup>309</sup> While these entities may focus entirely on the provision of digital music, more and more digital music is also offered by Internet service providers, telecom operators, mobile handset or portable music device manufacturers as part of their core business. There have also been cases where brands that are already well known for their services in other areas have broadened their offerings to include digital music. In parallel to these structures, record companies increasingly market digital music to end users directly. In practice, there are also content aggregators which bundle the catalogues of different record companies and offer these packages to the various digital music retailers, who, in turn, do not need to negotiate individual licences with the respective record companies. Sometimes, content aggregators also offer digital music directly to end users. Note, however, that these content aggregators are only able to bundle the rights that are controlled by the record companies (the rights in the sound recording as well as the performers' rights). Their offering does not include the authors' rights which, in addition, must be cleared by the digital music retailer (or by the record companies or content aggregators respectively where they distribute music directly to the end user). As to the value chain of digital music in general, see Wunsch-Vincent and Vickery, *Digital Broadband Content: Music* (2005) 45–72 and Business Insights, *The Digital Music Industry Outlook* (2011) 103–120.

limited to the production of the respective recording and do not include the subsequent digital distribution. As a consequence, every time the sound recording is exploited, the underlying rights in the composition and the lyrics must also be cleared.

Both the production as well as the distribution of online music depends on clearing the authors' rights in the musical composition and lyrics for the respective uses. Article 7 proclaims that the production and distribution of cultural expressions are to be encouraged. If licences could not or only with difficulty be obtained, however, these activities would be discouraged, or even worse, prevented. In order to promote the diversity of online music, a state must, therefore, make sure that the licences necessary to produce a sound recording and to distribute it online can be obtained in a simple and effective way.

Yet, this postulate needs to be further refined in light of the crucial element of equal treatment that permeates all objectives to promote the diversity of cultural expressions.<sup>310</sup> Article 7(1)(a) is guided by the vision that all groups in a contracting party's territory may assert their culture at every step in the value chain of cultural expressions. In this regard, it is important to realise that such assertion at each of the different stages in the value chain of online music is absolutely limited by the degree to which the different cultural identities have expressed themselves at the preceding stage. Simply put, if the written music lacks diversity, so will the recorded and finally the online distributed music. In order to encourage all cultural groups to produce and distribute online music, a contracting party must, therefore, make sure that the system under which authors' rights are licensed is designed in a way that helps to achieve the highest possible degree of diversity at all (intermediate) steps; ideally the music distributed online would be as diverse as the music that is created. Thus it is not sufficient if authors' rights in only some of the repertoire of domestically written music are readily available; rather the authors' rights in the entire repertoire, irrespective of the cultural values and identities expressed in the individual musical pieces, have to be available for clearance with the same ease and efficiency.

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<sup>310</sup> See above, on page 94.

### 8.1.3 Access to Online Music

The final step in the value chain of a cultural product foreseen by Article 7 is its being accessed. This stage differs from the others in that Article 7(1)(b) provides that all cultural groups within a contracting party's territory should be able to access expressions of their own and other cultural groups, irrespective of whether the latter are located within or outside of that state's territory. In the context of online music, access would mean the possibility to listen to that music. In order to fully achieve the broad access envisaged, a contracting party's population would ideally be able to listen to the entire worldwide repertoire online. The licensing regime, however, does not have any direct bearing on the access of online music as there is no additional use in that stage that would need to be licensed. The making available of online music and its reproduction on the provider's server and the end user's computer are acts that are covered by the licence granted to the online music service and listening to music alone is not an act that needs to be licensed.<sup>311</sup> In an indirect way, however, the diversity of the music that can be accessed online is dependent on the diversity of the recorded music that is available to digital music retailers at the distribution stage. Only where the latter are able to obtain licences for a diverse repertoire, can diverse music be accessed by the public at large. This is why we concluded in the previous paragraphs that the entire domestic repertoire should be licensed with equal ease and efficiency irrespective of the cultural identity it expresses. In light of the claim for access to the music that, ideally, represents all the different foreign cultures the world, this postulate must be broadened. Accordingly, a state would promote the diversity in online music if its licensing framework made it possible for digital music retailers to obtain licences that do not only cover the domestic repertoire in all its diversity but, in addition, a diverse foreign repertoire or, under the best circumstances, the worldwide repertoire.

It is another matter, however, whether the repertoire offered by an online music service is actually accessed in all its diversity by the end user. To foster this, a contracting state would have to resort to other measures that more directly incentivise the actual use of the diversity of music available online. It could, for example, make

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<sup>311</sup> Parker paras 5-02 and 5-04.

sure that all its inhabitants have the technical capacities to engage with online music or enhance its efforts to stimulate the interest of the general public in intercultural dialogue.<sup>312</sup> An enquiry into these options that are more directly geared towards the participation of end users, however, lies beyond the remit of our study.

## **8.2 Regulating the EU Legal Framework for the Licensing of Authors' Rights as an Unsuitable Means to Promote the Diversity of Online Music through Positive Discrimination**

In all examples discussed so far, we have argued that a state should prevent the licensing system from becoming an obstacle in carrying forward the diversity achieved at the stage when music is created up to its being recorded, its online distribution and access to it. It would be another question, however, whether the licensing system could also be used to balance out potential disadvantages experienced by some cultural groups. One may, for example, imagine a situation in which some groups are less able than others to assert their cultural diversity through the creation of music. Could the legal framework for music licensing be designed in a way that it more vigorously promotes the licensing of these authors' rights when it comes to the production of sound recordings and their online distribution? While we have concluded that promotive measures, in general, may take the form of such positive discrimination,<sup>313</sup> there are practical as well as legal grounds to conclude that the licensing regime would not be an appropriate tool to achieve this.

On the practical side, one needs to take into account that culture is flexible and constantly evolving. Consequently, the dynamics of how well the different cultural groups may assert themselves through music might be subject to frequent change. Such change, however, could only be accommodated by the licensing framework with difficulties. Rather, on the contrary, the system of the licensing of authors' rights can only fully serve its purpose if it endows authors as well as users with

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<sup>312</sup> See also the examples provided by Cliche 8–10.

<sup>313</sup> See above, on page 93.

legal certainty. Yet, such legal certainty, in turn, presupposes stability and durability. Influencing the rules that govern the licensing of authors' right, therefore, does not seem to be appropriate.

This result is confirmed by some legal considerations. In fact, a legal framework for the licensing of authors' rights that is geared towards facilitating the recording and the online distribution of the music of groups that struggle with asserting their cultural identity to the detriment of the music of better-established cultural groups would make it more difficult for the latter to exercise their copyright. Whether such voluntary creation of an obstacle for some musical authors in the exercise of their exclusive rights would be legitimate appears rather doubtful and raises the question of compatibility not only with international intellectual property treaties but also the applicable human rights instruments.

With respect to the protection of intellectual property at the international level, Article 36(1) of the Berne Convention stipulates that 'any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention'.<sup>314</sup> In light of this provision it has been argued that a state does not fulfil its obligation to grant certain rights to authors if it merely states the existence of these rights; rather, it must also guarantee that the owners can actually enjoy their rights where this can be done through adequate governmental measures.<sup>315</sup> If a party does not take such appropriate measures this may be problematic insofar as states are not granted the possibility to impose conditions on the exercise of the right of making available to the public in Article 8 WCT<sup>316</sup> and must conform to the three-step test in Article 9(2) of the Berne Convention when allowing for exceptions to the reproduction right.<sup>317</sup>

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<sup>314</sup> The parallel provision in the WCT is Article 14(1): 'Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty'.

<sup>315</sup> Ficsor, 'Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the *Acquis Communautaire*' in Gervais (ed) *Collective Management of Copyright and Related Rights* (2nd edn, 2010) 29, 66-67.

<sup>316</sup> Ficsor, 'Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?' in Gervais (ed) *Collective Management of Copyright and Related Rights* (2006) 37, 57-58. In contrast, in relation to the broadcasting right, for example, states may subject its exercise to certain conditions

Moreover, the fundamental rights justification of intellectual property rights at different levels is increasingly highlighted.<sup>318</sup> In this respect, both the 1948 UDHR<sup>319</sup> and the 1966 ICESCR<sup>320</sup> protect the moral and material interests of creators. At the European level, Article 1 of Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms protects property<sup>321</sup> and extends to

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(Article 11bis(2) of the Berne Convention). Note, however, that the scope of such permitted exceptions is contested. *Silke von Lewinski* argues that these only concern the relationship between right holders and commercial users and not right holders and their rights managers; see von Lewinski, 'Mandatory Collective Administration of Exclusive Rights - A Case Study on Its Compatibility with International and EC Copyright Law' [2004] UNESCO e-Copyright Bulletin, 5-6. From this, she deduces that the mandatory collective administration of exclusive rights is beyond the concern of the Berne Convention and thus allowed even if not expressly permitted through the framework of international treaties. Possibly, the favouring of disadvantaged cultural groups affects the free exercise of the exclusive rights in a less intrusive way than a system of mandatory collective administration; *a maiore ad minus* one could, therefore, argue that the legitimacy of such measures does not depend either on their specific permission in the international legal framework. On the other hand, however, *Mihály Ficsor*, relying on a textual and contextual interpretation, makes the argument that the scope of such permitted exceptions is broader and that it covers any conditions determined or imposed by states under which exclusive rights may be exercised; see Ficsor, *Viewpoint of International Norms*, 48-59. Consequently, states could not impose conditions for the exercise of rights where they are not expressly permitted to do such, as is the case with the right of making available to the public.

<sup>317</sup> It should be noted, however, that Article 9(2) of the Berne Convention concerns situations in which states determine that certain reproductions are permitted. This is a much more intrusive measure than those envisaged here, which leave the authors' exclusive right untouched and only influence the way in which this right can be licensed. What can be said with certainty, therefore, is that *a maiore ad minus* such measures are permitted at least in such cases where they conform to the three requirements established in Article 9(2). Where they would not, one would have to ask whether the existence of Article 9(2) precludes the establishment of measures that influence the licensing of the reproduction right. As to the interpretation of Article 9(2) in general and in the specific context of the WCT, see Ricketson and Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond 2* (2006) paras 13.10-13.37, 13.116-13.129.

<sup>318</sup> A general overview of human right approaches to intellectual property is provided by Gervais, 'Intellectual Property and Human Rights. Learning to Live Together' in Torremans (ed) *Intellectual Property and Human Rights* (2008) 3.

<sup>319</sup> Article 27(2) reads: 'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

<sup>320</sup> Article 15(1) reads: 'the States Parties to the present Covenant recognize the right of everyone: ... (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. For more details on the scope of protection under the *International Covenant on Economic, Social and Cultural Rights* and its interpretation by the Committee on Economic, Social and Cultural Rights see Helfer, 'Collective Management of Copyright and Human Rights. An Uneasy Alliance Revisited' in Gervais (ed) *Collective Management of Copyright and Related Rights* (2nd edn, 2010) 75.

<sup>321</sup> *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 9 ETS, Article 1(1) reads: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The approach



copyrighted works.<sup>322</sup> CFREU Article 17(2) determines that ‘intellectual property shall be protected’.<sup>323</sup> In Germany, the protection of intellectual property rights falls within the basic right to property as guaranteed by Article 14(1) of the German Basic Law.<sup>324</sup> Creating a legislative framework for the licensing of authors’ rights that hinders some holders from monetising their rights in the most effective way, appears to be, at least *a priori*, at odds with the afore-mentioned fundamental rights. It is true that at all the different levels, the protection of copyright – be it in the guise of specific creators’ rights or as part of the broader right to property – is not limitless; rather on the contrary, states retain a broad discretion to further regulate the scope of protection in the public interest.<sup>325</sup> Ultimately, however, it would remain a matter of a case-by-case analysis whether the particular measure to provide the legal framework for the licensing system falls within the scope of the permissible derogations of the mentioned rights.

Therefore, what seems to be inappropriate from a practical perspective also raises serious legal doubts. Thus, to influence the legal framework for music licensing in a way that it favours the recording or online distribution of music that expresses an under-represented cultural identity cannot be seen as an appropriate way to promote the diversity of online music.

Yet, this is not to say that a state’s legal framework on licensing may not support mechanisms that have been established by the authors themselves and are

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of the European Court of Human Rights towards the protection of creators’ rights is described by Helfer, ‘The New Innovation Frontier? Intellectual Property and the European Court of Human Rights’ (2008) 49 *Harvard International Law Journal*.

<sup>322</sup> *Victor Dima v Romania*, 58472/00, Admissability Decision (European Court of Human Rights 16 November 2005) section B 2 b).

<sup>323</sup> See also Walter, ‘Fundamental Rights’ in Walter and von Lewinski (eds) *European Copyright Law* (2010) 71, paras 4.0.9-4.0.13 and Geiger, ‘Intellectual Property Shall Be Protected!?! Article 17(2) of the Charter of Fundamental Rights of the European Union’ (2009) 31 *European Intellectual Property Review* 113.

<sup>324</sup> Article 14(1) reads: ‘property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws’ (translation provided in Deutscher Bundestag, *Basic Law for the Federal Republic of Germany* (2010)). More precisely, the German legislator must provide authors with exclusive rights to the extent that they may lead a self-determined life without governmental benefits; see Peukert, ‘Güterzuordnung und Freiheitsschutz’ in Hilty and others (eds) *Geistiges Eigentum* (2008) 47, 63.

<sup>325</sup> As to the respective derogations see the commentaries referenced in n 320, 321, 323 and 324 above.

intended to add more justice to the licensing system by introducing elements of solidarity between successful and less successful authors. More specifically, the collective system of managing copyright is marked by many of such traits of solidarity.<sup>326</sup> In this scenario, the legal and practical arguments that militate against any form of direct positive discrimination through the legal framework for the licensing of authors' rights lose their weight. As these are voluntary measures to which also the potentially disadvantaged authors agree, there are no problems from the point of view of international law or fundamental rights. On a similar note, these solidarity elements can be changed through collecting societies' competent bodies in order to keep track with the evolving nature of culture.<sup>327</sup> It is therefore submitted that a contracting party promotes the diversity of online music where it encourages and supports such efforts; on condition, however, that the effects of the solidarity elements of collective rights management conform to the objectives enumerated by Article 7.

Beyond this, a state has other support mechanisms at its disposal which may be targeted at balancing out potential disadvantages: at the production stage these include *inter alia* loans, subsidies or quotas in support of particular productions and at the distribution stage one might think of subsidies for independent distribution companies or support for festivals.<sup>328</sup>

### **8.3 Conclusion**

Several conclusions can be drawn from applying the objectives of TFEU Article 167(4) interpreted in light of Article 7 of the 2005 Convention to the area of the licensing of authors' rights in music. While the diversity at the stage of the creation of the musical works and lyrics may be indirectly influenced by the way in which authors' rights are collectively managed through authors' societies, the licensing conditions have the most

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<sup>326</sup> Most importantly, these are the cultural contributions that most continental European collecting societies apply.

<sup>327</sup> The cultural contributions of GEMA, for example, are allocated by a particular committee applying flexible rules.

<sup>328</sup> Cliche 6-8.

direct impact on the diversity of online music where a licence is needed to clear the authors' rights; notably (1) when music is recorded and (2) that recorded music is distributed by digital means. The conditions under which the licensing of authors' rights takes place promote the diversity of online music if they facilitate to 'carry over' the diversity of created music to the production and distribution stage to the broadest extent possible. In practical terms, to promote diversity in online music, the licensing system should make it possible for producers of sound recordings and digital music retailers to clear the rights in the entire domestic repertoire in an easy and efficient manner, regardless of the cultural identity expressed. In order to allow for the access of diverse online music from other countries of the world, the authors' rights in a diverse foreign repertoire, ideally the worldwide repertoire, should be available for licensing to digital music retailers. To respect the diversity of online music, the licensing system must not be changed in such a way as to make it more difficult for producers of sound recordings and digital music retailers to clear the just mentioned rights.

Regulating the EU legal framework for music licensing is not an appropriate policy tool to balance out disadvantages that certain cultural groups may experience at these stages by way of positive discrimination. The EU legislator could, however, support solutions established by collective societies in as much as those solutions achieve the objectives of TFEU Article 167(4) interpreted in light of Article 7 of the 2005 Convention.

## 9 The Impossibility of Statistically Measuring Diversity in Online Music

Up to this point our discussion of the concept of cultural diversity has very much centred on the *cultural* aspect. A sound understanding of the notion of *diversity* as such, however, would also make it easier to assess whether a measure is appropriate and effective in the promotion of cultural diversity, in particular if there were statistical indicators capable of measuring whether a practical or legal change to how authors' rights in music are licensed affects cultural diversity to the negative or positive. The present chapter reviews the available economic literature on the measuring of diversity to determine the extent to which they can be made useful in developing the diversity of online music as a guideline for policy choices.

### 9.1 Diversity as the Interplay of Variety, Balance and Disparity

*Andrew Stirling* first presented his concept of diversity as the interplay of variety, balance and disparity in 1994<sup>329</sup> and developed it fully in his 1998 working paper 'On the Economics and Analysis of Diversity'.<sup>330</sup>

#### 9.1.1 The Properties of Variety, Balance and Disparity

*Stirling's* interest in the subject was spurred by the recognition that diversity was very much in discussion in a wide range of different disciplines but that only very little attention was devoted to define or analyse the concept. Motivated to develop a general framework for diversity in science, technology and society,<sup>331</sup> he reviewed the broad literature on diversity in various fields.<sup>332</sup> While sharing the view that the

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<sup>329</sup> Stirling, 'Diversity and Ignorance in Electricity Supply Investment: Addressing the Solution Rather than the Problem' (1994) 22 *Energy Policy* 195.

<sup>330</sup> Stirling, 'On the Economics and Analysis of Diversity' (1998).

<sup>331</sup> Stirling (n 224).

<sup>332</sup> The disciplines identified included: mathematical ecology, conservation biology, palaeontology, taxonomy, pharmacology, psychology, archaeology, artificial intelligence, financial management, complexity theory, environmental economics, evolutionary economics, mainstream economics,

concept of diversity related to the nature or degree of apportionment of a quantity to a set of well-defined categories,<sup>333</sup> he was wary of the fact that such a general definition opened up more questions than it resolved. In order to refine this definition he concluded that diversity could be described by distinguishing just three different general properties: variety, balance and disparity.<sup>334</sup> We will now look at each of these properties in turn, before analysing their interplay.

**Variety** is the number of categories into which the elements of a system can be apportioned. It answers the question: ‘how many types of things do we have?’ All else being equal, the greater the variety, the greater the diversity.<sup>335</sup> In the context of music, variety could, for example, relate to the numbers of titles<sup>336</sup> or number of different genres.

**Balance** refers to the evenness with which the elements of a system are apportioned into the different categories. It is the answer to the question: ‘how much of each type of things do we have?’ All else being equal, the more equal are the fractions of each category, the more even is the balance, the greater is the diversity.<sup>337</sup> In the context of cultural diversity, it has been argued that imbalance leads mechanically to lesser visibility of the goods corresponding to the least produced genres. The less visible these genres are, the more difficult will consumers find it to access them and the more threatened is their viability in the long run.<sup>338</sup> To illustrate the importance of balance in the field of music one might invoke as an example the repertoire that is played by a radio station during 24 hours. If we regard variety as the number of different genres, a station that broadcasts 80 per cent classical music, 15 per

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sociology, bibliometrics and information management; see Stirling (n 330) 37.

<sup>333</sup> *Ibid* 38, citing Jones and Leonard, ‘The Concept of Diversity: An Introduction’ in Leonard and Jones (eds) *Quantifying Diversity in Archaeology* (1989) 1, 2, who themselves refer to Patil and Taillie, ‘Diversity as a Concept and its Measurement’ (1982) 77 *Journal of the American Statistical Association* 548, 548.

<sup>334</sup> Stirling (n 330) 39; Stirling (n 224) 709. This however does not mean that all three properties are equally articulated in every discipline; sometimes some properties are more pronounced than others. Likewise, the terminology employed in the different fields is highly diverging.

<sup>335</sup> Stirling (n 330) 39; Stirling (n 224) 709.

<sup>336</sup> Benhamou, *The Justification and Methodology for Measuring the Diversity of Cultural Expressions* (2010) 6.

<sup>337</sup> Stirling (n 330) 39; Stirling (n 224) 709.

<sup>338</sup> Benhamou 7-8.

cent jazz and 5 per cent folk offers a less diverse programme than a station where these three genres are played evenly. If we regard variety as the number of titles, we can imagine a radio station with a programme made up of 100 different titles. A station that plays all 100 titles twice is more diverse than a station that plays 25 songs five times a day and the remaining 75 songs only once.

**Disparity** refers to the manner in which the various categories may be distinguished and is the answer to the question: ‘how different from each other are the types of things that we have?’<sup>339</sup> In the context of cultural products, it has been argued that disparity expresses originality. Accordingly, it could be thought of as the degree of innovation or artistic development or, if one wanted to define it in the negative, the degree of standardisation between the categories.<sup>340</sup> In our example, it would refer to the degree that the genres or titles are different from one another.

The contributions of each of these properties to diversity are summarised in figure 1.

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<sup>339</sup> Stirling (n 330) 40; Stirling (n 224) 709.

<sup>340</sup> Benhamou 7-8.

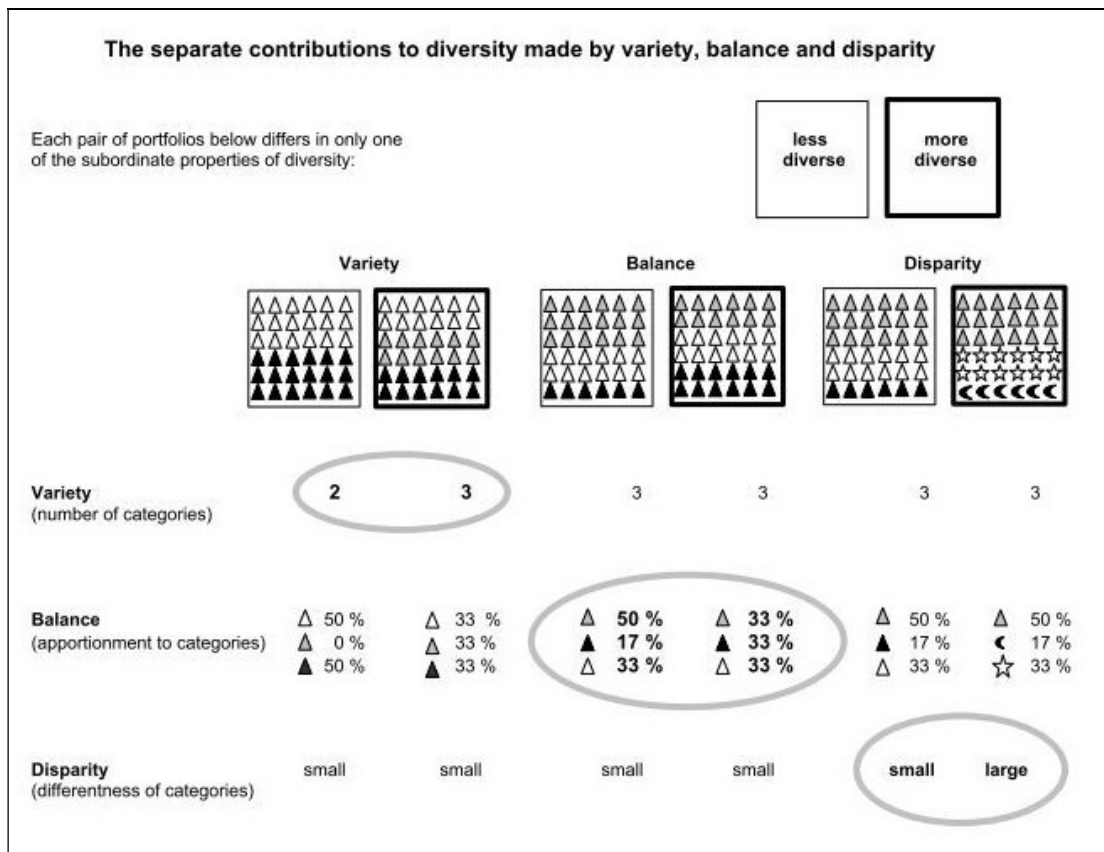


Figure 1: taken from Stirling, *The Social Appraisal*, 9.

One of the benefits of *Stirling's* model is that it makes the existence of the three properties explicit. While *Stirling's* broad review of the literature has shown that all discussion on diversity deals with essentially only three properties, not all three properties are dealt with in each and every discipline. His comparative view thus highlights the importance to recognise all of them and so helps re-think and challenge conventional patterns of explanation. *Stirling's* model, therefore, enriches the discussion of diversity across the boundaries of singular specialist domains.

Beyond highlighting the mere existence of the three different properties of diversity, the model also illustrates their interdependence. In particular, *Stirling* stresses that

‘each of the three properties may be held to constitute a necessary but individually insufficient condition for recognising the presence of the overarching property of diversity as a whole. Collectively, identification of

the entire set of properties is sufficient condition for recognition of diversity'.<sup>341</sup>

Consequently, it would be deceptive to regard either variety, balance or disparity alone as a suitable proxy for diversity.<sup>342</sup>

At the same time, this is also one of the challenges of the *Stirling* model. More precisely, at several points in the application of the model, developing an appropriate taxonomy may become an obstacle. The first of these difficulties concerns the determination of the category against which the properties 'variety', 'balance' and 'disparity' are to be tested. As we have seen, there might be several ways to apportion the elements of a given system; the variety of music, for example, could be categorised according to the number of different songs or number of different genres. If musical diversity as a factual statement is considered, it appears plausible that no one categorisation is *a priori* correct and trumps over the other.<sup>343</sup> The chosen categorisation, however, changes the rest of the matrix; in our case, the balance amongst the different songs may be different from the balance of the different genres and the disparity amongst the songs will not match the disparity amongst the genres. It adds to the complexity that the choice of categorisation also makes it necessary to consider disparity. In a study on TV programmes, assuming that programmes in the same category were more similar to each other than to any other programme, the authors observed that the chosen categorisation may model implicit views on the disparity between programmes.<sup>344</sup> Categorisation may, therefore, turn out to be no easy task.

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<sup>341</sup> Stirling (n 330) 39. As a result, 'this in turn highlights difficulties with diversity concepts and associated indices – in whatever discipline – that focus exclusively on subsets of these properties'; Stirling (n 224) 709–710.

<sup>342</sup> Stirling (n 330) 42–44.

<sup>343</sup> The decision on the appropriate categorisation is, however, influenced by the underpinning understanding of diversity. If the prevalent view sees cultural diversity largely in the sense of cultural pluralism, arguably it would make more sense to look at the different genres rather than at the different songs.

<sup>344</sup> Farchy and Ranaivoson, *The Influence of Funding by Advertising on the Diversity of Television Channels* (2010) 5; see also Stirling (n 224) 710.



Once the system under review has been categorised, a second difficulty lies in finding appropriate indicators of disparity. As much as the property of disparity is key to understanding diversity, it also limits any attempt to quantify it in an objective manner. Stirling highlights that disparity is ‘intrinsically qualitative, subjective and context-dependent’<sup>345</sup> and that, as a result, there might be different ways to interpret disparity which all depend on perspective.<sup>346</sup> Ultimately, this requires a subjective assessment, which – due to its very nature of not being amenable to objective justification – is prone to criticism of being biased and arbitrary.<sup>347</sup> In the context of the diversity of cultural expressions, *Benhamou* observes that

‘while certain aspects of the diversity of cultural expressions readily lend themselves to quantitative analysis, others defy measurement; they can only be described and studied in qualitative terms. Indicators can shed some light on the nature of yet others but only to a limited extent’.<sup>348</sup>

The application of the *Stirling* model, therefore, raises certain difficulties. These, however, are much less a consequence of the focus on variety, balance and disparity than a result of the complexities of the notion of diversity itself. Rather, on the contrary, *Stirling’s* criteria have the benefit of shedding light on these intricacies.<sup>349</sup> A number of studies have applied the model in the context of the diversity of cultural expressions. It is to them that the discussion now turns with a particular emphasis on how they have met the highlighted challenges.

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<sup>345</sup> Stirling (n 330) 40.

<sup>346</sup> Stirling (n 224) 710–711. He argues that while in some disciplines well-established criteria exist, ‘disparities in science and technology reflect complex webs of relationships, and so cannot readily be reduced to discrete branching taxonomies’.

<sup>347</sup> See, for example, Moreau and Peltier, ‘Cultural Diversity in the Movie Industry: A Cross-National Study’ (2004) 17 *The Journal of Media Economics* 123, 127: ‘our position is that any attempt to quantitatively assess disparity between cultural products would be far too controversial and would only weaken the proposed tool’.

<sup>348</sup> *Benhamou* 3.

<sup>349</sup> Farchy and Ranaivoson, ‘An International Comparison of the Ability of Television Channels to Provide Diverse Programme. Testing the Stirling Model in France, Turkey and the United Kingdom’ in UNESCO Institute for Statistics (ed) *Measuring the Diversity of Cultural Expressions: Applying the Stirling Model of Diversity in Culture* (2011) 77, 89, 131.

### 9.1.2 The Application of *Stirling's* Indicators to the Diversity of Cultural Expressions

After the adoption of the 2005 Convention, there was a growing awareness of the need to measure diversity. Such measuring is envisaged in the Convention itself: Article 9 calls for information sharing and transparency, Article 14, *inter alia*, requires capacity-building through the exchange of information, experience and expertise, and Article 19 contains the parties' specific agreement to exchange and share expertise concerning the data collection and statistics on the diversity of cultural expressions and best practices. In order to advance the methods to measure the diversity of cultural expressions, the UNESCO's culture sector and the UNESCO Institute for Statistics convened two expert meetings in 2007 and 2008.<sup>350</sup> At the first meeting, *Stirling's* methodology was accepted as the basic theoretical model and, at the second, it was agreed to commission research to test the application of that model in the realm of the diversity of cultural expressions.<sup>351</sup>

Partly as a consequence of this endorsement, a number of studies have applied *Stirling's* parameters to different areas of culture, such as book publishing,<sup>352</sup> book

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<sup>350</sup> The UNESCO Institute for Statistics provides general information about its activities in this area at <<http://www.uis.unesco.org/Culture/Pages/cultural-diversity.aspx>>. See also Flôres Jr., *Expert Group Meeting on the Statistical Measurement of the Diversity of Cultural Expressions; Montreal, 27-28 September 2007* (2007); UNESCO Institute for Statistics, *Second Expert Group Meeting on the Statistical Measurement of the Diversity of Cultural Expressions; Benhamou*. An overview of existing worldwide attempts to collect information, data and best practices on the diversity of cultural expressions is provided by UNESCO, *Collecting Information, Data, Best Practices: Existing Mechanisms and Tools* (2010).

<sup>351</sup> Flôres Jr. 6; UNESCO Institute for Statistics 5.

<sup>352</sup> Benhamou and Peltier, 'How Should Cultural Diversity Be Measured?' (2007) 31 *Journal of Cultural Economics* 85.

translations,<sup>353</sup> music recordings,<sup>354</sup> cinema,<sup>355</sup> TV programmes,<sup>356</sup> and live performances.<sup>357</sup>

As we have seen, the initial difficulty facing any application of the *Stirling* model to a particular context consists in finding an appropriate taxonomy. In a first instance, this concerns the choice of category, which most obviously influences ‘variety’, but also has a direct bearing on ‘balance’ and ‘disparity’. In their study, *Farchy* and *Ranaivoson* chose to focus on the variable ‘genre’ in order to assess the diversity of TV programmes and developed a set of 27 different programme types into which all TV programmes could be apportioned.<sup>358</sup> Most studies, however, found it insufficient to rely on only one aspect to describe the diversity in a particular area of culture; they tested the properties of variety, balance and disparity on several variables:

- in the film industry, the variables ‘title’, ‘country of origin’ and ‘language’ were analysed;<sup>359</sup>
- for an analysis of the French publishing industry, the variables ‘title’, ‘genre’ and ‘original language’ were addressed;<sup>360</sup> and
- the diversity of supplied music records was scrutinised by focussing on ‘title’ (total number of available titles, number of novelties) and ‘geographic origin’.<sup>361</sup>

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<sup>353</sup> Benhamou and others, *Diversity Analysis in Cultural Economics: Theoretical and Empirical Considerations*.

<sup>354</sup> Ranaivoson, *Diversité de la production et structure de marché* (2008); Ranaivoson, ‘The Determinants of the Diversity of Cultural Expressions’ (2010) 4 *Observatorio (OBS\*) Journal* 215.

<sup>355</sup> Moreau and Peltier; Benhamou and Peltier, *Application of the Stirling Model to Assess Diversity Using UIS Cinema Data*.

<sup>356</sup> Farchy and Ranaivoson, *The Influence of Funding*; Farchy and Ranaivoson, *An International Comparison*.

<sup>357</sup> Study mentioned without further reference by Benhamou 13-14.

<sup>358</sup> Farchy and Ranaivoson, *An International Comparison* 89.

<sup>359</sup> Moreau and Peltier 126-127 examine the number of titles and the country of origin; Benhamou and Peltier (n 355) 19-22 include, in addition to these two, language. Both studies explicitly discard the criterion of ‘genre’ for the intrinsically subjective choices that any categorisation based thereon would entail.

<sup>360</sup> Benhamou and Peltier (n 352) 90-93.

<sup>361</sup> Ranaivoson, *Diversité*, 196-198. In reality, however, his analysis of the diversity of recorded music is much more elaborate as it also accommodates the diversity of consumed music records and the diversity of the producers; in total *Ranaivoson* uses 21 different indicators. In a follow-up study the

Furthermore, the difficulty to measure disparity is also apparent in the applications of the *Stirling* model to cultural expressions. While numerous indices are proposed to measure variety and balance, only a few attempts are made to measure disparity, if that property is addressed at all.<sup>362</sup> *Farchy* and *Ranaivoson* select seven attributes to distinguish amongst the chosen categories of TV programmes and assign them values.<sup>363</sup> In those other studies where the language of the cultural goods in question was an issue, the authors assessed disparity with the help of the *Dyen* matrix of linguistic distances, a method based on lexicographical considerations.<sup>364</sup> Beyond this, proposed indicators of disparity are very coarse. In relation to cinematographic diversity, it has been proposed to measure disparity by the similarity of a domestic yearly top ten list of feature films to the global top ten list.<sup>365</sup> In an analysis of the diversity of the French publishing sector, disparity was expressed through the concentration of authors in bestseller lists; the more authors there were, the higher was the disparity.<sup>366</sup>

So far, our discussion has only focussed on the diversity of cultural products themselves. Yet, as we have seen, the notions of cultural diversity and diversity of cultural expressions have a very strong connotation in the sense of cultural pluralism and intercultural dialogue. To equally take this dimension of diversity into account variables would have to be developed that allow for assumptions as to the extent to which cultural groups can assert their identity through cultural expressions. This is, for example, recognised in the working definition of ‘cultural diversity’ of the

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statistical model was enlarged in order to also include social, economic and demographic conditions; see *Ranaivoson*, *The Determinant*. In both instances, however, the category ‘genre’ is again explicitly excluded; for an explanation see *Ranaivoson*, *Diversité*, 183–189.

<sup>362</sup> *Moreau* and *Peltier* do not measure disparity. Likewise, no attempt to address disparity in the product diversity of recorded music is made by *Ranaivoson*, *Diversité*, 190–191. He does, however, use the percentage of records distributed by independent labels as an indicator of disparity when assessing the diversity of the producers of recorded music; *ibid* 195.

<sup>363</sup> *Farchy* and *Ranaivoson*, *An International Comparison* 91–94. These attributes are: age; specificity; information; heritage; cost; risk; and story.

<sup>364</sup> *Benhamou* and *Peltier* (n 352) 92; *Benhamou* and others 3; *Benhamou* and *Peltier* (n 355) 19–21.

<sup>365</sup> *Benhamou* and *Peltier* (n 355) 17. Note, however, that this index only measures the disparity of consumed films.

<sup>366</sup> *Benhamou* and *Peltier* (n 352) 92. Again, this is only capable of measuring the consumed disparity; see above, n 365.

Compendium of Cultural Policies and Trends in Europe compiled by the CoE and ERICarts. Alongside the diversity of cultural content, the definition highlights ‘the pluralistic ethno-cultural or linguistic identity and origin of cultural creators, producers, distributors and audiences’.<sup>367</sup> Devising an appropriate methodology for the measurement of this dimension of cultural diversity, however, falls outwith the remit of the Compendium project. In the literature on the measuring of the diversity of cultural expressions, the pluralistic dimension has sometimes also been recognised. Thus, *Benhamou* highlights the fact that the diversity of cultural expressions is ‘also the diversity of men and women, of audiences and authors and all those actively involved in cultural life’.<sup>368</sup> Small scale attempts to accommodate this aspect have sometimes been made when studies explicitly included indices to measure the diversity of the producers or distributors of the cultural goods in question.<sup>369</sup> Yet, such a methodology would need to be further refined in order also to encompass the diversity of creators and their audience.

Apart from these taxonomic intricacies, economic literature is mostly concerned with developing statistical methods and searches for indices and heuristics to appropriately measure diversity, which – for present purposes – is of little importance. More interesting, however, are the general observations on the measuring of the diversity of cultural expressions that have emerged from this area of research; observations that are helpful for the understanding of diversity even beyond the realm of cultural economics. As a first and most important result, it has been realised that, within cultural diversity, internal trade-offs exist. This becomes apparent in those studies that test more than one variable against the properties of variety, balance and disparity. In these cases, the authors observed that there is not necessarily harmony between these variables<sup>370</sup> and that ‘diversity may increase in one dimension while

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<sup>367</sup> This working definition also raises an important additional dimension, notably ‘the diversity of actors which are responsible for or involved in decision-making and regulating in different fields of the arts, the media and heritage(s), particularly as regards funding artists and their works’; see <<http://www.culturalpolicies.net/web/cultural-diversity.php>>.

<sup>368</sup> *Benhamou* 2.

<sup>369</sup> *Ranaivoson, Diversité*, 193–196; *Benhamou and Peltier* (n 355) 15–22.

<sup>370</sup> *Ranaivoson, Diversité* 242.

decreasing in another'.<sup>371</sup> As a consequence, if a policy measure privileges only one dimension, this leads to 'debatable results with respect to the state and the evolution of cultural diversity'.<sup>372</sup>

A second insight that has emerged is that it is impossible to devise a single indicator that would be able to reliably describe the state of cultural diversity. In this regard, *Stirling* himself speaks of the 'futility of seeking to derive a single definitive diversity index' to 'measure diversity in some unconditional objective fashion'.<sup>373</sup> The reasons for this judgment are numerous and transcend the complexities involved in aggregating the three properties in a statistically sound fashion. The first explanation is profanely factual in nature in that there is simply not sufficient reliable data available that would allow for a thoroughly comprehensive assessment. This is partly due to the difficulties in obtaining sufficient quantitative empirical data on the one hand and of developing sound qualitative methodologies for the measuring of disparity on the other. More importantly, however, a single indicator is generally considered unhelpful because it would conceal the internal trade-offs of cultural diversity that may occur if the diversity of a cultural field is analysed under more than one perspective. Whether there is an increase or decrease of diversity in these finer layers could not be expressed by a general index.<sup>374</sup> A more finely tuned set of indicators is therefore needed.

Overall, research on the measuring of the diversity of cultural expressions generally concludes that while statistical indicators would not be able to describe cultural landscapes in their entirety, they are nevertheless indispensable to judge the suitability and effectiveness of political measures.<sup>375</sup> In addition, such indicators also allow for international comparisons of cultural diversity, but must never be interpreted

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<sup>371</sup> Benhamou and Peltier (n 352) 104.

<sup>372</sup> *Ibid.*

<sup>373</sup> *Stirling* (n 224) 711.

<sup>374</sup> Benhamou 9: 'a synoptic indicator cannot summarize all dimensions of diversity, especially as it is not possible to increase the quantity of all aspects of diversity simultaneously'.

<sup>375</sup> *Ibid* 3, 14.

in a mechanical fashion. Rather, 'context is essential to understanding the scope of diversity. Assessing criteria alone does not always convey the reality of a situation'.<sup>376</sup>

## 9.2 Literature on Musical Diversity beyond the *Stirling* Model

In parallel to the work achieved on the application of the concept of diversity as the interplay of variety, balance and disparity to cultural expressions, other areas of research have explored the measuring of, more specifically, musical diversity without resorting to the *Stirling* model. The question has mainly been addressed by economic on the one and musicological literature on the other hand. Finally, we present the initiatives of the French *Observatoire de la musique*.

Starting in the mid-1970s, one stream of academic debate has sought to establish whether there was a relationship between market concentration and musical diversity. Different studies yielded different results. Some asserted that there was an inverse relationship between concentration and diversity with the effect that the more the ownership of the record industry was concentrated, the lesser was the musical diversity.<sup>377</sup> Others suggested that even in oligopolistic markets music diversity could be high and explained this by the organisational strategy of the international major music companies to co-opt independent producers and labels in order to incorporate new artists and styles at a quick pace.<sup>378</sup> Then again, it was asserted that maximum diversity resulted from a moderately concentrated market structure.<sup>379</sup>

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<sup>376</sup> Benhamou and Peltier (n 355) 43-44. In this particular study, a strong diversity of feature films within a country correlated to a low degree of openness to diverse foreign content.

<sup>377</sup> Peterson and Berger, 'Cycles in Symbol Production: The Case of Popular Music' (1975) 40 *American Sociological Review* 158; Peterson and Berger, 'Measuring Industry Concentration, Diversity, and Innovation in Popular Music' (1996) 61 *American Sociological Review* 175. For the US recording industry between 1974 and 1980 the same result has been evinced by the work of Rothenbuhler and Dimmick, 'Popular Music' (1982) 32 *Journal of Communication* 143. The general assumption of an inverse relationship is also shared by Christianen, 'Cycles in Symbol Production? A New Model to Explain Concentration, Diversity and Innovation in the Music Industry' (1995) 14 *Popular Music* 55, 89-92, who, in addition, emphasises that 'demand controls the size and the nature of the supply of music' (p 89). See also Ross, 'Cycles in Symbol Production Research: Foundations, Applications, and Future Directions' (2005) 28 *Popular Music and Society* 473, who argues that the early methods and measures must be amended to be able to cope with the modern recorded music industry.

<sup>378</sup> Lopes, 'Innovation and Diversity in the Popular Music Industry, 1969 to 1990' (1992) 57 *American*

The studies employ differing variables to measure musical diversity.<sup>380</sup> *Peterson* and *Berger*, for example, use two criteria: first, the share between new and established artists in the number of different top 10 and number one singles in each year between 1948 and 1973 and, second, the lyrical content of the songs.<sup>381</sup> *Lopes* enhances this methodological framework by extending the focus to albums. He considers, in addition to the number of top ten and number one hits, the percentage of new artists in the top 100 album and single charts between 1969 and 1990.<sup>382</sup>

*Anderson and others* look at the number one hit singles between 1940 and 1977 and use the categories of musical genre, artist type and lyrical content as descriptors.<sup>383</sup> The musical genre is also taken up as the relevant indicator by *Christianen*, who analyses how the total number of albums released in The Netherlands from 1975 to 1992 spread over 27 musical genres and, in addition, identifies the respective percentages of new and debut albums.<sup>384</sup>

In contrast to these approaches, *Alexander* focuses on the particular characteristics of each song. For the period from 1955 to 1988, he looks at 30 top 40 songs per year and analyses them, based on their sheet notation, according to the criteria time, meter, form, accent, harmonic structure and melody.<sup>385</sup> Equally, looking

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Sociological Review 56; Burnett, 'The Implications of Ownership Changes on Concentration and Diversity in the Phonogram Industry' (1992) 19 *Communication Research* 749 finds that the negative market concentration and diversity has broken down since the 1980s. Dowd, *Musical Diversity and the U.S. Mainstream Recording Market, 1955 - 1990* (2000) and 'Concentration and Diversity Revisited: Production Logics and the U.S. Mainstream Recording Market, 1940-1990' (2004) 82 *Social Forces* 1411 argues that musical diversity rose because a decentralised production strategy 'allowed majors to co-opt the raw prototypes of emergent styles' and thus to 'commodify musical genres that were once on the periphery of the market' (p 1445).

<sup>379</sup> Alexander, 'Entropy and Popular Culture: Product Diversity in the Popular Music Recording Industry' (1996) 61 *American Sociological Review* 171, 171.

<sup>380</sup> In all cases, the musical diversity is related to the market concentration in the recording industry.

<sup>381</sup> Peterson and Berger 163-164; Rothenbuhler and Dimmick equally use the number of top ten and number one hits as indicators of diversity for the period of 1974-1980.

<sup>382</sup> Lopes 57-59.

<sup>383</sup> Anderson and others, 'Hit Record Trends, 1940-1977' (1980) 30 *Journal of Communication* 31, 31.

<sup>384</sup> Christianen 57-58. The difficulty that musical genres are prone to change and therefore do not lend themselves to long-term observations has been pointed out by Hesmondhalgh, *The Cultural Industries* (2nd edn, 2007) 273: 'Genres mutate, hybridise, disappear and appear so rapidly that no genre classification would work over any historical period greater than three or four years'.

<sup>385</sup> Alexander 172. The qualitative measurement of each attribute, however, is limited as he treats these



at the characteristics of songs, *Dowd* chooses a similar, yet more developed approach when examining a sample of 110 number one songs from the period of 1955 to 1990. Having transcribed the original recordings into written music, he assesses each song in terms of its melodic structure, its rhythmic structure, its chordal structure, its key structure and its verse structure.<sup>386</sup> This allows him to determine a ‘dissimilarity score’ for each song that indicates the extent to which that song is dissimilar from other songs in the same period.<sup>387</sup>

Two observations emerge from the review of the existing economic literature on market concentration and musical diversity. A first critique could be formulated with regard to the choice of samples used. In fact, all studies solely rely on hit recordings and disregard less successful songs.<sup>388</sup> The obvious explanation for this focus is the fact that data on the bestselling titles can be derived quite easily from widely available music charts, whereas empirical information on recorded music in its entirety does either not exist or is only accessible with much more difficulty. Some authors, however, have also explained the choice of bestselling titles in methodological terms. The argument would then be that hit recordings represent a ‘gold standard’ that is influential for ‘the range of and types of musical elements that will be pursued in subsequent recordings’.<sup>389</sup> Besides the fact that there are ‘cult artists’ that are highly influential although they are not commercially successful on the mass market,<sup>390</sup> such a stress on mainstream recordings does no justice to the aspect of cultural pluralism that underpins the concept of the diversity of cultural expressions, as it completely disregards the ability of minorities to express their identity through the creation and consumption of music. As a further consequence of relying on data from hit lists,

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attributes as binary variables. For example, if the traditional, popular ABACB form was used, this was assigned a 0 while for all other forms the variable was assigned a value of 1 (p 172).

<sup>386</sup> Dowd, *Musical Diversity* 30–32. In contrast to Alexander, he uses continuous variables. To assess the melody he uses 5 indices, for rhythm 12, for the chordal structure 8, for the key structure 2 and for the verse structure 2.

<sup>387</sup> In a follow-up study, Dowd also relies on the share of new performers; Dowd, *Concentration and Diversity Revisited*, 1448.

<sup>388</sup> The shortcomings of only looking at the bestselling titles have been described by Ranaivoson, *Diversité*, 51–52.

<sup>389</sup> Dowd, *Musical Diversity*, 20.

<sup>390</sup> Ranaivoson, *Diversité*, 52.

most studies only analyse the diversity of the music that is consumed and neglect the diversity of the available supply.<sup>391</sup>

A second point that deserves attention regards the question of how the economic literature has dealt with the particular problems that have become apparent in the application of the *Stirling* model to cultural expressions.<sup>392</sup> When it comes to categorisation, the large majority of studies choose to analyse single songs rather than musical genres. Moreover, the difficulty to accommodate what *Stirling* calls ‘disparity’ is also perceptible here; in fact, *Dowd* is the only author who offers an appropriate methodology in this regard.<sup>393</sup>

Beyond the work done in cultural economics, a second stream of research on musical diversity, sparked by the 2005 Convention, comes from authors in the musicological field. In 2006, the International Music Council completed a study commissioned by UNESCO on the protection and promotion of musical diversity. While musical diversity was seen as part of cultural diversity, as promulgated by the 2005 Convention,<sup>394</sup> there was no concerted effort amongst the researchers involved to develop a common definition and interpretation of the term ‘musical diversity’. Rather, as the principal investigator observes, ‘there seems to be a tacit agreement,

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<sup>391</sup> The sole exception to this trend is *Christanen’s* study, which is based on data of all albums released; see *Christanen* 58.

<sup>392</sup> Most studies address one or two of the three properties of variety, balance and disparity; *Ranaivoson, Diversité*, 44–55 offers a detailed account from the perspective of the *Stirling* model.

<sup>393</sup> Note that *Alexander* also analyses the characteristics of songs. These, however, are only expressed by two different possible values; see n 385. What is more, *Ranaivoson* shows that the statistical method used fails to express disparity; *Ranaivoson, Diversité*, 48.

<sup>394</sup> International Music Council, *The Protection and Promotion of Musical Diversity* (2006) 9. That musical diversity was to be deduced from the bigger concept of diversity of cultural expressions is also obvious from the terms of reference of the study. They called for an analysis of ‘cultural experiences marked by musical diversity, which may serve as models of integration in the context of a space for dialogue between the different components of a particular society while encouraging exchanges with the rest of the world’. In particular, the study was to analyse: the complementarity or reciprocity between the protection of musical diversity and that of human rights; the links between musical diversity, sustainable development and peace; the standards regulating musical diversity; the tendency to favour a uniform and non-pluralistic interpretation of the notion of identity hindering the manifold and free expression of cultural diversity; the manner in which diversity is addressed by cultural actors and expressed in various forms of musical creation, and its relationship to identity; the obstacles or challenges to be overcome in order to ensure better protection and promotion of musical diversity; and good practices and actions that need to be strengthened and widely practiced in this field.

roughly around diversity as a diversity of traditions or genres'.<sup>395</sup> In general, the study was less concerned with the measuring of diversity than with providing examples of best practices from all over the world.

This report, however, motivated researchers at the University of Music and Performing Arts Vienna to work on an Austrian Report on Musical Diversity. While the final report has not yet been delivered, the project is to analyse musical diversity in terms of so-called 'stylistic fields', a notion related to those of musical genres.<sup>396</sup> The development of these stylistic fields is to be depicted along the variables 'share in musical life' (increase / decrease), 'social status' (increase / decrease of the reputation of the relevant stylistic field in society), 'aesthetic prototypes' (changes, preservation and renewal of cultural expressions) and 'configuration' (emergence of new stylistic fields). From this basis, the state of the promotion and protection in Austria is to be examined.<sup>397</sup> While the 'share in musical life' will be measured quantitatively through an assessment of the top 75 singles in Austria in each year, the question of 'aesthetic prototypes' will be analysed in qualitative terms.<sup>398</sup> This research is promising in several regards. First, the notion of stylistic fields is more than the musical genre and also incorporates actors and audiences, thus possibly contains an element to describe the pluralistic aspect. Second, the methodology is conscious of the fact that the chosen categorisation might evolve over time, which takes into account the ever-changing nature of culture and might serve as an indicator of intercultural enrichment. While it still remains to be seen whether the Austrian Report on Musical Diversity will hold its promises, these two points could prove useful for further research.

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<sup>395</sup> *Ibid.*

<sup>396</sup> These stylistic fields are intended to describe more than simply musical genres in that they encompass the artistic scene that is associated with these genres, such as relevant institutions, actors and audiences. Six such stylistic fields are distinguished: electronic dance music, jazz & improvised music, classical & contemporary music, rock & pop music, Schlager & folkloristic popular music, folk & world music; see Huber and Leitich, *Forschungsprojekt „Musical Diversity/Musikalische Vielfalt“*, 8.

<sup>397</sup> This analysis is to be guided by the terms of reference that were the basis for the 2006 International Music Council report (above, n 394); see Huber and Leitich (n 396) 20–23.

<sup>398</sup> *Ibid.* 24. Surprisingly, the quantitative analysis is only to take account of albums with references to Austria. This approach seems to neglect the aspect of openness and to limit that of intercultural dialogue. As to the qualitative assessment, no further details on methodology are provided.

Finally, another noteworthy contribution to the research into musical diversity comes from the Paris based *Observatoire de la musique* which, since 2003, has compiled annual reports on musical diversity on French radios.<sup>399</sup> It does not have a particular focus either on the interaction of diversity and market structure or the element of cultural pluralism. Rather, the institution was born out of the will of the music industry to be able to measure musical programming in the media and to stimulate dialogue between the industry and public institutions.<sup>400</sup> What distinguishes the work of the Observatory from the other approaches is the fact that it is able to rely on a broad pool of empirical data; in fact, an associated private company automatically monitors radio stations that cover 92.5 % of the total audience of music stations on a 24/7 basis.<sup>401</sup> This has allowed the Observatory to develop a comprehensive methodology that enables a more robust and thorough measuring of musical diversity. Currently, musical diversity on French radio is analysed according to the following criteria:

- number of different titles (share of French language titles, share of international titles, share of instrumental titles);
- number of different artists (share of French language artists);
- overall number of played songs and the respective reach of audience according to musical genres (8 genres are distinguished: French mainstream, international mainstream, pop / rock, groove, dance, rap, reggae / world and jazz / blues / classic);
- share of new titles in the overall broadcasting;

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<sup>399</sup> Since 2009, the *Observatoire de la musique* also compiles annual reports on indicators of musical diversity in television, see Nicolas, *Indicateurs de la diversité musicale dans le paysage audiovisuel* (2011). Due to their less refined methodology, these are not specifically treated here. See on these activities in general Ranaivoson, 'Accessing the Diversity of Cultural Expressions. The French Observatory of Music Diversity of Television' in Sekhar and Steinkamp (eds) *Mapping Cultural Diversity - Good Practices from around the Globe* (2010), who highlights that this area is funded entirely by public money which allows the *Observatoire* neutrality and the accommodation of a plurality of views.

<sup>400</sup> The analysis of the data, for example, is overseen by both representatives of the music industry and the relevant public institutions; see Conseil supérieur de l'audiovisuel, *Installation de l'Observatoire de la diversité musicale en télévision* (2009) 1.

<sup>401</sup> Nicolas, *Indicateurs de la diversité musicale dans le paysage radiophonique* (2011) 4-5.

- distribution of new titles by label;
- share of the top 40 hits in the overall broadcasting of music;
- average weekly rotation of a title;
- share of titles played more than 400 / 200 / 100 times in the total number of songs and the overall broadcasting;
- share of new entrants to regular playlists in the overall broadcasting;
- classification of radio stations by number of times they were the first to broadcast a song / include it in the rotation / include it in the heavy rotation;
- classification of radio stations by degree of exclusivity (being the only station playing a particular song).

The Observatory thus surmounts some of the obstacles that the research on musical diversity and market concentration has encountered. Notably, the analysis comprises all music that is broadcast and not just a sample of popular hits. Due to the extensive data available, it would appear that the annual reports provide an accurate image of variety and balance in radio music. The already familiar difficulties, however, remain. The first problem is the subjectivity of applying any categorisation. One might, for example, ask why only three categories are used for the variable ‘language’ (French, international, instrumental)<sup>402</sup> or just why these particular eight categories are used to assess the variable ‘genre’. As a second point, no attempt is made to measure or explain the disparity between different categories; in this regard, even exhaustive empirical data does not help, as this would necessitate a qualitative assessment. Accordingly, there is no set definition of musical diversity.

Furthermore, although some data about the size of the radio audience is available, the methodology does not aim to incorporate the broader pluralistic

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<sup>402</sup> A pertinent critique, albeit voiced in the context of the Observatory’s reports on musical diversity on television, is formulated by Ranaivoson, *Accessing the Diversity*, 118: ‘it is not clear why there are only three categories in terms of the language used for the song ... There are very different songs within the category “International” and some of them might clearly add in terms of diversity if they correspond to languages and cultures rarely visible on French television’.

dimension. Rather, the Observatory only analyses musical diversity as a factual statement of the diversity of the songs that are played; the degree to which this diversity matches the desire of cultural groups to express their identity remains unknown.

Admittedly, any call for a refined methodology to measure disparity or the state of pluralism would go beyond the actual remit of the Observatory. The point illustrates, however, that even under almost perfect empirical conditions the measuring of musical diversity in all its elements remains a difficult if not illusionary task. This is well illustrated by *Dowd's* research, which appears to be the most refined approach to assess 'disparity' in music so far. It shows that any sound qualitative assessment requires a lot of effort; a disproportionate amount of effort, as some argue: 'it may be that the very concept of musical diversity within a particular nation over an extended time is simply not measurable quantifiably, without impossible resources of time and energy'.<sup>403</sup>

### **9.3 Assessment**

Having reviewed the existing literature on the measuring of the diversity of cultural expressions and, more precisely, music, the discussion now aims to show the extent to which the findings may help develop our argument. In a first step, we determine what would be necessary to measure the diversity in online music and whether or not such an enterprise is feasible. In the second part of this section, we determine how else the findings can usefully feed into our task of determining whether the framework for the licensing of authors' rights in music promotes the diversity of online music.

#### *Obstacles to Measuring the Diversity in Online Music*

If the diversity of online music is understood as a subset of the broader concepts of cultural diversity and diversity of cultural expressions, measuring it is certainly not an easy endeavour. We do not aim here to provide for a detailed

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<sup>403</sup> Hesmondhalgh 274.

methodology; not only do we lack the necessary expertise in statistical economics but this would also take us too far away from our main concern, the bearing that the licensing of authors' rights has on the diversity of online music.

This notwithstanding, it is useful to conceptualise the broad lines along which a method to measure the diversity of online music should be constructed; this allows us to apply the most important insight gained from the research of the measuring of diversity to the diversity of online music, the subject of our analysis. In order to do this, we use the diversity model developed by *Stirling* as a conceptual starting point.

Just like the bigger concept of cultural diversity, the diversity of online music has a factual as well as normative dimension. In a factual sense, it describes the diversity of the music that is available online; an aspect that, borrowing from economic literature, could be called product diversity. The normative side, however, contains an ideological statement in that such diversity is not to be fostered as an end in itself but in such a way that all groups in society be able to express their cultural identity. In order to measure the diversity in online music appropriately, it is therefore not sufficient to solely determine the factual diversity of online music, but also the degree to which online music reflects cultural pluralism must equally be established. The methodological framework must, therefore, find a way to correlate the factual diversity of online music with this aspect of cultural pluralism.

As far as the factual diversity is concerned, the first question that one needs to answer is that of the appropriate categorisation. In the context of music, two main variables have been proposed: the particular songs or the musical genres they form. Although from a strictly factual point of view both criteria appear equally well suited, the normative aspect of cultural pluralism rather argues in favour of musical genres. Obviously, to devise a taxonomy of musical genres available online would be challenging. Whatever the categories finally chosen, the methodology should be conscious of the evolving nature of culture and, thus, the fact that, if diversity in online music were to be measured over a longer period of time, it would be necessary to adjust the categories.

Having successfully steered around the question of categorisation, the next difficulty would lie in developing quantitative and qualitative indicators to describe the variety, the balance and the disparity of online music. In comparison with the case of music on French radio, it would be considerably more difficult to obtain suitable data. The distribution of recorded music through the Internet is non-linear in that the consumer initiates it; that impedes any effort to monitor such distribution. In addition, the consumer is, unlike the situation when music is broadcast on the radio, clearly identifiable, which may mean that steps would have to be taken to guarantee the protection of the consumers' personal data. Moreover, even where data could be obtained through monitoring techniques, this would only be revealing in relation to the diversity of online music that is actually consumed. If one wanted to focus on, or at least also include the supplied diversity of online music, relevant data could only be sourced from the providers of online music services themselves, who, for business reasons, might be reluctant to reveal information about the breadth of their offerings.

But even if a sound quantitative analysis could be carried out, it would still be necessary to develop a qualitative strategy to measure the disparity between the different musical genres. Inspired by *Dowd's* methodology, it is suggested that one should compare certain musical properties of the different genres in order to assess the disparity between them. An additional factor of the analysis should equally be the disparity of the lyrics. Lacking an extensive qualitative assessment such as *Dowd's*, some studies have used more coarse criteria such as the number of different performers on a bestseller list or the share of new performers. Perhaps such broad criteria could offer an approximation to disparity. It would appear, however, that instead of, or at least in addition to, focussing on performers, one should rather pay attention to the authors of the songs. Arguably, it is the musical author who gives the songs their fundamental musical characteristics, which performers may only change in nuances through their interpretation. This is not to say that performers may not express their cultural identity through their performances, yet any such expression is limited by the boundaries established by the author.



If we assume that it was possible to measure the product diversity of online music, one would still be faced with the problem as to how the normative side of diversity in online music, the element of intercultural pluralism, could be assessed and correlated with that factual state of diversity. A suitable methodology would have to be newly developed, as research on that point is quasi non-existent. While studies on the measuring of cultural diversity have sometimes acknowledged that it would be important to include the diversity of authors and audiences, no attempts have been made to put this into practice.<sup>404</sup> Moreover, it seems to us that what would be required in order to accommodate the pluralistic aspect is, in fact, not entirely the same as to assess the diversity of creators and audiences. More specifically, it would not be sufficient to establish the extent to which cultural groups within a certain territory are different from each other or what their respective size is, thus questions of disparity and balance. The reason that these aspects are of only secondary importance lies in the understanding of cultural pluralism itself that underpins the 2005 Convention. In fact, what Article 7 of the 2005 Convention requires to be promoted is the ability of all groups to express their cultural identity. It does not, as an end in itself, call for a given society to become more culturally pluralistic than it currently is but rather that the different existing groups may assert their cultural identity.<sup>405</sup> Hence, the only property of real significance in this regard is the variety of cultural groups. In the context of the diversity of online music, this would mean that, in a first step, one would have to establish how many different cultural groups there are in a given society that would like to express their identity through music. Second, this would have to be compared to the factual diversity of online music with a view to being able to answer the following questions: are the musical expressions of all groups that would like to express their identity through music available for online

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<sup>404</sup> Some studies have addressed the diversity of producers; see above, n 369. For an assessment of the pluralistic element, such approaches, however, can only add a supplemental element once the ability of groups to express their culture has been characterised. One could then ask whether the diversity of producers is an impediment to the distribution of the diverse music that has been created. Put differently, the question would then be whether a particular structure of record companies has a bearing on how much of the diverse created musical expressions are available as recorded music.

<sup>405</sup> If a society became more culturally pluralistic because of enhanced intercultural exchange between the different groups, this, however, would certainly be a welcomed by-product.

distribution? Can all those who would like to access these expressions do so? Whether this pluralistic element can, in reality, be measured in any reliable way is open for debate. Any taxonomy of cultural groups in a given society would raise difficult questions: what defines a cultural group? How can one take into account that cultural affiliations are dynamic and open to change?

If one reflects upon this still incomplete approximation of an ideal model to measure the diversity of online music, it becomes obvious that it would be a Herculean task to put the measuring of the diversity of online music into practice and certainly one that could, and indeed should not be endeavoured in this study.

### *Contribution of the Economic Literature on Diversity to Assessing Whether the EU Legal Framework Promotes Diversity in Online Music*

While it would be impossible for our study to fully develop a concept to measure the diversity of online music, it is, however, useful to determine where, in the further analysis of whether specific elements in the framework for music licensing promote diversity in online music, the findings of the literature on the measuring of diversity can make a helpful contribution. We will first look at the cultural functions of collecting societies before analysing the recent changes in the licensing mechanisms induced by EU intervention.

In this regard, the criteria and findings derived from the study of the measuring of cultural diversity would be directly relevant if they helped us in the assessment of whether or not particular elements of the licensing system promote the diversity in online music. Any statistical measurement to that effect, however, would prove to be very difficult. In the first place, to measure the existing state of musical diversity in a given territory alone appears, as we have already established in the preceding section, to be a nearly impossible task. Any approach that tried to devise a taxonomy of cultural groups and the respective musical genres that mirror their cultural identity would be too controversial, any sound development of qualitative criteria for disparity would be too resource-intensive, and, finally, any sound empirical quantitative data on the creation of music would be too scarce.

Assuming for a moment that these difficulties could be overcome, one would need to be cautious as to how to interpret the results of any such measurement. As regards the cultural functions of collecting societies, one approach could be to compare the given state of musical diversity under the cultural intervention of collecting societies to the state of musical diversity that would exist if there were no such involvement. A second approach with regard to the collecting societies' cultural functions could be to compare the given state of musical diversity in a country where the local collecting society fulfils cultural functions with that of a country where such intervention is absent; a comparison between the UK and Germany, for example, could be appropriate. Arguably, however, both approaches could not deliver reliable results. The first case is a hypothetical question that could only be answered by making numerous assumptions. But the flaw in both types of comparison is even at a more fundamental level; notably, one must be aware of the fact that collecting societies' cultural functions are only one way to promote musical diversity. Even in countries where collecting societies deploy such cultural activities, these only represent one of numerous cultural policies pursued by state and private actors alike in an attempt to stimulate creativity and diversity. This means that even if musical diversity in a given territory is high this can have many reasons – a monocausal effect, in any case, could not be attributed to the collecting societies' cultural functions. The same caveat would apply to any attempt to compare the musical diversity in the EU before and after EU intervention. An exact statistical measurement of the efficiency of the collecting societies' cultural functions or the EU interventions thus appears impossible.

This notwithstanding, less ambitious approaches may hold better promises. Notably, it will be useful to scrutinise their *modi operandi*; for only if the cultural functions or the EU interventions are designed in a way that is conducive to the promotion of cultural diversity, may there be any such effect at all. Put differently, our analysis of the collecting societies' cultural functions and the EU's past intervention will ask whether they are appropriate for attaining the objective of promoting musical diversity. For this test of appropriateness, the *Stirling* model and the existing attempts to quantify musical diversity provide helpful guidelines.

#### **Part 4: The Contributions of Authors' Societies' Cultural Functions to the Diversity of Online Music**

This part of the thesis seeks to assess the contributions of collecting societies to the diversity in online music and examines, more specifically, the extent to which, if any, collecting societies, in exercising their cultural functions, promote diversity in online music. In other words: how well do these activities sit with the parameters that our interpretation of TFEU Article 167(4) in light of the 2005 UNESCO Convention on the Diversity of Cultural Expressions has brought to the fore?

In asking this question, we do not overlook that the addressees of TFEU Article 167(4) are the EU institutions. Clearly, the provision does not bind collecting societies; as private associations of authors they remain free to pursue different cultural aims. Even without any legal obligation it may, however, still have important political and practical ramifications whether or not collecting societies' cultural activities promote the diversity of online music. In fact, collecting societies would be well-advised to align their cultural schemes with the notion of cultural diversity under EU law. After all, if they did, an argument in their favour could be made, considering that they usually spend considerable parts of the receipts generated by the online exploitation of music to fund their cultural activities. One could thus argue that the role of collecting societies in the online exploitation of authors' rights must be reinforced so that their online receipts continue to flow and, as a further consequence, their activities towards the promotion of diversity of online music can be carried on. Therefore, if the collecting societies' activities indeed supported diversity in online music, this would advocate for EU regulation to strengthen the collective management of copyright instead of dismantling it.

In that case, TFEU Article 167(4) interpreted in light of Article 7(2) of the 2005 Convention could even provide a legal basis for the EU to consolidate the collective management of authors' rights in the online realm: according to the latter provision, a party to the 2005 Convention may not only promote the diversity of

cultural expressions by creating an enabling environment itself but also, in a more indirect way, by supporting cultural communities or organisations to act as intermediaries in facilitating the creation of diverse cultural expressions.<sup>406</sup> Since there is no reason why collecting societies should not qualify as intermediaries in the sense of Article 7(2) of the 2005 Convention, the EU could implement the 2005 Convention by delegating to them the promotion of diversity of online music; provided, however, that their cultural schemes indeed promoted the diversity of cultural expressions. From this perspective, the analysis of collecting societies' cultural functions could also make a useful contribution to the larger debate on the appropriate EU legal framework to facilitate multi-territorial licensing.

Chapter 10.2 assesses the contribution of collecting societies' cultural functions to the diversity of online music through a detailed analysis using as an example what German collecting society GEMA regards itself as its cultural activities. In a first step, however, chapter 10 offers a short introduction to the role and functions of collecting societies.

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<sup>406</sup> See above at 7.2.2, on page 92.

## **10 Introduction to the Collective Management of Authors' Rights through Collecting Societies**

The main actors in the system of collective rights management are collecting societies who authors entrust with the (typically exclusive) administration of their rights. Their main rationale is economic in nature, yet they also advocate authors' rights more broadly. In order to emphasize the latter aspects of their work, they are often also referred to as authors' (rights) societies.<sup>407</sup>

### **10.1 Rationale and Functions of Collecting Societies**

#### **10.1.1 The Economic Rationale of Collecting Societies**

The primary function of collecting societies is of economic nature: they negotiate with and license users against appropriate remuneration on the basis of a tariff system and equitable conditions. Societies are also charged with monitoring the uses, collecting the remuneration, and distributing it among the owners of rights.<sup>408</sup>

Over the last more than 150 years,<sup>409</sup> the formula to the enormous success of collective rights management has been its ability to overcome market failure. Due to the sheer number of market participants on the sides of both right holders and users, transaction costs associated with identifying potential licensing partners, negotiating licences and monitoring uses would be prohibitively high if rights were administered on an individual basis.<sup>410</sup> An illustrative case in point is the mass use of copyrighted

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<sup>407</sup> The two terms are used synonymously throughout this thesis. The more specific notions of performing rights societies and mechanical rights societies are equally used.

<sup>408</sup> Ficsor, *Collective Management of Copyright and Related Rights* (2002) 17; Gervais, *Collective Management of Copyright and Related Rights* (2nd edn, 2010) 6–10.

<sup>409</sup> Ficsor, *Collective Management*, 18–19.

<sup>410</sup> See Hansen and Schmidt-Bischoffshausen, 'Ökonomische Funktionen von Verwertungsgesellschaften - Kollektive Wahrnehmung im Lichte von Transaktionskosten- und Informationsökonomik' [2007] *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 461, 469–472 for a detailed analysis of the transaction cost argument.

works, in particular where such works, individually, are of only small value. By using economies of scale and scope, collecting societies reduce the costs of copyright administration and thus allow for the development of an otherwise non-existing market.<sup>411</sup> Without acting collectively, the countless mass of only averagely successful right holders could not monetise their rights. Commercial users, on the other hand, appreciate the one-stop shop solution that copyright collectives traditionally offer. Collective rights management is therefore beneficial for both the holders as well as the users of copyrighted material. When right holders assign their rights to collecting societies they voluntarily restrict the broad scope of the individual exclusivity rights that they enjoy by law and accept that their administration is henceforth governed by established principles that apply to all works managed by a society and that the individual author may influence only indirectly through the relevant governing bodies of the society. Thus, by collectivising the exercise of their rights, authors accept to give up immediate control over any further use of their works.<sup>412</sup> In this sense, one may say that, although copyright offers them protection through property rules, they choose to contract into liability rules.<sup>413</sup>

### 10.1.2 Strengthening the Authors' Voice through Collectivisation

In addition to their economic role, collecting societies more generally act as advocates for their members' interests. In this regard, their activities resemble those of trade unions or writers' guilds and are motivated by cultural or social aims.<sup>414</sup>

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<sup>411</sup> Besen and others, 'An Economic Analysis of Copyright Collectives' (1992) 78 *Virginia Law Review* 383, 383; Handke and Towse, 'Economics of Copyright Collecting Societies' (2007) 38 *International Review of Intellectual Property and Competition Law* 937, 938-940.

<sup>412</sup> For a more detailed discussion of the various elements of collectivisation in the German context, see Hauptmann, *Die Vergesellschaftung des Urheberrechts: Das ausschließliche Recht, Entindividualisierung und Vergesellschaftung bei Wahrnehmung durch Verwertungsgesellschaften am Beispiel der GEMA und der VG Wort* (1994) 57-64.

<sup>413</sup> Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations' (1996) 84 *California Law Review* 1293, 1302-1303; Schovsbo, *The Necessity to Collectivize Copyright - and Dangers Thereof* (2010) 169. Both provide more detailed definition of the associated concepts.

<sup>414</sup> Schovsbo 171.

One important goal is the safeguarding and strengthening of the authors' standing as a group within society, in particular by promoting a high level of remuneration for authors. In negotiations, only collecting societies have the necessary bargaining power to confront powerful commercial users at arm's length and secure appropriate royalties. At a more general level, collecting societies make sure that the domestic and/or European legislator hears the voice of authors. Finally, the mere existence of collecting societies can equally be seen as a safeguard of the authors' interests as it creates royalties that could not be generated on an individual basis.<sup>415</sup>

### 10.1.3 Built-in Features of Mutual Solidarity

Certain elements of solidarity permeate collective rights management with the aim of creating more equity amongst their members. These features incorporate elements that redistribute, to a certain extent, the benefits that authors derive from copyright.

#### *Blanket Licensing*

In particular, the performing rights of their members are typically licensed to commercial users by authors' societies by way of blanket licences that encompass a society's entire repertoire. Commercial users appreciate such licences as it offers them the highest possible degree of choice, flexibility and legal certainty.<sup>416</sup> A radio station, for example, does not need to determine in advance which songs it will broadcast. Moreover, blanket licences replace a bundle of individual licences which otherwise would have to be concluded in relation to each musical work to be used. This reduces transaction costs and is thus advantageous for both right holders and commercial users.

Beyond these general characteristics, blanket licensing also incorporates an element of solidarity amongst right holders. In the eyes of commercial users, some musical works will be more valuable than others. If individual licences had to be

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<sup>415</sup> Hellenic Foundation for European and Foreign Policy, *Collecting Society and Cultural Diversity in the Music Sector* (2009) 17.

<sup>416</sup> Müller, *Der Verteilungsplan der GEMA*, 141.



concluded, the fees for much-demanded works would be high and those for little demanded works low. For blanket licences, however, commercial users pay a lump sum, based on cooperative tariffs. Setting the rates for such blanket licence cooperatively means that a user pays the same tariff irrespective of the popularity of individual works within the repertoire. This results in a form of redistribution from successful to less successful members.<sup>417</sup>

### *Collective Allocation*

Another important aspect that benefits creators of less demanded repertoire is the way in which the sums for online uses of music are allocated. An individual allocation means that royalties are strictly allocated according to the level of use of works. Collective allocation, however, means that generalisations are made, for example, that a certain minimum share of the royalties is allocated to every work. Such generalisations benefit the creators of less demanded repertoire.

### *The Pooling of Administrative Costs*

A certain cross-subsidy from successful to less successful authors is also inherent in the way that collecting societies pool their administrative costs: while in reality, it is more costly to administer less successful repertoires, collecting societies charge all authors the same flat percentage of their royalties to cover their costs.<sup>418</sup>

#### **10.1.4 Explicit Cultural and Social Functions**

Many collecting societies make so-called ‘cultural and social deduction’; they retain a certain share of royalties and, instead of distributing these sums according to the actual use of works, use cultural and social criteria to allocate them. Chapter 11 examines whether this practice promotes the diversity of online music, using the example of GEMA.

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<sup>417</sup> Handke and Towse 942–943 and Müller, *Der Verteilungsplan der GEMA*, 141–143, also addressing blanket licences from a competition law perspective.

<sup>418</sup> Hellenic Foundation for European and Foreign Policy 18.

## 10.2 Collecting Societies in the Area of Music

In each member state of the EU there is at least one society that manages the rights of composers and lyricists.<sup>419</sup> In Germany, for example, this task is fulfilled by GEMA, the German Society for Musical Performing and Mechanical Reproduction Rights. As already visible from its title, GEMA manages both sets of authors' rights. In other countries, they are administered by two different entities, which, usually, maintain a close relationship. Such is the case in the UK, where the authors' rights are managed by The Performing Right Society (PRS) on the one and the Mechanical Copyright Protection Society (MCPS) on the other hand. While retaining their respective legal personalities, the two societies have been trading under the common brand PRS for Music since 2009.

The performing rights that are typically managed collectively encompass the right of public performance, the right of broadcasting and the right of communication to the public as well as the right of the making available of works to the public in interactive networks.<sup>420</sup> As far as mechanical rights are concerned, societies manage the authors' right of reproduction of their works in recorded form.<sup>421</sup>

Where music is exploited online, this affects both the making available as well as the reproduction right. In countries where the collective management of performing and mechanical rights is organised by different entities, the latter usually co-operate in order to enable online music services to clear both rights in a single transaction. In the UK, for example, PRS and MCPS have been granting joint online licences since 2002.<sup>422</sup>

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<sup>419</sup> Often, the membership in these societies is equally open to music publishers; with PRS for Music and GEMA this is the case.

<sup>420</sup> Ficsor, *Collective Management*, 39 with further explanations on the types of works that remain managed individually.

<sup>421</sup> *Ibid* 49. As the protected reproduction also encompasses the storing of a work in any medium by electronic means.

<sup>422</sup> Harrower, 'Copyright Issues in Internet Music' (2005) 24 *Contemporary Music Review* 483, 485. The difficulty faced by online music services is thus not so much to obtain online licences covering the domestic collecting society's repertoire for domestic online use but licences that aggregate the repertoires of several societies for a broader territorial scope.

At the international level, performing right societies set up CISAC, the International Confederation of Societies of Authors and Composers, in 1926. Its counterpart for mechanical right societies is BIEM, the *Bureau international des sociétés gérant les droits d'enregistrement et de reproduction mécanique*, founded in 1929. Amongst each other, national collecting societies maintain a network of reciprocal representation agreements, as a result of which they are in a position to license, in addition to their own repertoire, the repertoires of all other sister societies.

## **II Cultural Considerations in the Distribution of Royalties: GEMA as an Example of Authors' Societies' Explicit Cultural Functions**

In 2006, a study commissioned by the European Parliament concluded that in 24 of the (then) 25 member states local authors' societies in the field of music ran cultural and social schemes, albeit of largely differing outlook and scope.<sup>423</sup> Without a doubt, these schemes have the potential to be an important factor in the promotion of innovative music; in particular in countries where the state does not provide support for musical creation.<sup>424</sup> Often the cultural activities of collecting societies are therefore judged, by collecting societies themselves and legal commentators alike, as suitable means to promote cultural diversity. The European Parliament, for instance, declared that

‘the practice of certain collective management societies (chiefly in the field of music) to use the distribution rules to promote non-commercial but culturally important works contributes to the development of culture and cultural diversity’.<sup>425</sup>

This chapter asks whether the activities that authors' societies themselves regard as specifically conducive to cultural development promote the diversity of online music. In undertaking this enquiry we aim to go beyond often-heard general assumptions and vague claims and analyse the practical effects of such activities in order to assess them against the earlier developed notions. This approach, however, has its own difficulties in that cultural activities take many forms and are governed by rules that differ from society to society. It is therefore impossible, at least within the limits of this study, to provide a comprehensive assessment of the cultural activities of

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<sup>423</sup> KEA European Affairs, *The Collective Management of Rights in Europe* (2006) 89.

<sup>424</sup> Notably, in Greece; see *ibid* 125.

<sup>425</sup> European Parliament, *Resolution on a Community Framework for Collective Management Societies in the Field of Copyright and Neighbouring Rights (2002/2274(INI))* [2004] OJ C 92E/425, para 27.

all EU collecting societies. Rather, we concentrate on a particularly suitable example of such cultural activities, notably those undertaken by GEMA.<sup>426</sup>

In the case of GEMA, the cultural activities conform to a statutory requirement. The *Urheberrechtswahrmehmungs-gesetz* (UrhWG), the Law on the Administration of Copyright and Neighbouring Rights regulates the activities of CMOs in Germany. In its second sentence, UrhWG § 7 specifically mentions cultural aspects: ‘the distribution plan shall conform to the principle that *culturally important* works and contributions are to be promoted’.<sup>427</sup> The statute, however, does not specify what works are culturally important but leaves this determination to the addressees of the stipulation, namely the collecting societies. Furthermore, neither the rules nor regulations of GEMA, for their part, provide any definition.

In order to understand how GEMA ascertains cultural importance, it is therefore necessary to analyse the practical ways in which the society implements the statutory postulate. It will then be possible to determine whether the promotion of culturally important works, as understood by GEMA, promotes diversity in online music.

Generally speaking, GEMA fulfils its mandate of promoting culturally important works through the particular way in which it distributes the performance and broadcasting royalties. The distribution of royalties is a two-stage process encompassing the so-called allocation and the evaluation procedure. The guiding distribution criterion is the degree of use that GEMA’s licensees have made of any given work; authors of popular works, therefore, receive a larger share than authors of less popular works. However, at both stages cultural considerations also have a role to

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<sup>426</sup> For an explanation why GEMA cultural functions suggest themselves for a detailed analysis here, see above at 4.2, on page 8.

<sup>427</sup> Own translation; emphasis added. The nature of this provision is contested. Some see it as establishing a legal obligation; Gerlach, ‘§ 7 WahrnG’ in Wandtke and Bullinger (eds) *Praxiskommentar zum Urheberrecht* (3rd edn, 2009) para 6. According to the majority view, however, the norm simply allows CMOs to promote culturally important works; Nordemann, ‘§ 7 UrhWahrnG’ in Nordemann and Fromm (eds) *Urheberrecht: Kommentar zum Urheberrechtsgesetz, Verlagsgesetz, Urheberrechtswahrmehmungs-gesetz* (10th edn, 2008) paras 1-2. As concerns GEMA, the question is without practical implications, as the society has developed and continues to apply rules to promote culturally important works.

play; notably, culturally important works are treated favourably with the effect that their authors receive a higher share of royalties than would otherwise be the case.

Given that the criteria used to determine cultural importance differ, the analysis first examines the allocation procedure (11.1) before then turning to the additional payments that authors may receive in the evaluation procedure (11.2). Some support for culturally important work is also provided through GEMA's adjustment funds (11.3) as well as other specific projects (11.4).

In addition to its cultural activities, GEMA also provides certain social benefits to its members; notably it offers a pension scheme<sup>428</sup> as well as a social security fund.<sup>429</sup> While both schemes are funded through the same sources as the evaluation procedure,<sup>430</sup> they do not rely on any cultural criteria in the allocation of benefits and, therefore, remain beyond the scope of the present study.<sup>431</sup>

### **11.1 The Cultural Redistribution in the Allocation Procedure**

We start our analysis of the practical forms of GEMA's promotion of culturally important works with a closer look at the allocation procedure, the first step of the distribution process through which the vast majority of royalties are paid out.<sup>432</sup>

Before analysing how GEMA uses cultural criteria in the royalty allocation, it is important to point out which royalties exactly are subject to these cultural criteria. While all royalties collected by GEMA are distributed on the basis of use, it is only in relation to some royalties that the distribution not only depends on use but, in addition, cultural considerations. Any royalty fee that GEMA collects pertains to one

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<sup>428</sup> Annexes to *Rules on the Evaluation Procedure for Composers in Section E* in GEMA (ed), GEMA-Jahrbuch 2012/2013 (2012) 368, *Rules on the Evaluation Procedure in Section U* in GEMA (ed), GEMA-Jahrbuch 2012/2013 (2012) 382, and *Rules on the Evaluation Procedure for Publishers in Section E* in GEMA (ed), GEMA-Jahrbuch 2012/2013 (2012) 378; *Rules on the Evaluation Procedure for Lyricists in Section E* in GEMA (ed), GEMA-Jahrbuch 2012/2013 (2012) 377, § 2.

<sup>429</sup> *Rules on the Social Security Fund* in GEMA (ed), GEMA-Jahrbuch 2012/2013 (2012) 403.

<sup>430</sup> See below at 11.1.1, on page 152.

<sup>431</sup> A critical analysis of the two schemes is provided by Hauptmann 101-104, 108-124.

<sup>432</sup> As to the monies set aside for the evaluation procedure, see below at 11.1.1, on page 152.

of GEMA's three Distribution Plans: Distribution Plan A covers the royalties from public performances and broadcasts; Distribution Plan B those from mechanical reproductions; and Distribution Plan C those from online exploitation. Within each Distribution Plan, various sections exist - representing different forms of use of musical works. In order to fine-tune the allocation of royalties, each section has specific distribution rules.<sup>433</sup> Cultural considerations play a role in the allocation of the larger portion of public performance and broadcasting royalties, namely those sections in Distribution Plan A that are not allocated on an individual basis.<sup>434</sup> In relation to public live performances, these are:

- section E (public live performances of serious musical works);<sup>435</sup>
- section U in part (public live performances of light music during events for which the fees collected do not exceed €500);<sup>436</sup> and
- section KI (public live performances of musical works during religious services).<sup>437</sup>

In relation to broadcasts, these are:

- section R (radio broadcasts);<sup>438</sup> and
- section FS (broadcasts of musical works in television operators' self-produced or commissioned programmes).<sup>439</sup>

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<sup>433</sup> The creation of different sections is a common practice of CMOs and even required by the reciprocal representation agreements that CMOs have concluded amongst each other; see Schepens, 'Guide to the Collective Administration of Authors' Rights' (2000) 41-42. As to reciprocal representation agreements in general, see below at 13.3, on page 253.

<sup>434</sup> As to collective and individual allocation, see above at 10.1.3, on page 141. Where live events are allocated individually, the works used typically pertain to only a single or very few authors; in that case, however, a differentiation as to the cultural importance of the works would not have any practical effects. See also Müller, *Der Verteilungsplan der GEMA* 255.

<sup>435</sup> E is the acronym for the German term for serious music: *ernste Musik*.

<sup>436</sup> *Implementing Provisions of Distribution Plan A* in GEMA (ed), GEMA-Jahrbuch 2012/2013 (2012) 299, s IX(2.2). U is the acronym for the German term for light music: *Unterhaltungsmusik*.

<sup>437</sup> KI is the acronym for the German term for church music: *Kirchenmusik*.

<sup>438</sup> R is the acronym for the German term for radio: *Radio*.

<sup>439</sup> FS is the acronym for the German term for television: *Fernsehen*. As far as the allocation of royalties within section FS is concerned, cultural considerations only play a role for pre-existing works and not specially commissioned music to accompany films; see Müller, *Der Verteilungsplan der GEMA*

The general structure of the allocation procedure is the same in all distribution sections. First, it must be determined which royalties pertain to a given section<sup>440</sup> and which musical works correspond to the uses that have generated these royalties. Second and most crucially, the royalties must be allocated to the musical works. In other words, the task is to ascertain how big a share of the available royalties falls upon each of the relevant musical works.<sup>441</sup> Once a sum for each relevant work has been calculated, the third and final step is to distribute this sum between all holders of rights in that song.

It is during the second step – the allocation of the royalties to each relevant work – that GEMA, in the mentioned distribution sections, not only takes into account how often a work has been used but also whether it is culturally important. Both factors – use and cultural importance – are expressed in points; each work accumulates performance points and cultural points. These are multiplied and result in an overall number of points for each work. The value of each point is determined by dividing the net distribution sum<sup>442</sup> of a given section by the total number of points for all works involved in that section. The final sum allocable to each work is then obtained by multiplying its number of points with that point value. In practice, therefore, the more cultural points a work receives, the higher its share in the distribution sum. This promotion of culturally important work thus affects all GEMA members. More specifically, it leads to a certain internal reallocation in that it changes the amount of royalties that GEMA members would otherwise receive through a strictly usage-based distribution. In that sense, one may speak of a cultural redistribution. Moreover, where cultural importance influences the amount of royalties generated by a member's musical works, such cultural support takes the form

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250–251.

<sup>440</sup> See in detail *ibid* 169–180.

<sup>441</sup> For a detailed description of this step in each section, see *ibid* 181–226.

<sup>442</sup> The net distribution sum is the actual amount available for distribution for GEMA's members. It is calculated by deducting from GEMA's overall earnings its administrative cost as well as the ten per cent share used for cultural and social aims; see below at 11.2.1, on page 174.



of a monetary *ex post* reward for creativity and, at the same time, incentivises future musical creation.<sup>443</sup>

In order to determine how GEMA interprets cultural importance, it will thus be necessary to analyse the criteria according to which it grants cultural points. The analysis will start with a brief remark on the funding of cultural redistribution in the allocation procedure (11.1.1). Then, a more detailed account of the way in which GEMA promotes culturally important works in the allocation of performance (11.1.2) and broadcasting royalties (11.1.3) will allow us to assess the implications for the diversity in online music (11.1.4). More specifically, we will first determine the understanding of ‘cultural importance’ that underpins the allocation procedure as a whole (11.1.4.1) before concluding that it is inappropriate to reach the goal of diversity in online music (11.1.4.2). Finally, we explore how an element of cultural redistribution would need to be designed in order to promote diversity in online music (11.1.4.3).

#### **11.1.1 Provenance of the Funds for the Cultural Redistribution in the Allocation Procedure**

In contrast to the evaluation procedure,<sup>444</sup> no set amount funds the cultural redistribution in the allocation procedure and so the share of royalties distributed according to cultural importance cannot be pre-determined in the abstract. As the element of cultural redistribution is an inherent feature of the allocation procedure, it varies from year to year depending on which musical works have been used, to what extent these works have been used, and to what extent they are considered as culturally important. The cultural redistribution is thus funded by a flexible share of all those performance and broadcasting royalties whose allocation also depends on cultural importance.

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<sup>443</sup> As to the incentivising effect of copyright royalties, see in more detail below on page 169.

<sup>444</sup> See below at 11.2, on page 173.

This also includes some parts of the online royalties as Distribution Plan C provides that either one or two-third of the online receipts,<sup>445</sup> depending on the particular form of digital exploitation, are allocated according to the rules in Distribution Plan A and are thus subject to the cultural redistribution in the allocation procedure.<sup>446</sup>

## 11.1.2 Cultural Considerations in the Allocation of the Royalties from Public Live Performances

### 11.1.2.1 The Usage Element: Performance Points

In distribution sections E, U and KI (*live performances of serious, light and musical works during religious services*) the performance points of a given work are calculated on a *pro rata numeris* basis. It is, therefore, crucial to determine how many times a work has been performed. To this end, GEMA relies on the programmes returned by its licensees.<sup>447</sup> As the society assumes that in the field of serious music these programmes reflect almost entirely the actual performances of works, there is no need for any further assessment in section E. In section U, however, the number of performances cannot as easily be inferred from programmes since they only exist for approximately one-fourth of all light music performances.<sup>448</sup> GEMA uses statistical projections in an

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<sup>445</sup> Two-thirds of the online receipts are allocated through Distribution Plan A for the following forms of exploitation: Internet radio and TV, music use on websites, streaming of music and videos on demand. Only one-third is added to Distribution Plan A as far as downloading of music and videos on demand and ringtones are concerned. The remaining sums are distributed according to Distribution Plan B for mechanical rights; *General Principles of Distribution Plan C* in GEMA (ed), *GEMA-Jahrbuch 2012/2013* (2012) 351, § 2.

<sup>446</sup> Where receipts from Internet radio and television cannot be distributed individually, the shares that are to be allocated according to Distribution Plan A are added to the receipts of sections R and FS, ie those from radio and television broadcasts; *General Principles C* § 1(1) para 3. As the latter are subject to the cultural redistribution in the allocation procedure, so are these particular online royalties. Royalties are not allocated on an individual basis where no programming lists exist that could show which works have been used or where the costs of individual allocation would be disproportionate to the receipts; *General Principles C* § 1(1) para 2.

<sup>447</sup> Live performances during religious services are assessed according to representative samples; *Implementing Provisions A* s VIII(3)(e). For further particularities concerning distribution section KI, see Müller, 'Der Verteilungsplan für das Aufführungs- und Senderecht (Verteilungsplan A)' in Kreile and others (eds) *Recht und Praxis der GEMA* (2nd edn, 2008) 399, paras 220-222.

<sup>448</sup> *Ibid* para 173.

attempt to determine the number of performances of light music as accurately as possible.<sup>449</sup>

In addition to the number of uses, the particular type of use that has been made of a work may equally influence the overall number of performance points in so far as some types of uses are weighted more strongly than others.<sup>450</sup>

### 11.1.2.2 The Cultural Element: Cultural Points

The more culturally important a work is deemed to be, the more cultural points it receives. Ultimately, it will obtain a higher share of royalties than a work that was used equally often but is deemed to be culturally less important. The criteria underlying the determination of these points as well as the maximum number of points that can be obtained vary in the different distribution sections. Chapters X-XII of the Implementing Provisions of GEMA's Distribution Plan A contain indices that categorise musical works and prescribe a certain number of cultural points to each category.

In section E (*live performances of serious musical works*) a work may obtain between 12 and 2400 cultural points, depending on the type of musical work: instrumental works, electro-acoustic works, vocal works and choral works (each starting with 12 points); works for string or chamber orchestras (starting with 40 points); and works for full-size orchestras (starting with 80 points).<sup>451</sup> For instrumental works, vocal works and choral works a further refinement is made according to the number of voices their composition contains. Instrumental works with one or two voices, for

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<sup>449</sup> Until the end of 2012, the so-called PRO procedure was used; see Augenstein, *Rechtliche Grundlagen des Verteilungsplans urheberrechtlicher Verwertungsgesellschaften* (2004) 90-91, and Müller, *Verteilungsplan A*, paras 174-175. Since 2013 it has been replaced by a collection-based allocation method using linear approximation; see <<https://www.gema.de/index.php?id=2645>>. Certain (historically motivated) adjustments are made with regard to light musical works performed during events in spa and health resorts and during variety and cabaret shows; see *Implementing Provisions A s VIII(3)(b) and (d)* as well as Müller, *Der Verteilungsplan der GEMA* 248-249.

<sup>450</sup> This is the case where commercial users pay a lump sum for several types of uses of different value. Only one-third of a performance point is accorded where musical works (or fragments of these works) are performed live as break or advance music; introduction, interlude or end music; or title or theme music; *Implementing Provisions A* fn 15 for serious and fn 23 for light music. See, in general, Müller, *Verteilungsplan A*, para 312 and Müller, *Der Verteilungsplan der GEMA*, 227-231.

<sup>451</sup> *Implementing Provisions A s X*.

example, start with 12 points while those containing three to nine voices start with 24 points. Finally, within each (sub)group, the number of cultural points of a given work depends on its length; the index provides for nine different tranches ranging from up to two to over 60 minutes. Works for full-size orchestras lasting up to two minutes, for example, obtain 80 points while 2400 points are accorded to such works if they are longer than 60 minutes.

In distribution section U (*live performances of light musical works*) a musical work will normally obtain between 12 and 480 cultural points. Light musical works are classified according to their musical genre and, in some cases, their length. Although such simplified terminology is not used in the Implementing Provisions of GEMA's Distribution Plan A, the genres could be characterised as popular music (12 points),<sup>452</sup> simple concert works (24-48 points),<sup>453</sup> popular chansons (36 points),<sup>454</sup> and complex concert works (24-480 points).<sup>455</sup> If, however, the Works Committee<sup>456</sup> – upon application – holds that a work of light music is of particular artistic value, its cultural importance is assessed according to the criteria laid down for distribution section E. It may then attract up to 2400 cultural points.<sup>457</sup>

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<sup>452</sup> This group contains: dance, pop, jazz and rock music; marches and other light music; and chansons and copyright-protected lyrics to public domain musical works (*ibid* s XI(1)). Chansons only fall under this category as long as they have not been recognised as serious chansons or popular chansons. In the former case they obtain between 36 and 960 cultural points according to the index of cultural points for serious works (s X(3)); in the latter 36 point (s XI(3)(a)). GEMA's Distribution Plan does not contain any information as to the criteria according to which a chanson falls into one of these three groups.

<sup>453</sup> These are: *concertinos*; movements of suites; *Lieder* and musical pieces of staged shows or films that have been published for orchestras; works for one or several solo instruments with orchestra; vocal music not qualifying as a work of serious music; and contemporary artistic jazz with concert character (*ibid* s XI(2)).

<sup>454</sup> *Ibid* s XI(3)(a). See also above n 452.

<sup>455</sup> These are concert works for orchestra, big bands, and large fusion and jazz formations with a minimum of 10 independent voices (*ibid* s XI(6)).

<sup>456</sup> The Works Committee is a jury consisting of four composers, two lyricists and one publisher elected by the General Assembly. Its task is to review the classification of musical works within the allocation procedure in certain prescribed instances. See Müller, Verteilungsplan A, paras 140-150, as well as the *Rules of Procedure of the Works Committee* in GEMA (ed), GEMA-Jahrbuch 2012/2013 (2012) 287.

<sup>457</sup> *Implementing Provisions A* s XI(7).

*Musical works that are neither serious nor light* obtain, depending on their length, between 12 (works of up to two minutes) and 1200 (works of more than 60 minutes) cultural points.<sup>458</sup> Most commonly, these are works of jazz, world music and crossover.<sup>459</sup>

Finally, length is also the decisive factor in distribution section KI (*live performances of musical works during religious services*), where musical works of more than ten minutes receive three and those of more than 20 minutes six cultural points.<sup>460</sup>

### 11.1.3 Cultural Considerations in the Allocation of the Royalties from Broadcasting

#### 11.1.3.1 The Usage Element: Broadcasting Points

In distribution sections R (*radio broadcasts*) and FS (*broadcasting in television operators' self-produced or commissioned programmes*) the frequency of the use of musical works is calculated on a *pro rata temporis* basis and counted in minutes that a musical work has been broadcast on the radio or television. In order to determine these minutes of broadcasting GEMA relies on programming lists received from the radio and television operators.<sup>461</sup> As with the performance points for public live performances,<sup>462</sup> some uses are particularly weighted, depending on (a) the broadcaster and (b) the circumstances of the broadcasting of the musical work.<sup>463</sup> As a result, a number of weighted minutes of broadcasting are determined for each relevant musical work.

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<sup>458</sup> *Ibid* s XII. The receipts for live performances of these works are allocated in distribution section E; Müller, *Der Verteilungsplan der GEMA*, 247. For a work to fall into this category, it must be classified accordingly by GEMA's Distribution Division; *Implementing Provisions A* s I(12) para 1. In case of doubt, the Works Committee decides (*ibid* s I(15)(a)). As to the Works Committee, see above n 456.

<sup>459</sup> Müller, *Der Verteilungsplan der GEMA*, 247.

<sup>460</sup> *Implementing Provisions A* s VIII(3)(e).

<sup>461</sup> *Ibid* s V(3)(a).

<sup>462</sup> See above n 450.

<sup>463</sup> *Implementing Provisions A* ss V(3)(a)–(i), IX(1), fns 15, 23, 29; s XIV(3), fns 14, 22. For more details see Müller, *Der Verteilungsplan der GEMA*, 204-207 and 231-242. For example, a song broadcast on a local public television station is weighted less strongly (and therefore receives a smaller share of the royalties) than the same song broadcast in the countrywide public television station. A song played live during a musical programme is weighted more strongly (and therefore generates a bigger share of

### 11.1.3.2 The Cultural Element: Cultural Points

Broadcast musical works receive cultural points according to the same principles that apply to publicly performed works. Again, light and serious works are distinguished and broken down into the same musical categories using the criteria of genre and length; only the spectrum of obtainable points differs.<sup>464</sup> *Works of serious music* receive between one and 2.5 cultural points.<sup>465</sup> A simple instrumental work of up to two minutes, for instance, attracts one cultural point while any full orchestra work above five minutes is given 2.5 cultural points.

The spectrum of obtainable cultural points for *works of light music* is even narrower and ranges between one and two cultural points.<sup>466</sup> While, for example, popular music receives one point, only complex concert works of more than 30 minutes obtain the highest possible score of two points. The Works Committee may, however, recognise works of light music as having particularly artistic value. In that case, they attract up to 2.5 cultural points.<sup>467</sup> One exception to these rules exists with regard to both serious and light music. If these works (or fragments of these works) are used as break or advance music; introduction, interlude or end music; or title or theme music in regularly returning programmes, they receive only one cultural point and – in effect – no cultural evaluation is made.<sup>468</sup>

Where the Works Committee has classified works as *works of neither serious nor light music*, they receive one cultural point, although the Works Committee may – upon application – prescribe up to 2.5 cultural points.<sup>469</sup>

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royalties) than that song being broadcast to accompany a test card before or after an actual television programme on the same station.

<sup>464</sup> *Implementing Provisions A ss X – XII.*

<sup>465</sup> *Ibid s X.*

<sup>466</sup> *Ibid s XI(1)-(6).*

<sup>467</sup> *Ibid s XI(7).*

<sup>468</sup> *Ibid fns 14 and 22:* a regularly returning programme is one which returns either on a minimum of five consecutive days or once a week during a minimum of seven consecutive weeks. For such uses, different cultural considerations apply. While they are weighted less strongly in the allocation of performance royalties (see above at n 450), they nevertheless obtain the usual number of cultural points. In the allocation of broadcasting royalties, however, they are first weighted less strongly (see above at n 463) and, in addition, not given any cultural points.

<sup>469</sup> *Implementing Provisions A s XII paras 1 and 3.*

#### 11.1.4 Implications for the Diversity in Online Music

Having outlined the main elements of GEMA's cultural redistribution in the allocation procedure, the analysis now turns to the potential implications of such a mechanism for the diversity of online music. First, we determine the concept of 'cultural importance' that underpins GEMA's cultural redistribution (11.1.4.1) before concluding that it is unable to promote diversity in online music (11.1.4.2). In order to broaden the focus, the final remarks provide more general considerations as to whether and how it would be possible to promote diversity in online music through a mechanism of royalty redistribution (11.1.4.3).

##### 11.1.4.1 The Concept of 'Cultural Importance' in the Allocation Procedure

In German legal commentary, the way in which GEMA's cultural redistribution is organised is usually interpreted as displaying a general underlying rationale, namely that of rewarding the complexity of the musical work in question.<sup>470</sup> This is particularly obvious with serious music, where the number of cultural points increases with the number of instruments and voices featured as well as the length of the works. In relation to light music, the number of cultural points does not depend on the instrumentation of a work but rather the musical genre to which it belongs. But even so, the way in which the maximum number of obtainable cultural is nuanced from genre to genre shows a desire to favour more complex genres. Given that, in addition, length is used as another factor, the goal of rewarding complexity in both serious and light music is clearly discernible.

German commentators have put forward two different justifications for this favourable treatment of complex music. The first rests on the assumption that the more complex a musical work the less likely it is to be performed.<sup>471</sup> From this perspective, the cultural component in the allocation procedure balances out the disadvantages that complex musical works may experience due to the increased efforts needed to perform them.

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<sup>470</sup> Müller, *Der Verteilungsplan der GEMA*, 243-244; Augenstein 145.

<sup>471</sup> Müller, *Der Verteilungsplan der GEMA*, 243-244.

This understanding could account for some striking characteristics in the allocation of cultural points. First, it clarifies why the range of obtainable cultural points is much broader for works performed (up to 2400 for serious and 480 points for light music) than broadcast (up to 2.5 for serious and 2 points for light music). In fact, this takes into account that the lack of performance chances of complex works is an irrelevant consideration in the case of broadcasting. Broadcasters typically use sound recordings; these, however, are readily available irrespective of the complexity of the underlying musical works.<sup>472</sup>

The intention of rewarding complex works also explains the noticeable difference in the maximum number of cultural points that a musical work may obtain in the allocation of performance royalties depending on whether it is of serious (up to 2400) or light nature (up to 480). Such differential treatment results from the assumption that, typically,<sup>473</sup> two works of serious music may, in relation to their complexity, diverge to a much stronger extent than two works of light music.<sup>474</sup> It should be noted, however, that the implications of these diverging scales are less far-reaching than one might assume at first glance. From the fact that serious music may attract many more cultural points than light music, one might be tempted to conclude that serious music generally receives a higher number of overall points and thus a bigger share of royalties than light music. Yet, at least as far as performance royalties are concerned, such cross-subsidy is impossible, as two separate distribution sums exist for serious and light music.<sup>475</sup> The situation is different for royalties from radio and TV broadcasts, which form a common distribution sum.<sup>476</sup> In contrast to public performance royalties, however, the maximum number of cultural points in the allocation of broadcasting receipts does not differ strongly: serious music may attract up to 2.5 and light music up to two, or even 2.5 cultural points where it is of particular

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<sup>472</sup> *Ibid* 252.

<sup>473</sup> Note that atypical cases may still be treated in an equitable way in that the Works Committee may determine that a musical work has 'particular artistic value' which, in turn, leads to a higher amount of cultural points. See above, ns 457 and 467, and below, on page 162

<sup>474</sup> Müller, *Der Verteilungsplan der GEMA*, 246-247.

<sup>475</sup> *Ibid* 153-154.

<sup>476</sup> *Implementing Provisions A s IX(1) para 2*; see also Müller, *Der Verteilungsplan der GEMA*, 202-204, 211-212, 253-254.



artistic value.<sup>477</sup> With regard to both performance and broadcasting royalties, a systematically favourable treatment of serious music is thus precluded.<sup>478</sup>

According to a second view, the somewhat more evaluative consideration of complexity is indicative of an author's achievement and skills. In particular, it has been argued that the more complex a work, the more scope there was for authors to express their individuality. Moreover, complex music has also been judged to be of more cultural value as it forced the listener to actively engage with the work.<sup>479</sup>

Irrespective of the particular justification given, it has become apparent that GEMA's cultural considerations break with the principle of a strictly usage-based royalty allocation and introduce a form of redistribution affecting all musical categories. In simplified but pointed terms, one could say that heavily used but culturally unimportant works cross-subsidise those that are little used but culturally important. The decisive criterion for determining whether a musical work is culturally important is its complexity. The question that remains to be addressed is whether this practice promotes diversity in online music.

#### **11.1.4.2 The Inappropriateness of the Cultural Redistribution in the Allocation Procedure for Promoting Diversity in Online Music**

The preceding analysis has focused on GEMA's allocation procedure, in which performance and broadcasting royalties are not only allocated on the basis of use but moreover in accordance with cultural considerations. Upon closer examination, it has become apparent that these considerations create a mechanism of royalty allocation aimed to promote musically complex works.

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<sup>477</sup> See above, text accompanying ns 465, 466 and 467.

<sup>478</sup> This, however, does not mean that it may not be much more advantageous for an individual work to be classified as serious instead of light music. The distinction between serious and light music is therefore criticised by many; see Bergner, Frieder W, 'Das E und das U in der Musik' *Glarean Magazin* (10 August 2007) <<http://glareanverlag.wordpress.com/category/u-und-e-musik/>> accessed 10 February 2013, on the one and Hagedorn, Volker, 'Nur der Markt macht die Musik' *Die Zeit* (2004) <<http://www.zeit.de/2004/12/GEMA>> accessed 10 February 2013, on the other hand. The distinction between serious and light music also leads to the application of different tariffs for public performances; see Risch and Kerst, *Eventrecht kompakt: Ein Lehr- und Praxisbuch mit Beispielen aus dem Konzert- und Kulturbetrieb* (2nd edn, 2011) 321-323.

<sup>479</sup> Augenstein 145.

This section seeks to contrast this finding with the postulate to promote the creation of a diverse body of music, deduced from TFEU Article 167(4) and Article 7 of the 2005 Convention. It may be recalled that diversity in online music can most crucially be influenced at two points in the value chain of online music: through the creation of a diverse range of music and through licensing mechanisms that allow for this musical diversity to be made available online to the broadest extent possible.<sup>480</sup> While the cultural element in GEMA's allocation procedure has no bearing on the latter condition it clearly targets musical creation: through monetary rewards the collecting society aims to provide an incentive for authors to produce complex musical works. Whether GEMA's allocation procedure promotes diversity in online music thus hinges on the question of whether this stimulus also promotes the creation of a diverse body of musical works. Such diverse musical creation is promoted in an environment that encourages all groups within society to express their cultural identity through the creation of music.<sup>481</sup> Whether GEMA's favourable treatment of complex musical works helps build such an environment, however, appears doubtful. More precisely, one may question whether it is appropriate to use complexity as the only relevant criterion for supporting musical creations and whether GEMA's cultural redistribution possesses the required degree of flexibility.

Our first critique concerns the standard by which GEMA determines whether, and to what extent, it offers cultural support to musical works, which proves hard to reconcile with the promotion of diverse musical creation. The decisive criterion is based on musical complexity: complex works receive more cultural points and thus a larger share in the allocated royalties than musically less complex works. The problematic aspect is that GEMA thus resorts to an intrinsic feature of musical works. To make support dependent on such inherent qualities, however, reveals an underlying judgmental conviction that music may be more or less culturally valuable. Yet, such evaluative considerations are not only at odds with the anthropological view of culture that EU law embraces<sup>482</sup> but can neither be aligned with the principle of

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<sup>480</sup> See above at 8.1, on page 104.

<sup>481</sup> See above at 7, on page 84.

<sup>482</sup> See above at 5.5, on page 26.

equal dignity of and respect for all cultural groups (which is explicitly in Article 2(3) of the 2005 Convention and following the suggested harmonious interpretation also needs to be taken into account for interpreting TFEU Article 167(4)).<sup>483</sup>

That the recourse to the intrinsic criterion of complexity is allegedly motivated by the desire to balance out the low chances of musical works of being performed does not change this assessment. The assumption that there was a monocausal link between the complexity of a musical work and the number of times it is performed is too simplistic and lacks being assessed against reality. In fact, the decision to perform a musical work is informed by many factors, amongst which musical complexity is only one. Arguably, a much more influential role is played by market demand. Works of a popular composer, for example, will be performed more often than those of unknown authors, even if they share the same degree of complexity. Conversely, musical works expressing the identity of a cultural minority will only see limited market demand and thus not be performed much even when they are not particularly complex. Such cases, however, lie beyond the scope of what is assessed during GEMA's allocation procedure.

This demonstrates a striking conceptual difference between promoting complexity on the one hand and musical diversity on the other: the first lacks the normative element of pluralism that is at the core of the latter. Support for complex music only promotes a particular type of music whereas the objective to encourage all cultural groups to create music argues in favour of promoting all types of music.

There is, however, one element in the legal framework of GEMA's cultural redistribution that, at least at first sight, may call this verdict into question. In fact, the Works Committee may increase the cultural points of works of light music if they are of 'particularly artistic value'.<sup>484</sup> Since the Distribution Plan itself does not contain any

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<sup>483</sup> Where cultural support would target all works that lack performances (and not only those which supposedly do because of their complexity), this could indeed promote the creation of diverse music; see below, on page 168. As to the consequences of the principle of equal dignity of and respect for all cultural groups for the promotion of the diversity of cultural expressions, see above at 7.2.2, on page 94.

<sup>484</sup> *Implementing Provisions A s XI(7)*; see above, ns 457 and 467. Likewise, the Works Committee may determine that a work of neither serious nor light nature receives up to 2.5 cultural points in the

indication as to how this term is to be interpreted the Works Committee has a considerable margin of discretion. Theoretically, this could thus be a vehicle for introducing pluralistic aspects and promoting not only the creation of complex but also diverse music. A look into the practice of the Works Committee, however, reveals that in order to determine particular artistic value it assesses a work against criteria such as the quality and individual signature of the theme or the compositional implementation and instrumentation.<sup>485</sup> Hence, it appears that the discretionary power is not, in practice, used to correct but rather to carry forward GEMA's evaluative approach to works whose extraordinary complexity could not appropriately be accommodated by the existing categories. This reinforces the impression that GEMA's cultural redistribution favours complex and not necessarily diverse music.

However, even promoting the creation of a diverse body of musical works may, under specific circumstances, call for one-sided policies. Notably, it has already been concluded earlier that promotive measures favouring a particular musical genre may be legitimate if they intend to offset particular difficulties that authors of that genre experienced in expressing their cultural identity through music.<sup>486</sup> At first sight, this statement may seem broad enough to justify a preferential treatment of complex works. A closer analysis, however, reveals that the necessary conditions are not fulfilled. One may already doubt that it could be shown that authors of complex works face more difficulties in creating music than authors of other types of music. But at a more fundamental level, it must be recalled that the consideration underlying the mentioned exception was that songs expressing the same cultural identity share particular features and thus form a common musical genre. Then, a musical genre can be seen as a proxy for a particular cultural group and this is the premise under which lending support to a particular genre may still meet the objective of creating an enabling environment for all cultural groups. Yet, this pre-supposes the choice of appropriate criteria for categorisation; namely criteria capable of making apparent

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allocation of royalties from broadcasting, *Implementing Provisions A s XII*.

<sup>485</sup> Information provided by GEMA on 26 March 2012.

<sup>486</sup> See above at 7.2.2, on page 94.

those common features between musical works that determine their ‘symbolic meaning, artistic dimension and cultural values’.<sup>487</sup>

To categorise works solely according to their musical complexity, however, does not meet this standard. Undoubtedly, a certain degree of complexity is something that musical works may or may not share. Perhaps one could even say that musical works of largely differing complexity are unlikely to be expressions of the same cultural identity. A general rule, however, that musical works with a shared degree of complexity convey largely similar cultural ideas and thus form a common genre seems far-fetched. One might, for example, easily imagine songs that, in spite of similar simplicity as to their musical instrumentation and composition, largely differ in style. Again, this demonstrates that the criterion of complexity cannot be employed to implement cultural pluralism.

Moreover, and as a second point of critique, GEMA’s cultural redistribution is equally at odds with the concept of intercultural dialogue. Article 1(b) and (c) proclaim as one of the objectives of the 2005 Convention to ‘create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner’ and ‘to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace’. Diverse musical creation – as deduced from Article 7 – is a pre-requisite of this goal; only where all social groups are free to express their cultural identities can dialogue and exchange between them commence. The incentives created by GEMA’s cultural redistribution, however, are more likely to inhibit exchange and mutual enrichment between the various genres due to the inflexibility of the mechanism. Notably, the chosen categorisation of musical works does not leave much room for review; owing to GEMA’s inner democratic structure it would be difficult to change and, indeed, it has not evolved significantly in the past. When a new musical work is notified to GEMA, the society assesses – once and for all – into which musical category it falls and this classification determines the cultural points it will attract in all

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<sup>487</sup> See the definition of ‘cultural content’ in Article 4(2) of the 2005 Convention. Admittedly, this will always be a difficult and necessarily subjective choice requiring a more careful analysis than can be provided here. Some possible elements, however, have already been highlighted above, on page 135.

future royalty allocations. To the extent that the cultural element in the allocation procedure must be kept at a manageable administrative level it is understandable that GEMA strives for stability. The effects of such inflexibility for future musical creation, however, cannot be welcomed. Monetary rewards based on a set of fixed pre-established categories may incentivise musical creation but, it is asserted, they set the wrong incentives, encouraging authors to create music that fits these categories. This, however, may cement musical structures and fail to encourage the development of experimental musical works that cannot easily be described in conventional terms.

Admittedly, one particular feature in GEMA's cultural redistribution could – at least in theory – mitigate these conservational effects. Distribution Plan A contains a catch clause according to which works that cannot be placed into any of the pre-defined categories of either serious or light music receive a certain number of cultural points: in the allocation of broadcasting royalties one and in the allocation of performance royalties, depending on their length, between 12 and 1200 cultural points.<sup>488</sup> While this avoids any potential *lacunae* in GEMA's cultural redistribution, the figures show, once placed into context, that the authors' society does not deem these works culturally important. In the allocation of broadcast royalties, one cultural point is the minimum across all musical categories and in the allocation of performance royalties the prescribed range is at the lower end of the cultural points that serious music may attract.<sup>489</sup> Hence, these works receive less cultural points than the categories with which they compete for royalties.<sup>490</sup> This, however, does not extenuate the incentives for authors to create music that fits GEMA's pre-determined categories but rather reinforces them.

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<sup>488</sup> *Implementing Provisions A s XII.*

<sup>489</sup> *Ibid* ss X-XI.

<sup>490</sup> Certainly, in the allocation of performance royalties, the range of cultural points that works of neither serious nor light music receive is higher than the maximum prescribed for categories of light music. This, however, remains without practical effect. In fact, the royalties from performances of serious music are distributed separately from those of light music. Royalties from performances of the works in question, however, are allocated in distribution section E, and thus they only compete with serious music; see Müller, *Der Verteilungsplan der GEMA*, 247. Hence, the cultural points do not lead to any preferential treatment *vis-à-vis* works of light music.

All of this shows that by placing conditions on cultural support based on musical complexity, GEMA's cultural redistribution fails to promote the creation of diverse musical works and thus diversity in online music, as it is unable to respond to the exigencies of the principles of diversity of cultural expressions, cultural pluralism and intercultural dialogue. It should be added that this result was, by no means, pre-determined by the statutory obligation 'to promote culturally important works' (UrhWG § 7). As the statute leaves it to the collecting societies to define this concept, GEMA could well decide to regard those musical works as culturally important that make the overall body of created music more diverse.

#### **11.1.4.3 The Redistribution of Royalties as a Potential Means for Promoting Diversity in Online Music**

Beyond this result, a more intriguing question remains to be addressed: would it be possible to incorporate an element of cultural redistribution into the otherwise strictly usage-based allocation of royalties that would promote diverse musical creation and thus diversity in online music? If so, how would it need to be designed? In analysing these questions, the aim is to distil some of the parameters that cultural measures would have to possess in order to be able to positively influence musical diversity. It is hoped that these parameters will be more generally applicable to cultural measures whether put in place by collecting societies or states.

Perhaps the most striking feature of GEMA's cultural redistribution in the allocation procedure, and thus the start of our analysis, is that it is entirely based on an analysis of the body of musical works that have already been created by the society's authors. Centred on the various social groups and how they express their cultural identities, Article 7 of the 2005 Convention has a slightly different perspective. By solely focusing on the results of expressing one's cultural identity – in this case, the musical works created – GEMA short-circuits much of the sociological underpinning of the Convention. But could such a shortcut approach still be appropriate for encouraging all cultural groups to create musical works?

Clearly, a one-to-one practical implementation of the theoretical approach of Article 7 appears impossible. Applied literally to the area of music, the norm would require a sociological exercise that first maps out all groups in society before then enquiring whether they express their cultural identity through music. If a certain group did not, additional research would need to show whether the group was prevented from or simply did not care for creating music. However, any such assessment would have to confront the difficulties associated with taxonomising cultural groups in times of dynamic and permeable cultural affiliations.<sup>491</sup> Even if these pitfalls could be avoided, to quantify the pluralistic element of musical diversity in any reliable way seems an endeavour far too arduous and resource-intensive even for states, let alone collecting societies.

Consequently, practicable ways of encouraging all social groups to express their cultural identity through music must be found. Inevitably, this will lead to certain generalisations that, it is suggested, have to be accepted as long as the implementation as a whole conforms to Article 7.<sup>492</sup> From this perspective, the focus on musical output, as the basis for cultural support, may be justified by practical constraints.

However, that focus has one important drawback that would exclude it as an appropriate means to promote diversity in musical creations in specific scenarios. Notably, from the available data it is impossible to ascertain whether there are any groups wishing, but unable, to express their cultural identity through music. In societies in which social groups are inhibited by law or fact from expressing their cultural identity through music, a cultural redistribution mechanism based on already existing musical output would be moot because these groups would stay out of reach. Instead, the objective of encouraging all groups to express their identity through music would call for measures aimed at removing any such legal or factual obstacles.<sup>493</sup> A

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<sup>491</sup> See also the remarks above, on page 136, asking whether and how the normative element of diversity in online music could be measured.

<sup>492</sup> See the discussion on the difficulties of categorisation in the application of the *Stirling* model above, on page 119.

<sup>493</sup> Article 2(3) of the 2005 Convention confirms this point by stressing that the equal dignity of and respect for all cultures is a precondition for the protection and promotion of the diversity of cultural expressions. See for a more detailed discussion above at 7.2.2, on page 90.



system of incentivising musical creation by rewarding music that has been created in the past can thus only be an appropriate approach in societies that have reached a certain level of cultural pluralism in that everybody wishing to participate in that system may do so.<sup>494</sup>

As a first intermediate result, we can therefore conclude that cultural redistribution built into the distribution of royalties is not *a priori* inappropriate for achieving the promotion of diverse musical creation just because it is construed on musical output.

The decisive question would then be whether criteria for cultural redistribution could be found that would promote a diverse musical creation, ie build an environment that encourages social groups to express their cultural identities through musical creation. The principle of equal dignity of and equal respect for all cultures, enshrined in Article 2(3) of the 2005 Convention, further refines the contours of this aspired environment in that its objective must be to enable and encourage *all* social groups to create music. While the overall goal is that all cultural groups should be free to decide whether or not to create music, measures to reach that goal are necessarily differential, affecting various cultural groups differently.<sup>495</sup> This takes into account that cultural groups exist in different realities, in which they are more or less able to assert their cultural identity. The framework of Article 7 of the 2005 Convention also reveals the desired degree of diversity: a body of created musical works is diverse if all social groups are free to contribute.

It follows that, in order to promote diverse musical creation, support measures would primarily have to be directed against any legal or factual obstacles generally impeding on a cultural group's ability to create music. Consequently, cultural support

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<sup>494</sup> In the specific case of GEMA, this is the case: in Germany, human and fundamental freedoms are guaranteed by law and, as far as can be seen, no cultural group faces practical obstacles that would prevent it from creating music. Finally, GEMA membership is open to anybody creating music irrespective of his or her cultural affiliations.

But even in societies without obvious legal or factual obstacles, it would be wise to provide for certain safeguards as a once achieved level of cultural pluralism cannot be taken for granted. If a state relied on an authors' society for promoting musical creation, it must remain alert and create some form of early warning system equipped to pick up the signs if and when this level deteriorates.

<sup>495</sup> See above at 7.2.2, on page 94.

that is construed on the basis of already created musical works is unable to promote diverse musical creation in societies in which the primary ability of all cultural groups to create music is not safeguarded. Under such circumstances incorporating an element of cultural redistribution in the allocation of music royalties could not be an appropriate instrument.<sup>496</sup>

But the principle of equal dignity of and equal respect for all cultures provides direction not only for cultural measures aimed at removing such impediments but also those seeking to stimulate musical creations through positive incentives. Notably, no particular cultural groups must be unduly favoured.<sup>497</sup> This would also determine the way in which a cultural redistribution mechanism would have to be shaped. In addition, however, it must be taken into account that such a mechanism would only be one element in the bigger scheme of allocating performing royalties. If the allocation of royalties, without an additional cultural element, did not help establish an environment that encouraged all cultural groups to create music, such an element could serve as a corrective. The search for a suitable criterion for cultural redistribution thus warrants a closer look at the consequences of royalty allocation in general.

It is only because copyright endows authors of music with exclusive rights in their works that there are any royalties to be distributed. Copyright assumes that by monetizing the exclusive rights in their works authors will recoup the costs incurred during the creative process. This prospect, it is further expected, incentivises musical creation and thus creativity and innovation. Underlying the whole construction is the premise that the public gains in terms of creativity and innovation are greater than or equal to the private gains of authors.<sup>498</sup>

The whole aim of copyright is thus to prompt cultural creation. Still, if assessed against the objective to encourage all cultural groups to create music, it appears problematic that copyright is only able to live up to that objective under

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<sup>496</sup> See above, on page 167.

<sup>497</sup> See above at 7.2.2, on page 94.

<sup>498</sup> Schovsbo 3.

specific circumstances.<sup>499</sup> Markedly, authors can only monetize their exclusive rights if others wish to use their works. This direct correlation between the monies generated with a specific work and the public demand for that work unveils that copyright exclusivity is a rather imprecise tool to incentivise diverse cultural creation. This may be illustrated by looking at two extreme examples. On the one hand, the mass of musical works with low public demand cannot realise the prospect of monetary rewards to any noteworthy extent; in these instances, copyright exclusivity fails to serve as an incentive. On the other hand, successful works may generate extremely high royalties, arguably surpassing what would be needed to fulfil the incentivising function. In the language of the 2005 Convention, one would therefore have to conclude that not all cultural groups are equally encouraged to create music. On the contrary, copyright exclusivity one-sidedly favours the music of the cultural groups in the majority.

The collective management of authors' rights, to a certain extent, mitigates these effects. Notably, it allows for monetising these rights in situations in which individual licences would be impossible to negotiate and thus opens royalty streams which otherwise would remain untapped. Although this benefits all right holders, an author's royalty payments still depend directly on public demand. There are, however, certain elements of collectivisation that aim at closing the gap between the successful few and the fortuneless many. Notably, the practices of blanket licensing and collective royalty allocation introduce elements of solidarity amongst right holders.<sup>500</sup> While these effects are to be welcomed, they do not go far enough if musical creation of all cultural groups is to be encouraged. Even where authors' rights are administered collectively, empirical data suggests that the gap remains immense between a few highly successful and the many authors whose works are without significant demand. In 1994, PRS distributed £20.35 million to 15,000 author members. The highest-earning 1.3 per cent of authors received a royalty share of nearly 41 per cent, and the highest-earning 19.5 per cent accounted for some 92 per cent. In absolute terms, 10

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<sup>499</sup> As to the relationship of copyright and diverse musical creation, see also above at 8.1.1, on page 104, as well as below at 11.5, on page 200.

<sup>500</sup> See in more detail below at 10.1.3, on page 143.

authors received more than £100,000 while 8,237 authors were allocated less than £100.<sup>501</sup> In 2000, only five per cent of authors represented by PRS reached the average UK wage from copyright earnings alone.<sup>502</sup> In 2003, only 2.4 per cent of GEMA's authors could live from their creative output.<sup>503</sup> It can therefore safely be concluded that even under collective rights management 'a small number of very high earners earn a disproportionate share of total income'.<sup>504</sup> Yet this also means that a strictly usage-based allocation of royalties fails to encourage all cultural groups to create music.

These shortcomings could, in fact, be remedied through a form of cultural redistribution that levels out the identified pitfalls of a strictly usage-based allocation with a view to encouraging all cultural groups to create music. The obvious criterion to achieve this would be the demand for a musical work. Works should benefit from cultural redistribution if they have not been used enough to generate copyright royalties sufficiently high to have an incentivising effect. In order to assess public demand, one could rely on the way in which GEMA grants performance points to each work in the allocation procedure. First, a certain number of performance points should be determined as the threshold above which a musical work will not receive any cultural points. This takes into account that the incentive function of copyright is attained with royalty payment of a certain importance. Then, however, musical works attracting such high payments should not in addition benefit from cultural redistribution. Second, for works below that threshold, the fewer performance points they obtain the more cultural points they should be allocated. Finally, those works with the fewest performance points should obtain the highest cultural redistribution. It has been argued in cultural economics that the least produced genres are constantly

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<sup>501</sup> Great Britain Monopolies and Mergers Commission, *Performing Rights: A Report on the Supply in the UK of the Services of Administering Performing Rights and Film Synchronisation Rights*, paras 5.35-5.34. For an analysis of royalty distributions in other areas of collectively administered copyright (literary and visual arts works), see Kretschmer and Hardwick, *Authors' Earnings from Copyright and Non-copyright Sources: A Survey of 25,000 British and German Writers* (2007); Kretschmer and others, *Copyright Contracts and Earnings of Visual Creators: A Survey of 5,800 British Designers, Fine Artists, Illustrators and Photographers* (2011).

<sup>502</sup> Kretschmer, *Does Copyright Law Matter?* (2012) 21.

<sup>503</sup> *Ibid* 22, citing Dümling, *Musik hat ihren Wert: 100 Jahre musikalische Verwertungsgesellschaft in Deutschland* (2003) 313.

<sup>504</sup> Kretschmer 22.

at risk of being marginalised.<sup>505</sup> On this view, one might even consider not only granting the highest but also indeed a disproportionately high share of cultural redistribution to the works with the fewest performance points. To have a particularly strong incentive for the least demanded works would encourage cultural groups that are not yet able to express their cultural identity through music to do so because they would know that even if their music were only of niche interest it would attract relatively high cultural payments.

A system of cultural redistribution as described above would have several advantages. In comparison with GEMA's current cultural considerations, it would be simple to administer. There would be no need to classify musical works into genres because the proposed criterion of lack of public demand can be measured in relation to each individual musical work. Moreover, the system would be much more flexible. Cultural payments would not depend on how a work fits into a system of long determined categories but how each work has fared commercially in a given year. If the public demand for a work changes, the number of performance points it attracts do too, which, as has been proposed, would also impact on the cultural redistribution payments. Finally and most importantly, such a system would be in line with the promotion of diverse musical creation and thus the promotion of diversity in online music.

Finally, one should be clear about the effects of changing from a redistribution based on complexity to one of diversity. Works that are musically complex and seldom performed would benefit from both regimes while successful complex works would be supported to a smaller extent. In addition, and this is the important difference, a redistribution based on diversity would support all musical works whose performance royalties alone would be too low to be considered an appropriate incentive for musical creation, irrespective of their musical complexity.

Obviously, the above paragraphs only paint a very sketchy outline of a possible cultural redistribution mechanism and many important decisions would still need to

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<sup>505</sup> Benhamou 8.

be made.<sup>506</sup> For present purposes, however, suffice it to conclude that it would be possible to incorporate an element of cultural redistribution into royalty distribution that would promote diverse musical creation.

## **11.2 The Promotion of Culturally Important Works through Evaluation Payments**

The analysis now turns to the second tier of GEMA's specifically cultural activities, namely the cultural considerations it applies in the evaluation procedure. In this scheme, a specified amount of royalties are distributed. Independent from the allocation procedure, the evaluation procedure is based on specific rules of its own. The largest share of the available funds in the evaluation procedure finances the so-called evaluation payments.

These are additional payments that every composer, lyricist or publisher of both serious and light music may attract if the necessary conditions are fulfilled.<sup>507</sup> For the majority of the various professional groups, these conditions are based on cultural considerations. Where this is the case, evaluation payments implement GEMA's statutory obligation to 'promote culturally important works' (UrhWG § 7).

Like the cultural redistribution of the allocation procedure, evaluation payments affect the royalties of all GEMA members. While this is obvious for

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<sup>506</sup> What should the threshold be above which no cultural redistribution is to be paid? How high should the maximum share of cultural redistribution in the overall royalty payments of a musical work be? Should the cultural redistribution increase arithmetically with decreasing performance points or would it be more appropriate or practicable to let it increase in steps? Should the system take into account that one author typically receives royalties for several works? This is not the space to contemplate such detailed questions in the abstract. If a collecting society intended to reform its allocation procedure in compliance with the objective to promote the creation of diverse music, it would appear important to openly discuss these questions during the internal decision-making process.

<sup>507</sup> *Evaluation Procedure Composers E; Evaluation Procedure Lyricists E; Evaluation Procedure Publishers E; Evaluation Procedure U*. For arrangers and adaptors, GEMA's statutes provide for an Estimation Procedure; see *Rules on the Estimation Procedure for Arrangers and Adapters* in GEMA (ed), *GEMA-Jahrbuch 2012/2013* (2012) 391. This procedure, however, is not based on cultural considerations; see Riesenhuber, 'Das Schätzungsverfahren der Bearbeiter (GO Schätzung B)' in Kreile and others (eds) *Recht und Praxis der GEMA* (2nd edn, 2008) 654, para 1. It is thus outwith the scope of the present analysis.

members receiving such payments, there is also an impact on those who do not qualify. If there were no evaluation payments and the used sums were distributed according to the normal allocation procedure, the overall amount of royalties would be different. The evaluation payments are thus also a form of redistribution on cultural grounds. Whether these grounds are identical to those prevalent in the allocation procedure, however, is still to be seen. The payments can also be seen as an *ex post* reward for the creation of musical works. In comparison to the cultural elements of the allocation procedure, however, their incentivising effect is even more direct because the payments are not internally offset but paid separately.

Our discussion first explores the provenance of the funds for the evaluation procedure (11.2.1). The cultural considerations that determine the evaluation payments for authors of serious (11.2.2) and light music (11.2.3) are then assessed before exploring their implications for diversity in online music (11.2.4).

### 11.2.1 Provenance of the Funds for the Evaluation Procedure

The funds distributed in the evaluation procedure come from two different sources. The first and most prominent source is a ten per cent deduction from the gross distribution sum that GEMA generated through its members' performing rights; ie the receipts paid out through Distribution Plan A.<sup>508</sup> First, GEMA deducts from the overall earnings its administrative costs.<sup>509</sup> From the resulting gross distribution sum, the society then deducts ten per cent for cultural and social aims. In 2011 this amounted to €27.5 million.<sup>510</sup> The remaining net distribution sum is paid out to right holders in the various distribution sections through the allocation procedure.<sup>511</sup>

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<sup>508</sup> *General Principles of Distribution Plan A* in GEMA (ed), *GEMA-Jahrbuch 2012/2013* (2012) 293, § 1(4)(a).

<sup>509</sup> Within Distribution Plan A a uniform cost rate applies to all the different sections. Only the royalties that GEMA receives from foreign collecting societies are subjected to a reduced cost rate of five per cent. This is because a deduction to cover the relevant foreign collecting society's costs has already been applied before passing the sums on to GEMA for distribution; see Müller, *Verteilungsplan A*, para 4.

<sup>510</sup> GEMA, *GEMA-Jahrbuch 2012/2013* (2012) 51.

<sup>511</sup> Where these sums are to be allocated collectively, they are subject to the analysed element of cultural redistribution; see above at 11.1, on page 149.

In this regard, online royalties also play an important role in the funding of the evaluation procedure. Notably, as far as they are allocated according to the rules in Distribution Plan A<sup>512</sup> they are also subject to this ten per cent deduction.<sup>513</sup>

Although ten per cent deductions for cultural and social ends are common practice amongst continental European collecting societies and also enshrined in the CISAC Model Agreement,<sup>514</sup> their legality is contested.<sup>515</sup> In particular, PRS for Music has been highly critical of these deductions in the past.<sup>516</sup> Given, however, that the question of whether the cultural activities of collecting societies promote diversity in online music does not depend on how they are funded, the legality of the ten per cent deductions lies beyond the scope of this chapter.<sup>517</sup>

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<sup>512</sup> Depending on the particular form of online use that has generated the receipts, either one or two-thirds of the online royalties are allocated through Distribution Plan A; *General Principles C* § 2. See above n 445.

<sup>513</sup> Confirmed by GEMA on 26 March 2012.

<sup>514</sup> *CISAC Model Reciprocal Representation Agreement for the EU* in GEMA (ed), *GEMA-Jahrbuch 2012/2013* (2012) 248, § 8(II); the historic development of the 10 per cent rule is analysed by Hauptmann 67–70.

<sup>515</sup> Doubts as to their legitimacy have been nourished by the fact that such deductions are applied on all of GEMA's income without making a distinction whether that income pertains to works created by GEMA's own members or authors of one of GEMA's sister societies, which is represented by GEMA; even where works of another society's repertoire are exploited, the cultural and social contributions are deducted before the corresponding royalties are passed on to that society. At the same time, the cultural and social funds only support GEMA's own members. This has the effect that foreign creators help finance a system which will never benefit them.

<sup>516</sup> Most of GEMA's sister societies accept them as they equally make use of cultural and social deductions. In relation to British creators, however, no such element of rough justice exists. Generally, PRS applies cultural deductions to a much smaller extent and only to the royalties earned from its own repertoire. In addition, funding is open even to non-members and members of other societies. As to the PRS deductions, see KEA European Affairs 128. See also Harcourt, 'The Unlawful Deduction Levied upon UK Composers Performing Right Income' [1996] *Copyright World* 15, contending that cultural and social deductions are a hidden form of discrimination prohibited under the law of the (then) European Community. For the US perspective, see Ladd, 'To Cope with the World Upheaval in Copyright' (1983) 19 *Copyright* 289, 299, who – without further analysis – denounces them as an abuse of copyright.

<sup>517</sup> The question of legality is assessed by a number of existing contributions which analyse the compatibility of these deductions with the principle of national treatment enshrined in Article 5(1) of the Berne Convention and Article 3 of the TRIPS Agreement as well as the principle of non-discrimination proclaimed by TFEU Article 18; see, for example, Lerche, 'Rechtsfragen der Verwirklichung kultureller und sozialer Aufgaben bei der kollektiven Wahrnehmung von Urheberrechten, insbesondere im Blick auf den sogen. 10 %-Abzug der GEMA' in GEMA (ed) *GEMA-Jahrbuch 1997/98* (1997) 80; Melichar, 'Deductions Made by Collecting Societies for Social and Cultural Purposes in the Light of International Copyright Law' (1991) 22 *International Review of Intellectual Property and Competition Law* 47; Bartels, 'Die Abzüge der Verwertungsgesellschaften für soziale und kulturelle Zwecke' [2006] *Archiv für Urheber- und*



A second and considerable part of GEMA's cultural and social funds is made up of non-allocable sums. These monies consist of interest gains on royalties received, membership and administration fees as well as contract penalty payments. Commentators have pointed out that it is imprecise to purport that these monies could not be allocated. Indeed, they could simply be added to the total amount available for distribution and thus increase each member's royalty receipts.<sup>518</sup> Interest gains could also be allocated individually to each member.<sup>519</sup> These sums are only non-allocable insofar as the usual method of allocation cannot be applied. Normally, receipts are distributed according to the use of each member's works. The mentioned sums, however, do not correspond to any particular use.<sup>520</sup> In 2011 the non-allocable sums amounted to €14.1 million.<sup>521</sup>

The total amount of deductions and non-allocable sums (in 2011 €41.6 million) is then distributed amongst several cultural and social activities that GEMA undertakes. In a first step, a maximum of 17 per cent is deducted to finance GEMA's social security fund (in 2011 €7.4 million).<sup>522</sup> The Executive Board and the Board of Supervisors must mutually agree on the splitting of the remaining monies.<sup>523</sup> In practice, the formula has not changed since 1990: 30.07 per cent go to the evaluation procedure for serious music (in 2011 €10.3 million), 58.67 to the evaluation procedure for light music (in 2011 €20.1 million), 6.90 to GEMA's pension scheme<sup>524</sup> (in 2011 €2.4 million) and 4.36 to the estimation procedure for adapters and arrangers<sup>525</sup> (in 2011 €1.5 million).<sup>526</sup> Finally, the sums provided for the evaluation

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Medienrecht 325; Katzenberger and Nérison, 'Kulturförderung, Solidarität und Verteilungsgerechtigkeit in Recht und Praxis urheberrechtlicher Verwertungsgesellschaften' (2011) 60 *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 283.

<sup>518</sup> Augenstein 108.

<sup>519</sup> Hauptmann 100.

<sup>520</sup> Augenstein 108.

<sup>521</sup> GEMA, *Jahrbuch 2012/13*, 51

<sup>522</sup> *Social Security Fund* § 2(1); Müller, Verteilungsplan A, para 13. As to the social security fund, see above, on page 149.

<sup>523</sup> *General Principles A* § 1(4)(a). The sums for the evaluation procedure in section E, however, may not be lower than 30.07 per cent (§ 1(4)(b)).

<sup>524</sup> As to the pension scheme, see above, on page 149.

<sup>525</sup> As to the estimation procedure, see above n 507.

procedure must be distributed between the different professional groups. In relation to serious music, composers receive 57.5, lyricists three and publishers 39.5 per cent (in 2011 this amounted to €5.9, €0.3 and €4.1 million respectively). Regarding light music, composers receive 42.5, lyricists 20 and publishers 37.5 per cent (2011: €8.5, €4.0 and €7.5 million). These formulae have been applied constantly since 1957 (serious music) and 1956 (light music).<sup>527</sup>

From the sums provided for the various evaluation procedures, a relatively small portion is set aside and not used for evaluation payments but to finance the adjustment funds. Technically part of the evaluation procedure, these funds exist for every professional group of both serious and light music and follow different but, at least partially, also culturally motivated rules.<sup>528</sup>

### 11.2.2 Evaluation Payments for Authors of Works of Serious Music

Although the evaluation payments for composers, lyricists and publishers of serious music are based on separate rules, the following assessment is limited to those applicable to composers of serious music. In part, this is possible because the evaluation payments for publishers of serious music do not depend on any cultural criteria. They are distributed as mere supplements to the publishers' earnings in the allocation procedure<sup>529</sup> and are thus without relevance for the purposes of assessing GEMA's cultural activities. Moreover, still in relation to serious music, the rules on the evaluation payments of composers apply *mutatis mutandis* to lyricists.<sup>530</sup>

The amount of the evaluation payment that an individual composer receives depends on the use of his works and additional cultural considerations. While the

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<sup>526</sup> Müller, Verteilungsplan A, para 15. The figures for 2011 are provided in GEMA, *Jahrbuch 2012/13*, 51.

<sup>527</sup> *General Principles A* fn 1.

<sup>528</sup> See below 11.3, on page 191.

<sup>529</sup> *Evaluation Procedure Publishers E* § 3(1)-(3). The only relevant criterion here is the amount of royalties from public performances and broadcasts in the allocation procedure.

<sup>530</sup> *Evaluation Procedure Lyricists E* § 2. The Evaluation Committee for lyricists in section E consists of the same members as the Evaluation Committee for lyricists in section U; *ibid* § 1.

usage element is expressed in the composer's applicable earnings, the cultural element is reflected in so-called evaluation points.

### 11.2.2.1 The Usage Element: Applicable Earnings

The starting point to calculate a composer's evaluation payments is the determination of his applicable earnings. These are based on the three-year average amount of collectively allocated royalties that a composer of serious music generated from public performances and broadcasts of his works.<sup>531</sup>

There are, however, some refinements.<sup>532</sup> Thus, royalties from public live performances are fully taken into account up to an amount of €9,000; any exceeding amount is only considered if it is less than ten times as high as the royalties the composer earned from radio and television broadcasts.<sup>533</sup> Royalties from public live performances during religious services merely count insofar as they do not exceed one fourth of the average royalties from public live performances generally.<sup>534</sup> Finally, royalties earned from radio and television broadcasts count fully up to an amount of €1,500 and with one third up to an amount of €7,700. Of all royalties exceeding this sum, only ten per cent are considered.<sup>535</sup> The sum of a composer's applicable earnings, computed in this way, forms the basis of the calculation of his additional evaluation payment.

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<sup>531</sup> *Evaluation Procedure Composers E* fn 3. Relevant are sections E (*public live performances of works of serious music*), KI and FKI (*public live performances during religious services*), R (*radio broadcasts*), and FS (*television broadcasts*). As to collective and individual allocation, see below at 10.1.3, on page 143.

<sup>532</sup> *Evaluation Procedure Composers E* fn 3.

<sup>533</sup> This can only be understood against the background that some composers, in the past, abused the system of evaluation payments by artificially increasing their royalties through public live performances regardless of public demand. By tying the number of applicable performance royalties to the generated broadcasting royalties, GEMA's General Assembly rectified this situation insofar as it is assumed that radio and TV broadcasts reflect an existing public demand. See Riesenhuber, 'Das Wertungsverfahren der Komponisten in der Sparte E (GO Wertung KE)' in Kreile and others (eds) *Recht und Praxis der GEMA* (2nd edn, 2008) 578, paras 94-102, for a detailed description.

<sup>534</sup> This limitation is intended to take account of the particular nature of music for religious services, which differs from contemporary serious music in a strict sense; information provided by GEMA on 26 March 2012.

<sup>535</sup> The mentioned ceilings are an expression of solidarity in that successful composers agree to limit the amount of their evaluation payments to the benefit of less successful composers; information provided by GEMA on 26 March 2012.

### 11.2.2.2 The Cultural Element: Evaluation Points

Whether a composer participates in the evaluation procedure at all and – if so – to what extent his applicable earnings are taken into account, is decided in the second step, where each composer receives a certain number of evaluation points. Composers with less than ten evaluation points do not participate in the evaluation procedure. Those with ten or more evaluation points are classified into one of seven groups according to the points obtained.<sup>536</sup> For each group, a certain percentage (from ten to 100) is prescribed, which determines the extent to which the applicable earnings of all composers in that group are considered in the subsequent calculation of evaluation payments. For composers, for instance, with between ten and 19 evaluation points (group VII), only ten per cent of their average royalties are taken into account, while for composers with 120 evaluation points or more (group I) the full amount counts. To multiply a composer's applicable earnings with the relevant percentage results in a composer's weighted applicable earnings.

The amount of a composer's weighted applicable earnings alone merely serves as an accounting unit. It is the ratio of a single composer's weighted applicable earnings to the total amount of the weighted applicable earnings of all composers, eligible for evaluation payments, that determines his share in the overall sum available for evaluation payments. Applying this ratio to the overall amount of sums available finally defines the amount of a composer's evaluation payment.

The number of evaluation points therefore has an important bearing on the payments as they determine a composer's evaluation group and thus the percentage at which his applicable earnings are being taken into account to calculate the evaluation payment. Put simply, the more points a composer receives, the higher his evaluation payments.

There are, however, two important exceptions to this principle. On the one hand, once a composer has reached a certain evaluation group, he remains in that group even if he does not obtain the necessary amount of evaluation points in future

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<sup>536</sup> *Evaluation Procedure Composers E § 5(1).*

years.<sup>537</sup> On the other hand, no composer may receive more than two per cent of the overall sum available for the evaluation procedure.<sup>538</sup>

Three factors determine the number of evaluation points of every composer: the length of his membership; the revenue generated in the allocation procedure; and the evaluation of his artistic personality and creation.

### *Length of Membership*

Every member obtains one evaluation point for every year of membership.<sup>539</sup> Membership points may, however, only make up for a maximum of two-third of a composer's total evaluation points.<sup>540</sup> This limit finds its rationale in the fact that long membership alone cannot justify payments based on cultural importance.<sup>541</sup>

One might, however, take the view that the chosen threshold is not sufficiently restrictive to put this rationale into practice, in particular if one bears in mind that GEMA provides for a separate pension scheme.<sup>542</sup> Yet, on the other hand, even an exceptionally long membership of between 60 and 80 years could not bring a member within category I (in which applicable earnings are fully taken into account) but only category IV (in which they are taken into account at 60 per cent).

### *Revenue Generated with Serious Music*

The second factor in the determination of the evaluation points is the revenue a composer has generated with serious music. The royalties in all those distribution sections of the allocation procedure through which receipts for the use of (at least also partly) serious music are distributed are applicable.<sup>543</sup> Depending on the section, the

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<sup>537</sup> *Ibid* § 5(4).

<sup>538</sup> *Ibid* § 5(2) para 3.

<sup>539</sup> *Ibid* § 5(3)(A). All forms of membership count; Riesenhuber, GO Wertung KE, para 76.

<sup>540</sup> *Evaluation Procedure Composers E* § 5(2).

<sup>541</sup> Riesenhuber, GO Wertung KE, para 77.

<sup>542</sup> See above, on page 149.

<sup>543</sup> *Evaluation Procedure Composers E* § 5(3)(B)-(G). In contrast to the first step of the evaluation procedure where a composer's applicable earnings are determined (see above at n 531), not only collectively allocated royalties but also receipts that are distributed on an individual basis are taken

relevant bases are the earnings in the year or the average earnings in the three years preceding the evaluation. For each section, a certain amount in Euros represents one evaluation point. If composer gain that amount, they receive one evaluation point; if they earn a multiple of that amount, they receive the corresponding multiple of evaluation points up to a maximum limit of points obtainable in each section.

The Rules also contain a minimum threshold of four evaluation points that composers must achieve through their share of royalties in order to participate in the evaluation procedure.<sup>544</sup>

### *Entire Musical Oeuvre and Artistic Personality*

The third and final factor influencing a composer's evaluation points is the so-called evaluation proper, in which his or her entire musical *oeuvre* and artistic personality are assessed.<sup>545</sup> A composer may be accorded up to 80 evaluation points<sup>546</sup> by an Evaluation Committee consisting of five composers of serious music and elected by the General Assembly.<sup>547</sup> GEMA's statutes do not contain any definition of the terms 'entire musical *oeuvre*' and 'artistic personality'. Yet, some clarity as to their meaning can be derived from the criteria that must be fulfilled for composers to receive more than 40 evaluation points in this regard. Notably, such high numbers may only be accorded to composers 'whose musical *oeuvre* can be called comprehensive'.<sup>548</sup> Such composers may fall into four different sub-groups attracting 45, 50, 60 or 80 evaluation points respectively. The common determinant of all of these groups is that to qualify as comprehensive musical creation a composer's output

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into account in the calculation of revenue evaluation points. As to collective and individual allocation, see below at 10.1.3, on page 143.

<sup>544</sup> *Evaluation Procedure Composers E § 5(3)(H) para 2.* Two of these points must have been obtained through the royalties in sections E, KI and FKI, or R and FS. In the other sections there is no clear separation between serious and light music; thus the revenue does not necessarily pertain to the use of serious music. Accordingly, royalties in these sections alone would not justify payments under the evaluation scheme for serious music; Riesenhuber, GO Wertung KE, para 89.

<sup>545</sup> Own translation; in German, the terms 'Gesamtschaffen' and 'künstlerische Persönlichkeit' are used.

<sup>546</sup> *Evaluation Procedure Composers E § 5(3)(H).*

<sup>547</sup> *Ibid § 1(1) and (2).* See also Riesenhuber, GO Wertung KE, para 4.

<sup>548</sup> *Evaluation Procedure Composers E § 5(3)(H)(a).*

must comprise ‘the majority of musical genres’ and, in order to attract more than 45 points, in particular, orchestra works.<sup>549</sup> In addition, each group lists further qualifications that must be met to obtain the associated number of evaluation points.

More precisely, a composer must:

- in order to obtain 50 points:
  - (a) demonstrate performances in Germany and abroad, and
  - (b) TV and radio broadcasts corresponding to a minimum of €450 in royalties on average during the three years preceding the evaluation procedure;
- in order to obtain 60 points:
  - (a) demonstrate continuous performances and broadcasts during one decade
  - (b) of works of different musical genres, comprising orchestra works
  - (c) in Germany and abroad;
- in order to obtain 80 points:
  - (a) demonstrate continuous performances and broadcasts during one decade
  - (b) of works of different musical genres, comprising orchestra works
  - (c) as well as comprising standard or repertoire works, and
  - (d) demonstrate international repute expressed through performances of his works by foreign institutions or ensembles at a multitude of prominent music venues.

Composers whose musical creation does not meet the established criteria may still be accorded up to 40 evaluation points at the discretion of the Evaluation Committee in recognition of their musical creation and artistic personality. Yet, even in this context, more than 15 points presuppose an ‘appropriate number of performances and broadcasts’.<sup>550</sup>

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<sup>549</sup> In order to determine the relevant musical genres, reference is made to the indices of cultural points in the allocation procedure, provided in *Implementing Provisions A ss X and XII*; see *Evaluation Procedure Composers E § 5(3)(H)(a)* para 1.

<sup>550</sup> *Ibid § 5(3)(H)(b)*. Composers of predominantly church music may attract up to 50 (§ 5(3)(H)(c)) and those of predominantly choral music up to 40 points (§ 5(3)(H)(d)) without an explicit requirement in the rules to demonstrate an appropriate number of performances and broadcasts. In practice,

In light of these more detailed guidelines, it seems that the evaluation of a composer's entire musical *oeuvre* and his artistic personality entails an assessment of his reputation within Germany and beyond. Objectively measured are the use of a composer's works and the variety of different genres his works comprise, yet always with a view to the market's esteem. Thus, works of a broad variety of musical genres attract most evaluation points if they comprise standard or repertoire works. Likewise, the usage element has particular weight if the works have been performed over a long period of time or by highly regarded institutions in prominent venues. One could therefore say that what is assessed here is a particular type of success; not the immediate fame that also one-hit wonders may possess, but the ability to leave an enduring imprint in the musical field more akin to the overall achievement of an author.

### 11.2.3 Evaluation Payments for Authors of Works of Light Music

With regard to light music, uniform rules govern the evaluation payments for all three professional categories of GEMA members. In principle, they provide for the same steps as foreseen for composers of serious music. Thus, whether a member receives an evaluation payment depends on his applicable earnings and evaluation points.

#### 11.2.3.1 The Usage Element: Applicable Earnings

A member's application earnings are based on the amount of collectively allocated royalties generated with public performances and broadcasts of his works of a light nature in the year prior to the evaluation procedure.<sup>551</sup>

As GEMA explains, a member's applicable earnings should ideally be made up of equal shares of performance and broadcast royalties.<sup>552</sup> Given, however, that with

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however, this is one criterion that the Evaluation Committee, amongst numerous others, considers in assessing the overall artistic picture of a composer; see information provided by GEMA on 26 March 2012.

<sup>551</sup> Relevant are distribution section U (*public live performances of works of light music*), VK (*public live performances during variety, cabaret and circus shows*), R (*radio broadcasts*), FS (*TV broadcasts*), and T FS (*TV broadcasts of sound films*); *Evaluation Procedure U* § 5(1) and (2)(para 2). As to collective and individual allocation, see below at 10.1.3, on page 143.



regard to light music broadcasting royalties typically exceed those from performances, the broadcasting royalties are only partly taken into account to keep a rough balance: for composers at a rate of 50, for lyricists at 54 and for publishers at 53 per cent.<sup>553</sup>

### 11.2.3.2 The Cultural Element: Evaluation Points

As with composers of serious music, a minimum of ten evaluation points is necessary to participate in the evaluation procedure at all.<sup>554</sup> The participating members are classified into one of six categories depending on the number of evaluation points obtained.<sup>555</sup> For each group, a certain percentage (from five to 50) is prescribed, which determines the rate at which a member's applicable earnings are further taken into account. For a member with between ten and 19 evaluation points (group VI), for instance, only five per cent of his applicable earnings are taken into account, while for members with more than 100 evaluation points (group I), they count at a rate of 50 per cent. The multiplication of a member's applicable earnings with the relevant percentage results in the weighted applicable earnings.

Again, it is the ratio of a single composer's weighted applicable earnings to the total amount of the weighted applicable earnings of all composers eligible for evaluation payments that determines his share in the overall sum available for evaluation payments.

While, in principle, the amount of a member's evaluation payment is thus determined by the number of evaluation points, the same two exceptions exist that also applied in the evaluation of composers of serious music: on the one hand, once a member has reached a certain evaluation group he remains in that group even if he does no longer obtain the necessary amount of evaluation points in future years.<sup>556</sup> On the other hand, there is a cap on the overall amount of a single member's

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<sup>552</sup> Information provided by GEMA on 26 March 2012.

<sup>553</sup> *Evaluation Procedure U* § 5(1). The percentages differ because the typical ratio between performance and broadcast royalties equally differs from profession to profession.

<sup>554</sup> *Ibid* § 5(2) para 3.

<sup>555</sup> *Ibid* § 5(1).

<sup>556</sup> *Ibid* § 8(a).

evaluation payment. For composers and lyricists this is four and for publishers ten per cent of the sums available for the evaluation procedure of the respective profession.<sup>557</sup>

Evaluation points are granted according to three criteria largely similar to those used for the cultural evaluation of serious music: the length of membership; the revenues generated by the member with light music; and his global music creation as well as his impact as a creator.

### ***Length of Membership***

Just as in the evaluation procedure for composers of serious music, one evaluation point is gained with each year of membership of any kind.<sup>558</sup> For publishers, the amount of membership points is limited to 50.<sup>559</sup>

### ***Revenue Generated with Light Music***

The second relevant factor is the revenue that a member generated in the allocation procedure in all sections distributing receipts for the use of (at least partly) light music in the year prior to the evaluation procedure.<sup>560</sup>

For each section, a certain amount for each of the professional groups represents one evaluation point. Where members earned a multiple of that amount, they are granted the relevant multiple of evaluation points up to a prescribed maximum.

A particularity exists, which is not provided for in relation to the evaluation payments of composers of serious music, in that there are two instances in which specific types of light musical works are treated favourably. First, there is a possibility to supplement the evaluation points obtained for revenues earned in sections U and VK by up to ten points in case of so called exalted light music (“*gehobene*

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<sup>557</sup> *Ibid* § 5(2) paras 4 and 5.

<sup>558</sup> *Ibid* § 5(3)(A).

<sup>559</sup> *Ibid*.

<sup>560</sup> *Ibid* § 5(3)(B)-(H). Here, the receipts from sections in which the collections are allocated on an individual basis are also taken into account, although they are not considered when determining the applicable royalties. See also above, n 543.

*Unterhaltungsmusik*”).<sup>561</sup> Interestingly, the allocation of additional points does not depend on the amount of revenues made with exalted light music but is made at the discretion of the Evaluation Committee.<sup>562</sup> Second, public live performances or broadcasts of light musical works of particularly artistic value<sup>563</sup> are treated favourably as in these cases the thresholds to receive one evaluation point are lowered.<sup>564</sup> A composer or lyricist, for example, normally obtains one evaluation point for every €510 earned in section U. However, if his earnings stem from works of particularly artistic value, one evaluation point is already granted for every €125.

Finally, at least one-third of all eligible evaluation points must have been accorded because of the member’s revenue in the allocation procedure.<sup>565</sup>

### *Entire Musical Oeuvre and Impact as a Creator*

Third, composers and lyricists of light music may be granted a maximum of 25 evaluation points in recognition of their entire musical *oeuvre* and their impact as a creator;<sup>566</sup> publishers of light music are merely evaluated as to their entire musical *oeuvre*.<sup>567</sup> There is no indication as to how the two terms are to be understood in the context of light music and the question is left to the discretion of the Evaluation Committee.

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<sup>561</sup> *Ibid* § 5(3)(B)(aa)-(cc). The term designates a musical genre which established itself in Germany in the 1920s to satisfy the demand of radio broadcasters for more easily accessible orchestra works of up to twenty minutes. The popularity of works of exalted light music has decreased constantly since the 1970s.

<sup>562</sup> Riesenhuber, ‘Das Wertungsverfahren in der Unterhaltungs- und Tanzmusik (GO Wertung U)’ in Kreile and others (eds) *Recht und Praxis der GEMA* (2nd edn, 2008) 629, para 47.

<sup>563</sup> The term ‘particularly artistic value’ has the same meaning as in the allocation procedure; *Implementing Provisions A s XI(7)*. As to its interpretation, see above, on page 162.

<sup>564</sup> *Evaluation Procedure U* § 5(3)(B)(dd) and (C)(dd).

<sup>565</sup> *Ibid* § 5(1).

<sup>566</sup> Own translation; in German, the terms ‘*Gesamtschaffen*’ and ‘*Bedeutung als Urheber*’ are used.

<sup>567</sup> *Evaluation Procedure U* § 5(3)(I).

#### 11.2.4 Implications for the Diversity in Online Music

The criteria according to which GEMA calculates evaluation payments differ from the general principle of strictly usage-based royalty distribution. Just as with cultural considerations in the allocation procedure, evaluation payments can, therefore, be understood as a form of redistribution. Whether they promote diversity in online music remains to be assessed.

As the evaluation payments change the overall amount of royalties of all GEMA members they influence the effect of incentivising musical creation that copyright assumes these earnings to have. Evaluation payments would thus promote diversity of online music if they promoted the creation of a diverse body of musical works. In order to do that, they would need to establish conditions in which all social groups are equally able and encouraged to create music. Whether this is the case will be analysed in turn for each of the three factors that determine a member's evaluation points.

In order to determine what exactly these payments incentivise, it is necessary to look at the criteria that determine whether a member receives more or fewer evaluation points and their effects. Do they mitigate the imbalances of a usage-based royalty allocation in such a way that all cultural groups are equally enabled or encouraged to create music?

The first such factor is the length of a member's membership to GEMA. Assessed against the objective to encourage all cultural groups to create music, allocating one evaluation point for every year of membership appears neutral. Membership to GEMA is open to musical authors irrespective of their cultural affiliations and, accordingly, every cultural group is able to collect evaluation points based on membership. On the other hand, the imbalances in incentivising musical creation that arise from a strictly usage-based allocation remain unaffected.

The second important factor that determines a member's evaluation payments is the royalties that were earned in the allocation procedure. Usage is thus also a criterion for evaluation payments. Sometimes German case law and commentary has

argued that a member's earnings in the allocation procedure indicated the market's appreciation for the member's works and that such market appreciation was suitable to determine which works were culturally important.<sup>568</sup> This, however, reveals an evaluative understanding of cultural worth that cannot be reconciled with the 2005 Convention and the principle of equal dignity of and respect for all cultures. In as much as use determines which GEMA members receive evaluation payments and to what extent, the incentivising effects of the resulting payments are the same as under a strictly usage-based distribution: they would seem to not stimulate the creation of diverse music but of music that appeals to a majority audience.

Third, a member's evaluation points depend on his entire musical *oeuvre* and his artistic personality (serious music) or his impact as a creator (light music). In relation to composers and lyricists of serious music, GEMA assesses the repute that the member and his works enjoy in the musical field. But do payments in recognition of authors' repute encourage all cultural groups to create music? Rewarding repute has different effects than rewarding commercial success as indicated by use. Both, however, are evaluative criteria, the difference being that everyone consuming music secedes the latter, while the first depends on the esteem of the musical elite. In both instances, some music is regarded more valuable than other music, which cannot be reconciled with the equal dignity of and respect for all cultural groups and thus is inappropriate to promote musical diversity.

It must not be overlooked, however, that the evaluation proper of composers of serious music deems it an indication of repute if an author's works comprise the majority of musical genres. Is the recognition of such musical variety not an incentive for diverse musical creation? Two aspects suggest that this conclusion would be inaccurate. First, it is not musical variety *per se* that is decisive but musical variety if it contains complex musical works; high evaluation points are thus only accorded to works comprising the majority of genres and orchestra works. Arguably, it is,

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<sup>568</sup> Case 5 U 5185/00 [2004] ZUM 380 (Kammergericht Berlin, 10 May 2002) 385; Riesenhuber, GO Wertung KE, para 79.

therefore, the inappropriate criterion of complexity<sup>569</sup> that more indirectly resurfaces in determining repute. Second, musical variety is only assessed against GEMA's pre-established categories of works; authors creating music not fitting easily into this categorisation will thus find it difficult to obtain repute-driven evaluation points.

Furthermore, the Evaluation Committee has some flexibility in according up to 40 evaluation points based on an author's entire musical *oeuvre* and his artistic personality. As GEMA's rules do not define these terms, it could be that the Committee applies criteria more amenable to promoting diverse music than those addressed so far. In practice, however, this is not the case. GEMA reports that the Committee assesses the overall impression of any author in comparison to all other eligible authors. In so doing, it establishes the cultural impact of that author and his *oeuvre* through diverse aspects. It considers, for example, the way in which the author is covered in the specialised press, the artists that perform the authors' works, the venues in which the works are performed, and whether an author's works represent a range of different genres.<sup>570</sup> Even in exercising its discretionary power, the Committee thus implements the described notion of repute.

In relation to composers, lyricists and publishers of light music, the rules in the Distribution plan do not provide much information as to how a member's entire musical *oeuvre* and his impact as a creator is to be assessed and leave this determination to the Evaluation Committee. In practice, the Committee applies exactly the same criteria as in relation to serious music. It establishes the cultural impact of that author and his *oeuvre* and compared this overall impression to that of all other eligible authors.<sup>571</sup>

There are two additional instances in which certain musical works are treated favourably and which thus, in theory, could have the potential to supplement the criterion of repute with considerations more suitable for promoting diverse musical

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<sup>569</sup> See above at 11.1.4.2, on page 160.

<sup>570</sup> Information provided by GEMA on 26 March 2012.

<sup>571</sup> Information provided by GEMA on 26 March 2012. Again, the relevant aspects are: coverage in specialised press, artists performing the authors' works, venues in which the works are performed, and whether an author's works represent a range of different genres.

creation. First, the Evaluation Committee for light music may, at its discretion, allocate additional evaluation points to exalted light music.<sup>572</sup> In the current practice of the Evaluation Committee, however, this option is used to reward authors whose works have seen a popular demand for performances over many years.<sup>573</sup> Second, light music of particularly artistic value receives higher revenue evaluation points. In determining particular artistic value, however, GEMA resorts to the inappropriate criterion of complexity.<sup>574</sup> Hence, both particularities do not introduce considerations that are more appropriate for promoting the creation of diverse music.

Being based on a member's repute in Germany and abroad, the evaluation proper for both serious and light music thus uses a criterion that is unable to promote diverse musical creation.

Finally, the impression that the evaluation payments are not a suitable means for promoting a diverse musical creation is reinforced if one assesses the rules as a whole and the interplay between the three separate criteria. Then, a conservational effect is clearly discernible, protecting those already benefitting from evaluation payments and creating entry barriers for newcomers. Such partitioning perpetuates imperfect states of musical pluralism and hampers intercultural dialogue and exchange. In more concrete terms, this effect is caused by four factors: first, requiring a minimum of ten points to be eligible for payments at all,<sup>575</sup> second, computing the revenue-based evaluation points of authors of serious music through the three-year average of allocation royalties,<sup>576</sup> third, making participation in the evaluation proper dependent on a minimum of four (serious music) or two (light music) revenue-based evaluation points,<sup>577</sup> and finally, keeping members in their evaluation groups even if the necessary conditions could no longer be fulfilled.<sup>578</sup> With these particular features,

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<sup>572</sup> *Evaluation Procedure U § 5(3)(B)(aa)-(cc)*; see above, on page 185.

<sup>573</sup> Information provided by GEMA on 26 March 2012.

<sup>574</sup> See above, on page 162.

<sup>575</sup> *Evaluation Procedure Composers E § 5(1)*; *Evaluation Procedure U § 5(2)* para 3.

<sup>576</sup> *Evaluation Procedure Composers E § 5(3)(B) (E) and (G)*.

<sup>577</sup> *Evaluation Procedure Composers E § 5(3)* para 2; *Evaluation Procedure U § 5(2)* para 3.

<sup>578</sup> *Evaluation Procedure Composers E § 5(4)*; *Evaluation Procedure U § 8(a)*.

the evaluation payments maintain the status of a particular group of GEMA members. This, however, is likely to prevent diverse musical creation instead of promoting it.<sup>579</sup>

In conclusion, evaluation payments favour successful, long-standing members with a high reputation and fail to encourage all cultural groups to create music.

### **11.3 The Promotion of Culturally Important Works through Adjustment Funds**

The monies available for the evaluation procedures of composers, lyricists and publishers of both serious and light music not only finance the described evaluation payments but also the adjustment funds that exist for each of the professional groups.<sup>580</sup> These funds have mainly two purposes: to compensate for hardship and to promote contemporary music. In both instances, the support for culturally important works plays a certain role.

#### **11.3.1 Compensation for Hardship**

Where GEMA members endure hardship, they may – under certain conditions – receive compensation payments. Amongst the possible grounds for such payments, one is culturally motivated. It concerns cases in which, although a member and his

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<sup>579</sup> The general ceilings are inappropriate to mitigate these conservational effects. Notably, individual evaluation payment cannot be higher than two (composers and lyricists of serious music), four (composers and lyricists of light music), or ten (publishers of light music) per cent of the overall available funds for the evaluation procedure of the professional group concerned; see *Evaluation Procedure Composers E* § 5(2) para 3; *Evaluation Procedure U* § 5(2) paras 4-5. This provides for more equity amongst all those that receive evaluation payments but does not bridge the gap between all of them and those non-eligible for such payments.

<sup>580</sup> For composers and lyricists of serious music these funds are financed by a maximum of three (compensation for hardship) and 20 per cent (promotion of contemporary music) of the overall sums available for their evaluation procedure; *Evaluation Procedure Composers E* § 4(1)-(3); *Evaluation Procedure Lyricists E* § 2. For publishers of serious music, a cumulative ceiling of 20 per cent applies; *Evaluation Procedure Publishers E* § 3(1). As far as composers, lyricists and publishers of light music are concerned, a cumulative maximum of ten per cent of their respective evaluation sums applies; *Evaluation Procedure U* § 4(1) and (2).



entire musical works are deemed culturally important, there is so little demand for the works that the member does not receive evaluation payments.<sup>581</sup>

Such support must be rejected as a suited means to promote the creation of diverse music for two reasons. First, culturally motivated eligibility is determined exactly as in the evaluation proper, ie depends on the member's entire musical *oeuvre* and his artistic personality (serious music) or impact as a creator (light music) and thus on criteria inappropriate to reach that objective. Moreover, support of the discussed kind is only granted to compensate for a particular case of hardship<sup>582</sup> and therefore cannot unfold any incentivising effects.

### 11.3.2 Promotion of Contemporary Music

GEMA may also provide monies from the adjustment funds 'for the promotion of the creation of contemporary music'. While this type of support already existed for publishers of serious music, GEMA's General Assembly introduced it for composers of serious music in 2006<sup>583</sup> and for composers, lyricists and publishers of light music in 2007.<sup>584</sup> Initially only adopted for a period of three years, these schemes have been prolonged every year thereafter.<sup>585</sup>

The rules for the evaluation procedures do not specify how the term 'promotion of the creation of contemporary music' is to be understood. Therefore the Evaluation Committees have a broad margin of discretion,<sup>586</sup> the boundaries being

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<sup>581</sup> It applies to 'members whose works were artistically successful or particularly eligible for support on cultural grounds'; *Evaluation Procedure Publishers E* § 4(2); *Evaluation Procedure U* § 4(2). See also, in more detail, Hauptmann 107-108.

<sup>582</sup> Riesenhuber, GO Wertung KE, para 68; Riesenhuber, GO Wertung U, para 23.

<sup>583</sup> *Evaluation Procedure Publishers E* § 4(3). Due to the cross reference in *Evaluation Procedure Lyricists E* § 2 the same applies to lyricists of serious music. Originally, support for the creation of contemporary music was limited to ten per cent of the sums available for the respective evaluation procedure. This limit was raised to twenty per cent in 2008.

<sup>584</sup> *Evaluation Procedure U* § 4(3).

<sup>585</sup> Currently, the support is limited to the evaluation procedures for in the years 2008 to 2013 (composers of serious music) and 2007 to 2013 (light music); *Evaluation Procedure Publishers E* § 4(3) fn 2; *Evaluation Procedure U* § 4(3) fn 1.

<sup>586</sup> Riesenhuber, GO Wertung KE, para 70a; Riesenhuber, 'Das Wertungsverfahren der Verleger in der Sparte E (GO Wertung VE)' in Kreile and others (eds) *Recht und Praxis der GEMA* (2nd edn, 2008)

that decisions may not be arbitrary and must be guided by the principle of non-discrimination.<sup>587</sup> In practice, to determine a member's eligibility for support, the Committees conduct a global assessment and compare the member concerned to all other members in the same evaluation procedure.<sup>588</sup> The use of a member's works also plays a role; while it is not categorically ruled out for a member to receive funding if his works are not used, this would be unusual.<sup>589</sup>

Given the lack of clear guidelines, it is not an easy task to assess whether this mechanism promotes the creation of diverse music. It is striking, however, that the evaluation proper is also characterised by the global assessment of a member. One may thus be inclined to assume that the same criteria underpinning the assessment in that context equally determine support for contemporary music.

With regard to serious music, this conclusion is not far-fetched, as can be seen from the explanatory notes that accompanied the motion to create the mechanism in 2006. More precisely, the submitters complained that evaluation payments for composers of serious music functioned less and less in the intended way of benefitting those whose works were commercially successful but at the same time also enjoyed artistic reputation. In 2004, almost half of the evaluation payments for composers of serious music were allocated to composers whose works were often performed but never broadcast and who did not have a noticeable impact on the public.<sup>590</sup> Consequently, it was proposed that the new support for contemporary serious music be based on a composer's public reputation.<sup>591</sup> Apparently, this is current practice. In 2012, GEMA presented a motion to the General Assembly to make the support for serious contemporary music permanent. In the explanatory remarks, the society noted

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620, para 10.

<sup>587</sup> Information provided by GEMA on 26 March 2012.

<sup>588</sup> Information provided by GEMA on 26 March 2012.

<sup>589</sup> Information provided by GEMA on 6 April 2012.

<sup>590</sup> 'Motion No 31 presented at GEMA General Assembly 2006' [2006] GEMA-Nachrichten 104.

<sup>591</sup> Originally, the motion suggested that the applicable rules should explicitly contain the following criteria: performances/broadcasts in Germany and abroad through reputed orchestras and performers in renowned venues, in well-know concert series of contemporary serous music, impact in specialised press and supra-regional publications. The changed text of the rules as adopted, however, did not reproduce these criteria; see *ibid.*

that the grant of support was guided by the principle of solidarity<sup>592</sup> and by diverse aspects pertaining to the cultural impact of an author's personality.<sup>593</sup> From that perspective, the support for contemporary serious music would, in effect, reinforce the purpose of the evaluation payments albeit for a more exclusive circle of eligible members. Recompensing authors with a particularly high public reputation, however, would be an evaluative consideration unable to encourage all cultural groups to create music.<sup>594</sup>

In relation to contemporary light music, the allocation of support seems to follow more flexible rules. In 2012, GEMA proposed to extend the validity of the mechanism but, in contrast to the motion in relation to contemporary serious music, limited to another two years. It explained that this was necessary to further develop the concepts for the individual support of contemporary light music and to observe their implementation.<sup>595</sup> This suggests that best practices in funding contemporary light music are still to be found.

Moreover, the sums available for the promotion of contemporary music of both a serious and light nature also fund GEMA's European Music Author's Scholarship,<sup>596</sup> a scheme designed to promote cross-border cooperation among the members of European authors' societies. Eligible for grants of up to €5,000 are projects in all genres or styles of music and particularly those with creative and

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<sup>592</sup> The reference to the 'principle of solidarity' does not preclude a preferential treatment of reputed authors of serious music. While the term has many dimensions and could, if looked at with an open mind, equally be understood as solidarity between successful and unsuccessful members, in GEMA parlance it appears to indicate solidarity between successful and reputed members. As to elements of solidarity inherent in the collective administration of copyright, see above at 10.1.3, on page 143.

<sup>593</sup> GEMA, *Tagesordnung Mitgliederversammlung 2012* (2012) motion 48. It is further stated that the scheme had stood the test of time and become an indispensable targeted instrument of cultural support.

<sup>594</sup> This has already been shown in the context of the evaluation payments; see above on page 188.

<sup>595</sup> GEMA, *Tagesordnung Mitgliederversammlung 2012* (2012) motion 51.

<sup>596</sup> *Statutes of the European Music Author's Scholarship of GEMA*, s 3; confirmed through information provided by GEMA on 26 March 2012. It should, however, be added that although the scheme was intended to be of permanent nature, the Internet address that GEMA specifically communicated when launching it, <<https://www.gema.de/emas>>, nowadays only leads to a general landing page which does not hold any information on the status of the scheme, nor currently solicits new applications.

innovative character.<sup>597</sup> This, however, appears broad enough to equally target authors who have not yet reached any particular standing as a composer. It also suggests that not all of the monies available for the support of contemporary serious music are used according to standards of reputation.

In so far as contemporary music is promoted through grants and individual, targeted measures, such support seems to serve a different purpose than the mechanisms aiming to redistribute some of the royalties. The latter benefit every one of GEMA's members whose works have been used during the year prior to the allocation and evaluation procedures. Because every (prospective) author knows their basic functioning, royalty payments have the potential to incentivise musical creation in a very general way. Support for contemporary music, if understood in the second, more flexible way, does not display these features. As this benefit is only granted to some members and as its criteria are much less clearly delineated, it cannot be counted on by authors in the same way and is therefore unable to produce a comparable general stimulus or any redistributive effect. Its nature is more selective, as exemplified by the European Music Author's Scholarship, through which specific projects may be funded. This does not encourage musical creation through the promise of *ex post* rewards but through very concrete and targeted pre-financing.

But how would such direct means of support need to be implemented in order to promote diverse musical creation? As a first requirement, support would need to be open to all cultural groups and thus all possible musical genres. This should not only be stipulated in relation to particular projects funded by some of the money available for the support of contemporary music but be included in the applicable rules. Equally important, however, would be how the support is administered in practice and whether, on the whole, it satisfies the exigencies established by the principle of equal dignity of and respect for all cultural groups. Given its selective impact, this type of support cannot be expected to generally level out the imbalances in the encouragement of every cultural group to create music that results from a usage-based

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<sup>597</sup> *Statutes of the European Music Author's Scholarship of GEMA*, ss 1.4 and 2.3.

distribution of royalties.<sup>598</sup> Arguably, however, the institutional knowledge that GEMA has of the large gap between the few authors with high and the many with moderate or little royalty revenues must also be taken into account when administering such targeted support for contemporary music. It should therefore primarily be targeted at those authors for whom copyright royalties do not have the expected incentivising effect.

In conclusion, it appears as if GEMA's support for contemporary music could be an appropriate tool to promote the creation of diverse music. Given the lack of transparency as to how the measures are implemented, it is uncertain whether GEMA employs it to these ends.

## **11.4 Other Forms of Cultural Support**

Finally, there are two other major projects that GEMA itself sees within the ambit of its cultural vocation: the German Music Authors' Award and the *Initiative Musik*.

### **11.4.1 The German Music Authors' Award**

The German Music Authors' Award took place for the first time in 2009 and has been organised by GEMA every year thereafter. In a total of ten categories the award, according to GEMA, aims to honour those members who contribute considerably to the cultural diversity in the music industries through their creativity.<sup>599</sup> In all but the category 'most successful work', the winners are chosen by an independent jury of musical authors themselves. Only in the category of 'best up and coming author' the award carries a value of €10,000; otherwise it bestows non-material recognition upon its holders and, at a more general level, raises awareness amongst the general public of composers and lyricists who are often side-lined in the broader public perception by the artists performing their works.

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<sup>598</sup> See also above, on page 169.

<sup>599</sup> Information provided by GEMA on 6 April 2012. See also <<http://www.musikautorenpreis.de>>.

But does the award help build an environment which encourages all cultural groups to create music? Clearly, it serves purposes different from those of general incentives in form of royalty payments or direct funding. First, it financially promotes the future work of the award holder in the ‘up and coming author’ category. Beyond that, the prize recognises the achievements of only ten of the more than 64,000 GEMA members. Yet, putting the spotlight on a selective number of authors still has a potential impact on all GEMA members in the sense that they feel that their work is valued and appreciated by society at large. In a diffuse way, this serves as an encouragement to continue their work provided that authors can identify with the award holders. For all cultural groups to feel this way, it would be necessary that GEMA also honoured a representative of those smaller genres that neither are particularly successful nor benefit from the various instruments in the allocation and evaluation procedure rewarding musical complexity and reputation. That winners are chosen irrespective of their commercial success is a declared goal and assured through the independent jury. The criteria according to which this jury recognises outstanding artistic quality, however, are not known. Should the ideal of either complexity or reputation also be decisive in this forum, some cultural groups may be left behind; then the award as a whole would be unable to promote the creation of diverse music.

#### 11.4.2 *Initiative Musik*

Created as a joint venture between the German Music Council, GEMA and the German society of performers and producers of sound recordings GVL, *Initiative Musik* aims to promote newcomers, disseminate German music abroad and foster the integration of migrants. With an amount of more than €2 million, the German government provides the main source of funding while GVL on the one and GEMA and the GEMA Foundation<sup>600</sup> on the other hand, contribute an annual amount of €180,000.<sup>601</sup> Since 2008, the initiative has provided grants for more than 450

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<sup>600</sup> The GEMA Foundation is a non-profit organisation whose activities are funded by private contributions. It supports contemporary composers and lyricists in all musical areas through grants; see <<https://www.gema.de/die-gema/gema-stiftung.html>>.

<sup>601</sup> See <<http://www.initiative-musik.de/initiative-musik/zielsetzung.html>>.

infrastructure or artist projects in its main areas of activity: contemporary music, rock, pop and jazz.

In order to assess whether *Initiative Musik* promotes the creation of diverse music, it would be necessary to take a closer look at the projects that have been funded so far. What can be said with certainty, however, is that amongst the declared goals of the initiative is the integration of a particular cultural minority, notably those of migrants. This would seem to be well in line with the aim of building an enabling environment that encourages all cultural groups to create music and thus the promotion of diversity in online music. In any case, GEMA's involvement is limited to providing funding; it has no say in deciding which projects to support.<sup>602</sup>

### **11.5 Concluding Remarks and Broader Outlook**

The question of whether GEMA's cultural activities promote the creation of diverse music, for the most part, has to be answered in the negative.

Those selective measures that allow for targeted support of individual authors (the promotion of contemporary light music, the German Music Author's Award and the support of *Initiative Musik*) at least have the potential to be used in a way that encourages diverse musical creation. This, however, pre-supposes that they are allocated in accordance with the principle of equal dignity of and respect for all cultural groups. Arguably, this would require paying particular attention to those members whose royalty payments are too low to have an incentivising effect.

The majority of GEMA's measures to promote culturally important works (favourable treatment in the allocation procedure, the evaluation payments and much of the support for contemporary serious music) aim to redistribute the copyright royalties of its members. To that end, GEMA introduces various additional elements into the demand-driven, usage-based calculation of the royalties, notably musical

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<sup>602</sup> These decisions are made by the board of directors which is made up of representatives from politics and representatives from the German music industry; see <<http://www.initiative-musik.de/initiative-musik/der-aufsichtsrat.html>>.

complexity, length of membership and an author's reputation. Yet, all these criteria are evaluative in that they favour a particular group of existing GEMA members and therefore unsuitable to promote the creation of diverse music. This does not mean, however, that a redistribution of royalties could never comply with the promotion of diverse musical creation; notably, if it was specifically designed to redress the shortcomings of a strictly usage-based royalty distribution.<sup>603</sup>

While the criteria upon which GEMA bases its explicitly cultural activities are unable to encourage all groups to create music, one may still wonder whether musical creation would not be even less diverse without them. Admittedly, those authors will benefit from the redistribution of royalties who do not have much commercial success but fit the employed criteria. As a result, there will be authors who are encouraged to create music under these criteria and would not be under a strictly usage-based distribution. Yet such consequences are merely incidental as GEMA's cultural criteria are not targeted to level out the fact that a strictly usage-based distribution encourages cultural groups to create music only in an imbalanced way but follows their own evaluative agenda.

In summary, although there are possible ways for collecting societies to promote diverse musical creation, most of the measures with which GEMA aims to promote culturally important works have proved inappropriate to reach that objective. Selective schemes with a more open approach have the potential to promote diverse musical creation; whether they do so in practice, however, could not be established.

To place these findings into proper context, it should not be forgotten that the system of collective management of authors' rights has certain in-built features of solidarity that benefit less successful members more strongly than successful ones.<sup>604</sup> While these solidarity elements would therefore *a priori* appear to be suitable means to promote a diverse musical creation, their practical effect would need to be studied in more detail. This analysis, however, lies outside the scope of this chapter.

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<sup>603</sup> See above at 11.1.4.3 on page 166.

<sup>604</sup> See above at 10.1.3, on page 143.



Based on these findings on the relationship of GEMA's cultural activities and the promotion of musical diversity, some broader remarks on copyright, collective licensing, support for the arts and cultural diversity can be formulated.

### *Copyright, Collective Management of Authors' Rights and the Creation of Diverse Music*

The rationale and functioning of copyright are increasingly being questioned and there is little agreement whether it is a suitable means for promoting the creation of diverse cultural works. More specifically, economic research points out that it remains a mere assumption that copyright stimulates the creation of new works and that it is still unknown what exactly copyright achieves as an economic incentive.<sup>605</sup> More precisely, the case is made that many authors and artists seem to be driven by intrinsic motivation rather than economic considerations.<sup>606</sup> In relation to music, it has been pointed out that there is no historical evidence that the mere existence of copyright has promoted the creation of artistically satisfactory musical works and that copyright can be detrimental to musical diversity if protection becomes the cause of creativity.<sup>607</sup> This has led some to conclude that the relationship between copyright and the diversity of cultural expressions was dysfunctional<sup>608</sup> or that copyright should be abolished all together.<sup>609</sup>

Although it may be time to fundamentally re-think copyright and the way it works, this is not what the present study seeks to achieve. Our analysis of GEMA's cultural functions is rather based on the simple truth that copyright provides musical authors with economic rights that they usually choose to have collectively administered by an authors' society. For authors, these rights become tangible in form of royalty payments. Finally, the evidence showing that royalties benefit musical authors in very

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<sup>605</sup> Towse, 'What We Know, What We Don't Know and What Policy-makers Would Like Us to Know about the Economics of Copyright' (2011) 8 *Review of Economic Research on Copyright Issues* 101, 117.

<sup>606</sup> Kretschmer 35, citing a number of cultural economics accounts.

<sup>607</sup> Rahmatian, 'Is copyright good for music?' (2010) 5 *Journal of Intellectual Property Law & Practice* 869, 869, 871.

<sup>608</sup> Macmillan, 'The Dysfunctional Relationship between Copyright and Cultural Diversity' [2007] *Quaderns del CAC* 101.

<sup>609</sup> Smiers, 'The Abolition of Copyright' (2000) 62 *International Communication Gazette* 379.

unbalanced ways cannot be disregarded.<sup>610</sup> Assuming, as the law does, that royalty payments do have an incentivising effect, a first conclusion must, therefore, be that copyright stimulates the creation of music from cultural groups that are already commercially successful in much stronger ways than the music of cultural groups less asserted in society. Not equally encouraging all social groups to create music, it is thus unable to promote the creation of diverse music. This, however, defies the often-raised claim that because copyright stimulates the creation of new works it incentivises diversity. Such a view is too simplistic and disregards that musical diversity is more than the sheer number of created musical works.<sup>611</sup> This leaves us with an ambiguous result. On the one hand, copyright is too powerful an instrument that its effects on the creation of music can be ignored. On the other hand, these effects are too sweeping to accommodate the normative aspect of cultural pluralism and fulfil the postulate of diverse musical creation. The task must, therefore, be to acknowledge the role of copyright and find ways to remedy the existing dysfunction from within the framework of the existing law.<sup>612</sup> It is against this theoretical background that our analysis of GEMA's cultural functions must be seen.

### *Promoting Culturally Important Works, the National Arts and the Creation of Diverse Music*

To conclude that the cultural activities do not promote a diverse musical creation does not imply that GEMA's cultural support was illegitimate or may not have positive effects on the musical development in Germany. In particular, the statutory requirement to 'promote culturally important works' (UrhWG § 7) is deliberately general. While musical works could be understood to be culturally

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<sup>610</sup> As to the relationship of copyright and diverse musical creation, see also above at 8.1.1, on page 104, as well as at 11.1.4.3, on page 166.

<sup>611</sup> In *Stirling's* terms, such a view only considers variety and neglects the equally important factors of balance and disparity; see above 9.1, on page 115.

<sup>612</sup> For Macmillan, the dysfunctional relationship between copyright and cultural diversity shows in particular in the domination of cultural output by multinational media and entertainment corporations. Although this is a great source of concern, our starting point is the moment of creation of a new work. Even a pluralistic media landscape could not offer much diversity if the body of created works is not diverse.

important if they are diverse, this is not prescribed by the broad wording as the only possible interpretation. Equally extensive is the provision in the CISAC Model Agreements that allows an authors' society to deduct ten per cent of the collected performing royalties for cultural and social purposes when it speaks of 'the promotion of the national arts'.<sup>613</sup> Both formulations are extensive enough that musical support may be based on evaluative criteria. The reason is simple: § 8(II) of the CISAC Model Agreement and UrhWG § 7 date from 1958<sup>614</sup> and 1965 respectively and both provisions have remained unchanged until today. At the time of their creation, however, pluralism only slowly started to be recognised in international law and intergovernmental practice as a value for cultural policies.<sup>615</sup> Against this background, it is not surprising that the mechanisms used by GEMA have not changed direction either.

The difference between such a traditional, evaluative approach to cultural support and the notion of diversity of cultural expressions must also be born in mind when assessing whether the allowed percentage of cultural and social deductions under the CISAC Model Agreement should be increased. *Adolf Dietz* proposed a sliding scale of allowed deduction, in which the percentages would be higher the more imbalanced the mutual copyright exchanges between the societies are.<sup>616</sup> Collecting societies in countries in which the large majority of royalties fall upon foreign right holders and must, therefore, be paid out to sister societies should be able to retain a higher percentage for the promotion of national authors. Certainly, such a higher percentage would have the potential to counter the growing global homogenisation in cultural products that is often seen as threatening smaller, local cultures.<sup>617</sup> In light of the

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<sup>613</sup> CISAC Model Agreement § 8(II).

<sup>614</sup> Dittrich, 'Der Grundsatz der Inländerbehandlung der RBÜ und die sogenannte soziale Hälfte' in Dittrich (ed) *Festschrift 50 Jahre Urheberrechtsgesetz* (1986) 63, 88, who provides detailed information on the preparatory work.

<sup>615</sup> See in detail above 6.3, on page 34.

<sup>616</sup> Dietz, *Cultural Functions of Collecting Societies* (2010) 67, with more detailed explanations of the envisaged scheme and how the law would need to be changed to accommodate it.

<sup>617</sup> Already in 1958, the introduction of the ten per cent rule was justified by considerations of solidarity between collecting societies. The minutes of the CISAC Congress adopting that rule characterised the deduction as '*un abandon volontaire de la part des Sociétés les plus importantes pour permettre aux autres Sociétés d'alimenter leurs caisses de pensions, d'assistance, culturelles et autres, ce qu'elles*

results of the analysis of GEMA's cultural functions, it would appear doubtful whether the diversity of cultural expressions would be able to justify such a redistribution mechanism between collecting societies. Arguably, this could not be the case where the promotion of diverse music was not a value treasured by the withholding collecting society when it allocates such increased sums for cultural support.

### *The Appropriate Guardian of Diverse Musical Creation – A Policy Question*

At the end of our analysis of GEMA's cultural activities, a final question remains. In as far as collecting societies could promote the creation of diverse music through their cultural schemes but do not choose to do so, would it be better if cultural support was provided by the state rather than a collecting society? In many states, governments support musical authors through various means; sometimes even in parallel with the schemes of authors' societies.<sup>618</sup>

There is a lot to argue in favour of supporting musical creation through collecting societies. Given that their members are authors and publishers themselves, one may be inclined to trust that they are better placed to decide what to support than a government agency where their executive body acts with democratic legitimation from all members.<sup>619</sup> Moreover, it could be argued that the submitted proposal of cultural reallocation to cushion the imbalanced effects of a strictly usage-based royalty distribution could sensibly be put in place only by collecting societies as they control the necessary usage data. Further, if a collecting society introduced such cultural redistribution, it would have the benefit of being a voluntary scheme agreed on by all its members. The ability of states to implement a similar mechanism, on the other hand, may prove problematic from a constitutional point of view.

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*ne pourraient faire que difficilement sans cela ; ledit abandon constituant en quelque sorte une contrepartie des services rendus par ces dernières aux Sociétés des pays grands producteurs de musique'*; see Dittrich 88.

<sup>618</sup> For an overview of the manifold form that such cultural support may take, see Cliche; Riklin, *Das Urheberrecht als individuelles Herrschaftsrecht und seine Stellung im Rahmen der zentralen Wahrnehmung urheberrechtlicher Befugnisse sowie der Kunstförderung* (1978) 275–289. In particular in relation to music: Liebowitz and Watt, 'How to Best Ensure Remuneration for Creators in the Market for Music?' (2006) 20 *Journal of Economic Surveys* 513, 525–536.

<sup>619</sup> Riesenhuber, GO Wertung KE, para 87.

Cultural support by a state would have the advantage that it would, unlike GEMA's cultural schemes for example, not make eligibility dependent on whether an author is a member of a collecting society. Although membership to a collecting society should be open to all authors, particularly young and (yet) unsuccessful artists may be hesitant to join; not only would a membership fee be due but once authors have joined a society, they would also have to pay licence fees if they wanted to publicly perform their own songs.<sup>620</sup> On a different note, public support through states would be borne by all tax-payers, whereas the cultural activities of collecting societies are financed by its members.<sup>621</sup>

In light of these considerations, it is, in the end, a political question of whether musical support should be exercised by collecting societies or states themselves and thus one that cannot be decided in this study. As a result of the present assessment, however, it can be said that cultural policies would need to follow certain rules. Where states do prescribe cultural functions to collecting societies they should, if they want to implement the 2005 Convention, make sure that the delegated cultural activities serve the objective to promote the diversity of cultural expressions. In Germany, this could be achieved by revising the statutory obligation in UrhWG § 7. On the other hand, where states provide support for musical authors themselves, their schemes would equally have to fulfil the criteria for the promotion of diverse musical creation that have been elaborated upon throughout the assessment of GEMA's cultural schemes. In addition, it could be maintained that the principle of equal dignity of and respect for all cultures required a state to take due account of the imbalanced effect of copyright on musical authors. Arguably, state measures should then primarily benefit those whose copyright revenues are not sufficiently substantial to incentivise creation.

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<sup>620</sup> In theory, however, nothing prevents authors' societies from opening up their support to non-members.

<sup>621</sup> Depending on the perspective, one may also argue that, in the end, all those who use music fund these activities; after all the necessary monies are taken from the collected royalties; see also Kohn and Kohn, *Kohn on Music Licensing* (4th edn, 2010) 197.

## **Part 5: The State of Diversity in Online Music after EU Intervention**

The last part of the thesis enquires whether the way in which the EU has shaped the framework for the licensing of authors' rights in online music promotes the diversity of that cultural marker. Relevant in this regard are the 2005 Commission Recommendation on Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services<sup>622</sup> and the 2008 Commission Decision in the CISAC case.<sup>623</sup>

This part seeks to determine whether the practical effects that these two measures have had were conducive to the diversity of online music. In so doing, the analysis is based on the criteria that were developed in part 3 to develop the concept of diversity in online music into a workable guideline for policy choices in the licensing framework.

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<sup>622</sup> European Commission, *Commission Recommendation of 18 October 2005 on Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* [2005] OJ L 276/54.

<sup>623</sup> CISAC (COMP/C2/38.698).



## 12 The 2005 European Commission Recommendation

The 2005 Recommendation presents the first attempt on the side of the European Commission to regulate the collective management of copyright through legislative means.<sup>624</sup> The existing eight Directives on copyright matters had accepted collective licensing as a given without introducing any substantive standards.<sup>625</sup>

### 12.1 The Context of the 2005 Recommendation

Collective rights management was already addressed in the 1995 Green Paper on Copyright and Related Rights in the Information Society<sup>626</sup> and its 1996 Follow-up Communication.<sup>627</sup> At that time, the main issue was the licensing of multimedia works. On a more general note, the Commission recognised that

‘there are already indications for the need to define, both under the Single Market and the competition rules of the EC Treaty, at Community level the rights and obligations of collecting societies, in particular with respect

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<sup>624</sup> The activities of collecting societies have, however, regularly been subject to *ex post* scrutiny under EU competition law rules; for an extensive overview of the relevant cases during the last more than forty years see, for example, Schierholz, ‘Collective Rights Management in Europe - Practice and Legal Framework’ in Walter and von Lewinski (eds) *European Copyright Law* (2010) 1145, paras 12.0.23-12.0.37; Lánchidi, *Collective Management of Music Rights and Competition Policy in the European Union* (2010) 135-149; Frabboni, *Collective Management of Music Rights: A Test of Competition and Industrial Organisation Theories* (2009) 134-177.

<sup>625</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property (Codified Version) 2006 OJ, 28, Article 5(3) and (4) stipulate that member states may entrust the administration of the right to obtain an equitable remuneration for rental to collecting societies and that such administration may also be imposed; Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission [1993] OJ L 248/15, Article 9(1) provides for a mandatory administration of the cable retransmission right through collecting societies; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art (2001) Article 6(2) allows member states to provide for compulsory or optional collective management of the resale right. See, for a more detailed overview, Schierholz paras 12.0.38-12.0.44.

<sup>626</sup> European Commission, *Green Paper Copyright and Related Rights in the Information Society* (1995) 69-78.

<sup>627</sup> European Commission, *Communication from the Commission - Follow-up to the Green Paper on Copyright and Related Rights in the Information Society* (1996) 24-27.



to the methods of collecting, to the calculation of tariffs, to the supervision mechanisms, and to the application of the rules on competition to collecting societies and collective management'.<sup>628</sup>

This notwithstanding, the Commission decided that the development of collective licensing 'should be left, at least for the time being, to the market'.<sup>629</sup>

After a long phase of extensively exploring the issue further,<sup>630</sup> the European Commission announced legislative action in the field of collective management in its April 2004 Communication on the Management of Copyright and Related Rights in the Internal Market.<sup>631</sup> Important for our purposes are the Commission's remarks regarding collective management in general and the establishment of Community-wide licences in particular. In relation to collective management in general, the Commission notes broad consensus that an Internal Market in copyright could not be achieved without common ground on how the rights are exercised but that significant differences existed with respect to both legislation and practice.<sup>632</sup> In order to safeguard the functioning of the Internal market and to create a level playing field in the area of collective management, the Commission deemed it necessary to create common standards in relation to: the establishment and status of collecting societies; the relation of collecting societies to users; the relation of collecting societies to their right holders; and the external control of collecting societies.

Community action prescribing substantive minimum standards for the management of copyright within the internal market had also been called for by the European Parliament in its 2004 Resolution on a Community Framework for Collective Management Societies in the Field of Copyright and Neighbouring Rights,

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<sup>628</sup> *Ibid* 26–27.

<sup>629</sup> *Ibid* 26.

<sup>630</sup> Collective management was an issue at three conferences organised by the European Commission in Vienna (1998), Strasbourg (2000) and Santiago de Compostela (2002) as well as the topic of a study commissioned in 1998 and published in 2000; Deloitte and Touche, *Etude sur la gestion collective des droits d'auteur dans l'Union Européenne* (2000). Moreover, a two-day hearing took place in Brussels on 13–14 November 2000. See for a more detailed account on all of these activities Lánchidi 90–91.

<sup>631</sup> European Commission, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: The Management of Copyright and Related Rights in the Internal Market* (2004) 19.

<sup>632</sup> *Ibid* 15.

adopted three months earlier.<sup>633</sup> The European Parliament had considered such standards particularly necessary in the areas of the internal structure of collective management societies (para 39); control and arbitration mechanisms (paras 48-50); as well as transparency and information obligations in relation to tariffs, distribution keys, annual accounts, reciprocal agreements and management costs (paras 51-53).<sup>634</sup>

In addition to the implementation of general substantive standards, the 2004 Communication, at a more specific level, addressed the question of Community-wide licences; ie the 'grant of a licence by a single collecting society in a single transaction for exploitation throughout the Community'.<sup>635</sup> As the preceding consultations had shown, such licences were recurrently called for in the online environment by commercial users,<sup>636</sup> but had not yet been established to a satisfactory extent. In the view of the Commission, this was due to the great divergences that existed between the member states lacking both sufficient transparency and legal certainty.<sup>637</sup> To facilitate greater Community-wide licensing the Commission enumerated four potential options:<sup>638</sup>

- A first option was identified in the establishment of a system of Community-wide exhaustion of the rights of communication to the public and making available.<sup>639</sup> This would result in the partial removal of the principle of territoriality.

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<sup>633</sup> European Parliament, *2004 Resolution*; see in particular paras 12 and 34. The resolution was preceded by a report prepared by member of the European Parliament Raina A. Mercedes Echerer containing an explanatory statement; European Parliament, *Report on a Community Framework for Collecting Societies for Authors' Rights (2002/2274(INI))* (2003).

<sup>634</sup> For a more detailed overview of the Resolution and its commonalities and differences with the 2004 Commission Communication see Dietz, 'Marketing and Enforcing Intellectual Property in Europe - European Parliament versus Commission: How to Deal with Collecting Societies?' (2004) 35 *International Review of Intellectual Property and Competition Law* 807.

<sup>635</sup> European Commission, *2004 Communication on Copyright Management* 8.

<sup>636</sup> *Ibid.*

<sup>637</sup> *Ibid* 7.

<sup>638</sup> *Ibid* 9.

<sup>639</sup> The European Commission only mentions the rights of communication to the public and of making available; however, later documents also refer to the reproduction right.

- Inspired by Article 1(2)(b) of the Satellite and Cable Directive,<sup>640</sup> applying the country-of-origin principle to the online exploitation of copyright material was presented as another option. As a result, the act of communication to the public and making available would occur only once and in the country where the material was introduced into the online environment.
- As a third option, the Commission contemplated reducing the necessary exclusive rights to mere remuneration rights and subject them to mandatory collective management.
- Finally, the Commission considered that the regime chosen for the Simulcasting Agreement<sup>641</sup> could become a model to be followed more generally in the online exploitation of copyright material. In that case, the existing system of reciprocal representation agreements would be strengthened in order to allow commercial users to obtain Community-wide licences from a collective management society of their choice.

The Commission did not explicitly endorse any of these options to strengthen multi-territorial licensing but showed general support for the system of reciprocal representation.<sup>642</sup> In relation to the collective management of copyright at large, the Communication announced ‘a legislative instrument on certain aspects of collective management and good governance of the collecting societies’.<sup>643</sup>

In light of the high degree of common ground between the European Parliament and the European Commission with regard to the necessity of a European initiative in the field of collective copyright management, most commentators expected a Directive setting common substantive standards.<sup>644</sup> With the first Barroso

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<sup>640</sup> *Satellite and Cable Directive*.

<sup>641</sup> As to the Simulcasting Agreement, see below at 13.1.2, on page 241.

<sup>642</sup> European Commission, *2004 Communication on Copyright Management* 9.

<sup>643</sup> *Ibid* 19.

<sup>644</sup> See, for example, the responses to the consultation that followed the adoption of the 2004 Communication available at <[http://ec.europa.eu/internal\\_market/copyright/management/contributions\\_en.htm](http://ec.europa.eu/internal_market/copyright/management/contributions_en.htm)>. A detailed summary is provided by Lánchidi 98–107.

Commission taking office in November 2004, however, there was also a replacement of senior management staff in the Copyright Unit within the DG Internal Market & Services. In turn, this change of personnel brought about a change of approach,<sup>645</sup> as became clear when the Commission tabled its follow-up initiative, the 2005 Recommendation.

## 12.2 The Regulatory Scope of the 2005 Recommendation

On 18 October 2005, the EU Commission adopted its Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services.<sup>646</sup> Already the title indicates a departure from its earlier position in terms of both the form as well as the scope of the initiative.

As far as the form is concerned, the Commission, in 2004, had been of the view that ‘to rely on soft law ... appears to be no appropriate option’.<sup>647</sup> This, however, did not hinder it from adopting, 18 months later, a Recommendation<sup>648</sup> – thus an instrument without legally binding effect.<sup>649</sup> Its lack of legal value notwithstanding, the Commission hoped that the Recommendation would not only influence the EU

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<sup>645</sup> KEA European Affairs 43; Schierholz para 12.0.101.

<sup>646</sup> European Commission, 2005 Recommendation.

<sup>647</sup> European Commission, 2004 Communication on Copyright Management 19.

<sup>648</sup> The competence for the European Commission to adopt Recommendations was contained in (then) EC Article 211. After the changes introduced by the Lisbon Treaty, the Commission may now, in the area of freedom to provide services, adopt Recommendations to member states pursuant to TEU Article 17(1) and TFEU Articles 292 and 60.

<sup>649</sup> See the last sentence of TFEU Article 288. Notwithstanding the non-binding character, it is often argued that the principle of effectiveness, enshrined in TEU Article 4(3) obliges member states to act in accordance with Recommendations; Heyde, *Die grenzüberschreitende Lizenzierung von Online-Musikrechten in Europa: eine urheber- und wahrnehmungsrechtliche Studie* (2011) 110; Ruffert, ‘Art. 288 AEUV’ in Calliess and Ruffert (eds) *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar* (4th edn, 2011) para 95. Also note that the Commission stressed its ‘right to propose legislation should the self-regulatory voluntary approach not foster the [intended] policy objective’; European Commission, *Commission Staff Working Document - Impact Assessment Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services* (2005) 29.

member states but also all economic operators involved in collective copyright management.<sup>650</sup>

In relation to the scope of the measure, one equally notices a clear shift of emphasis. In 2004, the Commission had planned a comprehensive set of common standards for the collective management of copyright across Europe in general and had mentioned the difficulties with the establishment of pan-European licences as one of several contested issues. The 2005 Recommendation, however, focuses almost exclusively on pan-European licensing and suggests elements of good governance only in as far as these are necessary pre-requisites for the development of cross-border licences.<sup>651</sup>

This shift in priorities had already been perceptible in two in-house documents on cross-border licensing which preceded the 2005 Recommendation and were equally confined to cross-border licensing. First, the Commission released a study on 7 July 2005<sup>652</sup> and then, after having given interested parties the opportunity to comment within three weeks,<sup>653</sup> an impact assessment on 11 October 2005.<sup>654</sup> The documents

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<sup>650</sup> European Commission, *2005 Recommendation*, Article 19.

<sup>651</sup> *Ibid* Recital 10 illustrates this point: 'Fostering effective structures for cross-border management of rights should also ensure that collective rights managers achieve a higher level of rationalisation and transparency'. This change in emphasis is a result of the Commission's choice to foster pan-European licensing for online uses by establishing competition for right holders amongst collecting societies. Thus, in the eyes of the Commission 'the case that was previously made in the [2004 Communication] for introducing transparency requirements, rules of good governance and accountability would now be achieved by the [collective rights managers] themselves without regulatory intervention'; European Commission, *Commission Staff Working Document - Study on a Community Initiative on the Cross-border Collective Management of Copyright* (2005) 37.

<sup>652</sup> European Commission, *Commission Staff Working Document - Study on a Community Initiative on the Cross-border Collective Management of Copyright*.

<sup>653</sup> This unusually short time frame for a consultation in the midst of the holiday season, as well as the rushed procedure in general, was strongly criticised. The European Grouping of Societies of Authors and Composers GESAC, for example, highlights that it is inconsistent if the Commission deplores a lack of democracy in the internal structures of authors' societies but, at the same time, imposes a deadline too short to allow collecting societies to 'arrange a democratic procedure in which the representatives of various right owner groups would have a chance to comment on the EC document and discuss their position towards it'; GESAC, *Preliminary Comments on the Working Document of 7 July 2005 from the Directorate-General for the Internal Market on a Community Initiative on Cross-border Collective Management of Copyright* (2005) 4. All consultation submissions can be retrieved at <<https://circabc.europa.eu/w/browse/ecbb283a-388f4e04-a66a-d735f61bdf43A>>. A detailed summary of the responses is provided by Lánchidi 113-121.

<sup>654</sup> European Commission, *2005 Impact Assessment*.

started from the premise that there was a potential for growth in legitimate online music services in the EU that, as a result of the lack of cross-border licensing, was largely unexploited. Consequently, the Commission's attention centred on commercial users 'who need a licensing policy that corresponds to the ubiquity of the online environment'.<sup>655</sup> Only incidentally would a growth in online services then also benefit the right holders by increasing their revenue streams.<sup>656</sup> Without any reference to the suggestions made in the 2004 Communication,<sup>657</sup> the study analysed three potential options to achieve a 'vibrant market for online exploitation of copyright across the Community':<sup>658</sup>

- The first option considered was to do nothing.
- As a second option, the Commission discussed eliminating those clauses in the reciprocal representation agreements concluded between collecting societies that provided for territorial restriction or customer allocation (as had been foreseen by the Santiago and Barcelona Agreements).<sup>659</sup> The resulting regime of reciprocal representation would allow all collecting societies in the EU to offer multi-territorial and multi-repertoire licences. They would thus compete for commercial users who, in turn, could approach any society for EU-wide rights clearance.
- The third and final option analysed by the Commission represented a radical departure from the system of reciprocal representation agreements for the online exploitation of music. Under this option, right holders would choose any collecting society within the EU to manage their online rights directly and on an EU-wide basis. Instead of relying on the mandate of its sister societies to offer multi-repertoire but territorially restricted online licences, a collecting society would license its own repertoire on a

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<sup>655</sup> European Commission, 2005 *Recommendation*, Recital 8.

<sup>656</sup> *Ibid.*

<sup>657</sup> European Commission, 2004 *Communication on Copyright Management*.

<sup>658</sup> European Commission, 2005 *Study*, 32. As to the three options, see *ibid* 34-35 and European Commission, 2005 *Impact Assessment*, 17-18.

<sup>659</sup> As to these failed initiatives driven by collecting societies, see below at 13.1.3, on page 245.

multi-territorial basis. As a consequence, collecting societies would compete for right holders.

After both the study and the impact assessment had already favoured the third option,<sup>660</sup> this objective was confirmed by the 2005 Recommendation. The main characteristic of the new envisaged licensing model for legitimate online music services is formulated in Article 3:

‘Right-holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder’.

Given that, when the 2005 Recommendation was adopted, authors’ online rights were administered through the traditional system of reciprocal representation agreements, the Recommendation also provided that the right holders ‘should ... have the right to withdraw any of the online rights and transfer the multi-territorial management of those rights to another collective rights manager’ (Article 5(c)). Where rights are withdrawn, collective rights managers ‘should ensure that those rights are withdrawn from any existing reciprocal representation agreement’ (Article 5(d)). Apparently, the Commission was aware that such departure from the traditional system of reciprocal representation could lead to confusion as to which entity would be able to licence which online rights. To mitigate this risk, it recommended that collective rights managers provide comprehensive information about their repertoire, the territorial scope of their mandate for that repertoire and the applicable tariffs (Article 6).

Further, the Recommendation encouraged best practices for collective rights managers. In relation to its users, licences should be granted in an objective and non-discriminatory manner (Article 9). As far as the right holders are concerned, all categories of right holders should be treated equally – in particular with regard to the distribution of royalties (Article 10) – and be represented in a fair and balanced manner in the internal decision making process of collective rights managers

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<sup>660</sup> European Commission, *2005 Study*, 54–57; European Commission, *2005 Impact Assessment*, 36–40.

(Article 13). Still with regard to right holders, the Recommendation called for enhanced transparency and accountability: deductions from royalties ‘for purposes other than for the management services’ should be clearly identified in payment documentation as well as the membership contracts or, where membership is by legal mandate, in the respective statutory provisions (Articles 11-12). Moreover, collective rights managers should regularly report on the licences granted, the applicable tariffs and the royalties collected and distributed (Article 14). Finally, the Recommendation invited member states to provide for effective dispute resolution mechanisms (Article 15).

After this cursory overview of the objectives and mechanisms advocated by the 2005 Recommendations, it is apparent that the EU Commission’s change of heart as to how to address collective copyright management at the EU level was not confined merely to the scope and the form of the initiative but also clearly influenced its content. In 2004, the Commission had concluded that the fact that collecting societies provided for a one-stop shop of licensing the world repertoire for their territory of operation was ‘a significant advantage for right holders and users alike’ that ‘should not be jeopardised’.<sup>661</sup> With the 2005 Recommendation, however, only one year later the Commission consciously and explicitly rejected the approach based on reciprocal representation agreements and sought to install a counter model: the direct grant of licences which would be multi-territorial but limited in the repertoire covered.

### **12.3 The Practical Effects of the 2005 Recommendation**

To assess the impact of the 2005 Recommendation on diversity in online music, this section determines its practical consequences and examines how it changed the landscape of multi-territorial licensing of online music.

More than seven years after the adoption of the 2005 Recommendation, there has not been the paradigm shift in the management of online rights that the Commission had envisaged but clearly there are important changes. In part, the

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<sup>661</sup> European Commission, 2004 *Communication on Copyright Management*, 9.



licensing practice has indeed moved towards the objectives of the Recommendation, notably with the creation of publisher-controlled central pan-European licensing initiatives.<sup>662</sup> These newly established players issue licences which are multi-territorial but restricted to a specific publisher's repertoire. At the same time, these forms of direct rights administration co-exist with the traditional collective management of online rights based on the system of reciprocal agreements. What is more, within that traditional system another form of multi-territorial licensing has developed in that some collecting societies have begun to pool their repertoires in order to enhance the territorial scope of their licensing activities. It is thus fair to say that the licensing of authors' online rights has become a mixed system.

### 12.3.1 The Creation of Central Pan-European Licensing Initiatives

The central pan-European licensing initiatives created since the 2005 Recommendation fall within two categories. The first set of initiatives resulted from the move by some music publishers to withdraw from the system of collective rights administration those online rights that were under their control, notably the mechanical rights in their Anglo-American repertoire.<sup>663</sup> In a second step, these publishers then mandated one or two collecting societies to administer, on their behalf, the withdrawn rights on a pan-European basis (12.3.1.1).

In contrast to these publisher-controlled licensing schemes, a different trend towards pan-European licensing has been set by some collecting societies. They reinforced their cooperation to pool their respective repertoires and are now in a

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<sup>662</sup> As the major publishers had already contemplated such initiatives at the time of the adoption of the 2005 Recommendation, they cannot be seen as a direct result of that instrument. Yet, it certainly has fuelled these endeavours as it provided the major publishers with the comfort of knowing that direct pan-European licensing had the Commission's blessing.

<sup>663</sup> For a musical work to fall under the term 'Anglo-American repertoire', as it is used in this study, two conditions must be fulfilled. First, the authors of the works must have, as is typically the case under legal regimes in the tradition of English common law, assigned the mechanical reproduction rights in these works to their music publishers. Second, these authors must either be no members of any performing rights society or members of performing rights societies which authorise their European sister societies to represent their repertoire for online and mobile forms of exploitation on a pan-European basis. In the case of PRS for Music such unrestricted agreements appear to exist with the following societies: APRA (AUS), SOCAN (CA), IMRO (IRE), ASCAP (US), BMI (US), SESAC (US), SAMRO (ZA); see PRS for Music, *IMPEL Publisher FAQs* (2012).

position to grant online music licences that comprise the whole of their aggregate repertoire in a single transaction (12.3.1.2).

### 12.3.1.1 Publisher-controlled Initiatives

The first to withdraw their rights and form pan-European licensing initiatives of their own were the four major music publishers (12.3.1.1.1), followed by some large independent music publishers (12.3.1.1.2). In more recent times, pan-European licensing initiatives have been created specifically for medium and small-sized independent music publishers (12.3.1.1.3).

#### 12.3.1.1.1 Initiatives of the Four Major Music Publishers

##### *CELAS*

EMI Music Publishing Europe Ltd. was the first major music publisher to withdraw its rights from the collective rights management system. For the administration of these rights, EMI chose to cooperate with both GEMA and PRS for Music. With the specific aim to licence EMI's repertoire, the two collecting societies announced, on 23 January 2006, a new entity under the name of CELAS (Central European Licensing and Administration Services),<sup>664</sup> which was subsequently founded and registered as a private limited company under German law (GmbH) on 1 January 2007.<sup>665</sup> Jointly owned by the two collecting societies, CELAS licenses the Anglo-American repertoire of EMI Music Publishing Europe Ltd. for digital and mobile exploitation on a pan-European scale.<sup>666</sup> The first licensing agreement was signed on 12 December 2007<sup>667</sup> and in January 2010 CELAS had licensed approximately 30 digital music services and was in negotiations with about 20 further services.<sup>668</sup> CELAS operates out of the

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<sup>664</sup> EMI Group, *EMI Music Publishing Reaches Agreement with MCPS-PRS and GEMA to Establish 'one-stop' Pan-European Licensing of Mobile and Online Digital Rights in EMI MP's Anglo-American Songs* (2006).

<sup>665</sup> Heyde 136.

<sup>666</sup> The geographical reach of CELAS comprises a total of 41 territories; see <<http://www.celas.eu/CelasTabs/Territories.aspx>> (last accessed on 3 March 2012).

<sup>667</sup> GEMA, *First Licensing Agreements for CELAS GmbH* (2007). Several subsequent licensing deals are also publicly known; see Heyde 139.

<sup>668</sup> EMI Music Publishing, *Response to the Reflection Document of DG INFOSO and DG MARKT* (2010) 4.

headquarters of GEMA in Munich and of PRS for Music in London and, through service agreement, has access to the two societies' technical infrastructure and databases.<sup>669</sup>

### **DEAL**

In January 2008 Universal Music Publishing Group and the French authors' society SACEM announced their agreement to set up a joint framework for licensing Universal's Anglo-American and French repertoire on a pan-European basis for online and mobile exploitation in Europe.<sup>670</sup> One year later, the initiative, in the meantime named DEAL (Direct European Administration and Licensing), reported that it had granted its first pan-European licences to Amazon, Spotify and Nokia.<sup>671</sup>

### **PEDL**

Unlike the other major music publishers, Warner/Chappell Music, the publishing arm of Warner Music Group, did not choose one or two particular societies to administer the mechanical online rights in their Anglo-American repertoire. Rather, right from the start in January 2008, its Pan-European Digital Licensing Initiative (PEDL) has been designed to grant non-exclusive rights in its Anglo-American repertoire to any collecting society that complied with certain requirements; notably the prescription of maximum commission rates and standards on membership, accounting, transparency and IT as well as the prohibition of deduction for cultural and social purposes.<sup>672</sup>

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The licences covered 'the most significant services such as iTunes, Spotify, Amazon and Nokia as well as medium sized and smaller "niche" services such as 7Digital, Beatport and Emusic'.

<sup>669</sup> Hellenic Foundation for European and Foreign Policy 29.

<sup>670</sup> Universal Music Group, *Universal Music Publishing Group and SACEM Sign Agreement for Online and Mobile Licensing in Europe* (2008). Technically, the licensing process is handled by SDRM (*Société pour l'administration du Droit de Reproduction Mécanique des Auteurs, Compositeurs et Editeurs*), a joint venture of five French collecting societies to license their reproduction rights.

<sup>671</sup> SACEM, *Universal Music Publishing Group and SACEM Announce Name of Pan-European Licensing Model, as well as a Variety of Pan-European Deals with Major Internet Companies* (2009).

<sup>672</sup> GESAC, *Comments on the Initial Experience of GESAC's Member Societies after the Adoption of the Commission Recommendation of 18 October 2005 and the Developments of the Online Music Sector* (2007).

Today, seven collecting societies are part of PEDL: PRS for Music and Swedish performing rights society STIM, which both have been participating in the initiative since its inception,<sup>673</sup> as well as French SACEM, Spanish SGAE, Dutch BUMA/STEMRA<sup>674</sup> and Portuguese SPA.<sup>675</sup>

### **PAECOL**

On 16 June 2008, the last of the four major publishers, Sony/ATV Music Publishing, announced an alliance with GEMA, which enabled the collecting society to licence the rights of Sony/ATV's Anglo-American repertoire across Europe for mobile and online digital use.<sup>676</sup> To administer such pan-European licences, PAECOL (Pan-European Central Online Licensing), a private company under German law (GmbH) wholly owned by GEMA, was founded.

### **PEL**

All the publisher-controlled pan-European licensing initiatives presented so far cover the relevant publisher's Anglo-American repertoire. This is different with SGAE's pan-European Licensing Initiative of Latin American Repertoire (PEL). The Spanish authors' society has been mandated to licence the Latin American repertoires of large

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<sup>673</sup> Warner Music Group, GEMA, *The MCPS-PRS Alliance and STIM Join Warner/Chappell Music's Pan-European Digital Licensing (PEDL) Initiative* (2008). Initially, GEMA had also shown interest in the initiative but finally decided not to join; see Müller, 'Rechtswahrnehmung durch Verwertungsgesellschaften bei der Nutzung von Musikwerken im Internet' [2009] *Zeitschrift für Urheber- und Medienrecht* 121, 128. It is, however, still able to license Warner Chappell Music's Anglo-American repertoire on an individual basis; Müller, 'Die Rechteinhaberschaft an Musikwerken bei Online-Nutzungen' (2011) 55 *Zeitschrift für Urheber- und Medienrecht* 13, 16.

<sup>674</sup> Note that BUMA/STEMRA, in a different context, also licenses the mechanical online rights of the Anglo-American repertoire of large independent publisher Imagem; PRS for Music, *Imagem Appoint BUMA-STEMRA and PRS for Music to Manage European Online Rights* (2011).

<sup>675</sup> Warner Music Group, *SPA Joins Warner/Chappell Music's Pan-European Digital Licensing (PEDL) Initiative* (2011).

<sup>676</sup> Brandle, Lars, 'Sony/ATV, GEMA Team for Euro Licensing Breakthrough' *Billboard* (16 June 2008) <[www.billboard.com/news/sony-atv-gema-team-for-euro-licensing-breakthrough-1003816969.story](http://www.billboard.com/news/sony-atv-gema-team-for-euro-licensing-breakthrough-1003816969.story)> accessed 08 March 2012.

independent publisher Peer Music (January 2008)<sup>677</sup> and Sony/ATV (December 2008)<sup>678</sup> for online and mobile uses on a pan-European basis.

In January and June 2009 SGAE granted pan-European licences to eMusic and Nokia's 'Comes with music' service. These deals not only covered the Latin American and Spanish repertoires of Peer Music and Sony/ATV, but also that of EMI Music Publishing.<sup>679</sup> One may, therefore, assume that SGAE has a similar mandate with that publisher.<sup>680</sup>

Beyond these deals with music publishers, SGAE has also been mandated by the Portuguese authors' society SPA to represent the latter's online rights on a pan-European basis.<sup>681</sup>

### 12.3.1.1.2 Initiatives of Large Independent Music Publishers

Some large independent music publishers were equally active to forge alliances with particular collecting societies to directly administer the rights under their control.

It would appear that, since January 2008, PRS for Music was particularly successful in attracting large independent publishers. Today, the UK authors' society

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<sup>677</sup> MCPS-PRS, *Peermusic Announces Pan-European Licensing Partners* (2008).

<sup>678</sup> Paine, Andre, 'Sony/ATV Launches Pan-Euro Latin & Spanish License' *Billboard.biz* (23 December 2008) <[http://www.billboard.biz/bbbiz/content\\_display/industry/news/e3ie4767e187b7eb184188e03a9f96f9525](http://www.billboard.biz/bbbiz/content_display/industry/news/e3ie4767e187b7eb184188e03a9f96f9525)> accessed 10 March 2012.

<sup>679</sup> Ferguson, Tom, 'Continental Drift. Pan-European Licensing Inches Closer' *Billboard* (21 November 2009) 18; Paine, Andre, 'European Licensing Deals for Comes with Music' *Billboard* (14 May 2009) <[www.billboard.com/news/european-licensing-deals-for-comes-with-1003973217.story](http://www.billboard.com/news/european-licensing-deals-for-comes-with-1003973217.story)> accessed 10 March 2012.

<sup>680</sup> This is reported by Llewellyn, Howell, 'SGAE Signs With eMusic' *Billboard* (15 June 2009) <<http://www.billboard.com/news/sgae-signs-with-emusic-1003984404.story>> accessed 11 March 2012, and also suggested in SGAE, *Business and Corporate Social Responsibility Report 2008* (2009) 58. Perhaps, however, the arrangement between SGAE and EMI Music Publishing is less formalised and based on a case-by-case co-operation. This would explain why the Latin American Repertoire of EMI does not figure amongst the catalogue the Armonia, the joint venture between SACEM (France), SGAE (Spain), SIAE (Italy) and SPA (Portugal); see below at 224.

<sup>681</sup> AEPO-ARTIS, *News Bulletin November 2011* (2011) 5. While not many details of the deal are known, it would appear that the mandate covers both, the mechanical online as well as the making available right.

grants pan-European licenses for mechanical online rights in the Anglo-American repertoires of Peer Music, BMG Chrysalis Music and Imagem.<sup>682</sup>

As far as the latest co-operation with Imagem is concerned, it should be noted that the publisher not only mandated PRS for Music but equally the Dutch authors' society BUMA/STEMRA to directly license its Anglo-American repertoire to pan-European online and mobile services, on its behalf.<sup>683</sup>

The Spanish authors' society SGAE, again, is a particular case amongst the alliances of large independent publishers with collecting societies. Like PRS for Music, it has been mandated by Peer Music. Yet, there is no overlap of the two mandates as PRS for Music licenses Peer Music's Anglo-American and SGAE the latter's Latin repertoire.<sup>684</sup>

#### **12.3.1.1.3 Initiatives for Small and Medium-sized Independent Music Publishers**

The most recent addition to the different forms of pan-European licensing are initiatives of collecting societies specifically designed to allow small and medium-sized independent music publishers to directly license their Anglo-American repertoire for mobile and online uses on a pan-European basis.

#### ***IMPEL***

The first of these initiatives, operated by PRS for Music since 1 January 2010, is called IMPEL (Independent Music Publishers' European Licensing).<sup>685</sup> The network is open

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<sup>682</sup> See PRS for Music website at <<http://www.prsformusic.com/users/broadcastandonline/online/mobile/multiterritorylicensing/Pages/default.aspx>>. While the co-operation with Peer Music started on 1 January 2008, PRS for Music has been licensing Chrysalis' mechanical online rights at least from 2009 onwards; see MCPS-PRS and Paine. The most recent co-operation with Imagem started on 1 January 2012; PRS for Music (n 674).

<sup>683</sup> *Ibid.*

<sup>684</sup> MCPS-PRS.

<sup>685</sup> PRS for Music, *Indy Publishers and PRS for Music Launch IMPEL* (2010). Before the launch of IMPEL, PRS for Music had worked towards a solution for small and medium-sized music publishers under the name 'Alliance Digital', for which more than 730 independent music publishers had signed an online agency agreement; see Music Publishers Association, *Response to Call for Comments Requested by the European Commission in the Light of the Commission Recommendation of 18 October 2005 (2005/737/EC)* (2007) 3, 9-34. While it would appear that the Alliance Digital was never operative, PRS maintains that the contracts signed under the scheme will be rolled into the IMPEL initiative;

to all independent publishers and, at the time of writing, counts 20 publishers.<sup>686</sup> As with most other initiatives, IMPEL only covers the publishers' Anglo-American repertoire.<sup>687</sup> In January 2012, PRS for Music announced that the amount of royalties processed through IMPEL had passed the threshold of £1 million.<sup>688</sup>

### *STIM WOI Portal*

Another platform, the WOI Portal, has been developed by Swedish authors' society STIM and started operations on 30 January 2012. The initiative is specifically targeted at small publishers that have not yet been able to extract benefits from the new system of direct licensing endorsed by the 2005 Recommendation. The small independent publishers mandate STIM to license their mechanical online rights across the European Economic Area.<sup>689</sup> The collective management of their rights, STIM promises, would lead to better negotiation leverage.<sup>690</sup> As a particular characteristic of the new initiative, the publishers retain a voice in the licensing negotiations. More specifically, through access to a web-based application, they can micro-manage their rights on a licence-by-licence basis.<sup>691</sup> In exchange, STIM deducts a commission of 10

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see PRS for Music, *IMPEL Publisher FAQs*, question 15. That the number of publishers participating in IMPEL is so much smaller than those previously enrolled in Alliance Digital might be attributed to the fact that PRS for Music only accepts publishers for IMPEL which have fully withdrawn their online mechanical rights from the traditional system of collective copyright management; see *ibid* question 10.

<sup>686</sup> <<http://www.prsformusic.com/impel/Pages/default.aspx>>.

<sup>687</sup> *Ibid* questions 5 and 6.

<sup>688</sup> Koranteng, Juliana, 'Spirit Music Group Joins IMPEL, Pan-European Licensing Debate Remains Unresolved' *Billboard.biz* (26 January 2012) <<http://www.billboard.biz/bbbiz/others/spirit-music-group-joins-impel-pan-european-1005981152.story>>.

<sup>689</sup> There are no clear indications as to whether the WOI Portal is intended to grant licences covering more than its publisher members' Anglo-American repertoires. This might, however, be assumed; in particular, because STIM itself identifies small independent US publishers as the major group of potential members when it asserts that STIM 'has an effective way to satisfy U.S independent publishers needs within the EU in the best possible way'; STIM, *The WOI Portal* (2012) 3.

<sup>690</sup> STIM, *New Innovative Swedish Portal Provides Indie Publishing Power* (2012).

<sup>691</sup> STIM, *WOI Portal*, 2.

per cent from all licensing revenues generated.<sup>692</sup> No further deductions for cultural or social purposes are made.<sup>693</sup>

### 12.3.1.2 Pooling Initiatives of Collecting Societies

Two initiatives of several European collecting societies aim at aggregating their repertoire for online and mobile services. These licensing hubs do not follow the path laid by the 2005 Recommendation but, rather, on the contrary, rely on enhanced co-operation to offer multi-territorial licensing.

#### *Nordic Model*

The first initiative to become operative was the so-called 'Nordic Model'. Licences are issued by the Nordisk Copyright Bureau (NCB), an association of the Nordic authors' societies KODA (Denmark), STEF (Iceland), STIM (Sweden), TEOSTO (Finland) and TONO (Norway) with cooperation agreements with the Baltic authors' societies EAÜ (Estonia), AKKA/LAA (Latvia) and LATGA-A (Lithuania). Traditionally, NCB's core task has been the licensing of its affiliated societies' mechanical rights throughout the eight mentioned Nordic and Baltic countries.

In early 2009, however, NCB started to grant so-called Joint Nordic/Baltic Online Licences that combine the mechanical online rights managed by NCB with the local societies' performing online right.<sup>694</sup> These licences allow online music services to use the aggregate repertoire of all eight societies across all of the eight countries concerned.<sup>695</sup> In contrast to the publisher-controlled central licensing agencies, the

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<sup>692</sup> STIM, *WOI Portal Q & A* (2012), question 4.

<sup>693</sup> STIM, *WOI Portal*, 3. It would, however, be interesting to know whether the fixed commission of 10 per cent is higher than the actual administrative costs. Given that the negotiation process appears to be fully automated, this is well conceivable. If so, one could wonder to what purposes the excess will be used. As STIM is a not-for-profit organisation (see <<http://www.stim.se/en/This-is-STIM/>>) one would assume that any surplus would ultimately need to be spent to the benefit of the organisation's members. Indirectly, the *WOI Portal* could then also benefit the society's author members.

<sup>694</sup> Music & Copyright's Blog, *Is NCB the Model for Future Pan-European Licensing?* (2011).

<sup>695</sup> For online music service with only national reach, the eight authors' societies remain able to grant national online licences; *ibid.*



offered Joint Nordic/Baltic Online Licences are therefore not truly pan-European.<sup>696</sup> However, they are not limited to the repertoire of only one publisher. In summer 2011, NCB had already granted nine of these licences and was in negotiations for another nine.<sup>697</sup>

### **Armonia**

Another pooling initiative has been pursued since 2007 by the three authors' societies SACEM (France), SGAE (Spain) and SIAE (Italy). As it stands today, Armonia is a joint licensing scheme that grants online and mobile licenses for the repertoires represented by the three societies on a pan-European basis. Technically, a commercial user obtains a bundle of licences, each of which covering the catalogue of one of the three member societies.<sup>698</sup>

Given that both, SACEM and SGAE, have been successful in securing additional mandates to represent pan-European online rights, the breadth of Armonia's aggregate catalogue is considerable. As Armonia explains on its website, it 'represents the repertoires of SACEM, SGAE, SIAE and SPA in Europe jointly with Anglo-American works of Universal Music Publishing and Latin Works of SONY/ATV, and Peer Music'.<sup>699</sup>

The first joint licences facilitated by Armonia have been granted in January 2011 to Beatport.<sup>700</sup>

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<sup>696</sup> Heyde 146.

<sup>697</sup> Music & Copyright's Blog, *Is NCB the Model?* For example, NCB reported that it had processed Spotify's online service for Norway and Finland without having had to make larger changes to its systems or processes; NCB, *Annual Report 2010* (2011) 8.

<sup>698</sup> Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (2011) 34 *Columbia Journal of Law & the Arts* 757, 774.

<sup>699</sup> <[http://www.armoniaonline.org/home?request\\_locale=en](http://www.armoniaonline.org/home?request_locale=en)> (last accessed on 12 March 2012).

<sup>700</sup> SACEM, *Three Authors' Societies (SACEM, SGAE, SIAE) Members of Armonia Signed with Beatport Midem 2011* (2011).

### 12.3.2 The Undue Preferential Treatment of Some Right Holders

Time has proven right those critics of the 2005 Recommendation who argued that it was too simplistic in not duly distinguishing between the different categories of right holders and their respective needs and options. The way that central pan-European licensing initiatives have developed shows that some right holders were better able than others to put into practice the proclaimed freedom of withdrawing their online rights and entrusting them to a collective rights manager of their choice on a territorial basis of their choice. Very quick to make use of such freedom were the major music publishers through their creation of various pan-European initiatives (CELAS, DEAL, PEDL, PAECOL, PEL), followed by large independent music publishers like Peer Music, Imagem and Chrysalis. More recently, medium-sized independent publishers have been invited to join the IMPEL initiative and, as a fairly new development, small independent publishers are now the target group of the WOI Portal. Authors, however, do not appear to have moved their online rights from one collecting society to another to any discernible extent.

It thus seems entirely fitting to compare the 2005 Recommendation, as one commentator already aptly did in 2008, to an invitation for a swimming contest addressed to both well-trained and non-swimmers: while, of course, it was never too late to learn how to swim, until then not only would the contest be over, but perhaps some of the participants would already have drowned.<sup>701</sup> The present section assesses the varying degrees of difficulties and chances facing right holders when implementing the 2005 Recommendation. These inequalities reflect the given legal structures underpinning the collective management of music rights as well as the fact that only certain categories of right holders have the ability to change these to the extent necessary for direct pan-European licensing.

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<sup>701</sup> Poll, 'CELAS, PEDL & Co.: Metamorphose oder Anfang vom Ende der kollektiven Wahrnehmung von Musik-Online-Rechten in Europa?' (2008) 52 Zeitschrift für Urheber- und Medienrecht 500, 504.

As far as music publishers are concerned, the establishment of direct pan-European licensing initiatives depends on legal considerations that can be grouped into three themes, each of which will be analysed in turn:

- the publishers' control over Anglo-American reproduction rights (12.3.2.1);
- the ease with which they are able to withdraw these rights from the system of collective rights management (12.3.2.2); and
- the ability of their pan-European licensing initiatives to jointly license the making available rights (12.3.2.3).

### **12.3.2.1 The Publishers' Control over Anglo-American Online Reproduction Rights**

Both the making available as well as the online reproduction right must be cleared before music may legally be exploited through the Internet or mobile networks.

As far as the making available right is concerned, authors typically assign or exclusively license this right in any of their present and future works to their performing right society upon joining.<sup>702</sup> Where authors subsequently enter into publishing agreements, their publishers seek to gain control over as many of the authors' rights as possible. As a consequence of already having transferred their making available right to their collecting society, authors, however, are no longer in control of that right themselves and thus cannot subsequently transfer it to the publishers. In order to still compensate the publishers for their services to promote the authors' works, the latter, instead of transferring the making available right itself, grant their publishers a certain share in the royalties generated through the exploitation of that right.

In continental European traditions, the same principles apply to the reproduction right. Authors transfer it to their mechanical right society when they

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<sup>702</sup> In relation to existing members, performing rights societies, once the making available right was legally recognised, updated their membership agreements in order also to bring that right under the umbrella of collectively managed rights.

join and their publishers' influence is restricted to a share of the resulting royalties. Crucially, however, this situation is different in countries of Anglo-American legal tradition, where authors assign their reproduction right to their publishers. The publishers, in turn, mandate central entities with the exploitation of that right.<sup>703</sup> In order to manage the reproduction rights internationally, publishers have created a network of agreements with sub-publishers in foreign territories.

These brief considerations reveal a first fundamental difference: while publishers with a continental European repertoire simply do not hold any rights that they could potentially withdraw from the system of collective rights administration, publishers with Anglo-American repertoire at least own part of the necessary online rights, notably the online reproduction right. It was the publishers' withdrawal from the collective management system of this particular right that started the creation of publisher-controlled central pan-European licensing initiatives.<sup>704</sup>

Where publishers do have power over mechanical online rights, it is by financial gains that they are motivated to withdraw and administer directly. This gives them control over prerogatives that, in the traditional system, lay with the collecting societies. Notably, they may determine the licensing conditions and, more importantly, the licensing price.<sup>705</sup> They also hope for lower administration costs, more accurate and efficient reporting and greater transparency.<sup>706</sup>

But what obstacles prevent the other categories of right holders from equally implementing direct pan-European licensing? Music publishers with continental

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<sup>703</sup> For the most important Anglo-American territories these are the US-American Harry Fox Agency, the UK Mechanical-Copyright Protection Society (MCPS), now part of PRS for Music, and the Irish Mechanical Copyright Protection Society Ireland (MCPSI). These entities operate as agents to the publishers, who remain the holders of the reproduction right.

<sup>704</sup> A particular case is SGAE's pan-European licensing initiative for Latin repertoire. While there is no explicit information on which party effectively controls the mechanical online rights in music in Central and South America, it has been reported that music publishers withdrew their Latin repertoire before signing with SGAE; see Hellenic Foundation for European and Foreign Policy 32. It thus has to be assumed that their situation is comparable to that of publishers in Anglo-American legal traditions.

<sup>705</sup> Poll 504; *Universal/BMG Music Publishing (COMP/M.4404)*, Decision C(2007) 2160 (European Commission 22 May 2007) <[http://ec.europa.eu/competition/mergers/cases/decisions/m4404\\_20070522\\_20600\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4404_20070522_20600_en.pdf)> 51-52.

<sup>706</sup> Kohn and Kohn 194-195.

European repertoire, for their part, face considerable, if not insurmountable, difficulties if they attempt to establish comparable pan-European licensing initiatives. They would have to convince authors of continental European works to modify their membership agreements with their respective mechanical rights society;<sup>707</sup> although perhaps possible in theory, this would appear infeasible in practice, in light of the sheer volume of authors concerned and the different notice periods that they would all have to respect. Moreover, the success of direct pan-European licensing depends on the publisher's ability to aggregate a mass of repertoire substantial enough to be attractive in the eyes of online music services. Publishers would, therefore, need to motivate virtually all of their contracted authors to withdraw their rights. Clear obstacles to such mass orchestration, however, are the diverging views amongst the published authors themselves. Presumably, they share the same aim of monetising their rights to the largest extent possible. Yet, they will not all agree that pan-European direct licensing via their publishers would be the best way to reach that aim. In particular, the substantive mass of writers who do not have large commercial success will feel that the elements of solidarity built into the system of collective rights administration<sup>708</sup> better suit their needs and, for that reason, would probably not feel inclined to abandon these benefits.

Finally, authors without a publisher still control the online rights in their creations subject to the collective management of these rights through authors' societies. From a legal point of view, they would therefore not be hindered to withdraw their rights from their current society and henceforth administer them in different ways. Given that they do not have the support of a music publisher, their only choice would be to move their online rights to a collecting society that is more successfully engaged in offering pan-European online licences for its own repertoire than the authors' current society. To assess this as well as the question of whether a move would be beneficial more generally, however, requires considerable knowledge of

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<sup>707</sup> *Universal/BMG Music Publishing (COMP/M.4404)* 38–39. Once the authors have withdrawn these rights, the publishers would equally need to modify their own membership agreements with their mechanical rights society; see Heyde 218–220.

<sup>708</sup> See above at 10.1.3, on page 143.

the legal issues involved – a degree of knowledge that most unpublished authors will lack. Moreover, substantial notice periods to modify the membership agreements with their local society, as well as language barriers in relation to the new society, may equally discourage authors to move their online rights.<sup>709</sup> Finally, many authors feel culturally connected to their local society and are generally happy with its service. It is therefore not surprising that the European grouping of authors' societies GESAC, in 2007, reported that none of their member societies had noticed any substantial withdrawal activities on the parts of individual authors.<sup>710</sup> As far as can be seen, this has not changed since then.

### **12.3.2.2 The Publishers' Ability to Amend Their Sub-publisher Agreements**

It has become apparent that right holders must have effective control over exclusive rights granted under copyright rules – and not only a share in the royalties generated by these rights – before they can withdraw them from the system of collective rights management and license them directly on a pan-European basis. Yet, effective control over (at least some) online rights is only one of the preconditions for launching direct pan-European licensing. To an equally crucial extent, any such endeavour also depends on the ease with which music publishers may execute the withdrawal of their rights from collecting societies. This, however, might be complicated by the existing sub-publishing system.

Music publishers maintain a network of international sub-publishers to promote and administer their rights abroad. Under the traditional model, an original publishing company mandates sub-publishers on an exclusive basis to represent its repertoire in their domestic territory. The sub-publishers would then entrust their local mechanical rights societies with the administration of that right. In order to withdraw the mechanical rights from the system of collective rights administration, there are two possible procedures.<sup>711</sup>

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<sup>709</sup> As to all these potential reasons, see Heyde 246.

<sup>710</sup> GESAC, Comments on Initial Experience, 5.

<sup>711</sup> A much more detailed analysis of this point is provided by Heyde 221–223.

On the one hand, a sub-publisher could modify the membership agreements it has with its mechanical rights society to the effect that the relevant mechanical online rights would henceforth be excluded from collective administration. In a second step, the sub-publisher would need to re-transfer the mechanical online rights to the original publisher before the latter is in a position directly to license them on a pan-European basis. For the original publisher, this procedure has certain drawbacks. First, a sub-publisher could only withdraw the mechanical online rights after the applicable notice period. Second and even more importantly, the original publisher would depend on the sub-publisher's co-operation to agree to a re-transferral of the rights as sub-publishing agreements usually do not provide for such obligation.

On the other hand - and this has been the music publishers' strategy<sup>712</sup> - the original publishers may modify their sub-publishing agreements. If a sub-publisher loses the mandate to represent the original publisher's mechanical online rights, its local mechanical rights society may no longer administer them. In this scenario, the mechanical online rights automatically revert to the original publisher without any need to amend the membership agreement between the sub-publisher and its mechanical rights society.<sup>713</sup>

Under both possible scenarios, the ease with which original publishers may withdraw their mechanical online rights from the existing collective licensing structure hinges decisively on the power that they may exert over their sub-publishers.

The major music publishers are best placed to swiftly withdraw their mechanical online rights. They are part of world-wide operating music groups with affiliations in all noteworthy music markets. As their local sub-publishers belong to the same music group, the major music publishers have no difficulties ensuring their sub-publisher's co-operation to amend the latter's mandates. For large independent publishers with comparable internationalised structures withdrawal is similarly easy. Small and medium-sized music publishers, however, will struggle harder to have their

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<sup>712</sup> *Universal/BMG Music Publishing (COMP/M.4404)* 37.

<sup>713</sup> For a dogmatic analysis of this particular effect of the termination of the sub-publishing contract under German law, see Heyde 223-229. He also notes that, as far as can be seen, collecting societies have not sought to challenge this interpretation.

mechanical online rights re-vested.<sup>714</sup> Today, most sub-publishing agreements have a term of three to five years; in the past, however, sub-publishing agreements used to be concluded for the whole term of copyright protection.<sup>715</sup> Where these contracts are still in place, original publishers are locked in. Furthermore, they may not be able to change the contractual terms if they lack the necessary bargaining leverage. Beyond legal considerations, it should also be noted that sub-publishers typically do more than merely administrating the royalty flows; they actively promote the exploitation of the original publishers' repertoire in their domestic territories. When considering the establishment of central pan-European licensing, the loss of such local support is certainly also an element to be assessed carefully by small and medium-sized publishers. Finally, some sub-publishing agreements are built on the principle of reciprocity.<sup>716</sup> To the extent that this is the case, the withdrawal of the original publisher's repertoire may mean the termination of income stream from its own sub-publishing services.

The significantly lower bargaining power of small and medium-sized music publishers is also visible in their relationships with their potential partners for a central pan-European licensing initiative, the European collecting societies. When the major music publishers started their central pan-European licensing initiatives, several collecting societies submitted administration offers amongst which the publishers could choose the one with the most favourable terms.<sup>717</sup> With the two solutions that have until now been put in place for small and medium-sized music publishers (IMPEL and the WOI Portal), the collecting societies' bargaining position has changed: they operate their platform on non-negotiable terms that small and medium-sized publishers can only reject or accept.

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<sup>714</sup> As to the different options that may be available to small and medium-sized publishers, see Music Publishers Association, Annex 2.

<sup>715</sup> Kohn and Kohn 234-235. He also notes that in the aftermath of the 2005 Recommendation and the 2008 CISAC Decision, there is a new trend to insist on shorter terms, non-exclusive licences or the exclusion of online rights upon reasonable notice to the sub-publisher; *ibid* 216-218. It should not be overlooked, however, that insisting on terms thus favourable to the original publisher changes the overall contractual balance; in such a case, for example, a sub-publisher is much less likely to agree to the payment of advances.

<sup>716</sup> *Ibid* 206-207, 237-238.

<sup>717</sup> *Universal/BMG Music Publishing (COMP/M.4404)* 50.



This notwithstanding, the difficulties that small and medium-sized publishers face in the withdrawal of their mechanical online rights are, to a certain extent, accommodated by IMPEL and the WOI Portal. While both initiatives aim to provide them with a pan-European digital licensing solution, there are differences in the underlying legal construction. Both initiatives emphasise that other European collecting societies would continue to be able to license the participating publishers' repertoire for online and mobile services that are limited to their respective domestic market. The means, however, through which this is achieved, differ. PRS for Music insists that IMPEL publishers withdraw all their mechanical online rights from their respective sub-publishers and that the mandate for national digital licensing deals is directed to the relevant society through PRS for Music and the reciprocal agreement it maintains with the relevant society.<sup>718</sup> This strongly suggests that the IMPEL publishers mandate PRS for Music on an exclusive basis. As far as the WOI Portal is concerned, STIM highlights that the publishers' mandate is non-exclusive and that it only covers multi-territorial online services, purportedly leaving the agreements of the Portal members with their sub-publishers largely unaffected. Another EU collecting society could continue to license domestic digital services as it remains to be granted the necessary mechanical online rights by the relevant domestic sub-publisher for national exploitation.

A closer look, therefore, reveals that while both initiatives direct themselves at independent publishers, they still have distinct target groups. The different legal underpinning thus avoids competition between IMPEL and the WOI Portal:<sup>719</sup> only independent publishers who have the power to fully withdraw their mechanical online rights from their sub-publishers are able to join IMPEL; smaller sub-publishers who could not easily achieve this might still join the WOI Portal. Leaving existing sub-publishing agreements in place arguably makes it easier for independent publishers to join the WOI Portal, even though this assumes that their agreements are non-

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<sup>718</sup> PRS for Music, *IMPEL Publisher FAQs*, questions 10, 12-13. Arguably, this is the reason why the number of participating independent publishers is still relatively small; see above, n 685.

<sup>719</sup> This, in itself, is not a surprising result as both initiatives use technological backend solutions that have been developed by the STIM / PRS for Music joint venture ICE; PRS for Music, *IMPEL Information Pack 2012* (2012) 2; STIM, WOI Portal, 3.

exclusive.<sup>720</sup> For the operating society STIM, it has the additional benefit that it avoids competition with its own Swedish sub-publisher members.<sup>721</sup>

In conclusion, the above discussion revealed a further layer of inequality built into the 2005 Recommendation. Due to existing sub-publishing arrangements, the circle of those effectively able to make use of the proclaimed freedom to directly license their rights is thus not only restricted to music publishers with mostly<sup>722</sup> Anglo-American repertoire but, significantly more narrowly, to those with sufficiently strong market power. Be it intentionally or not, it is these global players that the 2005 Recommendation favours distinctly.

### 12.3.2.3 The Joint Licensing of the Making Available Right through the Publisher-Controlled Central Pan-European Licensing Initiatives

Even where publishers are in the position of directly licensing their rights, the scope of such licensing is limited in several ways. First, they only control rights in some of their catalogues, notably their Anglo-American and, to a lesser extent, Latin repertoire. Second, and more importantly, even in relation to that repertoire, only the mechanical online rights are within the publishers' reach. This is a clear disadvantage for online music services as all usual forms of online and mobile distribution of music affect both the mechanical as well as the performing online rights. Online music services therefore need to clear both sets of rights. The performing online rights, however, continue to be administered by performing right societies through their system of reciprocal representation.

As a remedy and in order to serve as a 'one-stop shop' at least with regard to the relevant publisher's Anglo-American or Latin repertoire, the publishers operate

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<sup>720</sup> However, common current practice appears to be exclusivity; Kohn and Kohn 215-217. If sub-publishers have an exclusive mandate for their domestic territory to represent the original publisher, this exclusivity would need to be lifted if multi-territorial licensing through the WOI Portal was to cover that territory.

<sup>721</sup> According to STIM, sub-publishing arrangements are typically restricted to the relevant sub-publisher's domestic territory, so that these sub-publishers would not be able to compete with the WOI Portal for multi-territorial music services anyway. Further, in cases where sub-publishers have been given a multi-territorial mandate by the original publishers, they may equally join the WOI Portal; STIM, *WOI Portal Q & A*, question 7.

<sup>722</sup> The only exception is SGAE's PEL initiative; see above on page 219.

their licensing initiatives in co-operation with one or several European collecting societies. The pan-European mechanical online rights provided by the publishers are thus supplemented with the matching performing online rights. This way, an online music service may clear all the authors' rights in a publisher's Anglo-American or Latin repertoire in a single transaction, even if, legally speaking, the mechanical and the performing online rights follow different licensing chains.

This, however, pre-supposes that the co-operating collecting society has a pan-European mandate to administer the performing online rights of the relevant publisher's Anglo-American or Latin repertoire. To secure such a comprehensive mandate is not necessarily an easy task. Typically, the authors of that repertoire are not members of any European performing right society<sup>723</sup> but belong to one of their local counterparts abroad. Whether the co-operating collecting societies may license the performing rights of their overseas sister societies on a pan-European basis thus depends on the reciprocal representation agreements between them.

Reciprocal representation agreements categorically used to contain territorial restrictions to the effect that a collecting society was only able to license its sister societies' repertoires within its own territory. As a consequence of the 2008 CISAC Decision, however, the prevalence of these territorial restrictions, at least as far as online rights are concerned, has crumbled. Today, the re-negotiated reciprocal agreements of EU collecting societies contain mandates of varying territorial reach.<sup>724</sup>

In relation to those performing rights societies with Anglo-American and Latin repertoires which are located overseas, it appears relatively easy for European collecting societies to negotiate agreements that allow for pan-European mandates. GEMA, for example, has agreed on such a mandate with US societies ASCAP and BMI and the

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<sup>723</sup> Obviously, this is not entirely true for PRS for Music in the UK or IMRO in Ireland, whose members' creations are part of the Anglo-American repertoire. Yet even so, the two societies' own repertoire only covers music from the UK and Ireland. In order to be able to license music from Anglo-American territories abroad, the two societies are equally dependent on reciprocal agreements with the societies in these territories.

<sup>724</sup> See below at 13.3, on page 253. See also Müller, *Rechtsinhaberschaft*, 14–16; PRS for Music, *Contribution to Public Hearing on Governance and Transparency of Collective Management of Rights* (2010) 1–2.

other Anglo-American performing rights societies.<sup>725</sup> PRS for Music has been granted a pan-European mandate by APRA (AUS), SOCAN (CA), IMRO (IRE), ASCAP (US), BMI (US), SESAC (US) and SAMRO (ZA).<sup>726</sup> It would appear that other European collecting societies have similar arrangements with Anglo-American overseas societies.<sup>727</sup> As far as SGAE's pan-European licensing initiative for the Latin repertoire is concerned, the Spanish collecting society has successfully broadened the scope of its mandate to represent Central and South American performing rights societies on a pan-European basis.<sup>728</sup>

While unrestricted representation agreements with overseas societies thus appear to be relatively easy to achieve, PRS for Music is much more hesitant to grant the other European societies a pan-European mandate for its own UK repertoire. For GEMA this seems not to have been problematic, as the German authors' society, by 2005, had territorially unrestricted agreements with PRS for Music.<sup>729</sup> Those societies alongside PRS for Music that were partners in Warner Chappell's PEDL initiative, however, struggled to conclude such arrangements. In 2008, Warner Chappell reported that PRS for Music refused to sub-license its repertoire to the other societies with the effect that wherever an online music service is interested in Warner Chappell's UK repertoire, PRS for Music must be included.<sup>730</sup> The difference in attitude between overseas performing rights societies and PRS for Music can be explained by the fact that for overseas societies direct online licensing in the EU is not a feasible option. PRS for Music, however, competes with the other PEDL societies for the pan-European online licensing of Warner Chappell's Anglo-American repertoire. Understandably, being the exclusive holder of the online performing rights in the UK repertoire is a clear advantage for PRS for Music that the society is

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<sup>725</sup> Müller, *Rechtsinhaberschaft*, 127.

<sup>726</sup> PRS for Music, *IMPEL Publisher FAQs*.

<sup>727</sup> Spanish SGAE, for example, reported the conclusion of an agreement through which the society represents US performing rights society BMI's repertoire; SGAE, *Business Report and Corporate Responsibility 2006* (2007) 45.

<sup>728</sup> Hellenic Foundation for European and Foreign Policy 31–32; see also SGAE 45.

<sup>729</sup> Heyde 266.

<sup>730</sup> Warner Music Group, *Comments on the DG Competition Issues Paper on Online Goods and Services* (2008) 11. Whether this situation has changed since then is unclear.

unwilling to give up. It not only explains the difficulties of the other PEDL societies but, looking at the broader picture, also clarifies the large involvement of PRS for Music in so many of the current pan-European licensing schemes.

This reveals a third element of inequality in the model of direct pan-European licensing established by the 2005 Recommendation: in practice, only the most powerful European collecting societies will be in a position to represent the performing online rights in the entire Anglo-American or Latin repertoire. Only they can therefore participate in the publisher-controlled initiatives.

## **12.4 Conclusion**

The preceding sections have highlighted the various elements of inequality that publishers and collecting societies were faced with and concluded that only some actors were able to change their licensing practices in line with the goals pursued by the 2005 Recommendation. A question that still needs to be answered, however, is whether those practical changes that have occurred had a positive or negative effect on the diversity of online music.

Arguably, this is best approached by comparing the changes with how authors' online music rights were licensed before the EU intervention. As a first observation, one can ascertain that the changes only affect online services that target several EU member states. Where online music is offered in only one EU member state, the domestic society, based on the network of reciprocal representation agreements amongst collecting societies, continues to be in a position to license the rights necessary for the online use of the worldwide repertoire within its territory.

Yet, for online music providers wishing to offer their services in several EU member states, the situation has changed. Before, they entered into licensing agreements with the domestic authors' rights societies in all of the targeted countries, who in turn were able to license the necessary online rights in the worldwide repertoire, but restricted in use to the territory of the respective society. Now, the new central pan-European licensing initiatives offer multi-territorial licences, but these

licences are limited to the repertoires of specific publishers. Under the old system, the licences that cross-border music services needed to operate in several EU member states were automatically of the broadest possible reach in repertoire. Today, the breadth of repertoire a cross-border music service is able to offer depends on the number of licences it is willing to conclude.

There is thus a clear risk that the repertoire offered to end consumers is less broad today than was previously the case. This risk becomes even more tangible if one considers that the pan-European licensing initiatives cover primarily Anglo-American and thus highly demanded repertoires. While there is an incentive for music services to clear the rights in the most popular music, it is unlikely that they will be equally motivated to negotiate additional licenses covering less popular or niche repertoire. In particular, this would concern music originating from EU member states that are in less popular demand. Where online music services do not make an explicit effort to additionally clear the rights in these repertoires, their customers will not be able to access music that expresses the identities of the cultural groups in those member states. It should be added that this risk cannot be mitigated by the fact that licences granted by the pan-European licensing initiatives typically include the right to the worldwide online exploitation of the domestic repertoire of the collecting society that jointly operates the relevant initiative. Notably, only the commercially dominant societies cooperate with publishers in the operation of the pan-European licensing initiatives. The fact that online music services receive the rights in their domestic repertoires in addition to the rights in the relevant Anglo-American repertoire does not change the fact that less popular European repertoires could only be offered if additional licences were sought. On the contrary, the fact that online music service providers are not only able to easily clear the Anglo-American repertoire of their choice but additionally receive the rights to sell popular European music would only appear to even lower the incentives for them to take an interest in less frequently requested other European music.

We concluded earlier that a measure affecting the licensing system would promote the diversity of online music if the authors' rights in a diverse foreign

repertoire, ideally the worldwide repertoire, were available for licensing to digital music retailers in an easy and efficient manner. Applied to the factual situation of music licensing subsequent to the adoption of the 2005 Recommendation, one would have to note that it has become less easy and efficient for digital music retailers to clear the authors' rights in a diverse foreign repertoire. There is therefore much to conclude that the recent changes did not promote but were rather detrimental for the diversity of online music.

### **13 The 2008 CISAC Decision**

While the 2005 Recommendation was triggered by internal market concerns, a second initiative of the EU Commission with profound impact on online music licensing in Europe was taken in the domain of EU competition law. In its 2008 CISAC Decision, the EU Commission held that the system of reciprocal representation, as it was practiced at that time by the EU performing rights societies in relation to cable, satellite and online distribution, constituted a concerted practice prohibited under (then) EC Article 81(1). Most importantly for present purposes, the EU Commission decreed that the mandates granted within the framework of these agreements were all restricted to the relevant mandated society's domestic territory. Although appeals against the decision were still pending at the time of submission before the European General Court,<sup>731</sup> the Decision has already changed the online licensing practice to an extent that probably could not be reversed.

Before looking more closely at the major aspects of the Decision (13.2), we place it into the context of the most important prior instances in which EU competition law has focused on collecting societies, and more specifically, their co-operation through reciprocal agreements (13.1). Finally, it will be necessary to map out the way in which the Decision has influenced the current online licensing situation (13.3).

#### **13.1 The Context of the 2008 CISAC Decision**

Since the early 1970s the relationship between collecting societies and their members, between collecting societies and their users, and, finally, among collecting societies themselves have regularly been scrutinised under EU competition law rules.<sup>732</sup> The monopoly of collecting societies as such, however, was accepted as an essential feature

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<sup>731</sup> See below, n 788.

<sup>732</sup> For a more detailed overview, see Nérison, *La légitimité de la gestion collective des droits des auteurs en France et en Allemagne* (2011) 899-972; Frabboni 134-163; Lánchidi 135-140.



of the normal activities and purposes of collective right management that, unless there were additional indications of abusive behaviour, would not conflict with EU competition law.<sup>733</sup> This interpretation was particularly drawn from the fact that both the European Commission as well as the ECJ, when asked to decide whether the membership agreements of two collecting societies violated competition rules, based their judgment on (now) Article 102 and not TFEU Article 101.<sup>734</sup>

More specifically, however, the territorial delineation of the reciprocal agreements was subject to the scrutiny of both the ECJ and the European Commission prior to the 2008 CISAC Decision.

### 13.1.1 The 1989 *Lucazeau* and *Tournier* Cases before the European Court of Justice

In the 1989 *Lucazeau* and *Tournier* cases, the ECJ was called upon to assess collecting societies' network of reciprocal representation agreements and, more specifically, the resulting *de facto* monopoly for each society within its domestic territory. In the two cases that had triggered references for preliminary ruling, French discothèque owners wanted to avoid the comparatively high royalty fees fixed by SACEM. As they were only interested in Anglo-American repertoire they approached another foreign collecting societies for a licence. The latter, however, refused to license due to the territorial restrictions of the reciprocal agreements in place with SACEM. The question therefore arose whether the reciprocal representation agreements were anti-competitive under (now) TFEU Article 101(1).

The ECJ first pointed out that the reciprocal representation agreements pursued two objectives: the implementation of national treatment for all musical works irrespective of their origin and the reliance on local societies for the protection of repertoires abroad. As these were legitimate aims, the agreements as such were not contrary to (now) TFEU Article 101(1). The Court went on to point out that 'the

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<sup>733</sup> Schierholz para 12.0.23; Nérison para 912.

<sup>734</sup> *Belgische Radio en Televisie v NV Fonior*; *Société belge des auteurs, compositeurs et éditeurs v NV Fonior*; *Belgische Radio en Televisie v NV Fonior v SV SABAM and NV Fonior*, Case 127/73 [1974] ECR 313 (ECJ, 27 March 1974) para 10; *GEMA III (IV/29.971)*, Decision 82/204/EEC [1982] OJ L 94/12 (European Commission, 4 December 1981) 54.

position might be different' if they established exclusive mandates to the effect that a mandating society could not allow direct access to its repertoire by foreign users abroad.<sup>735</sup> Yet, in contrast to previous practice, the agreements did not contain any such clauses. Given, however, that collecting societies still refused to directly license users abroad, the question arose whether collecting societies retained *de facto* exclusivity by means of a concerted practice prohibited under (now) TFEU Article 101(1). The Court noted that 'mere parallel behaviour may amount to strong evidence of a concerted practice' but also emphasised that

'concerted action of that kind cannot be presumed where the parallel behaviour can be accounted for by reasons other than the existence of concerted action. Such a reason might be that the copyright-management societies of other Member States would be obliged, in the event of direct access to their repertoires, to organize their own management and monitoring system in another country'.<sup>736</sup>

In the offline environment, the ECJ had therefore accepted that the collecting societies' behaviour to refuse direct licensing was not restrictive of competition under TFEU Article 101(1). That the question remained unsettled as far as the licensing of music for online uses was concerned became clear when, in the first years of the new millennium, the Commission considered whether several new types of reciprocal agreements fell foul of competition rules. These agreements had been elaborated upon by collecting societies in order to allow for both multi-territorial and multi-repertoire licences and were received rather critically by the European Commission.

### 13.1.2 The Simulcasting Agreement and Its Variants

The first of these new models specifically designed for the licensing of forms of musical exploitation through the Internet was the Simulcasting Agreement, originally concluded between 40 record producers' collecting societies from Europe, Asia,

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<sup>735</sup> *François Lucazeau et al v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) et al*, Joined cases 110/88, 241/88 and 242/88 [1989] ECR 2811 (ECJ, 13 July 1989) paras 13-14; *Ministère public v Jean-Louis Tourmier*, 395/87 [1989] ECR 2521 (ECJ, 13 July 1989) paras 19-20.

<sup>736</sup> *François Lucazeau et al v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) et al* para 18; *Ministère public v Jean-Louis Tourmier* para 24.

Northern and Latin America, Australia, New Zealand and South Africa.<sup>737</sup> While it only applies to the right of the producers of sound recordings and performers it was heralded, time and again, as a sensible model for the domain of authors' rights. The way it was evaluated by the Commission clearly illustrates the latter's attitude towards the role that competition should play in collective rights management.

The agreement was intended to make it easier for radio and TV broadcasters to clear the rights of performers and producers of sound recordings required in order to transmit radio or TV broadcasts simultaneously over the Internet. As it provided that the participating societies granted each other, on a non-exclusive and territorially unrestricted basis, the right to authorise the use of their repertoires for simulcasts,<sup>738</sup> a broadcaster could obtain a single licence that covered the necessary broadcasting and public performance rights in the repertoires of all participating societies (multi-repertoire) for all the countries into which the simulcast would be transmitted (multi-territorial). In contrast, under the previous system of reciprocal representation a record producers' society could only grant multi-repertoire licences within its local territory. A simulcaster was therefore obliged to seek several licences; one from each record producers' society in each of the countries in which the simulcast would be accessible.

On 16 November 2000 the International Federation of the Phonographic Industry (henceforth IFPI), which, as a representative of the record producers' societies, had facilitated the agreement's conclusion and applied to the Commission for it to be exempted under (now) TFEU Article 101(3). Despite the practical advantages of the one-stop shop solution established by the Agreement, the Commission was reluctant to accept two particular provisions of the model agreement.

Under the first problematic provision, the power of any participating collecting society to grant multi-territorial and multi-repertoire licences was limited to those

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<sup>737</sup> Mestmäcker, 'Agreements of Reciprocal Representation of Collecting Societies in the Internal Market' [2005] *Revue Internationale du Droit d'Auteur* 63.

<sup>738</sup> In territories where record producers and performers are not endowed with exclusive rights but mere rights to equitable remuneration, the reciprocal mandate also authorised the mandated society to claim such remuneration.

simulcasters whose signal originated in its domestic territory.<sup>739</sup> After the Commission had expressed its reluctance to accept such customer allocation, IFPI amended the clause to provide that broadcasters whose signal originated in the EEA could obtain a licence from any society within the EEA.<sup>740</sup>

The second point of contention concerned the calculation of royalties. While the Commission, in principle, accepted that the overall sum to be charged to simulcasters was the aggregate of the national tariffs of all countries covered by the licence,<sup>741</sup> it was particularly critical of the fact that the overall tariff would not distinguish the copyright royalty from the administration fee of the grantor society. This, therefore, prevented 'prospective users from assessing the efficiency of each one of the participating societies and from benefiting from the licensing services from the society capable of providing them at the lower cost'.<sup>742</sup> In order to alleviate the Commission's concerns, IFPI offered to change the agreement so as to separate the copyright royalty from the grantor society's administration fee and to identify them separately when charging a licence fee to a user.<sup>743</sup>

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<sup>739</sup> European Commission, *Notice Pursuant to Article 19(3) of Council Regulation No 17 Concerning an Application for Negative Clearance or Exemption under Article 81(3) of the EC Treaty (Case COMP/C2/38.014 – IFPI 'Simulcasting')* [2001] OJ C 231/18, para 17.

<sup>740</sup> *Ibid* paras 17-19.

<sup>741</sup> *IFPI 'Simulcasting'* (COMP/C2/38.014), Decision 2003/300/EC, [2003] OJ L 107/58 (European Commission, 8 October 2002) Recitals 108-115.

<sup>742</sup> *Ibid* Recital 71. It should be noted that the idea of a certain degree of price competition amongst collecting societies was not novel when the Simulcasting Agreement was scrutinised by the European Commission. In fact, in the context of central licensing agreements for the reproduction of sound recordings of musical works on physical carriers, mechanical rights societies themselves had started to grant record companies rebates on the royalties due. To counteract these tendencies, the publishers, threatening the societies with withdrawal, succeeded in establishing the Cannes Agreement, in which mechanical rights societies obliged themselves to deduct rebates from their administrative costs only and to keep them under a certain level; Gyertyanfy, 'Collective Management of Music Rights in Europe after the CISAC Decision' (2010) 41 *International Review of Intellectual Property and Competition Law* 59, fn 7. As to the European Commission's appraisal of the Cannes Extension Agreement – successor of the Cannes Agreement – under competition law, see *Cannes Extension Agreement* (COMP/C2/38.681), Decision 2007/735/EC [2007] OJ L 296/27 (European Commission, 4 October 2006). A succinct overview of the forces that led to the central licensing agreements and the Cannes (Extension) Agreement is provided by Hardy, 'National versus Regional, Many versus Few: The Dilemma Facing the Collection Societies' in Pietilä (ed) *World Music: Roots and Routes* (2009) 34.

<sup>743</sup> *IFPI 'Simulcasting'* (COMP/C2/38.014) Recital 103. Commentators have largely criticised the Commission for the separation of copyright royalty and administration fee as this was perceived as a cut with the traditional logic according to which collecting societies operate; see Nérissou

Satisfied with the offered amendments, the Commission exempted the Simulcasting Agreement under (then) EC Article 81(3).<sup>744</sup> The substantial economic benefit that warranted an exemption was seen in the fact that the agreement gave rise to a new product, namely multi-territorial, multi-repertoire simulcasting licences, which both promoted technical and economic progress and improved the distribution of music in sound recordings.<sup>745</sup>

While the Simulcasting Agreement is still in force,<sup>746</sup> it appears to be of minimal relevance in practice, as the rights necessary for simulcasting are typically cleared jointly with and at the same time as the broadcasting rights.<sup>747</sup>

After the implementation of the Simulcasting Agreement, IFPI facilitated two additional model agreements for the reciprocal representation of phonogram producers' collecting societies, covering further types of online music exploitation. In November 2003, an agreement for certain types of webcasting, ie the streaming of music programmes on the Internet, was announced.<sup>748</sup> In April 2007, the Webcasting Agreement was extended to cover a broader range of streaming services and a new reciprocal agreement was launched for catch-up TV and radio by way of streaming and podcasts.<sup>749</sup> As far as can be seen, all of these agreements are constructed along the lines of the Simulcasting Agreement as approved by the European Commission.<sup>750</sup>

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paras 1000-1001; Mestmäcker 93-129.

<sup>744</sup> As the notified agreement was only intended to operate for an experimental period until 31 December 2004 the exemption was granted accordingly until that date; *IFPI 'Simulcasting'* (COMP/C2/38.014) Article 1.

<sup>745</sup> *Ibid* Recitals 84-92.

<sup>746</sup> Schierholz para 12.0.80.

<sup>747</sup> Müller, *Rechtsinhaberschaft*, 125.

<sup>748</sup> IFPI, *Recording Industry Announces New One-stop-shop for Webcasting Licensing* (London). The agreement seems to be of more practical relevance than that for simulcasting; Müller, *Rechtsinhaberschaft*, 125.

<sup>749</sup> IFPI, *Response to the Reflection Document of DG INFSO and DG MARKT* (2010) 5.

<sup>750</sup> Gerlach 1-2.

### 13.1.3 The Santiago / Barcelona Agreements

In relation to the online rights of authors, authors' rights societies put forward a solution for multi-territorial licensing when they adopted the Santiago and Barcelona Agreements.

The first of these model agreements owes its name to the fact that it was concluded during the 2000 CISAC World Congress in Santiago de Chile.<sup>751</sup> Agreed upon by initially five performing rights societies,<sup>752</sup> it adapted the existing CISAC Model Agreement to the online environment. Every participating society authorised the other societies to grant non-exclusive licences for online performing rights in its repertoire on a worldwide basis. As a consequence, any participating society was able to grant multi-territorial and multi-repertoire licences to operators of webcasting, streaming, as well as music and video downloads on demand. Importantly, however, the Agreement provided for a customer allocation regime, according to which any online music service was able to obtain such licence from only one of the participating societies.<sup>753</sup>

It was this provision that proved to be contentious when BUMA, GEMA, PRS and SACEM notified the Santiago Agreement to the European Commission for negative clearance on 17 April 2001.<sup>754</sup> Three years later, the European Commission issued a Statement of Objections in which it invited the notifying parties to delete the customer allocation clause.<sup>755</sup> From the perspective of the Commission, this customer allocation led to a situation in which 'each national collecting society was given

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<sup>751</sup> A detailed overview of the different provisions of the agreement is provided by Ficsor, *Collective Management*, 114–120.

<sup>752</sup> BMI (USA), BUMA (NL), GEMA (D), PRS (UK) and SACEM (F). It was later joined by all other performing rights societies in the EEA except for SPA (P); see European Commission, *Notice Published pursuant to Article 27(4) in Cases COMP/C2/39152 – BUMA and COMP/C2/30151 SABAM (Santiago Agreement – COMP/C2/38126)* [2005] OJ C 200/11, para 1.

<sup>753</sup> Notably, a participating society's competence mainly depended on the top-level country domain that an online music service used, the primary language of its Internet site, or its country of incorporation; Ficsor, *Collective Management*, 117.

<sup>754</sup> European Commission, *Notification of Cooperation Agreements (Case COMP/C2/38.126 - BUMA, GEMA, PRS, SACEM)* [2001] OJ C 145/2.

<sup>755</sup> European Commission, *Commission Opens Proceedings into Collective Licensing of Music Copyrights for Online Use* (2004); Nérison para 1010.

absolute exclusivity for its territory as regards the possibility of granting multi-territorial/multi-repertoire licenses for online music rights'.<sup>756</sup> Moreover, the resulting exclusivity was further reinforced by a 'most favoured nation' clause.<sup>757</sup> Unlike the collecting societies of sound recording producers and performers under the Simulcasting Agreement, the performing rights societies were unwilling to agree to a removal of the restrictions.<sup>758</sup> As a consequence, when the Santiago Agreement expired at the end of 2004 it was not renewed<sup>759</sup> and performing rights societies then returned to the territorial delineated CISAC Model Agreement.<sup>760</sup>

While the Santiago Agreement covered online performing rights, a parallel model agreement for online reproduction rights was adopted by mechanical rights societies at the 2001 BIEM General Assembly in Barcelona. It functioned in a way analogous to the Santiago Agreement and also contained the same type of customer allocation.<sup>761</sup> After the European Commission's objection to the Santiago Agreement, the Barcelona Agreement also expired at the end of 2004 without being renewed.<sup>762</sup>

### **13.2 The Regulatory Scope of the 2008 CISAC Decision**

Following complaints by European broadcasting group RTL and digital music service Music Choice, the European Commission in November 2001 started an investigation into the possible anti-competitive effects of the CISAC Model Agreement itself and its

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<sup>756</sup> European Commission, *2005 Market Test Notice Santiago Agreement*, para 6.

<sup>757</sup> *Ibid* para 7.

<sup>758</sup> The notable exceptions are BUMA (NL) and SABAM (B) which offered to renounce to the criticised provisions; *ibid* paras 8-12.

<sup>759</sup> Woods, 'Multi-territorial Licensing and the Evolving Role of Collective Management Organizations' in Gervais (ed) *Collective Management of Copyright and Related Rights* (2nd edn, 2010) 105, 117.

<sup>760</sup> Alich, 'Neue Entwicklungen auf dem Gebiet der Lizenzierung von Musikrechten durch Verwertungsgesellschaften in Europa' (2008) 57 *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 996, 997.

<sup>761</sup> European Commission, *Notification of Cooperation Agreements (Case COMP/C-2/38.377 – BIEM Barcelona Agreements)* [2002] OJ C 132/18.

<sup>762</sup> Karbaum and others, 'Rechtsbeziehungen der GEMA zu ausländischen Verwertungsgesellschaften' in Kreile and others (eds) *Recht und Praxis der GEMA* (2nd edn, 2008) 792, para 30.

application by EEA performing rights societies. On 16 July 2008 it decided that the collecting societies had infringed (then) EC Article 81(1).<sup>763</sup>

The Commission identified three distinct restrictions of competition. A first restriction lay in the fact that the reciprocal agreements of some societies contained provisions to allocate potential members amongst themselves. The second and the third restriction concerned the scope of the mandates to reciprocal representation that performing rights societies granted each other.

As far as the allocation of potential members is concerned, the Commission disapproved of a clause that had been contained in the CISAC Model Agreement until 3 June 2004<sup>764</sup> and continued to be part of the bilateral agreements of several societies.<sup>765</sup> According to that clause performing rights societies barred themselves from accepting members of another society or right holders that had the nationality of any country in which another society operated.<sup>766</sup> The Commission considered that this membership clause prevented performing rights societies from competing for right holders.<sup>767</sup> Moreover, it was also deemed to affect competition for commercial users in an indirect way in that, as a result, the performing rights societies' own repertoires were purely national and thus more complementary than would otherwise be the case.<sup>768</sup> The performing rights societies apparently accepted this assessment as, in March 2007, CISAC offered not to recommend to EEA societies to include the membership clause and the EEA societies themselves offered to delete it from their bilateral agreements.<sup>769</sup> Moreover, as far as can be seen, none of the appeals lodged

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<sup>763</sup> CISAC (COMP/C2/38.698). A Statement of Objection had already been sent to the parties on 31 January 2006; see European Commission, *Competition: Commission Sends Statement of Objections to the International Confederation of Societies of Authors and Composers (CISAC) and its EEA Members* (2006). An oral hearing took place on 14-16 June 2006.

<sup>764</sup> CISAC (COMP/C2/38.698) Recital 27.

<sup>765</sup> *Ibid* Recitals 30-35.

<sup>766</sup> Article 11(II) of the CISAC Model Agreement read: 'While this contract is in force neither of the contracting Societies may, without the consent of the other, accept as a member any member of the other society or any natural person, firm or company having the nationality of one of the countries in which the other Society operates', see *ibid* Recital 18.

<sup>767</sup> *Ibid* Recitals 132-137.

<sup>768</sup> *Ibid* Recitals 126 and 137.

<sup>769</sup> European Commission, *Notice Published pursuant to Article 27(4) of Council Regulation No 1/2003 in*



against the CISAC Decision contest the anti-competitive effects of the membership clause.<sup>770</sup>

The remaining two restrictions identified by the Commission regarded the scope of the mandates that the performing rights societies granted each other. Until 1996 the CISAC Model Agreement had provided for reciprocal representation on an exclusive basis<sup>771</sup> and the bilateral agreements of 17 of the 24 EEA performing rights societies still maintained such exclusivity.<sup>772</sup> As a result, every performing rights society held a monopoly as this guaranteed that no other society could license performing rights in its territory. In the eyes of the Commission this unduly restricted competition on two levels: competition amongst societies on representation services granted to other societies as well as competition on licences granted to commercial users. The latter were forced to seek mono-territorial licences even if their intended use covered several countries.<sup>773</sup> CISAC and the EEA performing rights societies acknowledged the anti-competitive character of explicit exclusivity and, as with the membership clause, offered to delete it from their bilateral agreements.<sup>774</sup>

The far more contentious issue was the Commission's second reprimand in relation to the scope of the representation mandates. It concerned the fact that all EEA performing rights societies, within their bilateral representation agreements, had

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Case COMP/38698 – CISAC [2007] OJ C 128/12, para 9.

<sup>770</sup> Only five of the 23 appeals seek to annul the CISAC Decision as far as the membership clause is concerned. None of them challenge the anti-competitive effect of the membership clause; *AEPI v Commission of the European Communities*, Case T-392/08 R, Order on Interim Measures [2008] ECR II-281 (CFI, 19 November 2008); *AKM v Commission of the European Communities*, Case T-432/08, Action Brought on 1 October 2008 [2008] OJ C 327/33; *KODA v Commission of the European Communities*, Case T-425/08 R, Order on Interim Measures [2008] ECR II-303 (CFI, 5 December 2008); *SACEM v Commission of the European Communities*, Case T-422/08 R, Order on Interim Measures [2008] ECR II-271 (CFI, 14 November 2008); *TEOSTO v Commission of the European Communities*, Case T-401/08 R, Order on Interim Measures [2008] ECR II-267 (CFI, 14 November 2008).

<sup>771</sup> Article 1(I) and (II) of the CISAC Model Agreement; see *CISAC (COMP/C2/38.698)* Recitals 22-23, 28. The exclusive authorisation granted by a performing rights society to its sister society was, however, subject to territorial restrictions in that the sister society would only have the right to license the represented society's repertoire in specific territories.

<sup>772</sup> *Ibid* Recitals 36 and 37.

<sup>773</sup> *Ibid* Recitals 140-144.

<sup>774</sup> *CISAC (COMP/C2/38.698)* Recital 143; European Commission, 2007 *Market Test Notice CISAC*, para 10.

limited the geographical scope of the mandate that they granted to each of their sister societies to the latter's domestic territory.<sup>775</sup> This had the practical effect that, even in the absence of explicit exclusivity clauses, some degree of exclusivity was conferred to each performing rights society in so much as it was the only society able to grant multi-repertoire licences for the use of music within its territory. The territorial limitations thus created national markets in which the local collecting society enjoyed a monopoly for the multi-repertoire licensing of performing rights.<sup>776</sup>

In assessing whether such uniform action amounted to a concerted practice, restrictive of competition in such a way as to be caught by (now) TFEU Article 101(1), the Commission recalled the guidance offered by the ECJ in the *Lucazeau* and *Tournier* cases. Examining the categorical refusal by collecting societies to directly license users abroad, the Court had held that 'mere parallel behaviour may amount to strong evidence of a concerted practice' but that no such presumption can be made 'where the parallel behaviour can be accounted for by reasons other than the existence of concerted action'.<sup>777</sup> Back in 1989, the ECJ had considered that such a reason might be that collecting societies would otherwise be forced to organise their own management and monitoring systems abroad. For its part, the European Commission followed the ECJ in so much as it specifically acknowledged that – in the offline world – the costs of establishing monitoring structures abroad 'would simply be excessive' and that this explained the strictly national definition of licensing areas.<sup>778</sup> Yet, the Commission refused to apply the same reasoning to satellite, Internet and cable transmissions of music.<sup>779</sup> With specific regard to Internet transmissions, of most interest for present purposes, the Commission asserted that remote monitoring could be accomplished and noted that existing initiatives for multi-territorial licensing had developed apparently without the need for a local presence.<sup>780</sup> As the Commission

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<sup>775</sup> CISAC (COMP/C2/38.698) Recital 38.

<sup>776</sup> *Ibid* Recitals 203-207.

<sup>777</sup> *François Lucazeau et al v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) et al*, para 18; *Ministère public v Jean-Louis Tournier*, para 24. See above, on page 248.

<sup>778</sup> CISAC (COMP/C2/38.698) Recital 184.

<sup>779</sup> *Ibid* Recitals 185-199.

<sup>780</sup> *Ibid* Recitals 189-194. The Commission referred specifically to the Simulcasting and the Webcasting

could not identify any other reason to explain why the uniform territorial delineation resulted from autonomous behaviour, it held it to be a concerted practice.<sup>781</sup> The Commission further assumed that, in the absence of such practice, there would be more competition amongst collecting societies both in terms of providing representation services to other societies (several societies could be appointed to represent the mandating society in the same territory) as well as in terms of licensing performing rights to commercial users (all thus appointed societies could license the mandating society's repertoire within the defined territory). Such competition would force the performing rights societies to pursue more efficient forms of rights administration.<sup>782</sup> The Commission therefore concluded that the identified concerted practice restricted competition in such a way as to fall within (then) EC Article 81(1).

While condemning the performing rights societies' practice as anti-competitive in this way, the Commission took great care to emphasise that it was the coordinated nature of their action to geographically limit representation mandates to the mandated society's domestic territory in each and every case that was in violation with (now) TFEU Article 101(1). Reciprocal representation agreements as such were perfectly legitimate, just as it was to limit representation mandates in their geographical scope, even where the geographical scope of a mandate was limited to the mandated society's domestic territory. As long as it did not result from the coordinated activity of all societies, this would not be automatically anti-competitive,<sup>783</sup> nor would there be any territorial delineation that 'is the result of the assessment of the individual capabilities of the parties to the bilateral reciprocal representation agreement'.<sup>784</sup>

In order to alleviate the Commission's concerns, the performing rights societies had offered to license the online performing rights in their own repertoires directly across the EEA and to mandate each performing right society to grant multi-repertoire

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Agreement, the Santiago Agreement as well as CELAS.

<sup>781</sup> *Ibid* Recital 199.

<sup>782</sup> *Ibid* Recitals 208-212.

<sup>783</sup> *Ibid* Recital 201.

<sup>784</sup> *Ibid* Recital 183; see also Recital 95: 'This decision ... neither prohibits the reciprocal representation system as such, nor the possibility for collecting societies to introduce a certain territorial delineation together with certain commercial conditions in their representation contracts'.

and multi-territorial licences if it fulfilled qualitative criteria related to tariffs, deductions, administrative infrastructure, technical capacities, transparency and distribution rules.<sup>785</sup> When the commitments were market-tested, however, the general tenor throughout the received 80 observations was that almost no society would fulfil these qualitative criteria. The Commission therefore concluded that the proposed offers did not appropriately address the identified concerted practice.<sup>786</sup>

Without imposing any fine, the European Commission ordered the performing rights societies concerned to delete the membership or exclusivity clauses in their reciprocal representation agreements. In addition, it ordered all EEA performing rights societies to ‘review bilaterally’ with each other ‘the territorial delineation of their mandates for satellite, cable retransmission and Internet use in each of their reciprocal representation agreements’.<sup>787</sup> The decision was appealed by twenty-two of the twenty-four performing rights societies to which it was addressed as well as by CISAC.<sup>788</sup> Some societies had also sought interim measures; yet the Court

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<sup>785</sup> European Commission, 2007 Market Test Notice CISAC, paras 11-12.

<sup>786</sup> CISAC (COMP/C2/38.698) Recital 72.

<sup>787</sup> *Ibid* Article 4.

<sup>788</sup> *AEPI v Commission of the European Communities*; *AKKA/LAA v Commission of the European Communities*, Case T-414/08, Action Brought on 29 September 2008 [2008] OJ C 313/39; *AKM v Commission of the European Communities*; *ARTISJUS v Commission of the European Communities*, Case T-411/08 R, Order on Interim Measures [2008] ECR II-270 (CFI, 14 November 2008); *EAÜ v Commission of the European Communities*, Case T-416/08, Action Brought on 29 September 2008 [2008] OJ C 313/40; *GEMA v Commission of the European Communities*, Case T-410/08 R, Order on Interim Measures [2008] ECR II-268 (CFI, 14 November 2008); *IMRO v Commission of the European Communities*, Case T-415/08, Action Brought on 29 September 2008 [2008] OJ C 313/40; *KODA v Commission of the European Communities*; *LATGA-A v Commission of the European Communities*, Case T-419/08, Action Brought on 29 September 2008 [2008] OJ C 313/42; *OSA v Commission of the European Communities*, Case T-418/08, Action Brought on 29 September 2008 [2008] OJ C 313/41; *PRS v Commission of the European Communities*, Case T-421/08, Action Brought on 29 September 2008 [2008] OJ C 313/42; *SACEM v Commission of the European Communities*; *SAZAS v Commission of the European Communities*, Case T-420/08, Action Brought on 29 September 2008 [2008] OJ C 313/42; *SIAE v Commission of the European Communities*, Case T-433/08 R, Order on Interim Measures [2008] ECR II-282 (CFI, 20 November 2008); *SOZA v Commission of the European Communities*, Case T-413/08, Action Brought on 29 September 2008 [2008] OJ C 301/56; *SPA v Commission of the European Communities*, Case T-417/08, Action Brought on 29 September 2008 [2008] OJ C 313/41; *STEF v Commission of the European Communities*, Case T-428/08, Action Brought on 30 September 2008 [2008] OJ C 313/44; *STIM v Commission of the European Communities*, Case T-451/08, Action Brought on 2 October 2008 [2008] OJ C 313/52; *TEOSTO v Commission of the European Communities*; *TONO v Commission of the European Communities*, Case T-434/08, Action Brought on 1 October 2008 [2008] OJ C 313/47; *ZAiKS v Commission of the European Communities*, Case T-398/08 R, Order on Interim Measures [2008] ECR II-266 (CFI, 14 November 2008); CISAC

of First Instance refused to suspend the application of the Decision's operative part; later, this order was confirmed by the ECJ.<sup>789</sup> At the time of submission, the General Court's judgments are still pending.<sup>790</sup>

In conclusion, the CISAC Decision has been, at least for the time being, the culmination of a series of instances in which the European Commission questioned the European collecting societies' monopoly position in online licensing under EU competition rules. Throughout the different cases the Commission has shown consistent reasoning in asserting that physical infrastructure was no longer needed to control the online uses of music and that monitoring could equally well be done remotely from abroad. As far as online licensing is concerned, the Commission, therefore, has taken the stance that the 'traditional economic justification for collecting societies not to compete in cross-border provision of services does not seem to apply'.<sup>791</sup> In its investigations, the Commission identified different forms by which reciprocal representation agreements unduly restricted competition. The most obvious one, perhaps, was addressed in the CISAC Decision where, notably, explicit exclusivity was coupled with a geographical restriction of the granted mandates to the domestic territory of the mandated society. Moreover, the CISAC Decision also showed that such geographic limitation alone, if applied as part of a coordinated approach, is equally deemed to fall foul of TFEU Article 101(1). In the Simulcasting, Santiago and Barcelona Agreements, no such systematic territorial delineation was present. However, the Commission made it clear that a clause allocating potential

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*v Commission of the European Communities*, Case T-442/08, Action Brought on 3 October 2008 [2009] OJ C 82/25. The appeal lodged by SGAE, however, reached the court too late and was judged inadmissible; *SGAE v Commission of the European Communities*, Case T-456/08, Confirmed on Appeal (European CFI, 13 January 2009).

<sup>789</sup> *AEPI v Commission of the European Communities*; *ARTISJUS v Commission of the European Communities*; *GEMA v Commission of the European Communities*; *KODA v Commission of the European Communities*; *SACEM v Commission of the European Communities*; *SIAE v Commission of the European Communities*; *TEOSTO v Commission of the European Communities*; *ZAiKS v Commission of the European Communities*. The refusal of the Court of First Instance to suspend the application of the CISAC Decision was equally unsuccessfully appealed; *ARTISJUS v Commission of the European Communities*, Case C-32/09 P(R) (ECJ, 31 August 2010) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CO0032:EN:HTML>>.

<sup>790</sup> Oral hearings in all pending cases took place between 28 September and 24 October 2011; Navarro, 'Collecting Societies Face the Music - General Court Hearing Underway' (2011).

<sup>791</sup> *IFPI 'Simulcasting'* (COMP/C2/38.014) Recital 61.

users according to their economic residency would have a similarly restrictive effect. Finally, as demonstrated in the Simulcasting Decision, even in the absence of territorial restrictions or customer allocation, a system of reciprocal representation agreements would not find acceptance in which all forms of price competition were excluded.

Conceding that the European Commission's decisions apply consistent reason, however, is not to say that this reasoning is necessarily correct. Thus from many quarters, the Commission's approach has been met with distinct reservations. The CISAC Decision, in particular, can be questioned on various grounds, including *inter alia* the following: Is the Commission correct in assuming the feasibility of remote monitoring? Can the systematic territorial delineation not be explained by the traditional development of the collective management system or by the fact that the laws of some member states prescribe a monopoly position to collecting societies? Is such territorial delineation not simply commercially preferable in the interests of the societies' members? Even if no other reason for the parallel behaviour can be found, does it not reverse the burden of proof if the Commission readily assumes a concerted practice?<sup>792</sup> Notwithstanding their importance, these and other issues fall beyond the terms of reference of our study.

### **13.3 The Practical Effects of the 2008 CISAC Decision**

In what may be seen as the most obvious practical effect of the Decision, the European performing rights societies complied with the order to bilaterally re-negotiate their reciprocal representation agreements. While the details of all contracts are confidential and known only to the Commission, some observations can be made. In the case of GEMA, the rationale in re-negotiations was two-fold: first, it sought to be able to license to German online services the world repertoire to the broadest extent possible, in particular as far as national services are concerned. In addition, a second

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<sup>792</sup> These are some of the issues raised by Gyertyanfy 73-75 and in the pleas of those performing rights societies that have appealed the Decision (see above n 788).

important aim was to secure that GEMA's own repertoire was licensed abroad as comprehensively and efficiently as possible.<sup>793</sup> Yet, while GEMA chose to continue to rely on reciprocal representation to guarantee the availability of its own repertoire abroad, some societies decided to license their own repertoire directly on a pan-European basis.<sup>794</sup> This led to a certain disruption in the system of reciprocal representation that, as a result, has become more complex.

Although the bilateral agreements obviously differ in their details, one may, as far as online uses are concerned, distinguish three basic types: contracts that contain mandates allowing the grantee society to represent the grantor society's repertoire on a worldwide basis; contracts that contain mandates limiting the grantee society's ability to license to national online music services; and, finally, contracts that do not contain any representation mandate.

Upon initial examination, the grantee society's mandate in the first type of contracts appears particularly wide. There are, however, two restrictions of considerable limiting effect. On the one hand, they provide for customer allocation in that the mandate is only granted as far as online music services have their economic residency in the territory of the grantee society.<sup>795</sup> On the other, the mandated society may not license important online uses for the mandating society's territory.<sup>796</sup>

Mandates of the second type effectively retain the territorial delineation to the mandated society's territory: the grantee society may only license domestic online music services, ie music offers that are exclusively or primarily aimed at end customers in the grantee society's territory.<sup>797</sup> Importantly in this regard, some collecting societies

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<sup>793</sup> Information provided by GEMA on 26 March 2012.

<sup>794</sup> Müller, *Rechtsinhaberschaft*, 15. While one would, perhaps, expect these to be most likely those societies that are part of ARMONIA (see above at 12.3.1.2, on page 224), no specific information on that point is available.

<sup>795</sup> Müller, *Rechtsinhaberschaft*, 14; Gyertyanfy 81.

<sup>796</sup> Müller, *Rechtsinhaberschaft*, 14. These uses comprise, *inter alia*, ringtones, music and video on demand, and user-generated content. The restriction aims at preventing forum shopping on the side of the online music service, who, it is feared, might change its economic residency to another country in which copyright is less valued.

<sup>797</sup> Often, this is determined to depend on where the online music service generates the substantial part of its income. As far as catch-up TV or radio is concerned, there is general agreement amongst collecting societies that these uses should be licensed by the same society that licenses the

have explicitly prescribed that national affiliations of international services are not to be regarded as national online services.<sup>798</sup>

Finally, those contracts that do not contain any representation mandates provide for criteria according to which licensing mandates can be granted on a case-by-case basis.<sup>799</sup>

Some insight into what motivates societies to grant either type of representation mandate has been provided by PRS for Music, when it noted that it had ‘introduced a new framework agreement to determine the scope of appointments for ... online mandates ... based on service levels, flexibility and transparency between us and the contracting society’.<sup>800</sup> As a general rule, it might therefore be fair to say that the more efficiently the grantee society handles the administration of a foreign repertoire, the more likely the grantor society will be inclined to agree to a wide representation mandate. In addition, it may also be assumed that the bargaining power of the two societies as well as the attractiveness of their respective repertoires would equally be of influence.

In the re-designed reciprocal representation system, a collecting society’s ability to license a repertoire as broadly as possible depends on the scope of the service to be licensed. Where online music services are national, it appears that their domestic society is able to grant licences comprising the entire repertoire still subject to reciprocal representation,<sup>801</sup> even though occasionally the society might be obliged, in relation to a particular repertoire, to request case-by-case authorisation.<sup>802</sup> Where online services cover several territories, the repertoire available through the domestic society is more limited and excludes rights of those societies that pursue direct pan-

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corresponding broadcasting rights; see *ibid* 14–15.

<sup>798</sup> Gyertyanfy fn 85; Müller, *Rechtsinhaberschaft*, 14.

<sup>799</sup> Müller, *Rechtsinhaberschaft*, 15. Apparently, reciprocal representation agreements which do not even contain a mandate to license national online music services are concluded only occasionally; see Gyertyanfy fn 85.

<sup>800</sup> PRS for Music, *Contribution to 2010 Public Hearing*, 2.

<sup>801</sup> It should be recalled that the most important Anglo-American or Latin repertoire is licensed outwith the system of reciprocal representation after the major music publishers’ withdrawals; see above 12.3.1.1, starting on page 217.

<sup>802</sup> Gyertyanfy 84; Müller, *Rechtsinhaberschaft*, 15.



European licensing strategies. Yet, even in these circumstances, there appears to be scope for case-by-case authorisations, although the frequency and the conditions of such *ad hoc* mandates remain unclear.<sup>803</sup>

As a general conclusion, it can be stated that the reconfigured reciprocal representation regime has, for the first time, made available licences of both multi-territorial and multi-repertoire nature. One should not forget, however, that societies are not equally well placed to grant such licences, in particular since their licensable repertoire differs. As a flipside to the improved availability of multi-territorial / multi-repertoire licences, a hitherto unknown degree of inequality has thus been introduced into the system of reciprocal representation and thereby weakens the international solidarity that formerly informed collective rights management.

Moreover, the in-built customer allocation might become a problematic feature of the newly negotiated reciprocal mandates. In fact, it would appear that collecting societies have replaced the systematic geographic delineation of the representation mandates to the domestic territory of the grantee society by a mixed system in which mandates are either limited by an economic residency requirement or virtually the same territorial restriction. Arguably, this still complies with the letter of the CISAC Decision: the territorial delineation is no longer systematic and one may even say that, under the new system, several societies can grant multi-repertoire licences for the same territory.<sup>804</sup> Yet, because of the economic residency requirement users may only obtain a license from one particular society. In practice, therefore, competition amongst collecting societies for commercial users at the level of multi-territorial licensing is excluded. Given that, in the context of the Santiago and Barcelona Agreements, the European Commission had already disapproved the economic residency clause, one might conclude that the present mixed system could only be equally anti-competitive. In order to properly analyse whether this is the case, one would, of course, need more information as to how frequently reciprocal mandates are granted on condition of such customer allocation. But even if one were to assume that every territorially

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<sup>803</sup> In the case of GEMA it has been reported that most of its sister societies allow case-by-case mandates; see Müller, *Rechtsinhaberschaft*, 15.

<sup>804</sup> Compare CISAC (COMP/C2/38.698) Recitals 207-212.

unlimited mandate did contain this restriction,<sup>805</sup> the case would not be as clear-cut as might be assumed at first sight. Primarily, unlike both the Santiago and Barcelona Agreements and the CISAC Model Agreement, the restrictions have not been systematically prescribed by a model contract but are the result of strictly bilateral consultations. Moreover, as indicated by PRS for Music, the decision as to what type of mandate is granted is informed by a commercial assessment of the grantee society's abilities, as was demanded by the EU Commission. Further, there is an element of competition in the new system that was present neither when the Santiago and Barcelona Agreements nor the CISAC Model Agreement were applied. Notably, some collecting societies deny reciprocal representation – at least in principle – and choose to license their repertoire directly on a pan-European basis. As a final and related point, the eventuality, laid down in some bilateral agreements, of granting case-by-case mandates also adds a certain degree of flexibility to the system; even if it might *a priori* appear unlikely that such case-by-case mandates would be broader than those granted immediately in the agreements, this remains a possibility. In light of these considerations it may be asserted that, under the newly designed regime, the market is less foreclosed. Be this as it may, in practical terms it would be very unlikely if the EU Commission investigated the new system before the EGC has decided the still pending appeals in the CISAC case – in particular, because it will be up to the Court to determine the more fundamental question of whether the nature of collecting societies' activities does not preclude an application of TFEU Article 101.

As a more general consequence of the CISAC Decision, one observes a change of climate between collecting societies. On the one hand, collecting societies, having been found guilty of an anti-competitive concerted practice, were uncertain to what extent they would still be allowed to co-operate without risking any further investigation or, possibly, fines. The Decision has thus created an atmosphere in which societies were afraid to talk to each other.<sup>806</sup> According to Armonia, this was

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<sup>805</sup> Such is the description by Müller, *Rechtsinhaberschaft*, 14.

<sup>806</sup> This has been described by (then) CISAC Director General Eric Baptiste at the Wild West Web Conference (Brussels 8 October 2008): 'Before the decision was published our European members were talking amongst each other to try to find a solution. Unfortunately, when the decision was

also the reason why the development of the pooling initiative had been substantially delayed.<sup>807</sup> On the other hand, tensions between collecting societies have been expressed more publicly, as the smaller societies, in particular, feel threatened by the erosion of the principle of international solidarity that the changes to the traditional licensing model have brought about. One very pointed example of a small collecting society aiming to retain a place in the newly ordered system of online licensing, albeit unsuccessfully, is the case of the Dutch Buma/Stemra. Less than a week after the adoption of the CISAC Decision and thus before the re-negotiation of the reciprocal agreements, the society issued a pan-European licence to online music retailer Beatport covering the world repertoire. Arguing that this was ‘in line with the European Commission’s intentions to end the traditional system of territorially restricted collective management’,<sup>808</sup> the society apparently interpreted the Decision to render the territorial restrictions in its reciprocal representation agreements invalid. A proper reading of TFEU Article 101(2) reveals, however, that the anti-competitiveness of a concerted practice does not entail the nullity of that practice.<sup>809</sup> Consequently, the proceedings brought against that licence by PRS and GEMA were successful.<sup>810</sup>

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published all of that stopped because of this kind of injunction to stop talking to each other’.

<sup>807</sup> Hellenic Foundation for European and Foreign Policy 33. Initially, a memorandum of understanding to establish a joint framework had already been signed in January 2007.

<sup>808</sup> Buma/Stemra, *Buma/Stemra Issues Beatport.com a Pan-European License* (2008). The tariffs charged were based on the country-of-destination principle; see Guibault and van Gompel, ‘Collective Management in the European Union’ in Gervais (ed) *Collective Management of Copyright and Related Rights* (2nd edn, 2010) 135, 163.

<sup>809</sup> This has also been confirmed by the Court of First Instance; see *GEMA v Commission of the European Communities*.

<sup>810</sup> *GEMA v Buma/Stemra*, Case 7 O 224/08 Kart (Landgericht Mannheim, 7 November 2008) <[http://ec.europa.eu/competition/antitrust/national\\_courts/831856.pdf](http://ec.europa.eu/competition/antitrust/national_courts/831856.pdf)>; *PRS v Buma*, Case 148418 / KG ZA 08-410 (Rechtbank Haarlem 19.08.2008) <<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BE8765>>. The latter case was confirmed in *Buma v PRS*, Case 200.016.122/01 (Gerechtshof Amsterdam 19.01.2010) <<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BL4289>>. See also Neefs, ‘Collecting Societies Collide over Pan-European Online Music Licensing’ (2008) 3 *Journal of Intellectual Property Law & Practice* 758.

### **13.4 Conclusion**

Having determined the practical effects of the 2008 CISAC Decision, we still need to assess whether the increased complexity that results from the re-configuration of the network of reciprocal representation agreements can be seen as promoting the diversity in online music.

The concerns to be voiced in this regard are comparable to those that we identified in the analysis of the new pan-European licensing initiatives.<sup>811</sup> Again, less demanded EU repertoires would appear to be at risk of no longer being available to the end consumer as securing the necessary right would require negotiating an additional licence. The reason is the inequality of the new system, in which efficient societies and those with strong bargaining power (ie those with a highly attractive own repertoire) are able to grant licences of the widest reach possible. Smaller societies with a less frequently requested own repertoire, on the other hand, do not even have the mandate to represent the attractive repertoires of their sister societies on a pan-European scale. As a consequence, the starting point for a cross-border music service provider in building an attractive music catalogue will always be a society able to represent as many of its sister societies' domestic repertoires as possible. In order to secure the rights for less popular European repertoires, the online music service would have to seek an additional licence.

As this makes it less easy and efficient for online music providers to clear the authors' rights in a diverse foreign repertoire, the re-configured network of reciprocal representation agreements would not be conducive to but rather detrimental for the diversity of online music.

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<sup>811</sup> See above at 12.4, on page 236.



## **Part 6: Main Research Results**

The starting point of our research was the quest into the meaning of cultural diversity and its application in the area of online music (part 2). Analysing the notion of 'culture' applicable under EU law (chapter 5), we noted:

- The notion of 'culture' is a sociological construct open to diverging explanations.
- The review of relevant legal instruments and policy documents adopted under the aegis of UNESCO and the CoE reveals that the understanding of 'culture' has, since the creation of the organisations, broadened up over time to embrace an anthropological view of culture as everything that expresses the particular way of life or identity of groups within society.
- While the concept of culture at the EU level remains sketchy and lacks legal definitions, it is equally infused by this anthropological understanding, which is not contrary to the fact that the EU's competencies in the area of culture are of merely supplementary nature.

More specifically focussing on the notion of 'cultural diversity' applicable under EU law (chapter 6), the following results could be reached:

- Based on the anthropological view of culture, we were able to deduce an understanding of cultural diversity as the spectrum of different cultural identities or ways of life in society or, depending on the perspective, of the various forms through which the different cultural identities or ways of life in society are expressed.
- In this descriptive sense, diversity in online music would be the spectrum of different cultural identities as conveyed through music distributed online.
- However, an analysis of the relevant UNESCO or CoE instruments addressing cultural diversity until the mid-1990s shows that cultural diversity has not only been used in this descriptive sense but with varying connotations, serving as an

argument to support diverse political goals. While the particular political goals changed over time, the theoretical framework under which they developed and which informed the use of the concept of cultural diversity was that of cultural pluralism. At the core of cultural pluralism is the conviction that cultures – although being different – are of equal dignity and value and that everyone affiliating themselves with a certain culture must be able to express and preserve them. Where the notion of ‘cultural diversity’ is used in the sense of cultural pluralism, its descriptive, factual character is thus supplemented by the normative subtext of the latter. It still denotes the extent to which the various identities or ways of life in society are expressed but also signals that the desired degree of diversity would be a state in which they can all be freely expressed. Calling for diversity in online music would thus mean to call for a situation in which all cultural identities may be expressed through music that is available online.

- Since the late 1990s, UNESCO and CoE materials on cultural diversity have increasingly conflated the concept with that of intercultural dialogue, stressing the need for exchange between different cultures in pursuit of mutual enrichment. Against this background, calling for diversity in online music would also call for the availability of online music expressing identities or ways of life that are different from the consumers’ own.
- Cultural diversity has also been an often-evoked argument in the debate on whether cultural goods and services require special treatment under international trade liberalization regimes. Three international instruments specifically address the connection of cultural diversity and free trade. The 2005 Convention is the only legally binding and thus the most important one although it is limited in scope to the diversity of expressions of cultural (which in turn are distinguished from cultural heritage). Upon closer examination, it becomes apparent that these instruments did not seek to change the normative connotation of cultural diversity as intercultural pluralism. It is true that the 2005 Convention allows parties to take measures to protect and preserve

cultural expressions under exceptional circumstances (Article 8), but at the same time it expressly aspires to the ideals of cultural pluralism and intercultural dialogue.

- Implicit in the understanding of cultural diversity in the sense of intercultural pluralism is also a desired level of diversity – a level which would be achieved if all groups and individual who wish to do so could express their cultural identities.
- The interpretation of cultural diversity in the sense of intercultural pluralism is also appropriate under EU law as it ensures consistency. This result finds additional confirmation in the drafting history of TFEU Article 167(4) as well as the political practice of the EU institutions.

In part 3 we aimed to develop the formulated concept of cultural diversity into a more workable guideline for analysing the multi-territorial licensing of authors' rights in online music. Chapter 7 offered an enquiry into the exact scope of the obligation to respect and promote the diversity of the EU's cultures in TFEU Article 167(4) and how it applies to online music. The main conclusions were:

- When adopting predominantly non-cultural measures, the EU institutions are bound by TFEU Article 167(4) to choose, amongst several ones equally suited to achieve the pursued goal, the most culturally-friendly one. As the EU's previous interventions in the area of multi-territorial licensing of authors' rights in online music, ie the 2005 Recommendation and the 2008 CISAC Decision, responded primarily to internal market and competition law concerns, they are examples of measures to which TFEU Article 167(4) applied and any further EU measure in that area would also need to comply with that norm.
- The 2005 Convention provides for an internationally accepted system of values, principles and objectives in relation to the diversity of cultural expressions and its Article 7 obliges the parties to the Convention to endeavour to promote the diversity of cultural expressions. Our interpretation of the 2005 Convention concludes that the diversity of cultural expressions is promoted through measures



that encourage all groups and individuals in society to create expressions of their cultural identity as well as measures enhancing access to the expressions of these groups and individuals as well as those of others irrespective of their location. Parties to the Convention may also achieve this type of encouragement indirectly through the support of those who facilitate cultural creation or of organizations that support the work of the creators, such as collecting societies.

- One important objective that provides guidance in the interpretation of Article 7 is that of equal dignity of and respect for all cultures (Article 2(3)). It allows us to draw additional conclusions as to how measures to promote the diversity of cultural expressions would be designed. Notably, no cultural group may be unduly favoured, which does not imply equal support but rather presupposes that promotive measure be tailored to the particular situation of a cultural group. Where a group faces particular difficulties in expressing their culture, it would be legitimate for that group to receive more support than other groups. On the other hand, measures to promote the diversity of cultural expressions should be limited to encourage cultural expression – whether a particular group in society wishes to make use of that opportunity is a decision to be made by that group.
- TFEU Article 167(4) and Article 7 of the 2005 Convention contain largely overlapping rules as to how to deal with cultural diversity and both bind the EU. More specifically, the latter is restricted to a subset of cultural diversity, namely the diversity of cultural expressions. To achieve coherence between these two norms, we suggest a harmonious interpretation of Article 167(4) in light of Article 7 of the 2005 Convention. For the implementation of Article 167(4), this has the practical advantage that recourse can be had to the values, principles and objectives of the 2005 Convention.
- Based on the proposed harmonious interpretation, we are able to further substantiate how Article 167(4) would apply to online music. Notably, the EU would ‘promote the diversity of its cultures’ if it created an environment that enabled and encouraged all groups and individuals to express their cultural

identities through online music and to have access to online music expressing their own cultural identities as well as those of others, irrespective of their location.

- At a more general level, the harmonious interpretation strengthens the implementation of the 2005 Convention in as much as the best endeavour obligation of parties to the Convention to promote the diversity of cultural expressions in effect becomes an obligation to take the promotion of the diversity of cultural expressions into account wherever a predominantly non-cultural measure may affect the diversity of cultural expressions.

In chapter 8, we determined how measures regulating the EU framework for the licensing of authors' rights could promote the diversity in online music. The most pertinent conclusions were:

- The analysis of the various steps in the value chain of online music reveals that the diversity of online music most crucially depends on the creation of a diverse body of music and on appropriate licensing conditions that allow for that diverse body of music to be turned into a sound recording offered through online means.
- The framework for the licensing of authors' rights in music has the most direct influence on the diversity of online music when a licence is needed to record music and to distribute it online. To promote diversity in online music, any measure affecting the licensing system should make it possible for producers of sound recordings and digital music retailers to clear the rights in the entire domestic repertoire in an easy and efficient manner, regardless of the cultural identity expressed. In order to allow for the access of diverse online music from other countries of the world, the authors' rights in a diverse foreign repertoire, ideally the entire worldwide repertoire, should be available for licensing to digital music retailers.

Chapter 9 reviewed the existing economic literature on the measuring of diversity, cultural diversity and musical diversity. We concluded:

- Conceptualising diversity as the interplay of variety, balance and disparity has the merit of not only making the existence and interdependence of these three

properties explicit. It also illustrates that diversity is inherently subjective – both as regards the categorisation and the evaluation of how disparate the chosen categories are; depending on these choices, the matrix as whole changes. This also leads to the realisation that there is no one single indicator that could describe diversity in any area.

- It is impossible to measure diversity in online music. Already a limited analysis of the available online music in a given territory would require unfeasible quantitative data and difficult choices of the appropriate categorisation as well as qualitative indicators of disparity. It would be even less viable to bring the normative element of cultural diversity into the equation.
- Nevertheless, the conceptualisation of diversity as the interplay of variety, balance and disparity is a helpful starting point for assessing policy measures as to whether they improve or decrease the diversity of online music. Notably, it is useful to analyse which of these three properties are affected by the measure in question and how such effects would change the matrix of the three properties on the whole. Such an analysis of the *modus operandi* of the measure could help make an informed assertion as to whether the measure is at all appropriate to influence the diversity in online music.

Part 4 examined whether the explicit cultural functions of authors' societies contributed to the diversity in online music. The introductory overview of the system of collective rights management noted (chapter 10):

- The primary rationale of collecting societies is economic in nature as they allow for the exploitation of the authors' rights in situations in which otherwise authors would not be able to monetize their rights. This creates revenue for authors and thus implements the premise of copyright to incentivise creativity through monetary rewards.
- In addition, collecting societies act more broadly in the interests of their members, manage their members' right collectively in ways that present certain in-built

features of solidarity between successful and less successful authors and operate schemes with explicitly cultural and social goals for the benefits of their members.

In chapter 11, we assessed whether GEMA's cultural considerations in the distribution of royalties could be seen as promoting the diversity of online music, with the following results:

- In its allocation procedure GEMA favours culturally important works. In practice, GEMA regards those works as culturally important that are complex. The criterion of complexity, however, is unable to accommodate the normative element in the concept of cultural diversity, which, based on the principle of equal dignity of and respect for all cultural groups, requires that all cultural groups are to be encouraged to express their identity through music. The allocation procedure, therefore, does not promote the diversity of online music.
- Collecting societies could, at least in countries in which no cultural group faces legal or practical obstacles in expressing themselves through music, use the redistribution of royalties as an instrument to promote a diverse musical creation if the criteria for such redistribution were in line with TFEU Article 167(4) and the 2005 Convention. Such a criterion could be the lack of demand for musical works.
- The additional payments that some authors receive as a consequence of GEMA's evaluation procedure favour successful, long-standing authors with a high repute. As they are inherent evaluative, they fail to encourage all groups in society to express their identity through music and, consequently, fail to promote a diverse musical creation.
- GEMA also runs several other more limited schemes with the potential to be an appropriate tool to promote a diverse musical creation. Their practical implementation, however, lacks transparency, which is why it could not be established whether in practice they promote musical diversity.

In part 5 we presented practical changes that have been prompted by the 2005 Recommendation and the 2008 CISAC Decision and determined whether they promoted diversity in online music. We concluded:

- After the adoption of the 2005 Recommendation, pan-European licensing initiatives started to form. Most of them are controlled by Anglo-American music publishers and jointly operated with one of the bigger EU collecting societies. Two other initiatives, however, rely on the pooling of repertoires of several domestic authors' societies.
- The pan-European licensing initiatives formed in unequal ways as their creation was dependent on a publisher's control of the reproduction rights in music, the ease with which they were able to withdraw them from the system of collective rights management and the ability of a partner author society to jointly license the corresponding making available rights.
- The 2008 CISAC Decision led to a renegotiation of the existing reciprocal representation agreements in place between the authors' societies in the EU. As a result, an element of inequality was introduced into the system as today only those societies which operate efficiently or those with strong bargaining power (ie those with a highly attractive own repertoire) are able to grant licences of the widest reach possible. Smaller societies with a less frequently requested own repertoire, on the other hand, do not even have the mandate to represent the attractive repertoires of their sister societies on a pan-European scale.
- As a result of both practical developments, there is a clearly discernible risk for less popular EU repertoire of no longer being available to the end consumers of online music services across the EU unless the service provider makes an additional effort to clear these rights. As this decreases the ease and efficiency with which the online music provider can clear the authors' rights in a diverse foreign repertoire, both new developments - the trend towards pan-European licensing as well as the renegotiated reciprocal representation agreements - thus did not promote the diversity of online music.

## **Annex: Questionnaires Sent to GEMA**

### **First Questionnaire (Responses Received on 26 March 2012)**

#### **GEMA Lizenzierungspraxis für Onlinenutzungen – national**

- Wie sind die aktuell zwischen der GEMA und Internetmusikdiensten gültigen Lizenzerträge über Streaming und Download gestaltet? Gelten die Tarife VR-OD 2 und VR-OD 3 oder sind einzelvertragliche Bestimmungen ausgehandelt worden?
- Im Falle von Einzelabreden, wie hoch ist die von den Internetmusikdiensten gezahlte Vergütung?
- Falls die Tarifhöhe nicht öffentlich gemacht wird, drängt die GEMA oder drängen die Internetmusikdienste auf eine Geheimhaltung? Was ist die Motivation?
- Umfassen aktuelle Lizenzverträge zum Download / Streaming das gesamte GEMA Repertoire im Wege einer Blankettlizenz oder kann ein Internetmusikdienst auch Lizenzen für nur einen Teil des GEMA Repertoires erwerben?
- Was waren die Hauptstreitpunkte in den Verhandlungen mit YouTube?
- Der Verteilungsplan C geht vom Grundsatz der Nettoeinzerverrechnung aus. Wie ist das in der Praxis: Kann überhaupt eine Nettoeinzerverrechnung durchgeführt werden? Bei welchen Nutzungsarten wird kollektiv verrechnet?
- Ist der einheitliche Kostensatz für den Verteilungsplan C öffentlich bekannt?

#### **GEMA Lizenzierungspraxis für Onlinenutzungen – multi-territorial**

- Welche Prinzipien waren aus Sicht der GEMA für die Neuverhandlung der Gegenseitigkeitsverträge mit den Schwestergesellschaften maßgeblich?
- Inwiefern kann die GEMA einem deutschen Onlinemusikdienst, nachdem die Gegenseitigkeitsverträge neu verhandelt wurden, multi-territoriale Lizenzen

erteilen? Für welche Repertoires kann die GEMA das Recht zur öffentlichen Zugänglichmachung sowie das mechanische Onlinerecht (mglw. im Zusammenspiel mit den von den großen Musikverlegern für die mechanischen Onlinerechte am anglo-amerikanischen Repertoire geschaffenen Zentralstellen) vermitteln?

- Stimmt es, dass die Initiativen zwischen einzelnen europäischen Verwertungsgesellschaften und den großen Musikverlagen zur europaweiten Lizenzierung der mechanischen Onlinerechte des anglo-amerikanischen Repertoires der Verlage nicht mehr ausschließlich sind? Kann z.B. die SACEM EMIs anglo-amerikanisches Repertoire in Frankreich lizenzieren?
- Wie steht die GEMA der Idee eines Poolings der Repertoires verschiedener Verwertungsgesellschaften für multi-territoriale Lizenzen gegenüber? Unterstützt die GEMA die Pan-European Platform Idee der CELAS? Unterstützt die GEMA die PRS Idee, sogenannte Hubs in Europa zu gründen? Wie schätzt die GEMA die Chancen der Realisierung der beiden Modelle ein?
- Welches sind aus Sicht der GEMA die Hauptargumente, die dagegen sprechen, die Ausschließlichkeit im Verhältnis der Rechteübertragung zwischen dem Mitglied und der Verwertungsgesellschaft aufzuheben und daneben eine direkte Lizenzierung zuzulassen?
- Wie steht die GEMA zu dem Vorschlag, dass Anbieter von Musikdiensten im Internet multiterritoriale Lizenzen von der lokalen Verwertungsgesellschaft bekommen sollen, die die hierzu nötigen Rechte ihrerseits im Wege der erweiterten kollektiven Rechtewahrnehmung bekommt?
- Warum wird von Seiten der europäischen Verwertungsgesellschaften ein dem Simulcasting Abkommen nachempfundenes Modell abgelehnt?
- Wie sähe aus Sicht der GEMA eine ideale Regelung der Vergabe von multiterritorialen Lizenzen für Onlinenutzungen in der angekündigten EU Rahmenrichtlinie aus?

- Was wäre aus Sicht der GEMA das „worst-case“ Szenario für eine zukünftige europäische Regelung?
- Sollte das EuG den Verwertungsgesellschaften in der CISAC Entscheidung in der Einschätzung folgen, dass die territorial begrenzten Gegenseitigkeitsträger keinen Wettbewerb unterbinden, der schützenswert i.S.v. jetzt Art. 101 AEUV ist, wäre es nach der Neuverhandlung der Gegenseitigkeitsverträge überhaupt möglich zum *status quo ante* zurückzukehren?

#### **Verteilungsverfahren:**

- Nach welchen Kriterien entscheidet der Werkausschuss, dass ein Unterhaltungsmusikwerk von besonderem künstlerischen Wert ist (Abschn. XI Ziff. 7 Ausführungsbestimmungen zum Verteilungsplan A) oder dass ein Werk nach Abschnitt XI eine erhöhte Punktbewertung im Rundfunk erhalten soll?
- Wird der 10 % Abzug von allen Einnahmen, die gemäß Verteilungsplan A verrechnet werden, abgezogen oder nur dort, wo keine Nettoeinzerverrechnung stattfindet? Wie ist es konkret mit den Einnahmen aus der Onlinenutzung, die nach Verteilungsplan A verteilt werden?

#### **Wertungsverfahren:**

- Wie erklärt sich die Aufteilung des für soziale und kulturelle Zwecke zur Verfügung stehenden Betrages nach Abzug des (gedeckelten) Bedarfs der Sozialkasse auf Wertung E (30,07 %), Wertung U (58,67 %), Alterssicherung (6,9 %) und Schätzungsverfahren (4,36 %)? Ist dies aktuell noch gültig?
- Wie erklärt sich die Aufteilung der Wertungsmittel auf die verschiedenen Berufsgruppen (Fußnote 1 zu den Allg. Grundsätzen des Verteilungsplans A)?
- Wie hoch war die Wertungsmark im letzten Jahr in den verschiedenen Wertungsverfahren?
- In der Wertung KE und TE wird das berücksichtigungsfähige Aufkommen in der Sparte E insofern begrenzt, als ein über € 9 000 hinausgehender Anteil nur



berücksichtigt wird, sofern er das 10fache des Aufkommens in den Sparten R und FS nicht übersteigt. Hiermit sollen künstliche Erhöhungen durch Selbstaufführungen verhindert werden. Was aber ist der Grund für die im Rahmen der Wertung KE und TE geltenden Beschränkungen bei der Berücksichtigung des Aufkommens in den Sparten KI und FKI (Fn. 3 zu § 5 I GO Wertung KE) und den Sparten R und FS, sowie die im Rahmen der Wertung U geltenden Beschränkungen des Aufkommens in den Sparten R, FS und T FS (§ 5 I GO Wertung U)?

- Nach welchen Kriterien wird die Bewertung der künstlerischen Persönlichkeit nach § 5 III H) b) GO Wertung KE durchgeführt? Was wird unter einer „angemessenen Anzahl von Aufführungen und Sendungen“ verstanden?
- Nach welchen Kriterien wird die Bewertung von Komponisten von Kirchen- und Chormusik nach § 5 III H) c) und d) GO Wertung E durchgeführt? Warum wird hier auf die Forderung einer angemessenen Anzahl von Aufführungen und Sendungen verzichtet?
- Welche Rolle spielen in der heutigen Praxis Zuschläge für Unterhaltungsmusik gem. § 5 III B) GO Wertung U?
- Nach welchen Kriterien wird das „Gesamtschaffen“ und die „Bedeutung als Urheber“ in § 5 III I GO Wertung U bewertet? In welchem Verhältnis stehen die beiden Begriffe?
- Die GOen zur Wertung enthalten Höchstsätze für Mittel, die den Ausgleichsfonds zugeführt werden: für Komponisten in der Sparte E maximal 3 % gemäß § 4 I und II GO Wertung E, für Textdichter in der Sparte E maximal 3 % gemäß § 2 GO Wertung TE i.V.m. § 4 I und II GO Wertung E, für Verleger in der Sparte E maximal 20 % für Ausgleichsfonds und zeitgenössisches Musikschaffen zusammen gemäß § 3 I GO Wertung VE und für Komponisten, Textdichter und Verleger der Sparte U maximal 10 % gemäß § 4 I und II GO Wertung U. Wie hoch ist die Mittelvergabe tatsächlich (absolut und prozentual)? Werden diese Höchstgrenzen ausgeschöpft?

- Sofern die Mittel der Ausgleichsfonds zur Linderung von Härtefällen verwandt werden, nach welchen Kriterien werden die Begriffe „kulturell besonders förderungswürdig“ und „künstlerisch erfolgreich“ ausgelegt (§ 4 I und II GO Wertung E, § 3 I GO Wertung VE und § 4 I und II GO Wertung U)?
- Die GOen zur Wertung enthalten z.T. Höchstsätze für Mittel, die für die Förderung zeitgenössischen Musikschaftens zur Verfügung gestellt werden: maximal 20 % gemäß § 4 III GO Wertung KE, maximal 20 % für Ausgleichsfonds und zeitgenössisches Musikschaftens zusammen gemäß § 3 I GO Wertung VE und keine Begrenzung gemäß § 4 III GO Wertung U. Wie hoch waren die tatsächlich im letzten Jahr zur Förderung zeitgenössischen Musikschaftens zur Verfügung gestellten Mittel (absolut und prozentual)? Werden die z.T. vorhandenen Höchstgrenzen ausgeschöpft?
- Nach welchen Kriterien werden die Mittel zur Förderung zeitgenössischen Musikschaftens vergeben? Welche Projekte werden hier konkret gefördert? Ist dies die Grundlage für die 2008 unter dem Stichwort „Neues Kulturkonzept“ eingeführten Neuerungen (Deutscher Musikautorenpreis, Euroäisches Musikautorenstipendium, Composers in Residence, Initiative Musik, GEMA-Campus)?
- Wie haben sich die vorstehenden Initiativen in den letzten Jahren entwickelt? Wenn sie nicht aus Mitteln für die Förderung zeitgenössischen Musikschaftens finanziert werden, wie dann und in welchem Maße?
- Ist die Befristung der Regelungen, Mittel für zeitgenössisches Musikschaftens zur Verfügung zu stellen, verlängert worden?

## **Second Questionnaire (Responses Received on 6 April 2012)**

### **Lizenzierungspraxis:**

#### **Repertoire der Schwestergesellschaften für nationale Onlinedienste**

- Dr. Stefan Müller (ZUM 2011, 13 ff.) beschreibt, dass sie die neu abgeschlossenen Gegenseitigkeitsverträge im Wesentlichen einteilen lassen in Verträge mit unbeschränkter Mandatierung, solche mit auf nationale Onlinedienste beschränkter Mandatierung und solche, die keine Rechte übertragen, sondern lediglich von Mandatierungen im Einzelfall ausgehen. Entspricht dies noch den aktuellen Gegebenheiten?
- Gilt das Gegenseitigkeitselement in den bilateralen Verträgen noch uneingeschränkt oder kommt es in der Praxis vor, dass Gesellschaft A Gesellschaft B unbeschränkt mandatiert, im Gegenzug die Mandatierung von Gesellschaft A durch Gesellschaft B mit Beschränkungen versehen ist?
- Welchen Vorteil hat es für eine Verwertungsgesellschaft, nicht unmittelbar in den Gegenseitigkeitsverträgen Rechte zu übertragen, sondern lediglich Einzelmandatierungen vorzusehen? Kann die mandatierende Gesellschaft hier mehr Einfluss nehmen und Vorgaben machen zu a) Tarifen, b) Verwaltungskosten und c) kulturellen und sozialen Abzügen?

### **Lizenzierungspraxis:**

#### **Repertoire der Schwestergesellschaften für multiterritoriale Onlinedienste**

- Wenn der GEMA durch die Gegenseitigkeitsverträge die Befugnis eingeräumt ist, multi-territoriale Lizenzen für das Repertoire einer ihrer Schwestergesellschaften zu erteilen, wie berechnet sich der anzuwendende Tarif? Gilt hier das Bestimmungslandprinzip?
- Sofern die gegenseitige Mandatierung beschränkt ist auf nationale Onlinedienste bzw. die Gegenseitigkeitsverträge selbst gar keine Rechte einräumen, werden in der Praxis von den Schwestergesellschaften der GEMA Einzelmandate für multi-

territoriale Onlinedienste erteilt, wenn ein solcher Anbieter an die GEMA herantritt mit dem Wunsch einer im Hinblick auf Repertoire sowie territoriale Geltung umfassenden Lizenzierung?

- Ist es schwieriger, solche Einzelmandate zu erreichen, wenn Verwertungsgesellschaften sich zur direkten pan-Europäischen Lizenzierung zusammengeschlossen haben, wie z.B. bei Armonia?
- Welchen Vorteil hat es für die mandatierende Gesellschaft, lediglich Einzelmandate zu erteilen?

#### **Lizenzierungspraxis:**

##### **Repertoire der direkt lizenzierenden Verlage für nationale Onlinedienste**

- Kann die GEMA für nationale Onlinedienste das Repertoire lizenzieren, dass auf pan-Europäischer Ebene von den Joint Ventures der Majors und der jeweils beteiligten Verwertungsgesellschaft vergeben wird? Für welche Majorverlage ist das der Fall?
- Wenn ja, auf welcher Basis? Werden die nötigen mechnischen Onlinerechte über den Weg Major - kooperierende Verwertungsgesellschaft - GEMA zugänglich gemacht oder muss die GEMA mit dem Major direkt verhandeln? Geschieht dies im Wege der Einzelmandatierung?
- Soweit die GEMA hiervon Kenntnis hat, wird nationalen Verwertungsgesellschaften grundsätzlich die Möglichkeit der Lizenzierung des von den Majors kontrollieren Repertoirs geboten oder ist dies einzelfallabhängig?

#### **Lizenzierungspraxis:**

##### **Repertoire der direkt lizenzierenden Verlage für multi-territoriale Onlinedienste**

- Laut Dr. Stefan Müller (ZUM 2011, 13 ff.) gewährleisten die direkt lizenzierenden Joint Ventures im Einzelfall der GEMA Mandate ihr Repertoire auch multi-territorial wahrzunehmen. Ist dies noch der Fall?
- Gibt es Majorinitiativen, die dies ablehnen (Dr. Müller bspw. nennt DEAL)?

- Inwiefern kann im Falle von solchen Einzelmandatierungen der jeweilige Verlag Einfluss nehmen auf a) Tarifen, b) Verwaltungskosten und c) kulturellen und sozialen Abzügen?
- Ist die Möglichkeit der Einflussnahme hier größer als bei den Einzelmandatierungen durch Schwestergesellschaften für deren eigenes Repertoire, z.B. weil die Verlage nicht den treuhänderischen Bindungen einer Verwertungsgesellschaft unterliegen?
- Sie schreiben, dass sich PEDL in der Praxis nicht bewährt hat. Liegt das daran, dass die beteiligten Verwertungsgesellschaften, mit Ausnahme der PRS, keinen direkten Zugang zu den online performing rights des UK Warner Repertoires haben und daher PRS grundsätzlich beteiligt werden muss?
- Wenn CELAS das anglo-amerikanische EMI Repertoires an multi-territoriale Nutzer lizenziert, wird dann gleichzeitig, sofern gewünscht, GEMA-eigenes Repertoire mitlizenziert? Wenn ja, nur das deutsche EMI Repertoire oder das gesamte Repertoire für das die GEMA sowohl die online performing wie auch mechanical rights inne hat?
- Verfahren die anderen Majorinitiativen, soweit der GEMA dies bekannt ist, ähnlich?

#### **Förderung zeitgenössischen Musikschaftens:**

- Sie schreiben, dass die Mittel zur Förderung zeitgenössischen Musikschaftens dadurch, dass sie im Rahmen des Wertungsverfahrens zugewiesen werden, nur Urhebern zugute kommen können. Verstehe ich das richtig, dass das bedeutet, dass nur GEMA Mitglieder durch diese Mittel gefördert werden können?
- Wie funktioniert die Förderung in der Praxis? Stellen interessierte Urheber Förderanträge? Werden bestimmte Maßnahmen vorgeschlagen, auf die Urheber sich bewerben können?
- Ist es richtig, dass bei der Vergabe der Fördermittel für zeitgenössisches Musikschaftens, anders als bei der eigentlichen Wertung, die Dauer der

Mitgliedschaft bzw. die Nutzung der Werke des interessierten Urhebers keine Rolle spielen?

- Gibt es andere kulturelle Maßnahmen der GEMA außerhalb der Fördermittel für zeitgenössisches Muskschaffen, die Mitgliedern ohne Ansehung der Mitgliedsdauer und der Nutzung ihrer Werke zugute kommen können?

**Kulturelle Fördermaßnahmen generell:**

- Inwiefern spielen die von der GEMA im Jahr 2008 angekündigten neuen Kulturinitiativen in der Praxis eine Rolle (Deutscher Musikautorenpreis, Europäisches Musikautorenstipendium, Composers in Residence, Initiative Musik, GEMA-Campus)? Finden diese statt?
- Das Europäische Musikautorenstipendium wird durch Mittel aus der Förderung zeitgenössischen Muskschaffens ermöglicht. Wie werden die anderen Projekte finanziert?

Allgemein gefragt: Betreibt die GEMA Kulturförderung außerhalb des Verteilungs- und Wertungsverfahrens? Wenn ja, können von solchen Fördermaßnahmen auch Nichtmitglieder profitieren?



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