

The Right of the Author to Grant Licenses for Non-Commercial Use

Creative Commons Licenses and the Directive on Collective Management

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A. Introduction

1 Art. 5 para. 3 CM directive¹ reserves the rightholders the right to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose. As the directive on collective management of copyright passed the legislative procedure on 26 February 2014, the member states have to bring into force the laws, regulations and administrative provisions necessary to comply with this directive by 10 April 2016. Regarding Art. 5 para. 3 CM directive this means that from that day on, every rightholder in the EU shall have the option to license parts of their own work repertoire for non-commercial use autonomously and at the same time let collective management organisations (CMOs) collect money for the commercial use of these works. As a consequence, authors and other rightholders should no longer be in the dilemma to either choose a participation in a collective rights management system or to use “non-commercial licenses”, a category which is further explained in this contribution. As easy as this is said, several difficulties lie within the way of implementing the provision in national law which shall be examined in this contribution, but not before

the current status quo and the legislative procedure of the provision have been dealt with.

B. Status quo

2 At first it is necessary to take stock of the conditions that can be found in the collective rights management.

I. Difficulties under the current legal regime

3 Looking at the current practice of collective rights management in the EU, the alternative that CMOs license the works of the authors represented by them on the basis of non-commercial licenses is not common at all. In certain sectors, authors struggle when they want a collecting society to exercise their rights for commercial use, but have their works licensed for non-commercial use. Non-commercial licenses can contain copyright limitations for non-

commercial uses that are simply not in line with the terms and conditions that many collecting societies lay down in their contracts with the authors. Being represented by a CMO therefore often makes it impossible to use alternatives like the Creative Commons licenses.

- 4 This is most notably the case where authors have to assign exclusively all relevant rights in their works to the CMO, if they want to be represented by the respective CMO. If collective management organisations only assumed commercial rights, or even just cared for statutory remuneration rights, e.g. copyright levies for private copies, there would be no problem at all. Authors could administrate non-commercial licenses on their own while CMOs would just collect money for the licenses authors cannot survey efficiently. Contrasting this, the administration agreements are far more extensive in practice and let the author resign from all his rights, so that the CMOs can administrate all licenses for a work.
- 5 The consequence of such an agreement is that the authors do not have any right left that they could license for any kind of use to third parties on their own, but rather are dependent on the CMO to grant the licenses. Unfortunately, many of the big and economically relevant CMOs do not want to grant licenses for non-commercial use for many reasons (as shown in the following section), what leaves the rightholders organized in one of these CMOs with no opportunity to have their works made available for free. This is what the CM directive wants to address in its Art. 5 para 3.

II. Differences in practice due to diverse types of works – the German experience

- 6 Whether the authors can license their works for non-commercial use at this particular moment depends very much on the type of the created work. While the CMOs assuming rights in the literary sector tend to be more liberal and giving the authors flexibility concerning the non-commercial use for their works, CMOs working in the musical sector are much more imperious. This difference can be seen relatively well looking at the two biggest German collecting societies VG Wort and GEMA.

1. VG Wort

- 7 The VG Wort manages the rights of authors and other rightholders in literary works. For this, the rightholders often do not have to conclude an administration agreement with the collecting society. The VG Wort provides two models of rights

management, depending on the type of literature, and the differences following this distinction are noticeable.

- 8 In some cases it is sufficient to just notify the VG Wort². This opportunity is available for authors and publishing houses of literary works that are just published on the internet, like blog posts. More relevant is the opportunity for authors of scientific works published online and offline, who can desist from an administration agreement as well and use the option of just notifying the VG Wort. For example, the VG Wort collects money for the use of literary scientific works in scientific libraries, in detail for copying and lending the literary work, if the author of the scientific literary work notifies the VG Wort that a publication has been made. In these cases the author is then beneficiary and gets money only for this particular use of this particular work, what means that for every other use and for every other work, the right to license the work stays with him or her. Hence, the author can individually determine the licensing for non-commercial uses as well.³
- 9 When authors have rights in other types of literary works and want the CMO to manage these rights, they have to conclude an administration agreement with the VG Wort. In this administration agreement, they have to grant the collecting society considerably more rights for all of their existing and future works. Among them are not only commercial rights, but for example the right of reproduction as a whole. In this case, authors are not free to license their works for every non-commercial use.
- 10 By looking at the 2013 annual report of the VG Wort, it becomes clear that the majority of the beneficiaries do not have an administration agreement with the collecting society: from 487,083 beneficiaries only 176,742 have concluded an administration agreement, which leaves 310.341 beneficiaries without a contract of this kind⁴. Additionally, most of the rightholders who get money from the VG Wort are not members of the collecting society⁵. This means that most of the authors in the literary sector do have the option to use non-commercial licenses, but still a considerable amount of authors cannot.

2. GEMA

- 11 Taking a look at the GEMA, the picture turns rapidly. The GEMA manages the rights of authors and other rightholders in musical works. If an author wants to earn money with these works, the conclusion of an administration agreement is mandatory. The authors therefore have to exclusively assign the GEMA all-embracing rights in their existing and future works, and without the exclusive rights, an author cannot license his or her works for non-commercial uses

anymore. When all rights are exercised by the GEMA, there is no opportunity for the author to license single works with non-commercial licenses. The GEMA itself however does not grant licenses for non-commercial uses. As a consequence, it is not possible to use non-commercial licenses and still let the GEMA manage the rights in musical works at the same time. An author currently wanting to use non-commercial licenses has to withdraw all his rights from the GEMA, which would leave him alone with the rights management. As most of the uses of copyrighted works can not be supervised by a single person, authors would effectively waive for a large part of their income. It is no surprise that most of them tend to stay in the GEMA and do not use non-commercial licenses.

- 12 In a statement, the GEMA enumerated various reasons why it does not license works for non-commercial use⁶. It stated that the granting of non-commercial licenses like the Creative Commons licenses (CCPLs) is not compatible with the management model of the collecting society, as these licenses apply only on single works and for specific uses. The GEMA model of collective management could in contrast ensure an efficient and economic protection of the authors and other rightholders. If non-commercial licenses were allowed, a huge increase of administration costs would follow. Every time GEMA would want to grant a license, it had to examine if the work is licensed with a CCPL, because in this case GEMA would not be allowed to grant licenses for this work. This obligation would interfere with the working management system, not least because every rightholder represented by GEMA would suffer in the form of less payments.
- 13 Furthermore, the term “non-commercial” would not be clear enough to separate between GEMA-licenses and CCPLs, so that a sufficient distinction between collective and individual rights management would not be possible. Without a clear distinction, legal certainty could not be ensured, neither for rightholders nor users.
- 14 One of GEMAs strongest arguments though is the endangerment of cherry picking. Based on this concept GEMA believes that authors who can bring in enough profit out of concert tickets, merchandising and other business activities apart from rights management, could tend to license successful works under non-commercial licenses for free to spread them as far as possible and generate more awareness, whereas less successful works should be managed by GEMA to make at least some money with them. If this was the case, the distribution sum would reduce remarkably for every member of GEMA, even for those who are urgently dependent on remuneration payments. With a decreasing distribution sum and less money for every creative mind, the creative activity as a whole would reduce, and cultural diversity would diminish.
- 15 The fact that the members of GEMA would not favour a change of GEMA constitution would point out that the majority are against non-commercial and Creative Commons licenses.
- 16 Yet, there are strong counter arguments against the points raised by GEMA. GEMA apprehends that the efficiency of the collective management could be threatened because of increasing administration costs through detailed examination of the licenses of a work. But already today GEMA has to examine for every single work which rights are held by which rightholder, so that the distribution of the revenues can be exercised correctly. Furthermore it is questionable whether the administration costs could really increase when the necessary examination can be performed by automated procedures on the basis of databases that have all the relevant data in it already.
- 17 The claim of GEMA that the term “non-commercial” has to be filled with meaning to have legal certainty for the distinction between collective and individual rights management is not only understandable, but supportable. Nevertheless, this argument is not sufficient enough to preclude the feasibility of a combination of collective rights management and non-commercial licensing of works. Of course the legal term has to be interpreted and legal practice will have to find a sufficiently clear definition⁷. But just the fact that in the past the distinction was not clear enough is not a convincing argument that in the future this cannot be changed⁸.
- 18 Also, the argument of endangerment through cherry picking is not really persuasive. Why would successful rightholders license their most successful works with non-commercial licenses to get more awareness when they have reached already a sufficient level of awareness for their works? Why should rightholders waive at their biggest revenues? Moreover, even if rightholders grant non-commercial licenses for their most successful works, it is not obvious or self-evident that such a license grant would diminish the revenues for commercial uses. Beyond this, at least in the music sector these questions may become less relevant in the nearer future, as new business models take over and the market shifts from possession of works to access to these works⁹.
- 19 Nevertheless, GEMA insisted on its arguments in the past and did not allow its members the licensing of works with non-commercial licenses. Apart from non-commercial licenses, GEMA provides only few opportunities to adapt its collective management system to special needs of single rightholders. Beneficiaries can exclude certain branches of rights management from the collective system, for

example the broadcasting on radio or making the works available to the public online. By doing so, the rights for these uses stay with the rightholder, and he or she can exercise the rights as he or she pleases. What seems like a good option is in most cases not completely satisfying. An author who wants to make use of this alternative has to exclude all of his or her existing and future works for the chosen branch from the collective rights management, so that at least non-commercial uses can be licensed, but every other use of every work of an author in this branch has to be licensed by the author as well. Not only is it insufficient that only certain branches can be excluded, the fact that every work is excluded from the management of this branch and leaves the author with the management alone causes this option to be largely unappealing. And, as non-commercial licenses like the Creative Commons non-commercial licenses (CC-NC-licenses) want to include every type of use, the author would need to exclude his works for all branches of the collective rights management. Withdrawing all existing and future works from every branch of collective rights management would be the same as resign the membership in GEMA. Therefore, regarding non-commercial licenses, this option is not a suitable solution.

- 20 Furthermore, GEMA established a shorter 3-month cancellation period at the end of a calendar year for certain online uses, so that authors can assume their rights for these certain uses and license works for these uses with a CCPL. But again, as non-commercial licenses want to include every type of use, this option is only helpful to some extent – and again, the authors would have to cancel the collective rights management for all of their existing and future works.
- 21 For authors who have a website, GEMA provides another option. Authors can use their own works for a free stream on the website, but only on the condition that the website is personal and non-commercial. This means that authors, who have exclusively assigned to GEMA all-embracing rights, can use their own work for this without having to license their works back¹⁰. The question occurs, under which circumstances the website of a music artist, who wants to spread his work, sell it and make revenues out of merchandise, exactly is “non-commercial”. And, of course, the works are not licensed with non-commercial licenses, so that they cannot be distributed to users for further use.
- 22 In total, members of GEMA cannot use non-commercial licenses and have the CMO managing the commercial rights at the same time. The opportunities GEMA provides to give its members more flexibility are not sufficient regarding non-commercial uses.

3. Reasons for the differences between literary and musical sector

- 23 Looking at collecting societies in the areas of literature and music, the encountered differences alter from quite massive to rather small. Every author who concludes an administration agreement with the GEMA or VG Wort does not have any convincing opportunity to license his or her works for non-commercial use. However, most authors in literary works enjoy in practice some flexibility, based on the fact that they do not have to conclude an administration agreement but can still be represented for some rights by a CMO. Such authors can decide for every single work whether they want to inform the VG Wort or not, and even if they inform the CMO, it only collects money for very specific uses. As a consequence authors are free to license their works for non-commercial use and be represented by a CMO. The downside of this more flexible approach is a rather limited collective rights management for the commercial use of the works.
- 24 Additionally, the market structures of the musical and literary sector are very different. The music market is dominated by a handful of powerful and globally operating vendors (major labels) that have to face very distinct users of their works, with some of them being very powerful as well, e.g. the public broadcasting service. By contrast, the different markets for literary works are more divers with many small and medium size actors. And by examining the market shares in the music industry it becomes rapidly clear that the major labels, who are widely interested in music as a profitable and lucrative business commodity rather than spreading the works for free for non-commercial uses, are much more powerful than single literary publishing houses when it comes to debating the procedures in their industry. In 2013, the recording industry made 15 billion \$ in total¹¹, and from this amount, the three major labels¹² had a market share of 74,9%¹³. Hence, they can apply much more pressure on every other market participant, including CMOs and rightholders. Non-commercial licenses could undermine many business models of the music industry, and with rapidly shifting business models in this area, most of the market participants are rather careful loosing any protection whatsoever, especially the one they get from their rights and through the law.
- 25 Moreover, the use of music and literature differs significantly. Music in general is mostly used as a whole, tracks are played completely, whereas literature is often used in excerpts. An author of literature often has to read or publish only pieces of his work to gain more attention, musicians need their whole song to be played to make users aware of their works. When music is available for free

because it is licensed for non-commercial uses, users do not have to buy this music anymore, whereas free excerpts of literature may motivate the user to read more and even buy the full work.

- 26 Another reason for the differences between the collective management system of GEMA and VG Wort is based on the fact that the GEMA was established in 1933 as a CMO for the management of the rights of use, so that the levies for private copies are not nearly as important to the GEMA's business model as they are for the VG Wort.

III. Pilot experiments of collecting societies in other European jurisdictions

- 27 In spite of the fact that the European¹⁴ CMOs managing musical rights are normally more rigorous when it comes to non-commercial uses, several of them have started pilot experiments with Creative Commons. The collecting societies for authors of musical works in the Netherlands (Buma/Stemra), Denmark (KODA) and France (SACEM) elaborated standards for their members under which the CC-NC-licenses could be used for works already exercised by the CMOs.

1. The Netherlands: Buma/Stemra

- 28 The first European collecting society experimenting whether collective rights management and individual licensing can be combined was Buma/Stemra in the Netherlands¹⁵. The pilot started on the 23rd of August 2007 and was initially planned to last for one year, but had been extended repeatedly.
- 29 The pilot project enabled members of the collecting society for the first time to use CCPLs while having works exercised by the CMO. The focus on CC-NC-licenses in the project was justified with the argument that Buma/Stemra's main aim was to generate revenue for its members and therefore could only allow free non-commercial uses of the works. As long as authors want to use CCPLs to promote themselves, non-commercial licenses would have to be sufficient, so that Buma/Stemra could continue to collect royalties for commercial uses. In practice¹⁶, authors had to ensure that they were the only ones having a right in the works that shall be licensed with a CC-NC-license or at least they had permission from everyone having rights in the works to use such licenses. After accepting the conditions of the pilot on the website of Buma/Stemra, they had to indicate what particular works they intended to publish under a CC-NC-license. Right after that, the authors could generate license buttons that marked the works as licensed under the

conditions of the pilot. This meant that authors at first had to assign their rights to Buma/Stemra and afterwards, the non-commercial rights were licensed back to them.

- 30 To guarantee the success of the experiment, Buma/Stemra and Creative Commons had to define what uses shall be regarded as commercial and what uses non-commercial, as the CCPLs did not comprise a sufficiently clear definition. While Buma/Stemra argued to have just a small amount of uses regarded as non-commercial, Creative Commons wanted to preserve already existing practices and a wider interpretation.¹⁷ In the end, they agreed on a very strict interpretation of what uses are deemed to be non-commercial.
- 31 First, every use of a work by a for-profit institutions was qualified as 'commercial use'. Furthermore, distributing or publicly performing or making the work available online against payment or other financial compensation was qualified as 'commercial use' as well. Financial compensation in this respect included not only making profit out of the work, but the use of the work in combination with ads, publicity actions or any other similar activity intended to generate income for the user or a third party. Beyond this already very strict definition the distribution and public performance of a work were seen as commercial too, as well as having public as well as private broadcasting organisations make the work available online and using the work in hotel and catering establishments, work, sales and retail spaces. This even included the use of the work in churches, schools and dancing schools and welfare institutions. For these uses separate licenses were needed.
- 32 As this definition had the advantage of being very precise and much more specific than the definition contained in the CCPLs, it was also more restrictive and therefore left the experiment with little room to develop. It is no surprise that the actual use of the pilot was rather disappointing. At the end of 2009, only 30 authors wanted a re-transfer or their non-commercial rights for in total 100 works. This showed in particular that the definition of the non-commercial use was far too strict.¹⁸ While nearly 25% of the Buma/Stemra members showed interest in taking part in the pilot, less than 1% finally joined¹⁹. Further surveys showed that the rightholders were desperate to gain more flexibility, especially when it comes to promotional use of their works, so that in general, there was a fundamental need of the pilot. But although the pilot showed that collecting societies can deal in with CCPLs in their practice, the limitations of the non-commercial uses were so strict that the consequence was a "mismatch between the way non-commercial use is framed in the definition developed for the pilot and forms of use that are

considered to be non-commercial among Buma/Stemra members”²⁰.

- 33 The experiment has now been converted into a structural arrangement²¹, so that Buma/Stemra allows the licensing of works with CC-NC-licenses and regards the following uses as commercial:
- 34 Distribution to the public, performing or making available the work online by broadcasters, the use of the work in catering matters, employment, sales and retail spaces and the use by organizations in both the profit and not for profit industry that use music in or next to the performance of their duties, such as churches, (dance) schools, institutions for social work, and the like²². This definition is not as strict as in the pilot and gives the rightholders more flexibility.

2. Denmark: KODA

- 35 In 2008, the danish CMO for musical rights, KODA, started another experiment. The KODA agreed to collect the royalties for the commercial use of a music album (e.g. radio broadcasting) while the album has been licensed with the danish CC-BY-NC-ND 2.5dk-licence²³. Different from the dutch pilot, this experiment was not limited in time and showed that collecting societies can deal with CCPLs in practice. Defining the non-commercial use of a work, KODA and CC Denmark agreed on guidelines. A licensee who wants to use the work under the terms of CC-NC-license has no right to exercise any of the rights in a way that is primarily directed toward commercial advantage or private monetary compensation. This definition was more flexible and let the experiment develop much more.

3. France: SACEM

- 36 The latest experiment was started in France by the SACEM in January 2012. For at least 18 month, its members were given the opportunity to license their works with CC-NC-licenses, and even single works could be licensed alternatively. For this purpose, a clarifying specification of what uses are deemed to be commercial was drafted. The following uses have to be regarded commercial under the specification²⁴:

- any use of the work by a for-profit entity;
- any use of the work giving rise to any compensation, whether financial or other, whatever the form, the reason and the motive and whoever the beneficiary;
- any use of the work in order to promote or in connection with the promotion of products

or services whatsoever and for the benefit of whomever;

- any use of the work by broadcasting entities as well as in workplaces, stores and retail spaces;
- any use of the work in restaurants, bars, cafes, concert venues and other hospitality establishments;
- any use of the work by an entity as part or in connection with revenue generating activities;
- any exchange of the licensed work for other copyrighted works by means of digital file-sharing or otherwise but only when there are advertising or sponsorship receipts, whether direct or indirect, or payment of any kind in connection with the exchange of copyrighted works.

- 37 The restrictions made in the pilot make it clear how strict the definition of the non-commercial use can be, in this experiment not many scenarios were left in which the use was non-commercial. Moreover, the pilot was limited in time. In practice rightholders had to assign their rights to the SACEM first and the non-commercial rights licensed back to them afterwards, so that congruent to the Buma/Stemra pilot the concept of a “non-commercial license back” was seen as the most practicable solution.

4. Conclusion of the pilot experiments

- 38 Considering the results of the pilots projects, some first conclusions may be drawn. It became clear during the projects that authors seek for more flexibility in the rights management of their works, and that collecting societies can provide this flexibility and deal with open content licenses like the CC-NC-licenses if they are willing to adjust their system and practice. However, the projects have also shown that only a small number of members participated in the pilots because of various reasons. On one hand, the definition of “non-commercial use” was strict in all observed pilot projects. This led to a narrow set of application scenarios for the CC-NC-licenses, so that members did not have much flexibility in the end. On the other hand, many of the authors interested in non-commercial licenses are not organized in CMOs anyway. Therefore the total number of authors using non-commercial licenses and yet being represented by CMOs was small. But even though the pilots were not successful in the sense of a massive use in practice, the experiences gathered with the projects may still be useful for the better understanding of Art. 5 para. 3 CM Directive and its implementation into national law.

IV. The legislative procedure: How the provision got into the directive

39 The Commission proposal for a directive of the European parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market was published in July 2012²⁵. In the proposal it was emphasized in Recital 9 that the “directive should not prejudice the possibilities of rightholders to manage their rights individually, including for non-commercial uses”²⁶ However, the initial proposal did not comprise a black-letter rule in this regard. The European Economic and Social Committee opinion from the 12th of December 2012²⁷ and the working document of the Committee for Legal Affairs from the 4th of March 2013²⁸ changed nothing with regard to the provision about non-commercial use. The first official document expressing the right to grant licences for non-commercial uses in a rule was the draft of an opinion of the CULT committee on the 28th of March 2013²⁹. In amendment 29, a proposal for a new Art. 5 para. 2 a was made that stated “rightholders shall have the right to grant free licences for the non-commercial use of their works and rights. In this case, rightholders shall inform in due time the collective management organisations authorised to manage the rights of such works that such a free license has been granted.”³⁰ The provision was substantiated with the argument that the management of works should be more flexible for rightholders and they shall have the right to decide if they want to use non-commercial licenses without jeopardising their membership to the CMO they are in. The draft report of the Committee on Legal Affairs³¹ of the 30th of April 2013 however proposed no such amendment. On the 30th of May 2013, the Council debated about the directive in its 3242nd meeting³² before the Committee on Legal Affairs published its report on the proposal on the 4th of October 2013³³, in which again, the new Article 5 para. 2 a was taken up with a modified wording, by which the “rightholders shall have the right to grant licences for the non-commercial uses of the rights, categories of rights or types of works and other subject matter of their choice. Collective management organisations shall inform their members of this right and of the conditions attaching thereto.”³⁴ Recital 9 was not changed. When representatives of the European Parliament and the Council of ministers agreed on a compromise on the 4th of November 2013³⁵, they agreed that rightholders will be able to grant licenses for non-commercial uses as well. In the following vote on the final version of the directive³⁶, Recital 9 was expanded to the final wording of then later Recital 19 subparagraph 3³⁷. It was stated that “as far as non-commercial uses are concerned, Member States should provide that collective management organisations take the necessary steps to ensure that

their rightholders can exercise the right to grant licences for such uses. Such steps should include, inter alia, a decision by the collective management organisation on the conditions attached to the exercise of that right as well as the provision to their members of information on those conditions.” Furthermore, Article 5 para. 2a. was affirmed, so that “rightholders shall have the right to grant licences for the non-commercial uses of the rights, categories of rights or types of works and other subject matter of their choice”. In a last opinion of the Committee on Legal Affairs from the 6th of December 2013, only the legal basis of the directive was verified³⁸. While the Commission proposed Articles 50 para. 2 lit. g, 53 and 62 of the Treaty on the Functioning of the European Union (TFEU) as the legal basis, the Committee on legal Affairs came to the result that the correct legal basis can rather be found Articles 50 para. 1, 53 para.1 and 62 TFEU.

40 On the 4th of February, the European Parliament adopted the directive, now with Recital 9 placed in Recital 19 and Art. 5 para. 2a shifted to Art. 5 para. 3³⁹. On the 20th of February 2014, the Council of the European Union adopted the directive and 6 days later, at the 26th of February 2014, the directive was signed by the President of the EP and by the President of the Council. The directive was published in the Official Journal of the European union on the 20th of March 2014⁴⁰.

V. The implementation in national law: interpretation and consequences of the provision

41 Art. 5 para. 3 CM directive has to be brought into force by the 10th of April 2016. Until then, the Member States must provide a suitable implementation that will suffice the requirements the directive established. Unfortunately, Art. 5 para. 3 does not clarify the technicalities of the author’s right to grant non-commercial licenses. Is Art. 5 para. 3 CM directive an entitlement that right holders can enforce? What uses shall exactly be „non-commercial“? An adequate distinction between non-commercial and commercial uses is necessary for legal certainty. Closely related is the question who should be responsible for this distinction and has the prerogative of interpretation? Is there a need to design new non-commercial licenses, or are existing license models suitable? How should collecting societies implement the regulation in their practice?

1. The meaning of non-commercial and the prerogative of interpretation

- 42 The CM directive makes clear in Recital 19 subpara. 3 sentence 2 that CMOs should allow flexibility to all rightholders, and therefore the Member States have to „provide that collective management organisations take the necessary steps to ensure that their rightholders can exercise the right to grant licences“ for non-commercial uses⁴¹. Therefore, CMOs should decide „on the conditions attached to the exercise of that right as well as the provision to their members of information on those conditions“⁴². It is a debatable point what this exactly means. It could lead to the interpretation that collecting societies have the prerogative of interpretation over the term „non-commercial“, so that they decide how far the scope of the directive regulation actually is⁴³, and with upcoming litigations, the courts and in the end the European Court of Justice (ECJ) have to determine what uses shall be considered non-commercial. A different approach would be that the Member States define the term „non-commercial“ in the implementing provisions, so that the scope of the provision would be defined by (national) law⁴⁴. Regarding this second approach, one should keep in mind that the directive does not concede a leeway for the Member States to define the term „non-commercial“. Rather, “non-commercial” must be interpreted as a European legal term that finally has to be specified by the ECJ based upon autonomous, European criteria. Would a national legislator specify the term rather than just adopt it from the directive, it would risk a violation of European law. A more specific definition on the national level is therefore no solution.
- 43 But as the meaning of the term is naturally of high importance for the legal practice, the term has to be filled with meaning. Having in mind that the notion “non-commercial” is a legal term that has to be defined by courts, it still seems necessary to give CMOs the right to implement Art. 5 para. 3 CM directive through individual and tailor-made terms and conditions as expressed by Recital 19. Yet, Member States must have the right to exercise control of the terms and conditions of CMOs and should not be under an obligation to enforce terms and conditions which are based on a notion of “non-commercial” incompatible with the legal standards defined by the Directive and the implementing national provisions. This is not least the case because the directive does not implement a status of self-regulation of the CMOs in which the actions of the CMOs cannot be reviewed. In spite of the fact that the directive gives the CMOs in Recital 19 CM directive the right to define the conditions attached to the exercise of the right given by Art. 5 para. 3 CM directive, the provision of self-regulation had to be much more clear⁴⁵.
- 44 Following this approach, CMOs as well as the legislators have to consider various aspects in their proceedings.
- 45 At first, the term „non-commercial use“ is not completely new, but was used before in several European⁴⁶ and German⁴⁷ regulations about the limitations of the copyright law, and courts have dealt with this term before. The Bundesgerichtshof for example ruled that acts of exploitation are always non-commercial when they are not intended to realize profit⁴⁸. Determining the content of „non-commercial“, this prior use of the term should definitely be considered⁴⁹.
- 46 Secondly, it seems to make sense to streamline the concept with already existing licenses. As the authors shall have the right to grant licenses for non-commercial uses, such licenses are needed to establish the right in practice. Theoretically, for every type of work, type of use and for every member state, different licenses could be designed to help the regulation come into force. But this would lead to confusion over the many different licenses without securing legal certainty. Hence, it is much more reasonable to use already existing, international and established licenses like the CC-NC-licenses. These licenses provide for a definition of the term „non-commercial“, so that they could indeed make distinctions for what uses shall be considered non-commercial. According to the CC Non-Commercial 4.0 International Public License, non-commercial „means not primarily intended for or directed towards commercial advantage or monetary compensation. For purposes of this Public License, the exchange of the Licensed Material for other material subject to Copyright and Similar Rights by digital file-sharing or similar means is NonCommercial provided there is no payment of monetary compensation in connection with the exchange.“
- 47 Of course, these remarks have to be interpreted as well, and there is struggle about the scope of this definition. Within the CC community, there is a vivid debate over the interpretation of “not primarily intended” and “purposes of this Public License”. Whereas CMOs have an interest in interpreting the licenses as strict as possible and by that keeping most of the uses commercial and bringing in revenues, it is important to keep in mind that the purpose of the directive was to grant the rightholders more flexibility.
- 48 The meaning of “non-commercial” in regard to the CC-NC-licenses has been litigated in German courts. The LG Köln ruled in one of its decisions that the use of a picture on a website by a public broadcasting company is a commercial use, because only the private use of a work should be considered non-commercial⁵⁰. The LG Köln interpreted the term of

„non-commercial“ very strict. Based on this opinion, nearly every use would be commercial, and only the use of a natural private person in his private sphere would be regarded as non-commercial. This legal opinion did not only contradict with the case law of the Bundesgerichtshof to the non-commercial use in § 52a UrhG, it was far too narrow in this particular issue as well and was therefore corrected in the appeals procedure by the OLG Köln⁵¹. The appeal court applied the German statutory provisions for general terms⁵². It was sufficient that the public broadcaster made no direct profit from the picture, because uncertain wording of a standard clause like the CC-license clause is to be interpreted against the party that provided the terms⁵³. This means that if there is no clear answer whether or not the NC clause covers public undertakings (defendant was Deutschlandradio, a public broadcaster) it had to be interpreted in the widest way possible favouring the defendant. Hence, “non-commercial” in a wide sense does include public broadcasters. This decision is far more balanced and should be a point of reference for the collecting societies when they have to communicate what uses shall be non-commercial. Further criteria may be taken from the decision of the Bundesgerichtshof about non-commercial uses in the referring to § 52a UrhG⁵⁴ should be regarded, so that acts of exploitation should always be non-commercial when they are not intended to realize profit. The Bundesgerichtshof applied this test in a case of a copyright limitation, which are often subject to strict interpretation, whereas Art. 5 para. 3 CM Directive shall save the rightholders original rights and therefore has to be interpreted more widely.

- 49 Finally one should take into account the experiences from the pilot projects in the Netherlands, Denmark and France. The experience from the projects has shown that a too narrow concept of “non-commercial licenses” may severely endanger the effectiveness of such a rule. It is not very likely that the European legislator wanted to implement a provision that is with very little practical use for authors.

2. Enforcement of Art. 5 par. 3

- 50 Every right is only valuable as far as it can be enforced. Looking at the exact wording of Art. 5 para. 3 of the collective management directive, the rightholders shall have the right to grant licenses for non-commercial uses. Technically speaking, rightholders who have no rights managed by a CMO already are free to use non-commercial licenses; the regulation therefore only makes sense reading it as “rightholders shall have the right to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose and at the same time have a collecting society grant licenses for commercial

uses.” But this still leaves the question open how the author may enforce Art. 5 para. 3 CM directive against a CMO. Given that the main aim of the regulation was to give authors the opportunity to distinguish between commercial and non-commercial uses and provide them with a more flexible way of rights management, Art 5 para. 3 CM directive cannot be interpreted as a mere guideline. Instead Member States are obliged to provide enforcement mechanisms, so that rightholders have an effective tool against the collecting society responsible for the management of his type of works. If necessary, this right has to be enforceable before the courts to ensure that the purpose of the directive is valid to the maximum extent possible. One possible scenario could be that an author may bring an action against a CMO which denies to represent this author because he or she has chosen to license a work for non-commercial uses. Such denial would be in conflict with Art. 5 para. 2 (2) CM Directive. In a second scenario it could be the CMO which sues a user, e.g. a public radio station, that makes use of work that has been licensed under a non-commercial license. In this scenario the court would have to decide whether the user could acquire the necessary rights under the non-commercial license even though the author has transferred some or all other rights to a CMO. A possible third enforcement mechanism could be provided by the competent authorities of the respective Member State which has to supervise the CMO’s compliance with the national implementation of the Directive under Art. 36. As a fourth possible enforcement measure, CMOs terms and conditions for the non-commercial use of works could be controlled as standard terms on the basis of individual or collective claims.

3. The practical implementation by the collective management organisations

- 51 The practical implementation of Art. 5 para. 3 CM directive is of high relevance. What may appear as technicalities at first glance, has decisive influence for the effective implementation of Art. 5 para. 3 CM directive. In the process it is important that Art. 5 para. 3 CM directive does not refer to statutory remuneration claims as part of the copyright limitations permitted by the law⁵⁵. The implementation is therefore only needed in cases of individually licensed uses. Another important but technical issue concerns the rights the author must have to grant non-commercial licenses to third parties. The basic idea of Art. 5 para. 3 CM directive is that the author or other rightholder should transfer all rights in the work to a CMO but keep the rights necessary to grant non-exclusive licenses. A second scenario would be that the CMO has all exclusive rights but transfers back the necessary rights to the author so that he or she can allow non-commercial

uses. Is it necessary that the author or rightholder has the exclusive right for the granting of non-exclusive licenses to third parties covering the non-commercial use? Or is it sufficient that the author is entitled with an indefinite number of non-exclusive licenses that can be transferred to third parties? Or is it better to grant-back a non-exclusive license with the right to grant sublicenses to third parties?⁵⁶ Who shall bear the legal risk that such a construction may at the end be insufficient to provide users with a safe legal basis? Giving the clear expression of the legislative goal in Recital 19 according to which CMOs should allow authors “to exercise the rights related to those choices as easily as possible” it is the preferable solution to give the author and not the CMO the exclusive right for non-commercial uses.

- 52 A possible approach would be the one of the Cultural Commons Collecting Society (C3S), a new-founded European companionship with the aim to build a collecting society for musical works⁵⁷. The C3S wants to provide the opportunity to have single works managed by the collecting society, the rightholder would then have to inform the C3S, which work should be managed. Further on, for every single work the rightholder should be able to determine what licenses shall be granted, varying from the classical “all rights reserved” to non-commercial CCPLs. The rightholder shall additionally have the decision, for which types of use the C3S is responsible and what types of use shall be managed individually. This could guarantee the most flexibility for the rightholders and make it possible to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose.

4. Privileged Persons under Art. 5 para. 3 CM directive

- 53 Under Art. 5 para. “rightholders” shall have the right to grant licenses for non-commercial uses. The notion “rightholder” is defined in Art. 3 lit. c) as “any person or entity, other than a collective management organisation, that holds a copyright or related right or, under an agreement for the exploitation of rights or by law, is entitled to a share of the rights revenue”. Even though the pilot projects have mainly targeted authors as potential licensors for non-commercial licenses, the provision of Art. 5 para. 3 is broader in its scope and allows also copyright owners or authors of (exclusive) rights to make use of the privilege. However, one should keep in mind that Art. 5 para. 3 may only invoked by those rightholders who have a sufficient legal position to grant non-commercial licenses. This is certainly the case for copyright owners but must not apply to rightholders who are owners of simple licenses. If a licensee can grant non-commercial licenses or

sublicenses to third parties is a question covered by the law of each country for which protections is sought.⁵⁸ Therefore the answer may vary from state to state according to the national copyright legislation. Having said this, the notion of rightholder in the sense of Art. 5 para. 3 must be interpreted more restrictively than suggested by Art. 3 lit. c).

C. Summary and conclusion

- 54 Art. 5 para. 3 CM directive opens a window of opportunity for alternative license schemes. It enables authors and other rightholders to license works to a CMO and at the same time allow third parties to use their works under the terms of a non-commercial license. As simple as the provision is drafted, as many difficult legal questions will have to be solved on the way to its efficient implementation. The Directive makes clear that CMOs are called in the first place to take the necessary steps to ensure that rightholders can exercise their rights under Art. 5 para. 3. However, those implementing rules should not endanger or circumvent the legislative aims and should not impose the legal risks only on the author. At the end, national courts and the Court of Justice of the European Union will have to define what a non-commercial license is, what rights must remain with or be transferred back to the author or other rightholder, how the provision can be enforced etc. To prevent legal conflicts about these questions, it would be desirable if CMOs and rightholders would negotiate standard terms to be used for the implementation of the new provision. The experience gathered in the pilot projects may be useful in this regard. At the end, success or failure of Art. 5 para. 3 will very much depend on whether authors and other rightholders make active use of their privilege.

- 1 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
- 2 <http://www.vgwort.de/teilnahmemoeglichkeiten/bezugsberechtigte.html> (last downloaded 26.02.2015).
- 3 The same has already been pointed out by Metzger, Die urheberrechtliche Gestaltung von Open Access Repositorien, Gutachten im Auftrag des Projekts IUWIS (Infrastruktur für Wissenschaft und Bildung in Sachen Urheberrecht), downloadable on <http://www.iuwis.de/sites/default/files/iuwis-gutachten-metzger.pdf> (last downloaded 26.02.2015).
- 4 See p. 4 of the annual report 2013, downloadable on http://www.vgwort.de/fileadmin/pdf/geschaeftsberichte/Geschaeftsbericht_2013.pdf (last downloaded 26.02.2015).
- 5 At the Moment, there are just about 397 members, including 326 authors and 71 publishing houses: <http://www.autorenwelt.de/aktuelles/branchennews/meldung-22052014-vg-wort> last downloaded 26.02.2015.
- 6 http://www.telemedicus.info/uploads/Dokumente/Stellungnahme_GEMA_CreativeCommons-01-2012.pdf (last downloaded 26.02.2015).

- 7 See the chapter on the pilot experiments on how other European music CMOs have dealt with this problem in bilateral arrangement with the Creative Commons Organisation.
- 8 Another question is who has the prerogative of interpretation, see below.
- 9 This might be different for other markets, e.g. literature; see below for the differences between these sectors as well.
- 10 In fact, this has been different. The GEMA provided this option before, but rightholders had to license – and pay – their own works if they wanted to use them. Only afterwards these payments were cleared when the revenues were distributed.
- 11 [Http://www.ifpi.org/facts-and-stats.php](http://www.ifpi.org/facts-and-stats.php) (last downloaded 26.02.2015).
- 12 Universal Music Group: 36,7%, Sony Music Entertainment: 22,4%, Warner Music Group: 15,8%.
- 13 Informa (Music & Copyright), Marktanteile der größten Plattenfirmen weltweit in den Jahren 2011 bis 2013, Statista, downloadable on <http://de.statista.com/statistik/daten/studie/224077/umfrage/marktanteile-der-groessten-plattenfirmen-weltweit/> (last downloaded 26.02.2015).
- 14 The exclusive assignment of rights to a CMO can be found throughout the world, except for the United States of America. Collective rights management organisations working there are banned from obtaining exclusive assignments in their administration agreements. Thus, members of collecting societies in the US are free to license their works with individual contracts that complete the exercising by the CMO, which includes CCPLs as well. This perception is based on antitrust law, see the consent decree *U.S. v. ASCAP*, 1940-43 Trade Cas. (CCH) 56, 104 (S.D.N.Y. 1941) as well as *U.S. v. BMI*, 1940-43 Trade Cas. (CCH) 56,096 (E.D. Wis. 1941). Further on this Goldmann, *Kollektive Wahrnehmung musikalischer Rechte in den USA und Deutschland*, p. 142 ff.; Goldmann, GRUR Int 2001, 420 [426 f.]; Sobel, 3 Loyola Los Angeles Entertainment Law Journal, S. 1, 6 (1983).
- 15 For this and the following see the „Evaluation of the Creative Commons Buma/Stemra pilot“ by Paul Keller and Andy Zondervan from the 27th of August 2010, downloadable on http://www.creativecommons.nl/downloads/100824evaluation_pilot_en.pdf (last downloaded 26.02.2015).
- 16 The practical realization of the pilot is documented in the „Evaluation of the Creative Commons Buma/Stemra pilot“ by Paul Keller and Andy Zondervan from the 27th of August 2010, p. 5f.
- 17 „Evaluation of the Creative Commons Buma/Stemra pilot“ by Paul Keller and Andy Zondervan from the 27th of August 2010, p. 5.
- 18 *Idem*, p. 7.
- 19 *Idem*, p. 9.
- 20 *Idem*, p. 12.
- 21 Further information about the structural arrangement can be found on <http://creativecommons.nl/flexibel-rechtenbeheer-met-bumastemra/> (last downloaded 26.02.2015).
- 22 [Http://creativecommons.nl/flexibel-rechtenbeheer-met-bumastemra/](http://creativecommons.nl/flexibel-rechtenbeheer-met-bumastemra/) (last downloaded 26.02.2015).
- 23 The license text can be downloaded at <http://creativecommons.org/licenses/by-nc-nd/2.5/dk/legalcode> (last downloaded 26.02.2015).
- 24 The definition can be found on <http://www.sacem.fr/cms/site/en/home/creators-publishers/creative-commons-engl/sacem-creative-commons-pilot> (last downloaded 26.02.2015).
- 25 COM/2012/0372 final - 2012/0180 (COD), downloadable on <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0372:FIN> (last downloaded 26.02.2015).
- 26 Recital 9 of the final proposal COM/2012/0372 final - 2012/0180 (COD).
- 27 282013/C 44/18, downloadable on <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012AE0372&from=DE> (last downloaded 26.02.2015).
- 28 Downloadable on <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-502.061+01+DOC+PDF+V0//DE&language=DE> (last downloaded 26.02.2015).
- 29 Draft opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012)0372 - C7-0183/2012 - 2012/0180(COD)), downloadable on http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cult/pa/931/931731/931731en.pdf (last downloaded 26.02.2015).
- 30 P. 29 of the draft opinion of the CULT committee.
- 31 Draft report on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012)0372 - C7-0183/2012 - 2012/0180(COD)), downloadable on <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BPE-510.562%2B01%2BDOC%2BPDF%2BV0//EN> (last downloaded 26.02.2015).
- 32 Documented on <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1272239&t=e&l=en> (last downloaded 26.02.2015).
- 33 Report on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012)0372 - C7-0183/2012 - 2012/0180(COD)), downloadable on <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0281+0+DOC+XML+V0//EN> (last downloaded 26.02.2015).
- 34 Amendment 54 of the report on the proposal by the Committee on Legal Affairs.
- 35 Documented on <http://www.europarl.europa.eu/news/en/news-room/content/20131105IPR23815/html/Collective-management-of-copyright-EP-and-Council-strike-a-deal> (last downloaded 26.02.2015).
- 36 Downloadable on <https://netzpoltik.org/wp-upload/EU-RL-VerwG-131126.pdf> (last downloaded on 26.02.2015).
- 37 P. 11f. of the voted version, downloadable on <https://netzpoltik.org/wp-upload/EU-RL-VerwG-131126.pdf> (last downloaded on 26.02.2015).
- 38 Opinion on the legal basis of the for a Directive of the European Parliament and of the Council on collective management of copyright and related rights in musical works for online uses in the internal market [COM(2012)0372], downloadable on <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-524.630%2B01%2BDOC%2BPDF%2BV0%2F%2FEN> (last downloaded 26.02.2015).
- 39 Documented on http://europa.eu/rapid/press-release_MEMO-14-80_en.htm?locale=en and <http://www.europarl.europa.eu/news/en/news-room/content/20140203IPR34615/html/Copyright-cross-border-licences-for-online-music-services> (both last downloaded 26.02.2015).
- 40 Official Journal L84/72 - 96.

- 41 Recital 19 subparagraph 3 sentence 2 of the collective management directive.
- 42 Recital 19 subparagraph 3 sentence 3 of the collective management directive.
- 43 Stellungnahmen der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V. (GRUR), GEMA und VG Bild-Kunst gegenüber dem Bundesministerium der Justiz und für Verbraucherschutz zur Umsetzung der Richtlinie 2014/26/EU des Europäischen Parlaments und des Rates vom 26. Februar 2014 über die kollektive Wahrnehmung von Urheber- und verwandten Schutzrechten und die Vergabe von Mehrgebietslizenzen für Rechte an Musikwerken für die Online-Nutzung im Binnenmarkt („VG-Richtlinie“) sowie zu weiteren Änderungen des Urheberwahrnehmungsgesetzes.
- 44 Stellungnahme des Verbraucherzentrale Bundesverbandes gegenüber dem Bundesministerium der Justiz und für Verbraucherschutz zur Umsetzung der Richtlinie 2014/26/EU des Europäischen Parlaments und des Rates vom 26. Februar 2014 über die kollektive Wahrnehmung von Urheber- und verwandten Schutzrechten und die Vergabe von Mehrgebietslizenzen für Rechte an Musikwerken für die Online-Nutzung im Binnenmarkt („VG-Richtlinie“) sowie zu weiteren Änderungen des Urheberwahrnehmungsgesetzes.
- 45 Examples for self-regulation can be found in other European directives, e.g. in Art. 4 para. 7 in conjunction with Recital 44 of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) and in Art. 27 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
- 46 Art. 5 par. 2 lit. c, par. 3 lit. a, b of the 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 (InfoSoc-directive).
- 47 § 52a UrhG.
- 48 BGH GRUR 2014, 549 – Meilensteine der Psychologie.
- 49 See below on how the interpretation of the term has to change in different situations of the law.
- 50 LG Köln MMR 2014, 478.
- 51 OLG Köln MIR 2014, Dok. 121.
- 52 OLG Köln MIR 2014, Dok. 121, S. 8.
- 53 See the ambiguity rule in § 305c BGB, OLG Köln MIR 2014, Dok. 121, S. 10.
- 54 BGH GRUR 2014, 549 – Meilensteine der Psychologie.
- 55 For these uses no licenses are needed, as they are normally already allowed by the law. Additionally, a fair compensation is mandatory in most cases, compare Art. 5 par. 2 lit a, b, par. 5 of the 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 (InfoSoc-directive).
- 56 This has already been tested in the pilot experiments of Buma/Stemra and SACEM and would mean that rightholders continue to assign all-embracing exclusive rights to their CMO. If a rightholder later wants to grant a non-commercial license, he or she has to apply for the retransfer of a simple right for the non-commercial use that is capable of granting a sublicense.
- 57 The C3S is still working on an administration agreement and is not approved by the law as a collecting society, so that rightholders do not have the opportunity to have their rights managed by the C3S at the moment.
- 58 See Art. 3:301 CLIP-Principles, see also the comments with further comparative references European Max Plank Group on Conflict of Laws in Intellectual Property (eds.), Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary, Oxford University Press, 2013..