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# The Necessity to collectivize copyright - and dangers thereof\*

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**Abstract.** *This article describes and discusses the effects of collective rights administration of (individual) copyright. It points out that collectivization is driven either by an economic argument relating to the reduction of transaction costs or a cultural one relating to the protection of authors. It then claims that collectivization has the potential to affect copyright as it is perceived in the Berne Convention and in traditional copyright legislation fundamentally. The effects include a basic shift in copyright from a system based on property rules to a system based also on liability rules. The article then discusses how to best deal with these effects. It recommends that action is considered to identify and possibly remove internal barriers to beneficial collectivization, regulate societies effectively to secure innovation-interest, and to protect the interests of authors more effectively.*

## 1. Introduction

My title calls for attention in two directions: Firstly, I will reflect on the claim that copyright “needs” to be collectivized. Secondly, I will describe some of the dangers - and benefits - associated with this. These two aspects are closely interlinked: If one accepts that there is a need to collectivize copyright then probably one would also be willing to accept some level of danger. If on the other hand, there is no clear need to collectivize copyright then why accept the unpleasant by-products of such a process? In this way, the title also indicates that any decisions to further or to restrict “collectivization” of copyright involve a balancing of interests. It is my basic premise that the purpose of such balancing should be to further societal interests at large rather than the interests of special groups be that authors, users or collecting societies. In this regard the collectivization of copyright is an interesting case. It shows how copyright has been and is being used in practice in ways to overcome some of the structural limitations which are built into the copyright system when it comes to mass uses. At the same time, it demonstrates how copyright as part of that process has been transformed from a system based on property rules to a system based *also* on liability rights. And how it has survived. In this way the following may include lessons for other IPRs.

I will focus on the traditional aspects of copyright i.e. the exclusive rights associated with (individual) authorship of literary and artistic works (in particular music) and on

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\* The following is based on my presentation at the ATRIP conference in Stockholm on May 25<sup>th</sup> 2010. The general theme of the conference was “Individualism and Collectiveness in Intellectual Property Law”. This contribution is scheduled to be published together with other contributions from the conference. Conference material is available on the ATRIP website ([www.atrip.org](http://www.atrip.org)).

<sup>1</sup> Professor, dr.jur., PhD, University of Copenhagen, Centre for Information and Innovation Law (CIIR). Thanks for comments from my colleagues at the University of Copenhagen Thomas Riis and Peter Roth.

the role of the “author” (i.e. the individual creative person). I do so because these are the areas where collectivization has come the furthest. At the same time, they are the most problematic as seen from a traditional copyright perspective. I will concentrate on the collectivization which is related to the *collective rights administration* of (individual) copyright. Issues such as joint authorship etc. will not be discussed. Nor will clearing houses or similar mechanisms which are only aimed at facilitating contacts between individual “buyers” and “sellers”. I will thus only deal with “collective management” which contains what Ficsor (2002) calls “true ‘collective’ elements” including an organisation (a “collecting society”) which is capable of licensing the use of copyright protected works and as part of this function negotiates fees, collects and distributes royalties and monitors the use of the works on behalf of the authors. I will discuss the effects of the process of collectivization and the general consequences of this to copyright law and will not address specific models of rights’ administration as such (see for an overview notably Ficsor (2002)).

## **2. “Collectivization”**

First, I will identify copyright’s basic norms and describe how this leads to a starting point of individual transactions. Secondly, I will describe how in reality rights are being used collectively and how that changes some of the basic notions of copyright.

### ***2.1. Copyright and exclusivity***

Ideologically, copyright is based on liberalistic and individualistic grounds. The copyright *exclusivity* makes it possible for authors to prevent third parties from copying or making available original works for the duration of protection (normally 70 years after the death of the author). Copyright’s exclusivity is thus an example of a “property rule”, i.e. a “legal entitlement which cannot be removed without prior bargaining with the author” (Kur and Schovsbo (2009) 2 with references notably to Calabresi & Melamed (1972) 1092). For this reason, publishers and other users must enter into agreements with authors in order to publish music, books, etc. Exclusivity also covers “secondary uses” such as the public performance or the uploading/making available of recorded music and so radio stations, web-casters, etc. also need permission. For works which have been published permission is normally needed from both the author and the publisher.

The individual character of copyright also lies at the very heart of the basic Continental European and US criterion for deciding the scope of copyright. In order for something to be protected by copyright it must be “original” in the sense that it is the result of a personal, creative effort by a natural person (i.e. the “author”). Some (European) copyright laws takes the point even further and see copyright not just as an individual but as a *personal* right and protect also authors’ moral rights (e.g. von Lewinski (2010) at pp. 50-54).

Copyright isn’t intended to protect authors for their own sake. The purpose of copyright is to benefit society at large and it is for this purpose that copyright grants authors exclusivity. Exclusivity is though to benefit society by furthering innovation and creativity because it enables authors to include their costs of creativity in the

price of their works. This makes it sensible for a rational *homo economicus*-author to create because she will be able to recoup her costs. As seen from an economic perspective exclusivity is thought to benefit the public because the value of the innovation market made possible by copyright exceeds the societal costs associated with the overprice (monopoly profit) paid by consumers. Copyright is based on the basic assumption that the public benefits in innovation and creativity exceed the private gains of authors. Copyright relies on the market to deliver the reward to the author. This obviously presupposes that the author is able to sell her work and to receive a payment which reflects her costs. To do so a market-place must exist where authors and users can meet and agree on the terms for the use.

Finally, it's a basic assumption in copyright that the societal benefits arise when the exclusivity is afforded to the "author" (and not to say a publisher) and that the author's right corresponds to her contribution to society. The rules on authorship and exclusivity in this way serve to connect the system of benefits to the production of new works. The real link of course is money in the form of payment from a user of the work to the author who without this reward would not – it is the basic copyright claim – have made the work.

## **2.2. Why Collectivization?**

Given the starting points of exclusivity, individuality and personality it may come as a surprise that in reality large portions of copyright such as the rights to receive compensation for secondary uses in connection with public performances, broadcasting of music or photocopying of books etc. have for many years been exercised collectively through collecting societies (see on the historical development in the music business from the "dark and dingy Parisian theatres" in the 1700s to on-line licensing and the internet Gervais (2006)). The legal drivers behind these schemes differ (for a full overview Ficsor (2002) and (2006)). In this article the focus is on organisations which have been set up voluntarily by authors (such as composer) who in this way chose to "contract into liability rules ..." (Mergers (1996)). Sometimes, however collectivization is the result of specific legislation which may provide for (remuneration) rights which can only be exercised collectively (e.g. EU Satellite and Cable Directive, Article and Council Directive 93/83, art. 9(1), 1993 O.J. (L 248) 15 (EEC)) or of "hybrid models" such as Extended Collective Licenses which rely on a combination of law and contracts (e.g. Riis and Schovsbo (2010)).

### **2.2.1. Collectivization and liability rules**

It's a common feature of collective rights administration of copyrights that it transfers the ability to enter into agreements for the use of protected works from the authors and to the societies which in various ways exercise the exclusive right on behalf of the author. As a result, authors lose the ability to prevent third parties from using their works. In this way, the effects of collectivization can be described as a twist of the base line for the copyright system from a "property rule" (supra 2.1.) and to a "liability rule", i.e. "a legal structure permitting third parties to undertake certain actions without prior permission, provided that they pay compensation for the trespass" (Kur & Schovsbo (2009) 2).

Before the discussion below it's an important point to note that the process of collectivization of copyright and the resulting substitution of the property right with the liability right base line to a very high degree is the result of active choices made by authors to set up collecting societies. As it will be demonstrated *infra* 2.2.2. this choice is totally rational given the forms of uses which are covered by exclusivity. Collectivization, therefore, should not just be seen as the choice of a handy way of administering rights. It's also a rejection of the business model identified by copyright law, i.e. the model of individual contracting for the use of individual works.

### 2.2.2. *Why collectivization?*

There are two basic arguments for collectivization; an economic and a cultural. These are closely interlinked – the cultural argument for instance obviously also presupposes an adequate remuneration of the author – but for the present purposes it makes sense to make a distinction.

#### 2.2.2.1. *The economic argument*

According to the economic argument collectivization is triggered by a market failure in connection with the identification and negotiation of a large number of individual contracts (generally Handke and Towse (2007)). As seen from this perspective the main point of collectivization is to overcome *transactions costs*. This is done by setting up a transaction mechanism in the form of “collecting societies” which can turn the “useless” individual rights into “useable bundles” (Heller (1998)). In this regard collectivization of copyright has been enormously successful.<sup>2</sup>

The transaction cost argument is based on several assumptions. As seen from a legal perspective the need for collective mechanisms arises because exclusivity also covers secondary uses of a work. If copyright's exclusivity had been “thinner” and e.g. ceased with the transfer of the “property right” in a physical copy of – say – a music cd then collective rights administration would probably not have been needed. The buyer of the cd – e.g. a radio station – would just have been able to use that copy for its shows. By granting exclusivity also in the “public performance” of the cd, however, copyright exclusivity has created a market which cannot in any rational way be dealt with by individual contracts. This is so because rights for secondary uses are particularly difficult for authors and users to negotiate on an individual because the possible uses may not be known at the outset and finding the right price even though the use is known is inherently complicated. As seen from a market point of view, it's also a basic assumption that users need access to large amounts of works. If a radio station only wanted to use only one single music-cd it would be feasible to make a contract with the

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<sup>2</sup> CISAC, the International Confederation of Societies of Authors and Composers, according to its website ([www.cisac.org](http://www.cisac.org)) represents 225 authors' societies from 118 countries and indirectly represents more than 2.5 million creators within all the artistic repertoires: music, drama, literature, audio-visual, graphic and visual arts. In 2007, the total amount of royalties collected by CISAC's member societies, on their own national collection territories, came to more than € 7.14 billion (64 pct. of which comes from the EU).

author concerning that cd. Radio stations, however, need access to a large amount of music; indeed to “music” in the abstract.

The combination of a broad scope of exclusivity and a need for access to a multitude of different works mean that users need to contract with many authors and since this involves transactions costs an absence of effective transactions mechanisms would either lead to unauthorized use or to a very limited – or no – use at all. This in turn would not benefit the goals of copyright law as the authors would not be compensated and therefore eventually no – or very few – works would be produced to the detriment of society in general.

As seen from an institutional point of view the transaction cost argument presupposes a set-up which enables an organisation to enter into contracts concerning the use of copyright. This further requires a legal basis either in the form of special provisions in the copyright legislation or contracts between rights holders and the organisation and between the organisations and users. In order for the transactions to take place it also takes physical structures in the form of an organisation to monitor the deals, distribute the fees etc. To benefit from economies of scale-benefit societies will have to use standardised contracts and procedures. For works such as music which can be enjoyed despite of differences in languages the organisation finally needs to be international in order to give access also to music of foreign authors.

Last but not least, the whole set up is based on the basic premise that facilitating the access in this way is more beneficial to authors and users than the alternative. From the perspective of the author this means rewards which are higher than those which could have been achieved by individual negotiations and from that of the users lower fees. It’s also part of the story, however, that access to alternative models may be restricted because of the contracts between authors and organisations. This may have lock in-effects. If the transfer of rights to the organisation is exclusive then it’s very difficult for users to get around the model because authors would have to opt out of the organisation in order to be able to make individual contracts. An alternative to collective licensing could also arise because of the development of new technologies, see more *infra* 2.2.4.

#### *2.2.2.2. The cultural argument*

The cultural argument emphasizes how collectivization (including the setting up of organizations) serves to protect authors against users to make sure that authors receive their copyright reward. This view sees the societies not only as exchange mechanisms but also – and maybe primarily – as “Authors Guilds” (“Unions”). As seen from this perspective, collectivization is not only a means to make sure that right holders are compensated for the use of their works but also that their rights are respected as such. As an integrated part of this argument many organizations would see it as being a part of their mission to support a national (or even European) “culture” in a broader sense e.g. by grants to members or by prizes (European Parliament Study (2009)). In the same vein Helfer 2006 points out that also a Human Rights perspective on copyright may support collective rights administration as such

because it prevents infringement, collects and distributes authors' compensation and makes it possible to maintain author's individual control over their copyright.

### 2.2.3. *Balancing the interests*

It is worth pointing out at the outset, that there are obvious *tensions* between the two arguments mentioned above. A very basic tension is that the economic argument only favours collective licensing to the extent that no "better" (i.e. no more efficient) alternatives exist. If more efficient models ever became available then the economic argument for collective licensing would vanish. The economic argument thus only sees collective licensing as an acceptable "second best" solution until something better turns up. The cultural argument, however, sees collective rights administration as having an inherent value of its own such as the "protection of authors" or even "culture". Another basic difference between the two positions is that whereas the economic argument basically seeks to weaken exclusivity by turning the individual rights into manageable bundles, the cultural argument is based on the assertion of exclusivity as an "authors' prize". Similarly, the economic argument is driven by a claim of increased efficiency which points to a constant streamlining of the administration, the use of standard contracts etc. (to fully enjoy economies of scale-advantages) whereas the cultural argument would often point out that the organisations should also pursue softer and non-economic goals such as "the institutionalisation of a certain amount of solidarity between authors" including the protection for weaker authors such as younger and not particularly popular ones (European Parliament Study (2009) 18).

The traditional *copyright perspective* in the Berne Convention is that copyright is based on a system of exclusivity.<sup>3</sup> In order for member countries to live up to their obligations to give exclusive rights to the public performance or reproduction<sup>4</sup> (or to making works available<sup>5</sup>) it is thus not enough to put into place copyright rules which make sure that rights holders receive compensation for the use of their works by liability rules. Where Berne prescribes for exclusive rights it is required by the states to use exclusivity as the means of remuneration of authors. From this perspective, *prima facie*, rules which lead to collectivization of exclusive rights are acceptable only if they are voluntary and serve as instruments for the administration of the authors' individual exclusive rights.<sup>6</sup> Mandatory collective models which include compulsory elements and for instance prevent authors from exercising their rights individually would fall foul of the Berne Convention, unless especially provided for notably by Article *11bis* which allows for compulsory licensing on broadcast rights. Furthermore, the scope of the limitations which follow from the Berne Convention may be difficult to

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<sup>3</sup> Berne Convention Article 9(1): "authors of literary and artistic works protected by this Convention shall have the *exclusive right* of authorizing the reproduction of these works, in any manner or form." The position in TRIPS is similar.

<sup>4</sup> See the Berne Conventions Articles 10 (reproduction) and 11, *11bis* and 14 (public performance).

<sup>5</sup> WIPO Copyright Treaty Article 8 (WIPO Performances and Phonograms Treaty Articles 10).

<sup>6</sup> The limitations in the Berne Convention (and TRIPS) do not apply to rights which are not provided for as exclusive rights but only as rights to remuneration (such as the resale right, cf. Berne Convention Article *14ter*). For such rights mandatory rules on collective administration are not prevented by the Berne Convention, Ficsor 2006.

define very precisely. These difficulties are mostly due to the fact that the three-step-test<sup>7</sup> and which is the basic rule for assessing national limitations in copyright law is inherently vague and difficult to apply. As seen from a copyright perspective, collective licensing is thus also seen as the *second best* option compared to individual transactions and something to be used only where – as stated by Ficsor – individual exercise of rights “due to the number and other circumstances of uses ... is impossible or, at least, highly impracticable” (Ficsor (2002) 158). For these reasons one could fear that an overly restrictive interpretation would prevent national legislators from experimentations of new collective models on the fringes of the international rules.<sup>8</sup>

Even though the international copyright rules limit the extent to which collectivization may take place they obviously also allow it to a rather large extent. This, however, does not mean that there are no tensions between the present state of collectivization and copyright. It would thus seem to be obvious that the *process of collectivization* in itself contains elements which tend to erode the individualistic starting point of copyright law. A tension exists between the principles of exclusivity and individuality on which the Berne Convention is built and the logic which is contained in any initiative involving collectivization of the rights. It's important to recognize that this effect is not an incidental by product of collectivization. It is exactly the idea of collectivization that users *cannot* negotiate individual contracts and that authors *cannot* give permissions on an individual basis. The process of collectivization thus incorporates a logic that is based on an entitlement model more akin to a liability rule than a property rule.

Against this background one could point out that the present state of international copyright law is characterized by being based a fundamental schism between an ideal world of exclusivity and property rules which is to a large extent only a mirage and a reality characterised by liability rules (Kur and Schovsbo (2009)). At the same time, however, one should also recognize that collective administration has long been part of the very fabric of international copyright law. By collectivisation the exclusivity becomes manageable and this has undoubtedly paved the way for part of the expansion of copyright to cover situations involving mass uses. If authors were generally unable to exercise their rights e.g. of making the work available by wireless means then the pressure to expand copyright to cover such secondary uses would arguably not have been strong. Collectivisation of copyright has thus fertilized the ground for an expansion of copyright to areas such as secondary uses in the form of public performance etc. In this way there is (or at least till now, *infra* 2.2.4., has been)

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<sup>7</sup> The three-step-test originates in the BC article 9(2) but from there it has spread and a related and more general rule is now found in TRIPS Article 13 on “*Limitations and Exceptions*”, which reads: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

<sup>8</sup> See as an example of this Riis and Schovsbo 2010 on the Danish rules on Extended Collective Licenses which may be problematic in the light of the three-step-test even though they are wanted by broad circles in Denmark including authors and publishers and they provide for workable solutions to contentious issues such as Orphan Works and compensate authors.

a *complementary relationship* between copyright's broad exclusivity and collective rights administration as the one doesn't make sense without the other. A dogmatic view on copyright as a right of "exclusivity" can be accused of overlooking this relationship and for failing to recognize how the use of liability rule-elements in copyright has helped make copyright become what it is today.

#### 2.2.4. Digitization, DRM and collectivization

The technological developments in terms of digitization and the use of Digital Rights' Management systems (DRM) have a great impact on copyright in general and certainly also on collective rights administration.

Firstly, the digital technologies because of the expansion of copyright to cover "every copy" (in the EU see the notorious Infosoc.-Directive, European Parliament and Council Directive 2001/29 article 2, 2001 O.J. (L 167) 10 (EC)) has meant that the potential number of (reproduction) rights which have to be dealt with in any technical process of use of works has exploded. Adding to the need to license also the right to communicate to the public the result is what professor Gervais (2006) calls a "fragmentation" of copyright. This potentially increases the need for collective administration to "de-fragmentize" and "simplify" copyright and the licensing process, Gervais, *ibid.*

Secondly, the new technologies have also opened the door to what may lead to an alternative to collective administration at least as far as on-line use is concerned. Such systems may not only lead to individual clearing of rights but also to models which are not linked to a particular territory. This latter point is particularly complicated in the EU context where rights administration has traditionally been linked to the individual member countries and where the local collecting societies often see their "cultural" mission as being linked to the national territory of "their" member state.<sup>9</sup>

Finally, the term "digitization" is normally – and also here – used rather broadly to refer to "technological changes". It's trite to note that these go faster and faster and also that developments take us in unforeseen directions (imagine that Facebook hardly existed 5 years ago). In a world of rapid changes what is needed of the legal structures is the ability to *adapt* to changes. The collecting societies themselves have been developed because of changes in technologies (broadcast, reprography etc.) Collecting societies will no doubt also be part of the changes brought about by the internet, DRM etc. The point to make here is, however, that because the collecting societies have been born in the "old world" there is also a risk that they will oppose changes from emerging technologies merely because they are "new" and different and challenge their business models and traditional ways of thinking. This risk is particularly pertinent because the new technologies would indeed seem to be able of individual rights' administration to an extent otherwise unheard of. A development

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<sup>9</sup> See notably COMMISSION RECOMMENDATION of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, (2005/737/EC) which calls for practices which "corresponds to the ubiquity of the online environment and which is multi-territorial", *ibid.* point 8.

towards a more individualized licensing situation would no doubt pose many challenges and new risks such as those related to the identification of authors, to the potential misuse of authors by unfair contracts, or to the “Americanization” of culture. It’s one of the challenges, however, to make sure that collecting societies do not use their power to prevent the future developments of new administration models simply because they are not based on the collective structures of the societies (also Ficsor (2006), Gervais (2006) and Handke and Towse (2007)).

### **3. Collectivization and Institutions**

Collective rights’ administration comes with institutions for the administration of copyright (“collecting societies”). Collecting societies may be privately owned (by authors) or owned by the state (“public”). For the discussion it is, however, important to bear in mind that authors’ organisations like all other institutions have a vested interest in maintaining a system which is dependent on their services. This has already been hinted at *supra* 2.2.4. It would also be naïve to reject that sometimes these interest would not coincide completely with the interests of users, members (i.e. authors) or “society”.

The potential conflicts are the most visible as seen from the economic argument. As mentioned *supra* 2.2.1. this argument sees collective administration and thus the organisations entrusted with this as second best-solutions only. If a better – i.e. more efficient alternative – comes along the economic argument would point to that and dismiss the institutions. The collecting societies therefore obviously see alternative models such as those based on DRM-technologies as threats. On way to respond to such a threat would be to improve the administration to make it even better and more efficient. Another way would be to focus on the cultural aspects. Either way it’s important when considering the legal respons to collectivization in copyright to recognize the organisations as active players with views and a policy agenda of their own and not just as mindless instruments.

The existence of institutions also brings into play the discussion about the need for external control-mechanisms such as control of the organisations by specialised government agencies such as Copyright Tribunals or ministries. In stark opposition to the individual exercise of copyright the collective administration through organisations also triggers competition law and this opens a new front for the infusion of economic arguments into copyright, *infra* 5.3.1.

### **4. Effects of collectivization**

To sum up: Collectivization has the potential to affect copyright as it is perceived in the Berne Convention and in “traditional copyright” legislation<sup>10</sup> fundamentally. The effects of collectivization can be measured on a number of different levels including:

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<sup>10</sup> This notion is admittedly very imprecise. One could possibly argue that the impact is most profound to systems within the *droit d’auteur* tradition. This is so because collectivization in many ways would seem to underline the economic rationales of copyright. On the other hand the “cultural arguments” identified *supra* 2.2.2. would mostly find support in countries belonging to the *droit d’auteur* tradition. The issues are too complicated to pursue within the framework of this article.

- the *structural* level;
- the *market* level;
- the *cultural* (value) level; and
- the *policy* level.

The changes on the *structural level* – i.e. from a “property rule to a liability rule” – are the most profound. As it was pointed out *supra* 2.2.1. the shift from “property to liability” is an unavoidable consequence of collectivization which takes place even though the collective models are in full conformity with Berne. These effects challenge copyright’s basic understanding of the system as being based on property rules and exclusivity. To some extent, this understanding is clearly false and is the result of a romantic mirage. Copyright in fact is not a monolith based on “property rights” but a patch-work of rules and practices based both on property rules and on liability rules. As seen from a general, normative copyright perspective, however, the changes on the structural level towards liability rules is obviously a threat (it is “dangerous”) to the copyright system as it stands to day. This perspective is important because the conventions are based on a system built on exclusive rights and this marks the room of manoeuvre for national copyright legislation. It’s also, however, a dangerous argument because one may confuse the means of copyright – “exclusivity” – with the goals of copyright – “innovation, creativity and recognition of the author”. As seen from a policy perspective it’s important to bear in mind that exclusivity isn’t the purpose of copyright but merely its means. As a matter of policy it’s thus not possible to maintain that one should prefer exclusivity to a liability rule as such. One should prefer the entitlement model which maximizes public benefits and that may sometimes be a rule based on exclusivity and sometimes one based on liability. The lessons from copyright may also suggest that the optimum could be a *combination* of property and liability based elements. On the structural level collectivization in this way not only pose practical problems but challenges copyrights own self-image as a system based on property rules.

On the level of the *market* several things happen. First and foremost, collectivization opens for access to the use of works which would otherwise have been inaccessible because of transaction costs. This in turn transfers money to authors from users (who receive payment from their users and eventually the end consumers). To this process collectivization is instrumental because it makes copyright work in areas where no individual markets exist or where such markets would be sub-optimal. At the same time, however, collectivization also changes the position of the parties on the market by strengthening the market power of authors (as represented by their societies). This may sometimes lead to a risk that “authors” misuse their market power for rent seeking or to impose unfair contract terms on users. These risks are basically of a competition law nature. Sometimes, they are regulated by special provisions in the copyright legislation. Normally, however, competition law would also be able to intervene to prevent the abuse (see more on this *infra* 5.3.1.). The balancing act here is thus to make sure that collective administration does not result in an

overcompensation of authors (and collecting societies) because of market power at the expense of users and ultimately the society at large.

On the *cultural level* a number of important changes take place when compared to the traditional base line protection envisaged in the Berne Convention and traditional copyright law and their emphasis on copyright as an individual/personal right. On the organizational level the relationship between author and organization is based on contractual grounds and “authors” are here reduced to being mere “members” who must exercise their control on the actual use of their works indirectly i.e. through the organisation by invoking their member rights. This may give rise to a number of problems in making sure that a democratic culture exists in the societies and that members are heard and their views respected etc. These issues have not concerned copyright law much (even though some countries have specific rules see notably the German Act on Collective Rights Management (*Urheberrechtswahrnehmungsgesetz*<sup>11</sup>)). Apart from the transformation from “author” to “member” a transformation also takes place with regard to the object of copyright protection. What is to copyright a “work” which is being protected as the author’s “spiritual child” is to the society a “commodity” which is being sold in bulk via blanket licenses. This is part of the logic of collectivization (economies of scale). As seen on the cultural level the effect is a commodification of the work which furthermore erodes the ground under the notion of copyright as an individual/personal right.

On the *policy level* the effect of collectivization is difficult to describe in simple terms. The point to be made here is just that the collecting societies must be expected to pursue their own agenda and that this will not necessarily correspond with what is in the best interest of authors, users or society at large. What is good to the societies is not necessarily good to authors or users. The policy risk is, therefore, that the copyright system because of the lobbying of collecting societies pursues a course which is not to the benefit of the policies lying behind copyright law. This *caveat* is of course relevant also to individual authors or users or representatives of those so the message here is simply to point out that collecting societies should not be expected to be any different – be that better or worse – than any other member of an interest group. The special thing about the societies however, is that their interests unlike those of authors and to some extent users have not traditionally been internalized into the international copyright system.

## 5. The dangers of collectivization

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<sup>11</sup> Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten of 9 September 1965, BGBl. I S. 1294 FNA 440-12 as amended lastly by Art. 2 Zweites Urheberrecht-RegelungsG of 26 October 2007 (BGBl. I S. 2513). See for an overview Reinbothe (2006). The law includes obligations for the collecting societies both *vis-a-vis* members and users including rights for members to have their copyrights administered fairly and for users to be given access to works on equitable conditions. The Act is being supervised by the German Patent Office.

Collectivization implies two set dangers: One from going too far and one from not going far enough. In the following, the focus will be on the first but it's important to bear in mind that the danger of not using the potentials of collective models to their full extent may be grave.

On the basis of the discussions above and in particular on the effects of collectivization the *dangers of going too far in the direction of collectivization* of copyright can be measured from two perspectives: "Innovation dangers" and "cultural dangers".

### **5.1. Innovation dangers**

The innovation dangers notably include *incentive losses* from going from a property model to a liability system. Losses may also be incurred because of monopolization (misuse) or from lock-ins to certain technologies or to collective rights administration models.

As far as dealing with the incentive losses are concerned a first and basic difficulty is to correlate the level of copyright-remuneration to the level of creativity in society. The collecting societies' turn-over may give some indication of the level of activity but as copyright is about incentivising creativity the crucial point is related to the effects on creativity of the fees raised and not to the fees themselves. This is so even though there would seem to be no doubt that within the areas where no alternative to collective licensing exist more revenue is being raised because of the societies.

If for the present purposes a (positive) correlation is thought to exist, i.e. that authors generally respond to remuneration by being creative and that the level of creativity rises with the level of remuneration the problem of collective administration would be to consider whether those positive effects are weakened *because* of the collective administration. Rights organisations not only collect fees but also *distribute* them and sometimes according to other criteria than use. To the extent that fees are distributed on the basis of "cultural reasons" e.g. to non-popular authors or old or young ones it could be argued that the level of useful creativity in society is reduced. This would at least seem to be the traditional starting point for copyright. Copyright thus grants exclusive rights in a work no matter the societal benefits of the concrete work in question but simply because it's a "work". Protection is objective and exclusivity is based on the assumption that the protection of "works" in the abstract increases societal benefits. Copyright isn't a prize of the fine arts and protection isn't based on the notion that "this work" should be preferred compared to "that work" or that "this author" should be granted a stronger right compared to "that author". This position is obviously very sensible as copyright thus avoids putting values on the individual works (I for once wouldn't value pop or rock music much but others would disagree).

Authors' societies may of course base their distribution on soft or cultural criteria and to decide to e.g. operate funds for older artists or working grants etc. The central *danger* to innovation resulting from collectivization and such activities would seem to be that collectivization may lead to the inclusion of factors and concerns (values) which are *external* when compared to copyright and that this may diminish the

positive effects of copyright protection in dynamic efficiency etc. As a consequence of this it isn't possible to extrapolate as a matter of principle the effects on innovation from copyright as such to copyright which has been exposed to collective administration. This point is of particular interest to the competition law assessment. As it will be shown *infra* 5.3.1. competition law normally grants immunity as far as the "existence" of copyright is concerned. The points here indicate that collecting societies should be assessed on the basis of their merits and cannot escape liability simply by claiming to be "part of copyright".

## **5.2. Cultural dangers**

The cultural dangers are equally hard to measure but relate to the losses of the non-economic values which come about when authors join the society and thereby let go of the individual/personal control which copyright has given them. It's thus correct to point out that copyright is intended to benefit society. But it's equally important that copyright sets out to do so by granting individual rights. According to traditional European copyright thinking these rights are based not only on economic concerns but also on the protection of the integrity of the authors and their personal and social interests in their works. To measure the "dangers" of collectivization these effects need to be taken into account too.

Copyright's exclusivity doesn't come with an obligation for authors to exercise the rights themselves. Normally, the economic aspects of copyright can be transferred (or at least licensed) to third parties in the return for money. Authors do so of course all the time and most commercially interesting works only make it to the market only because they are put there by producers who have contracted with authors for the publication of their works.

To the extent authors chose to use the rights of exclusivity to enter the market through a collecting society that is no problem as seen from a copyright perspective. On the contrary: Authors are as a starting point free to exercise their rights the way they want to and it's exactly for this reason that copyright should be preferred as a stimulus compared to e.g. state grants or other non-market based incentives. At the same time, however, it's also clear that in reality authors often have little choice. If one accepts that collectivization occurs because of a market failure regarding certain uses then there simply isn't any individual market for such uses for the author to prefer to the collective market place and thus the society. The "choice" therefore is normally reduced to either not having the work used (or at least not receiving a fee) or joining a society. This of course is no real "choice".

Copyright's interest in the contractual and social conditions of authors is generally very limited. Copyright provides the legal framework in the form of rules on exclusivity but leaves it to authors to make the best of it. Some copyright statutes also contain rules on issues such as individual contracts. Generally, however the rules found in the international copyright treaties do not regulate the aspects of copyright concerning the authors' *exercise* of their rights.

The rules on *droit moral* can be seen as noticeable exceptions to this principle. These rules provide authors with rights for instance to be named on the copy of a work. Normally, the moral rights cannot be contracted away and also have to be respected even though rights are being used according to an agreement with a collecting society. The interest in the moral aspects of authorship can be traced back to the natural law justifications of copyright law in continental Europe. Apart from the protection of the metaphysical aspects of authors' moral rights protection is also, however, based on *social* and even *economic* aspects. The right to be named for instance has a social value because it allows the author to be known to society for her views and to be recognized as the author. It's also central for the branding of authors and this in turn may have significant economic value (think of Damien Hirst).

The very idea of protecting author's broader social and economic interests is therefore not totally unknown to copyright (at least not in the *droit d'auteur*-tradition). This level of protection has not expanded in a way comparable to the economic rights of authors. Despite of the fact that large streams of author's revenues pass through collecting societies copyright law does generally not seek to protect the author in her relationship to a collecting society<sup>12</sup> e.g. by granting her a legally based right to be heard, to receive a "fair compensation", or to take part in the decision making process of the organisation. The lack of such "*member rights*" can be explained for the historical reasons indicated above. As seen from a systematic point of view it may also seem strange that copyright should provide for such rights. On the other hand: If one accepts that the protection of moral rights has a social aspect to it and ideally thinks that copyright laws should protect authors and the central aspects of their "creational life" then why shouldn't the possible harmful effects on authors resulting from their relationship to a society interest copyright law? As it will be shown in the following copyright's lack of interest doesn't mean that authors do not enjoy some "member rights". Their protection, however, is found in *competition law* which basically serves to make sure that societies do not misuse their dominant position *vis-à-vis* their members. If one accepts, however, that authors should enjoy protection in their capacity of being authors and that such protection should include non-economic issues then this protection system is obviously not satisfactory.

### **5.3. Balancing**

Apart from any internal balancing mechanisms in copyright law the most important external balancing instruments are those found in competition law. Before the final conclusions, it's therefore necessary to cover those aspects as well.

#### **5.3.1. Competition law and Collecting Societies**

The general relationship between IPR and competition law is complicated but it is by now generally accepted that competition law and IPR pursue common goals (i.e. "dynamic efficiency") and also that competition law may serve a "correcting factor" to IPR but only in "special circumstances" such as the misuse of a dominant position

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<sup>12</sup> Some countries do, however, provide for protection, e.g. Germany, *supra* footnote 10. The EU Commission's 2005-Recommendations, *supra* footnote 8, also contains provisions on "member rights", see more *infra* 5.3.1.

involving IPR (e.g. Schovsbo (2009)). In the following, I'll briefly describe a number of cases involving collecting societies and competition law. Many countries would have addressed some of the competition law issues directly in their copyright statutes. Also to those countries the competition rules, however, would often be applicable. In this sense competition law is external not only to the societies but also to copyright law.

Competition law normally operates two basic prohibitions. The first prohibition concerns agreements between companies which limit competition (the cartel rule). The second type of rules prevents companies from "misusing" a dominant position ("monopolization") (in EU law: Article 102 in the Treaty on the Functioning of the European Union (ex Article 82 of the EC Treaty)). Authors' organizations may give rise to problems in both regards but for the following I will focus on the issue of misuse of a dominant position and the cases involving collecting societies in the music business and the European cases.<sup>13</sup>

Collecting societies in the music business commit some of competition law's deadliest sins: Horizontal price fixing agreements and blanket licensing. In the EU the (national) societies have, furthermore, often limited their licensing to one member state and only offer access to music by members of other companies by way of reciprocal agreements with those companies. Despite of this, collecting societies have been generally accepted by competition law as necessary evil representing a rational and generally pro competitive response to a marketplace characterized by "thousands of users, thousands of copyright holders and millions of compositions"<sup>14</sup>.

To EU competition law collecting societies have always been considered as being "dominant". Competition law, however, does not ban dominance in itself. It is only if a dominant company *misuses* ("abuses") its market position that competition law intervenes. To EU competition law the basic question in this regards is whether the company "has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition"<sup>15</sup>. The assessment is normally based on a comparison between the existing market conditions and those that would have existed had the company not behaved the way it did. This starting point is problematic to collecting societies because there is often no alternative market. One therefore instead tries to assess the "reasonableness" of the practice of the societies

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<sup>13</sup> From EU law and the cartel rule (Article 101 in the Treaty on the Functioning of the European Union (formerly Article 81 ECT)) see in particular the Decision from the Commission of July 16 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, COMP/C2/38.698 – CISAC. In this case 24 of CISAC's EU based societies were found to have engaged in a concerted practice in violation of Article 101 EUT "by coordinating the territorial delineations of the reciprocal representation mandates granted to one another in a way which limits a licence to the domestic territory of each collecting society". The Decision is now pending before the Court of First Instance.

<sup>14</sup> *Broadcast Music Inc. v CBS Inc.* 441 US 1 (1979) 20.

<sup>15</sup> Case 27/76, Judgment of the Court of 14 February 1978 *United Brands and United Brands Continentaal v Commission*, para. 249.

e.g. by benchmarking<sup>16</sup>. This, however, is also a complicated thing because of the “copyright nature” of the companies which requires a distinction between the limits to competition which are part of copyright and the limitations which go beyond and are the result of the market behaviour of the companies. Phrased in the parlance of EU-law one could say that the societies are “immune” to competition law as long as their activities can be described as being part of the “existence” of copyright, Schovsbo (2009). From this also follows that the practice can be attacked if it is only an “exercise” of copyright.<sup>17</sup> As explained *supra* 5.1. these principles only provide limited guidance in practice and do not imply that collecting societies in practice are not subjected to competition law. At the same time, however, the following will show that the copyright dimension to a certain extent has an impact on the way competition law is being applied in these cases.

In EU competition law cases involving collecting societies have erupted both regarding users and members.

#### 5.3.1.1. *Collecting companies vs. Users*

A number of cases involving alleged misuses regarding the relationship between societies and users have been decided over the years. Most cases have dealt with the issue of royalty calculation (see also Handke and Towse (2007) on the complicated economics involved). From the present perspective the most interesting aspect would seem to be the question to what extent competition law is willing to accept calculation principles which are not based on the actual use of music but on secondary, indirect indicators. This is interesting because a high degree of acceptance could be seen as an acceptance of the logic of collectivization and the transaction cost and economies of scale arguments.

In *Tournier* from 1989 the EU’s Court of Justice (“ECJ”), found that the use of flat-rate royalties is permissible but only “*unless* other methods might be capable of attaining the same *legitimate aim*, namely the protection of the interests of authors, composers and publishers of music, without thereby increasing the costs of managing contracts and monitoring the use of protected musical works”<sup>18</sup>. In the most recent case, which dealt with the calculation of royalties for the use of music from a tv-company, the ECJ remarked that the royalties should be determined in a way with

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<sup>16</sup> Case 395/8, Judgment of the Court of 13 July 1989, *Ministère public v Jean-Louis Tournier* para. 46.

<sup>17</sup> E.g. Case 395/8, Judgment of the Court of 13 July 1989, *Ministère public v Jean-Louis Tournier* and the references to the acceptance of practices necessary to “safeguard the interests of the authors, composers and publishers of music” e.g. in para. 31 and 33. See as the latest example Case C-52/07, Judgment of the Court of 11 December 2008, *Kanal 5 v. STIM*, where the dilemma is spelled out in the following way: “30. In so far as those royalties are intended to remunerate composers of musical works protected by copyright with respect to the television broadcast of those works, it is necessary to take into consideration the particular nature of that right. 31 In that context, it is appropriate to seek an appropriate balance between the interest of composers of music protected by copyright to receive remuneration for the television broadcast of those works and those of the television broadcasting companies to be able to broadcast those workers under reasonable conditions.”

<sup>18</sup> Case 395/8, Judgment of the Court of 13 July 1989, *Ministère public v Jean-Louis Tournier* para 45. Italics added.

”respect to the value of [their] use in trade” (para 36).<sup>19</sup> This meant that as a starting point it was not a misuse according to Article 102 for the company to calculate the royalties on the basis of the revenue of the company and on the amount of music used. The ECJ, however, continued that:

“it is conceivable that, in certain circumstances, the application of such a remuneration model may amount to an abuse, *in particular when another method exists* which enables the use of those works and the audience to be identified and quantified more precisely and that method is capable of achieving the same legitimate aim, which is the protection of the interests of composers and music editors, without however leading to a disproportionate increase in the costs incurred for the management of the contracts and the supervision of the use of musical works protected by copyright (para 40).<sup>20</sup>

Whereas the ECJ thus found that the concrete model used by STIM did not violate competition law the court in my view with the reference to “another method” also made it clear that the admissibility of the calculation model was based on an assessment which did not just take into account the existing system but also *alternative* models, *viz.* such which “enable the use of those works and the audience to be identified and quantified more precisely ...”. The court in this way did not provide a *blanco* acceptance of the collective remuneration model used. Instead, it conditioned its acceptance of the practices on there being not better alternative available *presently*. This line of reasoning is completely in line with the economic arguments described *supra* 2.2.2.1. and the position in copyright, *supra* 2.2.3. and thus also only acknowledges collective licensing models as a second best-solution.<sup>21</sup>

The ECJ would, furthermore, seem to take into account also the *cultural line* of argumentation with the remarks that any alternative models would need to protect the “interests of composers and music editors”. The next part of the sentence shows, however, that what mostly seem to concern the ECJ is the economic interests and effectiveness of the arrangement (“..., without however leading to a disproportionate increase in the costs incurred for the management of the contracts and the supervision of the use of musical works protected by copyright”).

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<sup>19</sup> STIM, *supra* footnote 15.

<sup>20</sup> Italics added. According to para. 48 a discrimination of royalties according to whether the companies concerned are commercial companies or public service undertakings would likely amount to an abuse of the dominant position of the society.

<sup>21</sup> DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society imposes in Article 5(2)(b) an obligation on EU-states to make sure that authors receive a “fair compensation” in connection with the limitation which allows for private copying. In her Opinion of May 11 2010 in Case-467/08 the Advocate General Trstenjak found that Member States enjoy a “wide margin of discretion” for implementing the remuneration models which they prefer on the basis of “practical considerations”, *ibid.* point 92. Should the ECJ accept this view, a similar principle would likely apply also to collective administration models in general. It is also worth noticing that the Advocate General seems to accept calculation models based on proxies for actual use (i.e. on “presumed private use”) only in the absence on practical methods based on the actual private use, *ibid.* This line of reasoning thus is also based on the notion that remuneration models based on something else than the concrete use is accepted as a second-best-solution only. See more on this Ficsor 2006.

As seen from an *institutional perspective*, it's finally worth noticing how the ECJ in other parts on the decision clearly seeks to link the acceptable business practices of STIM with the "specific character of *copyright*" (point 30). As it has been pointed out *supra* 5.1. the value of this statement is unclear. Not only is the "character of copyright" a somewhat unclear concept (to say the very least) but even if such "characters" could be identified one would still have to make a separate assessment of the business of the collecting society.

In this way the effect of the competition law interference regarding the society/user relationship is to keep the societies to the rationale of the economic argument (which is also copyright's): Collective rights administration and the resulting licensing mechanisms are accepted but only to the extent that no more efficient individual models are available. Competition law would, therefore, seem to come some way in addressing a number of the dangers associated with the effects of collectivization to copyright on the innovation level and on the policy level.

#### 5.3.1.2. *Collecting societies vs. Authors (Members)*

There has been a number of cases in the EU on misuse of market power by collecting societies in the internal relationship between society and member.<sup>22</sup> These cases are particularly challenging to the societies in their capacity of authors' societies because the basic claim is that the societies have failed to represent the interests of their owners and to protect them against the societies themselves. The cases are also difficult to decide because different author's obviously have different needs. It's part of the logic of being a member of any society or club that one must accept that certain decisions are being made on one's behalf and that one may not agree with all of them. If one is the member of – say – a tennis club and doesn't like the decision made by the board then one may ultimately decide to leave the club and to find another one. Authors, normally, do not have that choice. Even if an alternative society would be available then there would often not be any way of opting out of *collective rights administration* as such. Authors are locked in if not to a specific society then at least to the system of societies. This situation imposes special obligations on the societies. If, for instance societies, could refuse certain authors from becoming members then they would in fact "punish" the author by denying her access to compensation for the use of her works.

As seen from a competition law perspective, it's interesting to notice how the interests of authors are not limited to having their copyright upheld. Competition law looks upon authors in their capacity as "members" and "commercial entities". This perspective on the author is different from the one in copyright which focuses on the author in her capacity of a creative artist and on her personal/individual rights. Competition law has clearly made the point that authors may need protection in their capacity as "members" and that they have interests in that capacity which go beyond

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<sup>22</sup> The latest round of issues has concerned the ability of authors to benefit from the possibilities of cross-border online licensing, see the 2005 Commission Recommendation *supra* footnote 8.

those regulated by traditional copyright. These “member interest” include at the least (from the *CISAC*-decision)<sup>23</sup>

- (i) the cost elements (commission related deductions, membership fees and associated costs such as pension or cultural deductions);
- (ii) the quality of service (transparency, accountability, royalty payment terms, information, legal protection and enforcement);
- (iii) the benefits derived from the membership (such as pension or illness schemes); and
- (iv) the ability to collect the highest proportion of rights due to the authors. (point 134 )

As seen from a traditional copyright perspective all of these points are obviously relevant and important. Despite of this copyright could generally not be expected to provide any protection of authors who finds these interests to have been violated. The protection which competition law offers author-members is incidental and indirect and is triggered not by an interest in authors but in the societies and their eventual “misuse”. Despite of this it is submitted that the law works and that authors are better off because of competition law intervention than they would have been without it. In my view copyright should consider how to internalize these concerns. After all the need for authors to join societies to collect their reward is because of the way the copyright system has been constructed. Copyright protection has created a situation where authors have to submit to collective administration. Copyright should also make sure that the system works and that the remuneration ends up with the authors and not the societies.

## **6. Balancing the interests: Perspectives**

Collectivization includes dangers to copyright. This is no surprise. Also a system of individual copyright obviously includes dangers and collectivization should normally be seen as a rational response to some of these. The point to take on is then not that collectivization should be generally avoided because of these dangers. Instead policy makers should be *aware* of these dangers and that the copyright system should have *mechanisms* in place to deal with them.

The discussions have shown that in copyright authors (to a certain extent supported by national legislation) have to a large extent opted out of the property rules provided for by law and into collective models based liability rules. Despite of this and as seen from a dogmatic view collective rights administration remains a contentious issue; a “second best” only to be preferred in the absence of individual models. This starting point is problematic. As a matter of principle copyright should prefer collectivization if this is expected to lead to societal gains. And otherwise not. In finding the right balance copyright ought to let itself be guided by the *public interests*. As seen from this perspective one cannot prefer property rules to liability rules. Nor can one prefer

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<sup>23</sup> *Supra* footnote 12. “Member rights” are also part of the Commission’s 2005-Recommendation, *supra* footnote 8. These include e.g. “equitable distribution and deductions”, “non-discrimination and representation”, and “accountability”.

liability rules to property rules. What matters is what rule provides for the optimum level of creativity, innovation and authors' protection. To find that optimum the development in copyright indicates that a *mixture* of property rules and liability rules may be needed. Copyright also demonstrates how the right mix has to a large extent been found by trial and error. The present system for collective rights administration through authors societies has developed from below and over many years. For such developments to take place *flexibility* in the rules is required. At the same time, however, a certain element of *control* and maybe even firmness is required to make sure that the system does not freeze in ways that represent the limitations of an analogous past rather than the options of a digitized future.

The present copyright system would not seem to be ideal for the future developments. In order to be so copyright should probably change its ways and address collectivization more directly than it does at present. In doing so the law should arguably *encourage* collectivization. At the same time it should seek to *control* and maybe even *restrict* it. Concrete topics for action could include:

- Identifying and removing internal barriers to beneficial collectivization. This would mean in particular a restrictive use of the three-step-test to initiatives involving collective administration of copyright;
- regulating societies effectively to secure “innovation-”interest. This would include both a static perspective relating to the business practices of the societies in connection with fees and distribution etc. and the dynamic perspectives regarding the use and development of new and more individualized administration models;
- protecting the interests of authors more effectively e.g. by giving them “member rights” in copyright *via-a-vis* organisations such as the right to become members, to be heard, and to be protected against misuse.

Defining the right regulatory model is an extremely complicated task. One task in particular is important, however: To make sure that the international copyright legal framework does not stand in the way of beneficial collectivization. As I have argued elsewhere with Annette Kur international copyright should generally “stand back” to allow for legislative experimentation with regime shifts and one should avoid “canonizing” property rules as the only regulatory model permitted (Kur & Schovsbo (2009) 29). The experiences from the collectivization of copyright have shown that copyright has come a long way in such a direction but also that some work needs to be done. Copyright in this way can serve as an example to other IPR's.

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