AIPPI Study Question Q286 – Collecting Societies

Report of the Swiss Group

This Study Question aims to provide an understanding of the collecting societies in various jurisdictions in order to determine a necessary uniform approach for the governance of and activity by collecting societies. The below report answers the questionnaire from a Swiss law perspective.

A. Current law and practice

I. The legal regime applicable to collecting societies (CSs)

1. Are collecting societies subject to a special legal regime? Please answer YES or NO and explain.

YES.

In Switzerland, collecting societies operate in different market environments:

- In the special **areas of exploitation** listed in Article 40(1) Swiss Copyright Act **(«SCA»)** which are **legally reserved for collecting societies** and where exploitation by anybody else is prohibited (subject to a few exceptions).
- In markets where the collecting societies **are in competition with other players** such as, for example, original rightholders, publishers or independent management entities (IMEs). In this context, which is also referred to as «voluntary collective exploitation», the collecting societies act as «normal» private players that have acquired the rights they exploit on a contractual basis.

Unlike the legal situation in other countries and in contrast to the harmonization standards of the EU, the Swiss legislator has not imposed a special legal regime on the collective rights management as a whole. Rather, it has opted for a **system of selective regulation**, the scope of which is limited to the special areas of exploitation which are legally reserved for collecting societies (Article 40(1) SCA). Rights management beyond these specific areas of exploitation is not subject to a special regulation – even if carried out by collecting societies.

According to Article 40(1) SCA the following **special areas of exploitation** are reserved for collecting societies and thus subject to the special legal regime for collective rights management (for more details see answer to question 6 below):

- the management of the exclusive rights relating to the broadcasting, performance and reproduction on audio or audiovisual media of non-theatrical works of music (copyrights);
- the exploitation of exclusive rights in certain cases which are specified in the SCA (copyrights and related rights; for example, cable retransmission rights according to Article 22 SCA);
- the assertion of the various remuneration rights provided for in the SCA (copyrights and related rights; for example, the remuneration rights for private copying according to Article 20 SCA).

According to Article 42(2) SCA, the Federal Council has the competence to extend the special legal regime for collecting societies to additional areas of exploitation if this is in the public interest. However, no use has been made of this option (nor are there any plans to this effect on the horizon).

The special legal regime for collecting societies relies on **multiple pillars**:

- **Requirement of an authorization** by the Swiss Federal Institute of Intellectual Property (**«IPI»**; Articles 41 et seq. SCA).
- **Supervision of the business activities** by the IPI (Articles 52 et seq. SCA) which controls compliance with statutory requirements and duties on the status and good governance of collecting societies (Articles 42 et seqq. SCA).
- **Supervision of the tariffs** based on which the collecting societies collect remunerations. This supervision is exercised by a special arbitration committee **(«AC»)** which reviews the tariffs for fairness and reasonableness (see also answer to question 15 below).

The most recent revision of the SCA has extended the scope of the authorization requirement and the supervision exercised by the IPI to the granting of **extended collective licenses**, an institution that has been newly introduced into Swiss law (Article 43a SCA). Notwithstanding this, extended collective licenses are not subject to supervision of the tariffs and are thus not reviewed by the AC.

2. What can be the legal form of a CS?

Collecting societies must be **organized under Swiss law** (Article 42(1)(a) SCA). They must have their seat in Switzerland and conduct their business from here. No speci-

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fic legal form is prescribed. Four of the five Swiss collecting societies are organized as cooperatives, one as an association.

3. Are CSs for-profit or non-profit organizations?

Article 45(3) SCA precludes collecting societies from seeking their own profit. In this sense, Swiss collecting societies can be described as **non-profit organizations**. They are, however, not charitable organizations in the sense that they seek benefit for third parties since they particularly serve the interests of their members.

4. Who can be a partner/stakeholder in a CS?

Collecting societies must be open to **all rightholders**, regardless of whether they are original or derivative rightholders, of where they reside etc. (Article 42(1)(c) SCA).

Collecting societies must ensure that the **original rightholders** (authors, performing artists) **have appropriate participation rights** in respect of the society's governance (Article 42(1)(d) SCA). This requirement should prevent collecting societies from being dominated by large derivative rightholders such as publishing companies.

5. Are CSs subject to control by public authorities?

YES.

See the answer to question 1 above.

II. The copyrights managed by CSs/relation between CSs and rightholders

6. Please indicate which types of works/copyrights (including moral and/or economic rights) are/can be managed by CSs?

In principle, all types of works and copyrights can be exploited collectively under Swiss law. In areas where collective management is reserved for collecting societies, a special regulatory framework is in place (see answer to question 1 above). These areas are specified in Article 40 SCA and are outlined below:

According to Article 40(1)(a) SCA, copyrights that relate to the broadcasting and performance of **non-theatrical musical works** and to the production of sound or video media of such works (mechanical rights) can only be exercised by the competent collecting society (i.e. SUISA). In this context the mandatory character of the collective exploitation is limited, because the personal exploitation by the original rightholders or their heirs remains permissible (Article 40(3) SCA).

The following exclusive rights are subject to **mandatory collective exploitation** (Article 40(1)(a^{bis}) SCA):

- the right to **make perceptible broadcasted works** simultaneously and without alteration and to **rebroadcast** such works (Article 22 SCA);
- certain rights to use **archived works of broadcasting organizations** (Article 22a SCA);
- certain rights to use **orphan works** (Article 22b SCA);
- certain rights to **make available non-theatrical musical works** contained in a broadcast in connection with that broadcast (in particular as podcasts; Article 22c SCA);
- certain uses by broadcasters of **reproduction rights** in non-theatrical musical works embodied on commercially available audio or audiovisual media **for broadcasting purposes** (Article 24b SCA).

The following **remuneration rights** are subject to **mandatory collective exploitation** (Article 40(1)(b) SCA):

- for the **renting out of works against a fee** (Article 13 SCA);
- for making available certain audiovisual works (**video on demand**; Articles 13a and 35a SCA);
- for **private copying** and the import of **blank media** (Article 20(2) and (3) SCA);
- for the **use of commercially available phonograms and audiovisual media** for the purpose of broadcasting, retransmission, public reception or performance (related rights only; Article 35 SCA).

In addition, other works and rights may also be exploited collectively on a voluntary basis. This is the case, for example, for online rights in musical works or for rights to reproduce photographs. As said above (answer to question 1), the special regulatory regime for collecting societies does not apply to this kind of **voluntary collective exploitation** (even if done by collecting societies).

Moral rights of authors are **not** collectively administered.

7. Please indicate whether certain copyrights are subject to mandatory collective management?

YES.

See the answers to questions 1 and 6 above.

8. Can a rightholder opt out (alternatively whether there is a default rule enabling so-called Extended Collective Licensing and whether a rightholder can opt out) and if so, whether that is limited to specific categories of rightholders/sectors and/or users?

To answer this question, we must distinguish between the different categories of rights that are subject to the special regulatory regime for collecting societies:

The **exclusive rights in musical works** listed in Article 40(1)(a) SCA may only be exploited by the authorized collecting society (SUISA). The only exception is the **personal exploitation** by the original rightholders or their heirs (Article 40(3) SCA). Other parties which exploit such exclusive rights risk criminal prosecution under Article 70 SCA (*«Any person who, without the required authorization [Article 41 SCA], asserts copyrights or related rights, the exploitation of which is subject to state supervision [Article 40 SCA], is liable to a fine.»*). The scope of this exception is very limited. Since the collecting societies active in that field require the authors to assign to them the rights in all their works, personal exploitation by the author is either invalid (because he or she has already assigned the rights to the collecting society) or violates his or her contract with the collecting so-

ciety. The collecting societies, however, tolerate to a certain extent the exclusion of certain forms of exploitation from the assignment.

In the other areas of **mandatory collective exploitation**, the exception of personal exploitation does not apply (decision of the Swiss Federal Tribunal **(«SFT»)** 124 III 489, para. 1). Consequentially, the remuneration rights listed in Article 40(1)(a^{bis}) and (b) SCA can only be asserted by authorized collecting societies. In these areas it is therefore not at the rightholders' discretion to assert their rights outside of collective management or even in parallel with it (SFT 133 III 568, paras. 4.1 and 4.2). They would instead be liable to criminal prosecution if they assert rights in these areas themselves (Article 70 SCA). Notwithstanding the above, according to the SFT, rightholders may declare to their collecting society in areas of mandatory collective management that they **waive** the right to remuneration for the exploitation of their rights in whole or in part (i.e., only with respect to certain works or recordings or certain forms of use) (SFT 124 III 489, para. 2a). Collecting societies are required to accept such waivers if they are informed about them by the rightholders in advance and to the extent this is «possible and reasonable» from an administrative point of view. According to the SFT, such waivers are intended solely to prevent a collecting society from collecting royalties for a certain work or for a certain form of use when the respective rightholder does not want his work to be exploited at all (SFT 124 III 489, para. 2a). Accordingly, this waiver is an instrument to enable a work to be made available for free, but not a tool for rightholders to circumvent the mandatory collective management of rights. Thus, such a waiver is ineffective if it becomes clear from the circumstances that a rightholder does not in fact waive any remuneration for the use of his or her work at all, but wants to exploit this right in another way, i.e. wants to circumvent the mandatory collective exploitation. In practice, such waivers hardly ever occur.

In the area of **voluntary collective exploitation**, collective management is based on a purely contractual basis. Accordingly, each rightholder is free to decide whether or not to entrust his or her respective rights to a collecting society. But, in these areas too, collecting societies operate based on general rules and principles. This typically prevents rightholders who have transferred their rights to a collecting society from controlling the collecting society's licensing activities on a case-by-case basis.

For **extended collective licenses**, an opt-out is always possible (Article 43a(4) SCA), as is the case according to the EU solution.

9. Can/is there competition between several CS for the management of the same copyright? If so, is the author free to entrust the management of his/her copyright to the CS of his/her choice?

Article 42(2) SCA states that, in general, authorization is only granted to **one collecting society «per category of work»** and to one single collecting society for all types of related rights. Consequentially, rightholders have no choice between multiple colleting societies and there is no competition among such societies.

There is one exception, since in Switzerland there are two authorized collecting societies for copyrights in audiovisual works: Société Suisse des Auteurs (SSA) and Suissimage. This is primarily since the two societies traditionally focus on different language regions. It never was the intention to create competition between these societies.

10. If for each copyright prerogative, there is only one CS that can manage it, is the CS considered to be in a dominant position on the market and is competition law applicable to it? Please cite case law if available.

According to the prevailing understanding, the activities of collecting societies in the special exploitation areas where they are subject to state supervision (see answers to questions 1 and 6 above) are comprehensively regulated by the SCA and exclusively supervised by the IPI and the AC. **Antitrust law is not directly applicable** in these specific areas, and the activities of the collecting societies are **exempt from the direct supervision of the competition authorities**. This does not preclude the IPI and the AC from making competition law considerations to the extent that the framework set by the SCA leaves room for this.

11. What is the legal form of entrusting the management of an author's rights to a CS?

Authors or other rightholders entrust a collecting society with the exploitation of their rights by entering into an **administration agreement**. Collecting societies also enter into **reciprocal representation agreements** with (foreign) collecting societies. Under these largely standardized agreements, collecting societies are commissioned to manage and exploit the rights which are transferred to them. Consequently, under Swiss law, collecting societies are fiduciary owners of the rights they manage and exploit.

In addition to an administration agreement, rightholders may become **members** of the collecting society, which allows them to participate in the decision making within the society. Usually, a certain minimum turnover and/or the meeting of other quantitative or qualitative thresholds is required for a rightholder to become eligible for membership.

Notwithstanding the above, it should be noted that collecting societies can assert and enforce **remuneration claims for the use of the rights** listed in Article 40(1)(a^{bis}) and (b) SCA even if they do not have a contractual relationship with the rightholders concerned. According to the SFT's case law, the collecting societies' power to assert such remuneration claims arises **directly from the law** and does not require a contractual basis with the rightholders of the copyrights or related rights concerned (see, for example, decision of the SFT 133 III 568, para. 5.1).

12. Can a CS enforce the managed copyrights? And moral rights of authors?

YES, collecting societies can fully enforce the rights entrusted to them. As the rights are transferred to them and they become their fiduciary owners, the collecting societies enforce the rights in their own name and not as mere proxies of the rightholders.

As far as exclusive rights are concerned, they can also **prohibit** non-cooperating users from using the works underlying these rights and, in the event of violation of such prohibitions, even take **criminal action**. Such measures, of course, serve the collecting societies only as ultima ratio if a user does not comply with his or her obligations.

Since **moral rights** are not managed by collecting societies in Switzerland (see answer to question 6 above), the question of whether these rights can also be enforced by collecting societies is irrelevant.

III. The licenses concluded with the users

13. Please indicate the different forms of licenses that exist in collective management.

The character of the contracts that the collecting societies enter into with users depends on the type of uses and/or the kind of rights involved. While contracts in the area of the exploitation of exclusive rights have the character of **license agreements**, the area of the remuneration rights involves the **enforcement of quasi-contractual claims** (since, in these areas, the authorization for the users typically derives from the law and therefore no permission to use under a license agreement is required).

The core elements of the contracts are – as far as an area subject to state supervision is concerned – outlined in the corresponding approved **tariffs**.

Typically, the contracts are of a **«global» nature** covering a wide range of uses/works during a certain period or a specific event. In the area of the management of exclusive rights there are also licenses on a **work-for-work basis** (for example, for the reproduction of musical works in the context of the production of advertising films).

14. How are licensing contracts negotiated?

According to Article 45(2) SCA, collecting societies are required to administer the rights entrusted to them in accordance with **fixed rules** and in observance of the **principle of equal treatment**.

The main instruments to achieve these goals are the **tariffs** that the collecting societies have to establish as a mandatory basis for their remuneration claims (Article 46 (1) SCA). Approved tariffs are **binding for civil courts** (Article 59(3) SCA). Consequentially, the typical agreements between the users and the collecting societies are not «negotiated» on an individual basis, as their core elements are predetermined by the applicable tariff.

More room for maneuver for individual negotiations exists in areas which are not subject to state supervision or with regard to extended collective licenses. In these areas, contracts are negotiated between the user and the collecting society concerned.

15. The CS tariffs: How are licensing contract royalties set?

The fundamentals for determining royalties are mandatorily stipulated in tariffs. The tariffs must be **negotiated** by the collecting societies **with the relevant Swiss user associations** and must be **reviewed and approved by the AC** (Article 46(2) and (3) SCA; see answer to question 5 above). If more than one collecting society is active in the same field of exploitation, they must establish a common tariff for that field and designate one collecting society among them that is responsible for collecting the remunerations due (Article 47 SCA).

If the negotiations between the collecting societies and the user associations do not lead to an agreement, it is up to the AC to decide (Article 14 et seq. Swiss Copyright Ordinance [**«SCO»**]).

After approval by the AC, the tariffs are **published** in the Swiss Official Gazette of Commerce (Article 46(3) SCA).

Tariffs will only be approved by the AC if they are **fair and reasonable** (Article 59(1) SCA). Tariffs are fair and reasonable if they take into account the revenues generated by the users (or, subsidiarily, the users' expenses in connection with the uses), the nature and number of rights used, and the ratio between protected and unprotected works (Article 60(1) SCA). As a rule of thumb, Article 60(2) of the SCA provides that tariff-based remuneration for copyrights shall amount to **ten percent** of a user's revenues (or – as a subsidiary option – a user's expenses) and **three percent** for related rights. This rule, however, is only applicable to the extent it guarantees an **«adequate remuneration»** for the rightholders. Uses of works for educational purposes benefit from reduced rates (Article 60(3) SCA).

16. Are the CS tariffs public? If not, how do authors/artists know whether they would wish to join a CS?

YES, the tariffs are public. They are **published** in the Swiss Official Gazette of Commerce once they are approved by the AC. Further, tariffs are also made available on the collecting societies' websites.

IV. Distribution of royalties collected by the SC to authors

17. How do CSs distribute royalties among authors?

Collecting societies are required to enact **distribution regulations** and submit them to the IPI for approval (Article 48(1) SCA).

The distribution must meet a number of **statutory requirements**. The main principle is that the distribution to the rightholders must be made in proportion to the extent of use, i.e. to the proceeds received through the exploitation of the respective rights (Article 49(1) SCA). Consequentially, rightholders whose works have been used intensively and have generated substantial revenues should benefit to a

greater extent than those whose works have been used to a lesser extent. In order to comply with this «**principle of causality**», collecting societies must make reasonable efforts to track uses and to identify the rightholders (Article 49(1) SCA). However, if the expenses for such efforts would be unreasonably high, distribution may be based on generalizations and estimates that follow verifiable and appropriate criteria (Article 49(2) SCA).

According to Article 49(3) SCA, **original rightholders must receive an equitable share** of the total of the proceeds distributed. This statutory requirement aims to protect creators and performing artists by ensuring that derivative rightholders (in particular, publishers or producers) do not benefit disproportionately from the proceeds. In practice, the share of derivative rightholders is usually limited to 50 percent, but may also be smaller, for example, where individual publishing contracts are more favorable to the original rightholders.

18. Do the CSs devote part of the collected royalties to social, cultural or other actions? If so, in what proportion?

Subject to the approval of their supreme body (typically the members' general assembly), collecting societies may devote parts of their proceeds for the purpose of **social welfare** for the authors as well as for **cultural promotion** (Article 48(2) SCA). For example, SUISA currently devotes 2.5% to cultural promotion and 7.5% to social welfare purposes (SUISA Distribution Regulation, Article 5.2(1)(12) and (13)).

19. For the collected royalties for which the authors are not known (non-distributable royalties), are there any rules?

The **distribution regulations** of the collecting societies provide for rules on how to deal with proceeds attributable to non-identifiable or undocumented works. Typically, certain amounts are set aside for a specific period of time during which the rightholders concerned may make subsequent claims (for example, SUISA Distribution Regulation, Articles 7.2 and 7.3).

B. Policy considerations and proposals for improvements of your Group's current law

20. Is it desirable to enforce collectively licensed copyright works using the same procedures as for non-licensed works, and if not, how should they be enforced?

As far as **licensed works** are concerned, the focus is on how remuneration claims can be enforced by the collecting societies. According to Swiss law, these are civil law claims for which the «normal» civil proceedings and debt enforcement instruments are applicable. Collecting societies act in their own name as private persons, as they are (fiduciary) rightholders.

As far as concerns enforcement against **unlicensed users**, collecting societies have, in addition to civil proceedings (specifically damages and injunctive relief), the option of criminal law. Here, too, the instruments available to collecting societies do not differ from those available to «normal» rightholders.

Enforcement procedures before civil courts cause disproportionate costs and they and the intervention of criminal enforcement authorities lead to bad will in the business community. It is expected that new technologies (tracking of uses through automated internet crawlers, smart contracts, etc.) may offer alternative direct enforcement tools.

21. Should collective licensing for particular types of works and/or sectors be mandatory?

Collective management of copyrights must be seen in its wider **regulatory context**. In particular, collective management is often linked to exceptions to exclusive rights.

In certain areas of exploitation, the **mandatory character is necessary** for the collective management to fulfil its objectives or to ensure that the damage resulting from an exception is adequately absorbed.

The objectives that lead to mandatory collective management can be based on a **variety of interests**. In part, it is a matter of the interests of rightholders who would not be able to license individually (for example, mass uses or VOD for original rightholders); the interests of certain user groups (for example, businesses which make internal copies) or also public interests (for example, in a functioning broadcasting sector or accessible archive stocks). Accordingly, it is up to the legislator to decide separately for each area of exploitation whether these interests – balanced against others – require collective exploitation to be mandatory.

It is expected that new technologies (rights management systems, smart contracts, etc.) may offer individual rightholders tools that could change the need for collective exploitation, but for the moment such prospects are unclear, at least as regards small rightholders.

22. Should individual royalty rates be determined according to the individual circumstances of each case, or should all royalty rates be determined according to the same criteria?

On the one hand, the specifics of the individual case should be taken into account as far as possible. On the other hand, collective exploitation must be efficient and predictable for the users, so, to a certain extent, **generalizations are unavoidable**. The tariffs should themselves strike a balance between the **conflicting interests** at stake.

How exactly this should be weighted depends on the area of exploitation. While, for example, blank media remuneration is impossible without generalization, in the context of concert licensing the specifics of an individual event (ticket prices, nature of works performed, etc.) may be considered when calculating the remuneration.

In any case, it seems important that remuneration is determined based on **general principles** and in a **transparent, predictable** and understandable fashion that allows the users and the rightholders to plan their actions.

23. Should there be a certain minimum threshold of use (e.g. a bar with at least 50 customers, a dance party for fewer than 500 people, or a hairdresser with 12 stylist chairs), with any use below the minimum level being royalty free?

NO.

Such a «*de minimis* rule» would not be compatible with the fundamental principle of **equal treatment**. As a general rule, every user must pay for its uses.

This does not exclude taking account of different dimensions of users when determining the **amounts to be paid**. As the amount of remuneration normally depends on the revenues generated by a user it is therefore typically higher for larger users than for smaller ones. Further, it is possible to provide for certain **administrative relief** for smaller users (longer billing and reporting intervals; reduced reporting obligations, etc.).

Under Swiss law, the private use exemption serves as a de facto de minimus rule, i.e. where the use is only among a closely knit group of friends and relatives, there is no remuneration obligation (beyond to the blank media remuneration).

24. Should there be an exemption from collective licensing royalties for private, non-commercial use?

It is widely accepted that **private use** should not be controlled by means of exclusive copyrights. The law therefore excludes such uses from the scope of the individual rightholders' prohibitive right. In return, collective rights management, particularly through the blank media remuneration, ensures that the rightholders nevertheless receive a certain remuneration for such kinds of use. Collective rights management could no longer fulfil this task if private uses were generally exempted from remuneration obligations.

A general exemption of **non-commercial users** is incompatible with Swiss copyright law, as their offerings often compete with commercial providers. Accordingly, the market would be distorted if non-commercial users were privileged over commercial ones.

C. Proposals for harmonisation

25. Do you consider harmonisation regarding collecting societies as desirable in general? Please answer YES or NO and you may add a brief explanation.

The collective management of copyrights has always been an **international matter** and is increasingly so nowadays. The rights managed by the local collecting societies originate from authors from all over the world. And more and more, the licensed uses also affect multiple countries. Against this background, **harmonization is certainly desirable**.

Notwithstanding this, collective management is also **strongly influenced by local factors**. This relates to the legal framework (for example, how freely copyrights can be disposed of), but also to economic particularities such as the size and structure of the user markets, industry customs or the influence of foreign markets. The legal framework for collective management must also reflect these local factors, which set certain limits to international harmonization.

26. Should collective licensing be mandatory for any specific class of copyright works/sectors and, if so, how is that class of works defined?

If YES: Should authors/artists be allowed to opt out, if they do not agree with the licensing terms?

It has already been explained that in certain areas collective management must be structured in a mandatory manner in order to fulfil its function (see answer to question 21 above). **Opt-outs are not possible** here. In other areas, more freedom of choice for rightholders is possible and desirable.

These opt-out possibilities should not be too comprehensive so that they enable, for example, large rightholders to license only economically uninteresting matters through collecting societies. Such **cherry-picking** makes collective management more expensive and can even jeopardize its functioning altogether. Especially smaller rightholders would suffer from this, as for them individual exploitation is not feasible. Such an outcome would not be compatible with the **idea of solidarity**, which has always been a guiding principle of collective rights management.

27. How should the licensing terms, especially the remuneration, be calculated?

Swiss law provides guidelines that have mostly proved valuable in practice (see also answer to question 15 above.

According to Article 59(1) SCA, remuneration must be **fair and reasonable**, whereby according to Article 60(1) SCA, the following criteria must be taken into account when determining remuneration:

- the **revenue** derived from the use of the work or, in the alternative, the **expenses** incurred in connection with the use;
- the **type and quantity of works** used;
- the **ratio of protected to unprotected** works.

According to Article 60(2) SCA, remuneration shall as a rule amount to **ten per cent** of the revenue or expense of use for copyrights and **three per cent** for related rights (this latter figure is set too low from the perspective of the holders of related rights and is therefore one of the few drawbacks of the SCA). In any case, however, it shall ensure that the rightholders receive an **adequate remuneration**. The latter aims to guarantee, in particular, that the remuneration earned via collective exploitation corresponds to what could be achieved through individual exploitation.

These principles can and should be applied to **all types of remuneration**. Particularly, it should be avoided that deviating approaches are adopted for specific kinds of remuneration (as, for example, the ECJ has done with regard to the private copying remuneration, where the «harm» should be the determining factor).

The basis for the calculation of remuneration should be specified in **publicly available tariffs** with regard to the different areas of use, so that the amount of remuneration is predictable and transparent in each individual case.

28. Should authors of copyright works be allowed to choose between different licensing organisations?

Switzerland's experience shows that the **advantages** for rightholders resulting from the possibility to choose between different collecting societies that operate within the same field are **limited**. In particular, the fact that in Switzerland two societies for the audiovisual sector exist has not led to efficiency gains (see also answer to question 9 above).

Apart from the fact that a multiplicity of collecting societies leads to a **multiplication of the administrative machinery** and thus to bigger overheads, it is also **disadvantageous for users**. They would have several bodies with whom they have to negotiate and conclude licensing agreements. A one-stop shop would be much more convenient from a user's perspective.

It should also be considered that the possibility of choice would – if at all – **primarily be to the benefit of large rightholders**. Only they would have the bargaining power to negotiate better conditions with the different societies. In contrast, the smaller rightholders would suffer because they would only experience the disadvantages, in particular higher management costs. A possibility of choice therefore also **contradicts the idea of solidarity** among rightholders, which has always been an important principle in the context of the collective management of copyrights.

Finally, it remains to be mentioned that a certain concurrence has been established in the area of **cross-border exploitation of online rights to musical works**. The Swiss collecting society for musical authors and publishers, SUISA, was quick to notice the changes in this area and today licenses uses that go far beyond the Swiss borders and successfully also offers corresponding administrative services for third parties. Whether this EU-induced disruption of territorial exploitation makes sense from an overall perspective is an open question.

29. Should licensing terms be harmonized across jurisdictions, and if so, how could different licensing terms as between jurisdictions be avoided?

As long as the licenses relate to uses that have a **local impact only** (for example, events in Switzerland; background music in Swiss restaurants, photocopies in Swiss libraries, etc.) the proximity between licensor and licensee is the key factor, so that international **harmonization is less of a priority**.

The situation may be different with regard to **cross-border uses** (i.e. uses that affect more than one country/jurisdiction) as is the case, for example, with many online services. At first sight, **harmonization** of the respective licensing terms appears to be **desirable** in such cases. However, it should be kept in mind that in reality cross-border online markets too are often more segmented with regard to the different target markets than one might expect. This is not primarily due to copyright issues, but the result of the different purchasing power of end customers, different regulatory frameworks (for example, broadcasting regulations or film funding) or different contractual traditions (for example, local industry practices with regard to the remuneration of artists in the audiovisual sector). As promising as harmonization in these cross-border areas is, it is important that multinational rules do not unnecessarily break with existing local traditions.

30. Should the licensing terms (including remuneration) be reviewed and adjusted at specific time intervals, and if so, how should those intervals be defined?

Based on our experience with the tariff approval regime in Switzerland and with an eye to the respective systems in neighboring countries, the Swiss group is clearly of the opinion that **an abstract, periodic control of the licensing terms is desirable**. What is clarified in the abstract is not (or less) debated in individual cases. This is key for an efficient collective rights management.

The licensing terms should remain **stable for a certain period of time** (approximately three to five years). This facilitates planning for both the collecting societies and the users. Fundamental changes (for example, changes in the legal situation, striking technological developments etc.) may trigger an earlier review. An international **harmonization** of the control intervals is **not a must**.

31. Should the enforcement of a collectively licensed copyright be possible by the CS and if so:

should the author be joined into the action as a party?

if the answer to a. above is NO, how should any necessary evidence of originality be obtained for a copyright-protected work, and challenged by the defendant?

It is crucial for a collecting society that it can enforce the rights entrusted to it against third parties. On the one hand, this is important to **ensure compliance** with the licensing terms; on the other hand, it is also important to push possible users into a licensing relationship and to **fight piracy**.

Whether a collecting society represents the copyrights as its own right (like in Switzerland as the result of a fiduciary assignment) or within the framework of a specific litigation status *(«Prozessstandschaft»)* is not the deciding factor. From a procedural point of view, however, it is essential that the collecting society can enforce the rights **in its own name** and does not have to act as a mere proxy. Consequently, it should not be necessary for authors to join such proceedings as a party. This would unnecessarily complicate litigation.

The contractual framework between the collecting societies and the rightholders must include **support obligations** for the event of litigation. In particular, rightholders must provide collecting societies with information and evi-

dence on the chain of rights and the characteristics of the works concerned if these issues become disputed in a lawsuit.

32. Please comment on any additional issues concerning any aspect of collecting societies that you consider relevant to this Study Question.

Technological development is certainly one of the major challenges for collecting societies. Not only because this keeps resulting in new types of use that have to be licensed. But also because technology serves as an important tool for the collecting societies to fulfill their tasks. To a certain extent, this also shifts expectations towards such a society. While it was crucial in the past that the collecting society was locally anchored, it is important today, for example, that the society can keep up with the international reporting standards in the field of online licensing.

33. Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III. consider relevant to this Study Question.

Our Swiss group was strengthened by **two representatives of collecting societies**.

Zusammenfassung

Erstmalig widmet die AIPPI eine «Study Question» der kollektiven Verwertung von Urheberrechten und verwandten Schutzrechten. Das ist ein ebenso spannendes wie anspruchsvolles Unterfangen. Zwar kooperieren Verwertungsgesellschaften seit jeher mit ausländischen Schwestergesellschaften, was eine Angleichung der Systeme begünstigt hat. Nichtsdestotrotz unterschiedet sich die Rolle der kollektiven Verwertung und der sie umgebende regulatorische Rahmen in den einzelnen Ländern beträchtlich. Vorliegender Bericht der Schweizer AIPPI-Landesgruppe gibt einen Überblick über das Verwertungsrecht in der Schweiz und beantwortet Fragen zu möglichen Verbesserungen und internationalen Angleichungen.

Résumé

Pour la première fois, l'AIPPI consacre une «Study Question» à la gestion collective des droits d'auteur et des droits voisins. Il s'agit d'une exercice aussi intéressant qu'exigeant. Certes, les sociétés de gestion collective coopèrent depuis toujours avec leurs sociétés-sœurs étrangères, ce qui a favorisé une harmonisation des systèmes. Néanmoins, le rôle de la gestion collective et le régime juridique varient considérablement d'un pays à l'autre. Le présent rapport du groupe national suisse de l'AIPPI donne un aperçu du droit de gestion collective en Suisse et répond aux questions concernant les améliorations possibles et les rapprochements internationaux.