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STIM and Creative Commons licensing

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1. Introduction

1.1 Background

Copyright legislation is a part of a body of law known as intellectual property.¹ Intellectual property law protects creations of the human mind, i.e. the human intellect. Copyright law is constructed as a sole and exclusive right for the right holder to utilize and make use of the intellectual property as he or she wishes.² This is preferably done through agreements. Rights management may be carried out on either individual or collective basis.³ Individual rights management is usually by way of contractual license, which may be either exclusive or non- exclusive, and which may authorize a type of use only or all uses. Remuneration rights are usually managed by collecting societies that function as right holders' trustees.

STIM – the Swedish Performing Rights Society – has a mandate to protect the economic interest of Swedish and foreign authors and publishers of music in Sweden.⁴ STIM protects this interest by issuing STIM licenses. A license entitles a customer to play copyright protected music in a certain place, e.g. at a restaurant, in a concert hall or on a website. The cost of the license is administrated by STIM and thereafter distributed as royalties to the creators and publishers who are the copyright owners. STIM has currently around 50,000 registered members and by undertaking a license with STIM the customer gets access to a world repertoire of protected music to perform publicly under the terms of the license.

STIM's mandate is based on a standard contract entered into by its members. The contract provides STIM with an exclusive right to represent the member. Until now, the

¹ *Basic Notions of Copyright and Related Rights*, Document Prepared by the International Bureau of WIPO, at 2. Online:

http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/basic_notions.pdf

² Prop. 2004/05:110, *Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG*, at 243 [Prop. 2004/05:110]

³ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – *The Management of Copyright and Related Rights in the Internal Market*. Brussels 16.04.2004. Online:

http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=190457 [COM.2004]

⁴ *About STIM*, Online:

<http://www.stim.se/stim/prod/stimv4eng.nsf/alldocuments/78EDC7BBB483303FC1257100004EA253> [About STIM]

applicable contract between STIM and every one of its members has obligated right holders to license all copyright and neighboring rights connected to existing and future works to STIM in order to receive potential royalties. The monopoly in right management of STIM and other similar organizations are beneficial for both creators and users in terms of efficiency.

The copyright regime today is constructed after a binary relation where a user passively consumes creative works of an original author. In between these two players, copyright collecting societies possess a beneficial role in managing licenses that are difficult to administrate on an individual level. However, due to the increased use of information technology, the society has seen a change in consumer patterns and terms like “*Remix Culture*”⁵, “*Prosumers*”⁶ and “*Producer*”⁷ have made its way into copyright theory. In the light of the present change, several copyright collecting societies (among others Swedish STIM) have chosen to amend their standard contracts based on exclusive representation and allow their members to use a Creative Commons license (“CC license”) for works in the repertoire of the copyright collecting society. The CC licenses imply an opportunity to make a work free due to certain conditions. Pilot activity proceeds, besides in Sweden, in The Netherlands, in Denmark and soon also in Australia.⁸ The initiative by Swedish STIM will last initially for a trial period of two years and the CC licenses open to STIM members must only permit noncommercial use of the applicable work.⁹

□————□

⁵ Lessig, Lawrence, *Remix. Making Art and Commerce Thrive in the Hybrid Economy*, The Penguin Press (2008) [Lessig, “Remix”]

⁶ Benkler, Yochai, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. New Haven, Conn.: Yale University Press (2006)

⁷ Bruns, Axel, *Blogs, Wikipedia, Second Life, and Beyond: From Production to Producership*, Paperback (2008)

⁸ *Press release 2009-08-26: Persbericht: Unieke samenwerking Creative Commons krijgt vervolg*. Online: <http://www.bumastemra.nl/nl-NL/OverBumaStemra/Actueel/verlengingpilotcc.htm> [Press release Bumastemra]

⁹ *Press release 2009-05-29: STIM first in Sweden with Creative Commons licence*, (June 2009) Online: <http://www.stim.se/stim/prod/stimv4eng.nsf/alldocuments/74363AA9DA65B087C12575C5004710D4> [STIM Press release]

1.2 Purpose

As described above, the objectives of STIM includes to “protect the economic interest of authors, composers and publishers”. Creative Commons, on the other hand, is a nonprofit corporation dedicated to make it easier for people to share copyright protected works and build upon the existing work of others, consistent with the rules of copyright.¹⁰ Creative Commons provides free licenses and legal tools with the purpose of generating a larger “common” and for a creator to license and share work in a more pragmatic way, so others can e.g. share, remix or use commercially/noncommercially the original work.

Besides the obvious mismatch in pronounced objectives of the two organizations, it has been said that, while Creative Commons is compatible with the copyright system, it is not compatible with some of the other systems that are based on copyright, i.e. collective copyright licensing and collecting societies.¹¹

Thus, the purpose of this paper is to analyze judicial problems that may arise when a copyright collecting society draws up conditions for the use of CC licenses within the scope of their right management mandate. The conditions and the altered terms for administration will be described and discussed. For instance, how may the definition of *noncommercial* be understood? How will the remuneration accounting be affected – e.g. to what extent does STIM have an authority to withhold royalty payments and to what extent may STIM refuse to detach remuneration accounting no longer applicable? Moreover, to what extent does STIM have a responsibility to provide accurate information about its repertoire to customers and what are the information duties with respect to international sister societies? Additionally, the paper will discuss competition concerns arising from the initiative by STIM and how the activity of Creative Commons and STIM respectively may be affected by the present developments.

¹⁰ *About*, Online: <http://creativecommons.org/about/>

¹¹ Hietanen, H and Oksanen, V, *Legal metadata, open content distribution and collecting Societies*. Online: <http://fr.creativecommons.org/articles/finland.htm>

1.3 Scope

It will not fall under the scope of this paper to describe judicial problems with the porting¹² of the original US Creative Commons licenses into Swedish equivalents. So was done in connection to the porting process in 2005.¹³ The licenses have in the implementing process been altered to comply with Swedish mandatory law and are therefore due and enforceable within the jurisdiction of Sweden. The subject for this paper is to discuss the conditions set by STIM for the use of CC licenses (the conditions document below referred to as “the Addendum”) and whether the conditions comply with law, international affiliation obligations and other contractual obligations referable to the organization of STIM. From a more general perspective, the applicability and interpretation problems that appear when exclusivity is abandoned, but exchanged with conditions for the use of other license models, will be analyzed.

1.4 Method and Material

The starting point for the study has been the Act on Copyright in Literary and Artistic Works – the Copyright Act – (Swedish code of Statues, SFS 1960:729 with a number of subsequent amendments) and the Contracts Act (Swedish code of Statues, SFS 1915:218 with a number of subsequent amendments), as well as material discussing the mandate and authorization of STIM and material describing the role of Creative Commons. For the latter, the organization’s respective website and the information there accessible have been used, as well as former papers or articles written in connection to the porting process of the CC licenses to the jurisdiction of Sweden.

For the analysis in general, documentation published by the European Community has been analyzed and applied. There was an extensive period of consultation with focus on intellectual property between 1995-2002 within the European Union. Seven Directives were adopted between 1991 and 2001, which harmonized rights and exceptions and

¹² The process to linguistically translating the licenses and legally adapting them to particular jurisdictions.

¹³ See Björnesjö, S & Jonsson, K, *Creative Commons licenser i svensk rätt. En analys av tillämpligheten samt anpassning till svensk rätt*. Juridiska institutionen vid Handelshögskolan vid Göteborgs Universitet, 2005 [Björnesjö, “Creative”]

certain other features of substantive copyright law.¹⁴ From 2005 and onwards the focus has been on management carried out by copyright collecting societies and their position in an online environment.

Additional to European material, Swedish doctrine discussing the subject specific features of copyright contracts have been applied, together with regulation of international organizations which set standards for their society members. The issues identified further required an analysis of basic domestic contract law, such as rules for interpretation of unclear or unconscionable contract terms. For the analysis of the understanding of the material term *noncommercial*, a report recently published by Creative Commons has been used to a large extent. Finally, contacts have been pursued with the organization mainly relevant for the scope of this paper – *STIM*.

1.5 Disposition

This paper will initially provide an introduction to Swedish copyright law. Especially license opportunities and the mandate within which copyright collecting societies operate will be discussed. The study does not make an attempt to illustrate the entire Swedish copyright regime or even close thereto. The applicable regulation will be described only if relevant for the scope of this paper. Further on, the organization of *STIM* and the background to its establishment will be discussed to illustrate that some rights are difficult and insufficient to protect on an individual basis. Thereafter, with respect to Creative Commons - the organization, its foundations and license opportunities, including the ones now available for *STIM* members, will be discussed. Chapter five will subsequently solely describe the provisions set forth in the Addendum. Following, the analysis commences in chapter six. Potential judicial problems with the provisions set forth in the Addendum will be identified and analyzed. Each section containing an analysis of a provision is divided into subsections to clearly emphasize problem areas and applicability concerns. However, the final analysis chapter regarding competition concerns discusses the Addendum as a whole. Chapter seven will finally make an attempt to provide a short abstract of the judicial issues and thereafter discuss

¹⁴ COM.2004, supra note 3 at 5

conclusions and implications by the new protection scope for the organizations involved.

2. Management of Copyright and Related Rights

2.1 Background

Copyright regulation originate from the basic notion that any creator, whether an artist, a writer or a composer, should have a sole right to determine how his or her creative work may be used. From a bigger perspective, copyright aims, together with other intellectual property rights, to stimulate human intellectual creativity, to make the fruits of such creativity available to the public, and to ensure that international trade in goods and services protected by intellectual property rights is allowed to flourish on the basis of a smoothly functioning system of harmonized national laws.¹⁵ Unlike physical property, expressions of intellectual creativity are most often inherently non-rivalrous. One persons' possession, use and enjoyment of the good are not diminished by another's possession, use and enjoyment of the good. Hence intellectual property laws become material to protect the right holder from infringements of his or her rights. Additionally, contracts become important for the creator to obtain revenues for his or her creativity. The term "management of rights" refers to the means by which copyright and related rights are administered, i.e. licensed, assigned or remunerated for any type of use.¹⁶ Individual rights management is the marketing of rights by individual right holders to commercial users. Collective rights management is the system, under which a collecting society as trustee jointly administers rights and monitors, collects and distributes the payment of royalties on behalf of several right holders.

2.1.1 Swedish copyright legislation – a brief introduction

The Copyright Act is the heart of Swedish copyright legislation. It is accompanied by regulation containing detailed provisions on the applicability of the Copyright Act as well as regulation providing national protection to foreign works.

¹⁵ Gowers, Andrew, *Review of Intellectual Property*, Norwich, UK: HM Treasury, 2006.
¹⁶ COM.2004, supra note 3 at 4

A literary or artistic work qualifies for copyright protection regardless of the form of expression.¹⁷ Hence, the object for copyright protection may be any representation in writing or speech, a computer program, a dramatic or musical work, a photographic work, an architectural work (including applied art) or a database. For a work to be the subject matter for copyright protection it must be the outcome of an individual, intellectual creative process, i.e. it must possess originality.¹⁸ The concept of originality requires uniqueness. The work must be unique to a low extent but nonetheless it must possess a degree of individuality and originality. It must at least to some extent be the expression of the sole creator's individual skill and it may not be so trivial that it could be characterized as a purely mechanical exercise.¹⁹ Another important distinction for copyright protection is the idea/expression dichotomy. Protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. At this early stage the doctrine excludes two types of works²⁰; (i) work based on routine or obvious judgment where no creative skill is involved, e.g. a simple news item or advertisement notice, and (ii) elements of a work that are commonplace or must be used to express an idea. The elements are stock devices and the work in question may not be put in any other logical expression. The test must be case-by case based. Finds of creative elements speaks for protection while the doctrine excludes from protection elements that can be viewed as the very basic and innermost e.g. subject, motive, idea or experience.²¹

The initial creator (a natural person) of a work automatically becomes the subject for copyright, i.e. the right holder.²² An employer, a company or an authority must in general always deduce a claim for a right from a right holder. However, nothing restrains a group of creators to obtain common copyright for a work, provided that each contribution not qualifies as an individual work. A right holder must be distinguished from an owner of copyright. The owner of the copyright may be someone else than the original right holder, e.g. a natural person or a company subject for an assignment of copyright.

¹⁷ 1 § of the Copyright Act

¹⁸ Olsson, Henry, *Upphovsrättslagstiftningen. En kommentar*, 2 u, Norstedts Juridik AB, Stockholm 2006. at 41 [Olsson, "Upphovsrättslagstiftningen"]

¹⁹ NJA II 1961 at 12

²⁰ Olsson, "Upphovsrättslagstiftningen", supra note 18 at 42

²¹ NJA II 1961 at 14-15

²² Rosén, Jan, *Upphovsrättens avtal*, 3 u, Norstedts Juridik, Stockholm 2006, at 35-36 [Rosén, "Upphovsrättens avtal"]

The Copyright Act grants two types of rights – economic rights and moral rights. The economic rights are comprised into two main categories - the right to reproduction and the right to make the work available to the public.²³ The reproduction right is technique neutral and includes both temporary and permanent reproductions. The publicity right, on the other hand, is composed of four separated forms of the right.

- (i) Transmission to the public, which implies that the work is made available to the public by wire or wireless means, but always from a place other than where the public can access the work.
- (ii) Public performance. The right resemblances the transmission right but applies contrary in situations where a work is made available to the public in the same place as where the public are able to access it.
- (iii) Public display. The right implies public display of the actual physical copy of a work without the help of any technology.
- (iv) Distribution to the public, which implies that a copy of a work is offered for sale, rental or loan.

To identify the exclusive right connected to a work is of importance for the more detailed discussion below on how copyright may be transferred in contracts. It is the respective work and the respective right attached to the work that can be subject matter for a contract of transfer.

The moral rights, on the other hand, treat the artist's work as an extension of his or her personality, possessing a dignity that deserves protection. The main moral rights provision is to be found in 3 § of the Copyright Act and, comprise two characteristics: (1) the paternity right, i.e. the right to the respective name and (2) the right to respect of the work, i.e. an integrity right which implies a right to oppose prejudicial modifications of the work or disclosure of the work in a context or form which may be insulting or abusive for the artists' reputation or distinctive features.²⁴

The sole right of the right holder to use and exploit a work is constrained by legal exceptions to copyright.²⁵ The exceptions only refer to the economic rights and are mainly to be found in chapter two of the Copyright Act. When a work may be used

²³ Ibid. at 35 and 2 § of the Copyright Act

²⁴ Rosén, "Upphovsrättens avtal" supra note 22 at 162f

²⁵ Ibid. at 36-37

freely pursuant to these provisions, the moral rights of the author must nevertheless be observed. The explicit exceptions to the strong and enduring right of a sole owner are of importance for the balance within the copyright system. Acknowledgment and considerations regarding fundamental public interests, such as freedom of speech, the educational system and individuals right to exploit their property has formed the present balance. The provisions contain e.g. a right for anyone, for private use, to make a single or a few copies of protected works that have been made available to the public and are legal (i.e. not pirated). Moreover, it is allowed to make short quotations from works that have been made public and special provisions apply e.g. to copying within the educational system and for libraries and archives.

Additionally to the exclusive rights of the copyright holder, the Copyright Act provides protection to certain other categories of players who interact with copyright protected material as a part of the creative process or distribution process. These neighboring rights, which will not be described in more detail, are granted to performing artists, producers of sound recordings or recordings of moving images, certain TV and radio organizations for their exclusive right to their broadcasts, producers of catalogues or other compilations and the producer of a photographic picture (to be distinguished from a photographic work).²⁶

The protection of the rights lasts for the lifetime of the author and 70 years after the year of the respective author's death.²⁷ If the work is protected by common copyright of several right holders the protection lasts 70 years after the year of the death of the last author alive. In respect of anonymous works, the term of 70 year is counted from the year the work was made public. For neighboring rights the protection term is limited to 50 years from when the respective work was performed, recorded, broadcasted or produced. When the protection term has expired the work falls into the public domain and may be used freely.

2.1.2 The territorial nature of intellectual property

The legislation described above provides rules for the national territory of Sweden. Traditionally, the law applicable to the act of exploitation of any of the rights is the law

²⁶ Koktvedgaard, M. & Levin, M. *Lärobok i immaterialrätt*, 9u, Norstedts Juridik, Stockholm 2007, at 106-112 [Koktvedgaard, "Lärobok"]

²⁷ Ibid. at 211-214

of the place of exploitation.²⁸ This principle is confirmed by Article 5(2) of the Berne Convention (see below) and recognized by national laws. An alleged infringement of a Swedish creator's work in another jurisdiction shall be decided pursuant to the respective jurisdiction's legal framework. Due to the territorial nature of intellectual property, the international community (see more below) provides regulation prohibiting against national discrimination. The principle of national treatment applies in all situations, implying that foreign creators and their work shall obtain the same protection as nationals and their respective work.

2.1.3 The international framework

Similarly to other fields of intellectual property, copyright is to a great extent based on international arrangements and agreements rather than domestic singular solutions.²⁹

The Berne Convention,³⁰ administrated by the World Intellectual Property Organization ("WIPO"), contains two main principles applicable to all member states. The principle of national treatment, mentioned above, provides the non-discrimination standard applicable and provides the requirement of the same protection for foreign right holders as for national equivalents. However, the protection must always comply with the minima standards set forth in the convention. The convention does not contain any provisions which directly refers to copyright management. However, Article 11bis(2) and Article 13(1) of the Berne Convention deal with collective management and state that member states may determine the conditions under which certain rights may be exercised. Furthermore, Article 2(6) provides that "*protection shall operate for the benefit*" and thus emphasize a best practice approach with regards to how the rights may bring benefits to the right holders. Finally, Article 14bis(2)(b) of the Berne Convention provides that certain authors of a cinematographic work cannot exercise their rights separately.

Additionally to the Berne Convention, two other agreements, administered by WIPO and with content referable to copyright protection, are in force. The WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT") focus on the use of copyright and related rights protected material on the Internet and within

²⁸ COM.2004 supra note 3 at 7

²⁹ Rosén. "Upphovsrättens avtal", supra note 22 at 60f

³⁰ *Berne Convention for the Protection of Literary and Artistic Works*. Online:

http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

other digital or analog networks.³¹ With respect to related rights/neighboring rights, the Rome Convention of 1961 is the most comprehensive document. It provides a minima protection for performing artists, producers of phonogram and radio undertakings.

Within the scope for the World Trade Organization (“WTO”) an extensive agreement regarding trade related issues of copyright and other intellectual property rights has been adopted. The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”)³² contains general principles for protection and enforcement rules and creates a coherent protection system of close to a global dimension which has been attached to WTO’s system for surveillance and dispute resolution.³³ The regulation resemblances the rules set forth in the Berne Convention but additionally a “most favored nation” principle applies. Each benefit, with respect to protection, that a member state grants a right subject from any country must unconditionally be granted to the right subjects in every other WTO country.

Copyright and neighboring/related rights hold a strong position within the European Community. From the previous century’s last decade and onwards the organs of the European Union have produced an impressive amount of documents within the field of copyright. Traditionally the Community focuses on harmonizing domestic laws rather than creating a European copyright law. The respective harmonizing initiatives will be described below if of significance for the scope of this study.

2.2 Individual Rights Management

As will appear below, the copyright management regime contains concepts distinctive and unique from other areas of law. Nevertheless, Swedish legislation does not make a distinction in between licenses or assignments and contracts in general. The concepts have its base in contract law and the Swedish Contracts Act is applicable.³⁴

³¹ Rosén, “Upphovsrättens avtal”, supra note 22 at 63f

³² *Agreement on Trade-Related Aspects of Intellectual Property Rights*. Online: http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

³³ Rosén, “Upphovsrättens avtal”, supra note 22 at 69f

³⁴ Klang, Mathias, *Copyright – Copyleft. En guide om upphovsrätt och licenser på nätet*, .SE:s Internetguide nr 6 (2009) at 19

2.2.1 The object for management

The exclusive rights set forth in 2 § of the Copyright Act (and briefly discussed above) can each and one separately be the subject for an agreement of transfer of copyright. The original author has the sole right to, in whole or partially, transfer the copyright (27 § 1 st. of the Copyright Act). The legislation on this area provides, in general, full flexibility for the contracting parties to agree on any transfer suitable. However, the provision only refers to the economic right. Moral right cannot be transferred but stays with the original author even if an agreement states the contrary (27 § 1 st. and 3 § of the Copyright Act). However, 3 § stipulates further on that the author may waive the moral rights in whole or in part in relation to uses, which are limited as to their character and scope. Additionally, 28 § of the Copyright Act contains a provision of moral rights character; in the absence of an agreement to the contrary, the person to whom a copyright has been transferred may not alter the work or transfer the copyright to others.

2.2.2 Conditions for transfer and interpretation of content

An agreement to transfer the copyright may be expressed or implied. Within this field a reference is often made to the “specification principle”³⁵, which implies that the parts of the copyright that are not, according to the contract, transferred stays in the possession of the original author. The principle is especially applicable for the interpretation of standard agreements, which have been drafted one-sidedly by the larger party (most often the addressee of the transfer) or its representatives.³⁶ The principle further implies that silent or diffuse transfers shall be interpreted restrictively and/or direct limit the subject matter of the agreement.³⁷ Hence, the principle involves a presumption against assignments of copyright in favor of a licensing of the equivalent, as well as against too broad or extensive contract spans. Furthermore, the presumption works in favor of the original author and thus corresponds with the basic objective of the copyright regime, i.e. encourage creative process and reward the author for the creative effort.

The great number of contracts that nowadays are entered into over the Internet have given rise to doctrinal discussions of what prerequisites that are required for a contract

³⁵ Author’s translation. In Swedish: “Specifikationsprincipen”.

³⁶ Bernitz, U. m.fl. *Immaterialrätt och otillbörlig konkurrens*, 10 u, Stockholm 2007, at 343 [Bernitz, “Immaterialrätt”]

³⁷ Rosén, “Upphovsrättens avtal”, supra note 22 at 151ff

to be valid as “implied from conduct” and correspondingly be enough “specified”.³⁸ Regardless of if e.g. a license is obtained over the Internet by payment or if it’s free of charge the decisive determination to make is whether the licensee, or a respective licensor, has been made aware of the contract that is entered into and the conditions set forth in it. If the conditions are easy to detect and understand the agreements should be deemed valid under Swedish contract law, regardless of if the actual addressee choose to read the license conditions or not.

However, the Internet environment challenge the traditional principle and the understanding thereof. A restrictive interpretation of the “specification principle” implies that use of a transferred right in any new media, which is not covered in the applicable contract, will fall outside the scope of the transfer. This particular problem was acknowledged by the time the present Copyright Act was entered into force.³⁹ However, the issue was never regulated. It was solely emphasized that adjustment rules such as 36 § of the Contracts Act may be applicable for matters of this kind. Whether rapid developments of new arenas for use of a work shall alter the natural understanding of the principle has neither been determined by any domestic court. However, factors likely to be recognized in such a determination may include the intentions of the parties, whether the development of the respective new media was foreseeable and whether the new media has the same purpose and facilitate the same kind of use as the contract covered media.

2.2.3 An assignment or a license

A transfer of copyright may imply the entire economic right, i.e. an assignment of the copyright, or an interest in the right by license.⁴⁰ The latter is the most common way to transfer copyright and entails only a right to use or explore the work after certain conditions. As a consequence, a license contract may contain provisions limiting the scope of the transfer in e.g. subject matter, geographic extent, term and the degree of exclusivity. The extensive contractual flexibility, in addition to the complex and dynamic market that the contracts most often are applied within, brings about that the

³⁸ Olsson, Henry, *Copyright*, 7u, Norstedts Juridik, Stockholm 2006, at 289 [Olsson, “Copyright”]

³⁹ Prop. 1960:17, *till riksdagen med förslag till lag om upphovsrätt till litterära och konstnärliga verk m.m.*, at 173

⁴⁰ Rosén, “Upphovsrättens avtal, supra note 22 at 137

contracting parties in general spend a large amount of time and effort to determine the interpretation of certain conditions and which rights that are intended to be transferred in every separate case.

2.2.4 Exclusive and non-exclusive licenses

A copyright license implies that a licensor provides a licensee with a permission to exploit the exclusive right under certain conditions. During the grant of the license, the ownership of the same stays with the original author.⁴¹ This very feature distinguishes a license from an assignment of copyright. Hence, the ownership stays with the original author even when issuing an exclusive license in favor of a recipient. An exclusive license implies a sole right for a licensee to explore the work, including a right to prevent others from the same use and a possibility to seek a court order to hinder an existing infringement of the *license right*.

A non-exclusive license, on the other hand, may be granted to several licensees at the same time under the same conditions. Consequently, the licensee obtains no competitive advantages over other licensees and the possibility to exploit the obtained temporary right commercially is more limited than if the licensee obtains an exclusive equivalent.⁴² The license right may be even more undermined if the licensor self choose to contractually reserve a right to continue exploiting the right. Additionally, a licensee may not sublet the obtained license for commercial purposes of others, (“sub-licensing”), unless stipulated in the contract or after consent from the licensor.⁴³ Thus the license may in general not be used as a commodity.

2.2.5 Compulsory licenses

The Swedish license regime further contains a license concept that legally limits the exclusive right of the right holder. Several provisions in the Copyright Act entail a right of use of works without the right holder’s permission, but with the supplementary condition that the author has a right to remuneration.⁴⁴ I.e. the author is obligated to license the applicable work. The compulsory license is a rare phenomenon within

⁴¹ Olsson, “Copyright”, supra note 38 at 288

⁴² Rosén, “Upphovsrättens avtal, supra note 22 at 143-144

⁴³ Bernitz, “Immaterialrätt”, supra note 36 at 346

⁴⁴ See 18 §, 26 § and 47 § of the Copyright Act

copyright legislation worldwide. However, it exists and prevents bad practice and abuse of the exclusive rights within certain areas.⁴⁵

2.3 The Collective Management of Rights

2.3.1 The rationales and the management features

In many situations, due to the number of uses and users as well as right holders involved, licensing rights individually have been proven impractical.⁴⁶ Consequently, right holders have appointed agents to engage in the joint licensing of their works. Similarly, users have preferred to have a single point of reference when seeking a license both in terms of authorization and payment. The agent, often a copyright collecting society, carries out the collective contractual management which implies e.g. to identify the users, to negotiate license terms (incl. price), collect fees and establish parameters for distribution of royalties based on equity.⁴⁷ In addition to the contractual management, the management may imply to monitor use, to prosecute copyright infringements and to establish a voluntary willingness to pay (i.e. through policymaking). All these practical necessities imply transaction costs. By former experience transaction costs are particularly problematic in sectors where copyrighted works have a relatively small value to many users. Many users imply many transactions and the transaction costs may even come to exceed the market price for a license to use a copyright protected work. As a result, without the collective administration, the market would not develop and both right holders and potential users would lose out. The efficiency in the pricing structure involves bundling the entire repertoire into a single blanket license and, through price discrimination, charge users after approximations of the intensity of use.⁴⁸ It provides an opportunity to reduce transaction costs connected to negotiations of size of use and price referable thereto. On the whole collective rights management therefore lessens the burden on right holders in the enforcement of rights, and at the same time facilitates access to licenses for users

⁴⁵ Kocktvedgaard, “Lärobok” supra note 26 at 35

⁴⁶ COM.2004, supra note 3 at 14

⁴⁷ Handke, C. & Towse, R. *Economics of Copyright Collecting Societies*. 12 July 2008. Online: <http://ssrn.com/abstract=1159085>. [Handke, “Economics”]

⁴⁸ Ibid.

seeking to exploit copyright protected works. As a result, transaction costs are reduced in order to increase the number of the transactions taking place.⁴⁹

However, the transaction cost rationales for copyright collecting societies is not unchallenged in the digital realm. DRM⁵⁰-systems are perhaps most known as a tool to exclude users from contents, but further increasingly allow automatic registration and invoicing of uses.⁵¹ How does copyright collecting societies economically vindicate their activities if digital management at an individual level proves to be the most efficient arrangement for the minimization of transaction costs? The uncertainty around copyright collecting societies future role economically amplifies with the pressure from the European Community to abandon exclusivity formulas (see further below) and voluntarily initiatives from the societies to provide the opportunity for members to license works individually. Increased individual licensing parallel to the collective management entails more complex administration for the societies to carry out. As a result, corresponding to the decreased transaction costs for individual management due to DRM technique, transaction costs for collective management will increase.

Individual management however lacks the beneficial feature for the demand side of a one-stop-shop. The consumers of copyright protected works will be confronted with multiple suppliers and contact points. Moreover, the non-economic advantages deriving from collective management shall not be disregarded. The societies can provide information and call attention to options for both right holders and users by their extensive experience of copyright management. A manager or a society is further often a countervailing power in bargain activities. A small-scale right holder would meet obstacles if managing and bargaining his or her rights individually. Finally, the voice of an organized group of right holders should not be underestimated with respect to policy making and which direction regulation preferably should take to preserve creativity and the worth in creative works.

⁴⁹ Hansen, G. & Schmidt-Bischoffshausen, A. *Economic Functions of Collecting Societies – Collective Rights Management in the Light of Transaction Costs – and Information Economics*, October 19 2007. Online: <http://ssrn.com/abstract=998328> [Hansen, “Economic Functions”]

⁵⁰ Digital Right Management

⁵¹ Hansen, “Economic Functions”, supra note 49

2.3.2 The relation to the right holders

Usually only one society operates for each group of right holders in a territory.⁵² Hence principles of good governance, non-discrimination, transparency and accountability apply for the collecting society in its relation to right holders the principles. It is further important for the right holder to obtain a reasonable degree of flexibility connected to the management, such as a choice with regards to e.g. duration and scope. Unless the law provides otherwise, the right holders should have the possibility, if they so desire, to manage certain of their rights individually.

2.3.3 The relation to the users

Collecting societies usually represent a wide, if not worldwide repertoire and have had an exclusive mandate for the administration of rights in relation to their field of activity (about required change in the exclusive formula see below).⁵³ This implies a strong position vis-à-vis users. This position is appreciated as it enables collecting societies to function as one-stop-shops for licensing. However, the inferior bargaining position of the users entails concerns regarding tariffs and license conditions.

2.3.4 Reciprocal representation agreements

Worldwide copyright collecting societies work closely to be able to distribute remuneration to its members for use outside of the territory the respective society operates within.⁵⁴ In order to grant licenses and collect royalties from users abroad, the collecting societies worldwide co-operate on the basis of so-called "reciprocal representation agreements". A reciprocal representation agreement is a contract between two collecting societies whereby the societies give each other the right to grant licenses for any public performance of musical works of their respective members. The establishment of the agreements further facilitates the international administration of copyright.

⁵² COM.2004, supra note 3 at 19

⁵³ Ibid. at 18

⁵⁴ *Remuneration from abroad*. Online:
<http://www.stim.se/stim/prod/stimv4eng.nsf/AllDocuments/0E8A251E3D0102A7C125730D0042416A>

2.3.5 The extended collective license

In view of the perceived advantages of collective management regarding remuneration rights, several legislatures require mandatory collective management, i.e. such rights may only be administered by collecting societies.⁵⁵ The Scandinavian countries apply a unique concept for copyright legislation - the extended collective license. The general rule providing the legal mandate for extended collective licenses is located in 42 a § of the Copyright Act. The license may best be explained as a hybrid of a voluntary license contract and the compulsory license concept described above.⁵⁶ Several sectors manage and exploit a great number of copyright protected works. The administration for permission on an individual basis would here be impossible or at least economically inefficient.⁵⁷ Hence, the legislator has provided the copyright regime with a mechanism that enables applicability of a collective agreement for a whole group of right holders, organized or non-organized. Initially, applicability requires a voluntary agreement between a group of organized original authors. First thereafter, an extended collective license, based on an opt-out formula can come to affect non-organized authors - *if* statutory law so permits. As a result, the licensee of the extended collective license obtains access to the whole repertoire of copyright protected material referable to the particular group of authors. The license has particularly been of great significance for the enormous use of copyright protected material by radio and television corporations.

The collective administration of rights has come to embrace several other sectors and situations than the once the legislator explicitly has come to observe.⁵⁸ The most important illustration hereof is the area of musical compositions and thereto attached lyrics.⁵⁹ Swedish composers and authors of musical works license their right to public performance to STIM – the Swedish Performing Rights Society (see more detailed below).

⁵⁵ COM.2004, supra note 3 at 14

⁵⁶ Kocktvedgaard, “Lärobok” supra note 26 at 35

⁵⁷ Rosén, “Upphovsrättens avtal”, supra note 22 at 90f

⁵⁸ See 42 b § - 42 f § of the Copyright Act

⁵⁹ Rosén, “Upphovsrättens avtal”, supra note 22 at 101f

2.4 A Call for a European Community-wide license

2.4.1 Cross-border trade of copyrights and territory laws

The important Infosoc directive (2001/29/EC) on Copyright in the Information Society does not mention collective management in its articles. However, it addresses a desirability of encouraging collective licensing arrangements in order to facilitate the clearance of certain rights.⁶⁰

With the advent of the digital environment, cross-border trade in goods and services based on copyright and related rights has become the rule, notably for the rights of reproduction and communication to the public and the making available right. However, bear in mind that the law of the country of exploitation applies to licensing. Consequently, where exploitation extends to more than one state, different rules apply. The rules on e.g. ownership and authorship, conditions for copyright contracts and protection criteria, as well as conditions for collective management vary in between states. A lack of common rules may potentially be detrimental to both users and right holders, as it may expose them to different conditions applying in various states, as well as to lack of transparency and legal certainty. However, jurisdictions worldwide have acknowledged the importance in introducing intellectual property into the international trading system. TRIPS (discussed above) recognize trade related issues of copyright and other intellectual property. Moreover, in 2007, the European Union and a number of other WTO members began to work on a new international agreement – the Anti-Counterfeiting Trade Agreement (“ACTA”).⁶¹ The main purpose of the agreement is to improve global standards to more effectively combat trade in counterfeit and pirated goods. Formal negotiations are still ongoing and there is, at this stage, no agreed text.

2.4.2 Multi-territorial licenses

As a consequence of the reality described in the previous section, commercial users as well as several instances within the European Community have called attention to the need for establishment of Community-wide, multi-territorial licenses. Several multi-territorial arrangements have also been carried out based on initiatives by copyright

⁶⁰ COM.2004, supra note 3 at 15

⁶¹ European Commission Trade Topics: *Anti-Counterfeiting*. Online: <http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/>

collecting societies.⁶² Inter alia, in the area of music performing rights, nearly all the major authors' collecting societies representing authors in the year 2000 concluded a reciprocal agreement (the "Santiago Agreement"), which allows each of them to issue multi-territorial licenses of public performance rights to be used online. The agreement provides the online user with the opportunity to enter into a contract for a multi-territorial license with the collecting society in the territory in which the user's site is installed. However, in 2001 the European Commission opened proceedings against European collecting societies on the subject of the Santiago Agreement and in 2004 the Commission issued a Statement of Objections acknowledging problems in the fact that the Santiago Agreement determines that the society with authority to grant the multi-repertoire licenses is the society of the country where the content provider has its actual and economic location.⁶³ There is one single, monopolistic, collecting society per territory in the EEA, and given the fact that all collecting societies enter into such bilateral agreements, the Santiago Agreement entails that each national collecting society is given absolute exclusivity for its territory with respect to the possibility to grant multi-territorial/multi-repertoire licenses for online music rights. The Commission emphasized that the territorial exclusivity was not justified by technical reasons and it is not reconcilable with the basic features of the Internet such as worldwide reach. Online activities must be accompanied by freedom of choice by consumers and commercial users.

The proceedings on the subject of the Santiago Agreement was followed by other measures by of the European Commission to break down the monopolies of national collecting societies and to create competition in the field of collective management of copyrights. This development was followed by involvement by the European Parliament as well as judicial decisions. Below three important deeds on the matter will briefly be described for the reason of the analysis in chapter six.

In 2005 the European Commission issued a recommendation on collective cross-border management of copyright and related rights for legitimate online music services

⁶² COM.2004, supra note 3 at 7-9

⁶³ Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 — BUMA and COMP/C2/39151 SABAM (Santiago Agreement — COMP/C2/38126). (2005/C 200/05). Online: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005XC0817\(03\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005XC0817(03):EN:HTML)

(2005/737/EC) (“the Recommendation”).⁶⁴ The Recommendation set standards for the collective management of copyright. It advocates a new collective licensing policy that corresponds to the ubiquity of the online environment and which is multi-territorial.⁶⁵ The objectives of the Recommendation are to enhance greater legal certainty to commercial users in relation to their activity, foster the development of legitimate online services and in turn increasing the revenue stream for right holders. Hence the Commission recommends that right holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services (set forth in the Recommendation) on a territorial scope of their choice, to a collective right manager of their choice, irrespective of the member state of residence or the nationality of either the collective rights manager or the right holder.

However, at this present time a common approach on how to best meet legal challenges in the digital age seems impossible to achieve. The European Parliament, in a resolution on the Recommendation (“the Resolution”)⁶⁶, harshly criticized the Recommendation in several aspects. In general, the “soft law” approach by the Commission was not deemed appropriate. Furthermore, the Commission was criticized for failing to undertake a thorough consultation process with all interested parties and with the Parliament before adopting the Recommendation. Additionally, the Recommendation was deemed inadequate for several reasons. It sought merely to regulate the online sale of music recordings but the scope was imprecise due to the wording. Due to the intentional limited scope, the Commission disregarded the still existing importance of local or national collective rights managers, e.g. for promotion of new and minority right holders, cultural diversity, creativity and local repertoires. The Resolution emphasizes possible negative effects from the potential risk of favoring a concentration of rights in bigger, multinational societies. Bigger societies may develop as a result of right holders complying with the Recommendation with respect to their interactive online rights and hence deprive local collective rights managers of other rights. In stead, the Resolution

⁶⁴ *Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services.* (2005/737/EC). OJ L 276 21.10.2005, p. 54 [REC.2005]

⁶⁵ *Ibid.* at 54 para. 8

⁶⁶ *European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC).* Online: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0064+0+DOC+XML+V0//EN>. [RES.2007]

invites the Commission to make it clear that the Recommendation applies exclusively to online sales of music recordings, and to present a proposal for a flexible framework directive to be adopted by codecision. This should aim at regulating the collective management of copyright and related rights as regards cross-border online music services, while taking account of the specificity of the digital era and safeguarding European cultural diversity, small stakeholders and local repertoires, on the basis of the principle of equal treatment. Conclusively, the Resolution advocates a solution where commercial users may obtain multi-territorial licenses from the collective manager of choice, but as well maintain the system with national collective managers and reciprocal collection of royalties.

The discussion stepped into phase three when the European Commission on July 16, 2008 adopted an antitrust decision prohibiting 24 European collecting societies from restricting competition by limiting their ability to offer their services to authors and commercial users outside their domestic territory (“the Decision”).⁶⁷ The Decision bans the use of reciprocal membership clauses in between copyright managers and the use of exclusivity clauses.⁶⁸ A membership clause refers to a provision which prohibits a copyright collecting society to, without the consent of the other, accept as a member an author who is either already a member of another collecting society, or who is a national of the territory where the other collecting society operates. In an exclusivity clause, on the other hand, a collecting society authorizes another collecting society to license and administrate its repertoire, on an exclusive basis, within the territory of the latter society. The Decision is consistent with the Recommendation in that they both encourage the removal of anti-competitive barriers impeding right holders from freely choosing their collecting societies and right managers from delivering multi-territorial licenses.⁶⁹

However, in connection to the discussion above one should pay attention to that the Commission has chosen not to legislate the area. Concurring voices have emphasized

⁶⁷ Press Release *Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and uses*. July 16, 2008. Online: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1165&format=HTML&aged=0&language=EN&guiLanguage=en>

⁶⁸ *Commission Decision of 16.07.2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC)*. Online: <http://ec.europa.eu/competition/antitrust/cases/decisions/38698/en.pdf> [DEC.2008]

⁶⁹ *Ibid.* at 33 para. 109

that the Commission shall be cautious and not legislate in absence of a comprehensive analysis about the needs and tendency on the marketplace.⁷⁰ Creative content online are still growing and developing why an approach based on the knowledge of today may lead to negative effects tomorrow. However, the strategy of non-binding rules has created uncertainty, together with the diverged opinions of the Commission and the Parliament in the field of multi-territory licensing within the European community.

To sum up, national copyright collecting societies and the use of reciprocal representation agreements are still the standard formula used within collective copyright management. However, the respective societies have had to alter their agreements with respect to membership requirements and exclusivity to comply with the European Commission's opinions within the field. When more and more uses go online a more loudly call for an unambiguous standard for multi-territorial licensing is to expect. If this need will be fulfilled by competition in between copyright collecting societies within the internal market or by legislative initiatives is yet to be seen.

3. STIM – the Swedish Performing Rights Society

3.1 Background

STIM controls practically every communication and public performance of musical works in Sweden.⁷¹ Through an affiliation agreement, composers, lyricists, arrangers of musical works and/or publishers grant STIM the right to give permission for use of, and receive payments for, their respective music work that is performed in public.

The history and background of STIM, an organization founded and operated on the basis of the interest of its members, the right holders, parallels the history of copyright law and the forms in which music has been distributed over time.⁷² STIM was founded

⁷⁰ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market*. Brussels, 03.01.2008. Online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0836:FIN:EN:HTML>.

⁷¹ Rosén, "Upphovsrättens avtal", supra note 22 at 231f and *Members*. Online: <http://www.stim.se/stim/prod/stimv4eng.nsf/alldocuments/D41DD05C625F0666C1256B6E004492E7>

⁷² *STIM – serving music creators for 85 years: From restaurant trio in Paris to unlimited music distribution over the Internet*. Online:

in 1923 after an acknowledgment of the Society of Swedish Composers, which claimed that protecting copyright in accordance with the 1919 Copyright Act⁷³ was beyond the capacity of individuals, i.e. a joint solution was required based on international models. The idea of a collecting society collecting fees for the public performance of musical works was not obviously a good at the time. Music users resisted paying in all areas and STIM was considered to impede music enjoyment and music development. The negative opinion together with increasing pressure from popular music composers, problems with authorities and internal problems prompt STIM to review its operations. Recurrent reviews subsequent to amendments in copyright law, domestically an internationally, as well as altered social patterns and legal initiatives in other areas, has formed the organization to what is today. However, the most important features in STIM's history are the development of new media, including the explosive increase of media devices and applications for music, as well as the commercial success of musical works and the large-scale trade developments with music copyrights.

3.2 The Affiliation Agreement⁷⁴

To join STIM, the potential member is obligated to sign a contract assigning management of the financial rights to the organization. The assignment provides STIM with a right to give permission to (i) communication of the work to the public, (ii) public performance of the work, (iii) recording, communication, reproducing of a recording, (iv) distribution of all the existing and future musical work with attached lyrics and (v) recording of all the existing and future literature and dramatico-music works. Affiliation requires that at least one of the member's musical works have been performed in public or been recorded and published. Works, which not yet fulfill this requirement, are included in the repertoire STIM administrates only if the member gives special permission hereto. STIM, on the other hand, is under the agreement obligated to utilize the rights applicable and pay an amount to the member in accordance with the principles stated in STIM's Articles of Association and Distribution Rules. The member is further obligated to provide STIM with information about the works and oneself to

[http://www.stim.se/stim/prod/stimv4eng.nsf/wwwpages/21C169701F95F876C12572AD0039FEAA/\\$File/STIM%20-%20serving%20music%20creators%20for%2085%20years.pdf](http://www.stim.se/stim/prod/stimv4eng.nsf/wwwpages/21C169701F95F876C12572AD0039FEAA/$File/STIM%20-%20serving%20music%20creators%20for%2085%20years.pdf)

⁷³ Sweden's first real copyright law

⁷⁴ Rosén, "Upphovsrättens avtal", supra note 22, Appendix 1:3

facilitate the administration, not enter into agreement that violates the affiliation agreement or STIM's Articles of Association and Distribution Rules, as well as restrain from acts that may noteworthy harm the operations of STIM. If the member neglects the obligations set forth in the agreement STIM's board of directors may terminate the agreement. The board may further declare that the member, from the day of termination, loses the right to any remuneration under the agreement. Furthermore, the agreement stipulates that STIM receives a right to call attention to infringements of the assigned rights and undertake required measures to safeguard the applicable rights. STIM can seek a court order to hinder an infringement of the right as well as enter into arbitration agreements and receive funds and documentation related to the infringement. The affiliation agreement is non-transferable without explicit consent of STIM stating the contrary (unless in case of decease of a member) and operates for one year at the time.

3.3 Remuneration

To be eligible for payments three prerequisites must be fulfilled; (i) the person or organization subject for the payment must be a member of STIM, (ii) the work performed must be registered and (iii) STIM or the affiliated organization NCB⁷⁵ must have received a report stating that the work has been publicly performed or recorded.⁷⁶ The Distribution Rules contain the standards set by STIM to determine the size of the payment. The payment is based on factors such as (i) how many copyright owners that have an interest in the respective work, (ii) the nature of the work, i.e. the grading (some genres is given higher multipliers than others), (iii) the performing time of the work, (iv) the location where the work was performed and the amount of revenues received by STIM for the location as a whole or the applicable report of the performance, (v) the nature of the performance, e.g. live or from recording and finally (vi) STIM's costs for the administration.

⁷⁵ *The Nordic Copyright Bureau* administers, after mandate of STIM, the mechanical reproduction of musical works.

⁷⁶ *Distribution Info*. Online:
<http://www.stim.se/stim/prod/stimv4eng.nsf/AllDocuments/2BFD475F429CAB82C125716F0039D081>

3.4 International Affiliations

Additionally to the system of direct contracts in between societies, societies worldwide cooperate through international associations that act on behalf of copyright owners. STIM is a member of both the International Confederation of Societies of Authors and Composers (“CISAC”) and the European Grouping of Societies of Authors and Composers (“GESAC”) – two separate international associations that act on behalf of copyright holders by offering membership to copyright collecting societies.⁷⁷ CISAC activities consists of e.g. formalizing the co-operation in between societies by defining a model reciprocal representation contract, supporting the creation of new societies and offering them its political, legal and technical expertise, studying the technical and legal issues related to authors’ rights and their collective administration, operating a common information system (CIS) which provides the members with the necessary means to protect their repertoire in the digital environment, and standardizing the information exchange between societies in order to improve efficiency.⁷⁸ GESAC, on the other hand, has its focus on the preparation and implementation of European legislation and works in close collaboration with the institutions of the European Union.⁷⁹ The grouping emphasizes the importance of that legislation takes into account both the cultural dimension and the economical aspects of copyright and that it is adapted to the increasing internationalization of exchanges of cultural products and to the emergence of new technologies.

4. Creative Commons

4.1 Copyleft

The ideology of the organization of Creative Commons is based on other views of creative process and copyright law than present legislative copyright regimes around the

⁷⁷ *International Collaboration*. Online: <http://www.stim.se/stim/prod/stimv4eng.nsf/AllDocuments/8D9CC3CCD82C7502C12572AD003934AB>

⁷⁸ *Supporting a Global Network*. Online: <http://www.cisac.org/CisacPortal/afficherArticles.do?numRubrique=3>

⁷⁹ *Objectives*. Online: <http://www.gesac.org/eng/gesac/objectifs.htm>

world.⁸⁰ Creative Commons promotes the progress of a creative commons (see further below) and a “public domain default” mode (contrary to the present “copyright by default”) where the individual author may set the limits for the use of his or her work.⁸¹ Creative Commons believes that the present system stifles innovation and development within creative process. Hence, the organization emphasizes the importance of a creative public domain, as creativity and innovation rely on a rich heritage of prior intellectual endeavor. Experience, impressions, references and knowledge are of great importance in the creative process as well as for the users appreciation of the same. Expanding intellectual property protection leaves fewer and fewer creative works in the “public domain” and fewer and fewer direct references may be made to existing works in the process of creating future works.

4.1.1 The public domain

The concept of “the public domain” is far from self-explanatory.⁸² A definition may differ subsequent to if a reference is made to ordinary language or a legal concept and moreover, to which legal scholar one may refer. The conceptions vary from believes that the “public domain” consists only of complete work that are *completely free*, to e.g. the vision that the public domain is a *bundle of privileges* (and thus includes legislative exceptions to copyright and court predictions). However, the conceptions have a common denominator in the fact that a work adherent to the public domain is not embraced by the exclusive rights in favor of the original author that copyright law provides.

4.1.2 Commons

Directly related to the public domain concept is the more general idea of “a commons”.⁸³ The commons may be said to be a more philosophical concept than the idea of the public domain - a shared resource not divided into individual bits of property but rather jointly held so that anyone may use them without special permission. However, the concept of the commons possesses a dilemma acknowledged in an

⁸⁰ The ideology have come to be known as *Copyleft* since it challenges the present copyright system and the standards set therein.

⁸¹ *Legal Concepts*. Online: http://wiki.creativecommons.org/Legal_Concepts [Legal Concepts]

⁸² Boyle, J. *The Second Enclosure Movement And the Construction of the Public Domain*, at 68f Online: <http://ssrn.com/abstract=470983>

⁸³ *Legal Concepts*, supra note 81

influential article published in 1968 by Garrett Hardin.⁸⁴ Hardin made inter alia a reference to National Parks. They are open to all without limit. However the parks themselves are limited in extent. When the use grows without limit, the value of the property will be eroded until it reaches the level of no value to anyone. Hence the dilemma of a commons, containing any type of property, consists of that individuals will benefit at the expense of the society as a whole, of which the individuals are a part.

Copyright protected work may be included in a “commons” if the original author e.g. permits use to a greater extent than the legislative system. So may be done through licenses that limit the copyright default protection.

4.2 Creative Commons – the organization

4.2.1 Background and objectives

The foundation of Creative Commons in 2001 was led by among others cyberlaw and intellectual property experts⁸⁵ and by support of the Center for Public Domain⁸⁶. Creative Commons believes that many creators would not choose the “copyright by default” mode if they had an easy mechanism for turning their work/s over to the public or exercising some but not all of their legal rights. It was in 2001, and still is, Creative Commons’ goal to help create such a mechanism. In December 2002, a mechanism became reality when Creative Commons released its first set of copyright licenses for free to the public. The idea came from the free software movement⁸⁷ and the widespread access to content online.⁸⁸ The latter fully in line with the reality of the information society and recent technological developments. Creative Commons acknowledged that

⁸⁴ Hardin, Garrett, *The Tragedy of the Commons*, Published in *Science*, December 13, 1968. Accessed online at:

http://www.garretthardinsociety.org/articles/art_tragedy_of_the_commons.html

⁸⁵ *About. History*. Online: <http://creativecommons.org/about/history/>

⁸⁶ Access online at: <http://www.law.duke.edu/cspd/>

⁸⁷ Established by Richard M Stallman. The concept behind free software and open source is to provide the user of a computer program with a mechanism that permits amendments and improvements to the program by the user. As a result more programs of better quality will be developed. For an extensive Swedish analysis of the applicability of free software licenses and open source licenses see: Olofsson, J. *Upphovsrättsliga aspekter på licenser för fri programvara och öppen källkod – en analys av tillämpligheten i svensk rätt*, IRI rapport 2003:1, Institutet för rättsinformatik, Stockholms Universitet [Olofsson, “Upphovsrättsliga aspekter”]

⁸⁸ *CC in Review: Lawrence Lessig on How it All Begun*. Posted 051012. Online: <http://creativecommons.org/weblog/entry/5668>

when content goes digital use always requires making a “copy” and thus the gloomy reality is that every use of copyrighted content at least presumptively triggers a requirement of permission. The failure to secure permission placed a cloud of uncertainty over the legality of the use of works. Creative Commons believed, and so still do, that the uncertainty interferes with the opportunity for collaborative creativity and the sharing of knowledge that the Internet technologies provide. The law stifles the same when it denies social patterns and the technological reality. From this reality and acknowledgments grew the motivation for creation of a new licenses mechanism. In a social and technological reality that encourages freedom, authors and artists should have a tool to express the freedoms they want their creativity to carry. Soon the mechanism was born for creators who want just “Some Rights Reserved”. The presence of the word “Rights” is of importance to distinguish the license movement lead by the organization of Creative Commons from the Free Software Movement. Creative Commons believes that a device would help unburden creativity from rigid copyright legislation. However, unlike the Free Software Movement the aim has never been to eliminate the proprietary concept in copyright law. The aim is solely to balance trends that push towards the most rigid copyright system in history.⁸⁹ Over the years following the initial release of the licenses, Creative Commons has taken initiatives within the science⁹⁰ and educational⁹¹ sectors to support and create tools for more efficient research and open learning. Moreover, as Creative Commons and its licenses have grown⁹², the licenses has been further improved and ported to over 50 jurisdictions.

4.2.2 The porting process⁹³

The Creative Commons porting process involves a process to legally adapt the original US licenses to other jurisdictions worldwide, as well as linguistically translating the same for better understanding and clarity within the jurisdiction where the adapted licenses shall operate. The Creative Commons International (“CCI”) team works with volunteer experts around the world to “port” the core of the licenses worldwide.⁹⁴ The

⁸⁹ E.g. developments of digital right management technologies (“DRM”), which directly remove limitations to copyright such as the right to private copying (see above).

⁹⁰ *Science Commons*. Further information on: <http://sciencecommons.org/>

⁹¹ *ccLearn*. Further information on: <http://learn.creativecommons.org/>

⁹² Estimated 130 million CC licensed works in 2008.

⁹³ For detailed information about requirements for international porting, access guidelines online at: http://wiki.creativecommons.org/International_Overview

⁹⁴ *International*. Online: <http://wiki.creativecommons.org/International>

porting process most often requires amendments for the licenses to be compliant with the respective domestic legislation. However, for the reason of retaining the “core” of the original licenses, the Creative Commons Porting Guidelines emphasize that the licenses may not be modified beyond what is necessary to accomplish compliance with local law and never on grounds of policy or philosophy.⁹⁵ Since December 2005 a Swedish version of the applicable CC licenses are available (see more detailed below).⁹⁶

4.3 The Licenses

Creative Commons provides six main licenses⁹⁷ and by choosing a set of conditions applicable the creator decides how accommodating or restrictive he or she wants to license the applicable work. The latest US version (3.0) has not yet been ported to the jurisdiction of Sweden⁹⁸, thus the applicable version 2.5 Sweden will be described and discussed below.

4.3.1 Attribution 2.5 Sweden⁹⁹

CC BY is the most accommodating CC license and also the license that the other five main licenses derive from. The structure and the character of the license will be discussed in this section, while the optional conditions that constitute elements in the other five main licenses will be described in the following sections. As the most accommodating license - what holds for the applicability of the CC BY license generally also holds for the other five licenses. However, divergences will be identified and analyzed in the respective chapter below.

The CC BY license lets others distribute, remix, tweak, and build upon the work, even commercially, as long as they credit the author for the original creation. The attribution

⁹⁵ Hendriks, N. *Developing CC Licenses for Dutch Creatives*. Accessed in Bourcier, D. & Dulong de Rosnay, M. *International Commons at the Digital Age, La Création en portage*, Paris 2004. Online: <http://fr.creativecommons.org/iCommonsAtTheDigitalAge.pdf> and *Legal project lead produces a first draft*. Online: http://wiki.creativecommons.org/Legal_Project_Lead_produces_a_first_draft

⁹⁶ For an English explanation of substantive legal changes to version 2.0 see <http://mirrors.creativecommons.org/international/se/english-changes.pdf>

⁹⁷ *About. Licenses*. Online: <http://creativecommons.org/about/licenses/> [About. Licenses]

⁹⁸ For Swedish draft of version 3.0 Sweden see <http://www.creativecommons.se/drafts/>

⁹⁹ License Deed at: <http://creativecommons.org/licenses/by/2.5/se/>. Legal Code at: <http://creativecommons.org/licenses/by/2.5/se/legalcode>

must be done in the manner specified by the author or licensor (but not in any way that suggests that they endorse the licensee or the licensee's use of the work).

Distinguished features:

- The license let the licensor maintain its copyright, i.e. a CC license is not an assignment of copyright.
- The license does not reduce, limit or restrict uses free from copyright such as the limitations set forth in chapter two of the Copyright Act.
- The author's moral rights are not affected by the license.
- The licensor grants a worldwide, royalty-free, non-exclusive, perpetual (for the duration of the applicable copyright) license to exercise the rights set forth in the license agreement; i.e. to reproduce the work, to incorporate the work into collections, to create and reproduce adaptations, to distribute and publicly perform the work, the collection or the adaption. The rights may be exercised in all media and formats whether now known or hereafter devised.
- If the work is a musical work, the licensor waives the exclusive right to collect, individually or through a copyright collecting society (such as STIM), royalties for any exercise of the rights (see above) by the licensee. Furthermore, the licensee waives the right to collect royalties for a recording of the work.
- For any reuse or distribution the licensee must make clear to others the license terms of the work. So may be done with a link to the applicable website (with License Deed and Legal Code).
- The license conditions may not be altered and references to the applicable Legal Code must in any event be preserved.
- To sublet rights under this license to other parties is not permitted.
- Technical measures, which limit the rights under the license are not permitted.
- The licensee is obligated to ensure that reference is made to the applicable license conditions, and in relation to medium and type to performance, declare the name of the author, the name of the work if stated, an URL address that refers to information about ownership and license terms and finally, for adaptations, how the original work has been used in the adaptation.

- The licensor offers the work as-is and makes no representations or warranties of any kind concerning the work unless set forth under the conditions of the license, otherwise agreed in writing by the parties or required by law.
- The licensor extensively limits its liability for damages arising out of the license.
- The license and the rights granted there under will terminate automatically upon breach by the licensee of the terms of the license. Receivers of adaptations or collections made by the licensee will not have their licenses terminated provided they remain in full compliance with the license.
- The licensor reserves the right to commence or terminate distribution of the work licensed provided that any such act not serve to withdraw the license.
- The license is offered under a one-to-many principle. To avoid a system of sub-licenses, the addressee of a use made by the licensee is offered the same license from the licensor as the licensee originally was.
- Creative Commons are not a party to the applicable license agreement, unless otherwise stated.

4.3.2 Optional condition: *Noncommercial*¹⁰⁰



The NC licenses limit the use of the licensed work in one significant manner. The licensee of the work may exercise the rights granted, but for noncommercial purposes only. The banned use implies use that is primary intended for or directed toward commercial advantage or private monetary compensation. An exchange of a work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered a breach against the clause, provided there is no payment involved.

Contrary to what's stated under section 4.3.1, for musical works the licensor reserves the exclusive right to collect, individually or through a copyright collecting society, royalties for any commercial exercise of the rights by the licensee. Correspondingly, the licensee reserves the right to collect royalties for a recording of the work.

¹⁰⁰ Legal Code for the three main licenses containing a NC condition at: (i) <http://creativecommons.org/licenses/by-nc/2.5/se/legalcode>, (ii) <http://creativecommons.org/licenses/by-nc-sa/2.5/se/legalcode> and (iii) <http://creativecommons.org/licenses/by-nc-nd/2.5/se/legalcode>

A more precise definition of *noncommercial* will be discussed in the analysis. The condition implies interpretation difficulties and an accurate and exact definition is of great importance for the mandate of STIM and the right to remuneration.

4.3.3 Optional condition: *No Derivative Works*¹⁰¹

The optional ND condition implies that only verbatim copies of the work may be copied, distributed, displayed and performed, not derivative works based upon it. I.e. the licensee may not modify, adapt or build upon the work.

4.3.4 Optional condition: *Share Alike*¹⁰²

The condition implies allowance to others to distribute derivative works only under a license identical to the license that governs the original work, a later version of the same license with the same license elements as the first license or an equivalent CC license from another jurisdiction (iCommons license) with the same license elements. License “elements” refers to the conditions here discussed; attribution, noncommercial and share alike. As a result, a derivative work based on a work licensed under the BY-SA license terms will allow commercial use. The contrary holds when the original work is licensed under a BY-NC-SA license. The SA licenses are often compared to open source software licenses and the idea of a growing “commons”.¹⁰³ What has been made “free” to the public should stay “free”.

5. The Addendum - Conditions set out by STIM for the use of Creative Commons licenses¹⁰⁴

If a STIM member would like to license a work under a CC license the member is obligated to fill out an application form. The form stipulates that the membership of STIM implies an obligation to license all reproduction rights and performance rights to

¹⁰¹ Legal Code for the two main licenses containing a ND condition at: (i) <http://creativecommons.org/licenses/by-nd/2.5/se/legalcode> and (ii) <http://creativecommons.org/licenses/by-nc-nd/2.5/se/legalcode>

¹⁰² Legal Code for the two main licenses containing a SA condition at: (i) <http://creativecommons.org/licenses/by-sa/2.5/se/legalcode> and (ii) <http://creativecommons.org/licenses/by-nc-sa/2.5/se/legalcode>

¹⁰³ About.Licenses, supra note 97

¹⁰⁴ See *Villkor för användning av Creative Commons licenser*. Obtained from STIM on request.

STIM. However, the new opportunity implies a possibility to exclude expressly identified work/s from the exclusive STIM mandate and to license the particular work/s under a *noncommercial* CC license. The form further contains the following conditions:

1. Noncommercial use shall be interpreted in accordance with Creative Commons' definition thereof.
2. The form must be signed by each and every right holder of the properly identified work.
3. The member understands and agrees to that STIM cannot leave any warranty regarding possibilities to (i) collecting of fees or (ii) remuneration accounting for commercial use of the applicable work. The reason herefore is predictable difficulties to administrate and attribute rights that are licensed under a CC license, as well as increased costs connected thereto.
4. STIM cannot, towards the member, warrant that accounting is not made for noncommercial use. The reason herefore is difficulties in determining whether a specific use may be classified as commercial or noncommercial. Furthermore, cost for the determination may hinder the detachment of remuneration referred to noncommercial use.
5. STIM cannot protect or call attention to use carried out in violation of a CC license.
6. Paragraph 3, 4 and 5 applies for use of the work/s in jurisdictions outside of Sweden. STIM cannot be responsible for noticing foreign copyright collecting societies about the limitation in administration of the rights that follow from the CC license.
7. The member is informed and fully aware that a CC license is perpetual. Consequently, STIM cannot, in the future, restart the administration of the rights and collect fees for noncommercial use of the applicable work/s, irrespective of if the member so desire. Thus a termination of the agreement (that is entered into by the hand in of the application) has no practical effect.

6. Analysis: Contractual Divergence and Judicial Interpretational Issues

The discussion has so far been focused on the legal background to collective management, the organization and rationales of collecting societies, the free culture

movement and in particular the organization of Creative Commons and its six main licenses. Moreover, STIM's affiliation agreement and the Addendum with conditions and terms for the use of CC licenses have been described for the purpose of the forthcoming analysis.

In this chapter, the judicial problems that directly derive from the recent initiative by STIM will be identified and introduced. The CC license terms, the affiliation agreement and the Addendum will be compared and analyzed. Potential judicial issues due to disparity will be detected and analyzed. STIM's Addendum of earlier this year identifies several areas, which may come to interact with the applicability of the main affiliation agreement and the conduct executed by STIM and other copyright collecting societies.

6.1 *Noncommercial*

Creative Commons was founded under the understanding that one size does not fit all in the field of copyright.¹⁰⁵ Some creators and other owners of copyright may want to reserve all their rights provided to them under the legal copyright regime. Contrary, some right holders may want to reserve only some rights and may now do so under the Creative Commons mechanism. The CC licenses were intentionally drafted to reach out to creators with different expectations and demands on ownership. Some right holders, for instance, may want to reserve the right to control commercial uses of their work while broadly enabling noncommercial sharing. As a result the condition *noncommercial* was incorporated in three of the main licenses available. Currently, the noncommercial option only permits use of the work in any manner that is:

“not primary intended for or directed towards commercial advantage or private monetary compensation”.

The definition set implies difficulties in determining what use to fall within and outside the scope of noncommercial. What is the meaning of *primary*? How broad goes the scope of an *advantage*? How shall *private* be understood?

¹⁰⁵ *Defining “Noncommercial”: A Study of How the Online Population Understands “Noncommercial Use”*. Published Sept 14, 2009. Online: http://wiki.creativecommons.org/Defining_Noncommercial, at 17 [Defining Noncommercial]

Approximately two thirds of all CC licenses associated with works on the Internet include the NC term.¹⁰⁶ This gives an indication that overall the NC licenses appear to work rather well. There is no awareness of any large disputes between licensors and licensees over the meaning of the NC term (more about this below). However, due to the great use of the term and Creative Commons' commitment to making licenses as clear an understandable as possible for both creators and users, Creative Commons under 2008-9 carried out a comprehensive survey on the area to better understand the points of connection and disconnection between creators and users with respect to the interpretation of noncommercial use. The results were published in a full report on Sept 14, 2009: *Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"* ("the Report"). The Report will partly be used for the analysis of the judicial issues in general, and the interpretational problems in particular, that derive from the use of the term *noncommercial*. However, the Report is based on findings among the US online population and is aiming to find connection points and divergence between creators and users. This study ought to additionally discuss the impact of a third party - the copyright collecting society, discrepancy in relation to the Swedish understanding of the translated term¹⁰⁷ and domestic principles applicable for the interpretation of contractual provisions.

6.1.1 Creative Commons' definition

Noncommercial use shall be interpreted in accordance with Creative Commons' definition thereof states article 1 of the Addendum. The Report will most certainly help to establish a better understanding of the term *noncommercial* and how the parties to the applicable CC licenses define it. Hence it will be analyzed in this paragraph for the understanding of Creative Commons' definition of the term.¹⁰⁸

Additionally to present understanding, the Report will play a role as an important instrument for future determinations by Creative Commons in the field of license terms

¹⁰⁶ Ibid. at 17-18

¹⁰⁷ "*Ickekommersiell*"

¹⁰⁸ For the analysis, focus has been put on the "US online population" group in the survey. The Report additionally focus on a "Creative Commons Friends and Family" group, but due to the first groups more general character the findings among the latter group has been disregarded in this study. The findings among the "US online population" is here presented fairly general. However, some detailed information and findings are recognized where appropriate. A more detailed description of the Report and the findings therein should be advantageous but the scope of this study limits the discussion in this aspect.

and the applicability thereof. In the next years, Creative Commons expects to launch a multi-year, international process for producing the next version (4.0) of the six main Creative Commons licenses.¹⁰⁹ The process will include examination of whether the NC term should be usefully modified as a part of that effort, or if a better approach might be to adopt a “best practices” approach of articulating the commercial/noncommercial distinction for certain creator or user communities apart from the licenses themselves.

The NC term explicitly states that exchange of a CC-licensed work for any other copyrighted work, whether by means of peer-to-peer digital file-sharing or otherwise, provided no monetary compensation is involved, shall not be considered commercial use (see above). Moreover, as the definition aims at *primary* commercial use, use that brings about unconscious commercial rewards or advantages by chance should not by the wording be prohibited under the NC term. The second part of the definition, *private monetary compensation*, further indicates that use that not generates income in monies generally falls inside the scope of noncommercial.

The Report specifically aims at complex online uses, which have been hard to characterize as commercial or noncommercial.¹¹⁰ For instance, Internet business models, which enable or encourage free sharing of copyright protected works while also relying on indirect means for their financing, such as advertising. Some believe that because the web-advertising model is based on traffic, any use of content that helps increase visits to a particular web page containing advertising is commercial. Others believe that the ad-supported model is an innocuous reality of web based content distribution.

Profit is key in respect of characterizing a use as commercial or noncommercial. However, the Report doesn't stop there. It questions whether some key components in certain use shall lead to a de facto conception of the use or whether the use always shall be determined on a case-by-case standard.¹¹¹ For instance, does a de facto conception exist around the following statements? (i) noncommercial use is not carried out in order to make money, (ii) an individual's personal or private use of content is not considered a commercial use, (iii) use of content by a for-profit organization is always considered commercial, (iv) use by a not-for-profit should always be considered noncommercial

¹⁰⁹ Defining Noncommercial, supra note 105 at 77

¹¹⁰ Ibid. at 17-18, 21-22

¹¹¹ Ibid. See e.g. at 22, 31 and 53

regardless of the particular use, (v) costs in connection with the use may be recovered and the use is still considered noncommercial. Or does the subject performing the use and the opportunities to monetary compensation solely speak in favor of one or the other classification? The numbers speaks for the latter.

The summary¹¹² of the empirical findings for the US online population suggest that online US creators and users approach the question of noncommercial use similarly and overall, they're more alike than different in their understanding of noncommercial use.¹¹³ Creators and users were presented with statements describing certain distinct use scenarios, some more generic than others.¹¹⁴ Deliberately the statements contained “gatekeeping factors”, i.e. factors that may be considered definitive for the characterization of the use. Uses that earn users money, including uses that involve online advertising, are generally considered commercial by default.¹¹⁵ At least until specific cases scenarios are presented that disrupt those generalized views of commerciality. The disruptions were detected with an “Anchor Point” method. The method in general amounted to collect data from very basic situations and obtain information on how the data alters due to more information possession of the respondents.¹¹⁶ Individual online solutions give rise to a wide range of specific cases and result in a great uncertainty around the specific use.¹¹⁷ Uses by for-profit companies are typically considered commercial. If use contrary is performed by an organization for not-for-profit purposes the commercial rating drops but the use is still far from decidedly noncommercial.¹¹⁸ Uses with charitable purposes are generally considered more noncommercial. However, the organizations purpose with the charity activity influence the rating as well as whether the activities are carried out by a for-profit company or a not-for profit.¹¹⁹

Uses that are more difficult to classify also show greater divergence in understanding between creators and users.¹²⁰ This finding speaks in favor of o “best practice” solution for some areas. A license term definition that mismatches the sector in which it is to be

¹¹² Ibid. at 11

¹¹³ Ibid. at 42

¹¹⁴ Ibid. at 52-53

¹¹⁵ Ibid. at 54, 59-62

¹¹⁶ Ibid. at 57

¹¹⁷ Ibid. see figure

¹¹⁸ Ibid. at 62-63

¹¹⁹ Ibid. at 64-65

¹²⁰ Ibid. at 11

used may give rise to equity discussions and whether the definition is legit or not. Moreover, as a general rule, creators consider the uses studied to be more noncommercial than users. The finding may be explanatory to the lack of large disputes between licensors and licensees over the meaning of the NC term. If a creator is more liberal in his or her interpretation of the term than the actual potential infringer, disputes are unlikely to arise. The one exception is to be found in relation to uses by individuals that are personal or private in nature. Here, it is users who believe such uses are less commercial. To understand this exception from the findings in general one probably has to acknowledge factors such as the individuals' belief and demand for integrity and social patterns in the digital age, which have led to a notion that what's personal should not be controlled or regulated. The self-centered interest as a factor behind the results of the Report should not be denied. Even though the survey was made anonymously the individual always puts in own experience into its responses. Hence it's not surprising that the most notable difference among subgroups are between those groups who make money and those groups who doesn't, regardless of whether it's a creator or a user group.

To sum up, a vast majority believe their definition of noncommercial is essential the same or compatible with the language of the NC license term.¹²¹ Most believe that no money can be made if a use is to be considered noncommercial under the wording of the NC term. However, the survey acknowledge that the term does not refer to any particular uses and when more specific use cases are presented the results get more differenced. The latter is analyzed in the light of a desire among creators and users to simplify the complex issue.¹²² It is appealing to anchoring the definition around a definition that first comes to mind, i.e. no money is made.

6.1.2 A community related approach

The Report acknowledges a possibility for the definition of noncommercial to be "separated" from the licensed themselves.¹²³ In some instances a better approach may be to adapt a "best practices" approach of articulating the commercial/noncommercial distinction for certain creator or user communities. The original vision for study included a more in-depth exploration of the different perceptions and understandings of

¹²¹ Ibid.

¹²² Ibid. at 12

¹²³ Ibid. at 77

various content communities.¹²⁴ When Creative Commons' resources didn't so permit, further research on the meaning of noncommercial is encouraged to be made separately, bounded by e.g. geography and specific communities. The latter refers to e.g. collecting society members. Studies of the variations between and within different communities could add value to the understanding of licensor and licensee expectations regarding noncommercial use of content online.

Notwithstanding that STIM leaves the interpretation of noncommercial to Creative Commons to determine, the conditions set forth in the Addendum may indirectly come to affect the commercial/noncommercial distinction. It is more likely than unlikely that different content communities understand the concepts dissimilar, in conformity with the fact that different subgroups within the survey conducted by Creative Commons understood the concepts differently. Especially so if a copyright collecting society sets up reservations regarding opportunities to collection of fees applicable.¹²⁵ STIM leaves no warranty regarding collecting of fees or remuneration accounting referable to the work/s also licensed under a CC license. The CC licensor/member of STIM thus may fail to secure remuneration administered by STIM also for the commercial use of the work. A likely consequence hereof is that creators that possess both the character of a member of a copyright collecting society and of a licensor under a NC license may prefer to interpret more into commercial use than they otherwise would. If more uses are classified as commercial, the creator may have a greater chance to obtain remuneration from the copyright collecting society applicable.

Moreover, a "best practice" approach may open for direct interpretation interference of the copyright collecting society itself. A "best practice" solution within the community of copyright management could obviously not exclude the opinion of the managing party. STIM emphasizes that attribution and administration in general will become difficult with respect to work/s that are licensed under a CC license. The administrative operations as well as the costs hereof are predicted to increase significantly. As, not a party to the CC license agreement, but a third party with special interest therein the society benefits from over-simplified determinations. However, another aspect of the relations ought to be recognized and underlined. STIM and other copyright collecting societies operate in the interest of its members. The organization is not freestanding

¹²⁴ Ibid. at 82

¹²⁵ See paragraph 3 of the Addendum

from the creator party and its understandings and will. STIM takes initiatives and actions after demands from its members. Hence one can predict sub-opinions within the community of collective management members. In the same manner as creators of today have different opinions and views on the existence of illegal file-sharing. For instance, one group may advocate the maintenance of traditional administration operations, i.e. time and effort should be put into protection of the applicable copyrights and administrations of royalties, not into interpretation of agreements and the scope thereof that other members choose to enter into. Contrary, another group may argue for a modernization of the organization and demand a listening society that pays attention to majority and minority wishes, which consequently may entail new solutions and determinations.

Additionally, STIM's potential involvement in a "best practice" approach gives rise to speculations around how STIM further may limit opportunities for their members to enter into individual agreements and maintain their right to remuneration. *Extinktiva förvärv* does not exist within this area of Swedish law. Hence a licensee can never obtain a more extensive right than the right the licensor possesses.¹²⁶ The member of STIM who would like to license a work (included in STIM's repertoire) under a CC license can thus not assign more rights, i.e. use, than the affiliation agreement and the Addendum provides him or her with. E.g. if STIM considers a use commercial, this use may not be performed by a licensee since the licensor did not have a right to license the specific use away.

To conclude, a more "open" approach by Creative Commons, i.e. a community based solution to determine certain license terms and conditions, may result in several categories of work licensed under the same terms set forth in any of the NC licenses. E.g. works licensed by a copyright collective society member and works licensed by creators who choose to stand outside the collective management system. Such a result does not correspond with Creative Commons' wish to make licenses as clear and understandable as possible for both creators and *users*.

¹²⁶ Rosén, "Upphovsrättens avtal", supra note 22 at 150

6.1.3 A geographically related approach

Notwithstanding the international approach of Creative Commons and the fact that license agreements nowadays are entered into on a transnational basis, such as in between parties of different origin and use of standard agreements drafted elsewhere than where the parties are located geographically, a domestic approach must be analyzed in relation to the interpretation of the term noncommercial. The motivation hereof is twofold; (i) the Addendum aims at Swedish composers and music publishers and thus at least one of the parties to the CC license agreement the Addendum is referring to will be of Swedish origin and (ii) the original CC licenses have been ported to the jurisdiction of Sweden, why one can expect that the applicable CC license terms most often will be the Swedish ported version.¹²⁷ As described above, the porting team is obligated to retain the “core” in the licenses, i.e. not modify terms and conditions beyond what is necessary to accomplish compliance with local law and never on grounds of policy or philosophy. However, due to jurisdiction, the ported licenses are more or less altered and hence discrepancy exists in relation to the original terms and conditions set forth in the original US version.

The Swedish version 2.5 uses a direct translation of the word noncommercial – *ickekommersiell*. Moreover, the Swedish translation of the definition on noncommercial set forth in the license terms correspond with the US definition (in version 3.0). Hence, most likely the same complex interpretation issues, with respect to the different definition elements, as the ones acknowledge by the US Creative Commons organization will apply (see above).

Negative words are rarely explicit defined. The respective words are complicated to interpret vocabulary since the negative prefix may be understood differenced in extent. At what point on a scale does a term pass the positive equivalent of a word and becomes a negative? *Kommersiell* is defined as something that distinguishes commerce, trade or business activity.¹²⁸ Moreover, it is defined as activity carried out to obtain profit. The terminology advocates that use by for-profit organizations and use that gain monetary

¹²⁷ However, the STIM member can choose to license the work under any jurisdictional version of the CC licenses. Hence, if a foreign version is used, the interpretation must pay attention to the foreign, ported definition of the term and a foreign, domestic apprehension of the conception.

¹²⁸ *Svenska Akademiens Ordbok*. Online: <http://g3.spraakdata.gu.se/saob/>

rewards or advantages shall be determined as commercial. Again we have the issue of for-profit organizations participating in charity activities and private or personal use that entails monetary profit. Interpretation by solely the wording would include both these activities in the concept of *kommersiell*. However, as will be further discussed in the next section, one may include more factors than terminology in the interpretation of a contract term.

Not only a dictionary, but also a legal understanding of the word *ickekommersiell* seems absent. However, interpretation of similar concepts may be used to demonstrate how the courts would determine the distinction *ickekommersiell/kommersiell*. The concept *förvärvsverksamhet*¹²⁹ has been subject for interpretation of the Supreme Court of Sweden (“HD”).¹³⁰ HD came to the conclusion that also not-for-profit activities or activities carried out with the support of public funds, such as medical care, should be classified as *förvärvsverksamhet*. In the specific case musical works were publicly performed within areas demarcated for personnel at a public hospital. Medical care was not determined to be a business set up solely for economical reasons. However, elements characteristic for economic business activity existed such as management of real estate, purchase of materials used in the business and wages payable. Hence the medical care was determined to fall within the concept of *förvärvsverksamhet*. However, it should be underlined that the concept varies over different areas of law. For instance, the concept *förvärvsverksamhet* is explicitly used in the Swedish Income Tax Act (Swedish Code of Statutes, SFS 1999:1229). A commercial enterprise is defined as gainful business activity (*förvärvsverksamhet*) carried out professionally and independently.¹³¹ Gainful business activities are carried out with a purpose to obtain economic advantages, i.e. the concept of *förvärvsverksamhet* contains a profit motive.¹³²

The previous discussion may be compared to a potential European Community understanding of *noncommercial*. For instance, the Infosoc Directive (2001/29/EC) emphasizes that member states should be given the option of providing for certain

¹²⁹ Can best be explained as gainful business activity

¹³⁰ NJA 1988 s 715

¹³¹ See 13:1 of the Income Tax Act

¹³² SOU 2008:76, *F-skatt åt flera*, at 46

exceptions or limitations to copyright for certain cases.¹³³ In the Copyright Act these limitations are mainly to be found in chapter two (see above). The Infosoc Directive further explains that when applying the exception or limitation for noncommercial educational and scientific research purposes, the noncommercial nature of the activity in question should be determined by that activity as such.¹³⁴ The organizational structure and the means of funding of the establishment concerned are not the decisive factors in this respect. Conclusively the Infosoc Directive understands *noncommercial*, with respect to the present circumstances, differently than HD understands the term *förvärvsverksamhet* in the case described in the previous paragraph.

6.1.4 Domestic principles for the interpretation of contracts

Swedish courts acknowledge and use set principles for the interpretation of diffuse or unclear contractual provisions. The applicability of this practice with respect to the term noncommercial will be discussed below.

Due to the worldwide use of CC licenses and the position of musical works as objects for international trade it is likely that arising disputes in this field will contain parties of different nationalities. Neither STIM's affiliation agreement with the Addendum nor any of the six main CC licenses contain provisions regarding applicable law and competent courts. In the absence of such provisions conflicts of laws principles applies. For the purpose of this analysis the discussion will be constrained to the question of applicable domestic law. The reason herefore is that the analysis further on focuses on Swedish contractual principles applicable for the interpretation of the term *noncommercial*.

In this context it is important to make an initial distinction between provisions in the license agreements or the Addendum that concern existence or extent of copyright, and contractual provisions in general.¹³⁵ If a dispute concerns the intellectual property right, the law where the right/s are asserted is applicable. The Swedish right holder who asserts his right in France, claims his French right in France under the French copyright

¹³³ Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. OJ L 167, 22.6.2001, p.13 para. 34

¹³⁴ Ibid. para. 42

¹³⁵ Koktvedgaard, "Lärobok" supra note 26 at 477f & Olofsson, "Upphovsrättsliga aspekter", supra note 87 at 100

legislation. A right holder may never assert a copyright outside the respective jurisdiction's territory. The licensor most often prefers to assert his or her right in the country where the licensee has residence. With respect to disputes over contractual obligations the applicable law is the domestic law to where the contract has most connection. A contract generally has most connection to the jurisdiction where the party that shall perform the contractually characteristic obligation has its residency. For license agreements the characteristic obligation most often is to be performed by the licensor.

Is the provision containing the term *noncommercial* to be referred to the category of copyright provisions or the category of general contractual ones? The characteristics of the term as a qualitative one instead of a quantitative one speaks in favor of the latter.¹³⁶ A quantitative provision refers to how much of right that may be exploited by the licensee. However, the maxim is not very tenable on a case-by-case basis. More eligible is instead a classification based on if the use may address another market. A commercial use addresses another market than a noncommercial use and hence one may classify any of the both as a new use in relation to the other. The noncommercial provision shall thus be interpreted as a right provision and not a general contractual equivalent. Consequently, for Swedish domestic law to be applicable, the right/s must be asserted in the jurisdiction of Sweden.

Provided that Swedish domestic statutory law and principles are applicable the next part of the analysis endeavors to describe how the principles are applied and how the application affect the understanding of *noncommercial*.

The interpretation is carried out on a case-by-case basis as well as with considerations for the peculiarities of copyright law. Of basic importance for any interpretation of a contractual obligation are the intentions of the respective parties at the time of signing.¹³⁷ However, most often such an intention cannot easily be determined. If the contract is a standard agreement and used after a one-to-many principle any intention at all can be hard to distinguish. Furthermore, in the "online" reality, a common time of signing is most often absent. A free license online is open for a licensor to contract under at any time. Similarly, the licensee is free to use the licensed work, and hence be

¹³⁶ Rosén, "Upphovsrättens avtal", supra note 22 at 140f
¹³⁷ Ibid. at 343

bound by the terms applicable, at any optional time. The Addendum simply refers to Creative Commons' interpretation of the term. The CC licenses are contracts and the parties thereto are the creator and the user of the creator's work. The licenses explicitly state that Creative Commons are not a party to the license contract. Is it possible to determine a common intention in between the licensor and the licensee of what use to be permitted under the NC term? On an individual basis – No. The CC licenses are composed after the described non-discriminative and one-to-many principles. A creator contracts with a vast amount of licensees for use of the work. They may not all have the same understanding of how to distinguish commercial use from noncommercial use. However, here reports or surveys on the area may come in handy. For this non-traditional way of contracting it is more appropriate to analyze the intention of a contract group than actual individual intentions.

However, when no indication of a common intention in between the contracting parties may be established, interpretation methods or rules (subsidiary to the methods) shall determine the scope and understanding of a contract.¹³⁸ The method most appropriate for the particular case shall be applied.¹³⁹ For the interpretation of the CC license agreement some methods can be deemed more apt than others. The wording and the context in which the words appear may be determinative for the understanding of the contract term.¹⁴⁰ However, an industry-based method may be more suitable for the distinctive character of the CC licenses and the peculiar dividing into commercial and noncommercial exploitations. As been described above Creative Commons has put down significant efforts to ascertain the meaning of the term noncommercial. Hence it is natural to derive the understanding from the business' prevalent understanding of words and expression.¹⁴¹

The methods available may determine the understanding of a contract term. However, the result is not evidently appropriate and enviable. Hence the contract term may be modified or even set aside if it is deemed unconscionable.¹⁴² The general provision in 36 § of the Contracts Act is typically used for these operations, as well as for correction

¹³⁸ Hedwall, Mattias, *Tolkning av kommersiella avtal*, 2u, Juristförlaget, Stockholm 2004, at 42 & 49 [Hedwall, "Tolkning"]

¹³⁹ Ibid. at 47

¹⁴⁰ Ibid. at 43-44

¹⁴¹ Ibid. at 45

¹⁴² Ibid. at 54

or revision of the content in loose or diffuse contractual provisions. Regarding the transfer of a right, e.g. assigning or licensing of a copyright, the transfer may be revised both regarding subject matter and term.¹⁴³ 36 § states that:

A contract term or condition may be modified or set aside if such term or condition is unconscionable having regard to the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and circumstances in general. Where a term is of such significance for the agreement that it would be unreasonable to demand the continued enforceability of the remainder of the agreement with its terms unchanged, the agreement may be modified in other respects, or may be set aside in its entirety.

Upon determination of the applicability of the provisions of the first paragraph, particular attention shall be paid to the need to protect those parties who, in their capacity as consumers or otherwise, hold an inferior bargaining position in the contractual relationship.

The provisions of the first and second paragraphs shall apply “mutatis mutandis” to questions relating to the terms of legal acts other than contracts.

The provisions of section 11 of the Consumer Contracts Act (SFS 1994:1512) shall also apply to the modification of contractual terms relating to consumers. (SFS 1994:1513)

Consequently, the court may in a particular case choose to interpret the diffuse term paying attention to the unique contractual relationship that CC licenses constitute. In the following I will discuss these contractual circumstances that may affect the interpretation of the term *noncommercial*.

The CC license is free of charge. Traditionally, if an acquisition of a right to exploit a work didn't imply an obligation to pay a fair compensation herefore, the terms of the license could be revised.¹⁴⁴ However, nowadays our social reality is much based on the Internet and the possibilities that come with it. The Internet provides new revenue opportunities for commercial businesses but also recognizes the importance of sharing economies.¹⁴⁵ Creative Commons encourages this development and never had an intention to initiate an obligation for the licensee to pay for the right transfers set fort in

¹⁴³ Rosén, “Upphovsrättens avtal”, supra note 22 at 115

¹⁴⁴ Ibid. at 115

¹⁴⁵ For a comprehensive analysis on the characteristics of commercial economies and sharing economies – see Lessig, “Remix”, supra note 5 at 117-176

the license terms. Hence, the extensive right transfer and the devoid of compensation herefore corresponds with the objectives of the license model. However, the lack of compensation may favor a strict interpretation of the terms, i.e. the term noncommercial shall not be interpreted to contain more use than what self-evidently falls within the scope. Moreover, as free of charge, the legal classification of the CC licenses pursuant to Swedish law is a “contract of gift”.¹⁴⁶ With respect to gifts a subjective interpretation of the transfer applies.¹⁴⁷ Decisive is what the donor, i.e. the licensor, expected from the license. The perception of the donee is in general irrelevant. If the latter may be applied in all circumstances in relation to the unique concept of CC licenses I leave unspoken. However, the beneficial character of the contract will most likely influence the interpretation of contractual provisions applicable.

The CC license is perpetual. In many situations it may be difficult for the parties involved to foresee the applicable CC license effects on a long-term basis.¹⁴⁸ When the licensor license the applicable rights under a CC license of choice he or she may not know if the work will be a success or not. Consequently, the licensor may not, at the time he or she enters into the license contract, be able to foresee the license effect on upcoming revenues and opportunity to commercial success.¹⁴⁹ Hence, for the reason of the license being perpetual, the rights transferred should be defined restrictively.

The CC license is non-exclusive. Potentially every individual has the opportunity to noncommercially exploit and use the work licensed under a NC license. Consequently, none of the licensees possess a position free of competition, which will affect the prospect for the licensor to obtain revenues based on exclusive licenses for commercial use.¹⁵⁰ A licensee often inquires an exclusive license for a reason, e.g. an expectation for the work to be a part of distinguishing features. If the work is widely spread on a noncommercial basis it no more possesses the quality to be referred to e.g. a specific brand. As a result of this situation, the definition of noncommercial may preferably be interpreted either restrictive or broadly. Some may argue that the term may as well be interpreted broadly since it regardless of the distinction may be hard to obtain

¹⁴⁶ Björnesjö, “Creative”, supra note 13 at 29

¹⁴⁷ Hellner, J. & Hager, H. *Speciell avtalsrätt II, Kontraktsrätt, 1 häftet, Särskilda avtal*, 4u, Norstedts Juridik, Stockholm 2005, at 264

¹⁴⁸ Rosén, “Upphovsrättens avtal”, supra note 22 at 151

¹⁴⁹ Prop. 1975/76:81 *om ändring i lag om avtal och andra rättshandlingar på förmögenhetsrättens område* 36 §, at 42 [Prop. 1975/76:81]

¹⁵⁰ Rosén, “Upphovsrättens avtal”, supra note 22 at 143-144

commercial revenues for the work. Others may contrary argue that the character of the license as both non-discriminatory and non-exclusive should limit the scope of the right transfer.

The CC license has not been drafted by the contracting parties. One-sidedly drafted contracts shall in generally be interpreted restrictively and limit the benefits referable to the drafting party. I.e. the party responsible for the unclear contract has to carry the risk for the same.¹⁵¹ However, the CC licenses have been drafted of neither party thereto. Additionally, the licenses are drafted to entail benefits for both creators and users. So which party shall carry the risk for the unclear formulating of Creative Commons? Can it be said that Creative Commons shall carry the risk and hence the scope of the licenses should be limited due to the organizations wish for a greater *commons*? Or should this factor be excluded from the courts considerations when the contracts used are of standard character and provided on a win-win basis? I advocate the latter. Nobody benefits from an interpretation standard that counteract with the basic rationales for the applicable contract.

The CC license and position of the parties. From a social and economic point of view, the parties to a traditional license contract are rarely equal in terms of bargaining position.¹⁵² For instance, on the commercial media market, where the consumer of copyright protected works usually are a large cooperation, standard agreements are often very consumer-friendly, at the expense of the individual creator. The business offers a “take it or leave it” deal, which the sole copyright holder doesn’t have the strength to reject. As a contrast, the courts have traditionally applied a form of silent or hidden control over copyright agreements by means of a tendency to revise unclear contract terms in favor of the copyright holder. Consequently, a restrictive interpretation standard was practiced. However, this standard seems to be abandoned and nowadays a more open and free control of copyright contracts are prevailing. Such an approach is further suitable in the digital age when court control may be required for other players than solely the right holder. However, yet again, a CC license is within no party’s bargain power. The license terms have been formulated after deliberations of Creative Commons, yet altered domestically to comply with mandatory national law. It is explicitly forbidden to alter the terms of the respective license and, as mentioned in the

¹⁵¹ Ibid. at 116

¹⁵² Ibid. at 113-114

previous paragraph, the terms are drafted to entail benefits for both parties. Hence, this factor may not imply extensive considerations. If anything, the courts should acknowledge the fact that copyright legislation simply provides a non-nuanced protection system for the right holder, and other players, such as the user, lacks an explicit place in the same.

The CC license as a tool for copyright change. To a large extent, the character and the purpose of a contract is conclusive for the determination of subject matter and scope. The six main CC licenses are developed for a specific purpose and the objectives of Creative Commons permeate the formulation and the wording of the licenses. The licenses have been established as an alternative to the copyright by default regime that prevails in copyright legislation worldwide. Creative Commons exhorts licensors to be liberal in what to accept from others and most often CC licensors seem to be more liberal and broad in their interpretation of the NC term than the licensees.¹⁵³ The very nature of the CC licenses and the rationales for their existence will be acknowledged in the interpretation of the terms set forth in the respective license contract. This acknowledgement will lead to a more extensive estimation of what use that shall fall within the scope of *noncommercial*.

6.1.5 Final comments

For the analysis of judicial concerns associated with the term *noncommercial* the starting point was article 1 of the Addendum concerning CC licensing.

“Noncommercial use shall be interpreted in accordance with Creative Commons’ definition thereof.”

However, as presented above, the definition is not self-explanatory and Creative Commons even acknowledge the possibility for a “best practice” definition within certain communities. A potential appropriate community could be “copyright collecting society members” and consequently thereof the copyright collecting society itself may directly or indirectly come to affect the interpretation of the term *noncommercial*. Moreover, Creative Commons and its porting project recognize that a tenable definition ought to correspond with a geographical understanding of the concept in general. Thus domestic legal principles in force become essential for a valid and appropriate definition. The wording, but also intention of the parties and circumstances in general

¹⁵³ Defining Noncommercial, supra note 105 at 78

are considered by Swedish courts in interpretation of contractual provisions. The case-by-case standard will be difficult to abolish, as well as to get a single definition of *noncommercial* workable. Consequently Creative Commons is faced with a great challenge. The challenge consists of continuously upholding three undertakings and to induce the three to correlate:

- (i) Creative Commons is founded on the belief that “one size does not fit all”. Hence the organization undertakes to offer licenses of different terms and conditions, which e.g. distinguish between different types of use.
- (ii) Creative Commons undertakes to licensors not to break their expectations under the SA term. A modification of a term will imply that the licensee will license adaptations under other conditions than the original work and hence the assurance may not be upheld.
- (iii) Creative Commons undertakes to make its licenses as clear as possible for both creators and users and to communicate its licenses in a manner that is easily understandable.

6.2 The right to remuneration

STIM protects the economic rights of its members. As described above, the protection includes the collecting of fees applicable and distribution of the fees as royalties to the members after standards set by the organization. The affiliation agreement explicitly states that STIM is obligated to utilize the rights under the agreement and pay an amount to the member in accordance with principles in the organizations’ Articles of Association and Distribution Rules. However, the Addendum modifies the basic obligation of remuneration accounting and distribution. Pursuant to the Addendum, STIM does not leave any warranty regarding remuneration accounting for *commercial use* of a work licensed under a CC license for *noncommercial use*. The statement implies that STIM does not warrant that the creator can obtain any remuneration *at all* for the work the creator chooses to license under any of the NC licenses.

Contrary to the Addendum, the NC licenses all state that under the license, the licensor reserves the exclusive right to collect, individually or through a copyright collecting society, royalties for any *commercial* exercise of the rights by the licensee.

Pursuant to the previous analysis of the understanding of the term *noncommercial* it is not difficult to agree with STIM in their prediction of complexities in administration and increased costs in connection thereto. However, this section of the analysis will discuss legacy of the no-warranty provision and to what extent a copyright collecting society can refuse to account for royalties. The analysis will be carried out from three perspectives;

- Does the Addendum comply with law?
- Does the Addendum comply with membership rules of international affiliations for copyright collecting societies?
- Does the Addendum breach contractual obligations set forth in the affiliation agreement?

6.2.1 Equitable management

Being seen to be fair must be a vital part of the distribution process in a membership organization.¹⁵⁴ “Objective” information reassures members that the process is fair. What happens to the notion of equity when an organization starts to distinguish between its members and carry out the remuneration accounting based on separate terms and conditions?

The European Community acknowledges the importance of good governance, non-discrimination, transparency and accountability of the collecting society in its relation to right holders.¹⁵⁵ These principles should apply to the acquisition of rights (the mandate), the conditions of membership (including the end of that membership), the conditions of representation, and to the position of right holders within the society (right holders’ access to internal documents and financial records in relation to distribution and licensing revenue and deductions, genuine influence of right holders on the decision-making process as well as on the social and cultural policy of their society). The royalties collected on behalf of right holders should be distributed equitably and as effectively and efficiently as possible.¹⁵⁶ Discrimination based on residence, nationality, or category of right holder is prohibited. There must be no difference in treatment on the basis of category of membership in the collective rights management society: all right

¹⁵⁴ Handke, “Economics” supra note 47 at 9

¹⁵⁵ COM.2004, supra note 3 at 19

¹⁵⁶ REC.2005, supra note 64 at 55 para. 12-13

holders, e.g. authors, composers, publishers, record producers, performers *or others*, should be treated equally. The category of membership has traditionally covered distinct groups of creators, each with an assignment to perform within the process of creating, producing and distributing musical works. However, if a copyright collecting society creates a new type of member category by its own initiatives and decisions, equity and non-discrimination standards should by right and logically apply also in favor of the new group. The group of members who choose to fill out the application form for use of a CC license shall have equal rights to distribution of royalties as the members who choose not to.

The Recommendation of 2005 (see above under 2.4.2) advocates the importance of a new collective license policy that corresponds with the online reality – i.e. is multi-territorial. However, the reasoning of the Commission and the Parliament may be applicable also on other features of the online environment. The online reality offers new distribution channels and has resulted in new creation patterns. Collective license policy that corresponds with the online reality should recognize an equity standard that does not discriminate categories of members that choose to work in a certain way, e.g. offer their work/s in accordance with the online reality.

The Commission recommends, expressly with respect to royalty distribution, that collective right managers should distribute royalties to all right holders or category of right holders they represent in an equitable manner.¹⁵⁷ Furthermore, deductions, not referable to management services should be specified in applicable contracts or membership rules governing the society mandate. Additionally, upon the actual payment – the collective rights manager should specify vis-à-vis the deductions made for purposes other than for the management service provided. These recommendations are interesting in the light of the Addendum and the paragraph stating that no warranties can be made with respect to royalty accounting, due to expected difficulties in right attribution and increased costs connected thereto. (i) Should the paragraph be classified as a deduction provision? (ii) If yes, should possible deductions due to difficulties in right attribution (which in theory may be made down to zero remuneration) be referred to management service deductions? (iii) If not referred to service deductions, does the contractual “no warranties” provision comply with the Commission’s recommendation

¹⁵⁷ Ibid. at 56 para.10-12

on specification? The provision refers to the administration and hence, most naturally, the no-warranty provision is either not a deduction provision at all, or it must be understood to regulate managing costs. The provision does not mention potential deductions due to predicted difficulties in right attribution. However, it does mention predicted increased administration costs. Should the statement be understood as if the right attribution implies more costs, such costs shall be deducted from the CC licensors royalty account? Or should it be understood as if the administration turns out to be too complex and entails increased costs to a certain extent, the remuneration accounting will not be carried out at all? The latter is suggestive since the paragraph has the status of a safeguard provisions and seems to be a way for STIM to avoid responsibility to carry out too comprehensive examinations regarding e.g. indistinguishable cases of commercial/noncommercial use or adaptations. They put the risk for administrative difficulties on the creator.

However, this finding does not deprive STIM from the obligation to carry out the royalty distribution in an equitable manner and in general treat any category of right holder equally in relation to all elements of the management service provided.¹⁵⁸ The statement is supported by the Resolution, which emphasize equitable treatment of all right holders.¹⁵⁹ A society enriched by the emerge of new technologies and thus new ways to consume and distribute musical works and other subject-matter online must support the creation of a situation in which the interest of all parties concerned, including the end-user, are reflected and taken into consideration. The Distribution Rules of STIM¹⁶⁰ and the application standards therefore¹⁶¹ ought to have implied a not negligible amount of work. This effort must have implied complexities and required difficult determinations to be made. The new category of right holder, and the new administration tasks attached thereto, has the right to bring about the same amount of effort. Just because an administration standard is set doesn't mean the society has the right to neglect the need of a new standard and deny the members the due diligence they deserve (more about required due diligence below). That is not equity.

¹⁵⁸ Ibid. at 56 para.13(a)

¹⁵⁹ RES.2007, supra note 66, see especially para. M

¹⁶⁰ *Fördelningsregler*. Online:

[http://www.stim.se/stim/prod/stimv4.nsf/wwwpages/B767E79973AFFFC6C12571000053A248/\\$File/2008-08-14.pdf](http://www.stim.se/stim/prod/stimv4.nsf/wwwpages/B767E79973AFFFC6C12571000053A248/$File/2008-08-14.pdf)

¹⁶¹ *Tillämpning av fördelningsreglerna*. Online:

[http://www.stim.se/stim/prod/stimv4.nsf/wwwpages/B767E79973AFFFC6C12571000053A248/\\$File/Tillregl.pdf](http://www.stim.se/stim/prod/stimv4.nsf/wwwpages/B767E79973AFFFC6C12571000053A248/$File/Tillregl.pdf)

The Parliament (as well as the Commission) further calls on the member states and on collective right managers, whether a society or otherwise, to ensure fair representation of all categories of right holders and thus their balanced participation in the internal decision-making process.¹⁶² Pursuant to STIM's press release regarding the CC license initiative,¹⁶³ a demand for use of CC licenses from some of the organization's members triggered the process to compose an addendum for such use within the scope of STIM administration. Hence it is likely that this member category got to participate in the decision-making process to adopt an addendum for the use of CC licenses. However, the final formulations of the provisions set forth in the Addendum, especially the no-warranty provisions, were probably not influenced by the group referred to. Some might say it's an *equal* compromise. The possibility to use a CC license within the mandate of STIM, which traditionally has administrated under exclusivity, has to be conditioned and safeguarded with respect to some management. However, again, the societies must support the creation of a situation in which the interest of all parties concerned are reflected and taken into consideration.

Equitable management standards are an outflow of the non-discrimination principle which embraces all activities carried out on the internal market of the European Union and thus its not surprising that the organs of the European Community emphasize its importance. However, the equitable responsibility doesn't end here. As described above (section 3.4) STIM has the status of a *member* of CISAC.¹⁶⁴ Other affiliation categories are *associate* and *provisional*. Each member is at all times obligated to comply fully with the CISAC Statutes¹⁶⁵ and the Professional Rules.¹⁶⁶ The Statutes sets out qualifications for membership, which inter alia include equitable obligations. The member is required to carry out its activities for the common good of creators and publishers as a whole and not for any specific segment or group of creators and publishers.¹⁶⁷ Moreover, the Professional Rules for Musical Societies¹⁶⁸ sets out e.g.

¹⁶² RES.2007, supra note 66 para. 5 and REC.2005, supra note 64 at 56 para. 13(b)

¹⁶³ STIM Press release, supra note 9

¹⁶⁴ *CISAC Member Societies* (As of June 2009). Online:
<http://www.cisac.org/CisacPortal/consulterDocument.do?id=16654>

¹⁶⁵ *CISAC Statutes*. Adopted 11/06/2009. Online:
<http://www.cisac.org/CisacPortal/consulterDocument.do?id=15977> [CISAC Statutes]

¹⁶⁶ *Ibid.* Article 15 a

¹⁶⁷ *Ibid.* Article 8 d

¹⁶⁸ *Professional Rules for Musical Societies*. 01/06/2007. Online:
<http://www.cisac.org/CisacPortal/consulterDocument.do?id=155> [Professional Rules]

rules for conduct. Each music society shall, with respect to distribution, apply the same level of diligence and fairness to all distributions, irrespective of whether such distributions are being made to its members or to its sister societies.¹⁶⁹

6.2.2. Utilization of the rights

The affiliation agreement explicitly state that STIM is obligated to utilize the rights under the agreement and pay an amount to the member in accordance with principles in the organizations' Articles of Association and Distribution Rules. The filing for allowance to license a work under a CC license is a notification to STIM that the member only wants the organization to utilize the rights applicable with respect to commercial use. However, the no-warranty provision set forth in the Addendum implies that STIM, under certain circumstances, may not utilize *any* right under the affiliation agreement. The situation raises the question of how and to what extent the Addendum modifies the utilization obligation?

STIM has through the affiliation agreement obtained a right to manage the rights applicable and in return the organization assures to carry out the administration so the original author derives advantages from the management. However, the saving clause in the Addendum is incompatible with the utilization provision in the affiliation agreement and consequently a “battle of the forms” resembling situation here exists. Nothing in the Addendum indicates that the utilization provision is set aside or does not apply for CC licensors. The provisions both apply and thus priority rules and other interpretation principles becomes applicable to determine which provision prevails before the other and how they shall be interpreted for the contracts to become one whole compatible totality.

Initially, two basic factors shall be emphasized. (i) The affiliation agreement is the main agreement. A member does not have the option to sign the Addendum unless he or she has first entered into the affiliation agreement. (ii) The Addendum is precisely that, an addendum, which has been drafted for a particular situation. These two circumstances give rise to the applicability of different and inconsistent interpretation principles. Some which accentuate the primacy of the main provisions and some which contrary emphasize the add-ons. The principles will be discussed in order.

¹⁶⁹ Ibid. Article 19 c

The legal effects of several connected contracts may be reviewed in the same way as if the arrangements of the parties were settled in one single agreement.¹⁷⁰ As underlined above, the linguistic context is material in any contractual interpretation. Despite method or principle applied, the contract must be considered as a totality.¹⁷¹ Hence, under the present circumstances one shall not solely consider how the saving clause may affect the obligation to utilize, but also how the obligation to utilize may affect the saving clause. A general tendency implies that provisions containing exemptions shall be interpreted restrictively in relation to the objectives which support the main provision/s. Moreover, the provisions must be seen in its mutual context.¹⁷² The obligation to utilize is the exchange for membership and thus a precondition for the whole contractual relationship. Finally, a contradiction may further favor the understanding that the provisions of the affiliation agreement shall prevail. A party cannot both undertake an obligation and put up complete safeguards for the execution of the same.¹⁷³ Put differently, a party cannot, with a no-warranty provision, avoid responsibility for its own commitments.

In favor of a reversed utilization obligation with respect to CC licensors speaks the legal priority rules which have been formed within the legal doctrine. Three priority rules are directly applicable for the Addendum's relation to the affiliation agreement: (i) an addendum has priority over original wording, (ii) recent documents have priority over prior documents, and (iii) specified provisions have priority over general equivalents.¹⁷⁴ Additionally, a modification of a contract term is indicia for that the parties intended to dissociate from the original settlement and thus the modification shall prevail.

The analysis above favor an understanding where the obligation to utilize is not void, but altered due to the conditions set forth in the Addendum. To what exact extent the obligation may be modified is still open for discussion, but STIM's contradictory behavior of both undertaking an obligation and putting up complete safeguards for the execution of the same certainly will affect the applicability of the legal priority rules discussed above. Furthermore, it is of vast importance for the determinations that STIM

¹⁷⁰ Lehrberg, Bert, *Avtalsrättens grundelement*, 2u, Jure Förlag AB, Stockholm 2006, at 229

¹⁷¹ Lehrberg, Bert, *Avtalstolkning*, 4u, Jure Förlag AB, Stockholm 2006, at 88 [Lehrberg, "Avtalstolkning"]

¹⁷² *Ibid.* at 92

¹⁷³ *Ibid.* at 185

¹⁷⁴ *Ibid.* at 183

acts under the role of a *trustee*. It is a main and crucial issue for the exercise of rights that societies fulfil their function of trustees.¹⁷⁵

Hence, notwithstanding the Addendum, the organization still acts under an obligation to utilize the rights under the affiliation agreement. To *utilize* implies an obligation to *make the most of*. However, the no-warranty provision contains a notion that when filing for allowance to license a work under a CC license – the copyright collective society cannot assure that the rights under the affiliation agreement will be utilized in the most efficient manner. In other words, pursuant to STIM - efficiency goes hand in hand with exclusivity and totality. This approach is the traditional of copyright collective management. Copyright collecting societies enable the market to function when the right holder cannot contract directly with the end user. The rationales are based on efficiency and transaction costs. Nevertheless, can the desired efficiency be upheld if copyright collecting societies offer a non-exclusive or/and incomplete repertoire? The answer is two folded. The efficiency will be affected but it can be recovered. Yet again the technology comes into play. Over the recent years the DRM technique's influence on the operations of copyright collective societies has been discussed in the doctrine.¹⁷⁶ The rise of DRM was of some predicted to end the era of copyright collecting societies. Others have argued that the societies still have an important role as promoters of cultural diversity and cultural identity even if DRM technology takes over some of the traditional administrative operations such as remuneration accounting. An additional benefit from finding synergies between the two systems should be emphasized. If DRM is more accurate for some of the tasks that traditionally copyright collecting societies have been carrying out, the societies must and shall preferably adapt and put their efforts into other important features of the regime, e.g. offer a more diverged and pragmatic solution which is attractive to more categories of right holders. As a result, the copyright collecting societies, in synergy with the DRM technology, may remain efficient but may additionally offer a greater segment of appealing services.

¹⁷⁵ *European Parliament resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights* (2002/2274(INI)). OJ C 92 E, 16.4.2004, p 430 para. 37 [RES.2004]

¹⁷⁶ Graber, Nenova & Girsberger, *Collecting Societies – not yet “six feet under”*. A brief review of the international symposium “Digital Rights Management: The End of Collecting Societies? At the University of Lucerne, Switzerland, June 24 and 25, 2004. Online: <http://ssrn.com/abstract=1345093> [Graber, “Collecting Societies”]

However, the exclusive rationales do not end with the efficiency reason. A complete, exclusive repertoire implies market value.¹⁷⁷ Despite the demand among members for more pragmatic management solutions, the same members cannot deny the decrease in market value of the repertoire when the organization no longer offer complete coverage.

Above, STIM's obligation to utilize rights under the affiliation agreement has been analyzed under an *efficiency* perspective, i.e. utilize as in most efficient administration. However, under the affiliation agreement, to utilize must further imply an obligation to carry out the obtained mandate with due care and under due standards. The Recommendation advocates, with respect to the relationship between right holders, collective right managers and commercial users, that the collective manager, e.g. a society, should apply the utmost diligence in representing the interest of right holders.¹⁷⁸ Diligence ought to imply a duty to e.g. inform the right holders about the management and changes thereto. STIM does not carry out the utmost diligence when formulating a diffuse and unclear statement that regulates such a material feature like remuneration accounting. Utmost diligence would be to provide the members with information, based on findings and experience, on how the royalty accounting may be affected, to what extent and how the organization will administrate the new member category to reduce the potential upcoming difficulties and costs. On the other hand, the new opportunity is subject for a two-year trial. STIM is collecting statistics, facts and experience from the two-year trial to be able to set better standards for the use of CC licenses on a long-term basis and thus the diligence standard may be appropriate for the present circumstances.

Under the obligations set by CISAC, STIM has a responsibility to administrate the rights efficiently.¹⁷⁹ To administrate the rights implies to utilize the rights and consequently this must be done in best capable manner. STIM ought to have at its disposal effective machinery for the collection and distribution of royalties to creators and publishers and assumes full responsibility for the administration of the rights entrusted to it. Additionally STIM is obligated to adapt continually to market and technological developments.

¹⁷⁷ Handke, "Economics", supra note 47 at 10

¹⁷⁸ REC.2005, supra note 64 at 3 para. 4

¹⁷⁹ CISAC Statues, supra note 165 Article 8 c, e, i, and Professional Rules, supra note 168 Article 8 b, c, h.

6.2.3 Modification of an unconscionable contract term

In the previous analysis of the understanding of the concept *noncommercial* the possible impact of the general provision in 36 § of the Contracts Act was discussed. Yet again the important provision in Swedish contract law attracts attention. As described above, a contract term or condition may be modified or set aside if such a term or condition is unconscionable having regard to the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and circumstances in general. Hence, is it conscionable that the Addendum contains a provision that de facto may deprive the member of all potential remuneration connected to a work?

The Addendum must be viewed in the light of the main agreement, i.e. the affiliation agreement, and other provisions set forth in the Addendum. Since the Addendum explicitly limits the license possibilities to the NC licenses it appears illogical to, with respect to royalty accounting, create a state of affairs that potentially may not distinguish between *commercial* and *noncommercial*. Furthermore, it is contradictory that STIM leaves the determination of the definition of *noncommercial* to Creative Commons and at the same time makes reservations regarding its own possibilities to collect and account for royalties due to the vagueness of the term.

Once again - the party responsible for an unclear provision has to carry the risk for the same. STIM does not specify in what instances or situations the right attribution may be difficult to determine. Neither leaves the provision any clarity regarding what costs that may be affiliated with member's use of a CC license. Moreover, is STIM required to provide proof of management difficulties and increased costs for the no-warranty provision to kick in or does STIM always have the option to refuse royalty accounting for CC licensed work/s regardless of situation? "*The reason herefore is predictable difficulties...*" The wording implies that that the provision may be void if no difficulties or costs can be referred to the member's use of a CC license. Irrespectively, the vagueness will be interpreted to STIM's disadvantage and in some cases the no-warranty provision may be set aside.

Pursuant to 36 § particular attention shall be paid to the need to protect those parties who, in their capacity as consumers or otherwise, hold an inferior bargaining position in the contractual relationship. The sole member does not have the status of a consumer,

but of an undertaking of small caliber,¹⁸⁰ and should therefore qualify under the paragraph.¹⁸¹ The potential CC licensor clearly holds an inferior bargaining position. STIM is under no obligation to offer the opportunity. Moreover, at this stage, it is likely that the category of STIM members who will take advantage of the opportunity is of minor scale in relation to STIM members who will not and hence CC licensors lack a power to negotiate the terms and conditions of the Addendum.

An additional rationale for modification of a contract term may be discrimination.¹⁸² Hereto may be referred that a party make distinctions in between different categories of individuals based on circumstances which cannot be deemed acceptable. However, distinctions based on economical conditions, for instance differences in costs connected to various categories of contract parties, cannot in general be deemed unconscionable.

Finally, does any circumstances prevailing at the time the agreement was entered into, or subsequently appeared, favor a strict understanding of the no-warranty provision? I.e. if STIM so desire, they are not required to carry out royalty accounting even for commercial use of the work licensed under a NC license. It must be emphasized that the understanding of what constitutes *noncommercial* still is far from clear and unambiguous. An independent STIM interpretation of the concept is inappropriate. It would result in two categories of CC licensed works – the ones independently licensed by creators who choose to stand outside the collective management of copyright collecting societies, and the ones licensed under conditions drawn up by a copyright collecting society. When the terms of the Addendum were prepared the organization of Creative Commons had not yet published its report on the online population's understanding of the term and thus the situation was even more vague than what it can be considered today. Even if the circumstance that Creative Commons now has published a report on the matter may lead to a modification of the ability for STIM to leave no warranties regarding remuneration, the state of affairs is far from self-explanatory why it is reasonable for STIM to apply some sort of saving clause. Additionally, a factor of significance is the *trial* period of two years. STIM is the first collecting society in the jurisdiction of Sweden offering the opportunity for its members to license under a CC license why modest knowledge is accessible. To be able to obtain

¹⁸⁰ Rosén, “Upphovsrättens avtal”, supra note 22 at 117

¹⁸¹ Prop. 1975&76:81, supra note 149 at 137

¹⁸² Ibid. at 45

experience, findings and expressed opinions and understand the complexities applicable a test period is material. As a result, after the two years trial, the terms and conditions most likely will be altered or set aside due to the experience then accessible. Without safeguards, the incentive for STIM to carry out the trial would be reduced and no experience would be obtained.

6.2.4 Final Comments

STIM's saving clause set forth in the Addendum should be seen in the light of STIM's function as a trustee. Hence, even if the clause potentially can deprive the member from any remuneration accounting such an application of the provision is neither accurate nor legal. STIM is, particularly under legal deeds from the European Community, required to carry out the management after equitable standards. Certain categories of members may not be dispossessed their right to remuneration due to a need for new accounting models. Rather copyright collecting societies are required to pay attention to new market patterns and technological change. Being seen to be fair is of vital importance for any membership organization. STIM is yet obligated to utilize the rights in best capable manner. As a result of that new efficiency standards may have to be developed before copyright collecting societies can provide a greater segment of appealing services and still not renounce efficiency, some reservations with respect to utilization may be accepted, but not to the extent that CC licensors obtain no remuneration for any use of their works. The general provision in 36 § speaks in the same direction. STIM has drafted the unclear provision and has a stronger bargain position than the CC licensor why the provision should be interpreted to STIM's disadvantage. However, the application of the provision may be saved by the trial period and the purpose thereof to obtain knowledge on required alterations in management.

6.3 An Obligation to Detach Remuneration for Noncommercial Use

For this section, two previous observations needs to be brought to mind:

- (i) *STIM does not, towards the member, warrant that accounting is not made for noncommercial use and*

- (ii) *The filing for allowance to license a work under a CC license is a notification to STIM that the member only wants the organization to utilize the rights applicable with respect to commercial use.*

Yet again, STIM does not warrant that they can comply with the altered obligations ensuing as a consequence of the member's application for use of a CC license. Some observations discussed above are applicable also for this section hence they will initially be underlined, but for the rest of the analysis the discussion is constrained to areas which have not yet been described and analyzed.

In comparison to the previous discussion on the right to remuneration, STIM here puts the rationales for another saving clause differently. Under this provision STIM explicitly emphasizes the difficulties in determining whether a specific use may be classified as commercial or noncommercial as the reason for the no-warranty approach, as well as potential costs for the determination.

6.3.1 Equitable management

“Being seen to be fair must be a vital part of the distribution process in a membership organization”. Members receive regular payments when their works were found used and the payment due exceeds some minimum annual value.¹⁸³ Additionally, some link between the popularity of a work and a copyright collecting society payment to the right holder ought to be essential for equity purposes. The same holds for detachment of payments for use of works which don't qualify for remuneration accounting. Unjust payments which affect remunerations connected to other members, i.e. non-CC licensors, may in the long run affect the mandate of the respective copyright collecting society and whether its activity is considered legit.

The Addendum aims at the member, but another equity discussion may be carried out in relation to the customers of STIM. It is material for STIM to establish a willingness to pay among the users of copyright protected works. Resistance in this manner due to inadequate collecting standards will jeopardize the collective management system as a whole. Moreover, STIM is required to apply equitable payment standards under the CISAC membership. The Professional Rules states that each musical society at all times

¹⁸³ Handke, “Economics”, supra note 47 at 9

shall encourage the lawful dissemination of works by facilitating the licensing of rights in return for *equitable payment*.¹⁸⁴

6.3.2 Repertoire notification

The Recommendation contains a requirement regarding repertoire information.¹⁸⁵ Collective rights managers shall inform right holders and commercial users of the repertoire they represent, any existing repertoire reciprocal representation agreements, the territorial scope of their mandate for that repertoire and the applicable tariffs. Consequently it is important for a copyright collecting society to have accurate and up to date knowledge of its repertoire and the rights the organization are obligated to utilize. Additionally, CISAC in the same manner requires its members to keep accurate and up to date documentation relating the scope of their repertoires and the rights which they are mandated to administer in respect of such repertoire.¹⁸⁶ Uncertainty in this regard not only affects the members but also the customers of the respective copyright collecting society since some use of the customers will henceforth be free of charge and thus fall outside of the mandate of the society.

6.3.3 A right to refuse fees payable

The NC licenses provide the licensee with a royalty-free license to exploit the rights applicable for noncommercial purposes. What happens if STIM charge the licensee for the noncommercial use of the work on the basis that the classification of use is difficult to determine or the classification implies increased costs? The STIM customer and CC licensee will refer to the CC license contract and call attention to that the work is licensed for noncommercial use on an individual basis and that the license is free of charge. STIM shall therefore not administrate the use and collect fees. Consequently, if the use really falls within the scope of noncommercial use, the no-warranty provision set forth in the Addendum which aims at the members, should not affect the consumers right to refuse fees payable, regardless of it the classification is difficult and costly. According to STIM the customer contracts have not been altered and thus no saving clause corresponding the no-warranty provision in the Addendum is applicable.

¹⁸⁴ Professional Rules, supra note 168 Article 8 d

¹⁸⁵ REC.2005, supra note 64 at 3 para.6

¹⁸⁶ Professional Rules, supra note 168 Article 18 a-b

6.3.4 The survival of the opt-out formula

With an opportunity for members of copyright collecting societies to license works individually, no society can warrant an exclusive and complete repertoire within a territory. The CISAC decision¹⁸⁷ (see above) entails that copyright collecting societies can no longer, towards its customers, offer exclusive and complete repertoires since the individual member is free to pick any manager in any territory of their choice to administrate rights of the member's preference. The fact that the exclusivity is even more diminished by use of CC licenses by members of copyright collecting societies does not change much in this regard. In a competitive copyright collective management market the single society ought to alter distribution rules and applicable standards for the collection of fees.

Consequently, it must be questioned if the respective copyright collecting society may continuously operate under the opt-out formula that has been characterizing the administration of the Scandinavian copyright collecting societies. The Commission demands competition within the copyright management sector. If the demand impacts the market it is hard to picture how the extended collective license regime can survive. If several societies collect fees and distribute them as royalties, which one of them should be given the right to administrate the payments connected to creators who choose not to be a member of any managing society? The CISAC decision does not discuss the future of the extended collective licensing system. It solely states that the extended licensing system does not impede, as such, a collecting society located in another EEA country from issuing a license covering the territory of the EEA country where such a system is in place.¹⁸⁸ Hence, it is not subject for determinations in the particular ruling. The usual condition for a collecting society to validly issue an extended license is for it to be in line with local laws on the functioning of collecting societies (in terms of accountability, efficiency). Any collecting society fulfilling this condition could potentially start to issue extended licenses and accordingly, the decision does not undermine the existence and the functioning of the extended licensing system.

The future of the extended collective license was acknowledged by the Council on Legislation in the Swedish legislative proposal following the Infosoc directive

¹⁸⁷ DEC.2008, supra note 68

¹⁸⁸ Ibid. at 32

(2001/29/EG).¹⁸⁹ The Council on Legislation emphasized that issues may arise from the fact that several organizations may comply with the rules for allowance to enter into agreement under the extended collective license system.

6.3.5 The impact on the commons

STIM states that remuneration accounting may be carried out also for noncommercial use of a work if the use is difficult to classify or if the classification entails increased costs. Hence a licensee of a CC license may surprisingly be charged by STIM if the licensor is a member of the organization. This situation may impact the confidence in CC licenses generally. Picture a situation where a larger and larger common is created by the use of CC licenses, but where the public cannot put confidence in that the works actually are a part of the commons due to a potential risk to be charged by a copyright collecting society if the use carried out may be difficult to characterized as commercial or noncommercial. Creative Commons requests licensors to be liberal in what they accept from others.¹⁹⁰ A liberal and open attitude by licensors may be an explanation to the lack of disputes worldwide regarding the understanding of CC license terms. However, when a copyright collecting society collect fees for a use that a licensee considers free of charge the situation may be altered and it may on a greater level affect the extent of use of CC licensed work.

6.3.6 Final Comments

Yet again equity reasoning is of significance, but under this particular provision both with respect to members and customers of the society. Equity is material not only to comply with non-discrimination standards but also to retain the system legit. In the previous chapter divergence was mainly identified in between the provisions of the Addendum and the affiliation agreement. However, towards the customers of STIM, discrepancy identified in between provisions set forth in the CC license contracts and provisions in the Addendum becomes material. A customer of STIM is not obligated to pay fees referable to noncommercial use regardless of if the classification commercial/noncommercial is difficult and expensive to carry out or not. Moreover, a separate discussion of importance is one that acknowledges potential affects on the use

¹⁸⁹ Prop. 2004/05:110, supra note 2 at 246-247

¹⁹⁰ Defining Noncommercial, supra note 105 at 78

of CC licenses. Collecting operations lacking accurate due diligence may bring uncertainty to the use of CC licenses in general and hence affect the regime as a whole.

6.4 A Notification Obligation to Foreign Copyright Collecting Societies

Paragraph 3, 4 and 5 of the Addendum (paragraph 3 and 4 analyzed above) applies for use of the work/s in jurisdictions outside of Sweden. However, STIM disclaims any responsibility for noticing foreign copyright collecting societies about the limitation in administration of the rights that follow from the CC license.

Worldwide, copyright collecting societies works closely, on the basis of so-called “reciprocal representation agreements”, to be able to distribute remuneration to its members for use outside of the territory the respective society operates within. STIM’s disclaimer must be seen in the light of this background. Consequently, other parties than STIM have an interest in that their administration is carried out correctly. Poor information flow from STIM will affect the foreign copyright collecting societies and thus the analysis ought to emanate from international standards set and the obligations in between sister societies.

The European Community emphasizes the importance in management societies providing information both internally and externally and calls for efficient exchange of information between copyright collecting societies including the establishment of clear provisions for societies to enjoy access to each other’s economic data¹⁹¹

The Recommendation continuously calls attention to the value of information exchange. Collective rights managers should give reasonable notice to each other and commercial users of changes in the repertoire they represent.¹⁹² As a part of the reciprocal agreements in force on the marketplace the respective societies do exchange information on their repertoire. The application form for the use of a CC licensed must be provided with information of the work/s which the author wishes to license under a CC license. Hence, when a report is sent to a sister society a short information notice could be attached, describing that some works in the repertoire additionally may be licensed under NC licenses, which implies that the administration shall be limited to

¹⁹¹ RES.2004, supra note 175 at 431 para. 51 and 56
¹⁹² REC.2005, supra note 64 at 3 para. 7

commercial uses of the works. The report could further easily point out the works affected. It is another issue if the sister society has issues with the new administration formula and choose to manage the rights after its traditional methods.

The demand for multi-territorial licenses has started to form but yet national licenses and reciprocal representation agreements are the standard on the marketplace. Hence, until the need for multi-territorial licenses for copyright protected works becomes a reality, information in between right managers is crucial. Pursuant to the Recommendation, multi-territorial licensing is appropriate in order to enhance greater legal certainty to commercial users in relation to their activity and to foster the development of legitimate online services.¹⁹³ At the present state, the legal certainty for use not limited to a territory may be recovered through good information channels. The need has been acknowledged by CISAC in their *Common Information System (CIS)*. CIS is the heart of CISAC's technology development plan with the objectives to improve the quality of management, to facilitate the exchange of information and to maximize efficiency between societies.¹⁹⁴ For this purpose the CIS plan is determined to create a worldwide digital rights management system, based on standardized identification of creative works and linked data exchange networks between the CISAC societies. Technically, the CIS consists of two series of tools that provide the building blocks to global digital copyright administration. The first component features the integration of unique, ISO-certified, standardized international identifiers of works and parties relevant to the creative process. The second pertains to a network of global databases, or sub-systems relying on various centralized and increasingly decentralized technologies, that will serve as the repository of authoritative information on the creative process for all participating CISAC societies. By enabling CISAC members to optimize their day-to-day administration and information exchange, the CIS plan has beneficial results such as automated transactions and more accurate and quicker royalty distribution between CISAC societies. The Internet has introduced opportunities. Among a vast amount of benefits it is a prime mechanism for distribution, communication and information movement. CIS enables CISAC's member societies to improve their efficiency with respect to both creators and users and to seize the opportunities of the digital age. The introduction of CC licenses derived from the very

¹⁹³ Ibid. at 1 para. 8

¹⁹⁴ *Information Networks*. Online:
<http://www.cisac.org/CisacPortal/afficherArticles.do?numRubrique=43>

basic functions and opportunities of the Internet. As described above; new distribution channels facilitate new creation processes and changing roles of culture players and new technological methods challenge the provisions of copyright law worldwide since every use in the digital reality requires a copy and thus permission. Hence the CIS initiative seems created for situations just like the introduction of CC licenses within the mandate of copyright collecting societies, which challenge the traditional way of managing rights.

The tools for efficient and accurate administration provided by CISAC shall be kept in mind when studying the CISAC Statutes, as well as the different professional rules set for categories of societies. As previously described, an organization ought to have at its disposal effective machinery for the collection and distribution of royalties to creators and publishers and assumes full responsibility for the administration of the rights entrusted to it.¹⁹⁵ Regarding documentation, the society is obligated to keep accurate and up to date documentation relating to the scope of its repertoire and the rights which it is mandated to administer, and further provide, and keep current, accurate documentation of its distribution methods in the CISAC Distribution Methods Database.¹⁹⁶ Additionally, each music society shall at all times adapt continually to market and technological developments.¹⁹⁷ Consequently, if CISAC provides a copyright collecting society with advanced and developed mechanisms for information exchange it is obligated to administrate, and keep and distribute information, in the same qualified manner as the tools provide for.

6.5 Competition Concerns

Historically, questions have at several occasions been raised regarding if the respective activities carried out by copyright collecting societies do comply with competition law. STIM is an association which enjoys a *de facto* monopoly in Sweden over the market for making available copyright protected music.¹⁹⁸ Hence, their activities must always

¹⁹⁵ CISAC Statutes, supra note 165 Article 8 c

¹⁹⁶ Professional Rules, supra note 168 Article 18 a-b, 19 e

¹⁹⁷ Ibid. Article 8 h

¹⁹⁸ Case C-52/07, Kanal 5 Ltd and TV 4 AV v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa, (Reference for a preliminary ruling from the Marknadsdomstolen).

be reviewed in the light of potential affects on trade in between member states of the European Union.¹⁹⁹ The initiative of STIM to allow CC licensing for works in the repertoire represented and administered on an otherwise collective basis is carried out through an agreement with additional provisions applicable alongside with the provisions set forth in the affiliation agreement. In this section the Addendum will be analyzed through a competition perspective. However, STIM and other copyright collecting societies carry out pilot activity and consequently the European Community or domestic competition authorities have not yet reviewed any potential competition concerns arising from the new provisions in force. With no direct corresponding court decisions or declarations, accompanied by the very unique concept of allowing individual licensing within the mandate of collective equivalents, the attempt to an analyze becomes rather speculative.

6.5.1 Neglecting the need for an altered collection formula

Provided that STIM neglects the presence of CC licensed works within their repertoire and collect fees for noncommercial use of the work the administration may constitute abuse of dominate position pursuant to article 82 of the EC Treaty. In a request for a preliminary ruling concerning the interpretation of Article 82 EC the Court of Justice of the European Communities (“the Court”) interpreted the legacy of a remuneration model used by STIM for the television broadcast of musical works protected by copyright.²⁰⁰ The court found that:

“Article 82 EC must be interpreted as meaning that a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where, with respect to remuneration paid for the television broadcast of musical works protected by copyright, it applies to commercial television channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually

Online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0052:EN:HTML> [Case C-52/07]

¹⁹⁹ Article 82 of the EC Treaty. Online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E082:EN:NOT>

²⁰⁰ Case C-52/07, supra note 198, at para. 7

broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works.”

The ruling may be applicable also when STIM carries out administration of remuneration payments for work/s licensed under a NC license. STIM is obligated to carry out the administration in accordance with the method that most accurately identifies the use of works and the audience. However, attention may be paid to disproportionate increase in costs for the management of contracts and the supervision of the use of those works. Consequently, difficulties in category determinations and increased costs thereto may allow STIM to apply a previous, say traditional, remuneration model. However, STIM should discuss other potential methods or models with more accuracy and analyze whether or not disproportionate complexities and costs arise as a consequence thereof.

6.5.2 The impact on Creative Commons licenses' relevant market

Additional concerns arise from the fact that the Addendum solely allows individual licensing under a *Creative Commons license*. Consequently, other license initiatives similar to the one carried out by Creative Commons are deprived from the possibility to attract STIM members. From this particular aspect, could the Addendum constitute abuse of dominant position pursuant to Article 82 EC? To be able to determine a position of dominant position one must first decide the relevant market. The relevant market potentially affected could be one for individual licensing of copyright protected work by way of licenses free of charge, non-discriminative and open for all. To be able to determine relevant market the product market and the geographical market must be determined.²⁰¹ Conclusive for the classification of product market is the substitutability of a product or service. Products or services which is substitutable with regards to quality or characteristics, price, use, consumers' apprehension and real substitutability possibilities belong to the same product market. For the determination of the geographic market, transport possibilities and costs of transports are of material importance. When STIM offers its members to license works under a CC license it affects other undertakings providing licenses with the same characteristics since the licensors of

²⁰¹ Prop. 1992/93:56, *Ny konkurrenslagstiftning*, at 85

these licenses lacks the possibility to be members of a copyright collecting society which may manage remuneration administration on their account. However, STIM doesn't have a direct role on this market since their services doesn't include these particular type of licenses. Hence STIM cannot have a dominant position on this market. What STIM does is that it uses its dominant position on one relevant market to provide a player on another market with benefits which competitively disadvantage competitors to the player who obtained the benefits. However, one relevant market is affected due to operations only a dominant could successfully carry out and thus the provision can potentially be applicable. Additionally one has to determine whether the activities carried out constitutes abuse pursuant to Article 82 EC. In this context it needs to be ascertained whether the dominant undertaking 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 sufficient effective competition.²⁰² Yet again the unique arrangement of the allowance for individual licensing challenge the applicability of competition law. STIM does not reap trading benefits, STIM rather undermine its own monopoly position. The benefits are due to Creative Commons, but Creative Commons has no part in the activities carried out.

Imagine a situation where STIM would allow licensing under any licenses similar to the ones created by Creative Commons. These licenses could contain license terms of equivalent caliber as *noncommercial*. Without foreseeable terms and conditions STIM would have no practical possibility to carry out any management for the respective work/s also licensed under another license. Hence the practice of STIM, regardless of the determinations above, may be objectively justified.²⁰³

7. Summary and Final Conclusions

Individual licensing of copyrights are in many situations impractical or impossible. The online environment may be referred to this category of situations – the number of right holders, users and number of uses are vast. This sole fact should make collective management of rights particular suitable for the online environment, but the collective societies are faced with new challenges referable to the technical possibilities of the

²⁰² Case C-52/07, supra note 198, at para. 27

²⁰³ Ibid. at para. 47

digital age. DRM techniques, as well as a call for more diverged management operations, change the economic rationales for copyright collecting societies. Moreover, the long-established, exclusivity-based mandate of national copyright collecting societies has been perished by the European Commission. Consequently, societies must develop formulas for multi-territory licensing and remuneration accounting, as well as prepare for their operations to be carried out in a competitive market. How the efficiency benefits of a monopoly position may be recovered in a competitive market is a challenge for the new market and its players, as well as retaining cultural diversity therein. The European Community has further emphasized the importance of freedom of choice, i.e. for right holders to determine to which trustee they choose to transfer their rights and the management thereof. Flexibility is encouraged and the respective societies may not penalize certain groups of members due to e.g. their origin or choice of rights transferred to the society. The managers are trustees with the obligation to utilize the rights entrusted to them and thus requirements with respect to e.g. equity and best practice standards must in general apply. The initiative of STIM to allow CC licensing is an outflow of flexibility and adaption to the digital reality. As a result a new member category is created and STIM is obligated to carry out the management with respect to the member group with due diligence and fulfill its responsibility as a trustee.

No doubt the new opportunity will cause complex interpretational determinations. However, this fact does not deprive STIM from its obligation to carry out the management in best manner possible. Deviations here from may only be legit if proportionate in relation to the circumstances prevailing. The lack of experience and uncertainty in potential implications of the initiative will permit the use of saving clauses to a certain extent, but the applicable safeguards may never extend to the point where a situation is created in which STIM has withdrawn practically all responsibility towards the member. *STIM is required to fulfill its responsibilities as a trustee.*

The implications of STIM failing in this regard give idea to a separate discussion of the consequences thereof. An analogy may potentially be done to the Commercial Agents Act (Swedish code of Statues, SFS 1991:351) or the Commission Act (Swedish code of Statues, SFS 2009:865). 34 § of the Commercial Agents Act and 43 § of the Commission Act similarly state that where the agent fails to fulfill contractual or statutory obligations, liability to compensate the principal for damage so caused arises. Unless the agent can show that the failure was not due to negligence on the agents

behalf. But more importantly, if a particular copyright collecting society falls short in the obligations of a trustee, member's in a competitive collective management market will choose another society to manage their rights and thus the society's length of life will not be very long

Additionally to basic trustee responsibilities, requirements regarding flexibility and the birth of a competitive copyright collective management market will compel copyright collecting societies to reform their remuneration and management formulas. If an existing structure is not suitable for the administration of new uses by customers, nor appropriate for the need of individual solutions open to right holders, the structure needs to be reformed. STIM has taken a first step towards such a reformation, providing a more diverse and pragmatic service for its members. However, if STIM, during the state of reformation, doesn't maintain a management level which complies with the basic responsibilities of collective managers, the voluntary initiative by STIM may be subject for state or Community intervention.

Additionally, possible impact on the use of CC licenses in general should be acknowledged. Creative Commons welcomes the possibility for STIM members to license works under a NC license and maintain eligibility for remuneration for commercial use of the same work/s. The initiative unquestionably favor the use of CC licenses and the creation of a bigger commons since more creators now have the choice to reserve only some rights but sustain in the system of copyright collective management. However, Creative Commons should be concerned of, and closely review, how the interference of a copyright collecting society affects the use of CC licenses and how the society may come to indirectly influence the interpretation of the license contract terms. The interference may result in bigger confusion regarding the understanding of the CC contract terms and to which extent a work may be used free of charge.

The first evaluation of the Dutch corresponding trial, ongoing since 2007, illustrated that the pilot was successful and that the new services provided was highly valued by members.²⁰⁴ However, the number of members using the new opportunity has been modest. Hence the Dutch society will call attention to the opportunity by increased information. During the fall of 2009 the society will further carry out a study to better

²⁰⁴ Press release Bumastemra, supra note 8

understand how the project may fulfill the needs of the members. CC Netherlands and the Dutch society Buma/Stemra expect to be able to reveal the results by the end of the year.

Notwithstanding the identified concerns a first pilot is deemed successful and thus trials in several other jurisdictions are expected. The initiative pursues the requirement for collective societies to be flexible towards its members and their expectations of the management. Further, the particular flexibility and ability to provide more diverse services may turn out to be an important tool in the respective societies competition for worldwide members.

8. Material

- **Swedish domestic legislation**

The Act on Copyright in Literary and Artistic Works (Swedish code of Statues, SFS 1960:729)

The Contracts Act (Swedish code of Statues, SFS 1915:218)

Commercial Agents Act (Swedish code of Statues, SFS 1991:351)

Income Tax Act (Swedish Code of Statues, SFS 1999:1229)

Commission Act (Swedish code of Statues, SFS 2009:865)

- **Swedish legislative proposals and other preparatory material**

Prop. 1960:17, *till riksdagen med förslag till lag om upphovsrätt till litterära och konstnärliga verk m.m*

NJA II 1961 s. 12

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