

# EVALUATION OF THE SYSTEM OF COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS



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This is the second AEVAL Work Plan since the institution was set up on January 2007, and its main objective is checking how policy initiative results contribute to encourage transparency in public management, efficiency in use of resources and continuous improvement of public services quality.

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## GLOSSARY OF ABBREVIATIONS

SGAE	Sociedad General de Autores y Editores – society of authors and publishers
CEDRO	Centro Español de Derechos Reprográficos – Spanish reprographic rights centre
VEGAP	Visual Entidad de Gestión de Artistas Plásticos – collecting society for visual artists
DAMA	Derechos de Autor de Medios Audiovisuales – audiovisual media copyright
AIE	Artistas Intérpretes o Ejecutantes – artists and performers’ society
AISGE	Artistas Intérpretes Sociedad de Gestión – collecting society for artists and performers
AGEDI	Asociación Gestión Derechos Propiedad Intelectual – copyright and related rights management association
EGEDA	Entidad Gestión Derechos de Productores Audiovisuales – collecting society for audiovisual producers’ rights
AEVAL	Agencia Estatal de Evaluación de las Políticas Públicas y la Calidad de los Servicios – Spanish Agency for the Evaluation of Public Policy and Quality of Services
LPI	<i>Ley de Propiedad Intelectual</i> – the Spanish Copyright Act 1996

## **I. EXECUTIVE SUMMARY**

### **Evaluation mandate**

On 1 August 2008, the Spanish Council of Ministers incorporated the evaluating of the system for collective management of intellectual property rights into the work plan of the Agencia Estatal de Evaluación de las Políticas Públicas y la Calidad de los Servicios (Spanish Agency for the Evaluation of Public Policy and Quality of Services).

This evaluation of the system for collective management of the rights set down in copyright legislation covers seven main points, constituting its object and scope:

- The alignment of Spain's system for collective management of copyright and related rights with the prevailing systems in neighbouring countries.
- The collection systems used by copyright collecting societies.
- The application of discounts by collecting societies.
- The distribution of the sums collected by these societies to their members.
- The nature and volume of relations of the Spanish system for collective management of copyright and related rights with the systems of other countries.
- The perception of the Spanish system for collective management of copyright and related rights by the various user and stakeholder entities and groups.
- Determination of the added value that collecting societies provide to the protection of copyright and related rights.

In December 2008 there was completed the first phase of the evaluation, which quantified each of the main points defined as evaluation aims for the system overall and for the individual collecting societies.

A second stage will analyse the alignment of the Spanish system for collective management of copyright and related rights with those used in other countries. It will also deal with how the system is perceived by its stakeholders.

### **Intellectual Property Rights (copyright and related rights) in Spain**

Royal Legislative Decree 1/1996 of 12 April 1996 enacted the consolidated text of the Spanish Copyright Act 1996, ordering, clarifying and harmonising the statutory provisions on the matter.

Copyright and its neighbouring rights can fall into one of two categories, depending on the powers conferred on the holder: exclusive rights, which allow the holder to authorise or prohibit the use of his/her works or services, and rights to remuneration, which, while they do not enable the holder to control the use of his/her works, do entitle him/her to receive a sum for such use.

Copyright holders are free to decide whether to entrust the management of the different methods of exploitation to collecting societies or whether they wish to reserve this management for themselves. If management is transferred to a collecting society, the Spanish Copyright Act 1996 regulates the mandatory points to be included in the management agreement.

There are eight collecting societies of copyright and related rights currently operating in Spain. These are:<sup>1</sup>

- Sociedad General de Autores y Editores (SGAE). This society represents authors of literary, musical, dramatic, cinematographic and audio-visual works.
- Centro Español de Derechos Reprográficos (CEDRO). Represents authors and publishers of printed or printable works, except for those who produce visual art or photographic works.
- Visual Entidad de Gestión de Artistas Plásticos (VEGAP). Represents authors of visual works, both fixed and motion, regardless of the medium used. It does not include distribution.
- Derechos de Autor de Medios Audiovisuales (DAMA). Represents authors of cinematographic and other audio-visual works.
- Artistas Intérpretes o Ejecutantes (AIE). Represents performing artists or performers who act out, sing, read, recite, interpret or perform works.
- Artistas Intérpretes Sociedad de Gestión (AISGE). Represents actors, dubbing artists, dancers and stage directors.

The system of collective management of copyright and related rights carries out four main internal activities:

- It collects royalties for the payment to the beneficiaries of copyright and related rights.
- From the sums collected, it deducts administrative and operating expenses and the funds allocated to welfare, promotional and educational activities.
- It uses diverse procedures to allocate the sums payable as royalties to their beneficiaries.
- Lastly, it pays the corresponding sums to the beneficiaries and applies the amounts set aside for welfare, promotional and educational activities.

From an economic perspective, copyright and related rights tend to create a natural monopoly because their management produces economies of scale, generating lower costs than those obtained in situations of free competition. The drawback to this monopoly – high licensing fees – is tempered by the statutory duties set down in article 157 of the Spanish Copyright Act 1996.

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<sup>1</sup> See Annex III. Copyright collecting societies.

Therefore, it can be concluded that these societies are the “second-best” choice and preferable to the complex alternative of the individual negotiation of collective rights by their owners.

### **Facts and figures of the system of copyright collectives**

In 2007 the eight copyright collecting societies had 114,146 full members and 17,664 members with restricted rights, making a total 131,810 members. The societies’ funds were €559,358,668 in aggregate.

In their role as collecting societies, the entities collected €518,934,885, of which €97,111,425, or 18.71%, related to private copying, while the remainder, €390,236,930, related to the collective management of other copyright and related rights. €31,586,530 of total revenues related to royalties payable from outside Spain to Spanish authors, artists and producers.

€108,516,210 were deducted from copyright revenues, of which €73,402,791, or 67.6% of the deduction, were appropriated to administration expenses, accounting for 14.1% of total collected revenues.

The amount of €31,441,761 allocated in 2007 to social provision and promotional costs comprised €19,422,285, or 20% of private copying revenues, and €12,019,475 deducted by some collecting societies in accordance with their articles of association. Under the Copyright Act 1996, 10% of deductions from private copying revenues must be applied to members’ welfare costs, while a further 10% must be allocated to training and educational activities and promotion of authors and performing artists.

A total of €413,722,463 was paid out to authors, performers and producers, of which €50,697,563, or 12.25% of the total paid out, went to foreign beneficiaries.

Comparing the amount paid out in 2004, €378,386,864, to the contribution to gross value added from the cultural activities of creation and production in that year<sup>2</sup> - €12.51 billion – then collecting societies are seen to account for 3.02% of that gross value added.

### **Stages of the management process**

We now turn to a step-by-step account of the copyright management process that collecting societies undertake.

#### ***Collection***

The process of collection is fundamental to the effectiveness of copyright and related rights entrusted by holders to collecting societies. In addition, by deducting their

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<sup>2</sup> Spanish Ministry of Culture. (2006) *“El valor económico de la cultura en España”*. Technical Secretariat General. Spanish Ministry of Culture.

administration expenses from collected royalties, the societies obtain the funds they need to operate.

Certain features of the collection process are essential to an understanding of the final outcome.

Collection relies on two elements:

- Contracts entered into with user associations. These contracts specify the amounts payable for use of the rights.
- The fees attaching to the various rights. These fees apply by default wherever no general contract is in place. The fees constitute the price of using a work or benefit, payable by the party wishing to make such use, and at the same time constitute the remuneration payable to a holder for third-party use of the work or benefit, after applicable deductions.

The volume of collected revenues depends on the nature and quantity of the royalties to be collected, the number of parties under an obligation to pay, the years of existence of the collecting society, the society's negotiating acumen, and other factors.

As a result, the burden of royalties is borne asymmetrically, because it is heaviest on those forms of use and those users from whom making collection is easiest. The atomization and geographical dispersion of users gives rise to higher collection costs and a higher rate of fraud.

### **Deductions from royalties**

The copyright and related right royalties collected by collecting societies are intended to compensate holders for usage of the works and benefits in the societies' repertoires. The collecting societies apply two types of deduction to these amounts:

- Deductions to cover the societies' administration and management costs.
- Statutory deductions for social provision for members, and other deductions for activities in support of members mandated by the societies' own articles of association.

Collecting societies' costs are covered, first, by administration and management deductions, as mentioned above, secondly, by the financial returns on cash management of revenues for allocation and payment of royalties to right-holders, and, thirdly, as a residual item, revenues recognised as a result of lapse of title to unclaimed royalties.

### **Welfare, promotional and educational activities**

Copyright collecting societies engage in welfare, promotional and educational activities for their members. The funding for these activities comes from two sources:



a 20% statutory deduction from private copying revenues, and, in some cases, a deduction from other royalty revenues as stipulated by the governing body of the given society. The deductions are appropriated to a welfare, promotional and educational fund managed by the collecting society itself or by a charitable trust attached to it.

### **Allocation and payout of royalties to right-holders**

After deduction of administration and management costs and of the funds for welfare, promotional and educational activities prescribed by the Spanish Copyright Act 1996, collecting societies' revenues are allocated for distribution among right-holders.

### **Distribution of copyright royalties to authors**

Royalties are shared out among the various classes of right-holders by a procedure laid down by the general assembly of the given collecting society. Such procedure must comply with the legally defined principles of fairness, predetermination, publicity, non-arbitrariness and proportionality.

### **Identification and payment of copyright and related right royalties**

Royalties are nominally allocated to the respective right-holders, but a large amount of royalties are retained within collecting societies for a variety of reasons: the right-holder could not be identified at the allocation stage; the collecting society does not have the right-holder's current contact details; the right-holder has died, and his or her successors and assigns are unknown.

These retained royalties remain within the society's equity until lapse of any right-holder's entitlement to them, at which point they are recognised as income which - there being no specific regulation on its permitted uses - is appropriated to such purpose as the society's governing body may decide. When entitlement to such royalties lapses by reason of a time limitation of a certain number of years, amounts not paid to right-holders are likewise allocated to varying purposes in the discretion of the collecting society's governing body.

The amount of lapsed royalty entitlements is a function of the nature of the rights and the right-holders, on one hand, and, on the other, of the time limitation applicable to such rights. Moreover, a direct relation holds between the amount of lapsed unclaimed royalties and the age of the collecting society.

### **Conclusions and recommendations**

The functioning of the various collecting societies is highly variegated and comparisons of one society with another are not readily made, because the diversity of right-holders, managed rights, media and forms of communication of the protected works makes for widely different management decisions and policies.

The societies fulfil the purposes for which they were created by allowing for the existence of a market in copyright and related rights where the users of works and benefits compensate right-holders for usage of their works and benefits. Absent the collecting societies, authors, performing artists and producers would be hard-pressed to receive the income for their copyright and related rights that the Spanish Copyright Act 1996 now recognises as theirs, and those enjoying the least measure of artistic and commercial success would stand to lose the most.

The basic functions of the collecting societies – collection, administration and welfare deductions, allocation of royalties and payout to right-holders – are performed to a standard of efficiency that improves over time, in step with the societies' increasing experience.

Since the societies' operations are susceptible of economies of scale, increased transactional volume or amalgamation of activities may see their efficiency enhanced.

The societies' transparency can be regarded as adequate given the legal framework in which they operate. The benefits might be considered of regulations introducing an objective standard of transparency and enabling the implementation of policies common to all societies. It would be desirable, for instance, that rules common to all societies were prescribed as to the accounting treatment of rights management transactions.

The allocation rules that collecting societies apply can be regarded as fair in two ways: first, they reflect the prevailing asymmetry in the world of the arts; secondly, they are objectively applied, transparent and available to all right-holders.

The system is markedly mutualistic, insofar as the rules on welfare deductions benefit the less popularly successful right-holders at the expense of the highest earners.

The model of collective management of copyright and related rights by collecting societies is not expected to attract fresh European Union regulation in the short term; all else being equal, therefore, there is no bar to the making of such reform as the Spanish legislature sees fit.

These conclusions make room for the following **recommendations**:

The question is whether the system of copyright collecting societies is sufficiently regulated for it to achieve its purposes effectively, efficiently, transparently and fairly. The right degree of regulatory intervention may lie somewhere in between the present state of affairs, where the major management decisions are driven by market forces and the collecting societies' governing bodies, and a more heavily regulated model, where the main operational decisions and supervisory power rest with the regulator. The findings of this evaluation at any rate suggest the following actions:

1. Regulation should extend beyond the uses of welfare, promotional and educational funds to a statutory duty of separate management from the rest of funds of the collecting society - if the society administers them directly - or of the special-purpose charitable trust, if any.
2. A specific chart of accounts should be introduced for copyright collecting societies, covering accounting, economic and financial topics such as provisions, the accounting treatment of unclaimed royalties the title to which has lapsed, financial investments, the contents and disclosures of annual reports, etc.
3. Collecting societies should be placed under a statutory duty to consolidate their financial statements with those of their subsidiaries and investees.
4. The possibility should be considered of creating a common collection body – at least as regards private copying levies – to bring economies of scale into play.
5. Collecting societies' financial statements and fees should be made public by being filed with a public registrar overseen by the government as a guarantor of public access rights.
6. Specific regulations should be introduced on the treatment of time limitations on collected royalties: periods, uses, etc.

There is a need for regulatory action through rules that standardise management procedures and help convey to public opinion that collecting societies operate effectively, efficiently, fairly and transparently.

## **II . GENERAL REPORT ON THE EVALUATION**

### **1. INTRODUCTION**

On 1 August 2008, the Spanish cabinet incorporated the task of evaluating the system for collective management of copyright and related rights into the work plan of the Agencia Estatal de Evaluación de las Políticas Públicas y la Calidad de los Servicios (Spanish Agency for the Evaluation of Public Policy and Quality of Services).

For a number of reasons, the collective management of copyright and related rights has drawn the attention of the Spanish public. An adverse climate of opinion has formed around copyright managers, and the effectiveness, efficiency, fairness and transparency of the system of collective management of copyright and related rights have been called into question.

The Minister for Culture, with the support of the collecting societies themselves, proposed that the Agency for the Evaluation of Public Policy and Quality of Services

include in its work plan the evaluation presented in this paper. The preliminary work towards an evaluation project started on 31 March 2008, and the evaluation work itself finally commenced on 30 April 2008.

## **Subject matter and scope of the evaluation**

This evaluation of the system for collective management of the rights set down in copyright legislation covers seven main points, constituting its subject matter and scope:

1. The alignment of Spain's system for collective management of copyright and related rights with the prevailing systems in neighbouring countries, and the potential effects on the system of technological change and proposals for reform in the European Union.
2. The collection systems applied by copyright collecting societies and the transparency of their management practices as perceived by users, right-holders and the wider community.
3. The collecting societies' practice of making deductions to defray administration costs and provide funds for welfare, promotional and educational activities, and the breakdown of these expenditures.
4. The distribution of the sums collected from users by these societies to the various classes of right-holders.
5. The nature and volume of relations of the Spanish system for collective management of copyright and related rights with the systems of other countries, with an emphasis on the balance and movements of funds between the Spanish system and the other systems to which it is related.
6. The perception of the Spanish system for collective management of copyright and related rights by the various user and stakeholder entities and groups.
7. Determination of the added value that collecting societies provide to the protection of copyright and related rights.

Territorially, the main subject matter of the evaluation is the system of collective management of copyright and related rights in Spain; but that system must be viewed within the context of the European Union and of international associations of copyright collecting societies.

Given the complexity of the system, the number of collecting societies, the variety of managed rights, the diversity of sources of funding and the lack of standardised accounting and management practices, the evaluation has been divided into two stages: the first in 2008, and the second in the first half of 2009.

The first phase of the evaluation, to be completed in December 2008, seeks to quantify each of the main points defined as evaluation aims for the system overall and for the individual collecting societies.

A second stage will analyse the alignment of the Spanish system for collective management of copyright and related rights with those used in other countries. It will also deal with how the system is perceived by its stakeholders.

## **2. DISCUSSION OF THE CONTEXT**

The right to own property is recognised as a human right in Article 17 of the Universal Declaration of Human Rights, proclaimed in the United Nations on 16 December 1948. Intellectual property is recognised in Article 27 of the Declaration. That provision affirms "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Intellectual property also commands the recognition of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966, in Article 15.

The Spanish Constitution contemplates property rights in article 33; the sole reference to intellectual property appears in article 149(1)(9), which gives jurisdiction in the matter to central government. The Constitution specifies that property rights are bounded by their social utility, insofar as article 128(1) directs that "all the country's wealth, in its various forms, is subordinate to the public interest." Intellectual property, as a species of property, is likewise subordinate to its social utility and to the public interest in increasing the cultural heritage of the community.

Royal Legislative Decree 1/1996 of 12 April 1996 enacted the consolidated restated text of the Spanish Copyright Act 1996, lending order, clarity and harmony to the statutory provisions on the matter. The Act classifies copyright and related rights into those rights that are personal or moral, and those that are economic, proprietary or of exploitation, resting with authors, performers or players and producers of phonograms and audiovisual recordings. Copyright and its neighbouring rights can fall into one of two categories, depending on the powers conferred on the holder: exclusive rights, which allow the holder to authorise or prohibit the use of his/her works or services, and rights to remuneration, which, while they do not enable the holder to control the use of his/her works, do entitle him/her to receive a sum for such use.

- The exclusive rights manageable directly by the holder or through a collective management entity on his or her behalf include those of copying, distribution, public communication and adaptation.

- The remuneration rights include *rights to compensation for private copying*, which vest in authors, publishers, performers and producers, *participation rights* vesting in authors, *public communication rights* over phonograms, vesting in performers and producers, and others.

Copyright holders are free to decide whether to entrust the management of the different methods of exploitation to collecting societies or whether they wish to reserve such management for themselves. If management is transferred to a collecting society, the Spanish Copyright Act 1996 regulates the mandatory points to be included in the management agreement (duration of less than five years, no imposition of compulsory management of all forms of exploitation or of all works).

In some cases, however, the Spanish Copyright Act 1996 imposes mandatory collective management by collecting societies of certain rights exploited on a mass scale, having regard to the need to assure the effectiveness and efficiency of royalty collection.

Copyright collecting societies emerged in Spain as a result of the Copyright Act of 1987, which put an end to the former system of statutory monopoly of rights management by SGAE, the Spanish society of authors and publishers, with over a hundred years of history.

A collecting society, incorporated as a non-profit association, must obtain an administrative licence from the Ministry of Culture to operate in that capacity. The societies represent the various occupational categories of copyright owners and related right-holders.

There are eight collecting societies of copyright and related rights currently operating in Spain. These are:<sup>3</sup>

#### **Authors' copyright collecting societies:**

- *Sociedad General de Autores y Editores (SGAE)*. This society represents authors of literary, musical, dramatic, cinematographic and audio-visual works. SGAE manages members' assigned exclusive rights of copying, distribution, public communication and adaptation, and the following remuneration rights: private copying levies, compensation for rental of phonograms and audiovisual recordings, compensation for the screening, showing or public communication of audiovisual works, and compensation for the lending of copies.
- *Centro Español de Derechos Reprográficos (CEDRO)*. Represents authors and publishers of printed or printable works, except for those who produce visual art or photographic works. CEDRO manages members' assigned exclusive rights of copying, distribution, public communication and adaptation, and the

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<sup>3</sup> See Annex III. Copyright collecting societies.

following remuneration rights: private copying levies and compensation for the lending of copies.

- *Visual Entidad de Gestión de Artistas Plásticos (VEGAP)*. Represents authors of visual works, both fixed and motion, regardless of the medium used. It does not include distribution. VEGAP manages members' assigned exclusive rights of copying, distribution, public communication and adaptation, and the following remuneration rights: private copying levies, compensation for rental audiovisual recordings, compensation for the screening, showing or public communication of audiovisual works, and participation and compensation for the lending of copies.
- *Derechos de Autor de Medios Audiovisuales (DAMA)*. Represents authors of cinematographic and other audio-visual works. DAMA manages members' assigned exclusive rights of copying, distribution, public communication and adaptation, and the following remuneration rights: private copying levies, compensation for rental of audiovisual recordings, compensation for the screening, showing or public communication of audiovisual works, and compensation for the lending of copies.

#### **Performing rights collecting societies:**

- *Artistas Intérpretes o Ejecutantes (AIE)*. Represents performing artists or performers who act out, sing, read, recite, interpret or perform works. AIE manages members' assigned exclusive rights of fixation of their performances, copying, distribution and public communication, and the following remuneration rights: private copying levies, compensation for rental of phonograms and audiovisual recordings, and compensation for the public communication of phonograms and audiovisual recordings.
- *Artistas Intérpretes Sociedad de Gestión (AISGE)*. Represents actors, dubbing artists, dancers and stage directors. AIE manages members' assigned exclusive rights of fixation of their performances, copying, distribution and public communication, and the following remuneration rights: private copying levies, compensation for rental of phonograms and audiovisual recordings, and compensation for the public communication of phonograms and audiovisual recordings.

#### **Producers' copyright collecting societies:**

- *Asociación de Gestión de Derechos de Propiedad Intelectual (AGEDI)*. Represents phonographic producers. AGEDI manages members' assigned exclusive rights of copying for public communication, and the following remuneration rights: private copying levies and compensation for the public communication of phonograms.
- *Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA)*. Represents producers of audiovisual works or recordings. EGEDA manages

members' assigned exclusive rights of copying and public communication, and the following remuneration rights: private copying levies and compensation for the public communication of audiovisual works in certain forms.

Collecting societies, "organisations that administer authors', performers' and producers' copyright and neighbouring rights held by a large number of owners"<sup>4</sup>, are an effective solution to the problem of the high transaction costs that would arise if copyright owners were to manage their rights individually. Collecting societies<sup>5</sup> allow for the emergence of a market in copyrights, thus enabling right-holders to earn royalties that would be unavailable to them under individual management.

From an economic perspective, copyright and related rights tend to create a natural monopoly because their management produces economies of scale, generating lower costs than those obtained in situations of free competition.<sup>6</sup> The drawback to this monopoly – high licensing fees – is tempered by the statutory duties set down in article 157 of the Spanish Copyright Act 1996, which requires collecting societies to contract with all comers for non-exclusive licences on reasonable terms and for value, to set general fees for the use of their repertoires, and to enter into general contracts with user associations.

These statutory duties imposed on collecting societies – designed to prevent them from abusing their dominant position and to assure equal treatment of users of works and benefits - do not bind an individual right-holder who decides not to entrust his or her rights to a society but to manage them for him or herself.

Therefore it can be concluded that these societies are the "second-best" choice and preferable to the complex alternative of the individual negotiation of collective rights by their owners. The following conclusion can be drawn:

*The system of collective management of copyright and neighbouring rights is vital to assuring compensation to authors, performers and producers for the use of their works and benefits, because it protects their rights and allocates their royalties more effectively and efficiently than the alternative solution, individual management.*

### **3. DESCRIPTION OF THE POLICY UNDER EVALUATION**

The system of collective management of copyright and related rights carries out four main internal activities. It collects royalties for the payment to the beneficiaries of copyright and related rights. From these revenues, it deducts administration and

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<sup>4</sup> Adaptation of the definition framed by Besen, SM and Kirby, SN (1989) "Compensating creators of intellectual property-collectives that collect". The RAND Corporation. Santa Monica. California.

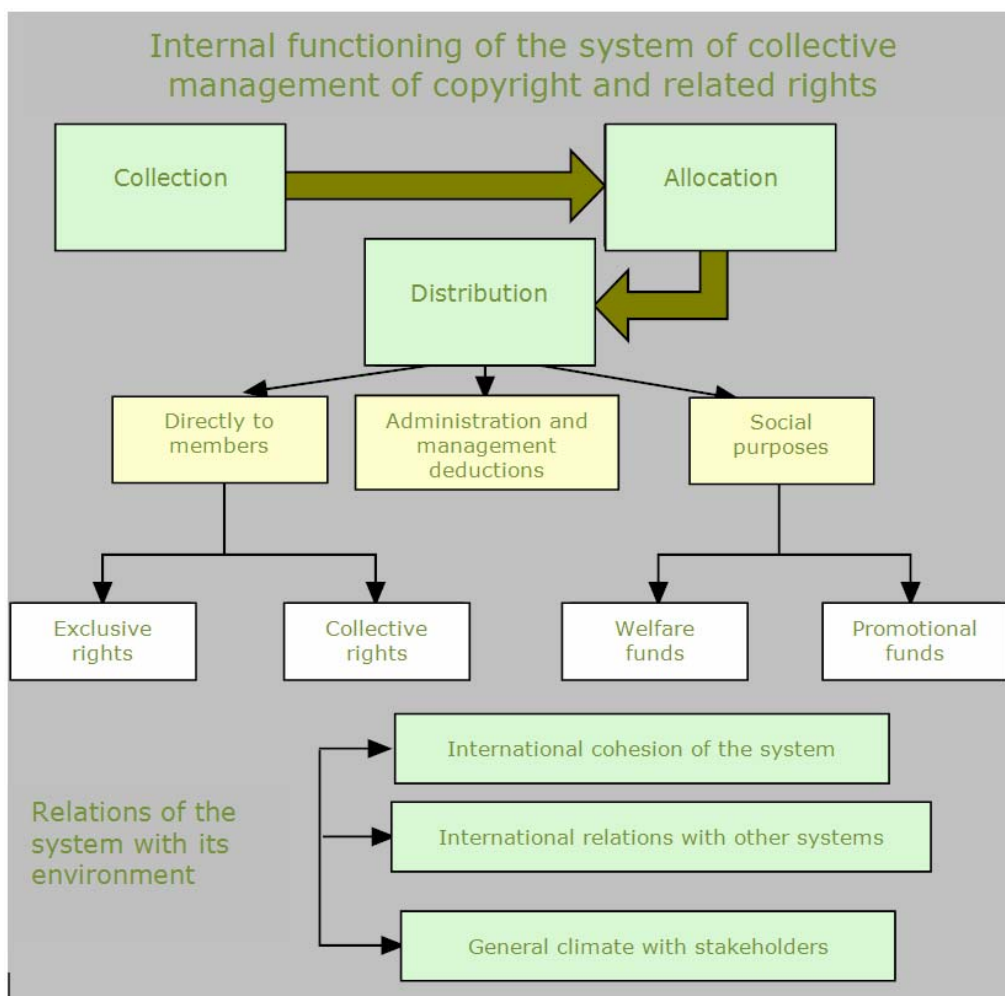
<sup>5</sup> Towse, Ruth and Handke, Christian. (2007). "Análisis económico de las entidades de gestión de los derechos de autor". Ediciones y Publicaciones Autor SRL. Madrid.

<sup>6</sup> Towse, Ruth and Handke, Christian. (2007). "Análisis económico de las entidades de gestión de los derechos de autor". Ediciones y Publicaciones Autor SRL. Madrid.



operating costs and the funds intended for welfare, promotional and educational activities; it uses various procedures to apportion the payable royalties across beneficiaries; and it actually pays out the appropriate amounts to beneficiaries and makes use of the funds set aside for welfare, promotional and educational activities.

From the perspective of the functioning of the system in relation to its external setting, there are three relevant topics for evaluation: collection and payment relations with the collective copyright management systems of other countries; the alignment of the Spanish system of collective copyright management with its foreign peers and with the development of other European systems; and the image of the Spanish system as perceived by its social interlocutors and stakeholders.



Source: Prepared by the authors.

## 4. SCOPE AND METHODOLOGY OF THE EVALUATION<sup>7</sup>

### Evaluation questions

The first stage of the evaluation, conducted in 2008, addresses the following questions about the system:

1. Are the collection systems used by copyright collecting societies effective? Is collection accomplished efficiently? Is collection spread fairly across sources of income? Is the collection process transparent for users, beneficiaries and society in general?
2. After deduction of administration costs and of the funds for welfare, promotional and educational activities prescribed by law and the societies' own articles, is allocation across beneficiaries accomplished fairly? Are the amounts allocated to beneficiaries the outcome of an effective and efficient management effort? Are the allocation rules and the allocated amounts transparent for beneficiaries and society in general?
3. Do the amounts allocated to beneficiaries reach them effectively, efficiently, fairly and transparently? How are the amounts appropriated to welfare, promotional and educational activities distributed? Do they achieve the objectives laid down by the applicable rules? Are they fair and transparent?
4. What value-added do collecting societies contribute to the system of protection of copyright and related rights? Are collecting societies effective, efficient, fair and transparent? Have they had any effects not desired by the legislature?

### Tools

The following tools were used to conduct the evaluation:

- Analysis of the available data and information, including collecting societies' annual reports, articles of association and audits. The publicly available information on collecting societies was supplemented by ad hoc information elicited using a special-purpose questionnaire.<sup>8</sup>
- Construction of an economic model to characterise the functioning of the system of collective management of copyright and related rights.
- Individual interviews with copyright management officers and experts and related institutions, entities and organisations.

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<sup>7</sup> See Annex I: Evaluation methodology.

<sup>8</sup> See Annex II: Evaluation questionnaire.

- Joint meetings with collecting society executives and regular meetings with each collecting society's designated coordinator and Ministry of Culture officials.
- Group-based analysis with collective copyright management experts.
- Statistical analysis of the distribution of royalties to right-holders implemented by collecting societies.
- Attendance at the meetings of European Union working parties relating to copyright.

## **Evaluation team**

This evaluation was conducted by a team drawn from the evaluation department of the Spanish Agency for the Evaluation of Public Policy and Quality of Services, led by the head of the evaluation division, José María Iváñez Gimeno, coordinated by the specialist evaluator Carmen Gómez de Marcos Pérez, and comprising the specialist evaluator Magdalena Sánchez Astillero, the lead evaluator Mónica Macías González and the specialist evaluator Luís Castro Pérez, who performed the required statistical processes.

For the purposes of this evaluation the Agency liaised with the Ministry of Culture's directorate of copyright and with one representative for each of the eight collecting societies, appointed by the respective chief executive.

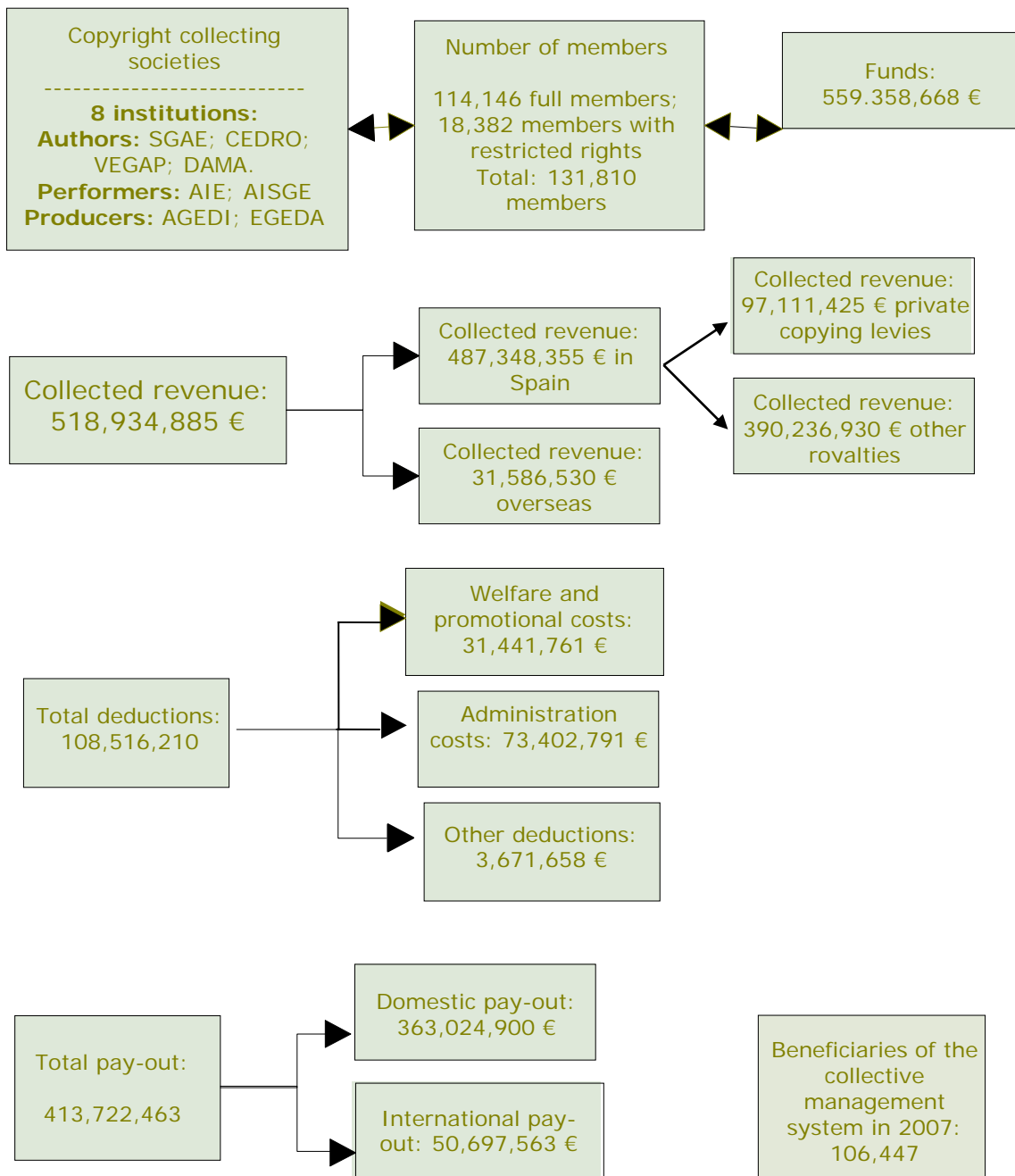
## **Time frame**

The period under study runs from 2004 to 2007, with a special focus on 2007 data.

## **5. ANALYSIS OF COPYRIGHT COLLECTING SOCIETIES**

### ***Facts and figures of the system of copyright collectives***

The headline figures of the collective copyright management system in 2007 were as follows:



Source: Prepared by the authors.

In 2007 the eight copyright collecting societies had 114,146 full members and 18,382 members with restricted rights, making a total 132,528 members. The societies' funds were €559,358,668 in aggregate.

In their role as collecting societies, the entities collected €518,934,885, of which €97,111,425, or 18.71%, related to private copying, while the remainder,

€390,236,930, related to the collective management of other copyright and related rights. €31,586,530 of total revenues related to royalties payable from outside Spain to Spanish authors, artists and producers.

€108,516,210 were deducted from copyright revenues, of which €73,402,791, or 67.6% of the deduction, were appropriated to administration expenses, accounting for 14.1% of total collected revenues.

The amount of €31,441,761 allocated in 2007 to social provision and promotional costs comprised €19,422,285, or 20% of private copying revenues, and €12,019,475 deducted by some collecting societies in accordance with their articles of association. Under the Spanish Copyright Act 1996, 10% of deductions from private copying revenues must be applied to members' welfare costs, while a further 10% must be allocated to training and educational activities and promotion of authors and performing artists.

A total of €413,722,463 was paid out to authors, performers and producers, of which €50,697,563, or 12.25% of the total paid out, went to foreign beneficiaries.

Comparing the amount paid out in 2004, €378,386,864, to the contribution to gross value added from the cultural activities of creation and production in that year<sup>9</sup> - €12.51 billion – then collecting societies are seen to account for 3.02% of that gross value added. Given that the proportion paid out to authors, performers and producers accounts for a small portion of the gross value added of the culture industries, the role of collecting societies can be seen as an important way of remunerating creative activities.

### ***Activities and governance of collecting societies***

Copyright collecting societies, which take the legal form of non-profit associations, are governed by their own articles, by the Spanish Association Act 2002 [*Ley Orgánica 1/2002 de derecho de Asociación*] and by Royal Legislative Decree 1/1996, enacting the consolidated text of the Spanish Copyright Act 1996.

The Spanish Copyright Act 1996 prescribes the requirements for a body to qualify as a collecting society, the terms of licensing of a collecting society by the Ministry of Culture, the events in which the Ministry might revoke such licence, the legal standing of a collecting society to exercise the rights entrusted to it, and certain mandatory provisions which must appear in its articles of association.

A decision of the Spanish Constitutional Court<sup>10</sup> [*Tribunal Constitucional*] found that the powers of oversight and inspection originally given to the Ministry of Culture

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<sup>9</sup> Spanish Ministry of Culture. (2006) *El valor económico de la cultura en España*. Technical Secretariat General. Spanish Ministry of Culture.

<sup>10</sup> Spanish Constitutional Court decision 196/97 of 13 November 1997.

under article 159 of the Spanish Copyright Act 1996 must in fact rest with the devolved regions [*Comunidades Autónomas*].

*The regulatory framework applicable to collecting societies gives them a high degree of autonomy, exercised through their governing bodies, which are competent to lay down the societies' own operating procedures.*

### LEGAL FRAMEWORK OF COLLECTING SOCIETIES

Legal form: non-profit associations

- Governed by their own articles of association.
- *Ley Orgánica 1/2002, de 22 de marzo, reguladora del derecho de Asociación* (founded on article 22 of the Spanish Constitution) – the Spanish Association Act 2002
- *Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual* – Royal Legislative Decree 1/1996, enacting the consolidated, restated text of the Spanish Copyright Act 1996 (art 147 prescribes the requirements for a body to qualify as a collecting society; art 148 sets the terms of grant of a licence by the Ministry of Culture; art 149 governs revocation of licence by the Ministry; art 150 deals with a society's legal standing to exercise rights entrusted to it; art 151 requires that certain provisions appear in a society's articles; art 152 creates a duty to manage the rights entrusted to it; art 153 prescribes the requirements of management contracts and the terms of performance of management; art 154 sets the terms governing allocation of royalties; art 155 creates a duty to undertake welfare activities for members and promotional and educational activities for authors and performers; art 156 specifies accounting requirements; art 157 creates a duty to enter into contract with all comers on reasonable terms, to stipulate generally applicable fees for use of a society's repertoire, and to enter into general contracts with associations of repertoire users; art 158 governs the role and membership of the arbitration and mediation body called the Comisión de Propiedad Intelectual [Copyright Commission]; and art 159 ascribes to the Ministry of Culture the power to supervise collecting societies' amendments to their articles of association).

The governing bodies of a collecting society are typically a general assembly and an executive board; in some societies, committees are tasked with specific functions. The ascription of roles among the various governing bodies is as follows:

Functions	General assembly or general meeting	Executive board	Committee
Set fees relating to the rights under the collecting society's management	EGEDA	CEDRO, AGEDI, AISGE, VEGAP	AIE, DAMA, SGAE
Write and amend the rules on allocation of collected royalties	AISGE,	DAMA, CEDRO, AGEDI, EGEDA, VEGAP	SGAE, EGEDA

Adopt the rules on allocation of collected royalties	AIE, DAMA, CEDRO, EGEDA, VEGAP	AGEDI	SGAE
Set and review deductions		DAMA, CEDRO, AGEDI, AISGE, EGEDA, VEGAP	AIE, SGAE,
Adopt deductions laid down	DAMA, AISGE		
Set rules on member admissions and departures	AISGE, EGEDA	AIE, DAMA, CEDRO, AGEDI, EGEDA, VEGAP	SGAE
Set member admission fees	DAMA, AISGE, VEGAP	CEDRO, AGEDI,	
Decide on the grant of advance payouts		DAMA, CEDRO, AGEDI, EGEDA, VEGAP	SGAE
Set time limitations on unidentified or unclaimed royalties	AIE, AISGE, EGEDA	DAMA, CEDRO	SGAE
Decide on the use to which lapsed unclaimed royalties are to be put	AISGE, EGEDA	DAMA, CEDRO	AIE, SGAE
Acquire, transfer, sell or exchange property (land and buildings)	AGEDI, VEGAP	AIE, DAMA, CEDRO, AISGE, EGEDA	SGAE
Acquire, transfer, sell or exchange assets (other)	AGEDI	DAMA, CEDRO, AISGE, EGEDA, VEGAP	AIE, SGAE
Ratify decisions to buy property and assets	EGEDA		
Enter into loan and credit facility agreements	DAMA	CEDRO, AGEDI, AISGE, EGEDA, VEGAP	AIE
Found and incorporate or join any manner of non-profit entity or commercial company	AGEDI, AISGE	AIE, DAMA, SGAE, CEDRO, EGEDA	
Ratify resolutions to merge, incorporate, etc, entities	EGEDA		

Set the amount of funds allocated to welfare, promotional and educational activities and their criteria of application	DAMA, AGEDI, AISGE, EGEDA, VEGAP	CEDRO	AIE
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*Source: Prepared by the authors.*

As shown above, the eight collecting societies are centralised to a similar extent. Their governance rests with the governing bodies that the applicable law allows, and the evaluation process found that decision-making is compliant with laws and regulations.

*The law applicable to copyright collecting societies makes insufficient provision for regulating their operating procedures. Their governing bodies are wholly autonomous in their decision-making; their activities are entirely compliant with the present legal framework.*

## **Exploitation rights**

Article 17 of the Spanish Copyright Act 1996 directs that the rights of exploitation in a work vest exclusively in the author, in particular, the rights of copying, distribution, public communication and adaptation.

The Spanish Copyright Act 1996 further recognises the following rights:

- An author who has transferred or assigned his/her right of rental over a phonogram or audiovisual recording has an inalienable right to fair compensation for such rental.
- An author of an audiovisual work, wherever such work is screened in a public place subject to a price of entry, has the right to a percentage of the proceeds of such public screening.

The Spanish Copyright Act 1996 gives to a performer the exclusive right to authorise the recording of his/her performances and the copying, public communication and distribution of such recordings.

The Act further gives performers an inalienable right to remuneration for certain forms of public communication of their phonograms and audiovisual recordings.

For their part, under the Act, producers of phonograms and audiovisual recordings have:

- exclusive rights to authorise the copying, public communication, and distribution of their phonograms and audiovisual recordings;



- rights to fair remuneration for public communication in the event of certain broadcasts.

### **Copying rights**

Copying is the direct or indirect temporary or permanent fixation, by any procedure and in any form, of the whole or a part of a work, in a manner permitting its being communicated or the obtainment of copies.

The fixation of a work is typically a preliminary of its being communicated, but communication does not invariably require fixation, nor does fixation necessarily entail communication or the obtainment of copies.

### **Distribution rights**

Distribution is the making available to the public of the original or copies of a work in a tangible medium by sale, rental, loan or in any other manner.

### **Public communication rights**

Public communication is any act whereby a plurality of persons may access the work without the prior distribution of a copy to each person. Communication is not deemed public if done within a strictly domestic setting that is neither a part of nor connected to a dissemination network of any kind.

### **Adaptation rights**

Adaptation comprises translation, adaptation or any other modification to the form of a work such as to derive a different work. The copyright and neighbouring rights in the work resulting from adaptation vest in the author of the adaptation. Such adaptation requires the consent of the author of the pre-existent work. The author of the pre-existent work also retains a right to authorise the exploitation of the adapted work in any form, and, in particular, by copying, distribution, public communication or further adaptation.

### **Other rights**

The Spanish Copyright Act 1996 also recognises other rights, known as 'simple remuneration' rights because they do not entitle the holder to prevent the exploitation of a work by third parties; they entitle him/her only to receive compensation for such exploitation. This category includes participation rights and rights to private copying compensation.

### **Participation rights**

The inalienable right of the author of a visual work to receive a percentage of the price of resale of the work on the professional secondary market.

## Private copying compensation

The right to fair compensation for copying for private use, under its present definition arising from the wording set forth in the *Ley 23/2006* [an enactment amending the Spanish Copyright Act 1996], flows from the right to compensation for royalties not received for copies made exclusively for private purposes, using non-typographical devices or instruments, of works disseminated in the form of books, publications, phonograms, videograms and other sound, visual or audiovisual media. This right is incapable of waiver by authors and performers.

## Members of collecting societies

In 2007, the memberships of the various collecting societies were as follows:

Entity	Full members	Other members
<b>Authors:</b>		
SGAE	86,315	7,618
CEDRO	4,836	8,297
VEGAP	1,706	2
DAMA	358	-
<b>Performers:</b>		
AIE	13,515	347
AISGE	6,610	1,382
<b>Producers:</b>		
AGEDI	222	0
EGEDA	584	736
<b>TOTAL</b>	<b>114,146</b>	<b>18,382</b>

Source: Prepared by the authors.

The rights and obligations of collecting society members subject to restricted rights are dependent chiefly on whether membership requires voluntary affiliation and whether such members contribute to the society's costs and activities. The "other members" category, depending on the specific collecting society's articles, typically comprises successors and assigns or bodies corporate that do not qualify as full members. A collecting society's benefits may be confined to members, or may extend to all right-holders regardless of membership. The number of beneficiaries hence exceeds the combined membership of the copyright collecting societies.

*The rights, recording media, communication media and beneficiaries that collecting societies are called on to handle are so widely diverse that it is hard to make meaningful comparisons of their results and management processes. The system is characteristically heterogeneous.*

*A collecting society's benefits often extend beyond members to all copyright owners and right-holders, regardless of membership.*

## **Stages of the management process**

We now turn to a step-by-step account of the copyright management process that collecting societies undertake.

### **Collection**

The process of collection is fundamental to the effectiveness of copyright and related rights entrusted by holders to collecting societies.

In addition, by deducting their administration expenses from collected royalties, the societies obtain the funds they need to operate.

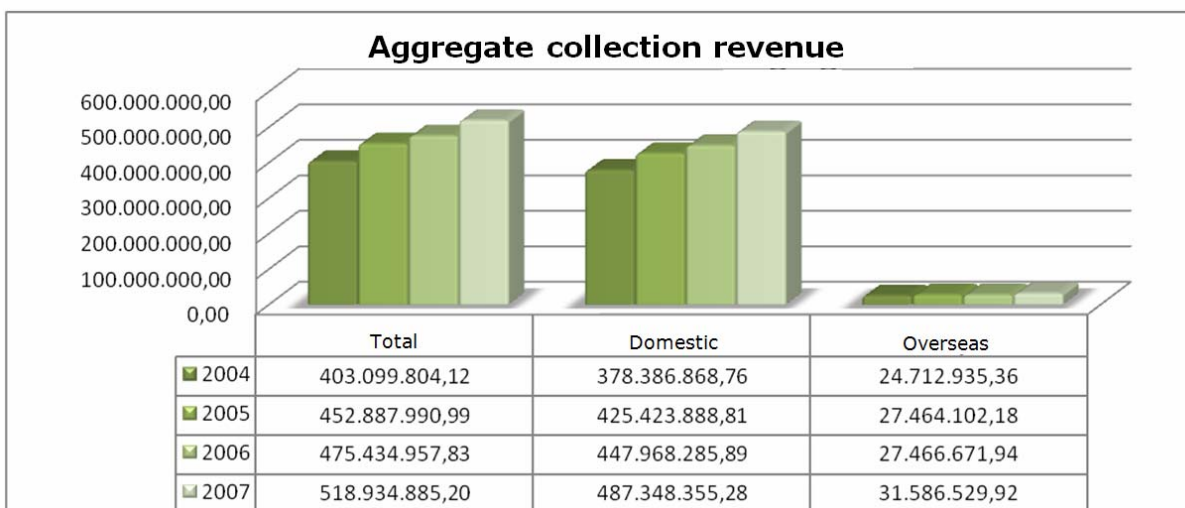
Certain features of the collection process are essential to an understanding of the final outcome.

- The legal framework of the collection process *prima facie* falls within private law, and contemplates a range of legal duties owed by collecting societies to right-holders on one hand and to users on the other. These duties restrict the freedom of action otherwise characterising relations among private actors, and are designed to counteract the *de facto* market dominance that collecting societies enjoy. Disputes generally fall to be resolved in the civil courts, but may also involve competition authorities and arbitration and mediation bodies such as the Comisión de Propiedad Intelectual, the Spanish Copyright Commission.
- Collection relies on two elements:
  - Contracts entered into with user associations. A collecting society is under a statutory duty to enter into a general contract with any user association seeking to make such contract. The contractual price for use of the rights - lower than the general fees that apply by default – can be calculated by a variety of methods (lump sum, percentage of a given source of user income, such as a radio broadcaster's advertising revenue, etc). Agreements with user associations contain a most-favoured-party clause and affect generally applicable fees, which are brought into line with the terms of agreements.
  - The fees attaching to the various rights. These fees apply by default wherever no general contract is in place. The fees constitute the price of using a work or benefit, payable by the party wishing to make such use, and at the same time constitute the remuneration payable to a holder for third-party use of the work or benefit, after applicable deductions.

The duty to set general fees is imposed on collecting societies to assure equal treatment of repertoire users. Non-profit cultural bodies are entitled to reduced fees. Fees are usually set unilaterally by collecting societies themselves, but might reflect prior negotiations with users or be decided on by the Spanish Copyright Commission. As to private copying levies, however, the law imposes mandatory negotiation between payers and payees; if they fail to reach agreement, the levies fall to be determined jointly by the Ministry of Culture and the Ministry of Industry, Tourism and Trade.

- The volume of collected revenues depends on the nature and quantity of the royalties to be collected, the number of parties under an obligation to pay, the experience amassed by the collecting society, the society's negotiating acumen, and other factors. Different collecting societies hence achieve varying standards of collection effectiveness and incur widely varying administration costs in the process.
- As a result, the burden of royalties is borne asymmetrically, because it is heaviest on those forms of use and those users from whom making collection is easiest or least costly. The atomization and geographical dispersion of users gives rise to higher collection costs and a higher rate of fraud.

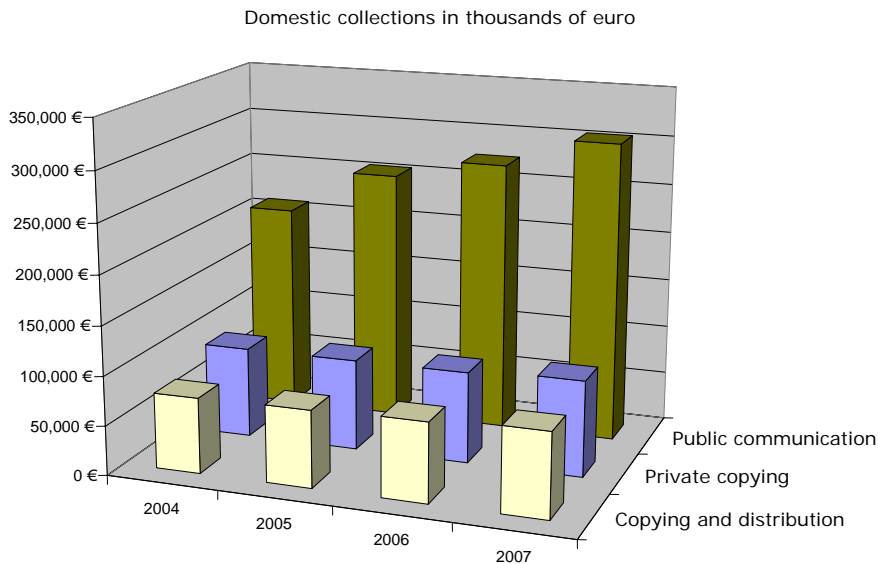
The following chart shows that aggregate collection revenues for all collecting societies has risen from year to year, from €403 million in 2004 to €515 million in 2007, an increase of 24%. This may reflect an increased number of users, rising fees or greater experience amassed by collecting societies. Royalties generated overseas accounted for 5.5% to 6.1% of the total, and rose at a slower rate than domestic collections.



Source: Prepared by the authors.

By type of royalty, revenue breaks down into public communication (62% of total royalties), private copying levies (20%) and copying and distribution (18%).

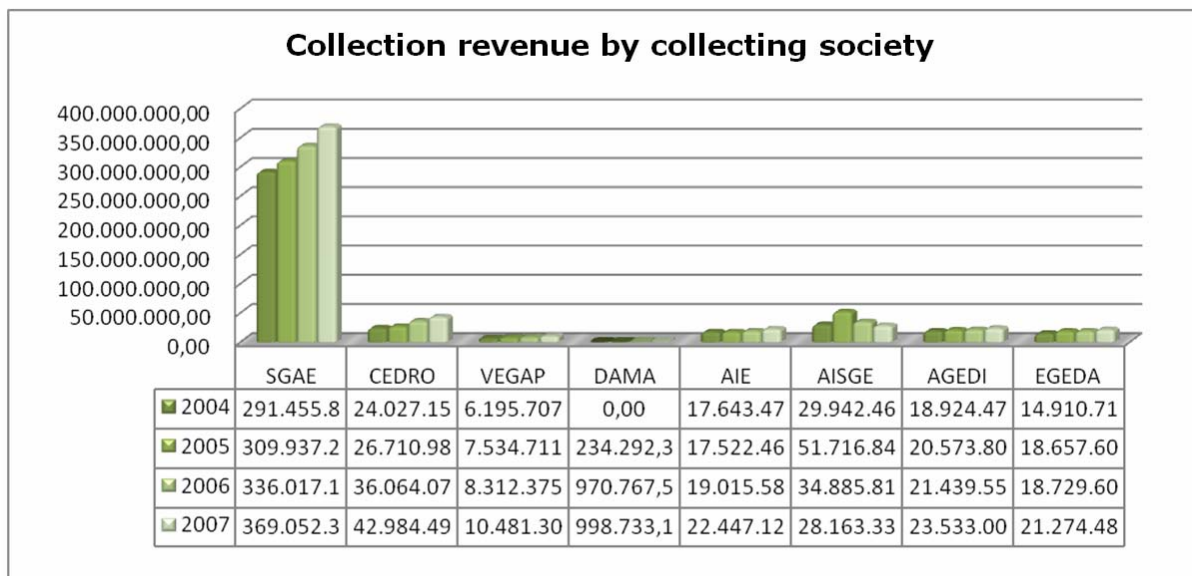
By type of royalty, the following chart shows that domestic revenue saw a rise in public communication royalties and a measure of stagnation in private copying levies and copying and distribution royalties.



	2004	2005	2006	2007
Copying and distribution	76,478 €	78,062 €	80,522 €	85,573 €
Private copying	92,015 €	92,180 €	92,510 €	97,110 €
Public communication	209,764 €	255,105 €	274,470 €	304,285 €

*Source: Prepared by the authors.*

By a large margin, the collecting society attracting the highest revenue is SGAE, the Spanish society of authors and publishers, accounting for 72% of all collections. The rest of collecting societies, CEDRO, VEGAP, AISGE, AGEDI, AIE, EGEDA and DAMA, each make collections accounting for under 8% of the aggregate.



*Source: Prepared by the authors.*

The differences in collecting societies' revenues mainly reflect the different kinds of copyright they are called on to manage. Societies acting for performers and producers only actually collect the remuneration royalties recognised by statute. Performers' and producers' exclusive rights remain with the individual holders, who do not entrust them to the societies, and it is these exclusive, individually managed rights that give rise to most of their earnings (for producers particularly).

Authors' societies, however, in respect of musical authors collect not only the remuneration royalties but also virtually all musical authors' exclusive royalties, which are economically very significant.

The differences also reflect the age of each collecting society, insofar as there holds a direct relationship between a society's length of experience in the market and its ability to collect royalties.

Finally, some societies collect royalties on behalf of other societies; collection figures are accordingly less faithful an indicator of a society's size than its payout figures, which reflect both its own collections and revenue collected on its behalf by another entity. Collections entrusted to other entities are as follows:

	Other entities' rights under management			Beneficiary entity	Type of copyright
	2.005	2.006	2.007		
<b>Trustee collecting society</b>					
<b>CEDRO</b>	<b>3,435,887.37</b>	<b>4,628,734.57</b>	<b>5,518,757.11</b>	VEGAP	Private copying / copying
	<b>167,703.43</b>	<b>179,569.47</b>	<b>193,148.84</b>		
<b>EGEDA</b>	40,200.26	64,721.31	91,109.29	AIE	Public communication of audiovisual recordings (hotels)
	127,503.17	114,848.16	102,039.55	AGEDI	Private copying
	<b>8,835,000.00</b>	<b>6,661,000.00</b>	<b>8,202,000.00</b>		
<b>SGAE</b>	116,000.00	99,000.00	80,000.00	VEGAP	Private copying
	8,272,000.00	6,146,000.00	7,817,000.00	AIE	Private copying
	252,000.00	318,000.00	305,000.00	AIE; AISGE (buses only)	Public communication
	195,000.00	98,000.00	0.00	Centralised licensing	Private copying

Source: Prepared by the authors.

The future trend in copyright collecting societies' revenues is likely to reflect the following factors.

- SGAE will remain the predominant royalties collector, given the social relevance of its beneficiaries and of the rights under its management; having become firmly entrenched over time, moreover, SGAE gets business under a range of user agreements that less longstanding collecting societies lack. But the relative weight of SGAE within the system is likely to subside as the collecting experience of other societies grows.
- Public communication royalties account for the largest share of societies' collections and have grown further on the back of accruals carried forward from earlier periods and the direct link to radio broadcasters' rising advertising income – the main source of this royalty type.

The effects of the new private copying levies remain to be seen, but it is likely that collecting societies' aggregate revenue will stabilise, unless there is a change in the law as to copyright fraud and recording media and devices.

The trends in collecting societies' revenue suggest a number of conclusions:

*The stark diversity of collecting societies in terms of revenue and collecting effectiveness reflects the widely varying types of copyright and types of user they are concerned to address, making for different collection processes; and the degree of each society's market entrenchment and collecting experience.*

*The collections process is subject to market forces and to the statutory duties that restrain the collecting societies' dominant position and assure fair and equal treatment of users. Disputes arising in the course of fee negotiations fall to be resolved by the courts. Court proceedings delay collections, introduce an element of revenue variability, and often raise collecting societies' operating costs.*

*The effectiveness and efficiency of the collections process grow as a function of a collecting society's experience; they are also enhanced if a society achieves a history of favourable court decisions, and if negotiations are streamlined because copyright users act through a small cluster of interlocutors.*

*The dual collections procedure imposed by statute (general contracts/fees) tempers collecting societies' dominant position with a duty to negotiate, a duty to set general public fees that apply by default, and a duty to assure fair and equal treatment of users. Collecting societies' generally applicable fees are public in practice, but there is no statutory duty to make them public.*

*The effective accomplishment of the collecting societies' objectives is partly undermined by the frequent litigation arising from the collections process. Arbitration and mediation bodies such as the Spanish Copyright Commission provide forums of alternative dispute resolution out of court.*

*Both copyright owners and users save costs by the application of licence fees for general usage of collecting societies' repertoires.*

*Centralising collections in a single entity, if practicable, might make the collections system more effective. Centralisation would appear to be more readily envisaged for the private copying levies prescribed by the Spanish Copyright Act 1996. It would streamline the collections process from the standpoint of users; by having a single interlocutor, users would then be required to deal with fewer royalty collection channels.*

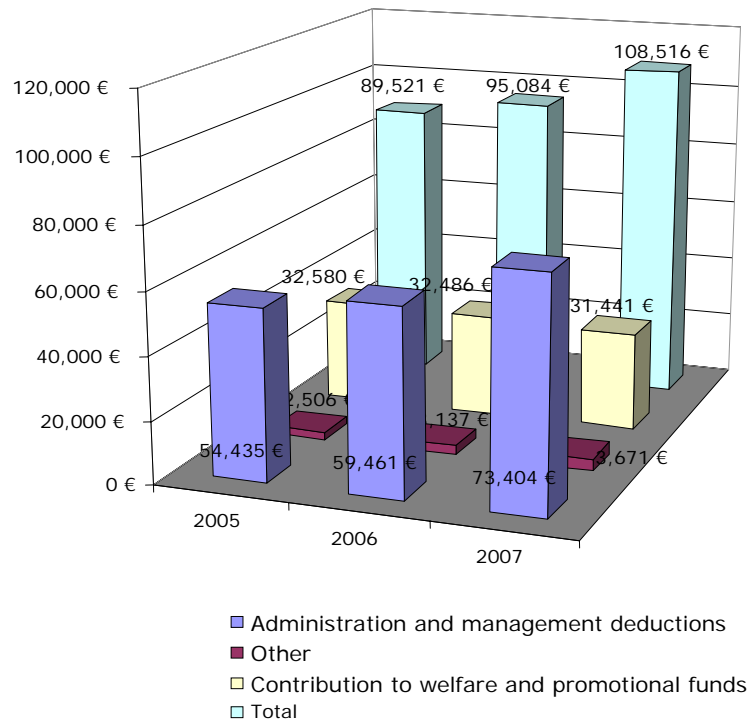
## **Deductions from royalties**

The copyright and related right royalties collected by collecting societies are intended to compensate holders for usage of the works and benefits in the societies' repertoires. The collecting societies apply two types of deduction to these amounts:

- Deductions to cover the societies' administration and management costs.
- Statutory deductions for social provision for members, promotional and educational activities for authors and performers and other deductions for such activities mandated by the societies' own articles of association.



Over the past few years deductions have behaved as follows:



Source: Prepared by the authors.

## Administration and management deductions

Collecting societies' costs are covered, first, by administration and management deductions, as mentioned above, secondly, by the financial returns on cash management of revenues for allocation and payment of royalties to right-holders, and, thirdly, at some societies and as a residual item, revenues recognised as a result of lapse of title to unclaimed royalties.

The comparison of collected revenue to administration and management costs is problematic. A representative index has therefore been constructed, whereby the administration rate is computed as:<sup>11</sup>

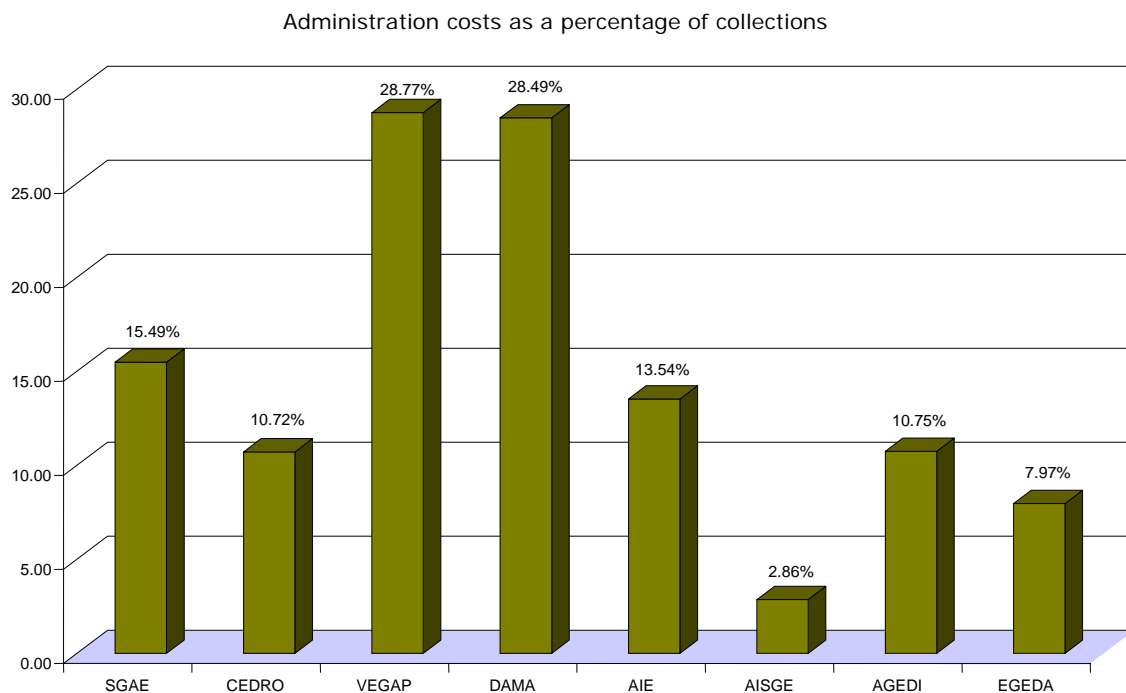
$$\frac{\text{Total costs} - \text{financial income} - \text{extraordinary income}}{\text{Total collected revenue}} \times 100$$

<sup>11</sup> The administration rate is the relative cost of collection, i.e., net administration costs as a percentage of collected revenue. As a percentage of revenue, the figure allows for comparisons among collecting societies.

The index provides the following data:<sup>12</sup>

	SGAE	CEDRO	VEGAP	DAMA	AIE	AISGE	AGEDI	EGEDA
2005	21.35%	14.20%	26.80%	0.00%	17.00%	3.96%	9.24%	9.98%
2006	18.38%	13.13%	30.44%	24.79%	16.19%	3.45%	9.72%	9.44%
2007	15.49%	10.72%	28.77%	28.49%	13.54%	2.84%	10.75%	7.97%

Based on 2007 data, the figures offer stark contrasts, ranging from 2.84% at AISGE to 28.77% at VEGAP. If excluding the outliers AISGE (2.84%) and VEGAP and DAMA (28.77% and 28.49%, respectively), the five remaining societies fall within a range one might regard as reasonable, bounded at the lower end by EGEDA (7.97%) and at the upper end by SGAE (15.49%). (AISGE's extraordinarily low admin cost rate is a function of its financial income, on one hand, and, on the other, of non-recurring collections from television stations in the specific years examined, in respect of accruals carried forward from earlier periods. The high admin rates at VEGAP and DAMA evince the low volume of rights under management; DAMA's case is further influenced by the society's having been created only recently, while VEGAP's case bears out the fact that collections are made by other entities on its behalf.) The indices are shown in the following chart:



Source: Prepared by the authors.

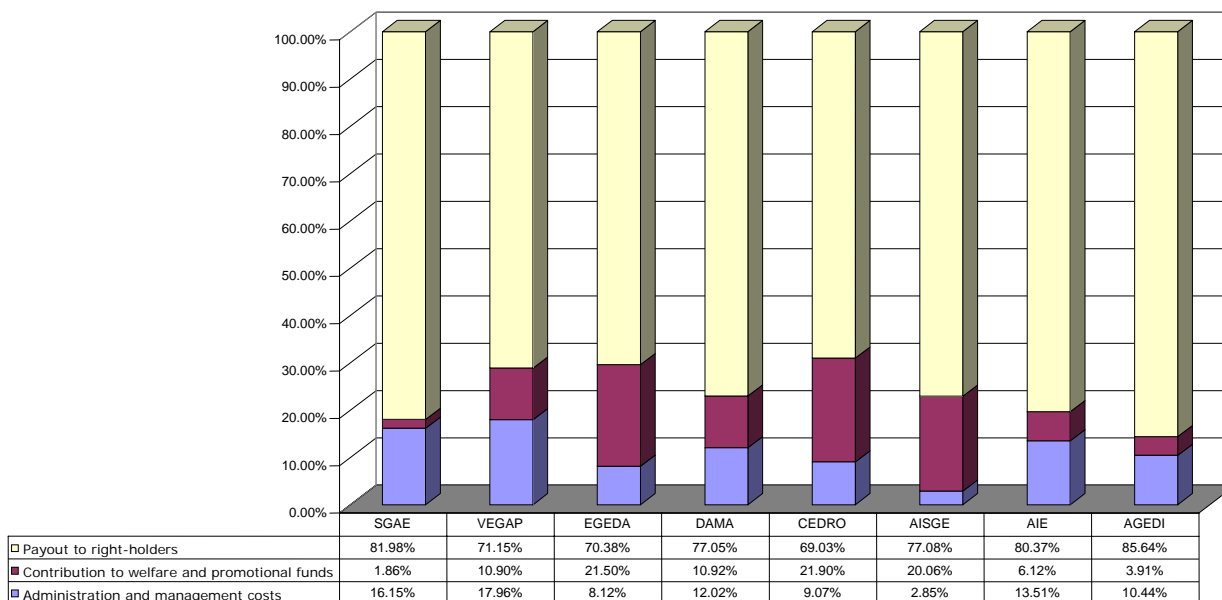
<sup>12</sup> Significant differences hold between the various collecting societies' administration rates, given that deductions are applied to collected revenue, and such revenue may comprise the society's own collections or collections made on its behalf by another collecting society.

In 2007 deductions from collected royalties were made in respect of administration, operating and management costs, and, secondly, in respect of member welfare activities and promotional and educational actions for authors and performers in pursuance of the requirements of the Spanish Copyright Act 1996.

The producer societies AGEDI and EGEDA, however, given that they act chiefly for bodies corporate, have been instructed by the Ministry of Culture to earmark most of such funds to fighting piracy.

The amounts itemised by collecting society were as follows (not counting €6.86 million deducted at SGAE and €8,000 deducted at CEDRO under governing body resolutions for purposes other than operating costs or statutory welfare, promotional and educational activities):

**Application of collected royalties**



*Source: Prepared by the authors.*

### **Estimated cost function of copyright collecting societies<sup>13</sup>**

The relationship holding between a collecting society's revenue and its total costs have been examined as a supplement to our analysis of admin cost deductions. It has been found that the relationship between the two magnitudes tends to increase with size. After a number of graphical analyses and modelling attempts, a regression model was used in which the dependent variable is the logarithm of the given society's total costs, while the independent variables are the logarithm of collected

<sup>13</sup> See Annex IV: Estimated cost function of copyright collecting societies.

revenue and seven dummy variables that take the value 1 where observations refer to a collecting society and value 0 otherwise.<sup>14</sup>

The results of this estimation model were:<sup>15</sup>

$$\begin{aligned} \text{LN (GT)} = & 4.5340 + 0.3736 \cdot \text{LN(R)} - 0.4411 \cdot \text{AG} + 0.0256 \cdot \text{VE} + 0.3364 \cdot \text{AI} - 0.3466 \cdot \text{EG} - 0.5794 \cdot \text{DA} \\ & (2.8186) (2.4192) (-2.3692) (0.0952) (1.7485) (-1.5960) (-2.4728) \\ & - 0.3063 \cdot \text{AIS} + 1.6975 \cdot \text{SG} \\ & (-1.7344) (4.2261) \end{aligned}$$

The adjusted determination coefficient was  $R^2 = 97.57\%$ . The model therefore accounts for 97.57% of variability in the total cost logarithm on the basis of collected revenue.

$$\text{GT} = \exp(4.5340) \cdot R^{0.3736} \cdot \exp(-0.4411 \cdot \text{AG} + 0.0256 \cdot \text{VE} + 0.3364 \cdot \text{AI} - 0.3466 \cdot \text{EG} - 0.5794 \cdot \text{DA} - 0.3063 \cdot \text{AIS} + 1.6975 \cdot \text{SG})$$

This shows that the functioning of copyright collecting societies exhibits economies of scale: costs grow less than proportionally to collected revenue, as shown in the chart below. The sector requires government intervention to ensure that resources are assigned to a reasonable standard of efficiency, prices do not become excessive and the more modest right-holders are adequately protected.<sup>16</sup>

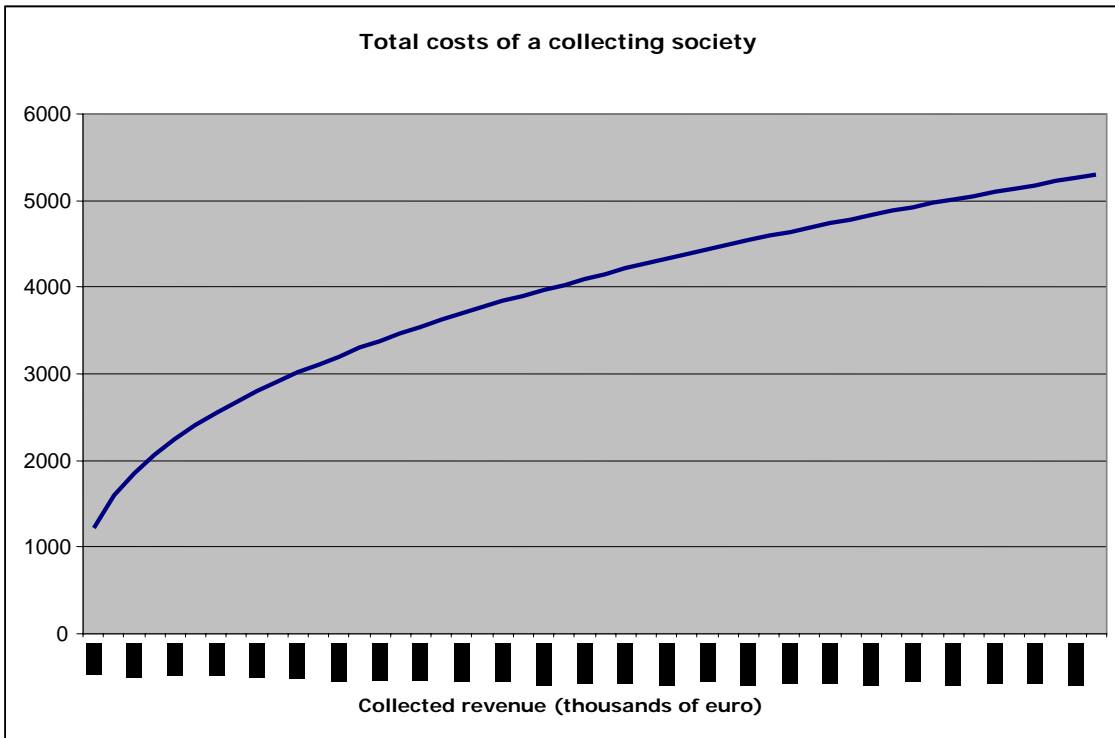
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<sup>14</sup> Estimation by ordinary least square under this model is unbiased and minimum-variance for models using panel data (see *The Theory and Practice of Econometrics*. Judge G. *et al.* 1985 John Wiley and Sons, Inc., pp 519 *et seq*). The model assumes that each society displays its own characteristics which influence total costs:

- Various inspection procedures and information requirements to obtain the basis of calculation to settle royalties with users and implement fair allocation to right-holders.
- Other special procedural and/or legal features, ranging from extensive litigation to recover public communication royalties to the funding of anti-fraud and anti-piracy initiatives.
- One marginal detail that might nonetheless be significant in this context is that some collecting societies provide services to others – royalties collections and the provision of information essential to the client society's operations, presumably at below arm's length price or the cost of acquiring such data privately.

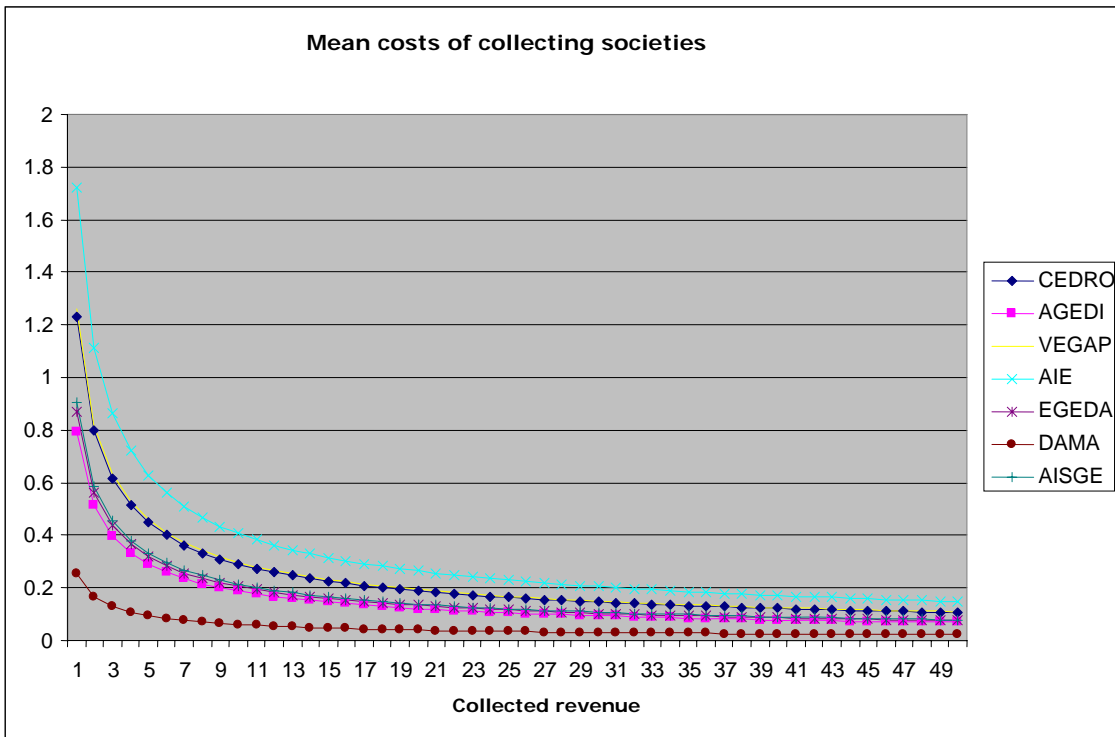
<sup>15</sup> Figures in brackets relate to the statistic *t*.

<sup>16</sup> See, for example, Segura, Julio. (1984). *Análisis microeconómico superior*. Editorial Saltés. Madrid.

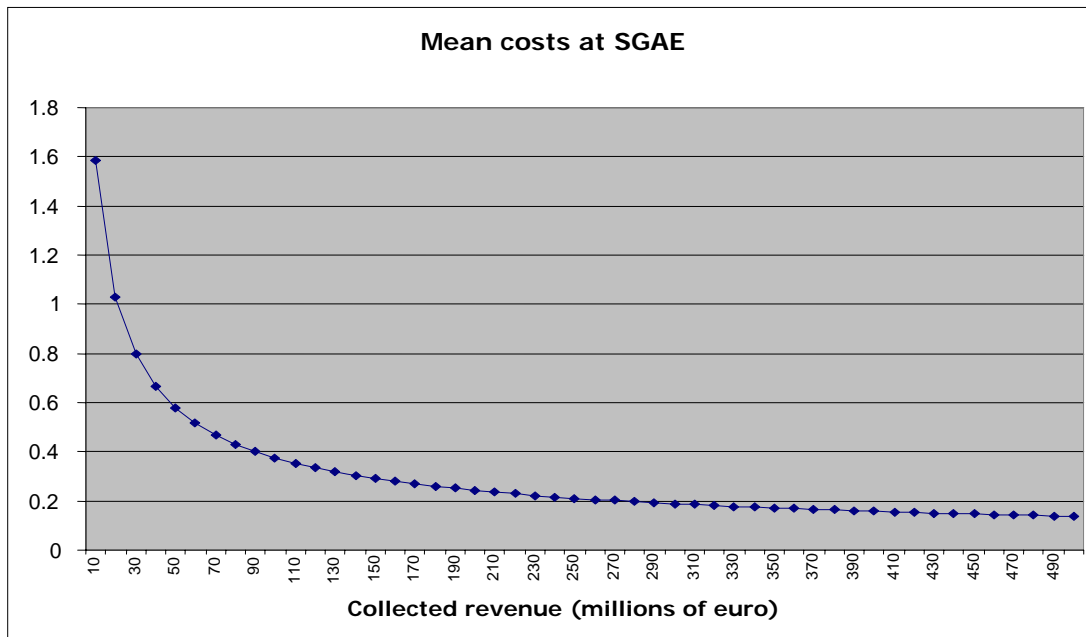


Source: Prepared by the authors.

Collecting societies' mean cost curves are shown in the following charts:



Source: Prepared by the authors.

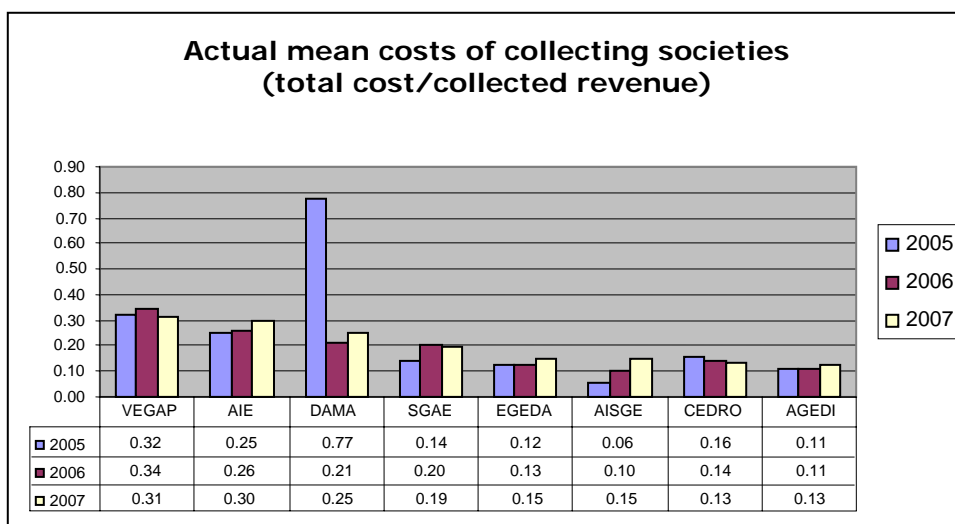


Source: Prepared by the authors.

The cost curves for CEDRO and VEGAP are virtually identical; the curves for EGEDA, AISGE and AGEDI are also closely matched. The small scale and relatively simple collection and allocation procedures of DAMA explain why its cost curve lies clearly below the rest.

The mean costs of SGAE are presented separately, because its size and overhead are much higher than those of the rest of collecting societies, and a single chart would obscure the differences from the rest of the field.

The curves shown above are the upshot of our estimation model, and are hence notional only. The actual mean costs for each collecting society are set out below.



The chart evinces a slightly different picture from that painted by the estimated mean cost curves. DAMA's case bears mention. Its structure is minimal, but it incurs high average costs, because, as a recently created body, its revenue is far lower than that of the rest of societies. VEGAP and AIE also sustain higher mean costs than the rest of societies.

## **Funding for welfare, promotional and educational activities**

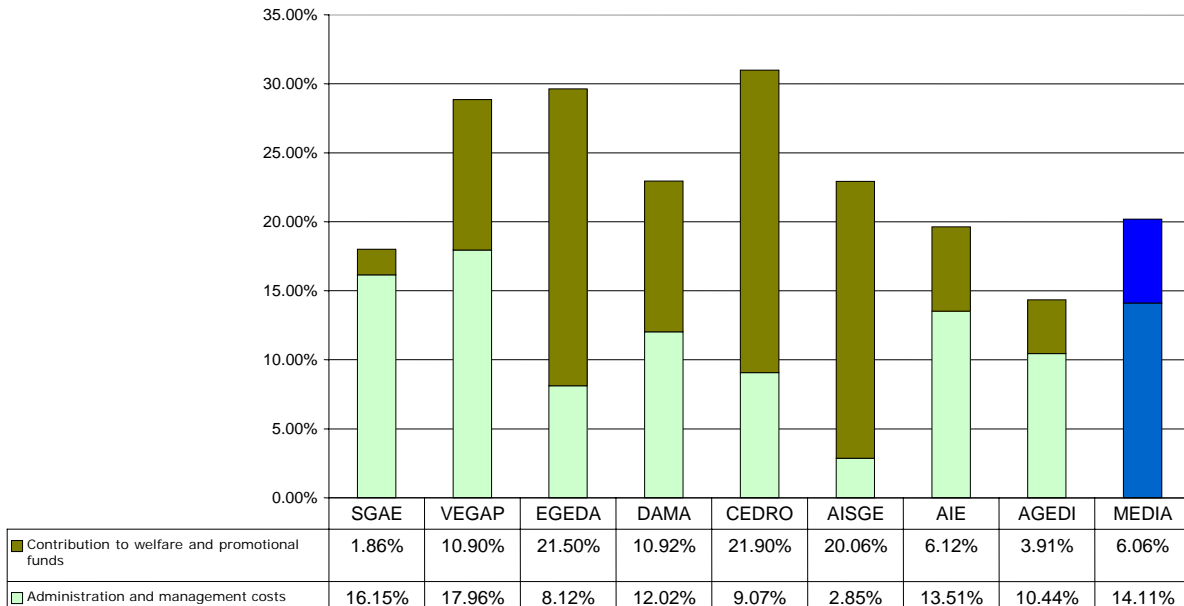
The following table sets out the sources of funding for administration costs and welfare, promotional and educational activities. Again, the collecting societies are widely heterogeneous in their sources of funds.

<b>SOURCE OF DEDUCTIONS AND FUNDS</b>						
ENTITY	Deductions from private copying levies	Deductions from rest of revenue	Total deductions in the year for welfare and promotion	Funds from lapsed unclaimed royalties	Other funding	Total funding
SGAE	<b>20%</b>	<b>10%</b>				
2005	4,724,070.00	6,763,696.00	11,487,766.00	8,209.299	2,638.435	22,335.500
2006	4,197,021.60	8,405,973.40	12,602,995.00	10,319.827	2,900.766	25,823.588
2007	4,101,971.00	9,443,670.00	13,545,641.00	10,221.948	13,345.986	37,113.575
CEDRO	<b>20%</b>	<b>(Miscellaneous %)</b>				
2005	5,673,075.65	152,990.77	5,826,066.42	0	0	5,826.066
2006	7,777,414.64	139,891.98	7,917,306.62	0	0	7,917.307
2007	9,226,212.99	187,613.37	9,413,826.36	0	0	9,413.826
DAMA	<b>20%</b>	<b>10%</b>		0	0	
2005	26,474.18	10,192.15	36,666.33	0	0	36.666
2006	27,024.10	83,564.66	110,588.76	0	0	110.589
2007	27,328.41	82,055.06	109,383.47	0	0	109.383
VEGAP	<b>20%</b>	<b>0%</b>		0	0	
2005	703,433.61	0.00	703,433.61	0	0	703.434
2006	828,151.40	0.00	828,151.40	0	0	828.151
2007	1,142,481.28	0.00	1,142,481.28	0	0	1,142.481
AIE	<b>20%</b>	<b>10%</b>				
2005	1,874,475.74	697,622.09	2,572,097.83	0	183.586	2,755.684
2006	1,343,274.00	1,155,755.00	3,842,303.00	1,807.839	258.768	5,908.910
2007	1,320,000.95	1,446,168.78	2,766,169.73	153.014	217.977	3,137.161
AISGE	<b>20%</b>	<b>20%</b>				
2005	2,039,133.81	8,223,808.94	10,262,942.75	53.254	154.332	10,470.529
2006	1,802,963.42	5,137,147.36	6,940,110.78	0	1,319.512	8,259.623
2007	1,671,830.41	3,948,899.46	5,620,729.87	0	217.190	5,837.920
AGEDI	<b>20%</b>	<b>0%</b>				
2005	1,447,613.85	0	1,447,613.85	0	0	1,447.614
2006	1,104,481.94	0	1,104,481.94	0	0	1,104.482
2007	920,791.66	0	920,791.66	0	0	920.792
EGEDA	<b>20%</b>	<b>(Miscellaneous %)</b>				
2005	2,975,553.34	1,031,264.29	4,006,817.63	0	0	4,006.818
2006	3,200,050.66	1,346,904.82	4,546,955.48	0	0	4,546.955
2007	2,671,115.15	1,903,037.25	4,574,152.40	0	0	4,574.152
<b>TOTAL</b>						
<b>2005</b>	<b>19,463,830.18</b>	<b>16,879,574.24</b>	<b>36,343,404.43</b>	<b>8,262.553</b>	<b>2,976.353</b>	<b>47,582.311</b>
<b>2006</b>	<b>20,280,381.76</b>	<b>16,269,237.22</b>	<b>37,892,892.98</b>	<b>12,127.666</b>	<b>4,479.046</b>	<b>54,499.605</b>
<b>2007</b>	<b>21,081,731.85</b>	<b>17,011,443.91</b>	<b>38,093,175.76</b>	<b>10,374.962</b>	<b>13,781.153</b>	<b>62,249.291</b>

Source: Prepared by the authors.



**Deductions for administration and management and welfare and promotional funds as a % of total collected revenue**



*Source: Prepared by the authors.*

Overall, total deductions from collected revenue ranged from 14.36% at AGEDI to 30% at EGEDA and CEDRO. More significant, however, is the mean value of 21.01%; AGEDI's percentage is inordinately low, because it applies deductions only for welfare, promotional and educational activities.

An appraisal of these data suggests the following conclusions:

*Because administration, welfare, promotional and educational costs are funded by a percent deduction from collected revenue, the more popularly successful copyright owners and the publishers with the largest catalogues effectively subsidise the less popularly successful copyright owners; this gives collecting societies a mutualistic character.*

*A collecting society's management costs, like its collected revenue, are a function of the type of copyright it is called on to manage, the extent to which its users are concentrated or scattered, and the society's management experience.*

*Given those three factors, administration and management costs can be regarded as appropriate, falling within a reasonable average range.*

*All else being equal, administration and management costs tend to decrease as and when a collecting society reaches agreement with user associations and secures an authoritative line of favourable court decisions.*

*The funding for welfare, promotional and educational activities comes from a 20% deduction from private copying levies and from other deductions from other royalty revenues stipulated by the governing body of the given society.*

*In summary, four out of every five euro collected by the collective copyright management system goes to copyright owners directly; the remaining euro is used in support of members in need, to promote members' activities collectively, or to defray the cost of collection processes.*

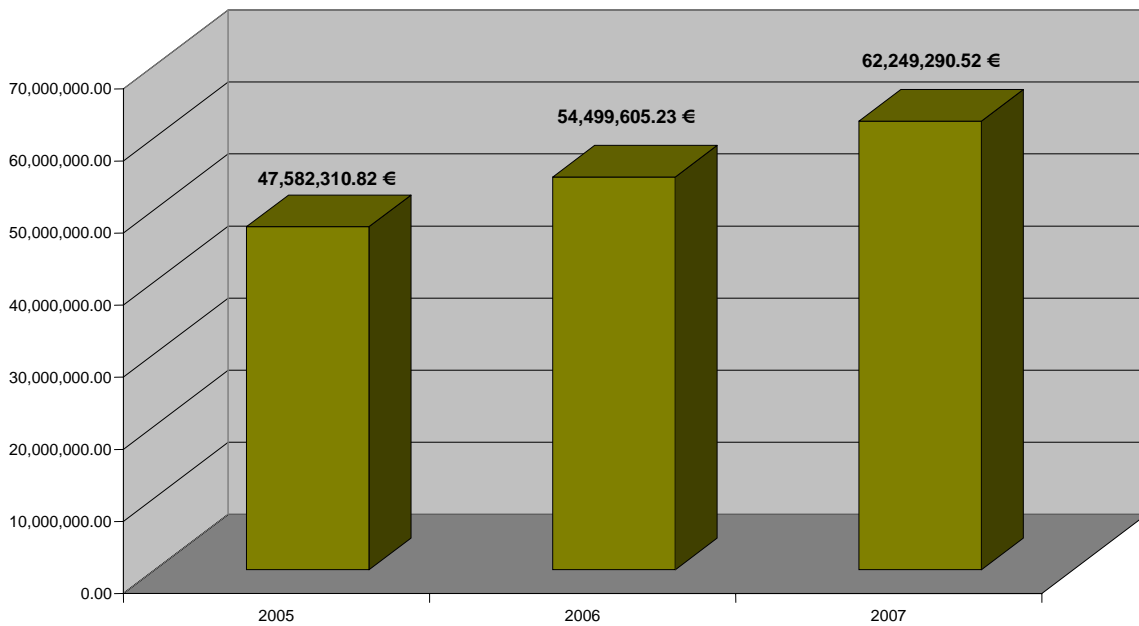
## **Welfare, promotional and educational activities**

Copyright collecting societies are required by the Spanish Copyright Act 1996 to engage in welfare, promotional and educational activities for the benefit of their members. The funding for these activities comes from two sources: a 20% statutory deduction from private copying revenues, and, in some cases, a deduction from other royalty revenues stipulated by the governing body of the given society. The deductions are appropriated to a welfare, promotional and educational fund managed by the collecting society itself or by a charitable trust attached to it.

The funding for welfare, promotional and educational activities breaks down as 44% from deductions from private copying levies, 35% from other deductions from other royalty revenues, and 21% from lapsed unclaimed royalties.

The total funds allocated to welfare, promotional and educational activities rose by 30% from 2005 to 2007.

Annual contribution to welfare and promotional funds



Source: Prepared by the authors.

Welfare, promotional and educational activities are put to two main purposes:

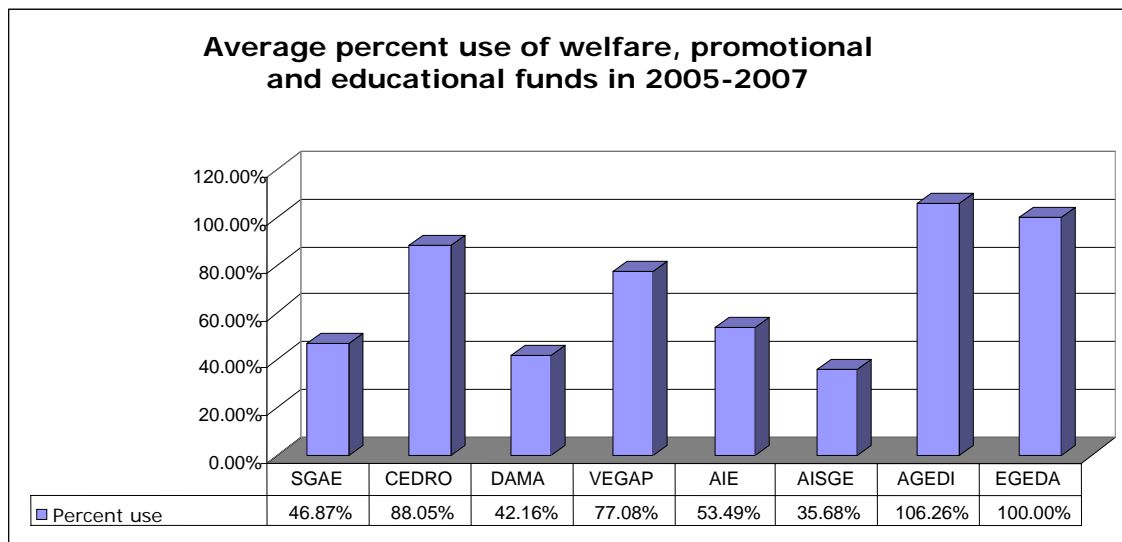
- welfare activities, which by statute command at least 10% of private copying levies;
- promotional and educational activities, which by statute also command at least 10% of private copying levies.

Some collecting societies have formed a foundation or charitable trust for the purpose of conducting or funding welfare, promotional and educational activities. The outcomes of the use of these funds have been as follows:

<b>USE OF FUNDS</b>			
<b>ENTITY</b>	<b>Welfare and educational activities</b>	<b>Promotional and dissemination activities</b>	<b>Total uses</b>
<b>CEDRO</b>			
2005	1,727,994.99	5,849,002.38	7,576,997.37
2006	1,484,788.04	4,751,138.96	6,235,927.00
2007	1,798,014.80	4,779,439.22	6,577,454.02
<b>SGAE</b>			
2005	1,622,561.00	11,122,999.00	12,745,560.00
2006	1,810,023.00	13,732,016.00	15,542,039.00
2007	1,063,149.00	10,613,137.00	11,676,286.00
<b>DAMA</b>			
2005		15,000.00	15,000.00
2006	12,300.00	40,325.00	52,625.00
2007	17,100.00	23,478.00	40,578.00
<b>VEGAP</b>			
2005	351,077.84	247,335.70	598,413.54
2006	665,395.89	228,543.95	893,939.84
2007	325,133.06	243,795.00	568,928.06
<b>AIE</b>			
2005	774,617.95	1,264,479.14	2,039,097.09
2006	855,600.00	1,416,219.00	2,271,819.00
2007	986,834.00	1,014,497.00	2,001,331.00
<b>AI SGE</b>			
2005	1,330,072.27	1,129,425.84	2,459,498.11
2006	1,578,524.69	1,318,008.72	2,896,533.41
2007	1,940,691.71	1,467,968.85	3,408,660.55
<b>AGEDI</b>			
2005		1,114,708.00	1,114,708.00
2006		1,470,942.00	1,470,942.00
2007		1,104,481.94	1,104,481.94
<b>EGEDA</b>			
2005	1,923,173.98	2,083,643.66	4,006,817.64
2006	2,238,661.43	2,308,294.06	4,546,955.49
2007	2,150,735.63	2,423,416.76	4,574,152.39
<b>TOTAL</b>			
<b>2005</b>	<b>7,729,598.03</b>	<b>22,826,593.72</b>	<b>30,556,091.75</b>
<b>2006</b>	<b>8,645,293.05</b>	<b>25,265,487.69</b>	<b>33,910,780.74</b>
<b>2007</b>	<b>8,281,658.20</b>	<b>21,670,213.77</b>	<b>29,951,871.96</b>

Source: Prepared by the authors.

In 2007, funds were allocated as follows: welfare and educational activities attracted 26% of funds, promotional and dissemination activities drew 37% and contributions to dependent charitable trusts for these purposes drew 37%.



The above chart shows that the publishers' and producers' collecting societies (AGEDI and EGEDA) apply their welfare, promotional and educational funds in their entirety. The rest of societies make far more restricted use of these funds; instead, they endow mutual funds to make provision for future benefits such as pension supplements, aid for over-60s, disability and sickness benefit, depreciation, etc.<sup>17</sup>

The following conclusions can be drawn on collecting societies' management of welfare, promotional and educational funds:

*All the collecting societies of course do apply the statutory deductions from the private copying levies they collect.*

*In the exercise of the discretion allowed to them by the law, the governing bodies of the collecting societies apply deductions at varying rates from royalties not otherwise subject to statutory deductions in order to discharge their statutory duty to allocate certain amounts to welfare, promotional and educational activities.*

*The specific application of these funds to their intended purposes is highly diverse, and lies within the discretion of collecting societies' governing bodies.*

<sup>17</sup> Welfare, promotional and educational funds are allocated to collective accident insurance, study grants, seminars, master-classes, conferences, legal and tax advisory services, charitable contributions, fairs and festivals, publications, purchase of premises for dependent charitable trusts, anti-piracy measures, etc. There being no specific regulation on the matter, the societies' governing bodies have discretion to apply the funds as they see fit, and their uses are accordingly highly varied.

*The collecting societies' mutualistic character again comes to the fore in their welfare programmes for members undergoing hardship and in the collective nature of their promotional and educational activities.*

*The growth of welfare, promotional and educational funds is closely tied to the behaviour of revenue, and, like revenue, is expected to stabilise in future.*

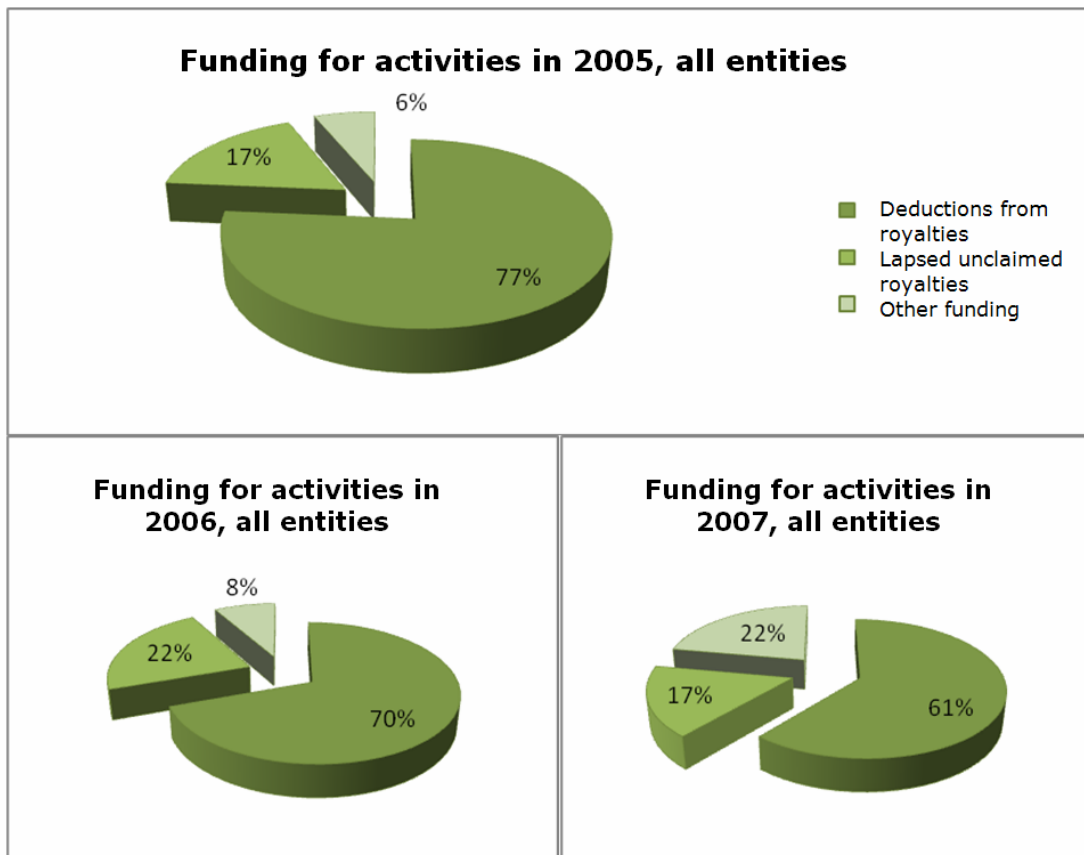
## **Charitable trusts connected with copyright collecting societies**

Welfare, promotional and educational activities, once funded by deductions from the year's revenue, may be conducted by the given collecting society itself, on the basis of a fund set up for the purpose, or by a *fundación* (Spanish charitable trust) or other special-purpose entity, whether affiliated to the collecting society or otherwise.

At present, the entities entrusted with implementing the welfare, promotional and educational activities funded by deductions from collected royalties (among other sources) are:

- For SGAE, part of its welfare and promotional fund is allocated to the activities of that nature carried on by the Fundación Autor, most of whose trustees are appointed by SGAE. Other activities, paid for out of the same fund, are put into practice by SGAE itself.
- CEDRO carries on its charitable activities directly using its own welfare and promotional fund.
- VEGAP created the Fundación Arte y Derecho charitable trust to manage those activities.
- DAMA manages its welfare, promotional and educational activities directly.
- AIE likewise manages its welfare, promotional and educational activities directly.
- AISGE manages its welfare, promotional and educational activities through charitable trust, Fundación AISGE.
- AGEDI uses its statutory welfare and promotional deductions to subsidise PROMUSICAE. Most AGEDI members are also PROMUSICAE members.
- EGEDA manages its welfare, promotional and educational activities directly.

An entity engaging in these charitable activities can also use funds other than deductions from royalties and lapsed unclaimed royalties. In the period 2005 to 2007, the sources of the charitable trusts' funding were:



Source: Prepared by the authors.

A copyright collecting society's election to use a charitable trust to fulfil its welfare, promotional and educational aims calls for a balance between effectiveness and efficiency on one hand and transparency on the other.

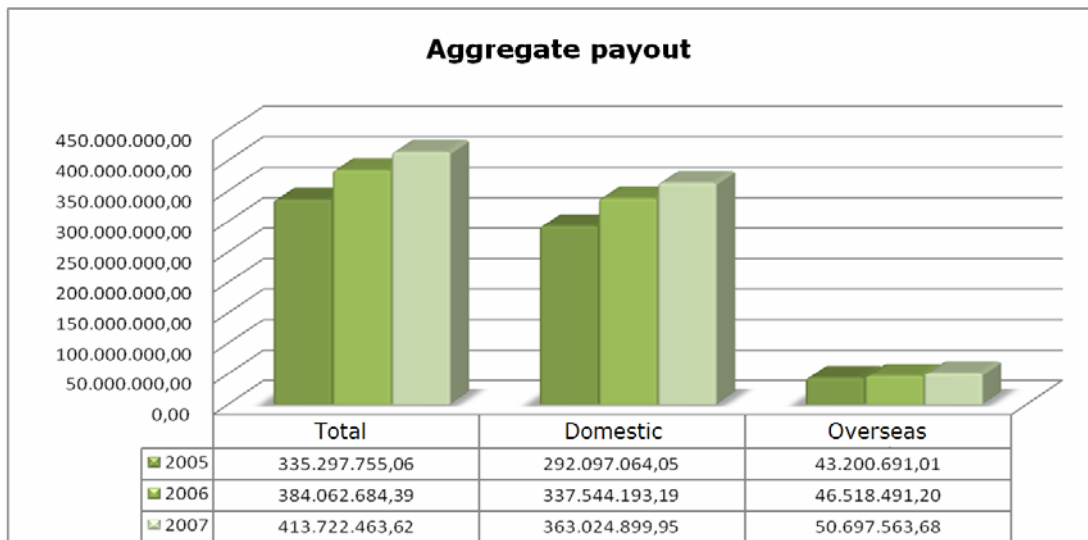
*The use of a charitable trust to handle welfare, promotional and educational funds may enhance effectiveness and efficiency by separating those concerns from the collecting society's core role of managing copyright and related rights.*

*That a charitable trust is funded by sources additional to deductions from collected royalties, or engages in activities in addition to managing those specific funds, need not impair the transparency of the system. Nevertheless, it may be appropriate for the second stage of this evaluation effort to undertake further scrutiny of the effectiveness and transparency of collecting societies' dependent charitable trusts as managers of their welfare, promotional and educational funds.*

*Regulation should address the uses of welfare, promotional and educational funds – so as to rectify the present heterogeneity of uses – and should extend, furthermore, to a statutory duty of separate management from the rest of funds of the collecting society - if the society administers them directly - or of any charitable trust performing that role.*

## Allocation and payout of royalties to right-holders

After deduction of administration and management costs and of the funds for welfare, promotional and educational activities prescribed by the Spanish Copyright Act 1996, collecting societies' revenues are allocated for distribution among right-holders. Allocations over the past three years have been as follows:



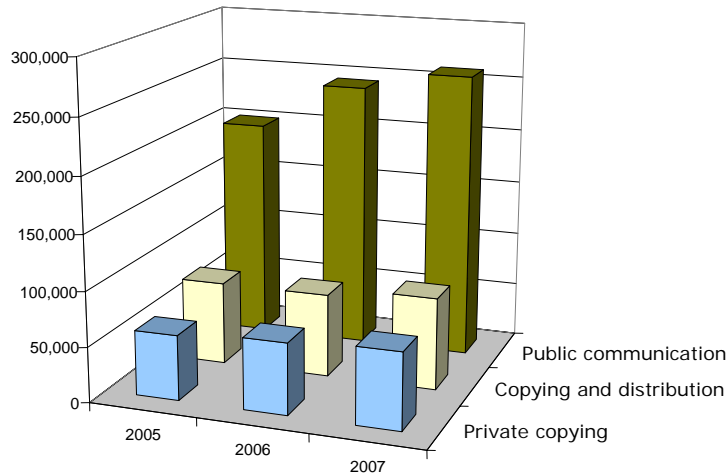
Source: Prepared by the authors.

In absolute terms, the royalties allocated to foreign authors and performers accounted for 12.88% of total allocations in 2005, 12.11% in 2006 and 12.25% in 2007. Aggregate royalties payable to domestic and foreign copyright owners combined grew more – 23% - than did royalties payable to foreign performers and producers, which rose 17%.

By type of royalty, in order of payout volume the most important was public communication, followed by private copying levies and copying and distribution. The figures are shown in the following chart:



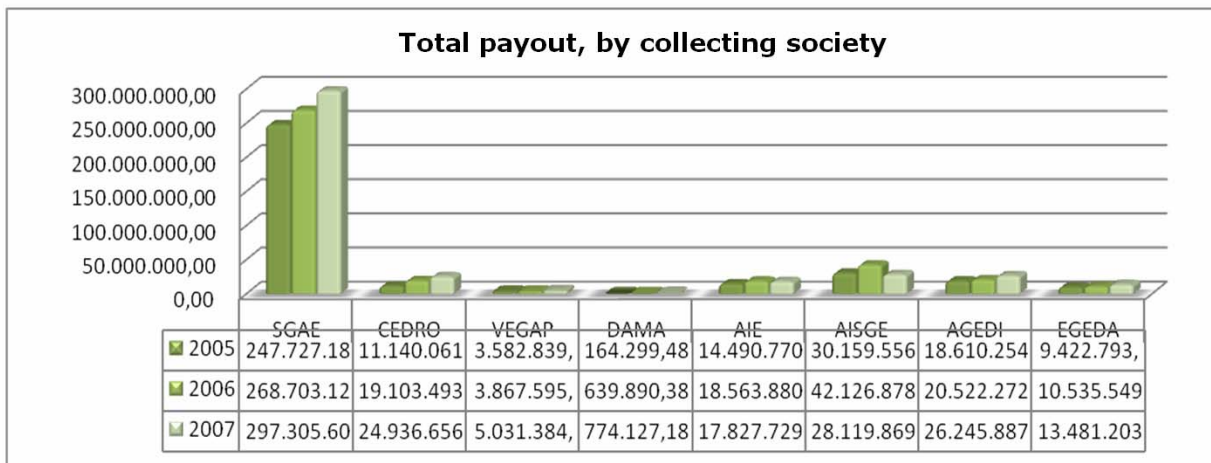
**Allocation of royalties to copyright owners by royalty type (thousands of euro)**



	2005	2006	2007
Private copying	59,038	64,710	69,394
Copying and distribution	75,535	75,727	83,643
Public communication	200,724	243,434	260,122

Source: Prepared by the authors.

The breakdown of payouts by collecting society of course reflects the size of the given society, the nature of its managed rights and the number of members. Royalties payout volume by collecting society was as follows:



Source: Prepared by the authors.

The overall picture is one of continued moderate growth of amounts paid out to authors, performers and producers. The exception is AISGE, which made large non-recurring collections in 2006 as a result of winning its court battle against its debtors for public communication royalties.

Royalties are apportioned to copyright owners by a range of procedures, which have been approved by the competent authorities and, being publicly available, are accessible to potential beneficiaries.

A collecting society's royalties allocation procedure is adopted, with the consent of its membership, by its governing body (a general assembly or delegated body), and must conform to the statutory requirements that it be predetermined in the articles of association, that it apportion royalties among right-holders fairly and non-arbitrarily, and that it give each right-holder a share in collected royalties proportional to the usage of his/her works.

*Allocation procedures vary widely, depending on the nature of the copyright and related rights, the media in which the protected works are embodied, the type of user and mode of use of the licensed rights. Societies' allocation procedures are thus shaped by the type of rights concerned and by members' discretion.*

*Allocation procedures have been found to be legally compliant, being adopted by the competent bodies and satisfying the existing statutory requirements of transparency – they are publicly available and known to stakeholders – and objectivity, given the allocation methods used.*

## **Distribution of copyright and related right royalties to right-holders**

After deduction of administration and management costs and of the funds for welfare, promotional and educational activities, collecting societies' revenues are allocated for distribution, by procedures stipulated by the societies' respective general assemblies, among the holders of the various kinds of copyright, in observance of the legal principles of fairness, predetermination, publicity, non-arbitrariness and proportionality.

The beneficiaries of the system of copyright collecting societies are a combined total of over one hundred thousand authors, performers and producers. By collecting society, beneficiaries are distributed as follows:<sup>18</sup>

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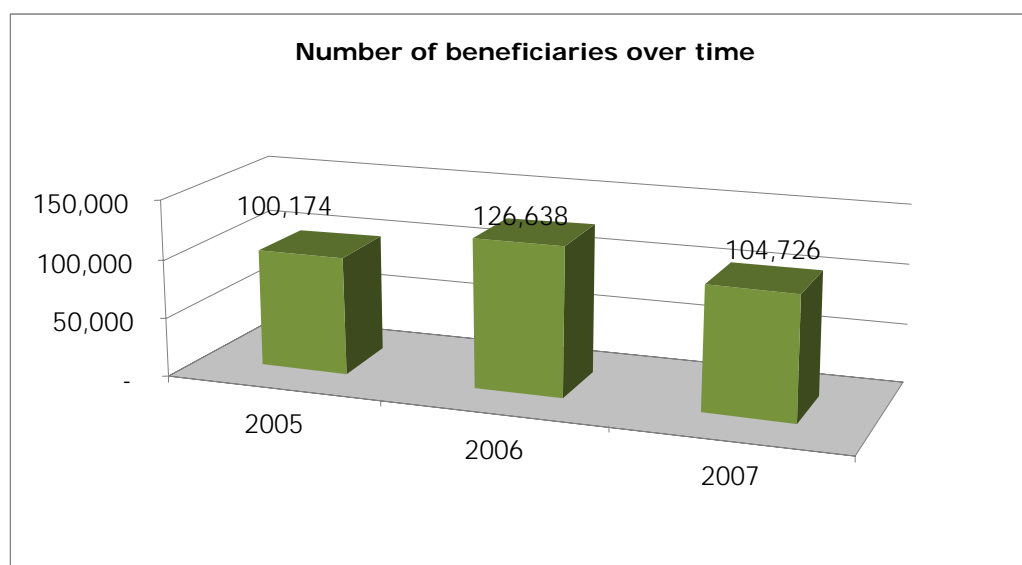
<sup>18</sup> Beneficiaries holding membership of foreign entities are included in some cases.

	2005	2006	2007
<b>AGEDI</b>	230	204	223
<b>AIE</b>	15,027	20,310	24,359
<b>AI SGE</b>	41,879	58,609	28,792
<b>CEDRO</b>	8,152	10,585	12,581
<b>DAMA</b>	61	93	184
<b>EGEDA</b>	1,957	2,164	2,111
<b>SGAE</b>	31,489	33,197	34,910
<b>VEGAP</b>	1,379	1,476	1,566
<b>TOTAL</b>	<b>100,174</b>	<b>126,638</b>	<b>104,726</b>

Source: Prepared by the authors.

Beneficiaries can be both natural persons and bodies corporate (e.g., producers, publishers).

The beneficiaries of collecting societies' royalty payouts have changed over time as follows:



Source: Prepared by the authors.

Payout beneficiaries as a percentage of total society members were as follows:

	<b>Beneficiaries</b>	<b>Members</b>	<b>Beneficiaries/members percent</b>
<b>AGEDI</b>	223	222	100.5%
<b>AIE</b>	24,359	13,862	175.7%
<b>AI SGE</b>	28,792	7,992	360.3%
<b>CEDRO</b>	12,581	13,133	95.8%
<b>DAMA</b>	184	358	51.4%
<b>EGEDA</b>	2,111	1,320	159.9%
<b>SGAE</b>	34,910	93,933	37.2%
<b>VEGAP</b>	1,566	1,708	91.7%
<b>TOTAL</b>	104,726	31,810	79.5%

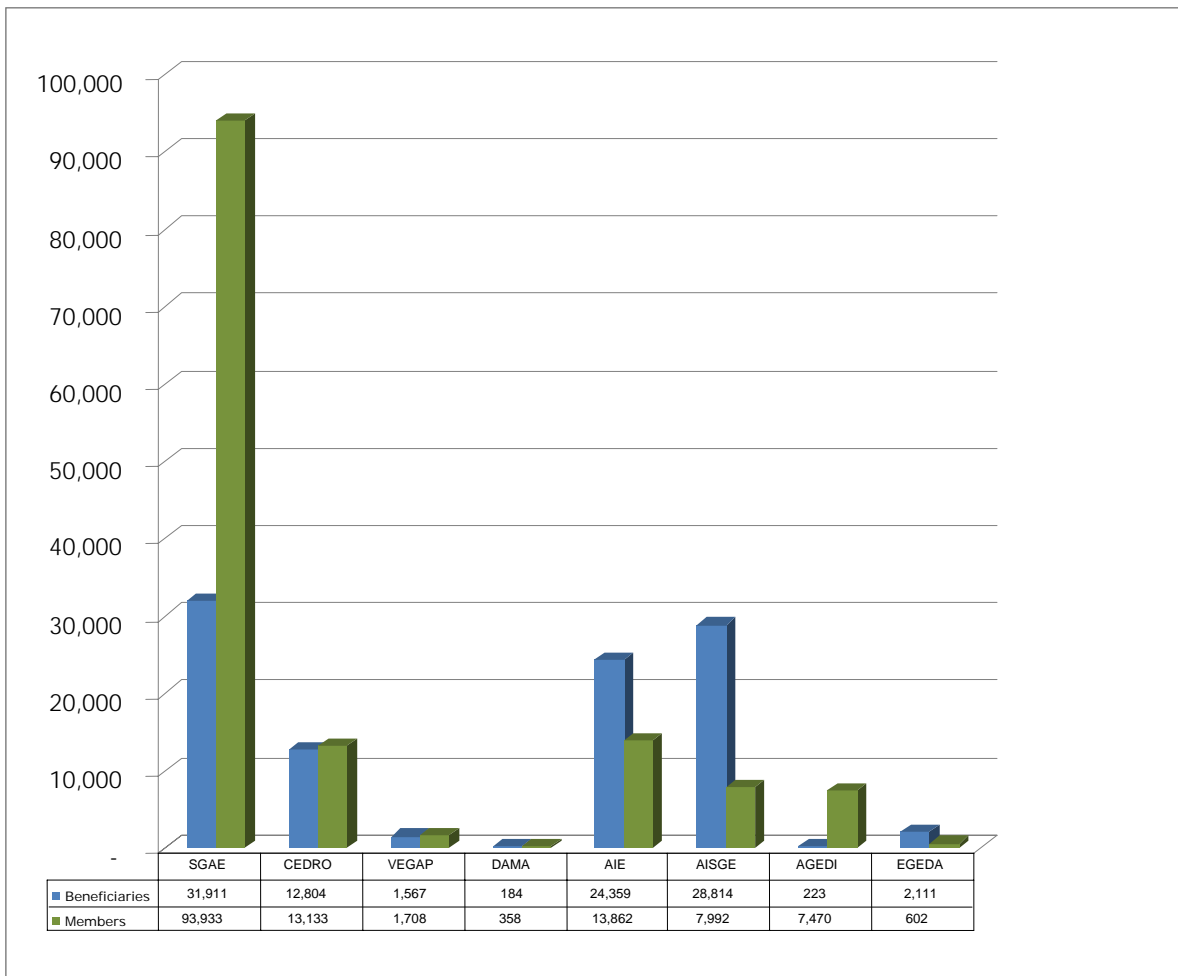
*Source: Prepared by the authors.*

The low percentage of beneficiaries at SGAE and DAMA indicates the high proportion of members not generating royalties.<sup>19</sup>

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<sup>19</sup> At DAMA, royalties accrue only to film and television screenwriters and directors whose work is screened in the given year. At SGAE, royalties accrue only to members whose repertoire has been screened, copied or communicated.

Collecting societies' beneficiaries and members in 2007



Source: Prepared by the authors.

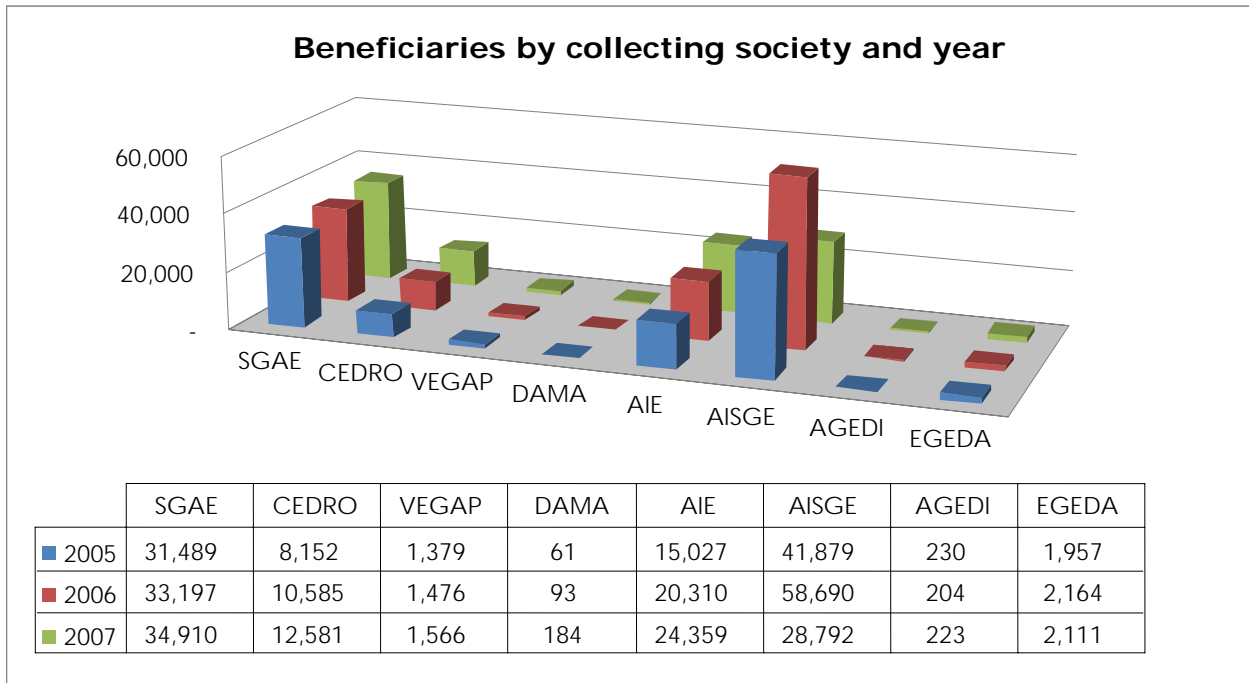
Collecting societies' payouts can be characterised as follows:

The number of beneficiaries varies by collecting society and its distinctive features.

The asymmetry in a collecting society's royalties payout mirrors the asymmetry in the world of the arts<sup>20</sup>. For example, the ten most popular Spanish stage productions accounted for 51.5% of all takings in the Spanish theatre. The top five record labels amassed 90.2% of the Spanish music market. Only 8% of the 1,686 films screened in Spain achieved distribution to over five hundred cinemas. The ten most widely screened films drew 24% of box office takings and total film-goers in Spain. The five leading film distributors attained 70% of film-goers. In 2005, the film attracting the highest television viewership was *Les choristes*, with 10.8 million viewers; the most popular television series, *Cuéntame cómo pasó*, achieved average viewing figures of

<sup>20</sup> See Annex V: Statistical analysis of the distribution of royalties among holders of copyright and related rights.

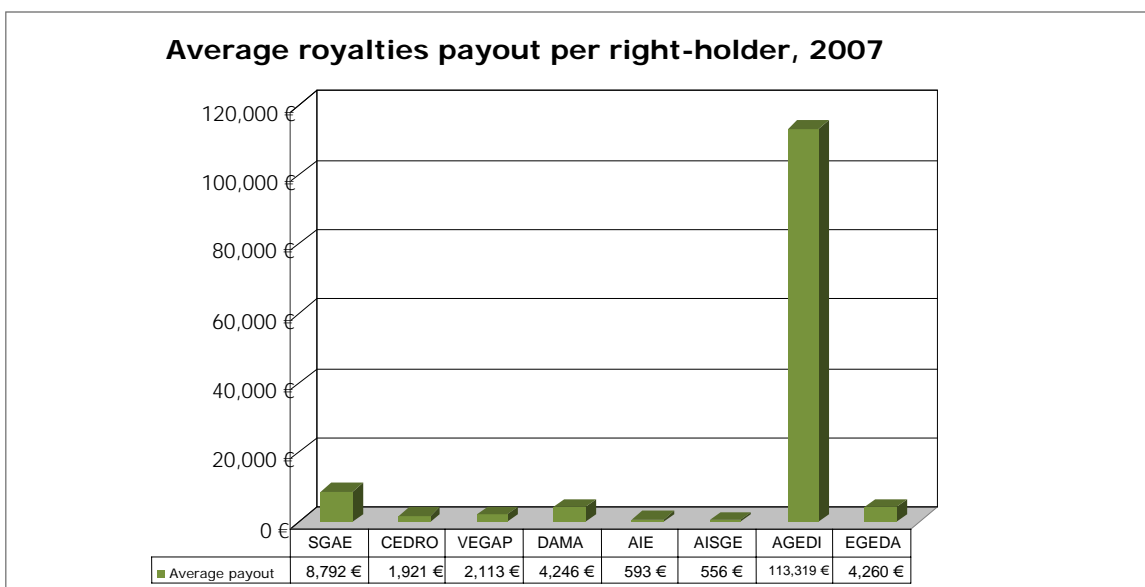
5 million, making for a combined total of 65 million viewers over its thirteen episodes. (All data provided by the Ministry of Culture for 2005.<sup>21</sup>)



Source: Prepared by the authors.

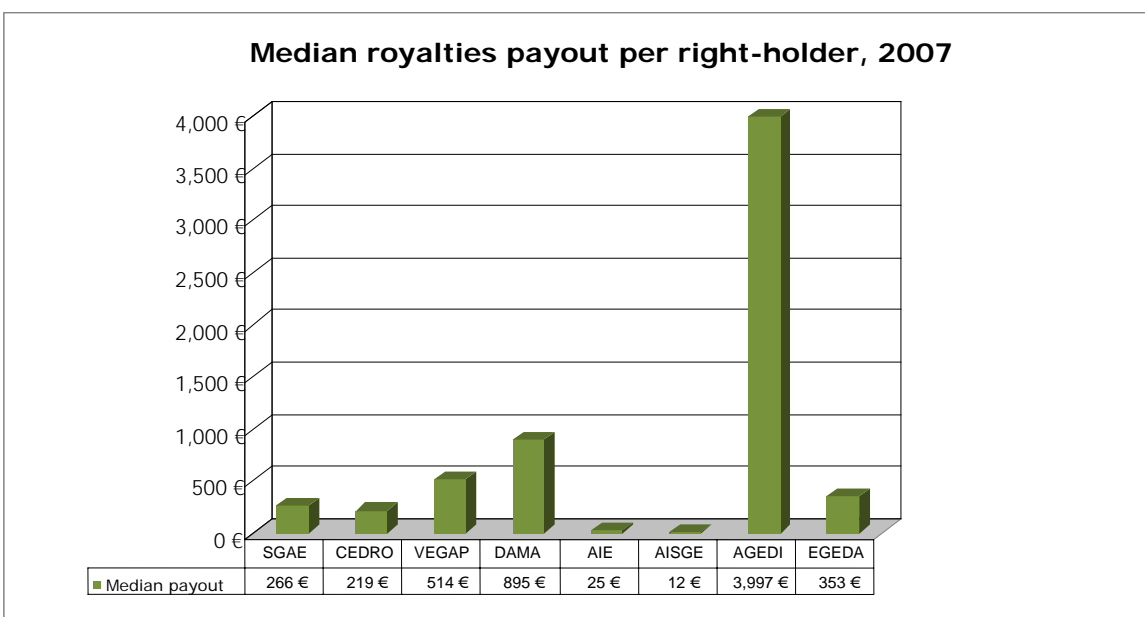
The following chart displays the average royalties payout per right-holder in 2007 at each copyright collecting society. The average payout at AGEDI was of course much higher than elsewhere, because its beneficiaries are producers holding large portfolios of rights.

<sup>21</sup> Fundación Autor. (2005). "Anuario SGAE de las artes escénicas, musicales y audiovisuales. 2006". Fundación Autor. Madrid.



Source: Prepared by the authors.

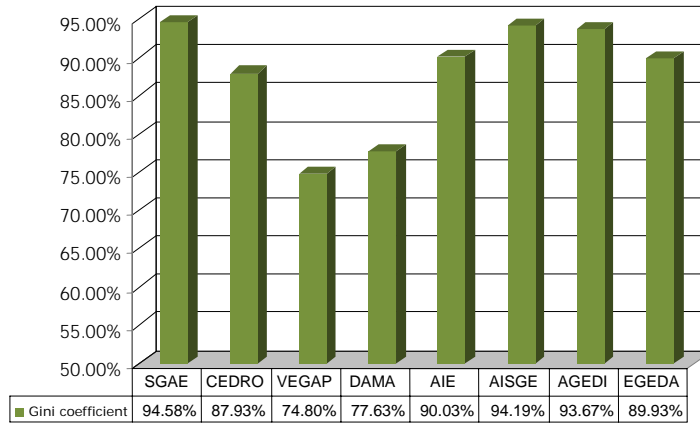
A more significant figure is the median payout – the amount dividing all a society’s payees into an upper and a lower half, such that 50% of payees receive more than the median and 50% receive less.



Source: Prepared by the authors.

The Gini coefficient measures the equality/inequality of distribution among beneficiaries. A coefficient of 0 points to a wholly even distribution across all royalties payees, while a coefficient of 1 means that a single payee receives the entire payout. The closer the Gini coefficient comes to 1, therefore, the greater the extent to which royalties are clustered in a small number of beneficiaries.

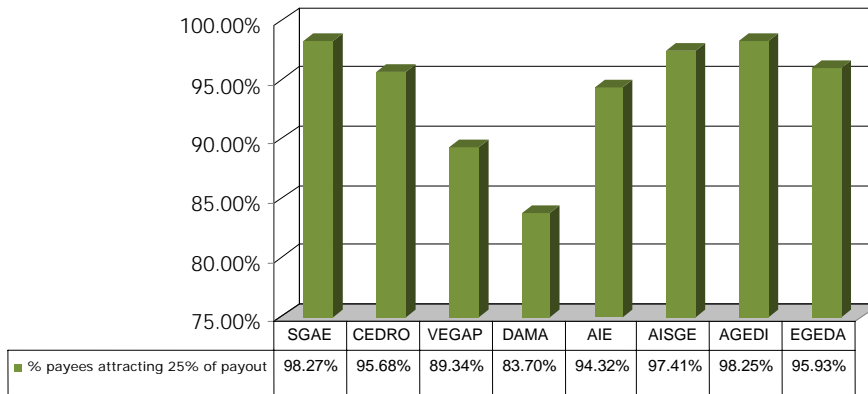
**Gini coefficient of each collecting society's payouts**



Source: Prepared by the authors.

Another measure of the degree to which societies' payouts are unequally distributed is the percentage of payees receiving the least payouts and the percentage of payees attracting 25% of the total payout.

**% payees attracting 25% of payout**



Source: Prepared by the authors.

The above charts reveal that success concentrates in a small number of works in collecting societies' repertoires, and that those successful works are clustered narrowly in only a few right-holders.



Another influential factor is that a wide range of repertoire works are held by only a few copyright owners, particularly in the case of publishers and producers. It is to be borne in mind that only three out of the eight collecting societies do not have publishers among their members.

The above figures do not distinguish between payouts to authors and performers and payouts to publishers and producers, so the appearance of inequality among right-holders is sharply exacerbated, since the average payout to a publisher or producer is typically ten times the average payout to an author or performer.

The following inferences are available as to collecting societies' royalties payouts:

*Collecting societies' royalties payouts tend towards stability, mirroring revenue; they have also been influenced by payouts resulting from non-recurring collections.*

*The number of payees of a collecting society's royalties payouts varies as a function of the size of the right-holder class represented by that society, the nature of the royalties collected, and whether royalties are payable to members only or to authors, performers and producers regardless of membership.*

*Given each collecting society's freedom to set its own royalties allocation rules, those rules differ from one society to another. In some cases, royalties are paid out even to non-members, while in others they are paid out to members only - to the entire membership, or to a variable proportion of it.*

*The average allocated payout again varies by collecting society. This variability is explained by each collecting society's ability to collect royalties, the nature of the right-holder class it represents, the nature of the collected royalties, the users of the protected works and benefits.*

*Payouts invariably cluster in a small number of right-holders; this mirrors the world of culture and the arts, where recognition and commercial success concentrate in a small number of right-holders and a narrow range of protected works and benefits.*

*The conclusion can be drawn that the fairness of the collecting societies is to be found not in an egalitarian distribution of collected royalties but in a distribution weighted objectively and proportionally to remunerate those protected works and benefits that generated the royalties originally.*

## **Collecting societies' identification and payment of royalties**

Royalties are nominally allocated to the respective right-holders, but a large amount of royalties are retained within collecting societies for a variety of reasons: the right-holder could not be identified at the allocation stage; the collecting society does not

have the right-holder's current contact details; the right-holder has died, and his or her successors and assigns are unknown.

These retained royalties remain within the society's equity until lapse of any right-holder's entitlement to them, at which point they are recognised as income which - there being no specific regulation on its permitted uses - is appropriated to such purpose as the society's governing body may decide. When entitlement to such royalties lapses by reason of a time limitation of a certain number of years, amounts not paid to right-holders are likewise allocated to varying purposes in the discretion of the collecting society's governing body.

Based on an estimate of the proportion of collected royalties for which the right-holders remain unidentified at a given society, it can be estimated, for 2007, the amount of royalties likely to be unclaimed upon first distribution. Subsequent searches for right-holders and claims operate to reduce this proportion considerably.

	<b>Average collections 2005-2007</b>	<b>Average % due to unidentified holders</b>	<b>Estimated royalties due to unidentified holders</b>
<b>Total</b>	<b>482,405,431.03</b>		<b>65,843,945.46</b>
SGAE	338,335,619.80	15%	50,750,342.97
CEDRO	35,253,184.06	9%	3,172,786.57
VEGAP	8,776,131.37	0%	0
DAMA	720,751.00	0%	0
<b>Authors</b>	<b>383,085,686.23</b>		<b>53,923,129.53</b>
AIE	19,661,726.31	19%	3,735,728.00
AISGE	38,255,331.32	14%	5,355,746.38
<b>Performers</b>	<b>57,917,057.63</b>		<b>9,091,474.38</b>
AGEDI	21,848,786.54	4%	873,951.46
EGEDA	19,553,900.393	10%	1,955,390.09
<b>Producers</b>	<b>41,402,687.47</b>		<b>2,829,341.55</b>

*Source: Prepared by the authors.*

In the absence of specific regulations, the articles of association of the various collecting societies stipulate different time limitations on the basis of the general rules laid down in the Spanish Civil Code. As at 2007, the time limitations were as follows:

ENTITY	Identified	Unidentified	INTENDED USE
SGAE	15 years	5 years	Society's income statement, activities fund
CEDRO	15 years	15 years	Society's income statement
VEGAP	15 years	5 years	Society's income statement
DAMA	15 years	15 years	Society's equity
AIE	15 years	5 years	Society's income statement, liability provision, activities fund or extraordinary payout
AISGE	15 years	5 years	Society's income statement, activities fund
AGEDI	5 years	N/A	Payout
EGEDA	3 years	N/A	Payout

Source: Prepared by the authors.

Lapse of title to royalties has occurred over the past three years in correlation with the age of the given collecting society. Lapsed unclaimed royalties have, in the discretion of each collecting society's governing body, been put to a variety of uses: appropriation to welfare, promotional and educational funds, recognition in the year's income statement, or distribution to other right-holders as an extraordinary payout.

Over the past three years lapsed unclaimed royalties have been allocated as follows:

YEAR	ACTIVITIES FUND	INCOME STATEMENT	PAYOUT	TOTAL
2005	8,262,553.40	4,828,114.41	1,318.71	13,091,986.52
2006	12,127,666.18	6,451,021.82	6,064,516.73	24,643,204.73
2007	10,374,962.00	6,356,333.57	854,950.18	17,586,245.75

Source: Prepared by the authors.

At the four collecting societies where unclaimed royalties have lapsed, the amounts have been allocated as follows, in thousands of euro:

ENTITY	YEAR	ACTIVITIES FUND	INCOME STATEMENT	PAYOUT	TOTAL	As a % collected revenue
SGAE	2005	8,209	4,828	0,00	13,037	4.56%
	2006	10,320	6,344	0,00	16,664	5.35%
	2007	10,222	6,294	0,00	16,516	4.80%
AIE	2005	0,00	0,00	0,00	0,00	0.00%
	2006	1,808	107	6,063	7,978	<b>43.66%</b>
	2007	153	61	855	1,068	5.07%
AISGE	2005	53	0,00	0,00	53	0.10%
	2006	0,00	0,00	0,00	0,00	0.00%
	2007	0,00	2	0,00	2	0.01%
AGEDI	2005	0,00	0,00	1	1	0.01%
	2006	0,00	0,00	2	2	0.01%
	2007	0,00	0,00	1	1	0.00%
<b>TOTAL</b>	<b>2005</b>	<b>8,263</b>	<b>4,828</b>	<b>1</b>	<b>13,092</b>	<b>3.05%</b>
	<b>2006</b>	<b>12,128</b>	<b>6,451</b>	<b>6,065</b>	<b>24,643</b>	<b>5.44%</b>
	<b>2007</b>	<b>10,375</b>	<b>6,356</b>	<b>855</b>	<b>17,586</b>	<b>3.57%</b>

Source: Prepared by the authors.

The amount of lapsed unclaimed royalties is a function of the nature of the rights and the right-holders, on one hand, and, on the other, of the time limitation applicable to such rights. Moreover, a direct relation holds between the amount of lapsed unclaimed royalties and the age of the collecting society.

In 2005, almost the entirety of lapsed unclaimed royalties related to rights managed by SGAE; it was only in 2006 and 2007 that AIE began to record lapsed unclaimed royalties in any significant amount.

Summarising:

*Most collecting societies have unclaimed royalties on their balance sheets, but it is only at four of them that any portion of such royalties has lapsed, pursuant to the societies' decisions.*

*No specific regulations are in place as to how a collecting society must deal with royalties payable to unidentified right-holders, the applicable time limitation, the use of any financial returns on such funds, or the final use to which lapsed royalties must be put.*

*In the period under consideration, lapsed unclaimed royalties were used mostly to feed the societies' welfare, promotional and educational funds or were put through the year's income statement, indirectly benefiting members by helping to defray administration and management costs. In two cases, lapsed royalties were distributed to members as an extraordinary payout.*

*In some cases, given the difficulty of locating right-holders, the society elects to set up a reserve with which to meet any subsequent claims for such royalties, and to pay out a part of unclaimed royalties among members or members of foreign entities with which a reciprocity agreement is in place.*

## **6. CONCLUSIONS AND RECOMMENDATIONS**

The evaluation team's assessment of the functioning of copyright collecting societies gives grounds for the following conclusions.

### *1. As to the model of collective management of copyright and related rights*

- The system of collective management of copyright and neighbouring rights is vital to assuring compensation to authors, performers and producers for the use of their works and benefits, because it protects their rights and allocates their royalties more effectively and efficiently than the alternative solution, individual management.
- The regulatory framework applicable to collecting societies gives them a high degree of autonomy, exercised through their governing bodies, which are competent to lay down the societies' own operating procedures.
- The law applicable to copyright collecting societies makes insufficient provision for regulating their operating procedures. Their governing bodies are wholly autonomous in their decision-making; their activities are entirely compliant with the present legal framework.

### *2. As to collecting societies' copyright management procedures*

#### *Regarding system beneficiaries*

- The rights, recording media, communication media and beneficiaries that collecting societies are called on to handle are so widely diverse that it is hard to make meaningful comparisons of their results and management processes. The system is characteristically heterogeneous.
- A collecting society's benefits often extend beyond members to all copyright owners and right-holders, regardless of membership.

### *Regarding collection procedures*

- The stark diversity of collecting societies in terms of revenue and collecting effectiveness reflects the widely varying types of copyright and types of user they are concerned to address, making for different collection processes; and the degree of each society's market entrenchment and collecting experience.
- The collections process is subject to market forces and to the statutory duties that restrict the collecting societies' dominant position and assure fair and equal treatment of users. Disputes arising in the course of fee negotiations fall to be resolved by the courts. Court proceedings delay collections, introduce an element of revenue variability, and often raise collecting societies' operating costs.
- The effectiveness and efficiency of the collections process grow as a function of a collecting society's experience; they are also enhanced if a society achieves a history of favourable court decisions, and if negotiations are streamlined because copyright users act through a small cluster of interlocutors.
- The dual collections procedure imposed by statute (general contracts/fees) tempers collecting societies' dominant position with a duty to negotiate, a duty to set general public fees that apply by default, and a duty to assure fair and equal treatment of users. Collecting societies' generally applicable fees are public in practice, but there is no statutory duty to make them public.
- The effective accomplishment of the collecting societies' objectives is partly undermined by the frequent litigation arising from the collections process. Arbitration and mediation bodies such as the Spanish Copyright Commission provide forums of alternative dispute resolution out of court.
- Both copyright owners and users save costs by the application of licence fees for general usage of collecting societies' repertoires.
- Centralising collections in a single entity, if practicable, might make the collections system more effective. Centralisation would appear to be more readily envisaged for the private copying levies prescribed by the Spanish Copyright Act 1996. It would streamline the collections process from the standpoint of users; by having a single interlocutor, users would then be required to deal with fewer royalty collection channels.

### *Regarding deductions from copyright revenues*

- Because administration, welfare, promotional and educational costs are funded by a percent deduction from collected revenue, the more popularly successful copyright owners and the publishers with the largest catalogues effectively subsidise the less popularly successful copyright owners; this gives collecting societies a mutualistic character.

- A collecting society's management costs, like its collected revenue, are a function of the type of copyright it is called on to manage, the extent to which its users are concentrated or scattered, and the society's management experience.
- Given those three factors, administration and management costs can be regarded as appropriate, falling within a reasonable average range.
- All else being equal, administration and management costs tend to decrease as and when a collecting society reaches agreement with user associations and secures an authoritative line of favourable court decisions.
- The funding for welfare, promotional and educational activities comes from a 20% deduction from private copying levies and from other deductions from other royalty revenues stipulated by the governing body of the given society.
- In summary, four out of every five euro collected by the collective copyright management system goes to copyright owners directly; the remaining euro is used in support of members in need, to promote members' activities collectively, or to defray the cost of collection processes.

#### *Regarding welfare and promotional funds*

- All the collecting societies of course do apply the statutory deductions from the private copying levies they collect.
- In the exercise of the discretion allowed to them by the law, the governing bodies of the collecting societies apply deductions at varying rates from royalties not otherwise subject to statutory deductions in order to discharge their statutory duty to allocate certain amounts to welfare, promotional and educational activities.
- The specific application of these funds to their intended purposes is highly diverse, and lies within the discretion of collecting societies' governing bodies.
- The collecting societies' mutualistic character again comes to the fore in their welfare programmes for members undergoing hardship and in the collective nature of their promotional and educational activities.<sup>22</sup>
- The growth of welfare, promotional and educational funds is closely tied to the behaviour of revenue, and, like revenue, is expected to stabilise in future.

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<sup>22</sup> For example: SGAE authors' widows and orphans fund; collective life and disability insurance, telephone assistance, social and healthcare benefits and individualised aid at CEDRO; collective accident insurance, travel assistance card and hardship fund at AIE; benefits for over-60s, home care service, temporary and permanent disability benefits, medication subsidies and hardship benefits, inter alia, at AISGE; etc.

### *Regarding the use of charitable trusts to manage welfare and promotional funds*

- The use of a charitable trust to handle welfare, promotional and educational funds may enhance effectiveness and efficiency by separating those concerns from the collecting society's core role of managing copyright and related rights.
- That a charitable trust is funded by sources additional to deductions from collected royalties, or engages in activities in addition to managing those specific funds, need not impair the transparency of the system. Nevertheless, it may be appropriate for the second stage of this evaluation effort to undertake further scrutiny of the effectiveness and transparency of collecting societies' dependent charitable trusts as managers of their welfare, promotional and educational funds.
- Regulation should address the uses of welfare, promotional and educational funds – so as to rectify the present heterogeneity of uses – and should extend, furthermore, to a statutory duty of separate management from the rest of funds of the collecting society - if the society administers them directly - or of any charitable trust performing that role.

### *Regarding allocation and payout of royalties to right-holders*

- A collecting society's royalties allocation procedure is adopted, with the consent of its membership, by its governing body (a general assembly or delegated body), and must conform to the statutory requirements that it be predetermined in the articles of association, that it apportion royalties among right-holders fairly and non-arbitrarily, and that it give each right-holder a share in collected royalties proportional to the usage of his/her works.
- Allocation procedures vary widely, depending on the nature of the copyright and related rights, the media in which the protected works are embodied, the type of user and mode of use of the licensed rights. Societies' allocation procedures are thus shaped by the type of rights concerned and by members' discretion.
- Allocation procedures have been found to be legally compliant, being adopted by the competent bodies and satisfying with the existing statutory requirements of transparency – they are publicly available and known to stakeholders – and objectivity, given the allocation methods used.

### *Regarding distribution of copyright royalties to holders*

- Collecting societies' royalties payouts tend towards stability, mirroring revenue; they have also been influenced by payouts resulting from non-recurring collections.



- The number of payees of a collecting society's royalties payouts varies as a function of the size of the right-holder class represented by that society, the nature of the royalties collected, and whether royalties are payable to members only or to authors, performers and producers regardless of membership.
- Given each collecting society's freedom to set its own royalties allocation rules, those rules differ from one society to another. In some cases, royalties are paid out even to non-members, while in others they are paid out to members only - to the entire membership, or to a variable proportion of it.
- The average allocated payout again varies by collecting society. This variability is explained by each collecting society's ability to collect royalties, the nature of the right-holder class it represents, the nature of the collected royalties, and the users of the protected works and benefits.
- Payouts invariably cluster in a small number of right-holders; this mirrors the world of culture and the arts, where recognition and commercial success concentrate in a small number of right-holders and a narrow range of protected works and benefits.
- The conclusion can be drawn that the fairness of the collecting societies is to be found not in an egalitarian distribution of collected royalties but in a distribution weighted objectively and proportionally to remunerate those protected works and benefits that generated the royalties originally.

*Regarding collecting societies' identification and payment of royalties*

- Most collecting societies have unclaimed royalties on their balance sheets, but it is only at four of them that any portion of such royalties has lapsed, pursuant to the societies' decisions.
- No specific regulations are in place as to how a collecting society must deal with royalties payable to unidentified right-holders, the applicable time limitation, the use of any financial returns on such funds, or the final use to which lapsed royalties must be put.
- In the period under consideration, lapsed unclaimed royalties were used mostly to feed the societies' welfare, promotional and educational funds or were put through the year's income statement, indirectly benefiting members by helping to defray administration and management costs. In two cases, lapsed royalties were distributed to members as an extraordinary payout.
- In some cases, given the difficulty of locating right-holders, the society elects to set up a reserve with which to meet any subsequent claims for such royalties, and to pay out a part of unclaimed royalties among members or members of foreign entities with which a reciprocity agreement is in place.

The functioning of the various collecting societies is highly variegated and comparisons of one society with another are not readily made, because the diversity of right-holders, managed rights, media and forms of communication of the protected works makes for widely different management decisions and policies.

The societies fulfil the purposes for which they were created by allowing for the existence of a market in copyright and related rights where the users of works and benefits compensate right-holders for usage of their works and benefits. Absent the collecting societies, authors, performing artists and producers would be hard-pressed to receive the income for their copyright and related rights that the Spanish Copyright Act 1996 now recognises as theirs, and those enjoying the least measure of artistic and commercial success would stand to lose the most.

The basic functions of the collecting societies – collection, administration and welfare deductions, allocation of royalties and payout to right-holders – are performed to a standard of efficiency that improves over time, in step with the societies' increasing experience.

Since the societies' operations are susceptible of economies of scale, increased transactional volume or amalgamation of activities may see their efficiency enhanced.

The societies' transparency can be regarded as adequate given the legal framework in which they operate. The benefits might be considered of regulations introducing an objective standard of transparency and enabling the implementation of policies common to all societies. It would be desirable, for instance, that rules common to all societies were prescribed as to the accounting treatment of rights management transactions.

The allocation rules that collecting societies apply can be regarded as fair in two ways: first, they reflect the prevailing asymmetry in the world of the arts; secondly, they are objectively applied, transparent and available to all right-holders.

The system is markedly mutualistic, insofar as the rules on welfare deductions benefit the less popularly successful right-holders at the expense of the highest earners.

The model of collective management of copyright and related rights by collecting societies is not expected to attract fresh European Union regulation in the short term; all else being equal, therefore, there is no bar to the making of such reform as the Spanish legislature sees fit.

These conclusions make room for the following **recommendations**:

The question is whether the system of copyright collecting societies is sufficiently regulated for it to achieve its purposes effectively, efficiently, transparently and fairly. The right degree of regulatory intervention may lie somewhere in between the present state of affairs, where the major management decisions are driven by market forces and the collecting societies' governing bodies, and a more heavily regulated model,

where the main operational decisions and supervisory power rest with the regulator. The findings of this evaluation at any rate suggest the following actions:

1. Regulation should extend beyond the uses of welfare, promotional and educational funds to a statutory duty of separate management from the rest of funds of the collecting society - if the society administers them directly - or of the special-purpose charitable trust, if any.
2. A specific chart of accounts should be introduced for copyright collecting societies, covering accounting, economic and financial topics such as provisions, the accounting treatment of unclaimed royalties the title to which has lapsed, financial investments, the contents and disclosures of annual reports, etc.
3. Collecting societies should be placed under a statutory duty to consolidate their financial statements with those of their subsidiaries and investees.
4. The possibility should be considered of creating a common collection body – at least as regards private copying levies – to bring economies of scale into play.
5. Collecting societies' financial statements and fees should be made public by being filed with a public registrar overseen by the government as a guarantor of public access rights.
6. Specific regulations should be introduced on the treatment of time limitations on collected royalties: periods, uses, etc.

There is a need for regulatory action through rules that standardise management procedures and help convey to public opinion that collecting societies operate effectively, efficiently, fairly and transparently.

The second phase of this evaluation, to be conducted in the first half of 2009, will examine how the Spanish system for collective management of copyright and related rights is perceived by the general public and the various user and stakeholder entities and groups. The second phase will likewise appraise the alignment of the Spanish system with its European peers, and will revisit those matters already addressed in 2008 which the mandate from the Spanish cabinet requires to be examined in greater depth.<sup>23</sup>

Madrid, 30 December 2008

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<sup>23</sup> Topics to be examined in more detail might include collection procedures, the nature of welfare, promotional and educational costs, criteria for allocation and payout of royalties to right-holders, use of funds in anti-piracy efforts, assessment of any effects on the management system not intended by the legislature, the effectiveness, efficiency and transparency of charitable trusts connected with collecting societies, or the relations between the Spanish collective copyright management system and its foreign counterparts.