Praise and criticism of the collective management of copyrights: a Spanish and European view

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Abstract: What is the cause of copyright collecting societies’ growing unpopularity? What circumstances have caused collecting societies such as the Spanish SGAE to become one of the social agents that arouses the most distrust among the population today? And why did the European Union have to strengthen the measures aimed at ensuring the transparency of collecting societies? There are many reasons that have contributed to bringing collecting societies in Spain and Europe into disrepute. This paper aspires to disclose some of them and to explain why collecting societies are indispensable in our society under new national and EU legislation.

Keywords: copyright; collecting societies; CMOs; intellectual property rights; internet; European Union; Spanish law; EU law; culture; entertainment; collective management; Directive 26/2014; Authors; performers; producers.


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1 Collective management of copyrights: an indispensable service

Collecting societies have become progressively prominent in a way they would have preferred to avoid. They now appear frequently in the press, are debated in the media and their very use and existence have been questioned by wide sectors of the European population. S.G.A.E., S.A.C.E.M., G.E.M.A., S.I.A.E. look more like the initials of a society of anarchist poets in The Man Who Was Thursday than those of copyright management organisations. For the average European citizen, they represent what RIAA or MPA does for the US citizen: associations of dubious legitimacy which defend the
interests of the few while enriching themselves at the expense of what – is claimed – should be common assets. Libraries, universities, theatres, cinemas, all have been shaken out of their peaceful daily existence by the receipt of a letter from a copyright collecting society. But are not these societies necessary? And are they not more necessary now than ever before, at a time when technology enables authors to raise their visibility in an increasingly sophisticated digital shop window? For the intellectual property scholar, the importance of collecting societies is beyond dispute. And this conviction rests on two major pillars.

1.1 Collecting societies as a service to society. Under a new challenge: cultural heritage only a click away

Our society suffers from a desperate need for culture, art, images, pure entertainment, and this need demands satisfaction. What the public wants is not merely access to a handful of works selected by experts, but rather to all the works created by humanity since the beginning of time: art music and pop music, sacred art and sacrilege, art films and animated films, high brow literature and escape literature, the most learned and the most prosaic. The public wants to admire and censure, enjoy, luxuriate in, abominate and, above all, choose and discard categorically from among all possible alternatives. “Just as water, gas, and electricity are brought into our houses from far off to satisfy our needs in response to a minimal effort, so we shall be supplied with visual or auditory images, which will appear and disappear at a simple movement of the hand, hardly more than a sign”. The prediction ventured by Paul Valéry in Paris in 1934 (and which Benjamin would later record in The Work of Art in the Age of Mechanical Reproduction) has come true, except that the public’s appetite is voracious and the possibilities of feeding it, absolute. The public education policies that have taken root in most countries worldwide, and the technological advances, have democratised access to culture. The very idea of what culture is or should be has evolved to comprise artistic and ludic expressions which are now appreciated by a mass of critics far greater than the traditional elite. And this has turned the concept of ‘public’ on its head. What is culture in the twenty first century? And who is the public at which it is targeted? Authoritative dictionaries, such as those of the Spanish Royal Academy, Oxford or Merriam Webster, agree when defining the public as a group of people having common tastes or interests. It is possible that this group of people with cultural interests has become larger commensurate with the trivialisation of the concept of culture. It has led to a bidirectional process in which the illiterate layers of the population are reduced thanks to a type of public ‘paideia’ which enables them to become aware of their own sensitivity (or, perhaps more accurately, of their capacity for enjoyment). At the same time, the concept of culture has become permeable to popular ludic statements, dragging with it the so-called ‘low culture’. If, as the Spanish novelist Javier Cercas affirms, the entertainment industry generates ‘kitsch’, aesthetic lies, art which is not art but rather an art substitute, or, in other words, if culture is devalued with a view to extending its limits, then the masses now make up the potential audience of a culture that comprises everything or virtually everything.

This popular thirst for creative stimulation has spawned a succulent business opportunity for the entertainment industry. For years, the entrepreneur has discerned the opportunity offered by such a boundless challenge: culture, all culture, only a click away. And yet it is not easy to do business based on those premises. There are many authors and many artists, just as there are many people involved in the production of works to whom
the law grants the power of deciding where, when and by whom those works are offered. Book and sheet music publishers, music and movie producers, software and videogame developers, are all copyright holders. Bringing them all (or a considerable number of them) together under a single business initiative, grouping them all on the same stage, would seem to be an unattainable pipe dream.

In this scenario, collecting societies representing a group of authors, artists and producers appear as the perfect partner to obtain the key to what they themselves call the ‘universal repertoire’. They act as the meeting point which, in many cases, allows the entrepreneur to avoid an unpredictable search, successive interviews and negotiations with countless authors, producers, publishers, actors and musicians. At the same time, they endow the latter with a visible face vis-à-vis the industry. Collective licenses granted by these societies should open doors for cultural transactions that would have been unthinkable only a few years ago. Whether this has actually been achieved in practice in the EU is another matter. Collecting societies are an essential component of the copyright system, but the laws regulating them should simplify their functioning and bring them into line with business initiatives that attempt to give the public what the public demands. They should enable the entrepreneur to know the costs of licenses, guarantee the transparency of the system and expand its territorial horizons. This is the goal of a new European legal framework on the collective management of copyrights, which lays the groundwork for the development of a single market of online cultural contents.

1.2 Collecting societies as a service to authors. Remuneration, assistance and legal advice

Other than in exceptional cases, the revenues generated by intellectual work are irregular. A novelist or composer of a symphony, for example, toil for years to write their work and only when they hand it in do they receive the advance on which they are to live until they finish a new work, months or years later. Advances are made with a charge to royalties, but are rarely recovered. In order to mitigate the irregularity of this income, copyright laws grant supplementary remuneration to right holders for the collective use of their works. As stated in the new Directive on collective management of copyright (CMO Directive): “collective management organisations enable right holders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets”. Thus, the law requires libraries to pay a small stipend to writers for the loan of their books. Radios and television stations do the same for musicians, actors and producers of series and programs. Cinemas pay fair remuneration to the directors, scriptwriters, actors and musicians whose work makes a movie possible, and so on. The more times a song is heard or a movie is seen, the more times a novel or a book of poems are lent in a library, the higher the emoluments payable to the musician or the writer. This remuneration is collected and distributed by collecting societies. As the Spanish Supreme Court has held, the law’s intention is to ensure that right holders obtain a proportional share of the profits generated by the work in question.

A basic principle of collective management is that redistribution should favour the author or artist whose works are most popular (since the bread and butter of the intellectual worker is based on the public’s favour). However European law has ensured that a percentage of what is collected by successful artists is used to attend to
disadvantaged groups. At best, authors and artists are usually independent professionals and it is not unusual for them to face difficulties later on in life (due to not having paid social security contributions regularly, inactivity because of illness or a temporary lack of occupation, etc.). In addition to managing the remuneration rights of their members, collecting societies are required by law to earmark part of the revenue they collect for welfare services, through welfare mutual insurance companies, pension plans and funds (the ‘mutual helps’, as novelist Lorenzo Silva would put it). This revenue enables musicians and other professionals to face the final stage of their lives with dignity and to overcome periods of inactivity or need.

The possibility of entrusting the defense of their rights to specialised professionals also gives authors or artists the peace of mind necessary for them to concentrate on their painstaking intellectual work or on perfecting their art. Dickens spoke ironically in *Bleak House* about the corrosive effects of the law, cautioning against submitting one’s entire future to the uncertain results of the justice system (as both Galdós in *La Desheredada* [The Disinherited] and Kafka in *The Trial* would go on to do). In the London of the nineteenth century, as in the Madrid of the twenty first, the length of court proceedings is draining. Legal matters require full dedication and consume lives and even entire generations of men and women seduced by the false prestige of justice. It is advisable (and even healthy) to separate creative work from the management of copyrights.

At a glance, the copyright collective management system appears to be well thought out. So why is it increasingly unpopular? Why have collecting societies been anathematised? What circumstances have caused collecting societies such as the Spanish SGAE to become one of the social agents that arouses the most distrust among the population today? Why did the European Union have to strengthen the measures aimed at ensuring the transparency of collecting societies? There are many reasons that have together contributed to bringing collecting societies in Spain and Europe into disrepute. This paper aspires to unveil some of them and to explain to the skeptical reader why collecting societies are indispensable in our society under new national and EU legislation. It seeks to explain, finally, why in this era of atonement and good intentions, we should lend them a hand and help them provide their services to society and to authors, adequately controlled and monitored by the public authorities. This is a necessary tribute to collective management, but one that is also deeply critical and, accordingly, constructive, focusing on the aspects of the system that must be corrected in order to make it sustainable and long-lasting. This at least is the author’s intention.

2 The decline and fall of Spanish collecting societies

2.1 The Spanish Constitutional Court judgment of November 13, 1997

On January 1, 1986 the Spanish democracy, still in its infancy, became a member of the European Community, eager to leave behind the vestiges of 35 years of dictatorship. Entry into Europe required the urgent modernisation of the country, its institutions, its economy and finance, and also of its cultural policies. The socialist government of Felipe González had managed to enact the Historical Heritage Law during the sweltering summer of 1985. But the copyright reform was long in coming, and the century-old law of 1879 (which had governed the rights of generations of thinkers and artists such as Ortega y Gasset, García Lorca, Salvador Dalí or Pablo Picasso, among many others for
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over one hundred years) was to remain in force for a few more years. Finally, at the end of 1987, the Spanish Parliament enacted a copyright law that brought Spanish authors on a par with those of the rest of Europe. Javier Solana, then minister of culture, would later assert that it was the most modern law in the world at that time.

The new legal text reserved a significant role for collecting societies: it abolished the monopoly of the Sociedad de Autores de España as the only collecting society in Spain, and paved the way for the creation of new associations grouped by profession (writers, composers, interpreters, producers, etc.). In its preamble, it pointed out “a fact acknowledged by the European Community institutions, i.e., that copyright holders are only able to attain true effectiveness when they act collectively, through organisations that exercise powers of intermediation or management of the aforesaid rights”. The responsibility given to these societies, called to manage millions, demanded a strong statutory counterbalance. In the original version enacted by Parliament, collecting societies were defined as non-profit associations that reported to the Ministry of Culture. The law did not establish administrative penalties for breaching their obligations, but rather centralised at the Ministry of Culture the powers to authorise and revoke collecting societies, entrusting the Ministry with their supervision, inspection and control.

The reaction of the Catalan and Basque Autonomous Communities was immediate: both Autonomous Communities joined together to challenge the brand-new law as unconstitutional. They questioned the attribution to the State of genuine powers of control over collecting societies which, they claimed, belonged to their regional sphere of action. The struggle can not be explained from a political standpoint: the powers in dispute were minor and there were no regional collecting societies (nor would there be for another twenty seven years). However, the instructions of the nationalist parties governing the two Autonomous Communities were unequivocal: to systematically appeal any questionable power, with a view to accumulating the highest possible quota of self-government. The issue was therefore not who exercised true control over collecting societies, but rather that of capturing one more piece on the chessboard of legislative power in Spain.

The 1978 Spanish Constitution attributed to the State the exclusive power to legislate on copyright. However, the Constitutional Court had already recognised that the enforcement of laws passed by the State could be assumed by the autonomous communities. These powers of enforcement do not allow the autonomous communities to legislate, but they do entitle them to apply State provisions or to put such provisions into practice. The Constitutional Court itself was to decide whether the attribution to the Ministry of Culture (i.e., the state) of the powers to authorise, revoke and control collecting societies was unconstitutional. And it would take almost ten years to do so because although the appeal claiming unconstitutionality was filed in 1988, a judgment was not handed down until November 13, 1997!

Perhaps this is merely a personal observation, but after reading the judgment you get the impression that the Constitutional Court allowed itself to be easily pleased with the nationalist aspirations. It seemed to indulge an impulse based less on law than on equity: with a view to safeguarding ‘a unitary legal regime at the service of a general interest’, it reserved to the State the power to authorise or revoke collecting societies. Unexpectedly however, it deprived it of powers of control and supervision, even though the activity of such societies exceeded, by law, regional boundaries. One must ask what purpose was served by reserving for the Ministry of Culture the power of disqualifying a collecting society if, conversely, it was prohibited from supervising the society’s compliance with
the law. The Court itself appears to be aware that it was not doing the system any favours and suggested to Central Government in its judgment that it put mechanisms in place to coordinate with the autonomous communities: “[it must] ensure that the manner in which the autonomous communities exercise the functions of control, inspection and supervision does not result in manifest or unreasonable differences, and adopt the necessary mechanisms of cooperation, coordination and reciprocal reporting which enable Central Government to obtain such data as it requires”.

This controversial judgment, criticised from all sides, in practice stripped the Ministry of Culture of its power to exercise effective control over Spanish collecting societies. But even more surprising is that, having won this match of powers, the autonomous communities would forget forever the responsibility it entailed and fail to implement mechanisms to oversee collecting societies. This has meant that, for years, collecting societies have had a practically unlimited scope of action in Spain (Reija, 2013), which has led them (some of them, on occasion) to commit outrages. In fact, if multinationals subject to stringent audits and inspections are capable of embezzlement, how could totally uncontrolled societies that manage astronomical sums be expected to refrain from doing the same? Seventeen years have elapsed since the Constitutional Court handed down its judgment. If we look back and note the excesses committed the high number of convictions by the antitrust authorities, the case brought by the National Appellate Court against the SGAE on the grounds of misappropriation, etc., it no longer seems preposterous to reproach the Constitutional Court for its mildness and the regional governments for their passivity when exercising the responsibility acquired. Although, as pointed out by certain authors (Bermúdez Sánchez, 2012), the absence of control could have been solved through efficient cooperation between governments, little or nothing was done. Neither did the Ministry of Culture, over all these years, make use of its power to reprimand or disqualify collecting societies. The current balance is not one of total impunity though, since the antitrust authorities and the courts have taken action to put a stop to the irregularities. But as so often occurs in Spain, there were no effective measures to prevent the irregularities in the first place.

From the start, this lack of control and transparency gave rise to suspicions regarding the actions of collecting societies, especially in connection with the tariffs charged to users for the use of their repertoires. The tariff battle was the first and most visible of the consequences of this judgment, but not the only one.

2.2 The reactions to the absence of public control

It was the National Antitrust Commission (2009) that first sounded the alarm, and it did so gradually, by bringing proceedings that convicted some collecting societies of abuse of a dominant position. In particular, it imposed on the users of their repertoires, discriminatory and arbitrary tariffs. The European Union itself would react in 2005 through a Recommendation in which it urged Member States to take measures aimed at guaranteeing the transparency of the system. This Recommendation, the legislative beginnings of the current CMO Directive, was mostly ignored and, in Spain, received a harsh answer from SGAE through its chief of staff, Mr. Pedro Farré, recently sentenced to two years in prison for misappropriation and falsification of documents.

The Supreme Court took up the gauntlet and in 2009 established case law that recognised the absence of public control. It thus shook up the inertia prevailing until that time in the instance and appeal courts, which tended to rule systematically in favour
of collecting societies. In its judgments of February and April 2009, the Supreme Court downplayed the importance of a collecting society’s filing of its tariffs with the Ministry of Culture (the argument repeatedly used by collecting societies as proof of their legitimacy), since the Ministry itself could do little or nothing to guarantee their equity. This was a break with the principle according to which the failure of negotiations between collecting societies and users enabled the former to impose their standard tariffs, since no other body had been able to examine these tariffs previously. Consequently, it had not been possible to check whether or not they complied with the guarantees of equity required by law. The Supreme Court also referred to CJEU case law in order to establish the guidelines that were to be followed when evaluating the tariffs. Tariffs were to be, above all, equitable and reasonable, and were therefore to be in line with the real and effective use of the repertoire by users and the economic value of such use for the interested party. They also had to bear in mind the size of the repertoire and any agreements reached previously with other users, and avoid discrimination. One year later, the National Antitrust Commission published a report containing the same guidelines, criticising collective management in Spain and demanding transparency in the collection and redistribution of funds. One of the judgments handed down by a Barcelona court during that time disclosed that a single collecting society had €25 million still to be distributed among US artists, simply because the USA did not have an equivalent society to manage artists’ remuneration. Finally, in 2011, the National Appellate Court would strike the coup de grace to the system when it ordered the elite corps of the Civil Guard to storm the modernist Longoria Palace, the Madrid headquarters of the SGAE, due to a presumed misappropriation of funds. The raid, which was televised live, resulted in the arrest of the leaders of the SGAE and, what is worse, the absolute discredit of collecting societies (and, by extension, of copyright) in Spain. As from that time the Spanish Parliament began working on an urgent reform of the Copyright Law that would prevent any further scandals.

3 New laws for a new collective management of copyrights

3.1 The reform of the Spanish Copyright Law: towards a more transparent model?

On November 4, 2014 the Spanish Parliament revealed the long-awaited reform of the Spanish Copyright Law. It is a partial and transitional reform that calls for the government to approve an integral amendment of the Law within one year. The government’s aim was to focus its efforts on essential and pressing aspects: to shore up the scaffolding of a rickety law as quickly as possible, to test the solutions proposed and, finally, to lay a solid foundation for the construction of a law based on the experience acquired.

The legal framework of collective management has doubtless been one of the bones of contention of the reform. The preamble of the Law agrees that collecting societies are an essential part of the copyright system and, thereafter, states that they have ‘generally’ been shown to be effective in the attainment of their purposes. However, the lawmakers, in a soul-searching exercise, admit that there are ‘problems in how the model works’ which reveal ‘considerable room for improvement, singularly in terms of the effectiveness and transparency of the system’. These words precede a long list of
measures which make the Spanish law one of the strictest in matters of transparency and control of collecting societies. At least in theory. What are the guidelines of the reform of the Spanish law on collective management?

1 As was to be expected, the reform puts an end to the uncertainty in the distribution of powers and does so using a formula which respects the Constitutional Court’s judgment: the Ministry of Culture maintains the power to authorise collecting societies, or to revoke such authorisation throughout Spain, while their inspection, supervision and control (including a new power to impose penalties) is attributed to the autonomous communities. However, not all autonomous communities may exercise these powers, only those in whose territory the society in question pursues its main activity. This was the dramatic change with which the lawmakers attempted to dispel the uncertainty created by the Constitutional Court. According to the Law, a collecting society will be deemed to act mainly in one autonomous community if more than 60% of its earnings come from that community and at least 50% of its members reside there. If these requirements are not met, it will be the Ministry of Culture, secondarily, that must supervise and control the society in question (article 159). But regardless of who holds the disciplinary baton (the State or the autonomous community), collecting societies are required to cooperate with the relevant government and to comply diligently with its demands for information and documentation. In the event of serious disobedience, the law imposes strict penalties of up to 2% of the total revenues obtained by the collecting society in the preceding year (article 162 quáter).

2 The law extends and clarifies the obligations of collecting societies (article 157.1). Collecting societies continue to have the power to set their standard tariffs, but they are now required to negotiate with users (in practice, the negotiation of tariffs was customary, but was not set out in the law as an obligation) and should do so in compliance with the criteria already established in case law by the Supreme Court, namely:

- The size of the collecting society’s repertoire. This encourages collecting societies to compete for the representation of large catalogues of works.
- The user’s actual use of the repertoire and the intensity and significance of such use in the user’s activity as a whole.
- The revenues obtained by the user from the commercial use of the repertoire. In other words, a university publisher of a 500-copy edition should not receive the same treatment as a commercial publisher, and a modest jazz club or flamenco club should not be treated in the same way as a major nightclub.
- The tariffs established by the collecting society with other users for the same type of use. Unjustified discrimination between users is thus prohibited.
- The tariffs established by equivalent collecting societies in other EU Member States for the same type of use, provided that there are uniform bases for comparison.

Another of the significant changes of this reform is that negotiations between the collecting society and the user aimed at setting a fair tariff cannot continue indefinitely. If the parties do not reach an agreement within six months, the decision will be made by the Copyright Commission of the Ministry of Culture (article 158...
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How this measure is to be executed is still uncertain but, in theory, it appears to be a good way of speeding-up negotiations and putting new business in motion.

3 Transparency is one of the fundamental goals pursued by the reform. The new law requires collecting societies to post the following information on their website and make it easily accessible (article 157.1):

- The standard tariffs in force for each type of use of their repertoire, together with the principles, criteria and methods used to calculate those tariffs.
- The repertoire managed by the society, which should include the works managed under reciprocity agreements executed with foreign collecting societies, the names of those societies and the respective territorial scope of their management.
- The standard contracts executed with associations of users and the specimen contract habitually used for each type of use of their repertoire.
- The distribution systems, rules and procedures, the reductions or percentage discount applied to each right and type of use managed, and the protected works and subject-matter managed whose holders are partially or totally unidentified or not located.

4 Accounting and audit (article 156). The new accounting and audit obligations represent a formidable swinging back and forth from traditional laxity to stringent, absolute control. The data now to be reflected in the financial statements in connection with, for example, amounts collected, amounts yet to be distributed, discounts applied to users, amounts earmarked for social functions, agreements executed with foreign collecting societies, etc., is so detailed that it will require a tremendous effort on the part of collecting societies.

There are those who claim that these obligations could lead to the meltdown of collecting societies, render their collective management unfeasible or hinder their fundamental objectives. It will therefore be necessary to monitor this new legal framework very closely as it is put into practice. In any event, these measures are a direct consequence of the fact that the control of collective management has lagged behind in recent years. It seems logical and even desirable to demand that collecting societies now make an additional effort to demonstrate their exemplary nature and good practices.

5 One-stop shop. Lastly, the law requires collecting societies to participate in the creation and financing of a *ventanilla única* (or one-stop shop) for billing and payment, accessible online (additional provision one). This will make it easy for users of repertoire to calculate the total cost of paying all collecting societies and making the relevant payment. Once it is up and running – the law envisages a very tight timeline for its creation\(^\text{36}\) – the one-stop shop should give considerable boost to online entertainment services in Spain. Enabling music or video businesses to pay the necessary authorisations (or at least the collective ones) all at once will be instrumental in fostering a lawful ‘digital contents’ business.\(^\text{37}\)

In short, the reform constitutes a major step forward towards a more transparent and efficient management of rights (Bercovitz, 2014)\(^\text{38}\), and endows the Copyright Commission at the Ministry of Culture with new powers to control and fix tariffs which
are, in themselves, promising signs. Nonetheless, all these measures must be
accompanied by sufficient personal and material resources to enable the Commission to
operate with speed and force. Otherwise, the system will be shown to be useless and,
thus, will be further discredited.

Lastly, despite the effort to increase public control, the Spanish lawmaker fails to
implement rules on good governance and management accountability: as opposed to the
Corporate Enterprises Law [Ley de Sociedades de Capital]39, the current Spanish
copyright law does not regulate measures for internal supervision of collecting societies’
individual managers. As some authors have pointed out (Perdices Huetos, 2014), public
intervention should remain a last resort, whereas day-to-day control of collecting
societies should be carefully exercised by their members as shareholders supervise the
board of directors in corporations.

3.2 Spanish law and the directive: two parallel universes?

Of the many criticisms of the reform of the Spanish law (the most biting being from the
collecting societies themselves), the most prevalent is precisely the reproach that the
lawmakers drafted the reform with their backs to Europe (Hernández, 2014)40. In the
particular case of collective management, this is in fact what occurred: despite being
subsequent to the CMO Directive, the Spanish law does not transpose it; neither does it
quote it or refer to its objectives. This does not mean that the reform is contrary to the
Directive or that its measures necessarily collide with those stipulated by the European
Union. Indeed, both pieces of legislation share a laudable objective: to discipline the
collective management of copyrights, promote transparency and correct the defects
shown to exist in the system throughout the years. The Directive (as always occurs with
this type of European ‘framework law’) indicates the goals which are to be fulfilled by
Member States and then leaves Member States leeway to attain them. For this reason, the
measures adopted by the Spanish lawmakers to restrain collecting societies are in
compliance with the Directive.

The Directive represents the response of European institutions to the irregularities
committed by certain collecting societies and, in particular, the deficient financial
management of the revenues collected.41 During the legislative process, the European
Commission disclosed that in 2010 the main European collecting societies had
accumulated approximately €3.6 billion yet to be distributed among their members, and
that between 5% and 6% of the amounts collected were retained without justification for
at least three years after their collection.42 For this reason the Directive now requires
collecting societies to reduce the distribution and payment period to nine months. Despite
this, musicians from international bands such as Radiohead’s Ed O’Brien and Thom
Yorke or Nick Mason from Pink Floyd have spoken out against the directive, claiming
that it authorises collecting societies to keep the amounts payable to unidentified right
holders when they are not claimed within three years (You have broken your promises
and encourage the management of collecting societies to keep the fruits of our creativity,
they claimed in a letter addressed to the European Commission. You stole our hopes).43
Spanish law does not implement a maximum period for distribution and payment (beyond
requiring generally that it be done ‘diligently’). Nonetheless, it does introduce the
three-year period criticised by authors and musicians. As from the third year collecting
societies may provisionally use up to one half of the amounts still to be paid
(article 154.6), even though the statute of limitations on legal action to claim outstanding
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amounts is five years.\textsuperscript{44} Furthermore, amounts not claimed in those periods should be used, among other purposes, for welfare work (article 155.2).

As pointed out above, the Spanish reform also fails to deal with the good governance and internal control of collecting societies-envisioned by the CMO Directive-, which may have contributed to improving self-control of collecting societies by their members.

But this is just one side of the coin. The flip side, the most ambitious, the one that seeks to assist an enterprise in launching an online music business throughout the European Union has not been implemented by the Spanish reform. The CMO Directive requires Member States to legislate in such a way as to enable collecting societies to offer pan-European licenses or, if the national collecting society lacks the infrastructure or the resources to do so, to delegate this function to collecting societies with greater capacity, which are required to agree to such a request (article 30). This encourages the aggregation of repertoires at a few collecting societies that will be able to offer the entertainment industry the desired multi-territorial repertoires throughout the EU. Unfortunately, the Directive restricts multi-territorial licenses to the music business: what happens then with the other areas of culture? Would it not be advisable to also encourage multi-territorial licenses for cinema, literature, the plastic arts, etc.? The Directive appeals to European collecting societies to use their own initiative to reach agreements and extend multi-territorial licenses to other areas of culture and entertainment, but it does not include specific regulations for doing so.\textsuperscript{45}

The Spanish lawmakers have not wished, or have not known how to deal with a challenge that is in some ways revolutionary: to make the collective management of copyrights truly European, to give Spanish authors the possibility of entrusting the management of their rights not only to a national society but also to a French or German or UK or Italian, etc. society and, in turn, to permit a company interested in launching a music business throughout Europe to do so by applying for this ‘European licenses passport’.

Spain, busy with its own pressing reform of the Copyright Law, has postponed the challenge of cross-border licenses. By doing so, it is not in breach of any commitment though, since the deadline set by the Directive for its transposition by Member States is April 2016 (article 43). Until that time, consideration must be given to the best way of regulating these licenses in Spain and how to respond to questions left completely unanswered by the Directive, such as: how much multi-territorial management will cost the right holder? What commissions will be received by each collecting society involved? How will the costs and expenses of multi-territorial management be allocated? What amounts will be deducted from the remuneration of right holders? None of these questions is given a clear answer in the Directive and yet they must be answered by the time the new system is up and running.\textsuperscript{46}

4 Final considerations

This article casts an eye over the decline and fall of collecting societies in Spain, the reasons behind their downfall and the measures taken to remedy the situation. The mistakes made help us to understand and adequately assess the reforms now being implemented at a Spanish and EU level. But, above all, they invite us to reflect on something much deeper: the way the European citizen perceives collecting societies and, through them, copyright. In recent years, Spain appeared on the Special 301 Report of the
US Foreign Trade Office as one of the countries with the highest piracy rates. The latest statutory reforms have enabled us to step out of the limelight, but the problem goes beyond that of a mere diplomatic or foreign trade issue. Only through a quality, egalitarian public education, with sufficient emphasis on the value of culture, creativity and intellectual work, is it likely to be possible to attain reasonable levels of respect for intellectual property. The investment in public education transcends by far the purpose of this article, but statutory measures must undeniably be accompanied by a major effort to raise awareness of the issue in education. In the copyright cause, to convince is to win: nothing is gained by going to court if citizens fail to understand, even intuitively, that intellectual work, as all other work, must be remunerated and that this is an indispensable premise for constructing a sustainable and diverse cultural ecosystem.

In this arduous task, collecting societies must play an essential role: it is they who represent the visible face of copyright vis-à-vis society. For better or worse, their actions leave an indelible mark on the public perception of copyright. They are to a large extent responsible for the discredit suffered by intellectual property today. But they also have the opportunity to vindicate their labours through the effort, work and exemplary conduct merited by the authors they represent. It is now up to them to act impeccably under a new Spanish and EU legal framework for collective management organisations. The legal measures are in force and they are heading in the right direction. Expectations are high, but will collecting societies deliver?

References


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Case-law

Judgment of the Court of Justice of the European Union of February 6, 2013 SENA (C-245/00).


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Notes
2 The initials of ‘Motion Pictures Association’ and ‘Recording Industry Association of America’, associations which represent, respectively, US movie and record producers. Their initials have been popularised in the USA by the high number of court claims filed against copyright violation on the internet.
6 One of the most palpable signs of this popularisation of culture and of the movement from the cultured elite to the masses is found in a change of paradigm in the arts, from postmodern obscurantism to a diaphanous style (Dawkins, 2007). Nowadays a desire for a direct and transparent style permeates all of the arts. The style of literature that is most recognised today is distilled, lacking unnecessary rhetoric and devices: Philip Roth, Mario Vargas Llosa, Alice Monroe, David Foster Wallace, to cite but a few. The desire for clarity has overridden a cultural paradigm targeted at the cultured elite. This is also the case in cinema, music, theatre and poetry, not to mention the new forms of entertainment such as video games (which in Spain are also considered ‘culture’ and benefit from public policies and subsidies for cultural development) whose degree of abstraction or depth beyond that of a mere pastime is questionable.
7 As established by Kea European Affairs and Vrije Universiteit Brussel (Licensing Music Works and Transaction Costs in Europe, 2012): “in Europe, […] complex rights licensing structures hinder the development of the market and the launch of new innovative online services. Compared to the US, Europe is lagging behind in terms of digital music revenue”.
9 Whereas (2) of the CMO Directive.
11 Pursuant to article 154.2 of the Spanish Copyright Law, “a right holder’s share in the distribution of the rights collected by the collecting society shall be proportional to the use of his works or services. Collecting societies shall establish suitable methods and means to obtain detailed information regarding the degree to which users use the works and services in their activity and users shall be obliged to furnish such information in a format agreed with the collecting societies. Where the information is obtained electronically, regard must be had to
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the voluntary industry-wide rules or practices implemented at international or European level for the electronic exchange of this type of data”.


13 Law 16/1985, of June 25, on Spanish Historical Heritage (BOE No. 155, June 29, 1985, pp.20342 to 20352).

14 Copyright Law of January 10, 1879 (BOE No. 12, January 12, 1879, pp.107 to 108).

15 El País, Cultura, December 20, 1985. The minister exaggerated: the law had to be reformed on a number of occasions until its rewording as a new legal text in 1996.

16 Copyright Law No. 22/1987 (BOE No. 275, November 17, 1987, pp.34163 a 34176).

17 Eight copyright collecting societies are currently authorised in Spain by the Ministry of Culture (plus one newly created society for the Basque Autonomous Community, see footnote 20 below): SGAE (General Society of Authors and Publishers), DAMA (Audiovisual Media Copyright), CEDRO (Spanish Center of Reprographic Rights), VEGAP (Visual Plastic Artists Management Society), AIE (Society of Actors or Performers of Spain), AISGE (Actors Management Society), AGEDI (Intellectual Property Rights Management Association) and EGEDA (Audiovisual Producers Rights Management Society).


19 The governing political parties in both autonomous communities had already submitted their respective amendments to the bill during the legislative process, but their arguments were rejected by the majority of Parliament (Marín López, 2007).

20 Only now, in 2014, has the Basque Autonomous Community authorised the creation of the first autonomous community collecting society, based on a Royal Decree from June 2011 in which the socialist government of José Luis Rodríguez Zapatero transferred to this autonomous community the powers to authorise and revoke the authorisation of collecting societies (Royal Decree 896/2011, extending the Central Government services transferred to the Basque Autonomous Community in matters of enforcement of intellectual property legislation – Official State Gazette No. 155, June 30, 2011 – p.69607).


23 From a strictly legal standpoint, the Court’s decision is in line with previous case law, according to which the ‘supra-territorial nature’ [of the scope of action of collecting societies with respect to the autonomous communities, one assumes] is not a standard criterion for attributing powers to the State, but rather is only admissible if the Constitution itself stipulates it expressly, which did not occur in the case of copyright: “The supra-territorial scope (with respect to autonomous communities) of the activities of collecting societies does not permit the mere displacement of the powers in dispute to the State, because these are not functions that fragment the unitary regime established by the legislature”.

24 The exhaustive article by Patricia Mariscal Garrido-Falla ‘Las entidades de gestión de derechos de propiedad intelectual’ [Copyright Collecting Societies], Revista Pe, Vol. 1, No. 34 (2010) is enlightening: “Thus the State was stripped of all its powers to control collecting societies […] The result of Constitutional Court judgment 196/1997 is a system which is unfortunate in every way. Although the Ministry of Culture has the power to grant or revoke the authorisation of collecting societies, it lacks the necessary information that would enable it to exercise these functions correctly, because all powers to demand information from such societies and to control their activity has been conferred on the autonomous communities. […] In view of the current circumstances, it is clear that this system of control will function only if collecting societies decide to continue to act transparently, reporting their standard
rates and the results of their audits at their own initiative, but if they decide to stop reporting this information the Ministry will be powerless to do anything”. José Miguel Rodríguez Tapia (Comentarios a la Ley de Propiedad Intelectual [Commentary on the Copyright Law], 2nd ed., 2009) is categorical when stating that: “The judgment of the Constitutional Court that must be complied with, drives the copyright system to a chaotic state of absolute paralysis”. 

Javier Bermúdez Sánchez, expert in administrative law, takes a more positive view in his article “Competencias estatales o de las comunidades autónomas en el control de las entidades de gestión colectiva de derechos de propiedad intelectual [Powers of the state or of the autonomous communities to control intellectual property right collecting societies] (Revista Pe, Vol. 1, No. 42, 2012), according to which: “However, I do not, under any circumstances, find that the current situation following Constitutional Court judgment 196/1997 prevents the effective management of these powers, since the duty to cooperate that exists within the State imposes an obligation on the [autonomous] communities, in this case, to forward information to the State so that it may, in turn, effectively exercise its power to authorise collecting societies, and to revoke such authorisation. The difficulty arising from a failure by the communities to exercise their powers of management is a different matter... This difficulty is not the result of how a State that is politically centralised in the autonomous communities works, but rather of the government’s failure to exercise its powers (which can occur both in the autonomous communities and in the State). Such powers cannot be waived (article 12.1 of Public Authorities and Common Administrative Procedure Law 30/1992) and if omitted, in the event that the powers are declined, can lead to a negative conflict of powers pursuant to article 68 of the Constitutional Court Organic Law. In the event of a lack of execution, this could constitute inactivity by the relevant authority, which is managed by the judicial review jurisdiction pursuant to article 29 (in this case, subarticle 1) of the Jurisdictional Law”.

Finally, Juan José Marín López (Comentarios a la Ley de Propiedad Intelectual [Commentary on the Copyright Law], 3rd ed., 2007) agrees that “The Constitutional Court could not disregard the fact that the powers of inspection, supervision and control [...] were all linked to the exercise by the Ministry of Culture of its powers of revocation”.

25 Decision of the National Appellate Court of July 4, 2011.Preliminary Investigations No. 90/2010 D.
26 See, as an example, the Decision of the Antitrust Tribunal of July 27, 2000, Audiovisual Intellectual Property case.
28 Judgment of the Criminal Central Court No. 1 of the National Appellate Court No. 27/2014 of November 5, 2014. When this article was sent to press, the judgment was not yet final.
29 Supreme Court judgments No. 55/2009, of February 18 (RJ 2009/3286), and No. 228/2009, of April 7 (RJ 2009/3289).
30 This trend in the rulings of the lower courts was in line with a Supreme Court judgment handed down on January 18, 1992 (before the Ministry of Culture was stripped of its supervisory powers), which attributed a supplementary nature to the general tariffs approved by collecting societies in the absence of an agreement between the parties.
31 Judgments of the Court of Justice of the European Union of February 6, 2013 SENA (C-245/00) and of July 14, 2005, Lagardère (C-192/04).
33 Judgment of Barcelona Commercial Court No. 8, of February 21, 2009.
34 Supra note 25.
36 Additional Provision One requires collecting societies to create the one-stop shop within five months from the entry into force of the amendment. If collecting societies do not respect this time limit, the Copyright Commission may impose sanctions and take any necessary steps
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Pursuant to the CMO Directive, the one-stop shop system will be privately run but monitored by the National Antitrust Commission.

The CMO Directive does not regulate the one-stop-shop system, but does mention it in Whereas (11) and (33). Pursuant to recital (11): “Nothing in this Directive should preclude collective management organisations from concluding representation agreements with other collective management organisations – in compliance with the antitrust rules laid down by Articles 101 and 102 TFEU – in the area of rights management in order to facilitate, improve and simplify the procedures for granting licences to users, including for the purposes of single invoicing [...].”


According to article 237 of the Spanish Corporate Enterprises Law: “All members of the governing body adopting the detrimental decision or performing the respective act shall answer jointly and severally, unless they prove that having taken no part in its adoption or implementation, they were unaware of its existence or, if aware, took all reasonable measures to prevent the damage or at least voice their objection thereto”.


Item (5): The aim of this Directive is to lay down requirements applicable to collective collecting societies in order to ensure a high standard of governance, financial management, transparency and reporting. This should not, however, prevent Member States from maintaining or imposing more stringent standards than those laid down in this Directive.


Subarticles 3 and 4 of article 154: “Actions to claim from collecting societies the payment of amounts allocated to a right holder in the distribution process become statute-barred five years after January 1 of the year following that in which the amounts payable to the right holder were made available to him”. “Action to claim from collecting societies the payment of amounts collected and still to be allocated where, following the distribution process, the right holder or the protected work or service has not been identified, become statute-barred five years after January 1 of the year following that in which such amounts were collected”.

Pursuant to whereas (11): “Nothing in this Directive should preclude collective management organisations from concluding representation agreements with other collective management organisations – in compliance with the antitrust rules laid down by Articles 101 and 102 TFEU – in the area of rights management in order to facilitate, improve and simplify the procedures for granting licences to users, including for the purposes of single invoicing, under equal, non-discriminatory and transparent conditions, and to offer multi-territorial licences also in areas other than those referred to in Title III of this Directive”.

The non-implementation of the Directive is not the only hurdle that would be encountered when launching pan-European online music businesses in Spain. Certain characteristics of mandatory collective management in Spain need to be overhauled. As pointed out by Kea European Affairs (2012): “Spain is the only country that has gone further in the implementation of the international and European texts and has added another level of protection for performers’ rights. Inspired by the right to equitable remuneration that commonly applies to certain communications to the public, Spain recognised in the law a remuneration right for making available [...] which cannot be waived and must be paid by the person who makes available the phonogram – i.e., the online music provider (section 108.
of Spanish Copyright). In order to make it effective, it is mandatorily managed through CMO – in this case through AIE: the performers’ collecting management organisation”. Unlike what occurs in the UK or Sweden, where entrepreneurs just have to deal with one negotiation in relation to the payment of producers’ and performers’ internet (making available) rights, in Spain online businesses need to negotiate separately with producers and, in addition, pay the performer’s collecting society. Mandatory collective management precludes performers from assigning their remuneration rights to producers. “In light of this, online music providers willing to provide music performed by Spanish artists must enter into negotiations with AIE regarding the fees to be paid for performers’ remuneration right in relation to the making available right – notwithstanding the negotiations with record producers to acquire the record producer’s and performer’s exclusive making available rights”.

47 The ‘Special 301 Report’, prepared each year by the US foreign trade office, is aimed at assessing the situation of intellectual property for investors in 78 countries of the world and to denounce those that, in its opinion, afford deficient protection. This is done by publishing a ranking showing those countries whose level of protection is deficient. Such ranking is divided into two lists, according to the seriousness of the infringement:

a  the ‘priority watch list’, popularly known as the ‘black list’, includes those countries in which the situation is considered to be most serious. These countries face potential economic penalties in the WTO, through the consultations and dispute resolution system.

b  the ‘watch list’ (also known as the ‘red list’) is made up of a series of countries that do not afford sufficient protection to intellectual property in certain contexts. This is a measure of pressure through the media and of a commercial kind seeking to discourage potential investors and force the country to open lines of negotiation with the USA to adapt their protection to the standards required by the US Trade Office. Mere inclusion on the list is therefore a kind of indirect commercial penalty. Spain appeared on the ‘Watch List’ from 2008 to 2011: http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf (accessed 6 April 2015).