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Rate-setting under EU and US Copyright Law

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Copyright

Abstract

While the rates for the use of copyrighted content are usually determined by negotiations between right holders and users, there are important exceptions to this rule in the fields of statutory licensing and the collective management of rights. In these fields, the amounts payable to right holders are often set by public authorities or courts; however, the law frequently only provides for very general guidelines and standards for rate-setting decisions. This paper explores the different standards that exist in the United States and the European Union and compares their interpretation and application in the two jurisdictions.

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I. Introduction

The royalties arising from statutory licenses or rights to remuneration constitute an important part of the income of many copyright holders. Prominent examples are private copying levies, or the fees received for the public performance of sound recordings. Both in the United States and in the European Union, the royalties due for the uses covered by such licenses are often determined by (collective) negotiations between users and right holders. However, if the parties cannot agree on a license fee, a court or governmental agency usually assumes the task of setting the rates. Moreover, the law provides for a periodic adjustment or re-determination of the applicable rate in certain cases. Furthermore, rates charged for the use of copyrighted content are also relevant in the competition law context, such as when antitrust authorities assess a potential abuse of market power.

Rate-setting[1] is practiced primarily in two respects: The operations of collective management organizations (CMOs) and rights to remuneration or statutory licenses.[2] A common feature of these two fields involves, to differing extents, governmental intervention in the determination of copyright license fees. In order to exercise this control, the law provides for different rules and standards[3] that offer guidance for the competent authorities when establishing license rates.[4] However, these standards are

[1] Even though competition authorities do not typically *set* but rather *control* rates (at least in the European Union), they are also referred to under the term "rate-setting" for the present purposes; *see* section VI.4.

[2] Since the royalties due under statutory licenses are usually administered by CMOs, these two areas – though conceptually distinct – overlap to a certain extent.

[3] *See*, on the difference between the two concepts, Justin Hughes, *Fair Use and Its Politics – at Home and Abroad*, in *Copyright Law in an Age of Limitations and Exceptions* 234, 237-240 (Ruth L. Okediji ed., 2017); *see also* Thomas B. Nachbar, *Rules and Standards in Copyright*, 52 Hous. L. Rev. 583 (2014).

[4] Infringement proceedings also involve processes that could be referred to as "rate-setting": If somebody uses protected content without permission (and this conduct is found to constitute copyright infringement), courts will have to determine the amount that the infringer is liable to pay to the right holder for the unauthorized use. While this process can involve principles similar to rate-setting under a

not uniform and differ in important respects. Moreover, applying these guidelines to individual cases can be an extremely complicated task that often involves problems of legal interpretation, as well as the application of economic principles. This paper addresses these difficulties from a legal perspective and analyzes the most important copyright rate-setting regimes under both the federal law of the United States and the law of the European Union, comparing the applicable rules and standards in light of statutory requirements and judicial practice.

II. Institutional background and scope of research

At the outset, it should be emphasized that rate-setting occurs on different levels and in distinct contexts in the United States and in the European Union. In the former jurisdiction, the U.S. Copyright Act[5] establishes a specialized rate-setting body, the Copyright Royalty Board (hereinafter, CRB) which is composed of three Copyright Royalty Judges.[6] The task of the CRB is to determine and adjust rates in accordance with the general provisions of Chapter 8 of the Copyright Act, as well as the special provisions set forth in connection with different statutory licenses.[7] Furthermore, the CRB can adopt as a basis for its decision an agreement reached between some or all participating parties; this means that the terms of the settlement will apply to all parties

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statutory license, the present analysis is limited to rate-setting in the context of statutory licensing and the collective management of copyrights.

[5] Title 17 U.S.C.

[6] 17 U.S.C. §§ 801-805.

[7] Accordingly, the CRB cannot change the U.S. Copyright Act, *see, e.g., Determination of royalty rates and terms for ephemeral recording and webcasting digital performance of sound recordings (Web IV)*, 81 Fed. Reg. 26316, 26403 (May 2, 2016) (hereinafter: *Web IV*) ("The Judges cannot, however, make regulations that are contrary to the requirements of the Act").

under the statutory license.[8] However, the CRB is not required to immediately act on such settlements.[9]

Conversely, there is no rate-setting body on the level of the European Union. Rather, member states individually decide how to set up their rate-setting regimes. This applies, in principle, to both procedural as well as substantive law. However, member states must comply with the broader legal framework established by the European Union. This means that lawmakers have to draft legislation within the limits of this framework and that rate-setting bodies will interpret national laws in accordance with these guidelines and the decisions of the ECJ. In the competition law arena, the European Commission (in cooperation with national authorities) is the enforcement body of the EU competition rules. While this task is carried out by the U.S. Department of Justice (Antitrust Division) along with the Federal Trade Commission, U.S. antitrust practice has established a specialized rate-setting regime for the two most important U.S. CMOs, the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[10]

Given these differences, it is not practical to compare the final rates set in individual EU or U.S. cases. This is because in Europe, as explained above, rates determined in individual cases are not set by European-wide but rather by national authorities. Nevertheless, the decisions made in the member states are heavily influenced by EU law. For this reason, the present research compares the structure and general logic of the different rate-setting standards and regimes. It is not the purpose of this work to

[8] 17 U.S.C. § 801(b)(7)(A). *See*, *e.g.*, *Determination of royalty rates and terms for Making and Distributing Phonorecords (Phonorecords III); Subpart A Configurations of the Mechanical License*, 82 Fed. Reg. 15297 (March 28, 2017).
[9] U.S. Copyright Office, *Copyright and the Music Marketplace* 51 (2015), *available at* https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (last visited Sept 21, 2018).
[10] *See* section III.5 for more details.

analyze all statutory licenses under EU and U.S. law. Rather, the most relevant rate-setting regimes are selected and outlined in the next section, followed by a discussion of the standards themselves.

During the time this article was being written, the Music Modernization Act[11] was pending legislation. This project aims at a comprehensive reform of the U.S. music-licensing regime with a special focus on statutory licenses. In particular, the bill contains substantial changes to sections 114 and 115 of the U.S. Copyright Act. In late September 2018, both the Senate and the House approved the bill. It was renamed the Orrin G. Hatch-Bob Goodlatte Music Modernization Act.[12] On October 11, 2018 the act was signed into law by President Trump (Pub. L. No. 115-264). Title I of the act – which contains the amendments relevant to this paper – is outlined in section V.

III. The different rate-setting regimes

1. TFEU article 102

Article 102 of the TFEU[13] prohibits the abuse of a dominant position within the Internal Market and as such is primarily relevant for CMOs, as they usually enjoy legal or de-facto monopolies in the different EU member states. These organizations qualify as "undertakings" within the meaning of the provision[14] and have been held not to qualify for the exception contained in article 106 of the TFEU.[15] The fee policies of CMOs fall within the scope of competition law control because license fees can

[11] Music Modernization Act, H.R. 5447, 115th Cong. (2017-2018).
[12] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551, 115th Cong. (2017-2018).
[13] Consolidated Version of the Treaty on The Functioning of the European Union, 2012 O.J. (C326) 47-390.
[14] *OSA v. Léčebné lázně Mariánské Lázně*, C-351/12, ¶ 80 (ECJ 2014).
[15] *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH v. Commission*, case 7/82, ¶ 29-32 (ECJ 1983).

constitute “unfair purchase or selling prices”. Such prices are expressly referred to by the TFEU as an example of a competition law violation.[16]

2. Copyright Directive article 5

The Copyright Directive[17] is often considered to be the centerpiece of EU copyright law. While it grants the reproduction right (article 2), the communication/making available to the public right (article 3) and the distribution right (article 4), article 5 addresses exceptions and limitations to these rights. This provision only contains one mandatory exception[18] (which applies to certain temporary reproductions).[19] In all other cases, member states may decide whether or not to restrict the right holders’ exclusive rights. However, in some cases, they have to provide for “fair compensation”. This applies, first and foremost, to the “private copying exception”[20] and the “reprography exception”.[21] While the former covers “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial”, the latter refers to reproductions on paper (or similar media) by the use of “any kind of photographic technique”.[22] Many member states have introduced levy systems which apply to reproduction devices and media, thereby complying with the fair compensation requirement.[23] Member states may also provide

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[16] TFEU art. 102(a).

[17] 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, 2001 O.J. (L167) 10-19 (hereinafter: Copyright Directive).

[18] *I.e.*, member states must transpose this provision into national law.

[19] Copyright Directive art. 5(1).

[20] Copyright Directive art. 5(2)(b).

[21] Copyright Directive art. 5(2)(a). Fair compensation is further due in the case of subsection (e) which refers to reproductions of broadcasts made by certain social institutions.

[22] This covers not only “analogue to analogue” copies, *see VG Wort v. Kyocera*, Joined Cases C-457/11 to C-460/11, ¶ 68-70 (ECJ 2013).

[23] *See*, *e.g.*, Martin Kretschmer, *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe* (2011), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710611 (last visited Sept 25, 2018).

for fair compensation in connection with exceptions and limitations where the Copyright Directive contains no express requirement of this kind[24] and they can actually be obliged to do so under certain circumstances.[25]

3. Rental and Lending Rights Directive article 6, 8(2)

The Rental and Lending Rights Directive[26] establishes the exclusive right of authors, performers, phonogram producers, and producers of the first fixation of a film to authorize or prohibit rental and lending in respect to both originals and copies of works as well as to other protected subject matter.[27] Member states may, however, replace the exclusive public lending right with a claim to "a remuneration",[28] thereby effectively converting the exclusive right to a statutory license. Furthermore, the directive provides for the rights of performers and phonogram producers.[29] Performers possess the exclusive right to fixate their performance and to authorize or prohibit its broadcasting by wireless means, as well as the right to public communications concerning their performances.[30] However, if a phonogram is published for commercial purposes and is used for broadcasting by wireless means or for any communication to the public, the directive provides for a statutory license that entitles the right holder to claim a "single equitable remuneration".[31]

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[24] Copyright Directive recital 36.
[25] This is implied by the three-step test contained in the Copyright Directive's art. 5(5), *see* Christophe Geiger & Franciska Schönherr, *Article 5: Exceptions and Limitations*, in *EU copyright law* 434, 471 (Irinia A. Stamatoudi & Paul Torremans, eds., 2014).
[26] Directive 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, 2006 O.J. (L376) 28-35 (hereinafter: Rental and Lending Rights Directive).
[27] Rental and Lending Rights Directive art. 1(1), 3(1).
[28] Rental and Lending Rights Directive art. 6(1).
[29] Under European terminology, these rights would be referred to as related rights or neighboring rights.
[30] Rental and Lending Rights Directive art. 7(1). This right does not apply "where the performance is itself already a broadcast performance or is made from a fixation." The Copyright Directive also contains performers' rights, *see*, *e.g.*, Copyright Directive art. 3(2)(a).
[31] Rental and Lending Rights Directive art. 8(2).

4. *Collective Management Directive article 16*

The Collective Management Directive[32] (CMD) contains general provisions that apply, in principle, to collective management organizations.[33] These relate to the CMOs' relationship with right holders, users and sister organizations. In relation to license fees, the CMD addresses both exclusive rights and rights to remuneration.[34]

5. *U.S. Consent Decrees*

Sections 1 and 2 of the Sherman Act[35] both apply to CMOs. While general antitrust law serves as an important regime for regulating the management of copyrights by CMOs, just like in the EU, the Department of Justice has negotiated so-called "consent decrees"[36] with ASCAP[37] and BMI;[38] these societies are the most important U.S. CMOs. The ASCAP and BMI consent decrees govern the most important aspects of ASCAP's and BMI's operations. For example, they contain an obligation to contract vis-à-vis users and right holders[39] and set forth the details of the rate-setting procedure, installing "rate courts" which determine the license fee in case of a dispute.[40] No consent decrees – and no corresponding rate-setting regimes – are currently in place with regard to other U.S. CMOs (*e.g.*, SESAC).

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[32] Directive 2014/26 of the European Parliament and of The Council of 24 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, 2014 O.J. (L84) 72-98 (hereinafter: CMD).
[33] As defined in art. 3(a). The directive applies in part to "independent management entities" as defined in CMD art. 3(b), *see* CMD art. 2(4).
[34] CMD art. 16.
[35] 15 U.S.C. §§ 1-7.
[36] Consent decrees are negotiated between the antitrust authority and the defendant and are subsequently approved by a court; compliance with the decree will shield the defendant from further claims by the antitrust authority in the given context. *See* for more details Richard A. Epstein, *Antitrust Consent Decrees in Theory and Practice* (2007).
[37] *United States v. American Society of Composers, Authors and Publishers*, 2001–2002 Trade Cas. (CCH) ¶ 73,474, 2001 U.S. Dist. LEXIS 23707 (S.D.N.Y. 2001) (hereinafter: ASCAP Consent Decree).
[38] *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,378, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. 1994) (hereinafter: BMI Consent Decree).
[39] ASCAP Consent Decree § XI(A); BMI Consent Decree § V(A).
[40] ASCAP Consent Decree § IX; BMI Consent Decree § XIV.

6. U.S. Copyright Act § 114

In the United States, sound recordings are considered "works of authorship"[41] which must be distinguished from the underlying musical composition.[42] While, in principle, sound recordings confer the same exclusive rights upon right holders as works belonging to other work categories, federal law only grants a limited right to public performance.[43] This right was introduced when Congress enacted the Digital Performance Right in Sound Recordings Act of 1995[44] and covers exclusively performances "by means of a digital audio transmission".[45] In this regard, section 114 further limits the scope of this narrow right[46] and distinguishes between three types performances.[47] First, a non-interactive[48] and nonsubscription broadcast transmission, a retransmission of a nonsubscription broadcast transmission and certain other transmissions (*e.g.*, incidental or within a business establishment) do not constitute copyright infringement and are thus exempt from the copyright owner's exclusive performance right.[49] Second, certain transmissions and services qualify for the statutory licensing regime with regard to the performance of sound recordings. Within

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[41] 17 U.S.C. § 102(a)(7).

[42] Sound recordings are defined as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied", *see* 17 U.S.C. § 101.

[43] *See* 17 U.S.C. § 106(6), as opposed to § 106(4); this is further clarified in § 114(a) ("The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4)").

[44] Pub. L. No. 104-39, 109 Stat. 336 (hereinafter: DPRSRA).

[45] The term digital audio transmission is defined in § 114(j)(5).

[46] *See* for further exemptions 17 U.S.C. § 114(b).

[47] *Cf.* Lydia Pallas Loren, *The Dual Narratives In The Landscape Of Music Copyright*, 52 Hous. L. Rev. 537, 571-577 (2014).

[48] Defined in § 114(j)(7). In *Arista Records, LLV v. Launch Media, Inc.*, 578 F.3d 148 at 163–164 (2nd Cir. 2009), the court did not qualify LAUNCHcast as an interactive service because, while the service selected the music that was provided to consumers based on their own individual preferences, consumers could not pick individual sound recordings. *See* for more details Mary Ann Lane, *"Interactive Services" and the Future of Internet Radio Broadcasts*, Alabama L. Rev. 2011, 459; William F. Patry, 4 *Patry on Copyright* § 14.92 (updated 09/2018).

[49] The exact conditions for these exceptions to apply are set forth in detail in 17 U.S.C. § 114(d)(1)(A)-(C).

this group, the act specifies three subcategories called "subscription digital audio transmissions", "eligible nonsubscription transmissions" or transmissions made by a "preexisting digital audio radio service".[50] However, more commonly, and with respect to the rate-setting process,[51] one can distinguish "preexisting satellite and music subscription services" as well as "webcasters"[52] (the latter not falling within the section 114(d)(1) exception[53] and essentially comprising "eligible noninteractive nonsubscription services") and "new subscription services".[54] The third group comprises transmissions and services which neither qualify for the exception nor the statutory license, especially for being of an interactive nature. This means that licenses can only be obtained via voluntary negotiations; the act contains further specifications regarding this.[55]

7. U.S. Copyright Act § 112

When users like radio or television stations perform copyrighted works, they often make temporary recordings of those works. Since such reproductions are usually considered "adjunct" to a licensed performance, section 112(a) provides for an exception for "ephemeral" recordings made by transmitting organizations. This exception, in principle, applies to all classes of works other than motion pictures or other audiovisual works.[56] In contrast, the statutory license contained in subsection (e) solely applies to sound recordings and permits the creation of "no more than one

[50] 17 U.S.C. § 114(d)(2).
[51] *See* section IV.6. below.
[52] Webcasters are often referred to as internet radio, since they have the same traits as traditional radio but rely on digital technology, *cf.* Kellen Myers, *The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties*, 61 Fed. Comm. L.J. 431, 435 (2009).
[53] *See* Paul Goldstein, *Goldstein on Copyright* § 7.8.6.1. (3rd ed., 2018-2 Supp. 2005); *Bonneville Int'l Corp. v. Peters*, 347 F. 3d 485 (3rd Cir. 2003).
[54] Stasha Loeza, *Out of Tune: How Public Performance Rights are Failing to Hit the Right Notes*, 31 Berkeley Tech. L. J. 725, 739 (2016); 17 U.S.C. § 114(j)(8).
[55] 17. U.S.C. § 114(d)(3). *See also* Patry, *Patry on Copyright*, *supra* at § 14.95.
[56] Patry, *Patry on Copyright*, *supra* at § 11.9; *cf.* Copyright Directive art. 5(1); *see* for further exceptions 17 U.S.C. § 112(b)-(d); *see also* subsection (f).

phonorecord of the sound recordings", unless the terms and conditions of the statutory license allow for more.[57] Transmitting organizations fall within the scope of the license if they are entitled to transmit a performance of a sound recording to the public according to section 114(d)(1)(C)(iv) or under section 114(f)'s statutory license.[58]

8. *U.S. Copyright Act § 115*

Under the license contained in section 115, any person may make and distribute phonorecords of nondramatic musical works (a "mechanical license"), provided that phonorecords of the work which is to be reproduced or distributed have been distributed to the public in the United States under the authority of the copyright owner.[59] Furthermore, the license grants authorization to make certain musical arrangements, to distribute a phonorecord by means of a digital phonorecord delivery as well as by rental, lease, or lending[60] and only covers acts carried out with the primary purpose of distribution to the public for private use.[61] The administrative procedures for obtaining the statutory authorization are rather burdensome, as a notice of intention (NOI) and ongoing reporting obligations are required.[62] For this reason, users tend to negotiate separate agreements with "third-party administrators", especially the Harry Fox Agency (HFA).[63]

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[57] 17 U.S.C. § 112(e)(1); *Web IV* at 26398.
[58] Further conditions are set forth in 17 U.S.C. § 112(e)(1)(A)-(D) and (6).
[59] 17 U.S.C. § 115(a)(1). This language covers disks and audio tapes and excludes music accompanying a motion picture or other audiovisual works because such works are embodied in copies and not phonorecords, *see* Goldstein, *Goldstein on Copyright, supra* at § 7.2.1.1. (citing H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 108 (1976)). Likewise, literary works as well as sound recordings are excluded, *see id.*; on ringtones *see* Patry, *Patry on Copyright*, *supra* at §11.24.50; on streaming *see* Goldstein, *Goldstein on Copyright, supra* at § 7.2.1.1; on karaoke *see Leadsinger, Inc. v. BMG Music Publ'g.*, 512 F.3d 522, 527 (9th Cir. 2008).
[60] 17 U.S.C. § 115(a)(2), (c)(3)(A), (c)(4). *See* for the definition of "digital phonorecord delivery" 17 U.S.C. § 115(d).
[61] 17 U.S.C. § 115(a)(1).
[62] 17 U.S.C. § 115(b), (c)(5)-(6).
[63] U.S. Copyright Office, *Music Marketplace*, *supra* at 107-108; *see also* Darrel Issa & Tyler Grimm, *A Blanket For a Tired Statute: Congress Must Repair the Mechnical License in Section 115 of The Copyright Act*, 55 Harv. J. on Legis. 23 (2018); Chris Castle, *Meet the New Boss: Tech giants Rely on*

9. Audio Home Recording Act

In the United States, acts that one would broadly refer to as "private copying" (such as so-called "time-shifting") often qualify as fair use.[64] However, in the wake of the 1984 Supreme Court ruling in *Sony Corp. of America*, the Audio Home Recording Act of 1992 (AHRA)[65] introduced a levy for certain types of recording equipment which can be used for home recording.[66] The levy is payable when "digital audio recording devices" or "digital audio recording media" are imported into/manufactured and distributed.[67] Compliance with the statutory requirements (payment of levy and other formal requirements) results in an immunization from claims under Title 17.[68] Conversely, the act contains a special set of civil remedies in the case of failure to make royalty payments due under its regime.[69] The AHRA covers both acts of manufactures (importers, distributers) and consumers. However, the use made by consumers of the covered devices and media must be "noncommercial".[70] It should be noted that the scope of the levy – *i.e.*, the obligation to make a payment – is, compared to many European countries, rather narrow, as it only applies to digital recording equipment.

Loopholes to Avoid Paying Statutory Royalties with Mass Filings of NOIs at the Copyright Office, 33 Ent. & Sports Law 65 (2017).

[64] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[65] Pub. L. No. 102-563, 106 Stat. 4237 (1992), codified in 17 U.S.C. §§ 1001-1010.

[66] *See* Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 Fordham L. Rev. 1831 (2006); *see also* P. Bernt Hugenholtz, *The Story of the Tape Recorder and the History of Copyright Levies*, in *Copyright and the Challenge of the New* 179, 193-194 (Brad Sherman & Leanne Wiseman eds., 2012).

[67] 17 U.S.C. § 1003(a). Furthermore, the act prohibits the importation, manufacture or distribution of digital audio recording devices or digital audio interface devices, unless they are equipped with certain measures against unauthorized serial copying, *see* 17 U.S.C. § 1002(a).

[68] 17 U.S.C. § 1008. This section also covers "analog recording devices" and "analog recording media".

[69] Patry, *Patry on Copyright*, *supra* at § 11.47; 17 U.S.C. § 1009.

[70] 17 U.S.C. § 1008. Otherwise, such acts could be regarded as contributory, or, in the case of consumers, direct infringement, Goldstein, *Goldstein on Copyright, supra* at § 7.2.2.3.; on the relation to section 115 *see id*. at § 7.2.1.1.

IV. The different rate-setting rules and standards

1. Unfair purchase or selling prices

The TFEU gives no indication at what point purchase or selling prices are deemed unfair, leaving it up to the competition authorities and the ECJ to give meaning to this standard. In this respect, the ECJ ruled in *United Brands* that a price will be considered unfair if it is *excessive* "because it has no reasonable relation to the economic value of the product supplied".[71] Thus, the economic value – which corresponds to the price that would have been charged under hypothetical competitive conditions – serves as the benchmark price, which is then compared to the price actually charged.[72]

There are different methods to determine whether a price is excessive. For example, one could compare the price charged with the production costs of a given product to reveal the undertaking's profit margin.[73] However, since this approach does not fit well in the context of the creation of copyrighted content,[74] the ECJ relies on the comparison of fees charged in other member states when dealing with the license fees charged by CMOs. Under this test, fees imposed by a CMO that are "appreciably higher" than those charged in other member states are indicative of abuse of a dominant position; if such a difference can be established, the CMO in question has the option to justify it by reference to "objective dissimilarities".[75] Naturally, given the diverging legal, cultural and factual circumstances in the member states, a major

[71] *United Brands Co. v. Commission*, case 27/76, ¶ 250 (ECJ 1978).
[72] *Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība v. Konkurences padome*, C-177/16 (ECJ 2017), Opinion of AG Wahl, ¶ 17.
[73] *United Brands*, 27/76 at ¶ 251.
[74] *Ministère public v. Jean-Louis Tournier,* case 395/87 (ECJ 1989), Opinion of AG Jacobs, ¶ 53.
[75] *Ministère public v. Jean-Louis Tournier*, case 395/87, ¶ 38 (ECJ 1989); *see* for other possible methods Martin Miernicki, *Collective Management of Copyrights between Competition, Regulation, and Monopolism* 195-201 (2017). There is neither a minimum number of member states that must be considered for the purposes of the comparison nor a minimum threshold above which a fee must be considered as "appreciably higher", *see Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība*, C-177/16 at ¶ 41, 55.

problem of this method is to conduct the comparison on a "consistent basis".[76] In this respect, the purchasing power parity index must be factored into the analysis to account for the different price levels in the member states.[77] Furthermore, not every deviation from the reference price will constitute an abuse of a CMO's dominant position, but only those that are "significant and persistent".[78] As these requirements developed by the ECJ are of a very general nature, the competent authorities have to adjust the parameters for this test in light of the individual case.

The question whether the price level of a license is "unfair" can be distinguished from the underlying calculation methods.[79] The ECJ has repeatedly been asked to assess the fee structures of CMOs and ruled that, also in this respect, a reasonable relation between the fee and the economic value must be established.[80] As a general principle, the court acknowledges that right holders have a legitimate interest in calculating the fees according to the actual or probable amount of use that is made of the licensed content.[81] However, other methods – which do not determine the amount of use in a fully accurate manner – are generally not prohibited. A typical example for this approach in this context is the frequent practice of expressing the license fees as a percentage of the licensee's turnover.[82]

Yet, it should be noted that two major restrictions apply to this approach. First, such a calculation method can amount to an abuse if, according to the circumstances in the

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[76] Rafael Allendesalazar & Roberto Vallina, *Collecting Societies: The Usual Suspects* in *European Competition Law Annual 2005: The Interaction between Competition Law and Intellectual Property Law* 371, 375-376 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2007).

[77] *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība*, C-177/16 at ¶ 51.

[78] *Id*. at ¶ 61.

[79] *See* Miernicki, *Collective Management*, *supra* at 195.

[80] *Kanal 5 Ltd v. STIM*, C-52/07, ¶ 29 (ECJ 2008).

[81] *Coditel v. Ciné Vog Films*, case 62/79, ¶ 13 (ECJ 1980) (number of performances of films; the decision was made in the context of the freedom to provide services).

[82] *Tournier,* 395/87, Opinion of AG Jacobs at ¶ 11 (In this case, the reference value was defined as "all the revenue received by the discothèque in return for the provisions of a service or the sale of a product, including revenue from entry charges and sales of food and drink, and including also VAT and service"; furthermore, royalties were payable irrespective of the actual performances of the CMO's repertoire).

individual case, there are other methods capable of more precisely determining the amount of use of the licensed content; however, there will be no abuse if these methods lead to a disproportionate increase of the management costs.[83] Second, one will have to take different groups of users into account. While for some users, for instance, licensed music is an integral part of their business (*e.g.*, discothèques), and the percentage-of-revenue-approach thus appears to reflect the music's importance for the licensee. For other users, music might occupy a rather complementary position (*e.g.*, restaurants).[84] Lastly, a CMO may not, by applying corresponding royalty schemes, expand the license fees to content which does not belong to its repertory.[85]

2. *Objective and nondiscriminatory licensing terms and appropriate remuneration*

Article 16 is one of the CMD's few provisions concerning the relationship between CMOs and users. The provision contains the general principle that licensing negotiations shall be conducted in "good faith" and that CMOs and users shall provide each other with all necessary information.[86] Then, the directive sets forth the general guidelines of licensing agreements:

> Licensing terms shall be based on objective and non-discriminatory criteria. When licensing rights, collective management organisations shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years.
>
> Rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the

[83] *Kanal 5 Ltd*, C-52/07 at ¶ 40; *Tournier*, 395/87 at ¶ 45.
[84] *Cf. Kanal 5 Ltd*, C-52/07 at ¶ 48; Miernicki, *Collective Management*, *supra* at 229-230.
[85] *GEMA I*, Commission Decision of 02.06.1971, case IV/26 760, 1971 O.J. (L134) 15-29, ¶ I(B)(1)(a), II(C)(4) (*GEMA* charged the full fee, even if not all the music on a record belonged to its repertory).
[86] CMD art. 16(1).

> collective management organisation. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs.[87]

As can be seen, the CMD uses different (non-exhaustive) factors to lay down the requirements in respect to the CMOs' license fees. First, the directive refers to "objective and non-discriminatory criteria". Second, it stipulates that right holders should receive "appropriate remuneration for the use of their rights". Lastly, it specifies that the tariffs shall be reasonable, especially in relation to the economic value of the use of the rights in trade as well as the services provided by the CMOs. The relationship of the different standards is not entirely clear. The wording of the provision suggests that "objective and non-discriminatory criteria" – calling for equal treatment and prohibiting arbitrary conditions – relate to licensing terms in general (and not only the license fee). In contrast, subsection two establishes the standard for the CMOs' tariff system. No indication is given as to why the directive refers to "appropriate" remuneration and does not rely on the other standards (*e.g.*, equitable remuneration) that are preexistent in EU law.[88] One might wonder whether the different wording requires a different interpretation in the present context; however, it appears that not all the language versions of the directive – which are all equally binding[89] – use the differing terminology like the English version.[90] It would perhaps correspond best to the aim of the provision, as well as to the principle of coherent

[87] CMD art. 16(2).
[88] *See* subsection 3 and 4.
[89] Koen Lenaerts & José A. Gutiérrez-Fons, *To say what the law of the EU is: Methods of interpretation and the European Court of Justice*. 20 Colum. J. Eur. L. 3, 10-16 (2014). In case of divergence between the different versions, the court looks at the purpose and the context of the provisions in question, *see*, *e.g.*, *Kødbranchens Fællesråd v. Ministeriet for Fødevarer, Landbrug og Fiskeri*, C-112/15, ¶ 36 (ECJ 2016) ("[T]he wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be given priority over the other language versions in that regard. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part") (citing prior case law).
[90] *See*, *e.g.*, the version in German ("angemessene Vergütung"); yet, similar to the English version are, for instance, the French, Italian and Spanish versions of the text.

interpretation of EU law,[91] to understand the provision as referring to the concept of "equitable remuneration".[92] In any event, it is reasonable to understand the "appropriate remuneration" standard both as ensuring a minimum level of royalties for right holders as well as constituting a ceiling above which payments for right holders would not be justified.[93]

In order to calculate the license fees, the CMD requires that the "economic value of the rights in trade" be taken into account, specifically referencing the nature and scope of the use, as well as the economic value of the service provided. While the competition case law of the ECJ references the first factor[94] and can arguably be relied upon to interpret the provision, the meaning of the second factor remains unclear. It appears that this factor relates to the fact that bundled licensing via a CMO lowers transaction costs significantly.[95] Lastly, it can be inferred from article 16 that comparable licensee agreements are to be taken into account when examining a CMO's tariffs. This follows from the special rule on "new types of online services". Under this rule, a CMO is not required to use licensing terms negotiated with such a user as a "precedent" for other online services.[96] Conversely, it follows that where a CMO does not negotiate with a "new online service", the CMO has to take prior licensing agreements into account, unless objective reasons indicate otherwise.[97]

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[91] The ECJ has, in different contexts, acknowledged this principle in the realm of copyright law, *see, e.g.*, *VEWA v. Belgische Staat*, C-271/10, ¶ 27 (ECJ 2011) ("unity and coherence of the legal order of the European Union"); *Football Association Premier League, Ltd v. QC Leisure*, joined cases C-403/08 and C-429/08, ¶ 188 (ECJ 2011); *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, C-572/13, ¶ 37-39 (ECJ 2015).

[92] *See also* Stef van Gompel, *Directive 2014/26/EU*, in *Concise European Copyright Law* 541, 594 (Thomas Dreier & P. Bernt Hugenholtz eds., 2nd ed., 2016).

[93] Miernicki, *Collective Management*, *supra* at 181.

[94] *Kanal 5*, C-52/07 at ¶ 29. It should be noted, however, that the decision was handed down before the CMD entered into force.

[95] *Cf. Kanal 5 Ltd v. STIM,* C-52/07 (ECJ 2008), Opinion of AG Trstenjak, ¶ 40-42; Miernicki, *Collective Management*, *supra* at 190-191.

[96] CMD recital 31.

[97] Miernicki, *Collective Management*, *supra* at 161.

3. Equitable remuneration

The concept of equitable remuneration has its roots in concepts of (Continental European) natural justice, according to which authors are entitled to remuneration for "each and every act" of their creations.[98] As a consequence, remuneration is – in principle – due whenever protected content is used, and it is not necessary to show that the right holder has been harmed.[99] Equitable remuneration is an autonomous concept of EU law, meaning that the notion must be construed uniformly across the EU (and hence independently from national legal traditions).[100] Thus, the ECJ is ultimately responsible for establishing the basic guidelines for the transposition of the concept into national law, and the court has already done so in a number of decisions. However, it should be noted that member states are given considerable leeway.[101] In *SENA*, the ECJ ruled that payments to right holders under the equitable remuneration standard must be assessed in light of the value of the use of the licensed content in trade and must ensure a proper balance between (categories of) right holders and users.[102] Accordingly, a calculation method which includes variable and fixed factors (*e.g.*, number of hours of phonograms broadcast, view and listing densities, comparable rates – both domestic and foreign) was deemed compatible with this standard.[103] These principles were later confirmed in *Lagardère Active Broadcast*,

[98] Stefan Bechtold, *Directive 2001/29/EC*, in Concise European Copyright Law 421, 459 (Thomas Dreier & P. Bernt Hugenholtz eds., 2nd ed. 2016); *see also* Geiger & Schönherr, *Article 5: Exceptions and Limitations*, *supra* at 470-471.
[99] Bernt Hugenholtz et al., *The Future of Levies in a Digital Environment* 36 (2003), *available at* http://www.ivir.nl/publicaties/download/332 (last visited May 23, 2017); Jörg Reinbothe, *Private Copy Levies*, in *New Developments in EU and International Copyright Law* 299, 304 (Irinia A. Stamatoudi ed., 2016); *see* on the concept of harm subsection 4. below.
[100] *SENA v. NOS*, C-245/00, ¶ 24 (ECJ 2003).
[101] *Id.* at ¶ 34 ("[T]here is no objective reason to justify the laying down by the Community judicature of specific methods for determining what constitutes uniform equitable remuneration […] it is therefore for the Member States alone to determine, in their own territory, what are the most relevant criteria for ensuring, within the limits imposed by Community law […] adherence to that Community concept").
[102] *Id.* at ¶ 36-37.
[103] *Id.* at ¶ 46.

where the ECJ added that, in the case of a broadcast, factors like the actual audience, the potential audience and the language version of the broadcast are to be considered.[104] Additionally, the court will consider whether the respective user acts on a for-profit basis.[105]

4. *Fair compensation*

The fair compensation standard is more recent than the equitable remuneration standard, being introduced into EU law through the adoption of the Copyright Directive. The notion of equitable remuneration was not used for the purposes of this directive because the member states could not reach a consensus, and the concept of fair compensation was introduced as an alternative solution.[106] Hence, the concept is essentially the result of a compromise.[107] Over the last couple of years, the ECJ has developed an impressive body of case law that sketches the contours of the concept. Being an autonomous concept of EU law,[108] member states must thus adapt their national compensation regime to the rulings of the court. However, they retain considerable freedom to determine the details of the compensation system within these boundaries,[109] as long as they ensure the actual recovery of the fair compensation.[110]

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[104] *Lagardère Active Broadcast v. Société pour la perception de la rémunération équitable*, C-192/04, ¶ 50-51 (ECJ 2005). The court referenced recital 17 of the Satellite and Cable Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L248) 15-21) that reads: "[I]n arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version". *See also VEWA*, C-271/10 at ¶ 32.

[105] *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v. GEMA*, C-117/15, ¶ 41 (ECJ 2016) ("It must also be stated that although it is true that the profit-making nature of the broadcast of a protective work does not determine conclusively whether a transmission is to be categorised as a 'communication to the public' […], it is not however irrelevant […], in particular, for the purpose of determining any remuneration due in respect of that transmission").

[106] Reinbothe, *Private Copy Levies*, *supra* at 313-315.

[107] Bechtold, *Directive 2001/29/EC*, *supra* at 359.

[108] *EGEDA v. Administración del Estado*, C-470-14, ¶ 38 (ECJ 2016).

[109] *Microsoft Mobiles Sales Int'l v. MIBAC*, C-110-15, ¶ 27 (ECJ 2016) ("[…] the Member States enjoy broad discretion in determining who is to pay that compensation. The same is true of the form, detailed arrangement and possible level of such compensation").

Furthermore, a system providing for fair compensation must strike a balance between the interests of the (different categories of) right holders and users.[111]

For the purposes of determining the compensation due, the Copyright Directive states that "a valuable criterion would be the possible harm to the rightholders resulting from the act in question".[112] Largely relying on this recital, the ECJ attributes great importance to this element. The court has frequently held that "fair compensation must be regarded as recompense for the harm suffered by authors".[113] In fact, this is already indicated by the terms "compensation" and "compensate".[114] This rationale distinguishes the fair compensation standard from the equitable remuneration standard. According to the ECJ, the European legislature deliberately chose different expressions in the Rental and Lending Rights Directive and the Copyright Directive; therefore, the concepts must not be interpreted in the same way.[115] Conversely, the concept of "remuneration" – which is also used in the former directive[116] – is, according to the ECJ, in fact based on the notion of harm, similar to the fair compensation standard.[117] It should be noted that Recital 35 of the Copyright Directive contains a de minimis rule, providing for cases in which no compensation may be due.[118]

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[110] *EGEDA*, C-470-14 at ¶ 21; *see also Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH*, C-462/09, ¶ 36 (ECJ 2011) ("effective recovery").

[111] Copyright Directive recital 31; *Austro Mechana GmbH v. Amazon EU Sàrl*, C-572/14, ¶ 22 (ECJ 2016).

[112] Copyright Directive recital 35; *see also id*. at recital 38.

[113] *Padawan SL v. Sociedad General de Autores y Editores de España*, C-467/08, ¶ 40 (ECJ 2010); *Stichting de Thuiskopie*, C-462/09 at ¶ 24; *Verwertungsgesellschaft Wort v. Kyocera*, joined Cases C-457/11 to C-460/11, ¶ 31 (ECJ 2013); *Amazon.com Int'l Sales Inc. v. Austro Mechana GmbH*, C-521/11, ¶ 47 (ECJ 2013); *ACI Adam v. Stichting de Thuiskopie*, C-435/12, ¶ 50 (ECJ 2014); *Hewlett-Packard Belgium*, C-572/13 at ¶ 36; *Austro Mechana*, C-572/14 at ¶ 19.

[114] *Padawan*, C-467/08 at ¶ 41.

[115] *Cf. VEWA*, C-271/10 at ¶ 30.

[116] Rental and Lending Rights Directive art. 6(1).

[117] *VEWA*, C-271/10 at ¶ 29. ("[T]that concept of 'remuneration' is also designed to establish recompense for authors […]").

[118] "In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise".

While it is clear that the ECJ construes the concept of fair compensation with regard to the notion of harm, the exact meaning of the latter notion remains somewhat obscure. In its earlier decisions on this matter, the ECJ referred to the harm "caused to authors of protected works by the introduction of the private copying exception".[119] This seems to indicate that the legislative decision to introduce a restriction to the right holders' exclusive rights is responsible for the harm suffered by right holders. As a consequence, in order to calculate the fair compensation due, one must look at a hypothetical situation with no limitation in place. This also implies that one would take only those uses into account which would have resulted in the payment of a license fee. In other words, one would have to ask whether the users would have paid for the uses occurring in reality absent the exception.[120] The problem with this solution is that many uses – especially in the field of private copying – are carried out regardless of their legal status due to enforcement problems. Hence, strictly speaking, these uses are not caused by the introduction of the exception and would hence not be accounted for when calculating the fair compensation.[121] Therefore, it is perhaps the most coherent solution to calculate fair compensation, in principle, on the basis of all acts which fall within the scope of the respective limitation or exception. After all, Recital 35 of the Copyright Directive – which forms the basis of ECJ case law – refers to the harm "resulting from the act in question" and not the introduction of the limitation.[122] Furthermore, the ECJ does not seem to refer, at least expressly, to the harm resulting

[119] *Padawan*, C-467/08 at ¶ 42; *Amazon.com Int'l Sales Inc. v. Austro Mechana GmbH*, C-521/11 at ¶ 47.
[120] António Vitorino, *Recommendations Resulting from The Mediation On Private Copying and Reprography Levies* 20 (2013), http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf (last visited May 23, 2017) ("[I]t is fair and reasonable to compensate rightholders precisely for lost income opportunities, e.g. via the license agreements they would have concluded if there were no exception").
[121] Joost Poort & João Pedro Quintais, *The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies*, 3 JIPITEC 205, 219 (2013).
[122] *Id.*

from the introduction of the exception in its more recent decision but appears to emphasize the damage arising from the actual use of the protected content.[123]

Under an economic conceptualization, harm is often equated to lost sales or profits.[124] Broadly speaking, this suggests that one must ascertain to what extent the acts covered by the exception substitute offerings made under the right holders' authority.[125] For this appraisal, it makes sense, in principal, to take the amount of use that is made of the protected content into account, since one would assume the profits to decrease indirectly proportionally to an increase in use.[126] Naturally, it is difficult to value these decreases (which at times might be minimal),[127] and it is impossible to precisely ascertain the actual amount of use. In this respect, the ECJ permits assumptions, stating that "it is unnecessary to show that [natural persons for private purposes] have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work".[128] Furthermore, commentators have

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[123] *See*, *e.g.*, *Hewlett-Packard Belgium*, C-572/13 at ¶ 36 ("harm resulting for the author from the reproduction of his protected work without his authorization") and ¶ 69 ("harm suffered resulting from the copies actually produced"; "the criterion of actual harm suffered"); *see also Microsoft Mobiles Sales Int'l*, C-110-15 at ¶ 28; *Austro Mechana GmbH*, C-572/14 at ¶ 19; *Copydan Båndkopi*, C-463/12 at ¶ 21; *Padawan*, C-467/08 at ¶ 54.

[124] *EGEDA v. Administración del Estado*, C-470-14 (ECJ 2016), Opinion of AG Szpunar, ¶ 23 ("lucrum cessans").

[125] Kretschmer, *Private Copying and Fair Compensation*, *supra* at 17, 67. This concept should be distinguished from the concept of lost licensing opportunities, *see* Poort & Quintais, *Levy Runs Dry*, *supra* at 214 (referencing art. 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 2004 O.J. (L157) 45-86 – hereinafter: Enforcement Directive); *see also* Karapapa*, Private Copying* 126-127 (2012).

[126] It seems that the ECJ takes the amount of use strongly into account when referring to the determination of harm; this appears to be in line with the with the rulings of the court cited above. In *VEWA*, the court held: "Thus, the higher the number of protected works made available by a public lending establishment, the greater will be the prejudice to copyright. It follows that the amount of remuneration to be paid by such an establishment should take account of the number of works made available to the public and, consequently, that large public lending establishments should pay a greater level of remuneration than smaller establishments", *see VEWA*, C-271/10 at ¶ 38. It should be noted, however, that the ECJ is rather strict when it comes to discrimination issues among different user groups, *see Hewlett-Packard Belgium*, C-572/13 at ¶ 71-77 (on a copying device the levy for which was calculated in advance and solely on the basis of its ability to the speed at which copies could be technically made; the court did not object to this method as such, but rather to its indiscriminate application); *see also Copydan Båndkopi*, C-463/12 at ¶ 29.

[127] *Cf.* Vitorino, *Recommendations*, *supra* at 20.

[128] *Padawan*, C-467/08 at ¶ 54. *See also Hewlett-Packard Belgium*, C-572/13 at ¶ 72; *Copydan Båndkopi*, C-463/12 at ¶ 24. The case law indicates, however, that users must have the option to obtain a

suggested that the harm for a right holder can be decreased by smart pricing policies. She could, for instance, demand a higher price for the original work to indirectly appropriate revenues for subsequent copies made by users.[129] Furthermore, taking promotional effects into account could also decrease harm.[130] Finally, it should be noted that member states may provide for a higher level of remuneration than would be due under the fair compensation standard.[131]

5. *Reasonable fee*

Both the ASCAP and the BMI consent decrees state that rate courts shall determine a "reasonable fee" for the use of the rights represented by the two CMOs.[132] Even though the decrees are not entirely identical, the courts have interpreted the standards in the same manner for the purposes of their rate-setting duties.[133] Essentially, the standard instructs the courts to determine the "fair market value" for the licensing of the rights in question in a hypothetical, competitive market.[134] As such, the courts seek

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refund if they bear the burden of the fee but do not carry out acts falling within the scope of the exception, *see*, *e.g.*, *Amazon.com Int'l Sales*, C-521/11 at ¶ 31; *Copydan Båndkopi*, C-463/12 at ¶ 45; *Microsoft Mobiles Sales Int'l*, C-110-15 at ¶ 56.

[129] Poort & Quintais, *Levy Runs Dry*, *supra* at 216-218; for more details on this topic *see* S. J. Liebowitz, *Copying and Indirect Appropriability: Photocopying of Journals*, 93 J. of Political Economy 945 (1985); Hal R. Varian, *Copying and Copyright*, 19 J. of Economic Perspectives 121 (2005); Michael Waldman, *What limits indirect appropriability?*, in Handbook on the Economics of Copyright 26 (Richard Watt ed., 2014).

[130] Luis Aguiar & Bertin Martens, *Digital Music consumption on the Internet: Evidence from clickstream data*, 34 Info. Econ. & Policy 27 (2016); Joel Waldfogel, *Music Piracy and Its Effects on Demand, Supply, and Welfare,* in *Innovation Policy and the Economy* 91 (Josh Lerner & Scott Stern, eds., 2012).

[131] Reinbothe, *Private Copy Levies*, *supra* at 316-319; Silke von Lewinski & Michel M. Walter, *Information Society Directive* in *European Copyright Law* 921, 1029 (Michel M Walter & Silke von Lewinski eds., 2010).

[132] ASCAP Consent Decree § IX(A); BMI Consent Decree § XIV(A).

[133] *United States v. BMI (Application of Music Choice, Inc.)*, 316 F. 3d 189, 194 (2nd Cir. 2003) ("This is the first time our Court has been invited to review a rate-setting pursuant to the BMI Consent Decree. We see no reason why our approach to this case should differ from any of the numerous occasions on which we have reviewed rate court decisions pursuant to the ASCAP consent decree").

[134] Due to the CMOs' market power, the competitive conditions are deemed hypothetical, *see In Re Pandora*, 6 F. Supp. 3d 317, 353-354 (S.D.N.Y. 2014), referring to *ASCAP v. Showtime/Movie Channel, Inc.*, 912 F. 2d 563, 569 (2nd Cir. 1990) ("Fair market value is a factual matter, albeit a hypothetical one. […] That the value to be determined is hypothetical does not render it any less a matter of fact, for

to establish the "price that a willing buyer and a willing seller would agree to in an arms' length transaction".[135] In order to establish the market value, the rate courts usually rely upon comparable agreements ("benchmarks"),[136] and a substantial amount of the litigation before the courts revolves around the question of whether a certain agreement in fact constitutes an appropriate benchmark.[137] Courts generally analyze whether the agreement in question dealt with "a comparable right, whether it involved similar parties in similar economic circumstances, and whether it arose in a sufficiently competitive market".[138] The consent decrees already point to this method, as they prohibit ASCAP and BMI from discriminating in license fees or other terms between "licensees similarly situated".[139] This can have practical consequences: In light of the definition of this term,[140] the ASCAP rate court,[141] for instance, has ordered an internet radio station to pay higher fees than traditional radio stations.[142]

The consent decrees specify different license types that ASCAP and BMI must, under certain conditions, offer to licensees. The main difference between these license types

purposes of the standard of review. Fact-finders frequently are obliged to determine as a matter of fact hypothetical values pertinent to damage calculations").

[135] *Showtime/Movie Channel*, 912 F. 2d 563 at 569; *United States v. BMI*, 426 F. 3d 91, 95 (2nd Cir. 2005); *BMI v. DMX Inc*., 683 F. 3d 32, 45 (2nd Cir. 2012).

[136] *United States v. ASCAP (Application RealNetworks and Yahoo, Inc.)*, 627 F. 3d 64, 76 (2nd Cir. 2010) (quoting *United States v. BMI*, 426 F. 3d 91 at 94); *BMI (Application of Music Choice, Inc.)*, 316 F. 3d 189 at 194 ("[The] determination is often facilitated by the use of a benchmark – that is, reasoning by analogy to an agreement reached after arms' length negotiation between similarly situated parties").

[137] *Cf. United States v. BMI*, 426 F. 3d 91 at 94.

[138] *BMI v. DMX Inc*., 683 F. 3d 32 at 45 (quoting *United States v. BMI*, 426 F. 3d 91 at 95).

[139] *BMI (Application of Music Choice, Inc.)*, 316 F. 3d 189 at 194; ASCAP Consent Decree §IV(C); BMI Consent Decree § VIII(A); *see also In re Major Market Radio, LLC*, 2018 U.S. Dist. LEXIS 115533 (S.D.N.Y. 2018).

[140] "[…] music users or licensees in the same industry that perform ASCAP music and that operate similar businesses and use music in similar ways and with similar frequency; factors relevant to determining whether music users or licensees are similarly situation include, but are not limited to, the nature and frequency of musical performances, ASCAP's costs of administering licenses, whether the music users or licensees compete with one another, and the amount and source of the music users' revenue", *see* ASCAP Consent Decree § II(R) – the BMI Consent Decree does not contain a definition.

[141] *In Re Pandora*, 6 F. Supp. 3d 317 at 370-371.

[142] Loren, *Dual Narratives*, *supra* at 564.

is the calculation method employed.[143] While the various license types grant access to the entire repertoire of the CMOs, under a blanket license agreement, the fee usually is a flat dollar amount or calculated from a percentage of the licensee's total revenue and does not depend on the amount of use that is made of the licensed content.[144] However, this principle is not carved in stone, as the rate courts are willing to adjust this fee structure if justified in a particular case, such as in the case of content directly licensed to users.[145] What is more, the Second Circuit held, in the context of streaming, that "fundamental to the reasonableness of a fee for music under a license is the reasonableness of the determination of the revenue attributable to the actual uses by the applicant of the music to which the rate percentage is applied" and therefore ordered to make adjustment in order to "reflect only those revenues attributable to music use".[146] The ASCAP Consent Decree furthermore distinguishes between the per-program license,[147] the per-segment license,[148] and the through-to-the-audience license (TTTA license).[149] The BMI Consent Decree provides for a special per-program license,[150] as well as special licenses for networks.[151]

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143 Miernicki, *Collective Management*, *supra* at 164-166, 216. In this respect, ASCAP Consent Decree § VII(A) provides that the different types of licenses should provide licensees with a "genuine choice"; this makes clear that ASCAP may not force users into choosing a particular type of license because the other options are economically unreasonable, *see United States v. ASCAP (Application of Muzak, LLC)*, 309 F. Supp. 2d 566, 580 (S.D.N.Y. 2004).

144 *BMI v. CBS*, 441 U.S. 1, 5 (1979); ASCAP Consent Decree § II(E).

145 In this case, one speaks of an adjustable fee blanket license – AFBL, *see BMI v. DMX Inc*., 683 F. 3d 32 at 39-40.

146 *ASCAP (Application RealNetworks and Yahoo, Inc.)*, 627 F. 3d 64 at 76 (referring to the "music-use-adjustment factor – MUAF). *See* for more details Miernicki, *Collective Management*, *supra* at 192-195.

147 For broadcasters; the fee varies depending on which programs contain ASCAP music not otherwise licensed for public performance, *see* ASCAP Consent Decree §§ II(J), VII(A)(1).

148 For background/foreground music service or online music user; the fee varies depending upon which segments contain ASCAP music not otherwise licensed for public performance, *see* ASCAP Consent Decree §§ II(K), VII(A)(2).

149 For broadcasters, online users, background/foreground music services, and operators of any yet-to-be-developed technology that transmits content to other music users with whom it has an economic relationship relating to that content; the fee takes into account the value of all performances made under the license, *see* ASCAP Consent Decree § II(S), V.

150 For unlicensed broadcasters; fees relate to programs or programming periods during which a licensed composition is performed, *see* BMI Consent Decree §VIII(B).

6. *Reasonable rates and term*

As a general matter, the U.S. Copyright Act directs the CRB to set and adjust "reasonable terms and rates of royalty payments" in relation to the respective statutory licenses falling within the CRB's jurisdiction.[152] While this language on its own would grant the judges great discretion, the statute provides for multiple factors which are to be taken into account when setting the rate. The analysis is complicated in that these factors are phrased in a detailed yet sometimes ambiguous fashion. Moreover, they do not apply to all rates set by the CRB but are split up between the different provisions.

This status quo can be explained when put in the historical context. Along with the performance right in sound recordings established by the DPRSRA in 1995, Congress created section 114 which had, however, a limited scope compared to today's status quo.[153] The scope of the license was later expanded with the introduction of the Digital Millennium Copyright Act in 1998[154] to include internet radio. Additionally, the act stipulated a new rate-setting standard (willing buyer/willing seller). This new standard was grandfathered-in such that the older § 801(b)(1) standard continues to apply to preexisting services in certain cases.[155]

To approach this complicated system, a broader distinction is helpful (and is usually drawn out by the relevant literature), separating the provisions that are market-based ("willing buyer-willing seller") from those that employ a broader multi-factor policy test. Below, the calculation of fees under the AHRA will also be addressed.

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[151] A single license fee is fixed for the network, *see* BMI Consent Decree § IX(B); this corresponds to ASCAP's TTTA license, *see* U.S. Copyright Office, *Music Marketplace*, *supra* at 36-37.

[152] 17 U.S.C. § 801(b)(1); § 112(e)(3); § 114(f)(1)(A), (2)(A); § 115(c)(3)(C).

[153] U.S. Copyright Office, *Music Marketplace*, *supra* at 49 (noting that § 114 only applied to satellite radio and subscription music services).

[154] Pub. L. 105-304, 112 Stat. 336 (hereinafter: DMCA).

[155] U.S. Copyright Office, *Music Marketplace*, *supra* at 49; Goldstein, *Goldstein on Copyright, supra* at § 7.8.6.2.

6.1. Willing buyer/willing seller

The willing buyer/willing seller standard applies to “eligible nonsubscription transmissions”[156] and “new subscription services”[157] for the purposes of section 114’s statutory license,[158] as well to the royalties due under section 112.[159] The most relevant passages of the act read as follows:

> In establishing rates and terms […], the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive and programming information presented by the parties, including—
> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner’s other streams of revenue from its sound recordings; and
> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.[160]

The CRB set the fees for the applicable section 112 and section 114 statutory licenses for the 2016-2020 period in its *Web IV* decision.[161] This decision is remarkable not only due to its length but also to its careful analysis of the arguments made by the involved parties. The rates themselves (as well as further accompanying provisions) are codified at 37 C.F.R. Part 380 Subpart A-D for commercial and noncommercial webcasters,[162] noncommercial educational webcasters[163] and public broadcasters.[164] The rates due under section 112 are “bundled” to those under section 114. This means that the minimum fee under section 112 is subsumed under the fee for the section 114 license, with a five to ninety-five percent split between section 112 and section 114 license holders.[165]

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[156] *See* for the definition 17 U.S.C. § 114(j)(6) (certain noninteractive nonsubscription digital audio transmission not excempt under subsection (d)(1)).
[157] *See* for the definition 17 U.S.C. § 114(j)(8) (certain noninteractive subscription services that are not preexisting subscription services or preexisting satellite digital audio radio services).
[158] 17 U.S.C. § 114(f)(2(A).
[159] 17 U.S.C. § 112(e)(4).
[160] 17 U.S.C. § 114(f)(2)(B). A similar – but not identical – wording is used by § 112(e)(4).
[161] *Web IV* at 26316; on the previous determinations and settlements *see id*. at 26317-26319.
[162] 37 C.F.R. 380.10.
[163] 37 C.F.R. 380.20-27.
[164] 37 C.F.R. 380.30-37.
[165] *Web IV* at 26398; 37 C.F.R. 380.10(d).

Under the willing buyer/willing seller standard, judges have the task of simulating a hypothetical marketplace – wherein the "sellers" are the right holders (record companies) and the "buyers" are the users (services)[166] – with no influence by the compulsory or statutory licenses.[167] As such, the market that the judges consider is a market driven by the forces of competition. However, as the D.C. Circuit put it, the statute "does not require that the market assumed by the Judges achieve metaphysical perfection in competitiveness".[168] Rather, the judges will decide against the background of "effective" competition.[169] The determination entails both the setting of the level of the rate (*e.g.*, a percentage rate or a dollar amount) as well as the calculation methods.[170]

In order to establish a rate that would have been agreed upon under such competitive conditions, the judges "may"[171] refer to comparable agreements negotiated voluntarily. However, they must, according to the act's requirements, establish a minimum fee.[172] Although this language indicates that the reliance on benchmarks is, strictly speaking, optional, this method is of great importance for the decision-making of judges.[173] This

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166 *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084, 24087 (May 1, 2007) (hereinafter: Web II). In this respect, the CRB highlights that the statutory license in section § 118 refers to a different market with different sellers and different copyrighted works, *see Web IV* at 26394.

167 *Web IV* at 26316.

168 *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Board*, 574 F. 3d 748, 757 (D.C. Cir. 2009).

169 *Web IV* at 26332-26333; *see also Web II* at 24091-24093. In this context, it may be a factor whether the licensees are capable of discriminating between the licensed content; in this respect, the CRB incorporated, based on the arguments raised by *Pandora*, a "steering-based" benchmark, *see Web IV* at 26374-26375; "steering" refers to the "licensee's ability to control the mix of music that's played on the service in response to differences in royalty rates charged by different record companies", *Web IV* at 26356 (citing *Pandora's* expert). *See* for further details Strickler, *Royalty Rate Setting For Sound Recordings By the United States Royalty Board: The Judicial Need For Independent Scholarly Analysis*, 12 Rev. of Econ. Research on Copyright Issues, 2015 (1/2), at 6-8; *see also Determination of royalty rates and terms for transmission of sound recordings by satellite radio and "preexisting" subscription services (SDARS III)*, 83 Fed. Reg. 65210, 65237-65238 (Dec. 19, 2018) (hereinafter: *SDARS III*).

170 *See*, *e.g.*, *Web IV* at 26323-26326 (comparing a percentage-of-revenue rate with a per-play rate).

171 17 U.S.C. 114(f)(2)(B)(ii); *see also id*. at §§ 112(e)(4)(B).

172 *Web IV* at 26316 citing *Web II* at 24087.

173 The greatest portions of *Web IV* are dedicated to the question (and the parties' arguments) concerning which agreements constitute viable benchmarks and what adjustments are to be made on this basis.

does not mean that they will not consider other pieces of evidence.[174] However, if a party is capable of substantiating an agreement as a suitable benchmark in the course of the proceedings, the CRB will very likely incorporate this benchmark in their decision,[175] even if the parties of the statute provides further factors for the purposes of the determination. In this regard, for instance, the judges must consider the promotion/substitution and relative contribution factors; however, they must not regard them as determinative nor use them to adjust a fair market rate.[176] In this context, when analyzing benchmark agreements in the webcasting sector, the CRB has considered promotion and substitution effects to be "baked in" by negotiating parties.[177] In a certain way, the CRB's prior determinations also work as benchmarks and, therefore, carry some authority.[178] However, this does not mean that the judges will automatically "rubber-stamp" prior decisions without further analysis.[179] In assessing benchmark agreements, the CRB refers to what is called the "Four Part Test" which is broken down into four "sub-tests, namely the i) willing buyer and seller test, the ii)

[174] Cf. *Web IV* at 26331 FN 65 ("[T]he Judges have rejected the non-benchmarking approaches to rate setting […] in this proceeding. They were not rejected because they were not benchmarks, but because each was unpersuasive in its own right"). *See also id*. at 26394-26495.
[175] *Cf. id*. at 26391 ("In the instant case, the Judges have sufficient confidence in the available benchmark analyses to proceed without reference to other guideposts").
[176] *Id.* at 26318 quoting *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45240, 45244 (July 8, 2002) (hereinafter: Web I); *see also* Rick Marshall, *The Quest for Parity: An Examination of the Internet Radio Fairness Act*, 60 J. Copyright Soc'y U.S.A. 445, 457 (2013) ([…] these factors highlight what should go into determining the fair-market value […]; they are not justifications for straying from a market-based rate").
[177] *Web IV* at 26326 (also referring to the previous determinations); *see also SDARS III* at 65253.
[178] *See*, *e.g.*, *Web IV* at 26382 ("There is no *a priori* reason to conclude that the rates set in that earlier proceeding failed to reflect or approximate market forces […]"). *See also* for reference to the "reasonable fee" standard in the rate court context *id*. at 26331-26332. Conversely, the CRB's interpretation of the statute can be considered in other proceedings, *see WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012); Jake Makar, *After Areo: Applying the Cable Compulsory License to Internet Retransmissions*, Colum. Bus. L. Rev. 475, 487-490 (2016).
[179] *Web IV* at 26323 ("[A]fter careful consideration of all rate structure proposals presented in the proceeding, the Judges find that a greater of rate structure is not warranted *in the current period*", emphasis added); *see also id*. at 26391; *SDARS III* at 65228 ("The Judges are charged with setting rates and terms *de novo* for each period").

same parties test, the iii) statutory license test, and, finally, the iv) same rights test."[180] As is the case in rate court proceedings, for an agreement to serve as a benchmark, it is not necessary that it "perfectly" fit the circumstances of the proceeding. The CRB can, and frequently does, adjust benchmark rates for the purposes of a given determination.[181] Suitable benchmark agreements do not necessarily set a fee proportional to the usage of the protected content.[182]

The CRB can discriminate between users – that is, set different rates – if warranted by the presented evidence in a given rate determination proceeding. In this respect, the rates for webcasting distinguish between commercial webcasters and noncommercial webcasters;[183] however, in *Web IV*, the judges refused to set different rates for copyright owners (major labels and independent record companies) or web- and simulcasters.[184] In a similar fashion, the CRB does not set different rates merely to protect the profitability of a certain business model.[185] In its comprehensive *Web IV* decision, the CRB discussed further interesting issues that cannot all be mentioned here. These include the question whether one must take into account the "shadow of

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[180] *Web IV* at 26383 (noting that the test was implicitly used in prior proceedings and outlined by an expert who participated in the proceeding).

[181] In this context, it is worthwhile to note that agreements will be looked at comprehensively, *see*, *e.g.*, *id*. at 26384-26388 ("A potential benchmark can include terms that provide a *licensor* with additional compensation, whether in cash or in kind, beyond the simple receipt of money in exchange for the right to play sound recordings"). *See also SDARS III* at 65214.

[182] *Web IV* at 26396 ("Willing buyers and willing sellers may, and often do, agree to rates that are not strictly proportional to usage. […] The statutory requirement of a minimum fee also runs counter to IBS's argument").

[183] 37 C.F.R. 380.10. While commercial webcasters pay a fixed dollar amount per performance (which also distinguishes between subscription services and nonsubscription services), noncommercial webcasters pay a fixed amount per year for each channel or station; however, they are treated as nonsubscription services insofar as they exceed 159,140 Aggregate Tuning Hours (ATH). *See* for the definition of ATH 37 C.F.R. § 380.7.

[184] *Web IV* at 26319-23. The judges considered not only factors that support discrimination but also those that support the same rate.

[185] *Web IV* at 26329 ("[T]he statute neither requires nor permits the Judges to protect any given business model proposed or adopted by a market participant", referencing *Web II* at 24089.).

the statutory rate", *i.e.*, to what extent statutory rates influenced potential benchmark agreements.[186]

Furthermore, the U.S. Copyright Act contains a special rule on the suitability of license fees for the public performance of sound recordings as benchmarks:

> License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).[187]

Thus, license fees due for the public performance of sound recordings may not be taken into account in other proceedings which especially relate to the rate courts under the ASCAP and BMI consent decrees.[188] In fact, this is an exception to the rule that comparable rates may serve as a benchmark. It is not a far stretch that the rates for sound recordings are relevant to the rates for musical composition,[189] given their interconnection and the fact that users often need both types of protected content for the provision of their services. Conversely, the provision does not apply vice versa, so that the CRB may take performance rates for composition into account.[190] Commentators suggest that this rule is one of the reasons for the largely differing rates for the performance of musical works and sound recordings.[191]

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186 *Web IV* at 26320-26331. The judges distinguished two possible "shadows" – the existing rates and the parties' awareness that the agreement could be used as a benchmark – but did not incorporate either of the two in their determination.
187 17 U.S.C. § 114(i).
188 *In Re Pandora*, 6 F. Supp. 3d 317 at 332-333, 366-367.
189 U.S. Copyright Office, *Music Marketplace*, *supra* at 157 (noting that the court in *Pandora* considered the sound recording royalties as irrelevant).
190 Joseph Pomianowski, *Toward An Efficient Licensing And Rate-Setting Regime: Reconstructing § 114(i) of the Copyright Act*, 125 Yale L. J. 1531, 1536 f (2015-2016).
191 *See e.g.*, Pomianowski, *Rate-Setting Regime*, *supra* at 1530-1543; U.S. Copyright Office, *Music Marketplace*, *supra* at 104-105, 157. *See*, however, *In Re Pandora*, 6 F. Supp. 3d 317 at 366-367 ("[T]he record is devoid of any principled explanation […] why the rate for sound recording rights should dictate any change in the rate for composition rights").

6.2. Section 801(b)'s four factor policy standard

In specifying the "reasonable terms and rates" standard, the second sentence of section 801(b)(1) introduces a list of four factors. The CRB is instructed to base its decisions on this standard in respect to, for the present purposes, subscription transmissions by "preexisting subscription services"[192] and transmissions by "preexisting satellite digital audio radio services",[193] as well as the acts covered by the mechanical license contained in section 115. The act stipulates that the rate calculation under the section 801(b) standard should achieve the following objectives:

> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[194]

This a different standard than the willing buyer/willing seller standard. While the former requires the ascertainment of the market price, the latter is policy-driven. From the market based standard's perspective, "any argument that the two rates should be equal as a matter of law is without merit."[195] Conversely, the CRB may, but does not necessarily have to, rely on market rates under the policy standard.[196] The standard is often understood as directing judges to set a rate that *adjusts* the hypothetical market

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[192] Defined as "a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service", § 17 U.S.C. § 114(j)(11); *see* in this connection *SDARS III* at 65225-65227 (in the context of internet streaming).

[193] Defined as "a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service", § 17 U.S.C. § 114(j)(10).

[194] 17 U.S.C. § 801(b)(1).

[195] *Web I* at 45244; *see also Web IV* at 26391 ("The Judges *must* determine market rates […]"). *See* on the background of the provision *SDARS III* at 65210-65212.

[196] *Music Choice v. Copyright Royalty Bd.*, 774 F. 3d 1000, 1010 (D.C. Cir. 2014).

rate.[197] In this vein, the CRB determines a reasonable market rate and subsequently adjusts the rate according to the policy factors.[198] Benchmarks constitute useful starting points for this analysis.[199] Importantly, this has resulted in protecting incumbent industries, a rationale the fourth factor is most obviously in line with.[200] However, the factors may also result in an upward adjustment of the benchmark, resulting in higher fees.[201]

6.3. Rates under the AHRA

While the act states that the CRB shall determine and adjust "reasonable terms and rates" of royalty payments due under the AHRA,[202] neither the willing buyer/willing seller standard nor section 801(b)'s policy standard applies. This is because the AHRA contains detailed rules on the calculation of the royalty fees[203] that are not based on those standards. After all, the judges make their decision "as provided" by section

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197 Marshall, *The Quest for Parity, supra* at 458-459.

198 *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. Cf. 4080, 4094 (Jan 24, 2008) (hereinafter: *SDARS I*); *see also SDARS III* at 65222 (using the prevailing statutory rate as the starting point for the analysis).

199 *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 23054, 23056 (April 17, 2013) (hereinafter: SDARS II); *see also Recording Indus. Assn. of Am. v. Librarian of Congress*, 608 F. 3d 861, 866 (D.C. Cir. 2010) (in connection with (17 U.S.C. § 115(c)(3)(D)).

200 *SDARS* I at 4097 ("In order to minimize the adverse impact of the rate applicable to the license here, we find it appropriate to adopt a rate from the zone of reasonableness for potential marketplace benchmarks that is lower than the upper boundary most strongly indicated by marketplace data. We do so in order to satisfy 801(b) policy considerations related to the minimization of disruption that are not adequately addressed by the benchmark data alone"); *SDARS III* at 65220 ("The intent of the carve-out was to acknowledge the pioneering status of the PSS, which invested in a new type of digital audio service […] in reliance on the existing 801(b) rate standard and to protect their prior investments. The PSS took the risks and received the benefits, one of which was a statutory exception from the rate-setting provisions in the DMCA that were designed to move the industry to market rates", footnotes and quotations omitted) (citing *SoundExchange v. Muzak*, 854 F. 3d 713 (D.C. Cir. 2017)) and at 65259-65260; Loren, *Dual Narratives*, *supra* at 551 (The fourth factor "is an invitation to protect the status quo at expense of new market entrants").

201 *SDARS II* at 23060 (making a one percent upward adjustment based on the second factor); *see however id*. at 23067 (citing *SDARS I* at 4095); Marshall, *The Quest for Parity, supra* at 464 (arguing that removing the fourth factor would essentially lead to rates at market value); Robert J. Williams, *Public Performance Royalty-Rate Disparity: Should Congress Pamper Pandora's Pandering?*, 48 New Eng. L. Rev. 371, 384 ("Thus, the "willing buyer, willing seller" standard encompasses only half of the considerations of the § 801(b)(1) standard"); *see also SDARS III* at 65253-65254.

202 17 U.S.C. § 801(b)(1).

203 17 U.S.C. § 1004; this is not to say that other provisions do not include special rules in addition to the more general standards, *see*, *e.g.*, § 115(c).

1004.[204] Payments due under section 1003 must be made for each digital audio recording device and are set at two percent of the transfer price.[205] In connection with this, special rules apply to digital audio recording devices first distributed in combination with one or more devices (whether physically integrated or as separate components).[206] Furthermore, the act provides both for a minimum and a maximum fee.[207] Finally, rates for each digital audio recording medium are set at three percent of the transfer price.[208]

V. Modifications by the Orrin G. Hatch-Bob Goodlatte Music Modernization Act

Under the MWMA,[209] section 115 has been completely redesigned. Most relevant in the present context is the introduction of the willing buyer/willing seller standard also for mechanical licenses contained in this provision.[210] The wording of this standard is in line with the previously existent willing buyer/willing seller standard under sections 112 and 114. Moreover, amongst other adaptations, the bill sets up a new licensing framework by providing for a blanket license for digital uses that can be acquired through the mechanical license collective.[211] The collective will be designated by the Register of Copyrights and the license will be available for all works under section

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[204] 17 U.S.C. § 801(b)(1).
[205] 17 U.S.C. § 1004(a)(1). *See* for the definition of "transfer price" 17 U.S.C. § 1001(12).
[206] 17 U.S.C. § 1004(a)(2).
[207] *Id*. at § 1004(a)(3). Furthermore, this provision sets forth the duties of the CRB: "[A]ny interested copyright party may petition the Copyright Royalty Judges to increase the royalty maximum and, if more than 20 percent of the royalty payments are at the relevant royalty maximum, the Copyright Royalty Judges shall prospectively increase such royalty maximum with the goal of having no more than 10 percent of such payments at the new royalty maximum […]". As such, the tasks of the CRB are comparatively small compared to the standards described above.
[208] 17 U.S.C. § 1004(3).
[209] Title I of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (*see* section II) can be short cited as Musical Works Modernization Act (hereinafter: MWMA), *see* MWMA § 101.
[210] *Id*. at § 102(a). The amendment will be codified at 17 U.S.C. § 115(c)(1)(F).
[211] MWMA § 102(a). The amendment will be codified at 17 U.S.C. § 115 (d)(1).

115.[212] This seems to be a clear commitment to the blanket license, which is common practice in music licensing through PROs and has been subject to extensive litigation in this context.[213]

As regards section 114, the MWMA introduces a "uniform rate standard", replacing subsections 114(f)(1) and (2) of the former text with a "willing buyer/willing seller standard.[214] In so doing, the act abolishes the distinction between different users with regard to the rates due under the statutory license. Furthermore, subsection 114(i) is deleted.[215] However, that does not mean that rates due for sound recordings may be taken into account in all proceedings on rates for musical works under the new regime, as the act limits the use of the sound recording benchmark to royalties for the public performance of musical works by means of a digital audio transmission (other than a transmission by a broadcaster).[216] While the CRB must apply the new rules to proceedings after the enactment of the act,[217] preexisting subscription services and preexisting satellite digital audio radio services are granted a transitional period until 2027.[218] Accordingly, the rates set under the old standard will continue to apply in the course of the following years.

As implied by the foregoing amendments, the four factor policy standard laid out in subsection 801(b) is deleted from the U.S. Copyright Act,[219] so that the willing buyer/willing seller standard remains as the prevailing standard for determining rates for statutory licenses in the United States. These changes have been recommended by

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[212] MWMA § 102(a). The amendments will be codified at 17 U.S.C. § 115 (d)(1)(B)(i), (3)(B).

[213] The blanket license was upheld by the Supreme Court in *BMI v. CBS*, 441 U.S. (1979); *see* for further details Miernicki, *Collective Management*, *supra* at 164-167, 171-176, 223-229. The new blanket license in section 115 aims at lowering transaction costs, *see* H.R. Rep. No. 115-651, 115th Cong., 2d Sess. 5 (2018).

[214] MWMA § 103(a).

[215] *Id*. at § 103(b).

[216] *Id*. at § 103(c)(1). *See also id*. § 103(e), (f).

[217] *Id*. at § 103(h).

[218] *Id*. at § 103(i). See also *SDARS III* at 65210.

[219] MWMA § 103(g)(2).

several stakeholders (including the U.S. Copyright Office),[220] although some have argued that the §801(b)(1)-standard, in principle, better reflects the aims of U.S. copyright law than a hypothetical market rate.[221]

Finally, the MWMA addresses "any performing rights society subject to a consent decree"[222] – in practice, ASCAP and BMI – and stipulates that a judge of the competent district court shall be randomly assigned to determine the license fee in a given case (a so-called "wheel" approach). Under the current regime, in contrast, the ASCAP and BMI consent decrees are each overseen by the same judge on a permanent basis. Furthermore, the MWMA specifies that, should the DOJ plan to terminate a consent decree between the United States and a performing rights society, the authority must notify and inform the Members of Congress and certain committees prior to filing a motion to terminate.[223] While the fact that Congress deems such a rule necessary is interesting on its own accord, it can be expected that future moves of the DOJ will be looked at closely. Most likely, this must be seen against the background of the (so far unsuccessful) attempts of the DOJ to change the consent decree regimes currently in place after a review concluded in 2016.[224] In any event, recent statements of the DOJ suggest that the authority has not put the topic completely aside.[225]

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[220] U.S. Copyright Office, *Music Marketplace*, *supra* at 142-145.

[221] *See*, *e.g.*, Andrew Stockment, *Internet Radio: The Case for a Technology Neutral Royalty Standard*, 95 Va. L. Rev. 2129, 2172 (2009); Williams, *Public Performance Royalty-Rate Disparity*, *supra* at 397 f.

[222] MWMA § 104(2).

[223] MWMA § 105(c).

[224] Department of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees* (2016), *available at* https://www.justice.gov/atr/file/882101/download (last visited Oct. 11, 2018).

[225] *See*, *e.g.*, John Eggerton, *DOJ Antitrust Chief: We are Reviewing ASCAP, BMI Consent Decrees*, Multichannel News, Mar 28, 2018, *available at* https://www.multichannel.com/news/doj-antitrust-chief-we-are-reviewing-ascap-bmi-consent-decrees-418910 (last visited Oct. 11, 2018).

VI. Comments on the different rate-setting regimes

1. From standards to calculation

As is the case in other fields, law-makers and regulators, when introducing governmental interventions in the setting of copyright license fees, must consider whether general standards or more detailed rules should be used. While the first solution will give the authorities that enforce the regulation more guidance (and one might thus expect that determinations will be more predictable and accurate), the second solution awards more flexibility to reach appropriate results in individual cases. An "extreme" solution – which can be found in the AHRA, for instance – would essentially amount to the determination of the rates through legislation. Such detailed rules that specify both calculation method and the level of the fee are rather exceptional in European copyright law; however, an example for this approach can be found in article 4 of the Resale Right Directive,[226] which stipulates that royalties are expressed as a specified percentage of the sale price. On the other hand, general standards will essentially shift the decision to the enforcing authorities (in many cases, courts). Of course, there is ample room for intermediate solutions.

Whatever regulatory strategy is chosen, the studied rate-setting regimes bear a resemblance in their overall structure. First, and usually by legislation, a very general standard is defined that gives a quick, though elusive, understanding concerning what a proper rate might look like. Second, either by interpretation or legislative clarification, a reference value is established that defines the rate that is deemed proper. This reference value can be phrased positively (*e.g.*, fair market value) or negatively, the latter being typically the case in EU competition law (a rate is only prohibited if it is

[226] 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, 2011 O.J. (L272) 32-36.

unfair).[227] Third, again by interpretation or legislative clarification, approximation criteria[228] are introduced which the enforcing authority can rely upon to establish the reference value.[229] These can, similarly as explained above, be negative or positive criteria[230] and might be subdivided into further criteria or methods. At this point, authorities will typically require economic expertise for further guidance, as this task is usually not confined to genuine legal questions or simple calculations.

To put these elements into context, the following table schematizes the studied U.S. and EU rate setting regimes.[231]

Rate-setting regime	**Reference value**	**Suitable approximation criteria**	**Scope (exemplified)**	**Enforcement, Determination, Adjustment**
European Union				
Unfair purchase or selling prices or other unfair trading conditions	Economic Value	- Territorial comparison of fees (level of fees) - Amount of use (calculation methods)	License fees set by CMOs	Antitrust authorities (Commission or national)
Fair compensation (remuneration)	Harm	Amount of use (*e.g.*, copying capacity of a device, number of users)	Private copying (public lending)	National law
Equitable remuneration	Economic value	Amount of use (*e.g.*, broadcast time; size of audience; nature of the business)	Broadcasts of phonorecords	National law
Objective and non-discriminatory licensing terms; appropriate remuneration	- Economic value of the use of the rights in trade - Economic value of the service provided	- Nature and scope of use - Efficiency gains - Comparable agreements (except “new online services”)	Rates set by CMOs (IMEs – CMD Art 16(1))	National law (competent authorities)

227 *See* section VI.4.

228 The term ‘approximation criteria’ is used hereinafter because rate-setting processes inherently tend to be inaccurate and thus can only strive to best approximate the reference value.

229 A related issue concerns the question to what extent the rate may stray from the reference value. For the purposes of EU competition law, for instance, the ECJ refers to a “significant and persistent” difference, *see Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība*, C-177/16 at ¶ 61.

230 Examples would be sections 17. U.S.C. 114(i) and 114(f)(2)(B)(i)-(ii), respectively.

231 Note that the examples used therein are derived from legislation and the most important examples of the case law discussed above and are neither exhaustive nor applicable in all cases.

United States				
Reasonable fee	Market price	- Comparable agreements (benchmarks, adjustment according to actual use where necessary) - Consent decree license types (*e.g.*, TTTA license, per-program license)	Performance right rates set by ASCAP and BMI	Rate courts
Reasonable Rates and Terms (Willing buyer/willing seller)	Market price	- Comparable agreements (benchmarks)	Public performance of sound recordings	CRB
Reasonable Rates and Terms (Policy standard)[232]	"Adjusted" market price	- Comparable agreements (benchmarks) - Adjustments according to policy objectives (§ 801(b)(1)(A)-(D))	Public performance of sound recordings, reproduction of musical works	CRB
Reasonable Rates and Terms (AHRA)	Percentage of transfer price	- Rates as set forth by statute, minimum and maximum threshold - Adjustments upon petition	Manufacture, import or distribution of digital audio recording devices or digital audio recording media	CRB

Table 1: Schematic overview of different rate-setting regimes in the EU and the United States

2. Market rates and benchmark agreements

As can be seen, the (hypothetical) market price of the use that is made of protected content often constitutes an important factor when authorities analyze and set license rates. This makes sense given that that copyrights are usually granted in the form of exclusive rights, which are (to some extent, at least) alienable. An important rationale of this approach is that right holders can negotiate with users over the use of their content and are thus capable of securing license fees for themselves.[233] For different reasons – that have been studied in detail and need not be recounted here – exclusive

[232] Deleted by the MWMA. *See* for the most important amendments, section V.

[233] *Cf.* Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 153 Proc. of the Am. Philos. Soc. 147, 149-151 (2009) (noting that many European jurisdictions provide for greater restrictions than the United States in this respect); Mark A. Lemley, *Contracting Around Liability Rules*, 100 Cal. L. Rev. 463 465-469 (2012).

rights have been replaced by rights to remuneration which inherently contain rules on the license fees. When it comes to calculating these fees, one might argue that right holders should be entitled to the exact amount that one would be able to negotiate in a license agreement for the uses covered by the statutory license on a market place. While this rationale is heavily relied upon in the United States, it also seems to be incorporated in the establishment of the "benchmark price" under EU competition law.[234] From this perspective, the reliance on hypothetical market rates is – in principle – well founded; that is, unless the rate-setting standard indicates otherwise. An example is the factor explicated in (the former) § 801(b)(1)(D) that has resulted in rates straying from the established market rate. In connection to this – and not only in the context of this policy standard – the task of rate-setting essentially involves i) the establishment of the hypothetical market rate, and ii) the decision whether an adjustment (upward or downward) should be made.

Of course, there are different ways to determine hypothetical market rates. Perhaps the most straightforward method is to rely on suitable benchmark agreements, assuming by analogy that this reflects that upon which a willing buyer and seller would have agreed. U.S. authorities have done so to a significant extent. However, in the ECJ's case law on the EU standards, "benchmarking" is not a prevalent method. There are at least two reasons for this divergence. First, the ECJ does not determine a final rate but instructs the national authority which parameters and methods they must incorporate in their decisions. Within this framework, there is no clear reason why benchmarks should not be taken into account.[235] Second, the EU copyright market is much more

[234] AG Wahl applies this principle in his insightful opinion on excessive prices charged by CMOS, *Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība*, C-177/16, Opinion of AG Wahl, ¶ 17 ("benchmark price").

[235] In some instances, however, there is a lack of comparable agreements, especially when it comes to private copying, *see* Poort & Quintais, *Levy Runs Dry*, *supra* at 214.

fragmented than the market in the United States, so it is much more difficult to find suitable benchmarks.[236] Nevertheless, the ECJ does rely on what could be called a benchmark approach in its decision regarding excessive pricing under TFEU Art 102. Strictly speaking, however, the court does not rely on benchmark agreements but on a territorial comparison of license rates.

Clearly, comparisons must be made on a "consistent" basis; yet, the U.S. experience demonstrates that one can bring forward a tremendous amount of evidence and arguments concerning why a certain rate is suitable to serve as a benchmark (or not), and the differences between the EU member states (*e.g.*, copyright legislation, cultural background, economic situation) add an additional layer of complexity to the process. One might very well ask whether the territorial comparison should only be applied in exceptional circumstances where the fee charged by a CMO is multiple times higher than in all other member states.[237] The shift of the burden of evidence to CMOs under ECJ competition case law seems, compared to this, rather harsh. After all, the justified concerns as to the high management costs of CMOs,[238] for instance, can be taken into account when analyzing the organization's management fees in relation to the distributed amounts or the justified administration costs.[239] However, the territorial comparison method – even though it can be assumed to exert great influence on

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[236] On the other hand, one might, of course, consider whether an excessive reliance on benchmarks causes authorities to dismiss other arguments too quickly.

[237] *Allendesalazar & Vallina*, *supra* at 376-378.

[238] *Tournier*, 395/87 at ¶ 42 ("Where […] the staff of a management society is much larger than that of its counterparts in other Member States and, moreover, the proportion of receipts taken up by collection, administration and distribution expenses rather than by payments to copyright is considerably higher, the possibly cannot be ruled out that it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence the high level of royalties").

[239] *Tournier,* 395/87, Opinion of AG Jacobs at ¶ 74; Miernicki, *Collective Management*, *supra* at 195-201.

national authorities – is only one possible factor in establishing a competition law violation.[240]

3. Amount of use, harm and economic value

In several cases, the ECJ has employed the amount of use (within the context of the respective cases) in order to approximate the reference value. While the usage aspect is not as pronounced in the United States, authorities have acknowledged its importance in different contexts.[241] Under competition law, the ECJ permits the percentage of turnover approach – which does not directly depend on music use[242] – as long as there is no method that is more accurate with respect to music use and so long as it is not disproportionally costly.[243] This approach appears to be in line with certain rationales articulated by the Second Circuit.[244] Accordingly, calculating license fees based on the amount of use – to the extent this is possible – will render license schemes reasonable from an antitrust and competition perspective.

The reasoning behind the foregoing assumes that the amount of use of the licensed content is proportional to its value to the user or her business. Hence, under competitive conditions, she would be willing to pay a greater fee for a greater amount of use. While this is a reasonable assumption in principle, this approach can only give

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[240] *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība*, C-177/16 at ¶ 37.
[241] *See, e.g.*, note 145 on the AFBL above.
[242] *Web IV* at 26396 ("The SoundExchange/NPR and SoundExchange/CBI agreements are agreements that incorporate a flat-rate structure where royalties where royalties are not strictly proportional to use"); *see also Tournier,* 395/87, Opinion of AG Jacobs at ¶ 55-56. However, one could argue to the contrary, at least in respect to users that largely depend on music, like streaming services, assuming that the proportion of revenues deriving from the music use is higher than in case of other users, like restaurants, for instance, *see* section IV.1. *See also* Loeza, *Out of Tune, supra* at 742 f.
[243] In *Kanal 5*, for instance, the court accepted this methodology, but highlighted that the CMO question accounted for the amount of music use by employing variable factors, *see Kanal 5*, C-52/07 at ¶ 39.
[244] *ASCAP (Application RealNetworks and Yahoo, Inc.)*, 627 F. 3d 64 at 76 ("[T]he value of the applicants' uses could not be premised on total revenue without an adjustment for the fact that some revenues were not at all attributable to any use of ASCAP music. The district court decided to make this adjustment by using a MUAF that discounted the total revenue to reflect only those revenues attributable to music use. We have no quarrel with the use of a MUAF here […]") and 77 FN 13 ("One reason a district court may use a less precise metric is because it is impracticable to use a more precise one, for example if relevant statistics are unobtainable or unreliable").

a rough indication, especially for the task of determining a rate. This is because it must be assumed that right holders normally could not appropriate the entire consumer surplus through their pricing schemes under competitive conditions (*i.e.*, in absence of the statutory license).[245] Hence, it is likely that right holders would pay an amount that is less than the entire value they attach to the amount of use. For the concept of harm under the fair compensation standard, for instance, this means on the one hand that equating the value of use[246] with the lost sales suffered by right holders would lead to excessive payments.[247] On the other hand, this appears to imply that hypothetical market rates govern the calculation of harm under the fair compensation standard; this would approximate the concept of harm to the concept of lost licensing opportunities.[248] However, it should not be forgotten that only those profits are to be considered which the right holders cannot generate due to the acts covered by the restriction to their exclusive copyrights. Moreover, where the right holders can reap profits from acts of use *even though* these acts are covered by such a restriction, granting a hypothetical market rate *in addition* to these profits would – following the logic of lost sales[249] – most likely lead to overcompensation. Such situations appear possible due to the concept of indirect appropriability or promotional effects, for instance.[250] Promotional effects are also relevant when analyzing agreements that

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[245] Poort & Quintais, *Levy Runs Dry*, *supra* at 214 (in the context of the concept of harm). *See also* in this connection Gert Würtenberger, *First Contours of European Law on Damages in IP Infringement Cases*, 67 GRUR Int. 725, 730 (2018) ("The benefits which had been gained by the person who committed the infringement correspond at least to the amount equivalent to the license fee which that person failed to pay") (in the context of Enforcement Directive art. 13).
[246] *Cf.* Vitorino, *Recommendations*, *supra* at 21.
[247] Poort & Quintais, *Levy Runs Dry*, *supra* at 214; *see also id*. at 217 (emphasizing the importance of the "expected utility" from the users' perspective).
[248] *Cf.* Michel M. Walter & Dominik Goebel, *Enforcement Directive*, in *European Copyright Law* 1193, 1310 (Michel M Walter & Silke von Lewinski eds., 2010) ("[…] the minimum to be provided for in this case is the amount of reasonable royalty which would have been due, in other words the market price of the license to be granted in the case of legitimate use", quotations omitted).
[249] The introduction of the AHRA can also be explained with the lost sales rationale, *see* Goldstein, *Goldstein on Copyright, supra* at § 7.2.2.3.
[250] *See* section IV.4.

might constitute suitable benchmarks; under section 114 of the U.S. Copyright Act, the CRB must consider "whether use of the service may substitute for or may promote the sales of phonorecords".[251] The CRB has – after careful consideration – ruled that the promotional and substitutional effects are usually implicitly included in the benchmark agreements.[252]

The concepts of harm and economic value under EU law bear similarities insofar as the amount of use can be used as an approximation criteria.[253] Yet, as stated above, equitable remuneration is due for every act of use, regardless of whether the right holders suffer any lost profits; accordingly, harm under the fair compensation standard and economic value under the equitable remuneration standard must not be equated, even though amounts that would have been paid under hypothetical circumstances are relevant under both concepts.[254] In other words, the fact that a user derives value from a certain act of use does not by itself mean that the right holders suffer decreases in sales of an equivalent amount or that such decreases are not treated as de-minimis harm. Accordingly, it appears that the equitable remuneration reference value corresponds, rather than to lost profits, to the value a user derives from every act of use of the protected content.[255] It is suggested that the payable amount can be expressed (at least) as the hypothetical price users would have had to pay under competitive

[251] 17 U.S.C. § 114(f)(2)(B)(i).

[252] *Web IV* at 26326-26329.

[253] *See also* Bechtold, *Directive 2001/29/EC*, supra at 459 ("ECJ case law seems to suggest that the conceptual difference between 'remuneration' and 'compensation' is not large").

[254] The ECJ has distinguished the fair compensation standard from the equitable remuneration standard, *see* section IV.4. *See also VEWA*, C-271/10 at ¶ 33 ("Consequently, the amount of the remuneration will necessarily be less than that which corresponds to equitable remuneration or may even be fixed on a flat-rate basis in order to compensate for the act of making available all the protected works concerned"). However, note that here the ECJ ruled in connection with the special nature of the public lending right.

[255] I have made this point elsewhere in the context of the transposition of the European rules into Austrian law, *see* Miernicki, *Kollektive Tarifgestaltung zwischen Kartell-, Wahrnehmungs- und Urheberrecht*, 36 Medien und Recht 222, 226-227 (2018).

conditions for the act of use in question,[256] although EU member states arguably may provide for the payment of a greater amount that approximates the entire consumer surplus.

4. The special role of EU competition law

European competition law occupies a special position among the studied rate-setting regimes. This is because the EU "unfair purchase or selling prices" standard is not designed to indicate the proper license fee. Rather, the standard defines unlawful price levels. As such, the Commission cannot actively determine the license rates.[257] However it can enforce competition law in cases in which a CMO demands fees which are too high. The same cannot be said about the United States, as antitrust doctrine usually does not deem high prices an antitrust violation.[258] However, through the rules provided for by the ASCAP and BMI consent decrees, antitrust-based rate-setting provides an effective remedy against the unreasonable fees charged by CMOs; at the same time, parallel antitrust enforcement is usually excluded.[259] While one could make an excellent case for transferring the rate courts' responsibilities to the CRB,[260] it should be noted that this creates a specialized rate-setting system for the two CMOs

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[256] *Cf.* von Lewinski & Walter, *Information Society Directive, supra* at 1030 ("The EC legislature did not intend to impose the criterion of possible harm onto the majority of counties that practiced systems of equitable remuneration, which might be comparable to a counterpart to a use in form of a *fictitious license*, rather than a compensation for harm", emphasis added).

[257] "Commitment decisions" (which are comparable to U.S. consent decrees) constitute an exception to this rule in certain respects, *see* art. 9 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty, 2003 O.J. (L1) 1-25.

[258] *See*, *e.g.*, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 at 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*").

[259] *United States v. ASCAP (Application of Capital Cities/ABC, Inc.)*, 831 F. Supp. 137, 154 (S.D.N.Y. 1993) (quoting *Buffalo Broadcasting Co. v. ASCAP*, 744 F. 2d 917 (2nd Cir., 1984).

[260] *See*, *e.g.*, U.S. Copyright Office, *Music Marketplace*, *supra* at 4, 155-157.

under the consent decrees. Conversely, in the EU, competition law applies in addition to national supervision regimes (which must comply with the CMD). Consequently, European CMOs must take into account both regimes when designing their fee policies. One could question whether this parallel control is actually necessary, especially if there exists an effective rate-setting procedure under national law.[261] In any event, the role of EU competition law is probably best understood as a "second layer"[262] of regulation or as a "framework review".[263]

VII. Concluding remarks

The studied rate-setting regimes apply to a variety of different contexts, limiting exclusive rights of authors as well as neighboring rights or rights in sound recordings. Each of those regimes directs the competent authorities to determine or adjust a rate, especially where the parties cannot reach an agreement. EU competition law occupies a special position in this context, as it has been used as an ex-post tool to regulate the fees charged by CMOs. The standards discussed above differ conceptually but, at the same time, possess certain substantial similarities.

A common regulatory strategy – apart from the legislative determination of the license fees – is the definition of a reference value which rate-setting authorities are instructed to approximate. For this task, certain approximation criteria can be used. A recurring notion is to use a hypothetical market price which has been approximated by

[261] *Cf. Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība*, C-177/16, Opinion of AG Wahl, ¶ 49 ("Sectoral authorities are clearly better-equipped than competition authorities to oversee prices and, where necessary, act to remedy possible abuses. It would seem, therefore, that antitrust infringements in those situations should be mainly confined to cases of error or, more generally, to regulatory failures: cases where the sectoral authority should have intervened and erroneously failed to do so", footnotes omitted).

[262] Josef Drexl, Max Planck Institute for Intellectual Property and Competition Law, Munich, *Copyright, Competition and Development* 34, 270-271 (2013), *available at* http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/02_copyright_competition/report_copyright-competition-development_december-2013.pdf (last visited Sept 29, 2018).

[263] *Kanal 5,* C-52/07, Opinion of AG Trstenjak, ¶ 47 ("framework review"); *see also* Miernicki, *Collective Management*, *supra* at 281-283; Miernicki, *Kollektive Tarifgestaltung*, *supra* at 231-232.

benchmark agreements, but which also takes into account the amount of use made of the licensed content. However, even if the legislature sets forth detailed criteria for the assessment, rate determinations will depend on the facts and evidence available in the individual case or proceedings and, hence, can vary even when extensive guidelines exist. With the advent of the MWMA, the U.S. rate-setting standards move towards convergence in important respects. While there remain differences between the European standards, it remains to be seen whether the ECJ will further approximate the existing standards in future decisions.