

REPORT ON THE COLLECTIVE MANAGEMENT OF INTELLECTUAL PROPERTY RIGHTS

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Spanish collecting societies enjoy a monopoly position. This reduces their incentive to operate efficiently and can lead to problems regarding the fee levels, as shown by several cases of unfair and/or discriminatory fees examined by Spanish antitrust authorities.

The aim of this Report is to explore problems regarding fees and restrictions on competition in this sector, by analysing the current regulatory framework and certain practices carried on by collecting societies, in order to make recommendations for achieving a more competitive model of collective rights management.



CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION	5
II. COLLECTIVE MANAGEMENT OF INTELLECTUAL PROPERTY RIGHTS	8
II.1 Intellectual property rights	8
II.2 Intellectual property rights collecting societies	13
II.3 Key sector data	20
III. MARKET POWER AND ENTRY BARRIERS	24
III.1 Economies of scale	25
III.2 Legal entry barriers	31
III.3 Strategic entry barriers	39
IV. PRICING PROBLEMS	52
IV.1 Regulatory context	52
IV.2 Exercise of market power in setting fees	63
V. CONCLUSIONS	78
VI. RECOMMENDATIONS	84
BIBLIOGRAPHY	88

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EXECUTIVE SUMMARY

Intellectual property rights recognised by the Spanish legal framework are in large part administered and exercised collectively by associations known as "collecting societies". These organisations act as intermediaries between the rightholders and the persons who use their works and other subject matter, representing the former and exercising the intellectual property rights in their place, be it by voluntary assignment or by legal mandate.

Although the traditional role of collecting societies is increasingly being called into question by technological progress and the new channels by which works and other subject matter are distributed and consumed, these associations continue to play a key role at present. Their activity has implications for a number of sectors of the economy, both in those that involve producing copyrighted works and in those whose activity involves the exploitation of such works. In 2007 collecting societies in Spain recorded revenues of 518.9 million euros.

Taking into account the importance of intellectual property rights in the economy, it is vital to ensure that the markets in which collecting societies operate function properly and with no anti-competitive distortions, above all when the exploitation of works and other subject matter is a key input into the activity of many economic operators.

Collecting societies have substantial market power and they normally carry on their activity from a monopoly position. The eight societies existing in Spain (SGAE, DAMA, CEDRO, VEGAP, AGEDI, EGEDA, AIE, and AISGE) each specialise in administering a given category of rights that no one else manages. The lone exception is found in relation to the authors of audiovisual works, where there is a minor degree of competition between the dominant association SGAE and the minority player DAMA.

The monopoly position of collecting societies reduces their incentive to operate efficiently and opens the door to a number of problems. One is the application of unfair and/or discriminatory pricing practices. Another consists of the difficulties confronted by users of protected works to manage their costs efficiently and to develop non-traditional markets for exploiting copyrighted works.

These difficulties are aggravated by the large number of rights and societies and by the lack of clear provisions in the Intellectual Property Act on issues that are key for the marketing of intellectual property rights. This increases

transaction and negotiation costs for users and generates a large volume of legal claims between purchasers and sellers, with the attendant legal uncertainty.

The lack of competitive pressure on collecting societies is explained by the confluence of entry barriers that hinder the real and/or potential competition that could be posed by other domestic or foreign societies.

Those barriers include, for one, economies of scale in managing intellectual property rights, which drive a trend toward concentration of the market that places new entrants at a competitive disadvantage. Nevertheless, their magnitude depends on the type of use and is being affected by technological advances, which enables the emergence of new forms of managing intellectual property rights, reduces the costs of this activity and makes individual management more feasible, especially in the online environment.

There are also legal entry barriers in the Intellectual Property Act and the strategic barriers to entry that collecting societies have established in a regulatory environment that does not counteract their considerable market power.

The Intellectual Property Act sets a series of conditions for being able to operate as a collecting society that have played a decisive role in articulating the current monopoly regime and which hinder the emergence of new operators to compete with the societies that have already been authorised. First, there is the requirement for a prior authorisation conditional on fulfilment of requirements that introduce a high degree of uncertainty, lack of clarity and subjectivity, and which give the Ministry of Culture very broad discretion in granting or declining the authorisations that affect the level of competition. This administrative interventionism blocks the path to other forms of collective management that differ from the present ones and which the market may be demanding. Second is the requirement that the societies be organised as not-for-profit entities. Third, the Intellectual Property Act requires, going beyond what is demanded by European Union law, that certain rights must necessarily be managed by collecting societies, stymieing the free development of individual management arrangements and preventing rightholders from taking advantage of the possibilities afforded by new technologies.

All of these factors underscore that the legal framework established by the Intellectual Property Act is highly restrictive of competition and heightens the effect of entry barriers of an economic nature. In this regard, the reforms introduced in the Intellectual Property Act in connection with the transposition of the Services Directive are clearly insufficient and favour the continued management of intellectual property rights by monopolies.

Together with the legal entry barriers, there are strategic obstacles which collecting societies have established in a regulatory environment that allows them to exploit their monopoly position. For one, it is standard practice for the contracts with foreign collecting societies to include exclusivity clauses in the management of repertoires and obstacles to the rightholders' free choice of society. In addition, contracts with rightholders are characterised by lengthy durations and advance notice requirements, limit the rightholder's freedom to define the scope of the contract and guarantee the society will have exclusivity in administering the rights. And lastly, collecting societies often establish fees that are unrelated to actual use, pool in the same repertoires rights which by law are subject to mandatory collective management with others that are not, and are markedly non-transparent in relation to their repertoires. These factors combine to strengthen collecting societies' market power.

Even though the Intellectual Property Act establishes a regulatory framework for collective management in which the most likely and desired option is monopoly management, the obligations placed by this law on those societies completely fail to counteract the great bargaining power they gain from their market power.

First, there is no *ex-ante* control of the fees set by collecting societies, be it by introducing effective obligations in this regard or through supervision by a competent authority. Second, the process by which contracts are negotiated with users does not ensure that the fees are reasonable and equitable, because when an agreement is not reached, the legal framework allows the application of the general fees previously and unilaterally established by the monopolistic society, greatly reducing its incentive to carry on real negotiations. Third, *ex-post* control is certainly limited, the main reason being that the Intellectual Property Commission, set up by the Intellectual Property Act of 1987 as a mechanism for resolving pricing disputes between collecting societies and certain users, has not proven to be effective, primarily because it has not been conferred the necessary authority and coercive powers to successfully achieve that purpose.

The combination of the absence of an effective regulatory framework and the monopoly position of collecting societies when setting their fees has given rise to many pricing disputes, which have been brought before the courts of justice and also before the former Competition Tribunal and the current CNC, the latter on several occasions having penalised these entities for abusing their dominant position by setting unfair and/or discriminatory fees. Problems regarding fees create distortions in the markets where users operate, either by leading to overpricing for use of the repertoire, by preventing users from managing their costs efficiently or by generating competitive disadvantages between similar users.

The CNC believes that the entry barriers identified and the problems regarding fees require a revision of the Spanish model for management of intellectual

property rights. The need for a new legislative approach to different aspects of the activity carried on by collecting societies is not new, but has been demanded repeatedly in the past in different forums. In the European area, specifically, there are important recent initiatives aimed at promoting competition between the different collecting societies that operate in the European Union.

The CNC takes the view that a more competitive model is possible, one where societies face greater competitive pressure in the services they provide to rightholders and users and where market mechanisms organise this activity, dictating how many entities should exist, what category of rights they should manage and how these should be administered. The objective of introducing competition in the management of intellectual property rights is particularly important in view of the technological developments of the last decade and the advent of the online environment as the main domain on which protected works and subject matter will be exploited in the future.

Fostering competition requires widening the choices available to copyright holders and users. For this reason, the CNC advocates a comprehensive overhaul of the Intellectual Property Act. Nevertheless, meanwhile collecting societies hold a monopoly position, it is essential to improve their regulation by requiring collecting societies to introduce greater flexibility in the terms of the contracts with rightholders; imposing transparency obligations and pricing methods that take into account the actual use of the repertoires and are based on objective pricing criteria; and creating a regulator that can adjudicate with binding force all types of intellectual property disputes. Removing the numerous entry barriers and obstacles to competition will increase collecting societies' incentives to provide their services as efficiently as possible and reduce their ability to exert their market power in different areas, particularly, in setting fees.

I. INTRODUCTION

1. The intellectual property system currently in place in Spain is articulated and protected by the domestic regulatory framework and various international agreements. This system recognises different types of intellectual property rights of the creators of works and other subject matter.
2. Intellectual property rights give recognition to creators and allow them to obtain economic compensation for their creations. By virtue of these rights, when a person, undertaking or institution exploits a protected work or other copyrighted subject matter, they must have authorisation to do so and make the payments in respect of that exploitation.
3. Management of intellectual property rights refers to the exercise of those rights by the rightholders, which essentially consists in granting the relevant authorisations and receiving the related royalties.
4. In Spain and in other countries, there exists the possibility, and often the obligation, to manage intellectual property (IP) rights collectively through what is known as a collecting society. The fundamental role of a collecting society is to act as an intermediary between rightholders and the persons who use them, representing the former and exercising the IP rights in their place, be it by voluntary assignment or by legal mandate.
5. At present, there are eight collecting societies in Spain: SGAE (publishers and authors of musical, audiovisual, literary, dramatic and choreographic works), CEDRO (publishers and authors of printed works), VEGAP (authors of visual creation works), DAMA (directors-filmmakers and screenplay writers of audiovisual works), AIE (music artists and performers), AISGE (actors), AGEDI (producers of phonograms) and EGEDA (audiovisual producers).
6. Each of the collecting societies existing in Spain has substantial market power (in most cases, collecting societies hold a *de facto* monopoly position) and faces no competition from other society managing the same category rights, with the lone exception of authors of audiovisual works, where there are two societies: SGAE and DAMA.
7. As demonstrated by certain decisions of the former Spanish Competition Court (Tribunal de Defensa de la Competencia; hereinafter, the Competition Court or TDC) and by the current National Competition Commission (Comisión Nacional de la Competencia; CNC), on several occasions IP rights collecting societies have abused their dominant position by setting unfair and/or discriminatory fees for use of the repertoire they manage. In

this area there are six resolutions,¹ five of which concluded with sanctions of the society investigated:

- TDC resolution of 14 December 1998 in case 430/98, Onda Ramblas/AGEDI. This proceeding issued from a complaint filed by Onda Ramblas against AGEDI for unfair and discriminatory pricing practices. The TDC, however, levied no sanction on AGEDI.
 - TDC resolution of 27 July 2000 in case 465/99 Audiovisual Intellectual Property. The TDC fined EGEDA, AISGE and AIE for charging unfair fees to hotels.
 - TDC resolution of 25 January 2002 in case 511/01 Vale Music/SGAE. The TDC fined SGAE for applying discriminatory fees to Vale Music in comparison with other record producers that belonged to an association.
 - TDC resolution of 13 July 2006 in case 593/05 Televisions. The proceeding originated from a complaint by AGEDI for unfair and discriminatory pricing practices. In this decision, the TDC fined AGEDI for charging discriminatory fees to TV networks Antena3 and Telecinco, compared with TVE.
 - CNC resolution of 9 December 2008 in case 636/07 Phonograms. In this resolution, the CNC penalised AGEDI and AIE for applying discriminatory fees to SOGECABLE compared with TVE and ONO.
 - CNC resolution of 23 July 2009 in case 651/08, AIE/T5. In this case, the CNC penalised AIE for charging unfair and discriminatory fees to Telecinco.
8. In addition, the introduction of obstacles to restrict competition from other domestic societies is another of the reasons why the TDC/CNC has declared certain conducts to be anti-competitive. In this regard, in 2003 the TDC investigated the conflict between SGAE and DAMA as a result of a complaint brought by DAMA. In that same year, the proceeding was settled on the acceptance of certain conditions between DAMA and SGAE, including a number of elements to foster competition between the two associations.
9. The conducts observed in recent years prompt the need for an analysis of the regulatory framework governing collective management of IP rights in Spain from the standpoint of competition. That is why the CNC is releasing

¹ Three resolutions are pending judicial review: Resolution on case 593/05, Televisions; CNC resolution on case 636/07, Phonograms; resolution on case 651/08, AIE/T5.

this Report, whose main aim is to analyse the conditions of competition and pricing problems in this sector, in order to make recommendations for articulating a more competitive model in which collecting societies are more likely to face competition, the level of conflicts can be reduced and assurances obtained of an effective framework for resolving disputes in the management of intellectual property, and, in particular, fee disputes.

10. The Report is structured as follows. Section II discusses what intellectual property rights are and how the system is currently organised in Spain. That discussion is followed by an analysis of the main characteristics of the Spanish system of IP rights collecting societies, the main players studied in this Report. Then, section III addresses the market power of collecting societies and the entry barriers that exist. Section IV analyses the fee problems that characterise the sector. And lastly, the Report's conclusions and recommendations are set out in sections V and VI.

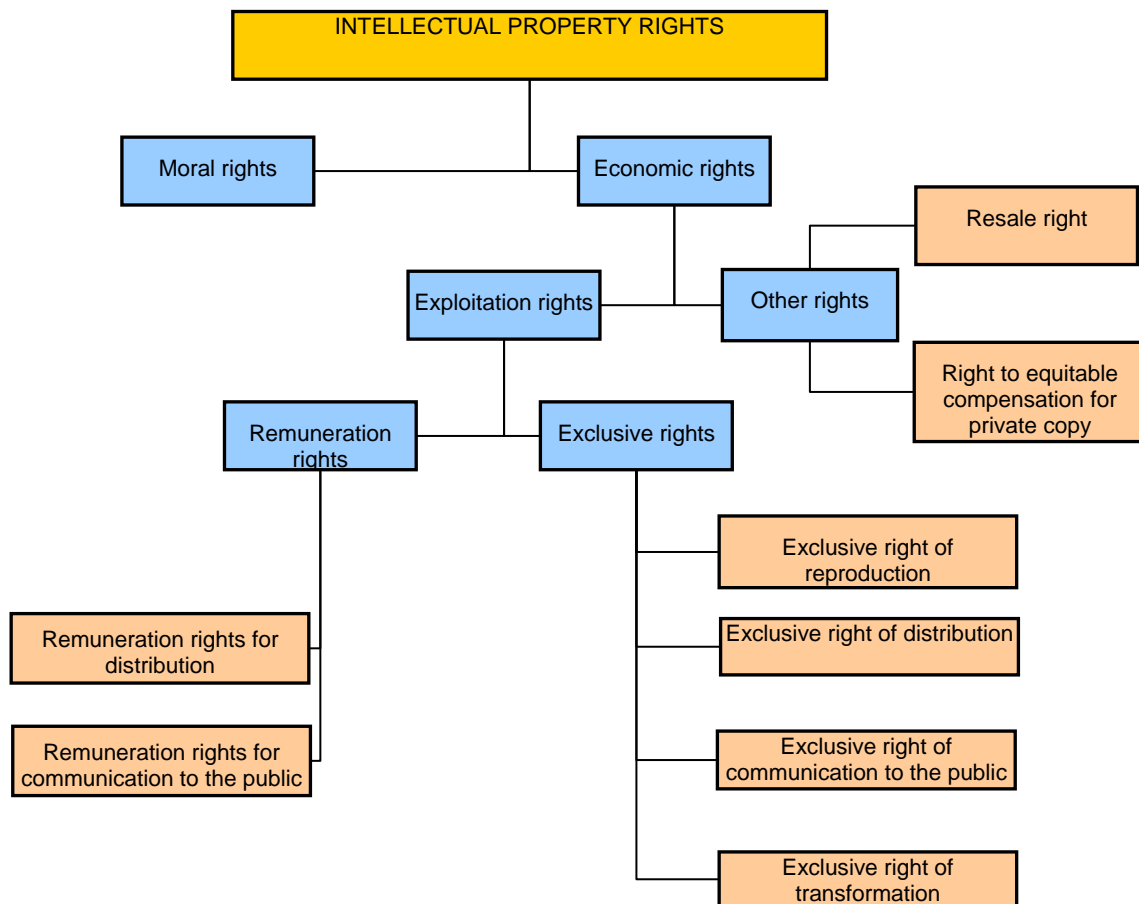
II. COLLECTIVE MANAGEMENT OF INTELLECTUAL PROPERTY RIGHTS

II.1 Intellectual property rights

11. The basic Spanish law on intellectual property rights is the Legislative Royal Decree 1/1996 of 12 April 1996, which approved the Consolidated Text of the Intellectual Property Act, regularising, clarifying and harmonising the various legal provisions in effect on these matters (hereinafter, this will be referred to by the Spanish acronym LPI for the Ley de Propiedad Intelectual).²
12. Intellectual property protects works and other subject matter. Works refer to original literary, artistic and scientific creations expressed in any medium. The other copyrighted subject matter consists of artistic performances, phonograms, audiovisual recordings and broadcasts.
13. According to the Ministry of Culture, *“intellectual property rights grant, in addition to the recognition of the creators, the economic compensation to which they are entitled for their works and other copyrighted subject matter. It is also an incentive to create and invest in works and other subject matter that benefit society as a whole”*.³
14. There are different types of rightholders for whom the law recognises intellectual property rights. A distinction is normally made between holders of copyright and other rightholders (sometimes referred to as holders of related rights), such as actors and performers, producers of phonograms, producers of audiovisual recordings, broadcasters, distributors of certain publications and creators of mere photographs.
15. The classification of intellectual property rights is depicted in the following diagram:

² In addition to the LPI, there is Act 3/2008 of 23 December 2008 on the right of an author of an original work of art to share in the profits. Prior to the entry into force of that statute, this right was regulated by the repealed article 24 of the LPI.

³ <http://www.mcu.es/propiedadInt/CE/PropiedadIntelectual/PreguntasFrecuentes/PropiedadIntelectual.html> (consultation dated 23/03/09).



16. Moral rights are recognised under Spanish law for the authors and performers. In essence, these rights recognise the author or performer's status as such, as well as their right to control the whole of their work.

17. Economic rights, in turn, are the rights whereby the rightholder receives remuneration. There are two classes of economic rights: exploitation rights and other rights.

18. The ones falling into the *Other rights* category are:

- Resale right. According to article 1 of Act 3/2008, *“the authors of works of graphic or plastic arts, such as paintings, collages, drawings, etchings, prints, lithographs, sculptures, tapestries, ceramics, glass objects, photographs and video art pieces will be entitled to receive from the vendor a share of the price of all resales after the initial transfer by the author. The specimens of art works covered by this right that have been done by the author himself or under his authority shall be considered*

original art works. Those specimens will be numbered, signed or duly authorised by the author”.

- Right to equitable compensation for private copy. According to article 25 of the LPI, *“reproduction done solely for private use, by means of non-typographical technical devices or instruments, of works distributed in the form of books or publications which for these purposes are considered similar thereto by regulation, and phonograms, videograms or other sound, visual or audiovisuals recordings, will give rise to fair one-time compensation for each of the three types of reproduction mentioned ... for the purpose of compensating the intellectual property rights that will not be received by reason of such reproduction”.*

19. This Report, however, will primarily focus on exploitation rights. The main reason for this is that the amount payable for exploitation rights is established by the collecting societies, whereas the amount of the other rights is set by different procedures which involve administrative intervention of one type or another in fixing the fee.⁴

20. There are two types of exploitation rights:

- Exclusive rights: those which allow the rightholder to authorise or prohibit exploitation by the user of his work or other subject matter, and to require the latter to pay for the authorisation granted thereto.
- Remuneration rights: unlike exclusive rights, here the rightholder does not have the power to authorise or prohibit a user's exploitation of the work or protected subject matter, although the user is obliged to pay a monetary amount for such acts of exploitation.

21. The acts of exploitation which may take place under those exploitation rights are:

- Reproduction: *“The direct or indirect, provisional or permanent fixation, by any means and in any form, of the complete work or a part of it, such as allows its to be communicated or copies to be obtained”* (article 18 of the LPI). In this case, there are only exclusive rights, not remuneration rights.
- Distribution: *“Making the original or copies of the work available to the public, on a tangible medium, by means of its sale, rental, loan or in any other way”* (article 19.1 of the LPI).

⁴ Regarding exploitation rights, the only case where the amount is set by administrative intervention is the right of remuneration for loan (article 37.2 of the LPI).

- Communication to the public: *“Any act by which a group of persons may have access to the work without prior distribution of copies thereof to each of those persons. Where this is done strictly within a home environment that is not integrated in or connected to a broadcast network, such communication shall not be considered public”* (article 20.1 of the LPI).
- Transformation: *“Transformation of a work includes its translation, adaptation and any other modification of its form that give rise to a different work”* (article 21.1 of the LPI). In this case, there are only exclusive rights, not remuneration rights.

22. The most important types of exploitation rights⁵ are those that derive from acts of communication to the public, which refers to acts such as staging a scene from a work, public projection of a film, its broadcast by television or radio or making it available on the Internet. Article 20.2 of the LPI includes a non-exhaustive list of acts of public communication. That list is quoted verbatim from the LPI in Chart 1.

Chart 1. Types of acts of public communication envisaged in the LPI

<p><i>“a. Stagings, recitations, dissertations and public performances of theatrical, musical-theatrical works, literary and musical works by any means of procedure.</i></p> <p><i>b. The public projection or exhibition of cinematographic films and other audiovisual works.</i></p> <p><i>c. The broadcast of any works through the radio airwaves or by any other means that serves for the wireless transmission of signs, sounds or images. The concept of broadcast includes the production of programme-carrying signals to a satellite, where reception thereof by the public is only possible through an entity that is different from the one of origin.</i></p> <p><i>d. Broadcast through the airwaves or public communication via satellite of any works, that is, the act of introducing, under the control and responsibility of the broadcaster, the programme-carrying signals destined to be received by the public in an uninterrupted chain of communication that goes to the satellite and from the satellite to the Earth. The normal technical processes relating to programme-carrying signals are not considered interruptions of the chain of communication.</i></p> <p>[...]</p> <p><i>e. The transmission of any works to the public by wire, cable, optic fibre or other similar procedure, whether or not on a subscription basis.</i></p> <p><i>f. The retransmission, by any of the means cited in the preceding subparagraphs and by an entity different from the entity of origin, of the broadcast work.</i></p> <p><i>Cable retransmission means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system of an initial transmission, including that by satellite, of television or radio programmes intended for reception by the public.</i></p> <p><i>g. Broadcast or transmission, in a location accessible to the public, by means of any suitable instrument of the work transmitted over the air.</i></p> <p><i>h. Public exhibition of works of art or their reproductions.</i></p>
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⁵ The importance is measured in terms of collected revenues. In 2007, these rights accounted for 62% of total national revenues collected by the collecting societies (Source: AEVAL (2008)).

- i. Making available to the public works by wire or over the air so that any person can have access to them from the location and at the time they so choose.*
- j. Public access in any way to works included in a database, even though the database is not protected by the provisions of Book I of this Act.*
- k. The performance of any of the foregoing acts with respect to a database protected by Book I of this Act.”*

23. The remuneration rights recognised in the LPI for acts of communication to the public are those set out in the following chart:

Chart 2. Remuneration rights for acts of communication to the public recognised in the LPI

Remuneration rights for acts of communication to the public	Right of authors to a remuneration for communication of audiovisual works to the public (articles 90.3 and 90.4 of the LPI), unwaivable and inalienable <i>inter vivos</i> .
	Right to equitable remuneration of performers for communication to the public (category ex art. 20.2.i of the LPI) of phonograms or audiovisual recordings (article 108.3 of the LPI), unwaivable.
	Right to a single equitable remuneration of producers of phonograms and performers for communication to the public of phonograms (articles 108.4 and 116.2 of the LPI), except in category of art. 20.2.i of the LPI.
	Right to a single equitable remuneration of producers of audiovisual recordings and performers for communication to the public (categories art. 20.2.f of the LPI and art. 20.2.g of the LPI) of audiovisual recordings (articles 108.5 and 122.2 of the LPI)
	Right to equitable remuneration of performers for public communication of audiovisual recordings (article 108.5 of the LPI), except in categories of articles 20.2.f of the LPI and 20.2.g of the LPI.

24. The holders of intellectual property rights may assign their exclusive rights to other persons or organisations, who thereby become the owners of those rights, even though on a derivative non-original basis. This is the case, for example, of book and music publishers who, under the publishing contracts made with authors of literary or musical works, acquire the original rights of the author, who assigns them in exchange for an economic consideration.

25. Although the rightholders cannot assign their remuneration rights, this point is not devoid of some controversy, because the LPI only establishes the inalienability of remuneration rights explicitly for some of them.

26. In summary, as can be seen, the intellectual property system includes different types of rightholders, works and other subject matter, and of acts of exploitation, which makes full determination of each of the rights and of their specific characteristics highly complex. Thus, the rightholder and the type of

right thereby held in each case will depend on the type of exploitation and the type of work or subject matter over which the holder has rights. Also, for one and the same work or matter there may be a number of different persons that hold different rights.

27. For example: exclusive rights over an audiovisual work belong to the author, but, as provided in article 88.1 of the LPI, the production contract for the audiovisual work is presumed to assign to the producer the exclusive rights of reproduction, distribution and communication to the public, as well as the rights to dub or subtitle the work. But apart from those exclusive rights, the LPI also recognises a series of remuneration rights for acts of communication to the public in favour of the producer, the authors and the actors or performers. Consequently, if an audiovisual work is retransmitted, for example, in a hotel room, in theory the exclusive right would belong to the audiovisual producer, and, moreover, the author (article 90.4 of the LPI), the audiovisual producer himself (article 122.2 of the LPI) and the performers (article 108.5 of the LPI) would be entitled to remuneration for this act of public communication.
28. This multiplicity of categories of rightholders, of works and other subject matter, and of rights and acts of exploitation provided for in the LPI, which is difficult to interpret in some cases, gives rise to a complex system which on many occasions generates uncertainty for the users who exploit works and other subject matter in relation to the payments they must make and authorisations they need to obtain, greatly hindering their interaction with the holders of the intellectual property rights.

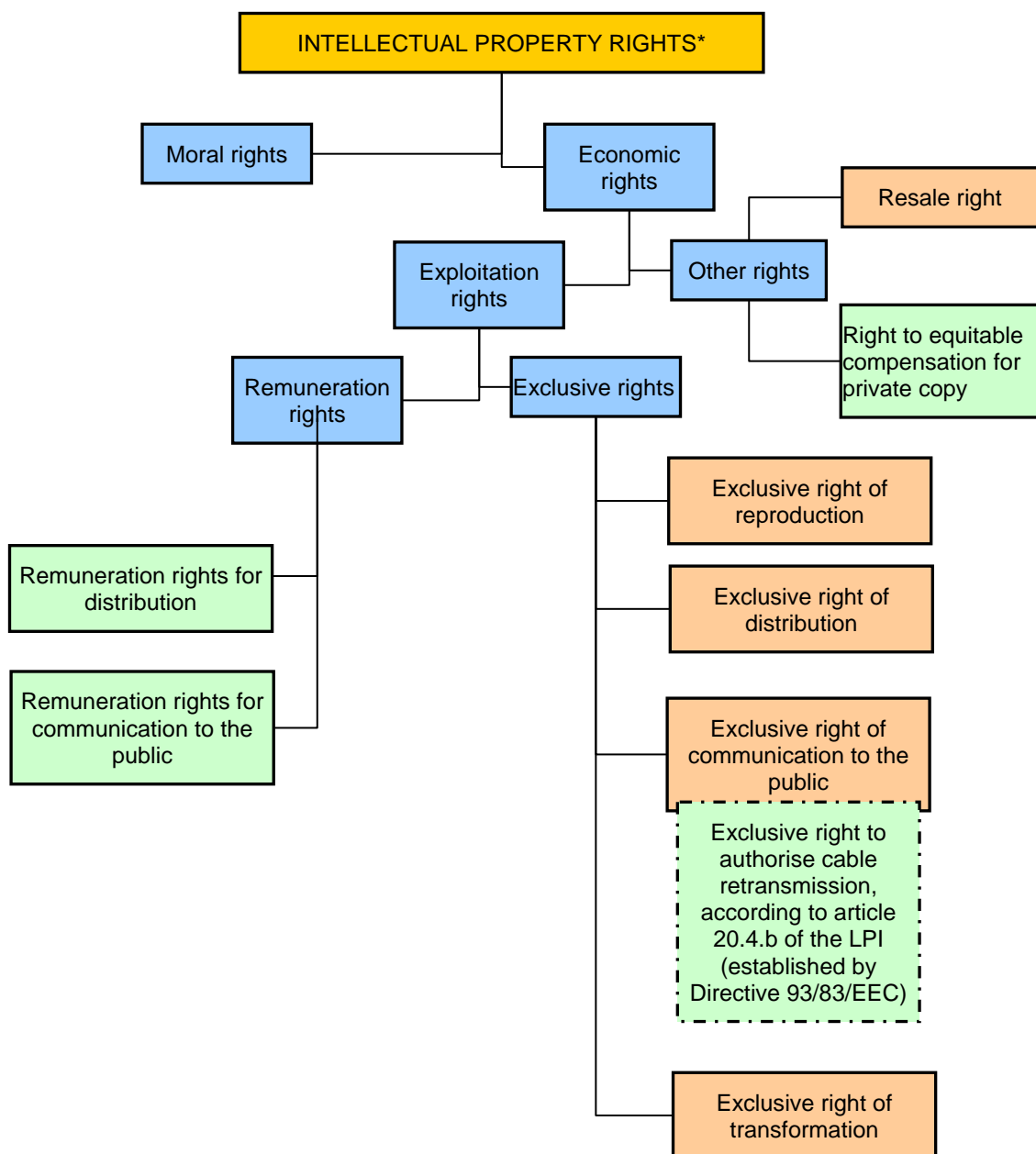
II.2 Intellectual property rights collecting societies

29. By virtue of the existence of the intellectual property rights analysed in the preceding section, when a person, company or institution (a user) exploits protected works or subject matter, that user must be authorised to do so and must make the relevant payments to which such exploitation gives rise.
30. The management of intellectual property rights is the exercise of those rights by the parties who hold them.
31. Spanish intellectual property law does not include a precise definition of the term management of intellectual property rights. According to the 2004 Communication of the European Commission on the management of copyright and related rights in the internal market, *“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. Individual rights management is the marketing of rights by individual*

*rightholders 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 rightholders”.*⁶

32. As can be gathered from the European Commission's Communication, rights management, in principle may be individual or collective. In individual management, each of the rightholders exercises his rights separately. In collective management arrangements, a collecting society represents a number of rightholders and exercises the rights for them.
33. Individual management does not necessarily imply one rightholder with a small number of works or protected matter. There are rightholders, such as large music publishers, who hold rights over a very large number of works. In this regard, it bears emphasis that the differences between rightholders with respect to the volume of works and subject matter over which they hold rights has an impact on their bargaining power vis-à-vis the entity that manages the rights in their name.
34. The LPI requires mandatory collective management through collecting societies for certain intellectual property rights, so as to preclude the individual management option for the rightholder in those cases. And, what is more, the collecting society represents the rightholder by legal mandate, that is, it can collect in the holder's name regardless of whether the latter has appointed the entity to do so.
35. The rights subject to mandatory management are basically the remuneration rights, but also the exclusive right to authorise cable retransmission (article 20.4.b LPI) and the right to equitable compensation for private copy (article 25 LPI).
36. Returning to the classification of intellectual property rights set out in the previous section, we may distinguish the rights subject to mandatory collective management:

⁶European Commission (2004).



*Green indicates rights subject to mandatory collective management.

37. IP rights collecting societies manage the rights subject to mandatory collective management and, in most cases, also manage rights subject to voluntary collective management.⁷

38. Until 1987 there was only one collecting society in Spain, the SGAE, and it managed all types of rights on a monopoly basis. After the LPI's enactment

⁷ AIE and AISGE are the only collecting societies that, *de facto*, although authorised to do so, do not manage voluntary collective management rights. In the rest of the cases, collecting societies manage voluntary collective management rights, and the predominance of these rights is greater in the case of author societies, especially the SGAE.

in 1987, and accompanying the introduction of new legal rights, new collecting societies emerged and basically took charge of managing the newly recognised rights.

39. As a result, at present Spain has eight collecting societies, which, however, do not compete in managing the same rights; instead, even though this was not imposed by the LPI, each one has specialised in managing rights that are not administered by any of the others (normally of a given group of rightholders), thus giving each of them a *de facto* monopoly in its sector.⁸ The only exception to this is the case of authors (director and screenplay writers) of audiovisual works, where there have been two collecting societies since 1999: SGAE and DAMA.

40. The eight collecting societies are:

Table 1. Collecting societies authorised by the Spanish Ministry of Culture. 2009

Name	Acronym	Year authorised	Groups of rightholders represented
Author societies			
Sociedad General de Autores y Editores	SGAE	1988	Publishers and authors of musical, audiovisual, literary, dramatic and choreographic works
Centro Español de Derechos Reprográficos	CEDRO	1988	Publishers and authors of printed works
Visual Entidad de Gestión de Artistas Plásticos	VEGAP	1990	Authors of works of visual creation
Derechos de Autor de Medios Audiovisuales	DAMA	1999	Directors-filmmakers and scriptwriters of audiovisual works
Societies of actors and performers			
Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España	AIE	1989	Musical performers
Artistas Intérpretes, Sociedad de Gestión	AISGE	1990	Actors
Societies of producers			
Asociación de Gestión de Derechos Intelectuales	AGEDI	1989	Producers of phonograms
Entidad de Gestión de Derechos de los productores audiovisuales	EGEDA	1990	Audiovisual producers

Source: prepared in house using information from the Ministry of Culture and websites and bylaws of the societies.

41. According to the LPI, collecting societies must be organised on a not-for-profit basis and be authorised by the Ministry of Culture to operate as such. The scope of the society's management, that is, the rights administered and the types of rightholders covered by its management, is set out in its bylaws, which must meet certain requirements (art. 151 of the LPI) and be submitted to the Ministry of Culture as part of the authorisation process. The Ministry of

⁸ In fact, AIE and AISGE have specialised within the same group, given that the former manages the rights of musical performers and the latter manages rights of actors.

Culture has authority to approve or reject the bylaws submitted by the society, as well as subsequent amendments thereto (article 159.2 of the LPI). The authority conferred by the LPI upon the Ministry of Culture gives that ministry very broad powers in the configuration of this sector. As will be explained further below, the margin of discretion enjoyed by the Ministry may be one of the reasons for the existence of monopoly managers of IP rights and for the compartmentalisation and segmentation of categories of rights observed.

42. The main objective of collecting societies is *“the management of exploitation rights or other economic rights, for the account and in the interest of various authors or other holders of intellectual property rights”* (article 147 of the LPI).

43. The LPI describes some of their functions rather imprecisely, and does not give an articulated systematic definition of what all their functions are. That systematisation is nevertheless done by the Ministry of Culture, which has stipulated that the functions of a collecting society are the ones set out verbatim below:⁹

- Administer the intellectual property rights conferred, subject to the prevailing legislation and to their bylaws, and exercise the intellectual property rights, either by delegation from their rightful holders or by legal mandate (rights subject to mandatory collective management). To manage the rights entrusted thereto by their bylaws, collecting societies grant users non-exclusive licenses¹⁰ to use the rights of the groups of rightholders they represent in exchange for an economic consideration.
- Establish a remuneration that is appropriate for the type of exploitation carried out and receive that remuneration as stipulated. Determining the economic consideration that users must pay to the collecting societies for the authorisations they receive is done by the societies in the form of general fees¹¹ which are not subject to prior or subsequent approval by the Ministry of Culture, without prejudice to the obligation to negotiate the fees with associations of users who wish to use the rights managed by the societies.
- Prosecute violations of rights by monitoring the use of the rights.

⁹ <http://www.mcu.es/propiedadInt/CE/GestionColectiva/Entidades.html> (consultation dated 23/03/09).

¹⁰ This means that use of a right administered by the society by a user A is compatible with that right being used by another user B.

¹¹ In this Report we will use the expression “fee” (*tarifa*). Nevertheless, it should be noted that these are not fees regulated or approved by any administrative authority or similar body, which is what is normally referred to when the term “*tarifa*” is used in Spanish. In this case, “fees” (*tarifas*) means the prices charged by collecting societies for use of their repertoire.

- In relation to large-scale utilisation, make general contracts with associations of users of its repertoire¹² and fix general fees for such use.
 - Allow enforcement of rights of a compensatory nature (for example, remuneration for private copy).
 - Distribute the net proceeds collected to the rightholders. The royalties collected are paid to the rightful holders of the IP rights after discounting certain variable percentages to cover the expenses incurred in performing these services.
 - In addition to its aim of managing rights, the collecting societies have a legal obligation to provide assistance, training and promotional services to the groups of rightholders they represent.
 - Protect and defend the intellectual property rights against the infringements that are committed, with recourse to the courts where appropriate.
44. More succinctly, it may be said that the core functions performed by a collecting society are to grant licences¹³ for use of the works and other subject matter managed; establish general fees; collect the payments deriving from exploitation of works and other protected subject matter; monitor the use made of the works and other protected materials; detect possible infringements and prosecute them; and distribute the payments collected amongst the rightholders it represents, after discounting the administrative cost. These are supplemented by the function to provide assistance and support to the rightholders which the LPI imposes as an obligation upon collecting societies.
45. Users of the protected works and subject matter are very diverse and include, amongst others, television and radio networks, wedding banquet venues, hotels, theatres, gymnasiums, bars and organisers of town festivals. Technological advances and the new forms of distributing and consuming copyrighted materials are giving ever greater importance to users who exploit those materials online. It must be borne in mind that the needs and characteristics of each user vary greatly.

¹² The LPI does not define “repertoire”, and this is a frequent point of contention between collecting societies and users. Solely for the purposes of this report, the term repertoire of a collecting society refers to the collection of intellectual property rights that it manages by legal mandate or contract. It is important to note that repertoire may refer to the rights of authors from other countries, by virtue of the agreements that Spanish collecting societies have with societies in the rest of the world or what the LPI establishes

¹³ For the purposes of this report, granting licences means both licences for exclusive rights and the contracts by which remuneration rights are exercised.

46. To classify users, three fundamental characteristics must be taken into account:

- The users' capacity to anticipate and control the use they make of the protected works and subject matter. Although this is possible for many, such as television and radio companies or users who exploit works online, some types of use are more difficult to control, for example, a radio in a bar or a television set in a hotel room. Obviously, technological progress constitutes a factor which determines the capacity to anticipate and control the use and on the cost at which this can be done.
- The possibility that the society or the rightholders can monitor, at a reasonable cost, the use made of their repertoires. This is more feasible in some cases, such as televisions, radios or online operators. But with other types of users (bars, discotheques, gyms), monitoring and tracking use is more costly. As in the previous case, technological progress is a factor with direct bearing on this monitoring capacity and on the cost at which it can be done.
- The need the users have for access to a broad repertoire in the pursuit of their commercial strategy. Some users require a very extensive repertoire, while others only need a small number of works.

47. With respect to the structure of IP rights management markets, it is important to point out that collecting societies operate in various product markets: they provide management services to the rightholders, licensing services to users and management services to other collecting societies, usually foreign¹⁴ but also Spanish ones.¹⁵ It should be recalled once again that the rightholders, but, above all, users, fall into different categories that vary significantly.

48. Due to the very structure of the intellectual property systems and to the existence of multiple rights of multiple rightholders, users sometimes have to pay royalties to nearly all of the collecting societies, because when they exploit certain works and subject matter they are using the rights of persons that belong to different categories.

49. For example, where an audiovisual work is retransmitted from a hotel room, in theory, the hotel would have to obtain authorisation to use the exclusive right of the audiovisual producer from EGEDA and pay the producer's royalty to that society. In addition, the hotel would also have to pay remuneration

¹⁴ Under the contracts with foreign entities.

¹⁵ Some collecting societies provide royalty collection services to other domestic collecting societies. For example, CEDRO performs that function for VEGAP in respect of certain rights, something that is also done by EGEDA for AGEDI and AIE or SGAE for VEGAP (see AEVAL (2008)).

rights to the societies that represent the rest of the persons with rights over the audiovisual work: authors and composers (SGAE and/or DAMA), actors (AISGE) and musical performers (AIE).

50. All of the operators to whom collecting societies provide services rely on those societies functioning effectively and efficiently.
51. This acquires special importance in the case of users, as collecting societies manage a key input for their businesses. This applies both to users who operate in traditional markets and to those who do business in new markets, such as online exploitation of copyrighted materials.
52. However, the lack of competition in these markets may generate problems. One is the application of unfair and/or discriminatory practices in setting fees. Another relates to the difficulties users face in managing their costs efficiently and in developing non-traditional markets for the exploitation of copyrighted materials.
53. These difficulties are aggravated by the multiplicity of rights and collecting societies and by the lack of clarity and adaptation to the new realities of the LPI, which, it needs be recalled, does not define in clear terms such crucial concept as *“repertoire”*, *“user”* or *“exploitation”* and has not been fully adapted to recent technological trends. The lack of definition is such that some users do not know they are users until a society contacts them to claim a royalty payment. These factors increase transaction costs, introduce uncertainty into negotiations and generate legal insecurity.

II.3 Key sector data

54. According to data from the Spanish Agency for the Evaluation of Public Policy and Quality (Agencia de Evaluación de las Políticas Públicas y la Calidad — AEVAL),¹⁶ the total number of members of Spanish collecting societies amounted to 132,528 in 2007, the largest part of which were authors and composers (109,132 or 82.3% of total members), followed by actors and performers (21,854 or 16.5%) and producers (1,542 or 1.2%). According to the historical data from the Ministry of Culture, total membership of collecting societies grew at an annual rate of 5.9% during 2000-2007.
55. SGAE plays a predominant role in this area (see Table 2), managing the rights of 70.9% of the members of collecting societies, followed by AIE (10.5%), CEDRO (9.9%) and AISGE (6.0%).

¹⁶ Unless otherwise indicated, the source of all data analysed in this section is AEVAL (2008).

56. The royalties received by collecting societies in 2007 totalled 518.9 million euros. A full 93.9% of this amount was collected in Spain, and the remaining 6.1% abroad. According to the Ministry of Culture's historical series, total revenues collected by societies grew at an average annual rate of 8.6% during 2000-2007.

57. Once again, the SGAE, with 369.1 million euros (see Table 2) is the predominant society in terms of revenue (71.1% of total revenues collected in 2007), followed by CEDRO (8.3%), AISGE (5.4%) and AGEDI (4.5%).

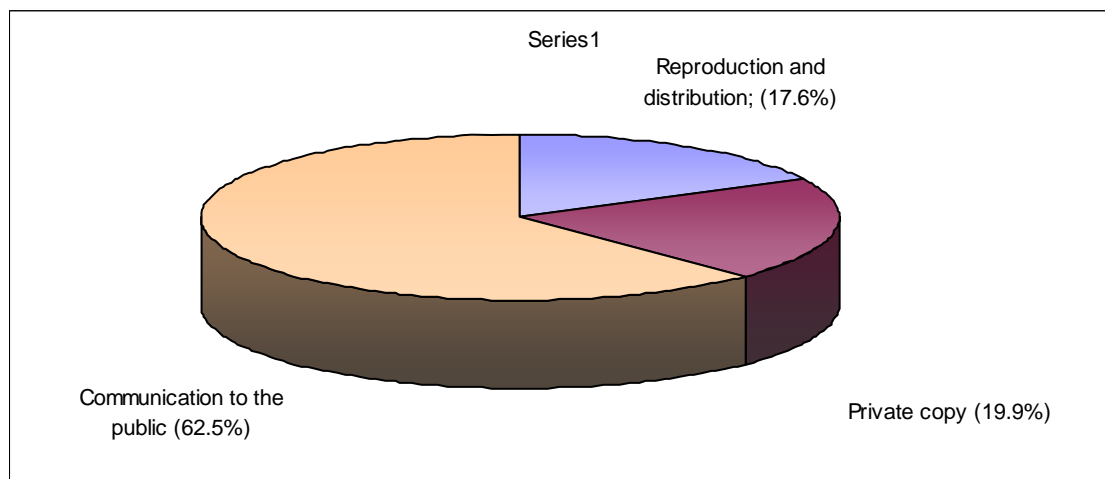
Table 2. Revenues and membership of Spanish collecting societies. 2007

	Collected revenues (in €mn)	as % of total	Members (no. of persons)	as % of total
SGAE	369.1	71.1%	93,933	70.9%
CEDRO	43.0	8.3%	13,133	9.9%
VEGAP	10.5	2.0%	1,708	1.3%
DAMA	1.0	0.2%	358	0.3%
AIE	22.4	4.3%	13,862	10.5%
AISGE	28.2	5.4%	7,992	6.0%
AGEDI	23.5	4.5%	222	0.2%
EGEDA	21.3	4.1%	1,320	1.0%
Total	518.9	100.0%	132,528	100.0%

Source: prepared in house using AEVAL data (2008).

58. The most important rights in terms of collected revenues in Spain are communication to the public (304.3 million euros; 62.5% of total revenues in 2007), followed by private copy (97.1; 19.9%) and reproduction and distribution (85.6; 17.6%).

Figure1. Distribution of revenues by type of rights, as percentage of total revenues. 2007



Source: AEVAL (2008).

59. Of the revenues collected in 2007, the collecting societies assigned 108.5 million euros, or 20.9% of the total, to administration costs (73.3 million euros) and to expenditures on assistance, promotion and training for societies' members (35.2 million euros).

60. The total revenue distributed amongst rightholders in 2007 amounted to 413.7 million euros. 87.7% of this amount was allocated to rightholders of Spanish collecting societies, while the remaining 12.3% was assigned to members of collecting societies from other countries.

61. It is important to point out that the societies generate revenue streams that are not distributed to any rightholder. That is, they collect money on behalf of a rightholder which, at the end, is not received by the rightholder. The information on this point is fairly scarce, and all of it comes from the collecting societies themselves and from their reports. According to data from AEVAL, of the average annual income for 2005-2007, 65.8 million euros (13.6%) was not assigned in the initial distribution. This percentage declines over time, as some rightholders are eventually found. Thus, the sums that wind up undistributed are approximately 4% of the total sums collected, according to AEVAL. In any event, royalties paid by users and not distributed to any rightholder accumulate over time in very considerable sums: in the case of SGAE, according to its balance sheet at year-end 2008, royalties pending distribution amounted to 164.3 million euros.

62. Collecting societies provide a key input for several sectors of the economy that use copyrighted works and subject matter in the pursuit of their activities. Table 3 gives a breakdown of total revenue collected by SGAE by

main type of user.¹⁷ As this table shows, the range of economic activities that must pay to use protected works and other subject matter is very broad, the main segments being, in royalty revenue terms, television and radio broadcasters, which combine to provide nearly 50% of the revenues collected by SGAE.

Table 3. Revenues collected by SGAE, by type of user. 2007

Categories	User	Revenues (€mn)	Share (as % of total)
Dramatic and musical arts	Dramatic arts	14.5	3.9%
	Variety shows	26.6	7.2%
	Symphonic	1.9	0.5%
Radio and cable	Public TV	77.6	21.0%
	Private TV	52.4	14.2%
	Pay TV	8.8	2.4%
	Radio	20.9	5.7%
Communication to the public	Restaurants	17.7	4.8%
	Cinemas	9.5	2.6%
	Disco bars	11.1	3.0%
	Discotheques	8.3	2.3%
	Lodging	5.5	1.5%
	Wedding halls	5.9	1.6%
	Municipal governments	5.3	1.4%
	Merchants	4.3	1.2%
	Transportation companies	1.6	0.4%
	Other	6.7	1.8%
Mechanical reproduction	Records and videos	38.4	10.4%
	Digital networks	5.6	1.5%
	Private copy	20.5	5.6%
	Other	1.1	0.3%
<i>International management</i>		24.7	6.7%
Total		369.1	100.0%

Source: prepared in house using SGAE Management Report, 2007

¹⁷ There are no data for the societies as a whole, so the SGAE data is used to approximate the aggregate figures. Data for the other societies may differ from those of SGAE, namely in the cases of CEDRO and, to a lesser extent, VEGAP, which have substantially different types of users than the other collecting societies.

III. MARKET POWER AND ENTRY BARRIERS

63. As already noted, each of collecting societies that exist in Spain manages different categories of rights, which means that no other entity manages those same rights. For each of the rights managed for each group, the society enjoys a monopoly position in the services it provides to rightholders and users.
64. The competitive pressure faced by these entities is thus negligible, which lessens their incentive to render their services to rightholders and users efficiently, and allows them to exert their market power and engage in anti-competitive practices, such as setting inequitable and/or discriminatory fees.
65. Only in one case is there competition, to a certain extent, between two entities: SGAE and DAMA compete in managing the rights of audiovisual authors (scriptwriters and directors). Although SGAE also manages rights of other types of authors (for example, music composers and playwrights), in which it holds a *de facto* monopoly, authors in the audiovisual segment do have the possibility of choosing between DAMA and SGAE to have one of them administer their rights. The user, in turn, may acquire licences for use of audiovisual works from either entity, although it must be kept in mind that each society's repertoire is different, with SGAE having a much broader one than DAMA. As a result, competition for users is necessarily very limited.
66. Both the former TDC and the CNC have on several occasions called attention to the monopoly position held by copyright collecting societies.¹⁸ The market power held by the societies and the absence of competitive pressure are explained by the combination of various factors:
- The existence of economies of scale in the management of intellectual property rights.
 - Legal entry barriers.
 - Strategic entry barriers.
67. These factors limit effective and/or potential competition from other domestic or foreign collecting societies, or the effective and/or potential competition that could be exerted by rightholders by opting for individual management of their rights.

¹⁸Specifically, attention has been called to the monopoly position of SGAE (TDC resolution of 25 January 2002 in Case 511/01 Vale Music/SGAE), EGEDA (TDC resolution of 27 July 2000 in Case 465/99 Audiovisual Intellectual Property), AGEDI (CNC resolution of 9 December 2008 in Case 636/07, Phonograms), AIE (CNC resolution of 9 December 2008 in Case 636/07, Phonograms) and AISGE (TDC resolution of 27 July 2000 in Case 465/99 Audiovisual Intellectual Property).

III.1 Economies of scale

68. One initial factor that explains the market power of collecting societies is the economies of scale that exist in the management of IP rights. When the users of a group of rightholders are the same, the formation of an entity to pool the rights and bear the high costs involved in copyright management (such as those incurred in licensing, monitoring, prosecution of infringements and royalty collection tasks) will allow a reduction in the average cost of managing the works or subject matter of that group of rightholders, thus generating economies of scale.¹⁹
69. Also, by using blanket licences, collecting societies intensify these efficiencies.²⁰ A blanket license is an authorisation to use an entire repertoire. Consequently, the monitoring tasks are made cheaper. Instead of having to track the use of each one of the works, and monitoring how each of the users uses the works and other subject matter, blanket licences allow all of the works to be monitored at the same time, since it does not matter which works are used by a user, but only if the user has a blanket license to use any of the items included in the repertoire.
70. The collecting society, in turn, can reduce the transaction costs between rightholders and users. First, it constitutes a mechanism for coordination, a place where the rightholder can be located by the user. Secondly, it reduces the costs of negotiating and obtaining authorisations. Instead of having to obtain an authorisation for each of the works to be exploited, the user obtains, with a single licence, one authorisation for all of them. And lastly, blanket licenses are sometimes claimed to offer a type of indirect guarantee against possible involuntary infringements. For example, a user who does not have a blanket license and cannot sufficiently control the use he makes of the works or other subject matter will be more likely to commit an involuntary infringement.
71. These efficiencies largely explain why collecting societies arise: taking into account that in some cases the value obtained by a user from using a work is less than the cost of managing it, it would not be viable for many rightholders to manage their rights individually in such situations. At the same time, it is essential to recall that the formation of a society allows the rightholders to fix the price of their rights collectively, thereby eliminating competition with each other and increasing their market power.
72. All the same, despite the existence of economies of scale in the management of intellectual property rights, some nuances are in order.

¹⁹ See, for example, Besen and Kirby (1989), Besen, Kirby and Salop (1992), Katz (2005) or Handke and Towse (2007).

²⁰ Katz (2005).

73. The first is that for some years now, technological progress and the spread of the Internet are lowering the costs of IP rights management, which somewhat mitigates the importance of those economies of scale and has an across-the-board effect on all of the tasks performed by a collecting society. Tasks which in the past could seem very costly (such as identifying the musical works broadcast by a radio) can now be carried out at a much lower cost.
74. The second is that the efficiency gains arising from collective management depend on the function. For example, monitoring tasks involve higher fixed costs than do authorisation tasks. And economies of scale, in turn, are more important for the management of rights in some uses (such as those carried on by bars and discotheques) than in others (such as the uses made by televisions or by companies that use copyrighted works and other subject matter online).
75. The third is that the existence of economies of scale does not render individual management unfeasible in certain cases. Although it is difficult to determine with absolute certainty the cases in which it is viable, an approximate idea can be obtained.²¹ We may say that individual management is viable in those situations where: the number of rightholders is small, locating them is feasible, the user places great value on the work or subject matter, and there is certainty as to when the copyrighted material will be used.
76. What is more, the growing degree of concentration of rights reduces the relative importance of the search and negotiation costs. And, in turn, this also affords holders a greater capacity to manage their rights. There are societies in which the degree of atomisation of the number of rightholders represented is low, such as, for example, musical works, where there are few rightholders, namely the major music publishers, that pool together large numbers of rights.²² We should also bear in mind the case of SGAE, where some 600 rightholders (1.7% of the total beneficiary rightholders²³) concentrate 75% of royalty distributions.²⁴
77. Furthermore, in areas such as online use of works and subject matter, the general reduction of management costs allowed by new technologies is

²¹ See Fels and Walke (2005), Besen (2008).

²² See Jenny and Newman (2005), Allendesalazar and Vallina (2005).

²³ There are rightholders represented by SGAE who are not beneficiaries, because their works are not used so they do not receive any collected revenues. According to AEVAL (2008), in 2007 only 37.2% of all SGAE members shared in the revenues.

²⁴ Prepared in house based from AEVAL data (2008).

making individual management viable, as it may be carried out through digital rights management (DRM) systems. Using these systems, with the very advanced technological infrastructure now available, a person can authorise the use of rights, guarantee payments and monitor and track use inexpensively and reliably. In this regard, the Directorate General for Competition of the European Commission gives an example of how the work of monitoring is transformed in an online environment, stating that contrary to the possibilities in the traditional off-line environment, in the former case *“the crucial requirements in order to be able to monitor the use of copyrights and related rights are therefore a computer and an Internet connection”*.²⁵

78. In fact, the European Commission, in its *Communication of 2004*, points out that the growing use of works and other subject matter in the digital arena and the possibility of digital management of rights may be transforming the function of collecting societies: *“digitisation has in principle empowered rightholders to individually control the licensing and royalty payment process, so that the role of collective rights management is questioned”*.²⁶
79. In any even, although it is not possible to generalise about the existence of economies of scale in all of the functions associated with IP rights management and the changes spawned by technological progress must be taken into account, where they do exist, such economies of scale may constitute a significant barrier to entry in this sector that contributes to reinforcing the market power held by the incumbent societies.
80. A new collecting society that wants to enter and compete in this market may face a comparative cost disadvantage with respect to the incumbent. If the latter has lower average management costs than the potential new entrant, the rightholders will have less incentives to turn to the entrant, as they will have a better chance of obtaining more income from their works with the incumbent society (as they spread the fixed costs of managing those rights with a larger number of rightholders). Thus, all other things being equal, the larger a society's repertoire, the less likelihood of it being challenged by a new entrant.²⁷
81. Nevertheless, the existence of certain economies of scale does not mean that there can be no competition in the provision of services to rightholders

²⁵ Commission Decision of 8 October 2002 in case COMP/C2/38,014 — IFPI “Simulcasting”.

²⁶ European Commission (2004).

²⁷ Another factor in the emergence of a new society, is how the established one distributes the collected revenues. If one group of rightholders (rightholders A) believes the incumbent society is giving them less than they deserve and more to another group of rightholders (rightholders M), this could spur rightholders A to form another entity, which will be less efficient in terms of cost per work but which will nonetheless make up for income they would forego by continuing with the incumbent society.

and/or users.²⁸ For example, in the United States there are three collecting societies that compete in managing the right of communication to the public of works by music composers and publishers: ASCAP, BMI and SESAC. They have been competing against each other for decades,²⁹ and it is important to note that SESAC only accounts for 5% of the market.

82. In Spain, there is a similar case, albeit a relatively recent one. SGAE and DAMA compete in managing the works of authors in the audiovisual arena, with the former managing a much broader repertoire than the latter. However, there are rightholders who have preferred to have DAMA manage their rights. In any event, given that the authors are divided up by the two entities and that they have repertoires of such different sizes, the competition for users must necessarily be very limited. For this reason, the model based on a distribution of rightholders amongst the collecting societies would not appear to be the best option: users are obliged to negotiate with all of the societies if they want access to the repertoire of all authors and this means that competition for users is not truly promoted.
83. Competition requires reinforcing the capacity to choose and act not just for users, but also for the holders of the rights. Notably, there are initiatives that show competition is possible. During recent years, the European Commission has taken a number of decisions aimed, precisely, at promoting competition between collecting societies in the European Union, by acting to remove certain restrictions on the provision of services to rightholders and users that had been established by the societies through arrangements that have strengthened their national monopoly position and have resulted in a national segmentation of the European market for collective copyright management. Most of these initiatives have focused on rights management in the online domain, where the European Commission's ultimate objective is to prevent collecting societies from extending the monopoly structures they have traditionally established in the off-line environment.
84. Those initiatives include the 2005 Recommendation,³⁰ which is intended to broaden the rightholders' capacity to choose which European Union collecting society manages their rights online and to facilitate the existence of pan-European licences that foster the development of new business models that use works and other subject matter in the European online environment.

²⁸ Katz (2005).

²⁹ Source: consultation to the US Department of Justice.

³⁰ Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

85. Since the 2005 Recommendation, several initiatives have been put in practice or announced to offer pan-European licences for use of musical works in the online environment. The main ones include:³¹ Alliance Digital is a platform formed by Britain's MCPS-PRS to offer licences for a repertoire of small and medium music publishers; the French entity SACEM and Universal Music Publishing Group (UMPG) have signed an agreement to license the UMPG repertoire; Germany's GEMA and the British MCPS-PRS have formed Central European Licensing and Administration Services (CELAS) to offer licences for the Anglo-American and German repertoire of the music publisher EMI; Warner Chappell Music has started up the initiative Pan-European Digital Licensing (PEDL), through which it confers non-exclusive management of its catalogue to the German collecting society GEMA, Sweden's STIM, Great Britain's MCPS-PRS and SGAE.³² Many of these initiatives are open to including other repertoires.

86. These initiatives are articulating a future European framework for competition in the management of rights in the online environment, even though problems of transparency regarding repertoires and lawsuits between societies are hindering its development and proper functioning.³³ On the other hand, users concerned have stated that none of these initiatives is yet effectively operational on a pan-European scale.

87. The Directorate General for Competition of the European Commission, in turn, has issued a series of decisions aimed at spurring competition between collecting societies by removing certain barriers to competition introduced by collecting societies through their reciprocal representation arrangements. These decisions relate to cases involving certain conducts performed by collecting societies which were finally settled with the submission of concrete commitments or the imposition of certain obligations upon societies.

- Decision on the Simulcasting Agreement of October 2002.³⁴ The aim of this decision is to promote competition between 18 European Union collecting societies managing phonogram producers' rights, in the domain of multi-repertoire and multi-territorial simulcasting licences.³⁵ Before this decision, these societies had an agreement to grant those licences but stipulating that users in each country could only obtain licenses from the collecting society established in their country. As a

³¹ European Commission (2008).

³² <http://www.wmg.com/news/article/?id=8a0af8121ca10443011cadd6a8a51218> (consultation dated 16/03/09).

³³ European Commission (2008).

³⁴ Commission Decision of 8 October 2002 in case COMP/C2/38,014 — IFPI "Simulcasting".

³⁵ Simulcasting is the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their single channel and free-to-air broadcasts of radio and/or TV signals.

result of the decision, the societies eliminated this condition from their agreements, so that commercial users can obtain a licence from any collecting society in the European Economic Area that participates in the reciprocal representation arrangements. The European Commission allowed each national society to set the price at which it would sell its repertoire, which means that competition between societies would only be based on their administration costs.

- Decision on the Cannes Extension Agreement of October 2006.³⁶ This decision aims to promote competition between 13 European Union copyright collecting societies in the granting of mechanical copyright licences for musical works, a right used by phonogram production companies. Prior to this decision, the Cannes Extension Agreement, signed by 15 European copyright collecting societies and five music publishers, included clauses that prohibited the collecting societies from entering the music publishing and/or record production business and hindered the granting of rebates (paid out of the administrative costs) in the context of a central licensing agreement between societies. As a result of the European Commission's observations, the 18 agents participating in the agreement decided to make certain changes: they deleted the clause preventing collecting societies from entering the music publishing and/or the record production markets, and reformulated the clause referring to rebates so that any collecting society may apply rebates, provided this is decided by a competent body within the society and with no need to obtain the consent of each relevant member.
- CISAC Decision of July 2008.³⁷ The purpose of this decision is to remove certain constraints on competition that 24 European Union copyright collecting societies had introduced through their representation arrangements, with the aim of promoting competition in the services provided by societies to users and rightholders in relation to the right of communication to the public via satellite, cable and the Internet. According to the CISAC Decision, the agreements included membership clauses (which prevented free choice and mobility of rightholders between European Union societies) and exclusivity clauses (that restricted competition between societies in licensing users, thereby ensuring a national monopoly in each country). Furthermore, according to the European Commission, the societies had engaged in a concerted practice consisting in limiting the mandates to the territory of each of the national societies. The European Commission obliged the collecting societies to eliminate the conducts that were restrictive of competition and put an end to the concerted practice.

³⁶ Commission Decision of 4 October 2006 on case COMP/C2/38.681 — The Cannes Extension Agreement.

³⁷ Commission Decision of 16 July 2008 in case COMP/C-2/38.698 — CISAC.

III.2 Legal entry barriers

88. The existence of legal entry barriers in the LPI is a significant factor in limiting the competitive pressure faced by collecting societies and strengthens their market power. Although the LPI is not incompatible with the existence of collecting societies that compete against each other, the truth is that it contains provisions which favour the current market configuration, that is, a series of collecting societies holding a monopoly position. In addition, the LPI provides the Ministry of Culture with broad powers, establishing an authorisation process that allows the Ministry to protect the monopoly management of certain categories of rights that collecting societies have set up, in most cases, in their very bylaws.

89. In this regard, it is important to note that the Omnibus Law,³⁸ enacted to transpose the Services Directive into Spanish law, has not introduced any significant change on this terrain.

Collecting societies must be not-for-profit entities

90. The LPI lays down the main requirements to be a “legally incorporated” IP rights collecting society. First, it must be organised on a not for profit basis (article 147 of the LPI) and, second, it must comply with a number of requirements regarding its bylaws.³⁹ These two requirements make it highly

³⁸ Act 25/2009 of 22 December 2009 amending diverse laws to adapt them to the Act on free access to and exercise of service activities.

³⁹ Prior to the approval of the Omnibus Law, article 151 of the LPI stipulated that bylaws of collecting societies must lay down:

- “1. The name, which cannot be the same as that of other entities, nor so similar as to give rise to confusion.
2. The object or purposes, specifying the rights administered, with no activity beyond that of protecting intellectual property rights.
3. The classes of rightholders covered by the management activity and, if applicable, the different categories of holders for purposes of their participation in the administration of the collecting society.
4. The conditions for acquiring and forfeiting membership. In all events, members shall be holders of rights of those to be managed by the society and shall not number less than ten.
5. The rights of the members and, in particular, the voting rules, which may be established taking into account weighting criteria that reasonably limit plural voting. On matters involving dismissal of members for disciplinary reasons, voting shall be done on an egalitarian basis.
6. The duties of members and their disciplinary regulation.
7. The society's organs of governance and representation, and their respective powers, as well as the rules on calling meetings, quorums and functioning of collegial bodies, with express prohibition on adopting resolutions on matters not set out on the meeting agenda.
8. The procedure for electing the managing members.
9. The initial assets and projected funding.
10. The rules governing distribution of the royalties collected.
11. The rules for supervising the society's economic and financial management.
12. The application of the net assets in the event of liquidation of the society. In no event, may the net assets be distributed amongst the members.”

The change introduced by the Omnibus Law leaves article 151 practically unchanged, although it does allow the societies to carry on other activities beyond the management of intellectual property rights, provided they are related to

unlikely that a collecting society will be organised as a mercantile undertaking,⁴⁰ so that practically all collecting societies have been organised as associations. This is “curious” when considering that these are legal entities genetically predisposed by law to carrying on such a typical business activity as is the commercial management of economic rights.

91. These two conditions reduce the possibilities of other operators entering these markets. Until the enactment of the Omnibus Law, the LPI did not mention the objective it sought to achieve by introducing these obligations; nor did it offer any explanation regarding the reasons there might be for introducing the aforesaid restrictions.
92. According to the Services Directive and its transposition into Spanish law (the Act on free access to and exercise of service activities), the inclusion of restrictions of this kind must satisfy the requirements of non-discrimination, necessity and proportionality. In addition, the law transposing the Directive makes explicit reference to the obligation of the service provider to be incorporated as a not-for-profit entity, and establishes that its inclusion must be justified by reasons of public interest.
93. The Omnibus Law's recent reform of the LPI has maintained this restriction, simply saying that it is necessary “*in order to ensure protection of intellectual property*”, but offering no explanation as to what causal relation may exist between that objective and the not-for-profit requirement.
94. The CNC is of the view that there are no reasons that justify requiring that a collecting society must be organised as a non-profit entity. While it is true that intellectual property laws in certain countries also impose this obligation, there are foreign collecting societies that are organised as for-profit entities; for example, the US copyright collecting society SESAC, which has been operating nearly 80 years.⁴¹ There are also other sectors of activity, unrelated to intellectual property, in which the achievement of certain public interest objectives is important but where the operators are not required to be organised as not-for-profit entities. Furthermore, there is no legal concept of not for profit, and it is highly questionable that non-pursuit of profit is

the entity's cultural sphere and that the not-for-profit requirement is fulfilled. From the standpoint of competition, this change is as insignificant as the rest of the modifications introduced by the Omnibus Law in the LPI.

⁴⁰ Nevertheless, according to the Spanish Public Limited Companies Act (Ley de Sociedades Anónimas) and Private Limited Companies Act (Ley de Sociedades de Responsabilidad Limitada), it is possible to incorporate public and private limited companies that are not for profit, because the mercantile nature of the organisation is not determined by its object, but by the typically mercantile form of the public or private limited company.

⁴¹ SESAC was created in 1930. It has been run on a for-profit basis since 1931. It manages the rights of songwriters and publishers of musical works, in competition with two other entities: ASCAP and BMI. In 1992 it was purchased by an investment group, and its share of the total income of the three societies went from 1% to 5% at present. Its repertoire includes 200,000 musical compositions. (Sources: US Department of Justice; <http://www.sesac.com/aboutsesac/about.aspx> (consultation dated 13/04/09)).

exactly the same as the impossibility of distributing profits in the form of dividends to shareholders.

95. In addition, the European Commission holds that, in the domain of collective management of copyright and related rights, there is no relation between legal form and efficiency. As stated in the *2004 Communication* on the management of copyright and related rights in the internal market: *“Regarding their status, collecting societies may be corporate, charitable, for profit or not for profit entities. The consultation process demonstrated that apparently, the efficiency of a collecting society is not linked to its legal form”*.⁴²

Requirement of prior authorisation from the Ministry of Culture

96. The first paragraph of article 147 of the LPI stipulates that *“legally constituted entities that have an establishment in Spanish territory and propose to engage, in their own name or in that of another, in managing exploitation rights or other economic rights, for the account and in the interest of several authors or other holders of intellectual property rights, must obtain the relevant authorisation from the Ministry of Culture, for the purpose of ensuring adequate protection of intellectual property”*.
97. The authorisation requirement restricts the establishment of operators in the market and, depending on the conditions they must fulfil to obtain it, may be of greater or lesser importance from the standpoint of competition.
98. As in the preceding case, prior to the approval of the Omnibus Law, the LPI neither explicitly set out any objective that was pursued with the introduction of the prior authorisation requirement, nor offered any explanation of the reasons for introducing that obligation.
99. Here again there applies the Services Directive, which restricts authorisation schemes to those cases in which they are justified by an overriding reason relating to the public interest and the system is non-discriminatory and complies with the principles of necessity and proportionality.
100. But, once again, the Omnibus Law maintains the authorisation scheme, and only mentions the aim of *“ensuring adequate protection of intellectual property”*. As in the previous case, in the opinion of the CNC, a mere mention of the objective does not constitute a justification, because it does not in and of itself imply there is a causal nexus between the objective and the restriction introduced, in this case, the prior administrative authorisation.

⁴² European Commission (2004).

101. In any event, the most restrictive aspect of the authorisation consists of the requirements that have to be met in order to obtain it. To the extent those requirements are not justified and introduce uncertainty, arbitrariness and legal insecurity, the restriction will be more severe.

102. To obtain the authorisation, article 148 of the LPI in force until the enactment of the Omnibus Law established a series of requirements and a set of criteria the Ministry of Culture was to use when assessing if the applicant met those requirements. With regard to requirements, the LPI provided:

“1. The authorisation referred to by the preceding article may only be granted if all of the following conditions are met:

a. The applicant entity's bylaws meet the requirements laid down in this Title.

b. The data submitted and information obtained indicates the applicant entity meets the necessary conditions for ensuring efficient administration of the rights whose management is to be entrusted thereto in all of the national territory.

c. The authorisation favours the general public interest of protecting intellectual property in Spain”.

103. On the assessment side, until the Omnibus Law came into effect, article 148 of the LPI stipulated that *“2. To evaluate fulfilment of the conditions laid down in subparagraphs b and c above, particular regard will be had to the number of rightholders who have committed to have their rights managed by the applicant, if authorised, the volume of potential users, the suitability of its bylaws and resources for achieving its purposes, the possible effectiveness of its management abroad and, if applicable, a report from the already authorised collecting societies”.*

104. The Omnibus Law introduces insignificant changes in article 148.1 and eliminates some of the assessment criteria. In the opinion of the CNC, however, the reforms introduced are clearly insufficient to solve the competition problems generated by these requirements.

Requirements for obtaining the authorisation

105. In relation to effective administration of the rights and that the authorisation should favour intellectual property interests, both requirements seem to be objectives more than conditions. And they seem rather unclear and subjective. Certainly their meaning is not clear, nor is the way in which an

applicant could demonstrate that these “requirements” are met in order to begin functioning as a collecting society. Lastly, they show the current legal's framework distrust of the market's ability to organise the collective management of IP rights. Not only does it prevent IP rights management from being carried on by for-profit entities with a commercial vision, it also stipulates that this activity is to be organised by a government ministry, instead of letting the market decide how many operators there should be and whether they are efficient or not.

106. The lack of clarity of these requirements introduces uncertainty, which can serve as an entry barrier for new operators and undercut competition. And the margin of discretion these requirements leave to the Ministry of Culture is very broad. It is sufficient that the ministry considers that a potential new competitor will not pursue its activity efficiently, or that its entry will not be favourable to the general interest in protecting intellectual property, to deny the authorisation and thus prevent competition through executive fiat.
107. In short, even though the Services Directive demands that the requirements for an authorisation process must be clear and objective, the Omnibus Law has maintained these requirements without significant changes, so that they will continue hindering competition in this sector. This is particularly worrisome when taking into account that the authorisation system designed by the LPI has been a key factor in consolidating the monopolies held by each of the collecting societies over a given type of IP rights.

Criteria for assessing the requirements

108. The criteria envisaged in the current LPI for evaluating fulfilment of the efficiency and IP protection requirements do not bring any greater clarity, transparency or objectivity; nor do they shed any more light on the necessity and proportionality of the requirements.
109. In this case, the Omnibus Law has eliminated or modified some of the criteria appropriately, in the opinion of the CNC (some of them were requirements directly prohibited by the Services Directive). This is the case of the assessment criteria referring to the “*number of rightholders who have committed to have their rights managed by the applicant*”, “*the volume of potential users*” and “*a report from the already authorised collecting societies*”.
110. In any event, it must be stressed that their negative effects on competition in this sector have been present until the recent enactment of the Omnibus Law. Any one of them—for example, the need to have a sufficient critical mass of rightholders, a sufficient number of customers or the acquiescence of entrenched competitors—underscores that the

111. Despite these modifications, the Omnibus Law leaves untouched other LPI criteria for assessing fulfilment of the requirements which the CNC believes generate serious competition problems because they hinder entry by new operators inappropriately and without justification. The criteria are as follows: *“the capacity for viable management of the rights entrusted”, “the suitability of its bylaws and material resources for achieving its purposes”* and the *“possible effectiveness of its management abroad”*.
112. It is the CNC's view that the criteria that remain in the Omnibus Law are unclear and subjective, and thus generate uncertainty and have a negative impact on competition. Furthermore, all of the criteria call on the applicant to demonstrate, before it enters the market, that it will be efficient and effective. This would seem to be rather disproportionate. In addition, the allusion to viable management could be construed as an economic test, which is prohibited by the Services Directive, if the operator's viability is made to depend on the existence of demand in the market.
113. Ultimately, the lack of clarity and subjectivity in the requirements and the criteria analysed that remain in the LPI leave the Ministry of Culture with a margin of discretion that has not been used to favour effective competition in the IP rights collective management markets. In this regard, it should be recalled what is provided in article 10 of the Services Directive, regarding the conditions for granting authorisations, specifically, in subparagraph 1, which reads: *“Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner”*.

Mandatory collective management

114. The legal entry barriers discussed above (i.e., the imposition of a specific legal form and the prior administrative authorisation requirement) are constraints on competition that limit competitive pressure from other collecting societies. Mandatory collective management, in turn, constitutes an obstacle for individual management and, therefore, prevents entry and limits the competitive pressure exerted by rightholders.
115. Preventing rightholders from managing their rights individually entails forcing them to obtain these services from a collecting society. This creates a captive demand for collecting societies, which hold a monopoly position and, what is more, in these cases represent the rightholder by legal mandate. This arrangement can give rise to agency problems between the rightholder and the collecting society, which appear when

there are conflicts of interest between the agent (the collective manager) that provides services and the rightholder. The ensuing problems may arise during negotiations or in the establishment of fees. For example, the society may prolong negotiations with users longer than what a group of rightholders might be willing to accept. Or, the pricing levels may not satisfy the preferences of rightholders that the society represents.

116. As already pointed out, the rights subject to mandatory collective management are basically remuneration rights, but also include the exclusive right to authorise cable retransmission (article 20.4.b LPI) and the right to equitable compensation for private copy (article 25 LPI).
117. Rights for which collective management is voluntary are all of the exclusive rights (except the exclusive right to authorise cable retransmission, article 20.4.b LPI) and the resale right (article 1 of Act 23/2008).
118. Now, the imposition of the collective management obligation for the exclusive right to authorise cable retransmission stems from a European Union Directive. Specifically, as indicated in article 9.1 of Directive 93/83/EEC of the European Parliament and of the Council of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission: *“Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society”*.
119. In no other case is the imposition of the collective management obligation a result of any EU Directive.⁴³ What is more, in those cases where a European directive mandates optional collective management, Spanish lawmakers have opted for imposing mandatory collective management. For example:
 - The right to equitable remuneration for rental that is held by authors (90.2 LPI) and by artists and performers (109.3 LPI) has its origin in Directive 92/100/EEC of the European Parliament and of the Council of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. One of the whereas clause establishes that *“it is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must retain the possibility to entrust the administration of this right to collecting societies representing them”*. And that Directive, in turn, provides in article 4.3 that *“The administration of this right to obtain an equitable remuneration may be*

⁴³ Marín López (2007).

entrusted to collecting societies”, and in article 4.4 that “Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed”. So, though the Directive does not mandate mandatory collective management,⁴⁴ the LPI does impose it.

- The right to a single equitable remuneration for producers of phonograms and performers for the communication of phonograms to the public (articles 108.4, 108.6, 116.2 and 116.3 of the LPI) likewise has its origin in the aforementioned Directive. Nevertheless, in this case, too, the Directive does not impose mandatory collective management, but the LPI does.

120. Even though the copyright owner should be able to manage his rights individually if there is no objective justification for prohibiting this, it is important to indicate one reason why he would want to opt for individual management of this rights. The main one is that he may feel he could get more income from the works or other subject matter by administering those rights individually. First, the rightholder may feel the collecting society is not giving him enough for the copyrighted material. Or he may believe the society's pricing policy is weakening the dissemination of his work and therefore hindering its popularity and his career development.
121. But the LPI does not address the reasons for imposing mandatory collective management of certain rights, that is, it gives no justification for why it restricts the individual freedom of the rightholders and why it retains management of the rights to the collecting societies.
122. One might think that the collective management obligation is imposed to protect the copyright owner in some way, to ensure he receives his payments. But if collective management were voluntary, the rightholder would still have the option to confer the management of his rights to a collecting society: if he felt unprotected, he could seek protection through the society. The mere supposition that rightholders would decide to opt for collective management cannot be taken as a justification for making it mandatory, for if this was the optimum arrangement for the agents involved, it could arise under a voluntary collective management scheme.
123. Furthermore, it should not be overlooked that, for this same situation, the EU Directives do not impose mandatory collective management, and that in relation to the resale right, which resembles a remuneration right more than an exclusive right, collective management is voluntary.⁴⁵

⁴⁴Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, which repealed Directive 92/100/CEE, continues to read the same way as regards the non-mandatory nature of collective management.

124. To summarise the analysis regarding legal entry barriers, although the LPI does not explicitly impose the existence of monopoly managers of IP rights, it does include diverse legal restrictions that hinder the entry of new operators. Furthermore, an examination of the legal architecture of the LPI for collecting societies reveals the lawmakers had monopolistic collecting societies clearly in mind, because only from this perspective could any justification be found, amongst others, for the contracting obligations imposed by articles 152 and 157.1 on the collecting societies,⁴⁵ which are analysed in depth further ahead. In addition, the authorisation scheme contributes to strengthening those monopolies in the management of intellectual property rights. All of these factors make the LPI a legal framework that is very restrictive of competition and amplifies the negative effects of the entry barriers intrinsic to the economic nature of intellectual property rights, barriers which of their already own generate a trend to concentration in the market.

III.3 Strategic entry barriers

125. There are other entry barriers that stem neither from the economic nature of IP rights collective management nor from the LPI. Instead, they have been erected by the collecting societies in the pursuit of their activity, specifically, through certain clauses in the reciprocal representation arrangements with other foreign collecting societies, through determined practices in the contracts with rightholders, through the application of fees unrelated to actual use and through a lack of transparency regarding the repertoires actually managed.

⁴⁵ Article 1 of Act 3/2008 of 23 December 2008 on the resale right for the benefit of the author or an original work of art provides that “the authors of works of graphic or plastic arts, such as paintings, collages, drawings, etchings, prints, lithographs, sculptures, tapestries, glass objects, photographs and video art pieces will be entitled to receive from the vendor a share of the price of all resales after the initial assignment made the author. The specimens of art works covered by this right that have been done by the author himself or under his authority shall be considered original art works. Those specimens will be numbered, signed or duly authorised by the author.” According to the preamble of Act 23/2008 “our legal system’s option of voluntary collective management of the resale right is maintained. The rightholders will therefore be free to choose to entrust the IP management to a collecting society or to exercise their rights individually”. This right resembles a remuneration right, as it does not allow the author to authorise the resale, but does oblige the reseller to pay royalties to the author, according to the prices set in Act 3/2008.

⁴⁶ Article 152. *Obligations to administer the intellectual property rights conferred*
The collecting societies are obliged to accept the administration of copyright and other intellectual property rights entrusted thereto according to their object or purposes. They shall discharge that responsibility subject to their bylaws and other applicable rules in this respect.

Article 157. *Other obligations*

1. The collecting societies are obliged to:

- a) Contract with whomever so requests, unless there is justified cause for refusal, the grant of non-exclusive authorisations of the rights managed, on reasonable conditions and on a remunerated basis.
- b) Establish general fee schedules that determine the remuneration required for using their repertoire, which must envisage reductions for not-for-profit cultural entities.
- c) Make general contracts with associations of users of their repertoire, provided they so request and are representative of the sector in question.

126. Barriers of this kind are termed strategic restrictions. As with regulation-induced barriers, strategic barriers lessen the competitive pressure faced by collecting societies, either by reducing the likelihood of other entities competing against them or by decreasing the possibilities of individual management. It is very important to note that in sectors with significant economies of scale, the anti-competitive effect of strategic barriers (such as, for example, the establishment of obstacles to the rightholders switching between societies) is greater.

Clauses in the reciprocal representation agreements with collecting societies from other countries

127. Collecting societies reach reciprocal representation agreements with collecting societies from other parts of the world. The fundamental objective of those agreements is to have the Spanish society's repertoire managed in other countries by the collecting societies there and the repertoire of the foreign society managed in Spain by its local counterpart.
128. Nevertheless, in some cases collecting societies include clauses into their agreements that have worked to strengthen their territorial monopolistic power. Note that the LPI does not formally regulate the contracts collecting societies reach with foreign societies. Until recently, it confined itself to stipulating that the societies had the obligation to report such agreements and send them to the Ministry of Culture.⁴⁷
129. In relation to this issue and, in particular, in specific reference to the right of cable, satellite and online communication to the public,⁴⁸ the European Commission issued a decision in 2008, the aforementioned CISAC Decision⁴⁹. The decision obliges 24 European copyright societies, including Spain's SGAE, to remove membership and exclusivity clauses from their reciprocal representation agreements. It also orders an end to the concerted practice of imposing territorial delineations on the management mandates that limit them the national territory of the other society. The European Commission wants to remove these restrictions in order to promote competition between European collecting societies in the services they provide to rightholders and users. It also seeks to eliminate

⁴⁷ This is what was provided in article 159.3 of the LPI, but the judgment 196/1997 of the Spanish Constitutional Court declared this unconstitutional because it was contrary to the constitutional division of powers between the central State and the regional governments (Autonomous Communities).

⁴⁸ The decision covers these types of exploitation because the case stemmed from a complaint filed by the RTL communication group and Music Choice, a provider of music over the Internet.

⁴⁹ Case COMP/38.698 - CISAC Agreement, July 2008. 153. CISAC is the International Confederation of Societies of Authors and Composers. The CISAC decision runs along the lines followed by the Commission in the Simulcasting Decision (2002) and in the Cannes Extension Agreement Decision (2006), discussed further above, seeking to promote competition between collecting societies in the services they provide to users.

barriers that are impeding the free development of the market in the online communication of musical works. The Commission takes the view that the current system forces users who exploit works simultaneously in various territories to negotiate with each of the collecting societies established in those territories. This creates a considerable obstacle to the creation of a single market in the online environment.

130. On the one hand, the membership clauses stipulate that no collective management society can *“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.”*⁵⁰
131. These clauses restrict competition between collecting societies. First, they prevent copyright owners from joining or switching to another collecting society, or from simultaneously belonging to different societies for the administration of their rights in different territories within the European Economic Area (EEA). Consequently, this restricts competition between collecting societies in the management services they provide to rightholders and create captive demand for the national monopolies that administer these rights. Second, they have contributed and contribute to nationalising, compartmentalising and differentiating the repertoires of each society, thereby undercutting the possibilities of greater competition in providing licensing services to users.⁵¹
132. On the other, the exclusivity clause implies that reciprocal representation agreements are exclusive arrangements. If Spanish collecting society E manages the repertoire of a series of foreign collecting societies from countries X, Y, Z in Spain, then E will be the only entity that manages those rights. The clause therefore *“prevents a collecting society from licensing its own repertoire in other territories and from allowing an additional collecting society to represent the same repertoire within the territory of the domestic collecting society.”*⁵²
133. Exclusivity clauses favour the existence of a national monopoly in each country, that is, they reduce the possibilities of other entities entering the

⁵⁰ Summary of Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C-2/38.698 — CISAC).

⁵¹ As stated in the Commission Decision on Case COMP/C-2/38.698 — CISAC: *“The clauses are liable to limit the repertoires of each collecting society to the rights of right holders of the same EEA country, thereby rendering the repertoires more complementary than would otherwise be the case. Therefore, the restrictions are liable to reduce potential competition between collecting societies on the licensing of their own repertoires. [...] Without the membership restriction this distinction by nationality is less likely to exist, and this would potentially render the repertoires more homogeneous in the long term”*.

⁵² Summary of Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C-2/38.698 — CISAC).

domestic market because they mean that one and only one society in each country will manage the repertoire of entities from other countries. At the same time, a domestic society seeking to compete with the national incumbent will not be able to offer a repertoire that includes that of other foreign collecting societies, a factor that is liable to make the potential entrant's repertoire less attractive than the incumbent's for some users.

134. Lastly, in the CISAC Decision the Commission held that collecting societies were limiting the mandate of foreign entities to the national territory of each. That is to say, if domestic collecting society E grants management of its repertoire to the entity in country Y, the latter can only manage E's repertoire in country Y and nowhere else. Consequently, competition between societies in licensing users is limited.
135. The CISAC Decision affects Spain's SGAE. Nevertheless, many other Spanish collecting societies include similar clauses in their representation agreements with foreign entities.⁵³ The analysis carried out by the CNC based on its consultations with the Spanish collecting societies and on the study of their model representation agreements concludes that most of these entities sign those agreements on exclusive terms. In the cases of AGEDI,⁵⁴ AISGE, DAMA and VEGAP, the agreements are subject to exclusivity, which means the Spanish entity is the only one that can collect royalties in Spain on behalf of the foreign society.
136. With respect to the membership clauses, the general rule is that they are not included as such, although there are some references to the members of each of the collecting societies party to the agreement. In the cases of the CEDRO, DAMA and VEGAP contracts, the bilateral agreements include clauses in which the societies undertake not to communicate directly with the members of the other and, if such communication is carried on, to conduct it using the other society as intermediary.
137. Regarding the necessity or justification of these clauses, it is important to note that many collecting societies, including SGAE, accept *de facto* breaches of these conditions in certain cases. Since 2008, SGAE has belonged to the initiative organised by Warner Chappell Music (the music publisher of the multinational Warner Music Group) called Pan-European Digital Licensing, organised to confer management of the Warner/Chappell catalogue on a non-exclusive basis to the European collecting societies that accept the terms of the agreement. The agreement implies that various European entities (SGAE amongst them) may simultaneously

⁵³ According to a European Commission study (see European Commission 2005), agreements between authors, producers and performers of different countries in the European Union have traditionally included clauses that restrict competition between entities in the services they provide to users and rightholders.

⁵⁴ Except in the simulcasting, webcasting and podcasting categories, which are not subject to exclusivity.

manage the Warner/Chappell catalogue and license its use throughout Europe.⁵⁵

138. In the opinion of the CNC, the European Commission's decisions aimed at favouring competition between European collecting societies in their reciprocal representation agreements have important pro-competitive effects.

Contractual practices in the contracts with rightholders

139. The LPI regulates in very general terms the duration and scope of the contract by which the collecting society and the rightholder agree the terms and conditions of the management service provided by the former to the latter⁵⁶ If these markets were characterised by greater competition, this regulation could possibly be considered sufficient. But taking into account the sizeable market power held by collecting societies, the regulatory framework makes it possible for those entities to exploit their monopoly position, which has allowed them to develop contractual practices that limit competitive pressure.
140. Some of the characteristics of the contracts with rightholders,⁵⁷ concerning issues such as their duration, scope and exclusivity, may act as barriers to entry by new operators by reducing their possible spheres of action.⁵⁸

Duration

141. The contracts usually have a lengthy term,⁵⁹ the same as occurs with the minimum notice periods, although there are differences from one society to another, as can be seen in Table 4.

⁵⁵ <http://www.wmg.com/news/article/?id=8a0af8121ca10443011cadd6a8a51218> (consultation dated 16/03/09).

⁵⁶ Article 153 of the LPI is where contracts with rightholders are regulated. It reads:

"1. Management of the rights will be entrusted by the rightholders to the entity by signing a contract with a duration of not more than five years, renewable indefinitely, and which shall not impose an obligation for management of all types of exploitation or for all of the future works or output.

2. The bylaws of the societies must contain the appropriate provisions to ensure the management activity is performed free of influence from the users of the repertoire and to avoid unfair preferential use of the works".

⁵⁷ To perform this analysis, the CNC has used information obtained through consultations with the collecting societies, as well as from their management contracts and bylaws.

⁵⁸ The relative importance of these barriers depends on the bargaining power of the rightholder vis-à-vis the collecting society.

⁵⁹ Although some entities hold that it is possible for a rightholder to modify the term of the management agreement, the truth is that this is not what can be deduced from their standard contracts or bylaws and, in those cases, where this possibility is envisaged, the procedure is not simple (in the case of SGAE, a request must be submitted to the Executive Board).

Table 4. Duration of contracts and minimum notice periods in collecting societies

Collecting society	Contract term (years)	Notice period (months)
AGEDI ⁶⁰	5	12
AISGE	5	12
EGEDA	5	12
VEGAP	5	12
AIE	5	12
SGAE ⁶¹	3	12
DAMA	3	3
CEDRO	2	12

Source: prepared in house on the basis of management contracts and bylaws of the collecting societies

142. The contracts are renewable indefinitely for their initial term, except in the cases of DAMA and SGAE (only for audiovisual authors), in which the extension are for one year.
143. Overly long contract durations or prior notice periods hinder the mobility of the rightholders and lengthen their ties to the incumbent entities, and thus serve as entry barriers and reinforce collecting societies' market power.
144. It bears emphasis that this type of barrier was one of the reasons why the former Competition Service (SDC) opened a probe into SGAE in 2003 pursuant to a complaint from DAMA. The proceeding was eventually settled with the acceptance of certain commitments that same year. The case was brought due to SGAE practices that were restrictive of competition, amongst them, *"preventing authors from freely choosing the collecting society and switching from one to another"*.⁶² In fact, point 9 of the Settlement Agreement indicates that effective competition between collecting societies is more intense on the side of contracting rightholders. This is why curbs on rightholder mobility between entities such as the length of the contracts is of special significance.
145. The settlement agreement included a number of conditions to favour competition, including shortening the duration of the management agreements. Specifically, point 4 of the Agreement required SGAE, in relation to authors of audiovisual works, the turf on which it competed with DAMA, to set a three year duration for the management agreement, with automatic renewals of one year each, and a notice period of three months.

⁶⁰ In simulcasting, webcasting and podcasting, the term is one year and the notice period two months.

⁶¹ In the case of SGAE, as provided in its management contract, *"with respect to authors who belong in the professional groups of directors-filmmakers, scriptwriters and screenplay writers, there shall apply the terms of COMMITMENT 4 of the Agreement for negotiated settlement of case 2398/02 pursued by the Spanish Competition Service on 27 November 2003, which provides that the management agreement for those professional groups will have a term of three years, with automatic 1-year extensions, unless notice of termination is given by the RIGHTHOLDER in writing to SGAE prior to 30 September of each year, with termination effective as from 1 January of the following year"*.

⁶² CNC Council Resolution of 24 June 2008, on Compliance Incident in relation to Agreed Settlement of Case 630/07, DAMA/SGAE.

146. There are no reasons to justify such lengthy durations of the contracts. The case of SGAE and DAMA for audiovisual authors or the two year term at CEDRO show that reduction of the contract durations is possible. Furthermore, there are collecting societies in other countries that offer shorter contract durations. For example, ASCAP in the USA allows a member to leave the association at the end of each year, provided the member gives advance notice at least three months ahead of time.⁶³
147. It is also important to note that the European Commission, in its *Communication of 2004* on the management of copyright and related rights in the internal market stated that rightholders should be offered flexibility as regards the duration of the contract.⁶⁴

Scope

148. As regards the scope of the contracts, the problems derive from the limitations that may exist in practice when it comes to modifying the scope of the standard contract offered by the collecting society, in particular, in relation to the exclusion of rights, works or territories from the standard contract. In general terms, the following is observed:
- First, rightholders face difficulties to opt for individual management⁶⁵ of rights and territories included in the standard contract. In many cases they cannot opt for individual management and, in other cases, such as with SGAE, the rightholder who wishes to exercise individual management over certain rights or in certain territories must follow a complicated procedure and make a reasoned request to the Board of Directors in order for that body to issue a reasoned decision.⁶⁶
 - Furthermore, the rightholders are confronted with difficulties if they want to confer to other collecting societies the management of certain rights or territories included in the standard contract. In many cases they cannot do it, and when they can it is not always clear if that possibility applies to rightholders who are Spanish nationals.
 - Ultimately, the rightholder cannot normally exclude from the contract works or other subject matter over which he holds rights or over which he

⁶³ See ASCAP Consent Decree.

⁶⁴ European Commission (2004).

⁶⁵ The reference in this specific case is to rights for which collective management is voluntary that are included in the standard contract offered by the entity, given that the LPI prohibits individual management of rights subject to mandatory collective management.

⁶⁶ Article 14.1.3.B), C) of the SGAE bylaws. This possibility was introduced following a complaint filed against SGAE with the former SDC in 2002 by a group of rightholders (music publishers).

acquires rights during the life of the contract, or faces obstacles to do so, as in the case of SGAE, where a request must be submitted to the Executive Board.⁶⁷

149. The limitations on the possibility of retaining management of rights, works or territories serve to limit both the entry of other collecting societies and the possibility of individual management.
150. In fact, the problems spawned by the scarce contractual freedom have been addressed by decisions of European authorities, as early as the *GEMA Decisions*⁶⁸ (of 1971, 1972 and 1981), where European antitrust rules were applied for the first time to a collecting society for abuse of dominant position and by which the European Commission established limits on the rights that a collecting society could require of a rightholder in order to join the society. Amongst other issues, these decisions held that a collecting society was abusing its dominant position if it demanded that the rightholder included in the contract all types of rights.
151. In relation to more recent decisions, attention should be called to the European Commission's position in the *Daft Punk Decision*⁶⁹ of 2002 in relation to the request by two members of the *Daft Punk* band to retain the rights of online reproduction and exploitation of their work when they signed the contract with the French collecting society SACEM. The society rejected the request, a decision the European Commission considered a disproportionate prohibition of individual management contrary to article 82 of the Treaty. Since, however, SACEM changed its bylaws⁷⁰ to allow individual management of certain rights subject to a reasoned request and reasoned decision by the society, the European Commission eventually held that the change meant there was no longer abuse.
152. In any event, it is important to underscore that the European Commission based its defence of individual management on the fact that technological advances allowed authors to manage their rights individually, as the new technologies has cut transaction costs considerably; individual management reinforces the moral right of authors; and the fact that few

⁶⁷ As stipulated in article 14.1.9 of the SGAE bylaws: *"The Executive Board may include in the contract any special covenants and conditions subject to the law, to these bylaws and to the applicable regulatory provisions, and amend the content of paragraphs 1 and 2 of part 1 of this article, having regard to the special circumstances of the grantor"*.

⁶⁸ Decisions 71/224/EEC, 72/268/EEC and 82/204/EEC of the European Commission.

⁶⁹ Case COMP/37.219 — Banghalter et Homem Christo / SACEM.

⁷⁰ Specifically, the amendment meant that: *"the Board of Directors, on the basis of a reasoned request, may accept that an author, director, composer or publisher from the European Union or the European Economic Area will not confer certain rights upon the society or upon one or more copyright societies. The decision must state its reasons"* (translated by the CNC from the press release in French on Case COMP/37.219 - Banghalter & de Homem Christo / SACEM).

entities restricted individual management in the rights of interest for the case at hand.

153. There is a similar case in Spain⁷¹ In 2002, a group of music publishers (Universal Music Publishing S.A., Ediciones Musicales BMG Ariola S.A., Sony ATV Music Publishing Holdings LLC S. En C., EMI Music Publishing Spain S.A. and Peermusic Española S.A.) filed a complaint against SGAE for blocking individual management of some of their voluntary collective management rights. In 2002, after the probe was already underway, the SGAE changed its bylaws to formally broaden the possibilities of individual management. According to the TDC, the situation prior to that change could have qualified as a restriction of individual management. Nevertheless, in the resolution it also pointed out that the possibility of going before the Executive Board *“would have allowed a rightholder to ask the Executive Board to allow him to retain the management of the rights he deemed fit”*, adding that *“only if the request was rejected arbitrarily or without justified reason would the rightholder be able to allege there as an abusive restriction of his rights”*.

154. Lastly, in relation to the contractual limitations detected, it bears emphasis that the European Commission believes there should be more flexibility in the scope of the contracts:

- In its Communication of 2004 on the management of copyright and related rights in the internal market, the Commission held that *“Regarding the mandate, it should offer rightholders a reasonable degree of flexibility on its duration and scope. Furthermore, in the light of the deployment of Digital Rights Management (DRM) systems, rightholders should have, in principle, and unless the law provides otherwise, the possibility if they so desire to manage certain of their rights individually”*.
- In the 2005 Recommendation,⁷² focused on online music rights, the European Commission emphasised the need for rightholders to have more flexibility to withdraw some rights from the management agreements: *“With respect to the licensing of online rights the relationship between right-holders and collective rights managers, whether based on contract or statutory membership rules, should, at least be governed by the following:*

a) right-holders should be able to determine the online rights to be entrusted for collective management;

⁷¹ See the 16 December 2004 resolution of the Competition Tribunal (TDC) on the Appeal against Acts of the SDC (R 609/04), Music Publications.

⁷² Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

b) right-holders should be able to determine the territorial scope of the mandate of the collective rights managers;

c) right-holders should, upon reasonable notice of their intention to do so, have the right to withdraw any of the online rights and transfer the multi-territorial management of those rights to another collective rights manager, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder”.

Exclusivity

155. Exclusivity, which entails that the collecting society is the only one that manages the rights included in the contract during its duration, is present in nearly all standard contracts of collecting societies. Exclusivity in the management of IP rights hinders competition, particularly with respect to users. If exclusivity arrangements did not exist, there would be different licensing alternatives by which users could exploit the same rights, and this would no doubt introduce more competition. Furthermore, from the standpoint of the rightholder, the freedom to choose whether or not to have his right managed exclusively would contribute to strengthening or balancing his negotiating position vis-à-vis the collecting society.
156. Neither the bylaws of the collecting societies nor the management contracts envisage the rightholder having the formal possibility of altering the exclusivity condition of the contract, except for SGAE, where the rightholder must make a request to the Executive Board.
157. If mandates were on a non-exclusive basis, and the rightholders were given the right to license the rights along with the collecting society, competition would be increased.⁷³ Compared with the current situation, in which the society is the only one that can license, an arrangement without such exclusivity would allow the rightholders to also license the use of their works or subject matter, and thereby compete with the collecting society. Users could therefore exploit the works of a rightholder by arranging this through the collecting entity or by dealing directly with the rightholder. This allows for a more flexible management model. If a user is not interested in a blanket license for the repertoire and only wants to obtain a license for some of the works included in the repertoire, he could try to obtain the right to exploit the works directly from the rightholder. A user interested in a blanket license could always go through the collecting society.

⁷³ See, for example, US Department of Justice (2000); Katz (2005); Fels and Walke (2005).

158. In other countries, the terms of exclusivity are looser than in Spain.⁷⁴ For example, in the United States, rightholders represented by ASCAP have for decades been signing non-exclusive management contracts, which means the rights included in the contract can be administered both by the collecting society and by the rightholder. Its two competitors, BMI and SESAC, likewise manage rights on these terms. The system functions properly, with the rightholder undertaking in the contract to notify the collecting society when he licenses a user. Non-exclusive management by the rightholder and collecting society also exists in Australia.
159. Giving a rightholder the option of engaging several collecting societies to manage his rights over the same works or subject matter and in the same territories would have major pro-competitive effects. This, however, would indispensably require mechanisms for coordination between the entities to avoid the risk of double payment by users, above all when the collecting societies do not manage identical repertoires.

Fees for availability that do not take actual use into account

160. The fees charged by collecting societies are usually availability fees, that is, flat fees that do not take into account the actual use the user makes of the repertoire. This means the user will pay the same price irrespective of whether or on what scale he uses the repertoire.
161. Fees of this kind constitute a major barrier to entry.⁷⁵ If there is a collecting society with market power that sets fees independent of effective use, potential entrants, or rightholders who decide to compete by managing their rights individually, will face greater difficulties than if the pricing was based on real use.⁷⁶
162. In the first scenario (fee for availability), a user wishing to replace use of the incumbent society's repertoire with that of a new competitor and/or manage his rights individually will not have much incentive for doing so, because the established entity will not change its fee regardless of how little or how much the repertoire is used. But in the second scenario (fee for actual use), the incumbent will charge less if the user reduces his consumption and, therefore, the user will have incentives to replace use of the established entity's repertoire with other alternatives. This would no doubt heighten competition and act as a curb on the incumbent's conduct.

⁷⁴ See US Department of Justice (2000); Fels and Walke (2005); <http://www.sesac.com/Licensing/FAQsGeneral.aspx> (consultation dated 17/07/09).

⁷⁵ There are also other problems with availability fees regardless of actual use that will be studied in the section of pricing problems.

⁷⁶ See US Department of Justice (2000); Fels and Walke (2005).

163. In principle, users who are able to anticipate their use and control it, and opt for fees based on effective use, could benefit from greater competition between different alternatives and from a greater possibility of managing their costs.

Lack of transparency on repertoires

164. The degree of transparency regarding the repertoires actually administered by collecting societies is not adequate for the needs of competition in this sector, as the CNC has had occasion to find. Specifically, in the 2003 case involving SGAE and DAMA, led to the settlement agreement of 2003 which included creating a database to determine which rightholders were represented by each society.
165. The LPI imposes no transparency obligations with respect to the repertoires. In any event, although there are no transparency requirements, some societies do have repertoire search engines on their websites, although the CNC has not been able to corroborate their reliability or effectiveness, which have been called into doubt by users. As for the joint database between DAMA and SGAE, spawned by one of the obligations from the 2003 settlement agreement, it is still under construction.
166. This lack of transparency regarding the repertoires has a negative impact on competition.
167. First, if there is no clear information on the repertoires, societies that compete against each other will find it difficult to locate potential rightholders, who are affiliated with other collecting societies or with none, in order to administer their rights. This is one of the reasons why the agreement that settled the case DAMA-SGAE in 2003 included, as one of the commitments made, the creation of a database reflecting the authors represented by each society. The final resolution indicated in this connection that *“the database will foster competition between collecting societies to attract audiovisual authors as a means of obtaining greater income for the rights at the lowest possible cost”*.⁷⁷
168. Second, if users do not know the repertoire administered by each entity, they will have a hard time knowing which one to go to for licences. This hinders transactions in the market and has various negative impacts on potential entrants: it increases the possibilities of an incumbent society receiving revenues for rightholders represented by the entrant, making it difficult for the latter to operate in the market and for the users to know

⁷⁷ Resolution of the CNC Council dated 24 June 2008 on Compliance Incident in relation to Agreed Settlement of Case 630/07, DAMA/SGAE.

what they are paying for, an added obstacle to entry. On this last point, it is not surprising that the settlement agreement in case DAMA-SGAE cited as another reason for creating the database that it will *“allow users of the audiovisual works to be able to know what is in the repertoire they are paying for”*.⁷⁸

169. Lack of transparency as to the repertoires actually administered by collecting societies also affects users by making it harder for them to manage their costs and spawns the pricing problems that plague this sector and which will be discussed further below.

⁷⁸ Resolution of the CNC Council dated 24 June 2008 on Compliance Incident in relation to Agreed Settlement of Case 630/07, DAMA/SGAE.

IV. PRICING PROBLEMS

IV.1 Regulatory context

170. Collective management entities set their fees in a regulatory context that does not counteract their market power. Put differently, the regulatory framework and administrative actions facilitate the existence of monopoly collecting societies and “allows” them to easily exploit their monopoly position vis-à-vis users of the repertoire, which creates a series of circumstances in the dealings between the societies and users that help generate many pricing problems. There are three fundamental reasons why the current regulatory framework is not adequate: there is no *ex-ante* control of the fees set by collecting societies; the negotiation process does not ensure fair and equitable pricing; and there is no genuinely effective *ex-post* control of the pricing practices of collecting societies beyond the checks provided by the CNC itself and by the courts of justice.

A) Absence of ex-ante control of fees

171. As regards the lack of *ex-ante* control, and taking into account the monopoly position held by collecting societies, the LPI includes neither effective obligations on how fees are set, nor objective concrete criteria for doing so. Furthermore, there is no supervision of the fees by any competent authority. As indicated by the CNC in its Resolution of 9 December 2008 in case 636/07, Phonograms, the LPI gives the collecting societies *“the power/obligation to unilaterally set general fees for the use of the rights managed without subjecting them to any objective criteria or standard, and without being subject to control or supervision beyond that which may be done by ex post by the courts and antitrust authorities within their respective jurisdictions and in relation to a specific dispute”*.

172. The obligations laid down in the LPI for collecting societies on licensing arrangements, setting general fees and agreements with associations of users⁷⁹ are the following:

- *“Contract with whomever so requests, unless there is justified cause for refusal, the grant of non-exclusive authorisations of the rights managed, on reasonable conditions and on a remunerated basis”* (article 157.1.a of the LPI).

⁷⁹ According to the LPI, these obligations will not “apply to the management of rights relating to literary, dramatic, dramatic-musical, choreographic or pantomime works, nor with respect to the one-time use of one or more works of any class that requires the individualised authorisation of the rightholder” (article 157.3 of the LPI).

- “Establish general fee schemes that determine the remuneration required for using their repertoire, which must envisage reductions for not-for-profit cultural entities” (article 157.1.b of the LPI).⁸⁰
- “Make general contracts with associations of users of their repertoire, provided they so request and are representative of the sector in question” (article 157.1.c of the LPI).
- What is more, for certain remuneration rights,⁸¹ the LPI explicitly provides that the entities must negotiate the amount of the remuneration with the users.

173. As has already been noted, imposing obligations such as these flows from the lawmaker's idea that, inasmuch as possible, there should be no more than one collecting society per type of intellectual property rightholder. If this idea is accepted, the obligations introduced by the LPI are very general, inadequate and insufficient to counteract the monopoly position held by collecting societies. In pricing issues, the LPI goes no further than imprecise concepts like “reasonable” and “fair”⁸² in terms of criteria, and includes no type of obligation as to how the fees must be calculated or what characteristics they should have, or, at the very least, some type of recommendation on how they should be set.

174. Although no specific criteria are included for the general fees, it should be noted that the inclusion of more informative criteria is not something unknown to the LPI. For example, in the case of fair compensation for private copy in relation to digital reproduction equipment, devices and physical media, a royalty for which a specific procedure is indicated for calculating its amount, the LPI does include the principles to be taken into account.⁸³ Other countries, in turn, include somewhat more informative

⁸⁰ The setting of general fees for remuneration rights is an area that spurs a certain amount of controversy. On the one hand, it could be construed that article 157.1.b of the LPI only refers to exclusive rights, given that article 157.4 deals with remuneration rights: “In addition, the collecting societies are obliged to enforce the rights to a fair remuneration for the various events provided for by this Act and to exercise the right to authorise cable retransmission”. Nevertheless, for certain remuneration rights, the LPI explicitly establishes that they must be applied according to the general fees of the collecting societies. This is the case of those provided for in articles 90.4, 122.2 and 108.5 (first paragraph) of the LPI.

⁸¹ Rights recognised in articles 108.3, 108.4, 108.5, 116.2 and 122.2 of the LPI.

⁸² Fair is present in the reference to rights to fair remuneration.

⁸³ According to article 25.6.4 of the LPI, the following criteria, inter alia, are taken into account:

- “4. The negotiating parties, during the negotiating process, and, in all events, the Ministries of Culture and of Industry, Tourism and Trade, for the purposes of approving the joint order referred to by the preceding rule, must take into account, inter alia, the following criteria:
- a. The harm actually caused to the rightholders by the reproductions referred to by paragraph 1, taking into account that if the harm caused to the rightholder is minimal, it cannot give rise to a payment obligation.
 - b. The degree of use of the said equipment, devices or physical media of executing the reproductions referred to by paragraph 1.
 - c. The storage capacity of the equipment, devices and physical media.
 - d. The quality of the reproductions.
 - e. The availability, degree of application and effectiveness of the technological measures referred to by article 161.

criteria in their intellectual property laws, such as Germany, or in the case of Australia,⁸⁴ in a code of conduct specifically created for collecting societies.

175. There should also be borne in mind the demand made by the European Parliament and Council in the 2003 Report of the European Parliament.⁸⁵ Paragraph 53 establishes that the European Parliament *“Considers it necessary to establish, in the event of a Community approach, a framework for minimum standards for the calculation of tariffs, thereby contributing to introducing the transparency required in accordance with competition law”*.
176. The absence of effective criteria is compounded by the absence of any *ex-ante* control on the fees set by collecting societies. The LPI originally gave the Ministry of Culture a potentially important role, mainly in article 159, which provided the following:
- Collecting societies *“are obliged to notify the Ministry of Culture of the appointments and removals of their directors and representatives, the general fees and modifications thereof, the general contracts made with associations of users and the arrangements made with foreign organisations in their same class, as well as the documents mentioned in article 156 of this Act”*.
 - The Ministry of Culture is responsible, *“in addition to the powers of granting or revoking the authorisation regulated in articles 148 and 149, for monitoring fulfilment of the obligations and requirements laid down in this Act”*. And the obligations include those relating to non-exclusive licensing of the rights managed by the entities on reasonable terms, the making of general contracts and establishment of the general fees. For these purposes, *“the Ministry of Culture may require of these entities information of any kind, order inspections and audits and appoint a representative to participate, with the right to speak but not vote at the meetings of their General Assemblies, Boards of Directors or similar bodies”* (article 159.1, second paragraph).
177. In any event, the Spanish Constitutional Court, in its judgment of 13 November 1997, declared that certain powers assigned by the LPI to the Ministry of Culture, in articles 159.1 and 159.3, were contrary to the constitutional distribution of government powers between the central State

f. The length of time during which the reproductions are conserved.

g. The relevant amounts of the applicable compensation for the different types of equipment and devices must be economically proportionate to the final average retail price”.

⁸⁴ <http://www.viscopy.com/pdfdocuments/COC.pdf> (consultation dated 22/04/09).

⁸⁵ European Parliament (2003).

and the regions. According to the Constitutional Court, the Ministry of Culture would retain responsibility for authorising and revoking the authorisation and the powers laid down in article 159.2 of the LPI, which refer to the approval of the collecting society's bylaws. In practice, the collecting societies have continued sending information to the Ministry of Culture, both in the form of their annual reports and summaries of their management activity and information regarding the general fees applied. The Autonomous Communities have not exerted any functions of any kind regarding collecting societies. If these regional governments were to eventually exercise such functions, the CNC believes that it should be done in a way that avoids rupturing market unity.

178. All the same, even though the supervisory role that rests with government agencies is potentially important, it must be noted that it is also very general and ambiguous and has no disciplinary powers, other than revocation of the authorisation.⁸⁶ The truth is that, as regards fees, and as underscored by the former Competition Tribunal in its Resolution of 27 July 2000 in case 465/99, Audiovisual Intellectual Property: “... *the Ministry of Culture does not approve the fees, it only acknowledges receipt of their notification*”. In this connection, note that the Spanish Supreme Court⁸⁷ has held that silence by the Ministry of Culture in relation to fees does not mean that they are tacitly approved or that they comply with criteria of fairness, contrary to what the collecting societies have been known to suggest.⁸⁸

B) Ineffectiveness of the negotiation mechanisms

179. As for the second regulatory shortcoming, the ineffectiveness of negotiations with users for ensuring the fees are fair, this failure basically stems from the existence of general fees which the collecting societies set unilaterally and which, if the negotiations fail to produce an agreement, they can impose. The lack of an effective negotiating process also affects or can affect the rightholders. This once again gives way to the agency problems that can arise from the fact that collecting societies provide services to the rightholders: if the latter did the negotiations directly, they might prefer not to drag out the negotiations so long and to reach an agreement instead of litigating.

⁸⁶ According to article 149 of the LPI, “*The authorisation may be revoked by the Ministry of Culture if there occurs or is discovered any event or fact that might have caused the authorisation to be denied, or if the collecting society commits a serious breach of the obligations established in this Title. In all three events a prior call to order must be issued by the Ministry of Culture, giving a period of not less than three months to remedy or correct the problems detected*”. Nevertheless, it is dubious that this measure could ever be applied, taking into account that in most cases the collecting societies enjoy a *de facto* monopoly.

⁸⁷ Judgment of the Supreme Court, Judicial Review Chamber, of 18 October 2006.

⁸⁸ See CNC Resolution of 23 July 2009 in case 651/08, AIE/T5: “... *the AIE says that if the Ministry of Culture had considered the notified fees to be unfair, it would have acted, and it has not done so*”.

180. The CNC, in the 9 December 2008 resolution in case 636/07, Phonograms, stated that *“a clear asymmetry of power is generated between the negotiating parties in the collecting society's favour, reducing the incentives it may have to reach an agreement, given that it is allowed to enforce through the courts (where the societies enjoy a privileged procedural position under article 150 LPI⁸⁹) payment of a price fixed unilaterally and subject to no limit beyond that set by the indeterminate legal concepts of the fairness or reasonableness of the remuneration”*. The prevalence of general fees in default of an agreement derives from the Supreme Court's judgment of 18 January 1990.
181. Consequently, the current context does not provide incentives for collecting societies to set fair fees or to negotiate fair fees with the users.⁹⁰ In addition, this arrangement distorts the supposedly subsidiary nature of the general fee, because it is dubious that a fee established unilaterally by a monopolistic collecting society can be a solution in the absence of an agreement with the users.
182. Also, the LPI stipulates that *“until the parties reach an agreement, the relevant authorisation shall be understood to be granted if the applicant pays in escrow or in a judicial deposit the royalty demanded by the collecting society according to the general fee schedule”* (article 157.2 of the LPI). This further unbalances the negotiations, as it increases the cost of negotiations for the user and can compel users to accept an agreement that they would not accept if the relative bargaining powers of the parties were more balanced.⁹¹
183. Lastly, the LPI also fails to include transparency obligations regarding the repertoires or the ranges of rights actually managed by collecting societies, the administration costs, the sums not distributed to rightholders and the contracts they reach with individual users. This provokes problems of information that affect the equilibrium of the negotiation process.

⁸⁹ According to article 150 of the LPI: *“Collecting societies, once authorised, shall have standing on the terms of their own bylaws to exercise the rights entrusted to their management and to enforce them in all types of administrative or judicial proceedings. To evidence such legitimate standing, the collecting society only needs to submit a copy of its bylaws and a certificate of its administrative authorisation at the beginning of the proceeding. The defendant may only base his opposition on the complainant's lack of representative capacity, on an authorisation from the holder of the exclusive right or on payment of the applicable royalty”*. It is important to note that the privilege envisaged in the LPI is of great importance: it is the accused (whom the LPI assumes is the user, not the entity) who must demonstrate that the society does not represent the rightholder, and not the other way around.

⁹⁰ On the point of the society's incentive or interest in negotiating with users, it should be noted that even in those rights for which the LPI explicitly requires that the amount of the royalties be negotiated with the users (the remuneration rights established in articles 108.3, 108.4, 108.5, 116.2 and 122.2 of the LPI), the collecting societies have declined to do so on occasions, and tried to impose the fee unilaterally without negotiating with the user. See the Competition Tribunal's resolution of 27 July 2000 in case 465/99, Audiovisual Intellectual Property, in which the Tribunal fined EGEDA for trying to impose its fees without negotiations.

⁹¹ In any event, the relative importance of this factor in the negotiations depends on the bargaining power of the user.

184. It also increases the cost of negotiating and, in short, the cost of obtaining licences, boosting aggregate costs for users and/or lengthening the business maturation periods, and introduces uncertainty, which can be especially harmful to the development of new markets and slow the pace of innovation.

185. As a result, the negotiation process between collecting societies and users does not ensure fair pricing, primarily because the societies have great market power and the legal and procedural framework allows them to obtain a fee that is fixed unilaterally in a pre-negotiation phase.

C) Absence of effective ex post control

186. In relation to the lack of *ex-post* control, the Intellectual Property Commission (Comisión de Propiedad Intelectual — IPC), the dispute resolution mechanism between collecting societies and certain classes of users envisaged by the LPI, has not proven to be an effective instrument for solving pricing conflicts. Consequently, the only *ex-post* control over collecting societies is that exercised by the ordinary courts of justice and the CNC.

187. The IPC is a national collegial body created in the Ministry of Culture to carry out the functions regulated in article 158 of the LPI and in Royal Decree 479/1989 of 5 May 1989 regulating the composition and rules of procedure of the Intellectual Property Arbitration Commission (hereinafter, RD 479/1989). The IPC is composed of a maximum of seven members, three of whom are appointed by the Ministry of Culture and the other four by the parties. With regard to users, only broadcast entities and associations of users can be party to the IPC mediation or arbitration proceedings.

188. The two functions assigned by the LPI to the IPC are arbitration and mediation:

- In its arbitration function, the IPC can act by providing a solution to the disputes that may arise between collecting societies and associations of users or broadcasters in relation to the applicable obligations.

Furthermore, if no agreement is reached by the parties, it may also stipulate “*a substitute amount for the general fees*” at the request of an association of users or a broadcaster, solely for the purposes of an escrow or judicial deposit. An indispensable condition for doing so,

however, is that the parties have voluntarily submitted in writing to the arbitration (article 158.2.a, b of the LPI).⁹²

The Commission's arbitration decision *"is binding and enforceable for the parties"*.⁹³

- Originally, the IPC was only an arbitration commission. The IPC's mediation function originated in Directive 93/83/EEC,⁹⁴ which demanded to establish the appropriate mediation mechanisms to assist in resolving the lack of agreement in relation to licensing of cable retransmission of a broadcast, which means that the scope of the mediation function is limited to this area only.

In its mediation function, the IPC collaborates in the negotiations *"upon prior submission by the parties, in the event no contract can be made to license cable retransmission of a broadcast due to lack of agreement between the copyright holders and the cable retransmission companies"* (article 158.1.a of the LPI). It may also present *"if applicable, proposals to the parties"* (article 158.1.b of the LPI), that is, it does not have powers to set substitute fees, but only to make proposals to the parties.

Unlike the arbitration function, in mediation the parties do not have to accept the proposals put to them by the IPC.

189. The main reason for the ineffectiveness of the IPC is precisely its arbitral nature, that is, the requirement of prior voluntary submission of both parties in order to be able to discharge the functions assigned to it by law.⁹⁵

190. Taking into account the monopoly position of collecting societies, along with the legal and procedural privileges discussed above, it is obvious that there is a clear asymmetry in the incentives for wanting to submit to the IPC.⁹⁶ Nevertheless, it should be noted that there have been cases in

⁹² See, for example, Casas Vallés (2003). This author, an IPC arbitrator, points out that there have been at least two occasions on which the IPC rejected a request to fix substitute sums accompanied by a submission to arbitration because the collecting society involved had not also submitted to arbitration.

⁹³ Nevertheless, the LPI stipulates that *"the provision of this article will be understood without prejudice to the remedies that may be pursued before the competent courts"*.

⁹⁴ Directive 93/83/EEC of the European Parliament and of the Council of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

⁹⁵ The only case in which the IPC could act without the need for mutual agreement between the parties, according to chapter V of RD 479/1989, would be in relation to the equitable remuneration for contracts assigning or transferring the phonogram and audiovisual recording rental right entered into prior to 1 July 1994. Nevertheless, the IPC has never exercised this fee-setting function (Casas Vallés, 2003).

⁹⁶ In the case of the mediation function, collecting societies have more incentive to submit to the IPC's authority, by virtue of the terms of article 20.4.g of the LPI in relation to the application of antitrust rules: *"Where one of the parties*

which it was the users who opted not to submit to the arbitration function because they disagreed with the terms of such submission.⁹⁷

191. The CNC has underscored the weaknesses and shortcomings of the IPC on several occasions:

- The Competition Tribunal's resolution of 27 July 2000 in case 465/99 Audiovisual Intellectual Property held that: *"the current Intellectual Property Act in practice creates a frustrating void when the parties do not reach an agreement to determine the expired single equitable remuneration payment because —most likely imagining that competition would bloom and spread to the field of IP management, contrary to what in fact has happened, which is the proliferation of monopolies that individually manage each one of the multiple categories of rights— the lawmakers thought it was sufficient for the Act to establish a Commission with powers for voluntary arbitration and mediation".* If real competition had existed, the IPC would have been sufficient, but, as the resolution asks: *"What happens, as in our case, if hotels think that payments are too high and the collecting society or societies, which are monopolies, reject arbitration? Who determines the single equitable remuneration payment then?"*.
- The CNC resolution of 9 December 2008 in case 636/07 Phonograms held that *"it is not irrelevant to point out that in its now nearly 20 years of life, ... even though disputes between collecting societies and users have come before the IPC, it has never issued a pronouncement on the essential issues, nor, therefore, arbitrated or mediated in any conflict of this kind or another. This ineffectualness or failure ... in the fulfilment of the purposes for which it was created is due, in the opinion of authoritative writers on the subject, not just to defects in its configuration but also to the lack of interest or confidence of the potential recipients".* As this resolution is from December 2008, it does not refer to the agreement, the first in the IPC's history, that the Confederación Española de Hoteles y Alojamientos Turísticos (Spanish Confederation of Hotels and Tourist Lodgings — CEHAT) and AGEDI-AIE reached through the IPC in December 2008. Note that in this case the IPC was discharging its mediation function, not arbitration.

abuses its negotiating position to prevent the initiation or bona fide pursuit of negotiations to licence the cable retransmission, or hinders without valid cause the negotiations or mediation referred to by the preceding paragraph, there shall apply provisions of Title I, Chapter I, of the Competition Act 16/1989 of 17 July 1989".

⁹⁷ As pointed out by the CNC resolution of 9 December 2008 in case 636/07, Phonograms: *"After several contacts and communications in 2005 the possibility of submission to arbitration by the IPC was considered. This was rejected by SOGECABLE in its document of February 2006 addressed to the said Commission because it disagreed on the terms on which AGEDI/AIE had formulated its request for intervention, and it proposed a different arbitration arrangement instead, in which, amongst other points, the arbitration would take into account the resolution to be issued by the Competition Tribunal in case 593/05. This was rejected, in turn, by AGEDI/AIE, arguing that it was impossible for it to submit to arbitration with the exclusionary effect proposed by SOGECABLE".*

192. To all of this we might add that in relation to the right to fair compensation for private copy the IPC has not been nominated to fix the amount of that royalty in the event of disagreement between collecting societies and users. To establish the equipment, devices and digital media for which payments must be made, and the amount of such payments, the LPI stipulates a period of four months for negotiations between collecting societies and associations of manufacturers to reach an agreement. If such agreement is not reached, the Ministry of Industry, Tourism and Trade and the Ministry of Culture may, jointly, determine the equipment and amounts. So in this case the IPC was not assigned any role and the relevant terms were to be determined by the Ministries in default of an agreement.
193. For the reasons discussed above, the IPC has not achieved the expected results and has not become an effective dispute resolution mechanism as intended when it was set up. The need to reform and strengthen the IPC has therefore been voiced on several occasions.
194. First, in the Preliminary Draft Bill for Reform of Legislative Royal Decree 1/1996 of 12 April 1996 which approved the consolidated text of the Intellectual Property Act (BALPI), an initiative undertaken in 2002 but which did not eventually materialise. The BALPI was intended as an overall reform of the LPI, one of its objectives being to improve the collective management model in Spain by trying to solve, *inter alia*, the various pricing problems seen. With regards to the IPC, it was envisaged that the Commission would be able to set substitute sums for the general fees in relation to escrow and judicial deposits of royalties at the request of associations of users, broadcasters and users who the IPC viewed as especially significant, without the need for the collecting society to also be in agreement. Furthermore, if no agreement was reached after three months of negotiations between collecting societies and users in the case of payments due to remuneration rights, the IPC was also to be assigned the authority to fix the amount of the payment, without the need of prior voluntary submission of both parties.
195. Second, in the Act 23/2006 of 7 July 2006, which amended the consolidated text of the Intellectual Property Act, approved by Legislative Royal Decree 1/1996 of 12 April 1996, the preamble of which establishes that *“there are aspects of the situation in Spain that must be addressed in the immediate future, such as, for example, arbitration bodies, without prejudice to this Act empowering the Government to apply provisional measures to strengthen the operational mechanisms of the present Intellectual Property Mediation Commission, which will henceforth be called the Intellectual Property Commission”*. Its second additional provision is more specific, stipulating that *“the Government is authorised,*

via Royal Decree, to amend, expand and develop the functions attributed by article 158 of this Act to the Intellectual Property Mediation and Arbitration Commission, to include, amongst others, arbitration, mediation, quantifying substitute fees and dispute resolution...”.

196. Third, the Draft Royal Decree of 2007, which was a response to what was demanded by Act 23/2006 and intended to regulate a reformed IPC, contemplated further reforms of the IPC aimed at resolving pricing conflicts. Specifically, the Draft RD, which was eventually not approved, decreed a decision-making function for fixing the amount that would substitute the fee in the case of remuneration rights: *“The Commission will exercise decision-making functions at the request of an association of users, of a broadcaster or of a collecting society, all organised on a nationwide basis, to quantify the amounts to substitute for the general fees, in relation to the remuneration rights provided for in articles 90.2, 90.3, 90.4, 108.3, 108.4, 108.5, 109.3.2, 116.2 and 122.2 of the consolidated text of the Intellectual Property Act”*. According to article 29.1 of the Draft Royal Decree: *“The Commission’s intervention may be requested by an association of users, a broadcaster or a collecting society, provided they are organised on a nationwide basis and that three months have passed after the start of negotiations between those associations or broadcasters and the collecting society in question, or after a certified request to start such negotiations was sent and not heeded by the other party”*.
197. All of these initiatives bear out the need to implement more effective mechanisms for resolving fee disputes. Such mechanisms, moreover, do exist in other countries. In fact, many countries have stronger *ex-post* control than Spain. Although the overall picture is diverse, many countries do have, at minimum, an independent agency specialised in intellectual property matters with authority to set fees when the parties (collecting societies and users) fail to reach an agreement, without requiring submission by both parties to such intervention. Nevertheless, the cases in which this intervention can take place vary: in some, it only applies to remuneration rights (or similar), whereas in others, it applies to all rights managed by a collecting society. The following chart describes in some detail the systems in other countries.

Chart 3. Pricing disputes resolution mechanism in certain countries

<p>United Kingdom</p>	<p>There is an independent body, the Copyright Tribunal, that was established in 1988 under the Copyright, Designs and Patents Act of the United Kingdom. The prime function of the tribunal is to decide the terms and conditions of the licences granted by collecting societies when the parties fail to reach an agreement.</p> <p>In jurisdictional terms, any user who has been denied a licence</p>
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	<p>unreasonably or who believes the terms of a licence are not reasonable may go before the tribunal. Collecting societies cannot go to the Copyright Tribunal.</p> <p>The decisions of the Copyright Tribunal may be applied in the courts only as regards their legal aspects.</p>
United States	<p>For the rights managed by ASCAP and BMI, collecting societies for the right of communication to the public of music composers and publishers, there is the possibility of pricing disputes being resolved by specialised judges. They have power to determine the amount of the royalty to be paid if either of the two parties (collecting society and user) asks the tribunal to set the fee amount in the absence of a negotiated agreement.</p> <p>The judges fix the fee on a fairly case-by-case basis, and are obliged to set the price on reasonable terms. The fees set by the judge extend to the entire sector made up of a group of similar users.</p>
Australia	<p>There is a Copyright Tribunal that was established to monitor the conduct of collecting societies. Both users and associations of users can go before the Copyright Tribunal.</p> <p>A user dissatisfied with the pricing arrangements or with the amount of a fee established by a collecting society, whether for a voluntary license or for a statutory license, may ask the Copyright Tribunal to intervene.</p>
Canada	<p>In 1989, the former Copyright Appeal Board was replaced by what is called the Copyright Board, which, in certain cases, has power to establish, at the petition of one of the parties, the royalty amount that the user must pay for using the copyrighted works and subject matter, in those cases where administration of those rights has been entrusted to a collective management entity.</p>
Germany	<p>The German Patents and Trademarks Office has an arbitration-type dispute resolution mechanism. Its purpose is to intervene in disputes that arise between the collecting societies (or in some cases, between the televisions that administer their rights) and other parties.</p>
Norway	<p>According to Norway's intellectual property law, each of the parties involved in the negotiations may apply to have the remuneration payable for use of IP rights set in certain cases by the Copyright Tribunal, and for its decision to be binding. This solution is applied in the following cases: use of protected works and subject matter for educational uses; production and use of reproductions for disabled persons; and communication to the public of audio recordings of performers and producers.</p>
Switzerland	<p>According to the Swiss federal law on copyright and neighbouring rights of 1992, the federal arbitration commission is competent to approve the fees charged by collecting societies if they are fair in structure and in each of their clauses, with authority to introduce modifications. There is a series of</p>

	requirements that the Commission will take into account to determine the fairness of the fees (article 60).
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Sources. *United Kingdom*: Consultation with the Office of Fair Trading; <http://www.ipo.gov.uk/ctribunal/ctribunal-about.htm> (consultation of 01/04/2009); *USA*: consultation with the Department of Justice; *Australia*: <http://www.copyrighttribunal.gov.au/about/index.html> (consultation dated 25/05/09); *Canada*: <http://www.cb-cda.gc.ca/aboutus/mandate-e.html> (consultation of 01/04/2009); Minister of Public Works and Government Services Canada (1999); http://laws.justice.gc.ca/en/showdoc/cs/C-42/bo-ga:l_VII/en#anchorbo-ga:l_VII (*Copyright Act of Canada*; consultation dated 01/04/2009); *Germany*: Consultation with the *Bundeskartellamt* (German antitrust authority); Intellectual Property Act of Germany [English translation may be seen at http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=1033#JD_DE079_S14 (consultation dated 31/03/2009)]; *Norway*: Consultation to the *Konkurransetilsynet* (Norwegian antitrust authority).

IV.2 Exercise of market power in setting fees

198. The monopoly position held by collecting societies and the failure of a regulatory framework to counteract their considerable market power has given rise to a fundamental pricing problem: the establishment of unfair and/or discriminatory license fees for use of the repertoires, a problem which has on several occasions been the subject of proceedings before the former Competition Tribunal (TDC) and the CNC.⁹⁸

Principal characteristics of the fees

199. Since the license fees set by collecting societies have given rise to numerous pricing problems and some of their related issues are complex, it is useful to begin by analysing their basic features.
200. Collecting societies set the so called “general fees” for use of the exploitation rights they manage, which may be exclusive rights or remuneration rights. Normally, the fee indicates what the user will have to pay (yearly, monthly, etc.) for exploiting the repertoire administered by the collecting society.
201. An analysis of the last general fees sent by the societies to the Ministry of Culture shows that these entities charge different types of users different prices for using the same repertoire. For example, for communication to the public of the musical and audiovisual repertoire that it manages, the SGAE charges a bar a different fee than what it charges a passenger bus service company. The differentiation can at times be very broad. According to the last fee schedule sent to the Ministry of Culture, the SGAE envisages more than 100 types of users of its repertoire in the public

⁹⁸ See: TDC resolution of 14 December 1998 in case 430/98, Onda Ramblas/AGEDI; TDC resolution of 27 July 2000 in case 465/99 Audiovisual Intellectual Property; TDC resolution of 25 January 2002 in case 511/01 Vale Music/SGAE; TDC resolution of 13 July 2006 in case 593/05 Televisions (pending judicial review); CNC resolution of 9 December 2008 in case 636/07, Phonograms (pending judicial review); CNC resolution of 23 July 2009 in case 651/08, AIE/T5 (pending judicial review).

communication category, ranging from discotheques to motels, including model fashion shows, bowling alleys, bullrings, political events and rooming houses.

202. For example, in the case of bus companies, the SGAE fee⁹⁹ amounts to 1,265.50 euros per vehicle for the entire life of the bus. In the case of bars, the monthly fee¹⁰⁰ charged by SGAE is between 15 and 25 euros (depending on the floor area of the premises). For restaurants the monthly fee for the same use is between 69 and 148 euros (depending on the forks-rating of the restaurant).

203. The fees are normally for availability, which means that the user pays an amount and can use all or part of the repertoire in the licensed category as much as he wants.¹⁰¹ Nevertheless, as it is analysed in greater detail further below, there are cases of fees that to some extent do reflect the actual use made of the repertoires.¹⁰²

204. There are two main types of fees:

- *Lump sum.* This means the user pays a set amount for using the repertoire.
- *A percentage of operating revenues.* This means the user pays a set percentage of its operating revenues.

205. General fees are of a subsidiary nature, that is, they are applied in default of an agreement between the collecting societies and users. They are also used to determine the amount payable by a user into an escrow or judicial deposit in order to have an interim authorisation until the collecting society and user reach an agreement.

206. Negotiations between the collective management entities and users may result in the final fee or price being different than the general fee, although the latter will have great weight in the process, as it is applied if there is no agreement. Collecting societies normally justify the difference between general fees and negotiated fees on the basis of the consideration they receive from the user, although this justification is subject to controversy.

⁹⁹ For use of works in the SGAE repertoire by means of a non-reproducing mechanical or electronic device and by legitimately produced and distributed videograms.

¹⁰⁰ For use of the musical and audiovisual works in the SGAE repertoire as background or incidental entertainment.

¹⁰¹ For example, a bar owner pays a fixed monthly sum to the SGAE and this allows him to play any of the works in the latter's repertoire to the public as much as he wishes.

¹⁰² There is no fixed scheme for actual use. What actual use entails is that the amount paid by the user varies according to the actual use of the repertoire. For example, DAMA does not charge the same price for a television that uses the DAMA repertoire during one hour of programming as for one that only uses in 10 minutes of its programming during the same time slot.

According to the societies, examples of such consideration are: the provision of certain services by the association or user that allow costs savings in the management and administration of the rights; the promotion of the works or other subject matter of the rightholders represented by the collecting society. The negotiations also seek to establish a phased timetable for implementing the general fee initially set by the collecting society.

Unfair fees

207. The issue of fair pricing by the collecting societies is a recurring problem in this sector. Taking into account that collecting societies are weakly regulated *de facto* monopolies, the likelihood that they will engage in unfair and hence abusive pricing are greater than what would be the case if they were subject to the discipline of greater competitive pressure or stricter supervision.
208. Unfair pricing is a constant source of complaints by users and generates many lawsuits. It has also been addressed by various decisions of the TDC/CNC:
- TDC resolution of 14 December 1998 in case 430/98, Onda Ramblas/AGEDI. One of the reasons for the case was a complaint filed by Onda Ramblas against AGEDI for unfair pricing. The TDC, however, levied no sanction on AGEDI.
 - In the TDC resolution of 27 July 2000 in case 465/99, Audiovisual Intellectual Property, several collecting societies (EGEDA, AIE and AISGE) were sanctioned for charging unfair fees to hotels.
 - In the TDC resolution of 13 July 2006 in case 593/05, Televisions, unfair pricing by AGEDI was addressed, although it was not demonstrated that its fees were unfair.
 - In the CNC resolution of 23 July 2009 in case 651/08, AIE/T5, AIE was fined for charging unfair fees to Telecinco.
209. There are a number of factors that affect whether a fee is fair and equitable: its reasonable relation with the economic value of the repertoire's use; its relation with the actual use; and its appropriateness to the repertoire. These factors follow from an analysis of the case-law precedents regarding unfair pricing by collecting societies.

Relation with the economic value of the use of the repertoires

210. A fair fee must be reasonably aligned with the economic value of the product or service supplied, in this case, of the use made of the repertoire. Otherwise, the fee may be excessive, according to what has been held by the CNC in several of its decisions based on European case-law on unfair pricing, which establishes that *“charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied may be an abuse of a dominant position within the meaning of subparagraph (a) of Article 86”*.¹⁰³
211. The excessive nature of the fee does not necessarily depend on whether it is a fee for availability or a fee for actual use, given that fees may be excessive in either type of fee. The fee for actual use which, for example, a society may establish for public communication of one minute of its repertoire may be excessive if it bears no reasonable relation to the economic value of communicating that minute.
212. There are reasons to believe that collecting societies set excessive fees on occasions, as evidenced by the significant differences¹⁰⁴ without objective justification that often arise between the general fees and negotiated fees, and which suggest that both cannot have a reasonable relation to the economic value at the same time. In turn, as the CNC has found, sometimes collecting societies do not take into account a series of criteria that could help determine how much use of the repertoires is really worth to the users. In fact, in its resolution of 23 July 2009 in the case 651/08, AIE/T5, the CNC held that in the case of televisions, AIE did not rely on objective criteria to determine how much the public communication was worth to the televisions, for example, by using factors such as time slots, audience size or advertising revenue.

Relation to actual use

213. Taking into account the actual use of the repertoires is one of the main problems why pricing disputes arise regarding unfair fees .
214. The problem is that a fee for availability which is independent of actual use can be an unreasonable approach to pricing on certain occasions, as it widens the possibility of a disproportionate relation between the economic value of the repertoire's use and what the user has to pay for that use. For example, charging a percentage of revenues in cases where the revenues bear no correlation to the use of the repertoire can give rise to a payment that bears insufficient or no relation to the economic value obtained from

¹⁰³ *United Brands* judgment of the Court of Justice of the European Communities of 14 February 1978.

¹⁰⁴ For example, the AIE's general fee for televisions for the right to equitable remuneration of performers for communication to the public of audiovisual recordings entailed making a payment that was twice the amount payable according to the free agreed in the contract with FORTA (see the resolution of 23 July 2009 in case 651/08, AIE/T5).

using the repertoire. If two television companies are charged 3% of their revenues and one of them airs one minute of music per day and the other five hours, a fee that is independent of effective use will make the royalty paid by the first broadcaster disproportionate. It would be more reasonable for the payment to be modulated as a function of the use that each television makes of the repertoire.

215. Furthermore, pricing schemes that do not take into account real use generate distortions in the allocation of resources, because users are not spurred to achieve efficiencies in their use of the repertoire, reducing consumption to apply the resources thus freed up to other uses. To take an illustrative example: suppose that a TV networks uses musical works two hours and has total gross revenues of 100. This will mean that the payments made to a collecting society that sets percentage fees for availability will be a set percentage of those 100. If the network decides to cut its use of the works by one hour and replace them with other content that does not use those works, though this leaves its revenues untouched at 100, the collecting society will still charge it the same percentage (and hence the same final amount). As a result, the cost to the network of exploiting those works will be the same as before, even though its use of the repertoire has now been cut by 50%. This does not promote efficient management of the costs of using copyrighted works and subject matter.
216. Nevertheless, in a pricing arrangement that does take the actual use into account, consideration must also be given to the cost of such use. Otherwise, in situations where monitoring use is costly, the user may end up paying a large sum, more than what would have been the case within a fee for availability scheme. This is the approach taken by the case-law that is discussed below, which has held that a fair fee must take into account the real use made of repertoires by the users, provided it can be assessed at a reasonable cost.
217. This is the position taken by the TDC/CNC on several occasions:
- In its resolution in case 593/05 Televisions, the TDC held that *“from the standpoint of free competition it would be desirable for the basis for calculation of the general fees be established in fundamental relation to the real use”*.
 - In the resolution of 4 February 2008 on Appeal against Acts of the Competition Service (714/07, Telecinco/AIE), the CNC *“believes that fixing a fee based exclusively on the user's total revenues is not reasonable and might not be fair, as those revenues are not directly related to greater or lesser use of the phonograms or audiovisual recordings; nor can it be accepted that the greater or lesser commercial*

success of the television chain is directly tied to more or less use of the music”.

- The CNC resolution of 23 July 2009 in case 651/08, AIE/T5, states that *“charging a user a general fee must necessarily envisage a criterion that allows, as an initial step, the intensity of the use to be measured inasmuch as possible (time of communication, relative weight in the final television product, etc.)”* and that *“what is fair is related to the effective use of this input”*.

218. At the same time, other authorities have also advocated that actual use criterion be introduced inasmuch as possible. A very important position in this case was the one set out by the Spanish Supreme Court, in a key ruling made in relation to a pricing dispute between the Telecinco television network and AIE.¹⁰⁵ The high court held that a criterion that has regard only to operating revenues *“cannot be accepted. It is, in principle, obviously fairer to rely on the actual use of the repertoire, to the extent this criterion can be applied, than on the criterion of availability or quantification as a function of the companies' operating revenues. So there is a need to require that one of the necessary criteria for ensuring fair pricing be that the fees charged reflect as far as feasible the actual use made of the collecting society's repertoire”*.

219. Lastly, in relation to a request for a preliminary ruling submitted by Sweden's competition authority to the Court of Justice of the European Communities,¹⁰⁶ the ECJ ruled that *“a copyright management organisation with a dominant position ... 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 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”*.

¹⁰⁵ Supreme Court judgment of 18 February 2009, on appeal number 2157/2003 brought before the court by counsel for Gestevisión Telecinco S.A. against the 21 March 2003 judgment handed down by the provincial appellate court of Madrid in proceeding 583/2001.

¹⁰⁶ Judgment of the Court of Justice (Fourth Chamber) of 11 December 2008 in case C-52/07, on a referral for a preliminary ruling under Article 234 EC, from the Marknadsdomstolen (Sweden), made by decision of 2 February 2007, received at the Court of Justice on 6 February 2007, in the proceeding between Kanal 5 Ltd, TV 4 AB and Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM).

220. Consequently, a fair fee must take into account the actual use made of the repertoires by the users, provided this can be determined at a reasonable cost.
221. But pricing regardless of use is the predominant practice at present. The reason normally cited for why prices do not take actual use into account is that this is difficult and very costly to measure, and would thus entail higher costs for the user. Nevertheless, although this may be true on occasions, it is no less true that the possibility of measuring use varies according to the type of user and the type of right and that some users who might sign up for use-based pricing are paying fees based on availability.
222. In this regard, it should be borne in mind that technological advances and digitalisation in many cases allow use to be monitored at a reasonable cost and that foreign collecting societies are doing so in cases in which Spain does not. It is also highly significant that collecting societies do use data on actual use to distribute a large part of their royalty revenues amongst the rightholders they represent.
223. The main beneficiaries of pricing for actual use would be television and radio broadcasters, but they normally pay for availability or according to actual-use pricing schemes that fall short of truly reflecting actual use.
224. For example, in the case of televisions, they currently pay a percentage of their revenues to collective management organisations such as SGAE,¹⁰⁷ AGEDI,¹⁰⁸ AIE and AISGE. Although TV broadcasters have said they would like to pay according to actual use, these collecting societies charge the same percentage independent of the extent of the repertoire's use by the broadcasters.
225. In this case, there is no justification based on technology or the cost of monitoring use, because television stations already give the collecting societies information on use of their repertoires so that the latter can then properly distribute the royalties amongst the rightholders. Also, DAMA, a small organisation compared with SGAE, does charge televisions according to their effective use of the audiovisual repertoire (Table 5).

¹⁰⁷ The fees charged in 2009 by SGAE for communication to the public of its repertoire by televisions via terrestrial broadcasts were a fixed percentage of gross or net revenues. The fees are applied to the monthly revenues. If the resulting sum falls below a certain minimum, the user pays the minimum. The total royalties as a percentage of gross revenues was 2.8804%, or 4.4802% of net revenues (*General Fees of SGAE 2009*).

¹⁰⁸ In the case of AGEDI, for public communication and reproduction of music videos, the fees take into account actual use to some extent, as they establish fixed lump sums for each music video broadcast (*General Fees of AGEDI-AIE for use of music videos, 2008*).

Table 5. DAMA fees for communication to the public by TV terrestrial broadcasters.¹⁰⁹
2008

Slot	Time	Price/minute (€)
Overnight	02:30 - 07:29	0,20
Wake up	07:30 - 08:59	3,86
Morning	09:00 - 12:59	12,62
Lunch time	13:00 - 14:59	128,14
Afternoon	15:00 - 17:59	79,72
Evening	18:00 - 20:59	103,00
Prime time	21:00 - 23:59	197,86
Late night	00:00 - 02:29	37,92

226. Looking at international experience, we see that some music copyright collecting societies charge rates based on actual use to television broadcasters, such as Germany's GEMA and Sweden's STIM. There are other examples of alternative pricing models that take effective use into account, such as per-program-licenses in the United States, under which a television can be licensed to use any work of the collecting society's repertoire during part of its programming.

227. In the case of radio, the general fee charged by AGEDI-AIE for communication of phonograms to the public is also set as a percentage of revenues¹¹⁰ and independent of actual use. Only in the case of communication to the public of phonograms via the Internet are lump sum fees established that take actual use into account in some way.¹¹¹ The SGAE, in turn, fixes a percentage rate for communication of musical works to the public in a pricing model which, though it takes use into account somewhat,¹¹² it does so in a clearly insufficient manner, given that the time slots are not flexible enough.

¹⁰⁹ These are the royalties paid for communication to the public of works in the DAMA repertoire on the user's own programmes, through wireless broadcast and transmission, both analogue and digital, and other similar systems, all via television. (*General Fees of DAMA, May 2008*).

¹¹⁰ For example, for wireless radio, AGEDI-AIE sets general fees for public communication: 2.35% (of which AGEDI gets 1.1985% and AIE 1.1515%) of the total gross monthly revenues of the radio broadcaster, and 5% (with AGEDI getting 2.55% and AIE 2.45%) of gross revenues obtained for broadcasts of phonograms in programmes sponsored by commercial entities or persons to advertise or promote their businesses. (*General Fees AGEDI-AIE for communication to the public of phonograms, 2009*).

¹¹¹ For public communication of phonograms via the Internet in non-interactive simulcasting and webcasting, two alternatives are offered: a) 0.000740 euros per song broadcast and listener, or b) 0.000185 euros per minute of broadcast and listener. (*General Fees AGEDI-AIE for communication to the public of phonograms, 2009*).

¹¹² For the use of its repertoire by radio broadcasters, SGAE charges general rates of 3.75% of revenues for communication to the public and 1.25% in respect of reproduction. The total revenue base to which these percentages are applied varies depending on the degree of use of the repertoire with respect to the total air time. There are three categories: a) broadcasters that use the repertoire up to 10% of their total on-air time; b) between 10% and 70%; c) 70% or more. The coefficients to be applied to obtain the base revenue to which the public communication and reproduction

228. However, as with TV broadcasters, radio stations disclose use of the repertoires to collecting societies, and, in all events, tracking that use on radio is both technologically and economically feasible. In fact, once again drawing on international comparisons, we see that copyright management organisations in other countries charge radio broadcasters fees based on actual use, applying much more sophisticated pricing schemes than those used in Spain. For example, the Australasian Performing Right Association (APRA) of Australia, which collects and distributes royalties for communication of musical works to the public, charges commercial radio stations based on real use (see Table 6).

Table 6. APRA fees charged to commercial radios for communication of musical works to the public. 2009

% of the music over total time on air	% of gross revenues payable
80% +	3.50%
75 – 79.99%	3.00%
70 – 74.99%	2.75%
65 – 69.99%	2.50%
60 – 64.99%	2.25%
55 – 59.99%	2.00%
50 – 54.99%	1.75%
45 – 49.99%	1.50%
40 – 44.99%	1.25%
30 – 39.99%	1.00%
10 – 29.99%	0.50
0 – 09.99%	0.05% per each percentage point (or fraction thereof) of relative use

Note: % to be applied to monthly advertising revenues.

Source: APRA website (consultation 21/04/09)

229. Apart from pointing out that charging TV and radio broadcasters on the basis of actual use is technologically and economically feasible, it should also be noted that these categories of users are very important, as can be gathered from the relative amount of royalties they pay:

- In 2007, SGAE's national revenue from cable and wireless TV and radio broadcaster amounted to 159.7 million euros, a full 46.4% of the its total domestic revenues.¹¹³

percentages are applied are 0.25 for the first category, 0.6 for the second and 1.0 for the third. The 3.75% and 1.25% are then applied to the revenue base thus obtained (General Fees of SGAE 2009).

¹¹³SGAE Management Report, 2007.

- In 2008, the revenues received by AGEDI¹¹⁴ from television and radio networks for public communication and reproduction of phonograms and music videos amounted to 16.9 million euros, 66.1% of its total gross revenues.
- In 2008, revenues obtained by AISGE¹¹⁵ from televisions were 20.4 million euros, or 64.7% of its national total for that year.
- In 2008, the AIE¹¹⁶ revenues recorded for communication to the public of phonograms came in at 8.2 million euros, 72.3% of its domestic total for rights in this category.

230. Although it is difficult to make a complete and precise list of all cases in which pricing models should be based on actual use, it is possible to assert that wherever monitoring and tracking effective use of repertoires can be done at a reasonable cost, and when the user is prepared to furnish the information that may be needed to measure use, then there should exist fees that take actual use into account as an alternative to fees for availability. This is the case, for example, of television and radio, but also of the incipient market of users who exploit works and other subject matter online. There may be users who for reasons of cost and technology, or of confidentiality and the need to safeguard trade secrets, prefer to be charged fees that do not consider actual use, even if the nature of their use would qualify them for such pricing. There may also be cases where actual use is but one of the price components, in combination with other fixed ones that reflect availability or other variables. The important thing is that the pricing model should be able to reflect variations in the user's actual utilisation of the repertoire.

Appropriateness to the repertoire

231. A fair price must take into account the repertoire actually managed by the collecting society. Otherwise, the fee is not likely to bear a reasonable relation to the economic value of the repertoire's use and there will be a greater likelihood of users paying royalties on rights of copyright authors not represented by that society. Recently, the Spanish Supreme Court, in the aforementioned judgment of 18 February 2009 on a case involving a fee disputed between Telecinco and AIE,¹¹⁷ held that the breadth of the repertoire must be a prime consideration in pricing models: "... pricing

¹¹⁴ Consultation with AGEDI.

¹¹⁵ Consultation with AISGE.

¹¹⁶ AIE Annual Report for 2008.

¹¹⁷ Supreme Court judgment in regard to cassation appeal number 2157/2003 brought before the court by counsel for Gestevisión Telecinco S.A. against the 21 March 2003 judgment handed down by the provincial appellate court of Madrid in proceeding 583/2001.

decisions must not fail to consider criteria relating to the breadth of the repertoire of each of these collecting societies in relation to the others...”

232. Nevertheless, as already discussed in relation to strategic barriers, there is insufficient transparency with respect to the repertoires, which means that at times a user does not know which rightholders are represented by a given collecting society and which are not. In the case of rights subject to mandatory collective management, this lack of knowledge is also due to the existence of differing interpretations as to which rightholders from other countries are protected in Spain under the LPI.

233. Lack of transparency results in pricing unsuited to the repertoire, as has on occasions been decried by users, and strengthens the bargaining position of the collecting society, further undercutting the possibility of a fair playing field. As a result, a greater degree of transparency is needed in collecting societies, as has been repeatedly demanded by various institutions:

- First, emphasis has been placed on the need for greater transparency in the specific area of repertoires:
 - Former Competition Tribunal (TDC). In the 2003 case between DAMA and SGAE, the TDC also voiced the need for more transparency, to be satisfied by a commitment to create a database in the settlement that ended the proceedings.
 - European Parliament. A European Parliament report from 2003¹¹⁸ on a Community framework for collecting societies for authors' rights underscored the need to ensure that collective management societies *“must operate according to the principles of transparency”* (whereas clause 31) and that *“where they perform public functions from a position of monopoly, collective management societies [...] are appropriately regulated, in order to ensure the transparency required under competition law”* (whereas 35). In addition, in the consultations carried on to prepare that report, the Committee on Economic and Monetary Affairs of the European Commission advocated establishing *“a public register, which can be accessed by electronic means, listing all right-holders represented by collective management societies”*.
 - European Commission. The European Commission in its 2005 *Recommendation*,¹¹⁹ on online music services, included the following recommendation: *“Collective rights managers should inform right-*

¹¹⁸ European Parliament (2003).

¹¹⁹ Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

holders and commercial users of the repertoire they represent, any existing reciprocal representation agreements, the territorial scope of their mandates for that repertoire and the applicable tariffs”.

- It should also be stressed that the BALPI included amendments of the LPI with the idea of making the collecting societies' activities more transparent, by including reporting obligations regarding the contracts made with other Spanish and foreign collecting societies and obligations to inform users as to the repertoire managed by the collecting society, as well as the categories of holders of IP rights not included within the scope of the license and which could be affected by the exploitation envisaged therein.
- Second, greater transparency has been sought in the functioning of collecting societies in a broader sense:
 - CNC. Both the resolution of 9 December 2008 in case 636/07, Phonograms, and in the resolution of 23 July 2009 in case 651/08, AIE/T5, allude to the special duty of transparency, reasonableness, and objectivity that falls to collecting societies in their negotiations with users.
 - European Parliament and European Council. Directive 2001/84/EC¹²⁰ of the European Parliament and Council posits that *“Member States should ensure that collecting societies operate in a transparent and efficient manner”* (whereas 28). Directive 2001/29/EC¹²¹ states that whereas *“It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules”* (whereas 17). Note that neither of these two directives specifically address collective management, but other issues related to copyright and related rights.
 - European Commission. In its *Communication of 2004*,¹²² the European Commission pronounces itself in the following terms in relation to problems that require a new legislative approach: *“The principles of good governance, non-discrimination, transparency and accountability of the collecting society in its relation to rightholders are, therefore, of particular importance. These principles should apply*

¹²⁰ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

¹²¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

¹²² European Commission (2004).

to the acquisition of rights (the mandate), the conditions of membership (including the end of that membership), of representation, and to the position of rightholders within the society ...”

Discriminatory pricing

234. Economic theory holds that discrimination exists when the same good or service is sold at different prices to different buyers, if that difference is not justified by the cost of producing the product or service. In order for price discrimination to be successful, two fundamental requirements must be met: that the companies are able to classify their users and that there is no possibility of arbitrage between them.¹²³
235. Given that the effect of discrimination on social wellbeing is ambiguous,¹²⁴ discrimination is not prohibited *per se*, which means that discriminatory pricing is not necessarily abusive.
236. The CNC has stipulated that when an entity with a dominant position charges different prices for the same product or service, without any objective justification and so as to generate a competitive disadvantage, this is discriminatory pricing that must be penalised. On this issue, too, there have been numerous resolutions:
- TDC resolution of 14 December 1998 in case 430/98, Onda Ramblas/AGEDI. Although discriminatory pricing was one of the reasons that gave rise to the case, the TDC eventually decided not to sanction AGEDI.
 - TDC resolution of 25 January 2002 in case 511/01 Vale Music/SGAE. In this resolution the TDC fined SGAE for abusing its dominant position by charging Vale Music discriminatory fees compared with other record producers belonging to an association. The specific conduct sanctioned was that of charging 37% more for Vale Music than for the other radio broadcasters in the association.

Note that the conflict between Vale Music and SGAE was also heard in the ordinary courts of justice parallel to the proceedings before antitrust

¹²³ For example, when the young and the elderly are charged different prices for using the underground, users are being classified. At the same time, the possibility of arbitrage between the different classes has to be eliminated, either by preventing persons in one of the groups from benefiting from the prices applied to others or by levying fines in case they do.

¹²⁴ It entails, on the one hand, transfer of income from consumers to producers, but, on the other, it may increase output. The overall effect may be an increase in social wellbeing as a whole.

authorities. Recently, the Supreme Court, in the judgment entered in the context of the dispute between SGAE and Vale Music in the civil courts,¹²⁵ held that *“establishing higher charges for individual producers than for those acting as part of an association, to the extent that, on the one hand, it imposes a unilateral nature that makes real negotiation impossible or difficult and, on the other, is of a discriminatory nature and hence contrary to the principle of equality, must be considered as violating the mandate of reasonableness contained in article 157 a) of the LPI and, therefore, demands annulment of the contract clauses that thus violate the limits imposed by law on the principle of autonomy of will, which is expressly referred to in article 1256 of the Spanish Civil Code”*.

- In the TDC resolution of 13 July 2006 in case 593/05, Televisions, the CNC penalised AGEDI for discriminating against A-3 and T-5 in comparison with TVE. In this case, the TDC ruled it has been proven that the weight of the amounts charged to A-3 and T-5 relative to advertising revenue was six times larger than for TVE in relation to its advertising revenues.
- The CNC resolution of 9 December 2008 in case 636/07, Phonograms, fined AGEDI and AIE for discriminating against SOGECABLE in comparison with TVE and ONO.
- In its resolution of 23 July 2009 in case 651/08, AIE/T5, the CNC fined AIE for having applied discriminatory fees to Telecinco.

237. These discriminatory practices pursued by collecting societies introduce competitive distortions in the markets where the users operate, as some users were obliged to pay much higher prices for an intermediate input than the prices paid by their competitors.

238. One important element in the advent of these practices is the lack of transparency regarding the contract that a collecting society has with a user j for another user i , where j and i are users engaged in a similar activity, a similar use of the repertoire and which exert some competitive pressure on each other. This lack of transparency makes discrimination easier, which serves to once again underscore the causal link between the absence of transparency obligations for collecting societies and their ability to use their monopoly position to introduce distortions in the markets.

239. For these reasons, in its resolution in case 636/07, Phonograms, the CNC held that *“concealment of agreements previously made with television*

¹²⁵Supreme Court judgment of 22 December 2008 on cassation appeal 2951/2002 lodged by SGAE against the ruling issued by the Provincial Appellate Court (Audiencia Provincial) of Madrid in 2002, which, amongst other things, ordered that the conditions covenanted between SGAE and AFYVE be applied to Vale Music.

operators is a serious breach of the special transparency duty that they have with the users of the rights they manage”, considering it necessary “in order to mitigate the risk of new discriminatory behaviours, of requiring the accused collecting societies, in all negotiations regarding the terms of access and remuneration of their copyright repertoire, to inform the user of the economic terms and conditions of the agreements previously executed with users who pursue the same or a similar activity and make comparable use of the repertoire”.

V. CONCLUSIONS

One. The current legal system recognises different types of intellectual property rights of the creators of works and other subject matter. Copyright collecting societies manage many of these rights and constitute an important sector of the economy that affects many different markets, even though technological advances and new channels for distributing and consuming the copyrighted works are questioning their traditional role.

Two. Collecting societies have substantial market power and normally pursue their activity from a monopoly position. Each of them manages a certain group of rights that are not managed by anyone else. As a result, in Spain there are seven monopolies which each manage a different set of intellectual property rights. The lone exception is found in relation to the authors of audiovisual works, where there is a minor degree of competition between the dominant association, SGAE, and the minority player, DAMA.

The monopoly position of collecting societies reduces their incentive to operate efficiently and opens the door to a number of problems. One is the application of unfair and/or discriminatory pricing practices. Another consists of the difficulties confronted by users of protected works to manage their costs efficiently and to develop non-traditional markets for exploiting copyrighted works.

These difficulties are aggravated by the large number of rights and societies and by the lack of clear provisions in the LPI on issues that are key for the marketing of intellectual property rights. All of this increases transaction and negotiation costs for users and generates a large volume of legal claims between purchasers and sellers, with the attendant legal uncertainty.

Three. The negligible competitive pressure faced by collecting societies is explained by the confluence of diverse entry barriers that hinder the real and/or potential competition that could be posed by other domestic or foreign societies or by rightholders through individual management of their rights

For one, the economies of scale in managing intellectual property rights drive a trend toward concentration of the market that places new entrants at a competitive disadvantage. Nevertheless, their magnitude depends on the type of use and has been affected by

technological advances, which is reducing the costs of IP management and making individual management more feasible, especially in the online environment.

There are also legal entry barriers in the LPI and the strategic entry barriers established by collecting societies in a regulatory environment that does not counteract their considerable market power.

In relation to legal entry barriers, the LPI sets a series of conditions for being able to operate as a collecting society that have played a decisive part in articulating the current monopoly regime and which hinder the emergence of new operators to compete with the societies that have already been authorised.

One is the obligation to obtain a prior authorisation conditional on fulfilment of requirements that introduce a high degree of uncertainty, lack of clarity and subjectivity, and which give the Ministry of Culture very broad discretion in granting or declining the authorisations that affect the level of competition. All this allows the collecting societies to block the path to other forms of collective management that differ from the present ones and which the market may be demanding, especially in the online environment.

Second, requiring that the collective manager be organised as a not-for-profit entity to pursue such a typical business activity as is IP rights management, and the imposition of certain requirements in the bylaws (article 151 LPI), are not justified by the need to defend the holders of the managed rights. In any event, the adoption of commercial corporate forms should not be prohibited as these are more appropriate than an association for pursuing typical corporate economic activities.

Lastly, the LPI imposes mandatory collective management through collecting societies beyond what is required by European Union law. This legal imposition eliminates the rightholder's freedom of choice between individual and collective management (in any of the forms that are materially possible), even though such choices are being made ever more feasible by technological advances, especially in the online environment.

In view of all of foregoing, although the LPI does not expressly mandate the existence of only one collecting society per type of rights, the CNC's analysis of the regulatory framework for collective copyright management shows that the lawmakers

intended collecting societies to operate as monopolies.

In any event, all of these factors show that the legal framework laid down in the LPI is highly restrictive of competition, and tends to strengthen the negative effects of entry barriers of an economic nature which on their own already drive a trend toward concentration in the market. In this regard, the reforms introduced in the LPI in connection with the transposition of the Services Directive are clearly insufficient and favour management of intellectual property rights by monopolies.

In relation to the strategic entry barriers, these derive from certain actions performed by the collecting societies in a regulatory environment that allows them to exploit their monopoly position. Fundamental amongst these are clauses in the reciprocal representation agreements made with copyright managers from other countries that generate national monopolies; the breadth of the contracts offered to rightholders for the management of their rights, both as regards the duration and the scope of the rights covered; exclusivity in the management of rights; the lack of transparency regarding the repertoires managed; the configuration of repertoires in which there coexist, with no apparent distinction, exclusive rights and remuneration rights, some subject to mandatory collective management and others for which collective management is voluntary; as well as the predominance of pricing models that do not consider actual use.

Four. Even though the LPI establishes a regulatory framework for collective management in which the most likely and desired option is monopoly management, the obligations placed by this law on those societies completely fail to counteract the vast bargaining clout they gain from their market power vis-à-vis rightholders and users.

In the area of pricing, there is no *ex-ante* control of the fees unilaterally set by the collecting societies, neither through the introduction of effective obligations nor by means of supervision by a competent authority, given that the powers conferred upon government agencies by the LPI are very general and ambiguous and carry no disciplinary powers.

This generates a situation in which the process of negotiating with users does not ensure that the fees will be reasonable and fair. The copyright managers enjoy great market power and, when an agreement is not reached, the legal framework allows the application of general fees previously fixed by the monopolistic

collecting society unilaterally, greatly reducing the society's incentive to carry on real negotiations.

Furthermore, the LPI does not include transparency obligations regarding the repertoires or scope of the rights actually managed by the collecting societies, regarding the copyright administration costs, the royalties not distributed and the terms of the contracts reached with individual users. The ensuing lack of information does not make for well balanced negotiations.

And lastly, there is very little *ex-post* control. The Intellectual Property Commission, set up by the LPI of 1987 as a mechanism for resolving pricing disputes between collecting societies and certain users, has not proven to be effective instrument for solving pricing conflicts, primarily because it has not been conferred the necessary authority and coercive powers to successfully achieve that purpose. Over the years lawmakers have not managed to improve this dispute resolution system, mainly due to opposition by the collecting societies to anything that entails government involvement in the determination of the fees charged for the use of the exclusive rights they manage.

Five. The combination of absence of an effective regulatory framework and the monopoly position of collecting societies when setting their fees has given rise to many pricing disputes, which have been brought before the courts of justice and also before the former Competition Tribunal and the current CNC, the latter on several occasions having penalised these entities for abusing their dominant position by setting unfair and/or discriminatory fees.

The problems of fairness mainly arise because the copyright managers set their fees unilaterally without regard to the economic value generated by the repertoire's use or to the actual use of the repertoires. Collecting societies are reluctant to charge licensees based on actual use, even though this is technologically and economically feasible in many cases and the societies use reports on actual use to distribute a very high percentage of the royalties they collect.

Unequal or unfair pricing introduces distortion into the markets where users operate, because they are excessive and/or because they hold users back from managing their costs efficiently.

In addition, the application of discriminatory fees occurs because collecting societies set different prices for similar users, without any objective justification and placing some users at a competitive

disadvantage. Practices of this kind are spawned by the absence of transparency obligations for collecting societies regarding the contracts signed with individual users and hinder competition in the markets where the users operate, because some licensees are obliged to pay much higher prices for an intermediate input than the prices paid by their competitors.

Six. The CNC takes the view that a more competitive model is possible, one where the societies face greater competitive pressure in the services they provide to rightholders and users, be it from other domestic or foreign copyright managers or from the rightholders themselves. The objective of introducing competition in the management of intellectual property rights is particularly important in view of the technological developments of the last decade and the advent of the online environment as prime terrain on which copyrighted works and subject matter will be exploited in the future. In this new environment, the possibilities of achieving more competition in the collective management of intellectual property rights are greater than in the offline world.

For this reason, the CNC advocates a comprehensive overhaul of the LPI on matters of collective management and recommends the removal of a number of obstacles and entry barriers to increase the incentive of copyright managers to provide their services more efficiently and reduce their capacity to exert their market power in the area of pricing.

Introducing competition does not mean that a given set of rights is distributed amongst several collecting societies. That model would not appear to be the best option as users would be obliged to negotiate with all of the collective copyright managers if they wish to be licensed for the repertoire of all authors, so this would not really favour competition. Competition requires a different approaches to collective management than the current ones, models that strengthen the capacity to choose and act, not just for users, but for the rightholders as well. Indeed, injecting greater competition will require freedom to engage in IP rights management, that is, to give the rightholders more contractual liberty with respect to the mandate they give to collecting societies, and more freedom of choice as to by whom and under what legal form their rights will be administered. Another indispensable need is to eradicate the administrative interventionism that during all these years has been preventing or hindering the mechanisms of the market from operating to organise the collective management of intellectual property rights.

Nevertheless, for so long as the collective managers continue to enjoy monopoly positions, the CNC believes that it is of decisive importance to improve the regulation of entities that consistently abuse their dominant position. Those improvements should include imposing transparency obligations, designing pricing models that take into account the actual use of the repertoires and certain quantitative criteria, as well as creating a regulator that can resolve all type of intellectual property disputes with binding decisions.

In any event, as it has been doing thus far, the CNC will continue scrutinising and moving against all unlawful anti-competitive practices and conducts in the services provided by intellectual property collecting societies.

VI. RECOMMENDATIONS

In this section, taking the current intellectual property regulatory framework as point of departure, the CNC makes proposals for the construction of a new model for collective management of IP rights, one that is more favourable to competition, with a greater likelihood of collecting societies being confronted by competitive pressure, and which reduces the amount of conflicts and ensures an effective framework for resolving copyright management disputes, particularly in the area of fees established by collecting societies.

This recasting of the model would be strengthened by pro-competition initiatives being carried out at the European level that are aimed at promoting competition between collective managers of different countries.

In fact, to the extent that Spanish intellectual property law may be thought to make it feasible for collecting societies to repeatedly engage or be able to engage in abusive conducts, it cannot be ruled out, in the view of European Union case-law, that the European Commission might eventually hold that Spain is in violation of article 86 of the EC Treaty. That article (now article 106 of the Treaty on the Functioning of the European Union) requires that *“in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties...”*. And article 82 of the said Treaty (now art. article 102 of the TFEU) prohibits companies from abusing their dominant position in the market.

Until advances are made toward making the model more favourable to free competition and the monopoly situation continues to exist in the collective management of IP rights, the CNC believes that other types of measures need to be enacted to help counteract that monopoly power and prevent possible abuses and inefficiencies.

One. As it currently stands, the legal framework embodied by the LPI is not sufficiently clear and predictable, and it fails to generate legal certainty for the agents involved in the IP rights management markets. It must therefore be overhauled.

Two. Review and, if appropriate, eliminate those elements of the LPI that are acting as legal entry barriers, having special regard to the new possibilities ushered in by technological advances. In particular:

- **The mandatory submission to collective management should be eliminated in those cases where it is imposed at present, except where the collective**

management obligation is laid down in a EU Directive.

- The current system of administrative authorisation for collecting societies should be replaced by a simple registration procedure.
- Eliminate the requirement that collecting societies be organised as not-for-profit entities and expressly provide that they may be incorporated in any legally admissible form.

Nevertheless, for so long as the current regulatory framework remains in place and, certainly, while the monopoly position of the collecting societies is maintained, the CNC proposes the changes discussed in the following recommendations.

Three. Revise the LPI's provisions on the bylaws of collective societies and on the contracts with rightholders in order to give them more flexibility and make it easier for rightholders to switch from one collective manager to another. Specifically:

- The duration, extension and cancellation notice period should be limited, establishing a maximum term of one year, renewable indefinitely for further extensions of one year each, and with a notice period of three months.
- Assurances are needed that the rightholder will have greater flexibility when determining the scope of the contract with regard to the rights, works, territories and types of use that it covers, as well as for stipulating that the contract is not exclusive so that the rightholder retains the right to issue licences along with the collecting societies, be it directly or through another collecting society.

Four. Include in the LPI transparency obligations, with penalties provided for in the event of breach. In any event, the transparency obligations should include at least the following:

- Obligations to disclose to rightholders and users the repertoires (rightholder works/subject matter) actually

managed.

- Disclosure obligations regarding the contracts entered into with users when negotiations are conducted with other users who carry out a similar activity.
- Disclosure obligations regarding contracts arranged with collecting societies in their same class.

Five. Include an obligation in the LPI that collecting societies must establish, at least for certain types of users, pricing models that take actual use into account, while keeping the current fees for availability as an alternative.

As a general principle for determining what types of users may opt for this type of fee, whenever monitoring and tracking actual use can be done at a reasonable cost and provided the user is willing to provide the information needed to ascertain the use, the collecting society should have the obligation to offer the user a royalty pricing scheme that takes into account actual use.

Six. Reform or replace the Intellectual Property Commission in order to make it an independent regulator, endowed with the technical competence and the decision-making and enforcement powers that are needed to resolve all disputes in the area of intellectual property and, in particular, pricing conflicts between collecting societies and users, be it with respect to exclusive rights or to remuneration rights.

The Commission should be able to perform its decision-making function *ex officio* or when so requested by either of the parties, if they have engaged in negotiations for a certain minimum period without reaching an agreement.

Along these lines, there should be eliminated the current regulatory provisions that allow application, in default of an agreement, of the general fees unilaterally approved by the collecting societies.

The decisions of this regulatory Commission will be public, enforceable immediately and open to review by the competent courts.

Seven. Establish laws and regulations setting out the criteria that collecting societies must follow for setting the fees for the

use of their repertoire of exclusive and/or remuneration rights, and which will also be applied by the regulatory Commission if its intervention is necessary. The criteria should in all events include the following:

- ***Breadth of the repertoire.*** The fee must be adapted to the repertoire or to the scope of the rights actually administered by the collective manager, and rightholders whose rights are not managed by the collecting society should not be considered in the calculation.
- ***No discrimination.*** The fee must be similar for the same services, that is, for users who pursue similar economic activities and make similar use of the repertoire, unless there is an objective justification for charging different fees.
- ***Economic value and actual use of the repertoire.*** The fee must be based on criteria that allow it to reflect the economic value of the repertoire's use.
- ***Simplicity, transparency and disclosure.*** Fee manuals should be clear and simple. The methodologies for calculating the fees should be available to users.

Eight. The competent government authorities who in the execution of their functions learn of agreements between Spanish collecting societies and foreign societies that hinder or are capable of hindering the development of a European market in the management of intellectual property rights should report this to competition authorities for the relevant purposes.

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