

**Collective Management of
Copyright and Related Rights**

Edited by Professor Daniel Gervais

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Introduction

Collective management of copyright allows authors and other rightsholders such as performers, publishers and producers to monitor and, in some cases, control certain uses of their works¹ that would otherwise be unmanageable or less efficient individually owing to the large number of users. The use of music for broadcast by radio stations is perhaps the best known example of such a use. Economically, collective management is not neutral. For example, collective management may allow authors to use the power of collective bargaining to obtain more for the use of their work and negotiate on a less unbalanced basis with large user groups. However, collective management may be seen as detrimental to authors of certain works because most collective licensing schemes value all works equally. Last but not least, collective management ensures that users will have easier access when their intended use of protected material is not allowed by law. It has also been said that the existence of collective licensing schemes is an argument against the introduction of new exceptions. The strength of that argument is dubious, however, since, as discussed in Chapter 1, exceptions must pass the Berne Convention's "three-step test", which is now also enshrined in the TRIPS Agreement.

What is collective management? It refers to licensing (i.e., the contractual grant of an authorization to use a protected work) performed by a Collective Management Organization (CMO) on behalf of a plurality of rightsholders. It implies that a group of rightsholders pooled some or all of their rights so that users can obtain a licence to use such pooled rights from a single source, namely the CMO. However, because collectives function in a variety of ways, collective licensing does not refer to a particular structure, legal regime or model. Some collectives function as mere agents of a group of rightsholders who voluntarily entrusted the licensing of one or more uses of their works to a collective. Other

1. To simplify the text and unless the context clearly indicates otherwise, "work" includes protected performances and sounds recordings.

collectives are assignees of copyright. In some cases, rightsholders transfer rights to all their present and future works to a CMO; in other cases rightsholders are allowed to choose which works the CMO will administer on their behalf. CMOs license work-by-work, other offer users a whole "repertory" of works. This may be combined with an indemnity clause or equivalent.²

In most cases, the structure of a particular collective licensing model can be explained by looking at the history and "vision" that governed at the time of its creation. Was the collective merely viewed as a tool to improve economic efficiency of the licensing process (by reducing transaction costs and delays, etc.) or was it viewed more as a "union" with a mission to defend the economic and, to a certain extent, moral interests of its members? The circumstances surrounding the birth of a particular collective licensing model may influence the drafting of accompanying legislation and shape the underlying policy of the state towards collective management. For instance, are collectives considered as a tolerated encroachment on competition law, an essential part of a well-functioning copyright system or rather viewed as a necessary policy instrument to defend the weaker party (authors) in transactions with large users?

CMOs generally belong to one of the two main "families" of Collective Management Organizations, namely the International Confederation of Societies of Authors and Composers (CISAC)³ the largest and oldest association of CMOs, or to the International Federation of Reproduction Rights Organizations (IFRRO).⁴ There are also several CMOs representing holders of related rights, and those may belong to other associations.⁵ These organizations have played and continue to play an important role in debates concerning international copyright norms and their implementation in national and regional legislation. They have tended to emphasize both the need to defend authors and the efficiencies for both rightsholders and users of collective licensing when compared to individual licensing by rightsholders.

CMOs are now facing the challenges of the digital age. Claims that "copyright does not work" in the digital age are often the result of the inability of users to use protected material lawfully. On the Internet, users of copyright material can easily access millions of works and parts of works, including government documents, legal, scientific, medical and other professional journals,

2. An "indemnity clause" is an undertaking by the CMO in favour of the user to defend the user for using any work/right in the CMO's repertory of works/rights if the work/right was used according to the terms of the licence. This indemnity often takes the form of an obligation to defend the user in court proceedings.
3. See online: <www.cisac.org> (last visited: 9 November 2005). As of 16 May 2005, CISAC had 207 member organizations in 109 countries, though not all would qualify as active CMOs.
4. See online: <www.ifrro.org> (last visited: 9 November 2005). As of 13 August 2001, IFRRO had 107 members including 45 CMOs.
5. Examples would include the International Federation of Musicians (IFM), online: <www.ifm-musicians.com/eng/index.html> (last visited: 9 November 2005) and the International Federation of the Phonographic Industry (IFPI), online: <www.ifpi.org> (last visited: 9 November 2005).

newspapers, but also of course music and audiovisual content. While digital access is fairly easy once a work has been located (though it may require identifying oneself and/or paying for a subscription or other fee), obtaining the right to use the material beyond the "initial contact" (which is usually only listening, viewing or reading all or a part of the work) is more difficult unless already allowed under the terms of the licence or subscription agreement or as an exception to exclusive rights contained in copyright laws around the world. While in some cases this is the result of the rightsholders' unwillingness to authorize the use – *a priori* a legitimate application of their right to prohibit – there are several other cases where it is the unavailability of adequate licensing options that makes authorized use impossible. Both rightsholders and users are losers in this scenario: rightsholders because they cannot provide authorized (controlled) access to their works and lose the benefits of orderly distribution of their works, and users because there is no easy authorized access to the right to reuse digital material. In other words, this inability to "control" their works means that these works are simply unavailable (legally) on the Web. The *Napster*, *Kazaa* and *Grokster* cases⁶ come to mind in that respect.

The pervasive nature of the Internet and the increasing tendency to link various appliances and devices such as cell phones and Personal Digital Assistants (PDAs) and, more and more, television sets and stereo receivers to the global network mean that keeping any material that can be digitized off the Internet will become increasingly difficult, technically, commercially, or both. While a combination of technology such as Digital Rights Management (DRM) and simpler Technological Protection Measures (TPMs) and reinforced laws might allow rightsholders to keep material off major servers in a number of countries (though not all countries have copyright laws) and/or request that Internet Service and Internet Access Providers (ISPs/IAPs) block access to domestic and foreign websites that make possible access to pirated material, consumer demand for digital access may ultimately prevail and, consequently, only rightsholders who are prepared to meet this demand will survive. In fact, as it has been argued in several other papers,⁷ is not the real question to ask whether the best course of action for rightsholders is to try to minimize unlawful uses or, rather to maximize lawful, legitimate uses? Will fighting the social norms that supports online access be productive? In fact, especially for mass-market

6. *A&M Records, Inc. v. Napster, Inc.* 284 F.3d 1091 (9th Cir., 2002); *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd.*, [2005] FCA 1242; and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (US Sup. Ct., 2005).

7. See, e.g., D. Gervais, "The Price of Social Norms: Towards a Liability Regime for File-Sharing" (2004), 12 *Journal of Intellectual Property* 40; D. Gervais, "Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing", in M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005), 602 at 517-549; see also M. Einhorn, "Digital Rights Management and Access Protection: An Economic Analysis", in J. Ginsburg and J. Besek (eds.), *Adjuncts and Alternatives to Copyright: ALAI Congress, June 13-17, 2001, New York, U.S.A.* (New York: Kernohan Center for Law Media and the Arts, Columbia University School of Law, 2002).

works such as pop music, is there not a serious risk that any attempt to prevent access on digital networks will be perceived by some users as an invitation to circumvent legal or technical protection measures?

Whatever the optimal answer to those questions may be, one basic fact remains: a large amount of copyright material is (and more will be) available through digital networks and that "market" will need to be organized in some way. By "organized", it is suggested that users will want access and the ability to reuse material lawfully. These uses include putting the material on a commercial or educational website or an Intranet, emailing it to a group of people, reusing all or part of it to create new copyright material, storing it and perhaps distributing on a CD-ROM. Authors and other rightsholders will want to ensure that they can put some reasonable limits on those uses and get paid for which they decide that users should pay (again, absent a specific exemption or compulsory licence in the law).

CMOs will be critical intermediaries in this process. Their expertise and knowledge of copyright law and management will be essential to make copyright work in the digital age. To play that role fully and efficiently, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks.

Collectives and the Paradox of Copyright

Copyright (and, in fact, most aspects of intellectual property policy) seems to rest on a paradox. In order to maximize the creation and dissemination of new works of art and the intellect (while appropriately rewarding authors and other owners of copyright and related rights), the law creates scarcity by providing copyright owners with a right to exclude others from copying, performing and communicating those new works. Is this paradox only a rhetorical illusion? To a certain extent, the answer is yes. The power to "exclude", or prohibit use of protected works, performances and recordings is only relevant at the level(s) at which the market needs to be organized by creating scarcity which, as it will become apparent, begins with the author and ends with the last professional intermediary, and sometimes earlier on. Historically, it has not reached the level of massive uses, and certainly not end-users.

Another difficulty in the world of copyright and related rights is the fragmentation of rights. If copyright was, initially, only a "copy"-right, a right to make (and prohibit others from making) copies of books and other writings, it evolved to include the performance of certain works in public (opera, theatre, music), then at a distance by Hertzian waves (radio, over-the-air television), satellite, cable, and expanded to cover other uses such as adaptation, and now rental, lending, etc. In cases where each such fragment corresponds to a discrete use of a protected work (or related right object), in principle only a single authorization is required, though that may not be the case if multiple authors are involved or if rights were split according to territory, language, media, etc.

Against this backdrop, one could fairly say that collective management is one of the principal reasons why copyright works. It solves a significant portion of the "paradox" and provides a solution to the fragmentation of rights. Barring a technological revolution such as intelligent agents (or "bots") that would completely automate rights clearance processes and erase transaction costs and delays (and then privacy issues may emerge), collective management will not only remain useful, but in fact necessary to ensure the future of copyright and the prosperity of future authors and other owners of copyright and related rights.

To be able to play this key role into the future, CMOs must understand the challenges and adapt to the evolving landscape. Global use of, and access to, protected works on the Internet has raised doubts about purely national systems based on territorial reciprocity. Because collectives increasingly play a role in the eyes not only of rightsholders, but users and the public as well, many are holding them up to a higher standard of efficiency and transparency, as guardians of a public good, the knowledge of humanity expressed in tangible forms known as texts, music, film, art, images and so on. If collectives hold the key to the Great Library, they must expect some degree of public scrutiny.

As collectives are now called upon to license new uses by new users, and possibly even individual end-users (even as certain rightsholders try to prohibit private uses, legally, technologically or both), collectives will also be confronted with issues such as privacy and freedom of expression.

The Approach Chosen for this Book

This book is divided into two main parts. Part I presents a number of horizontal issues that affect collective management in almost every country world-wide. The part begins with an introductory chapter which paints a brief historical overview of the evolving role of CMOs and provides a theoretical background to understand the evolution and the role of CMOs. It explains how copyright collectives are organized and the various models under which CMOs operate and situates the current role of collectives and its likely evolution over the coming years. The chapter also considers whether extended repertoire systems (also known as extended collective licensing) is compatible with international norms, including the three-step test and the prohibition of certain formalities and conditions in Article 5(2) of the Berne Convention.

Chapter II, by Dr. Mihály Ficsor, former Assistant Director General of the World Intellectual Property Organization (WIPO) and Director General of the Hungarian CMO ARTISZUS, discusses the role of collectives in the digital age, using the Berne Convention (in particular the three-step test) and the 1996 WIPO Copyright Treaties (and the "making available right") as a backdrop. Dr. Ficsor reminds us that "with the advent of ever newer and better technologies, the areas in which individual exercise became equally difficult, and – in certain cases, even impossible – began widening. It was in those

cases that rightsholders established collective management systems.” He then considers the impact of the US Digital Millennium Copyright Act⁸ and the Napster⁹ case, and EU Papers and the Copyright Directive.¹⁰ In reaction to the lowering of the level of levies, the use of which may increase, Dr. Ficsor warns:

[T]his is not justified, and rightsholders may expect of governments that they should not sacrifice the important public interests serving as a basis for adequate and effective copyright protection on the altar of giving in, in the hope of short-term political advantages, to demands behind which there may be nothing else but some demagogue, populist slogans and/or mere greed of certain strong lobby groups that want to increase their profit no matter the cost paid by others.

Dr. Ficsor offers key insights into the changing nature of collective management and the relationship between collective management, rights to remuneration and the ways in which CMOs acquire the rights they need to function (i.e., the authority to license). Insisting on the freedom of rightsholders to choose between individual and collective management of rights, he concludes that the cases in which mandatory collective management is possible are limited, but notes that extended repertoire (extended collective licensing)¹¹ is allowed, provided certain important safeguards are in place.

In Chapter III, Professor Lawrence Helfer of Vanderbilt University tackles the interface between collective management and human rights issues. That interface is seldom discussed but collectives manage rights in human knowledge, the creation of and access to which are crucial in every country, notably as a basis for a well-functioning democratic system. The chapter is one of the deepest analyses of that crucial rights intersection available. The chapter begins with a reminder that the Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR or “the Covenant”) protect the moral and material interests of authors and inventors,¹² as well as the public’s right “to enjoy the arts and to share in scientific advancement and its benefits,”¹³ but that “without elaboration, however, these provisions provide only a skeletal outline of how to develop human rights-compliant rules and policies for governments to promote

8. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 [DMCA]. See *supra* note 6.
9. EC Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (2001), O.J. L. 167/10, online: <europa.eu.int/eur-lex/en/consleg/pdf/2001/en_2001L0029_do_001.pdf> (last visited: 19 October 2005).
10. See Chapter I and the study of the Nordic countries by Ms. Koskinen-Olsson in Chapter 11, Universal Declaration of Human Rights, Art. 27(2); International Covenant on Economic, Social and Cultural Rights, Arts 15(1)(c) & 15(1)(b).
11. UDHR, *ibid.*, Art. 27(1).

creativity and innovation.” Suggesting that a “human rights framework for intellectual property puts the public’s interest front and center and on an equal footing with property rights in intangibles”, Professor Helfer then examines how Article 15(1)(c) of the Covenant could be expanded into a coherent framework. His analysis includes a detailed review of the work done by the Committee on Economic, Social and Cultural Rights (and its “Draft General Comment”) and difficulties stemming from the fact that both authors’ rights and access to copyright works may be considered fundamental rights (thus limiting the ability of states to legislate). He notes that in the Draft General Comment¹⁴ concerning Article 15(1)(c) of the Covenant (a “nonbinding, albeit highly persuasive” interpretation of the Covenant), the Committee mentioned affirmative measures to facilitate “the formation of professional associations,” and “to ensure the active and informed participation” of authors in those associations to protect their moral and material interests.¹⁵ Professor Helfer concludes that “a human rights framework for intellectual property offers a possible focal point around which all parties can structure a revised regulatory regime” instead of the increasingly conflictual and “corporate” approach to copyright regulation.

Part II of the book is divided on a geographical basis. The purpose of Part II is not encyclopaedic in nature; it does not aim to present in exactly the same way how collective management operates in every country. Rather, a number of national systems were selected as representatives of the principal models that are applied in various countries and regions. The basic structure of all the country-specific chapters is the same. Each begins with a historical overview and a presentation of existing CMOs and their activities. Where available, financial information is also provided. Then the authors explain how CMOs are supervised or controlled by legislation, a governmental authority or both. Finally, the chapters offer thoughts about the challenges facing CMOs in the country or region concerned. Naturally, the length and exact structure of each part of those chapters may vary slightly, owing to the important differences between CMOs and how they operate in various parts of the world.

The exception in Part II is its first chapter, which looks at efforts to regulate CMOs at the European level. Prepared by Professor Lucie Gubault of the Institute for Information Law of the University of Amsterdam and Stef van Gompel, the chapter begins with an analysis of the existing regulatory context, in particular key decisions by the European Court of Justice and the European Commission,¹⁶ which dealt with, on the one hand, the relationship between CMOs and users and, on the other hand, relations between CMOs and their

14. Committee on Economic, Social and Cultural Rights, “The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Art. 15(1)(c) of the Covenant), Draft General Comment No. 18” (15 November 2004), (Reporter: Eibe Riedel).
15. *Ibid.* at paras 36 and 50.
16. Notably *Gesellschaft für Musikalische Aufführungs- und Mechanische Vertriebsrechte (GEMA) v. Commission of the European Communities*, (1971) O.J. L. 134/15;

members. The chapter then presents briefly how individual EU member States have regulated CMOs. The chapter contains an analysis of the most recent normative efforts and work on a Community framework, including those outlined in the European Commission's Communication on the Management of Copyright and Related Rights in the Internal Market¹⁷ and in the Commission's Work Programme 2005.¹⁸ It covers the fundamental aspects that govern any intervention by the European Union in the area of collective management (notably attribution, subsidiarity and proportionality). In Part IV of her chapter, the authors discuss the need for harmonization at the EU level. They note that "effective structures for the cross-border collective management of copyright for legitimate online music services would require regulatory intervention. The main reason for this lies in the fact that the market has failed to produce effective structures for cross-border licensing and cross-border royalty distribution; and that it has not rectified a series of contractual restrictions preventing authors or other rightholders from seeking the best collective rights management service across national borders. In all likelihood, the Commission would not limit itself to the regulation of the cross-border licensing of online music services but would probably aim at all types of multi-territorial licensing." Their analysis includes thoughts on possible legislative and non-legislative intervention by Brussels.

Other chapters in Part II focus on one or more national systems. In Europe, the cradle of collective management, France, Germany, the United Kingdom & Ireland and the Nordic countries were selected, and a specific chapter is devoted to each one. The contributors of those chapters are respectively Ms. Nathalie Paskowski, LL.M., former legal director of French CMO SSCP; Dr. Jörg Reinbothe, former head of the Intellectual Property Unit at the European Commission, where he oversaw the development and application of several key directives; Professor Paul Torremans, who teaches Business Law and is Director of the Centre for Business Law and Practice at the Department of Law of the University of Leeds and Professor of Private International Law at the Faculty of Law of the University of Ghent in Belgium; and Ms. Tarja Koskinen-Olsson, former director of the Finnish RRO KOPIOSTO and former Chairperson of IFRRO.

- Belgische Radio en Televisie (BRT) v. SABAM*, (1974) E.C.R. 51 [BRT v. SABAM]; *Musik-Vertrieb Membran GmbH v. GEMA*, (1981) E.C.R. 147; *GVL v. Commission*, (1983) E.C.R. 483; *Ministere public v. Tournier*, (1989) E.C.R. 2521; and *Lucazzan v. SACEM*, (1989) E.C.R. 2811.
17. Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - The Management of Copyright and Related Rights in the Internal Market* (16 April 2004), COM(2004) 261 final.
18. Commission of the European Communities, *Commission Work Programme for 2005 - Communication from the President in agreement with Vice-President Wallström* (26 January 2005), COM(2005) 15 final.

Each country and region has a different approach to collective management. In France, where copyright, and copyright management are anchored in post-Revolution human rights doctrines, collectives have undergone very significant changes since 2000. Germany, whose model was considered by several CMOs in Central and Eastern Europe, has developed a unique system of government oversight, located in the Patent Office. The United Kingdom, whose copyright law served as a model for the laws of most Commonwealth members, uses a specialized tribunal to settle tariff disputes. Finally, the extended repertoire system (or extended collective licensing), which is also discussed in Chapters I and II, is reviewed including its development in the highly socially cohesive system of the Nordic countries. It has now cast a swarm, as it were, and is under consideration in several other countries.

Moving then to the Americas, the Canadian chapter was contributed by Mr. Mario Bouchard, General Counsel of the Copyright Board. Canada's collective management system is in transition, after the introduction in the late 1990s of both neighbouring rights and a private copying levy. Canada's Copyright Board has also adopted fairly unique measures to improve collective management over the past several years. The chapter compares the situation in Canada with developments in Australia. Like Canada, Australia inherited its copyright legislation from Britain. It is also a smaller market. The analysis of the parallels between the two systems thus offers unique insights into the role and function of collective licensing and the "counterintuitive" impact of a higher degree of governmental scrutiny based on empirical observations in the two countries.

The situation in the United States is presented by Professor Glynn Lunney of Tulane University in New Orleans, one of the most prolific and original intellectual property scholars in that country. The US situation is somewhat different. Controlled mostly under antitrust (competition) law judicial decrees (though there are tariff hearings administered by the Copyright Office), several collectives "compete" in the same area of licensing, namely the public performance of music. Fortunately, Professor Lunney's chapter made it in spite of difficulties, delays and devastation caused by Hurricane Katrina.

Collective management is a very important activity in Japan, where CMOs collect more than USD 1 billion/year. It is also well organized. The situation may seem complex to observers outside the Land of the Rising Sun in part because of the way in which CMOs are supervised, which differs to a certain extent from methods now in use elsewhere. Yet, the Japanese collective management system seems to work quite well. In a detailed chapter, Professor Okumura, a renowned copyright expert from Kanagawa University, offers one of the first complete presentations of collective management in Japan available in English.

In the rest of the Asia-Pacific region, Mr. Ang Kwee Tiang, the representative of CISAC in the region for more than a decade, authored a veritable *tour de force*. He manages to offer a detailed, up-to-date portrait of this huge region (minus Japan) in a single chapter. Again, this one is the only complete

presentation of CMO activity in that part of the world. Mr. Ang is one of the best qualified persons to author this chapter. He personally assisted in the establishment of many of the CMOs now in operation.

In Latin America, the systems of Argentina, Brazil, Costa Rica, Chile, Mexico, Peru and Venezuela were selected to represent the region. That chapter was prepared by Ms. Karina Correa Pereira, a Brazilian attorney specializing in copyright issues. It is the first such complete analysis of collective management in that region made available in English.

Daniel Gervais
Ottawa, February 2006

Part I

Chapter I The Changing Role of Copyright Collectives

Prof. Dr. Daniel Gervais

I. INTRODUCTION

This initial chapter attempts to provide a theoretical framework to understand the role of copyright collectives. The chapter examines, first, the apparent paradox of copyright, namely that to maximize the creation and dissemination of new works of art and the intellect (while appropriately rewarding authors and other owners of copyright and related rights), intellectual property law seemingly poses obstacles to the creation of new works (because authors may not create derivative works without authorization) and to their dissemination (because it provides copyright owners with a right to exclude others from copying, performing and communicating those new works). After a discussion of this paradox and how it affects collective management from both historical and economic perspectives, this chapter will turn to another issue that confronts copyright collectives head-on, namely the fragmentation of rights. That fragmentation may be defined as the fact that copyright and related rights are expressed in terms of a bundle of rights applicable to discrete types of use (defined by their technical nature such as making copies, performing in public, communicating by wire or wireless means, renting, etc.), and each such right can not only be shared by coauthors or their assigns, it can also be divided contractually by territory, language, type of media, etc. This creates problems on two different levels. First, these rights fragments may no longer map out discrete uses of protected works, especially on the Internet. In other words, a single use of a copyright work or object of a related right may require multiple authorizations from several different rightsholders. Second, the way in which rights are expressed does not take account of who does what, and for which purpose, with the work. As we will see, that directly impacts licensing, and in particular collective forms of licensing.

The chapter then offers a brief tour of the traditional role of copyright collectives, the purpose of which is to put current debates about the future of

copyright in perspective and allow the reader to consider the role that collectives could play in the years to come, providing solutions to both the underlying paradox of copyright and the problems caused by the fragmentation of rights. In other words, after an exposition of the problems, the chapter suggests solutions and changes to the role and functioning of collectives to ensure their continued relevancy.

2. THE CHALLENGES

2.1. THE COPYRIGHT PARADOX

At first glance, it may seem paradoxical that, in order to maximize the creation, dissemination and access to new human knowledge expressed as works of art and of the intellect, the law chooses to provide those who create, publish, produce or otherwise disseminate this knowledge with exclusive rights to prohibit many forms of use of the knowledge. That paradox is real, but only up to a point. The rights to prohibit contained in the bundles of copyright rights (and related rights) apply in specific cases and, in theory, with the view of organizing access, not denying it. In recent years, however, and especially since the advent of the Internet, copyright has also been used to try to prevent mass individual uses (e.g., music and video file-sharing), in many cases without providing an equivalent market (e.g., legal downloads). In addition, to enforce copyright, rightsholders tried to obtain usage information concerning individual users, thus confronting the right of privacy, a duel between rights not seen before because copyright was used by (or against) and transacted between professionals of the copyright industries, such as authors, publishers, producers, distributors and professional pirates, not individual end-users.

History can teach us some valuable lessons in looking for Ariadne's thread, the way out of this labyrinth. As a rule, artists in ancient Greece and the Roman Empire did not seek personal attribution, and it was common to identify someone else (a teacher, a famous person) as the "author".¹ During the first half of the middle Ages (approximately from the 8th to the 12th century), almost all

1. The situation was somewhat different in the Arab world. As Professor Khoury notes:

"Fine poetry was always deeply regarded within Arab literature, thereby granting its author renown and social respect, and ultimately wealth and security. Even during the centuries before Islam, poetry played a central role in the life of the ancient Arabs. Some even viewed it as 'the only form of artistic expression' of the 'Jahiliya' era. Poetry reflected the life and aspirations of the 'Jahiliya' Arabs, to the extent that it is regarded as 'the public register of Arabs'. Ibn Abbas, one of the commentators amongst Prophet Mohammad's companions, is known to have said: 'Poetry is the court of the Arabs (meaning the place where the finest language may be heard)'.

Indeed, poetry is the main remaining relic and cultural achievement of that distant era. Before Islam and even during the Islamic Empire, poets flocked to that era's centers of civilization and culture, namely Mecca, Madina, Baghdad, Damascus, Cairo, and even Toledo in Spain in an attempt to find favor in the eyes of Caliphs,

artistic works in Europe were created under the patronage of the Church, which became *de facto* the owner of all "works". Michelangelo was one of the first artists under Church patronage to insist on personal attribution. But because of the difficulty of copying works, there was little need for an economic right to prevent it. Then the modern printing press was invented in Europe in 1450 by Johann Gutenberg and imported into England in 1476 by William Caxton, the "first English printer". It then became possible to print and sell not only classic texts but also more recent works first published by another publisher or imported into England. In the first half of the 16th century, the forerunners of modern publishers, known as "stationers", were able to secure both a ban on imported books and a "monopoly" that prevented the publication of a book by anyone not a member of the Stationers' Company (guild).² Guild rules contained a *de facto* prohibition to reprint a book published by another member. However, those were internal rules and did not have the force of an act of Parliament. In fact, prior to the Statute of Anne³ of 1710, there was no copyright proper⁴ in Britain.

How did the Statute emerge? It was only in the late 1600s, after their licensing monopoly had expired and stationers were unable to justify a renewal of their publishing monopoly, which many saw as a form of censorship, that they joined authors in a petition to Parliament demanding a "copy-right" to be vested initially in authors but then normally assigned to publishers. This led

Kings or Salines. Such favor would bring these poets wealth, and in many cases a permanent place among the Caliph's court. It is therefore not surprising that some lesser poets were tempted to resort to various forms of 'plagiarism' in order to enhance their standing and wealth.

These actions, however, did not go unabated. In fact, such plagiarists were generally cast from cultural society. Their plagiarism was harshly condemned and generally classified as a crime.⁵ (Footnotes omitted)

A. Khoury, "Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks" (2003), *IDEA* 151 at 153-4. See also J. Carroll, "Intellectual Property Rights in the Middle East: A Cultural Perspective" (2001), 11 *Fordham Intellectual Property, Media & Entertainment Law Journal* 555.

2. See M. Rose, *Authors and Owners* (Cambridge, Mass.: Harvard University Press, 1993), 176; and L. Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), 264.

3. Statute of Anne, 1709-10, 8 Anne c. 19. There is still a debate as to whether the Statute of Anne was in fact "copyright". See

B. Sherman and L. Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999), 262 at 207-8. See also H. C. Streibich, "The Moral Right of Ownership to Intellectual Property: Part I - From the Beginning to the Age of Printing" (1975), 6 *Memphis State University Law Review* 1; D. Rosen, "Artists' Moral Rights: A European Evolution. An American Revolution" (1983), 2 *Cardozo Arts & Entertainment Law Journal* 155; C. Swack, "Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of *Droit Moral* between France and the United States" (1998), 22 *Columbia Journal of Law & Arts* 361; M. Carroll, "Whose Music Is It Anyway? How We Came to View Musical Expression As a Form of Property" (2004), *University of Cincinnati Law Review* 1405.

to the adoption of the Statute of Anne, which contained a 14-year monopoly granted authors (but fully assignable) and also renewed for a limited period of time the Stationers' licensing monopoly.

To this statutory copy-right, one should add that British authors' had common law rights to prevent first publication and false attribution.⁵ British "copyright" was thus born by merging two quite different approaches: on the one hand, there was the economically motivated desire of publishers to prevent copying of their books, and, on the other, the demands of authors to "own" their works, anchored in a natural rights perspective and based on the Lockean principle that every person should own the fruits of his or her labour.

The last justification seemed perhaps more morally acceptable for public opinion. It was also a view very strongly held on the Continent after the 1789 French Revolution and before that date in Germany, and defended by philosophers such as Kant and later Hegel. Yet, even if the *droit d'auteur* tradition can be seen as a child of the Enlightenment tradition of individual human rights, Josef Kohler made it clear that copyright's purpose was to be used by and between professionals.⁶ Interestingly, similar debates took place also in the United States, with Thomas Jefferson advocating an "economic" approach to copyright while James Madison apparently supporting the author's natural right.⁷

To this day, the difference between the economic/instrumentalist view of copyright in common law jurisdictions inspired by British legal principles and history and the natural right (indeed human right) approach defended in civil law jurisdictions inspired by, *inter alia*, French and German thinkers, is seen as profound.⁸ Yet the history of European and then American copyright since the 18th century shows that the picture is more complex, and that copyright is both an economically justifiable right required to organize markets for certain types of works of art or the intellect, and a right that authors have to prevent the publication of their works without consent, and to be recognized as the authors of such works.⁹ Trying to squeeze copyright on one side of that philosophical fence is incorrect in historical perspective, both in common law and civil law jurisdictions.

Many if not most copyright collectives are a good reflection of this history. They see themselves as champions of the rights of their members and recognize

5. After long debate before British courts, it was determined in *Donaldson v. Becker* (1774) 4 Burr. 2403, 98 Eng. Rep. 257 that there is no common law right in published works that could be used to prevent copying of books after the expiry of the statutory monopoly.
6. J. Kohler *Das Autorrecht* (1880), p. 230.
7. See note 2, above.
8. See A. Strouel, *Droit D'auteur et Copyright: Divergences et Convergences* (Bruxelles: Éditions Émile Bruylant, 1993), 722.
9. Philosophically, one may derive the right to prevent mutilation from the latter. It may be linked either to the right to protect one's reputation or in the link that united the author and his or her work.

the value of administering rights that can be justified as human rights or natural rights.¹⁰ But they also operate as "businesses", handling large sums of money. They are part of the multibillion dollar business of copyright and their work determines the economic livelihood of many an author worldwide.

2.2.

THE INTERNET

From the 17th century until the 1990s copyright was aimed at and used by professional entities, either legitimate ones such as broadcasters, cable companies or distributors or illegitimate ones, such as makers and distributors of pirated cassettes and later CDs and DVDs. In many cases, these professionals were intermediaries with no interest in the content itself (i.e., they could have sold shoes or food instead of books or music).

Things have changed dramatically since the advent of the Internet as a mass medium, and even more strikingly since the invention of peer-to-peer (P2P) software. Music file-sharing started as a centralized system known as Napster;¹¹ the demise of which was made possible, in large part, by its easily locatable and controllable nature. Napster was, in reality, a data base stored on a few Internet servers, which made their owner and operator an easy enforcement target and the system easy to shut down. The recording industry tried then and, at the time of this writing, is showing no sign of laying down arms to stop file-sharing. In addition to lawsuits,¹² it is using technological locks to make it harder to "rip" music from compact discs. It also uses spoofing (sending corrupted files into peer-to-peer networks). Yet, exchanges of music files have apparently continued to grow,¹³ and events since 2001 seem to beg the question

10. See Chapter 3 by Professor Laurence Helfer.
11. Napster was shut down after injunctions were issued by various courts in the United States. See *A&M Records, Inc. v. Napster, Inc.*, 284 F. 3d 1091 (9th Cir., 2002). A "new" Napster, which offers licensed music, is now in operation online: <www.napster.com> (last visited: 17 October 2005).
12. See D. Gervais, "The Price of Social Norms: Towards a Liability Regime for File-Sharing" (2004), 12 *Journal of Intellectual Property Law* 39, online: <www.crimsonconfct.org/IMG/pdf/p2p.pdf> (last visited: 17 October 2005).
13. According to several sources, including BigChampagne (online: <www.bigchampagne.com> (last visited: 17 October 2005)), "8.3 million people were online at any one time in June [2004] using unauthorized services like Kazaa and eDonkey – up 19% from 6.8 million in June 2003. The majority of files being traded were music. BigChampagne says: [...] Since September [2003], the Recording Industry Association of America has filed 3,500 lawsuits against music sharers who uploaded songs to the Internet. It has settled about 600 of them for fines ranging from USD 2,000 to USD 15,000. Phil Leigh, senior analyst at research firm Inside Digital Media, says the findings are the strongest evidence to date that the lawsuits aren't scaring people away from so-called P2P programs. "Many just don't think they'll be caught", he says. And users have become savvier about adjusting software so they can't be traced."

whether the music industry underestimated the strength of the demand for, and the societal role of, file-sharing and "free music".

History suggests that the commercial and public relations cost of trying to apply copyright's power to prohibit to end-users illustrates a simple fact: that is not what copyright was meant to do, at least not for its first three hundred years of existence. The history and underlying policy objectives of copyright clearly indicate that copyright was a right to be exercised by and against professionals. Historically, when a new form of dissemination was invented (radio, television, cable, satellite) copyright was not used to prevent use, but rather to regulate and organize markets. Yet, while (or perhaps because) the Internet is the biggest jump in technological form of use of copyright works, copyright law is used not to organize the Internet market but for many years simply to deny it. But once tens of millions of Internet users had expressed their strong desire to "share" music, could the industry superimpose a simple download model, based on the assertion of control over the number of copies made, as in the era of physical recordings? Would licensing not work better and, if so, is not collective licensing the most realistic and practical option?

The flood of music files over peer-to-peer networks launched in the wake of, and as a reaction to, the shutting down of Napster, was evidence of a strong emerging social norm. Trying to stop it was risky, as the enforcement of a legal norm that is considered unfair or unjustified by a majority of the people concerned is always difficult. In addition, historically copyright was not designed to stop the flow of works, but to channel it,¹⁴ thereby optimizing the commercial exploitation of protected works. Finally, while professional users comply with copyright as a matter of cost-benefit and risk assessment (i.e., the costs and risks of being sued versus the cost of compliance), individual users do not. Individual users are much more likely to comply with rules when the risk of getting caught is significant and/or when the rules have been internalized. When social norms support an activity such as file-sharing, only massive and costly enforcement efforts may eventually reduce it. Adding to the cost is the fact that

RIAA President Cary Sherman says the rise of legitimate alternatives such as Apple's iTunes Music Store shows the success of the litigation. iTunes was poised over the weekend to reach 100 million songs sold.

BigChampagne says 1 billion songs were available for free trading in June. That compares with 820 million a year ago".
Jefferson Graham, "Online File Swapping Endures" (12 July 2004), *USA Today*, online: <www.usatoday.com/tech/news/2004-07-11-fileswap_x.htm> (last visited: 17 October 2005).

14. The successes of publishers of scientific and medical journals show that using copyright norms in the Internet environment is possible. By making journals available online and leveraging the technology to provide, e.g., raw lab data or files containing three-dimensional images, those publishers who still sell plenty of paper copies, have increased total revenues. The key is to trust users, and let them use the material. Trust was always implicit in pre-Internet days, with legal devices such as the first-sale doctrine, private copying exceptions, fair use, etc.

those who are being sued may not rush to a record store to thank the industry who is suing them.

Has copyright's reach been stretched a medium too far? Communication on the Internet can be analogized to a communication to the public (historically analogous to a live public performance but at a distance). There is, however, a fundamental difference. In the case of broadcasts and of cable transmissions, the intermediary responsible both for the technical operation of getting content to end-users and for selecting the content is a professional. On the Internet, the function is split. In the vast majority of cases, ISPs do not select content. They merely provide the means to get content from one point to another. The point of origin may be a professional content provider, but it may also be another individual user. When broadcasters were analogized with theatre and concert hall operators, the analogy held because both were making a professional use of copyright content. On the Internet, individual end-users have become "content providers" but they are not professionals. Still, because rightsholders analogize them to professional content providers, they had no hesitation to apply copyright, a hitherto purely professional right, to those individuals, and that is when and why the tension emerged. Tension because, on the other side, individual users want to harness the enormous capabilities of the Internet to access, use and disseminate information and content.

The demand for Internet content is huge and ever increasing,¹⁵ Technologists responded to this huge pull not only by providing the initial adequate technological means but by responding to legal barriers by providing new ones: close Napster and P2P emerges. When efforts were made to shut P2P down, as was done in the recent wave of subpoenas and law suits against individual

15. Richard Stallman wrote a perceptive piece in 1996:

"The Internet is relevant because it facilitates copying and sharing of writings by ordinary readers. The easier it is to copy and share, the more useful it becomes, and the more copyright as it stands now becomes a bad deal.

This analysis also explains why it makes sense for the Grateful Dead to insist on copyright for CD manufacturing but not for individual copying. CD production works like the printing press: it is not feasible today for ordinary people, even computer owners, to copy a CD into another CD. Thus copyright for publishing CDs of music remains painless for music listeners, just as all copyright was painless in the age of the printing press. To restrict copying the same music onto a digital audio tape does hurt the listeners, however, and they are entitled to reject this restriction.

We can also see why the abstractness of intellectual property is not the crucial factor. Other forms of abstract property represent shares of something. Copying any kind of share is intrinsically a zero-sum activity: the person who copies benefits only by taking wealth away from everyone else. Copying a dollar bill in a color copier is effectively equivalent to shaving a small fraction off of every other dollar and adding these fractions together to make one dollar. Naturally, we consider this wrong. By contrast, copying useful, enlightening or entertaining information for a friend makes the world happier and better off; it benefits the friend and inherently hurts no one. It is a constructive activity that strengthens social bonds".

Richard Stallman, "Reevaluating Copyright: The Public Must Prevail" (1996), *75 Oregon Law Review* 291, at 294-5.

file "sharers",¹⁶ quite predictably another technology might surface, such as anonymous file exchange systems, thus defeating any subpoena served on the ISP.¹⁷ If ISPs do not know the identity of users who are exchanging music files, subpoenas to obtain the identity of file-sharers may be ineffective.¹⁸

When considered in a historical and policy-oriented perspective, is copyright's foray into the private sphere a misuse of the right to prohibit? Rightsholders cannot let everything go "free". At the same time, aggressive enforcement may not be truly effective in establishing or restoring revenue streams. However, copyright can be licensed and used to justify licensing schemes that will fairly compensate rightsholders for the use of their works. One of the best ways to implement such schemes, and perhaps the only viable method, is to use collective management.

Before turning to how collective management can be used as a tool for the future, let us examine the second vexing problem mentioned in the introduction, namely fragmentation.

2.3. FRAGMENTATION

Another important challenge faced by copyright owners and the collectives that administer their rights is fragmentation. Fragmentation in this context refers to the lack of cohesion, standardization, and, to a certain extent, effective organization of both copyright law and collective management *per se*.¹⁹ Let us use history again to understand the origins and scope of the problem.

16. *Ibid.*
17. See *In re: Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003). CNet reported the increasing use of proxies to ensure the anonymity of file-sharers. See John Borland, "Covering tracks: New privacy hope for P2P" (24 February 2004), *CNet News*, online: <news.com.com/2100-1027-5164413.html> (last visited: 17 October 2005). Another example is programmer Wyatt Wasiolek who has created a program called AnonX that masks the Internet address of people who use file-sharing programs such as Kazaa. Wasiolek promises not to divulge his 7,000 users' Internet addresses, and believes he cannot be forced to do so. At the time of this writing, the major labels had reached an agreement to shut down Grokster (in the wake of the US Supreme Court decision) and to operate a legal "peer-to-peer" system known as Mashboxx. See John Borland, "Last Waltz for Grokster", *CNet News*, 7 November 2005, available at <news.com.com/Grokster+settles+P2P+suit+with+labels%2C+studios/2100-1027-3-5937832.html>.
18. Regularly, new technologies that promise to stop P2P sharing of copyrighted material (such as Audible Magic) emerge, usually with some concerns about privacy. See John Borland, "File-swap 'killer' grabs attention" (3 March 2004), *CNet News*, online: <news.com.com/2100-1025-3-5166505.html> (last visited: 17 October 2005).
19. Fragment or fragmentation is derived from the Latin adjective "fractus". According to Benoit Mandelbrot, "[i]f the corresponding Latin verb 'frangere' means 'to break': to create irregular fragments. It is therefore sensible and... appropriate... that, in addition to 'fragmented', fractus should also mean 'irregular', both meanings being preserved in 'fragment'. The notion of fragments is a component to chaos theory. For an explanation of chaos theory and for further examples of Benoit Mandelbrot's work in the area, see Mannus

The pre-Internet history of copyright (from the early 18th century until the 1990s) was essentially that of the adaptation to new forms of creation (e.g., cinema) and, more importantly, of new ways to disseminate copyrighted works (radio, then television broadcasting, cable, satellite). As it was discussed in the previous section, copyright adapted and was able successfully to regulate the new markets made possible by these new technologies used by professionals. These new technologies caused the rights in the copyright bundle to grow by analogy. Playwrights and authors of music were able to obtain rights in respect of the live performance of their works by arguing that this was their main economic use. When radio was invented, those same live performances (mostly of opera and music) were then broadcast directly to the homes of listeners. People did not attend the live performance and the existing copyright rights did not apply. But broadcasters were making a commercial use of the material similar to the use made by theatre or concert hall operators. It was quite logical then, to extend the right of public performance to the "communication" by Hertzian waves. It was only a small step after that to add television, and later communication by cable and satellite. The result of this historical process is the bundle composed of "copyright rights" we find in most national copyright laws.

Those rights fragments are not particularly useful in mapping out the Internet world, and many other new types of use, including remix.²⁰ Contracts and licensing arrangements for copyright works do not usually refer to the specific rights enumerated in this section or if they do, it is an afterthought.²¹ In fact, contracts typically define the "use" that should be allowed, and not which fragments of rights are needed, although traditional fragments are still often owned by different entities. On the Internet, defining the use of a work in traditional copyright terms operates in some respects as a fiction *vis-à-vis* the law. The content is subdivided into various components such as sound, image, photograph, or software program. These subworks are broken down into specific rights as defined within the legislation and are often analogized to other categories of works.

20. I. Donathue III, *An Introduction to Mathematical Chaos Theory and Fractal Geometry*. See also <www.mathimind.org/chaos/>
 21. See M. Einhorn and L. Kuriantzick, "Traffic jam on the Music Highway" (2002), 8 *Journal of the Copyright Society of the USA* 417 ("Since these rights are controlled by different parties and agents, the complexity of the system leads to a gridlock of control that may hinder development."). See also Lawrence Lessig, *Free Culture* (New York: Penguin Press, 2004).
21. A contract to allow webcasting normally refers to the function of broadcasting, independently of whether a communication to the public, one or more reproductions, or adaptations may take place. The problem is that rights ownership is still by and large, especially in the area of collective management, owned by different entities based on the rights, not the functions. While a single economic transaction should take place, several legal transactions are involved. See A. & B. Kohn, *Kohn on Music Licensing*, (2nd ed.): 2000 Supplement (New York: Aspen Law & Business, 2000), at 398-9.

As if that was not enough, the Internet is structurally transnational, in spite of efforts to enclose it in virtual national walls.

The fragmentation of copyright, therefore, occurs on many different levels: of rights stemming from national laws, which recognize several economic rights (reproduction, communication to the public, adaptation, rental, etc.); within market structures; within licensing practices; within a repertory of works; within different markets (language, territory); and through the interoperability (or lack thereof) of rights clearance systems. Fragmentation impacts directly on all affected parties whether they be rightsholders, users of copyright works or regulatory authorities that oversee the process; it also affects, of course, copyright collectives. Collectives also face challenges stemming from technological and market developments, notably the Internet.

The division of tasks among traditional rights "fragments" (reproduction, performance, communication, etc.) is becoming progressively less relevant in mapping newer uses, such as use on the Internet which often requires both a licence to copy and to communicate to the public. Yet, collective administration is (still) organized around such fragments. Usually, one collective licenses the right of communication to the public while others license the right of reproduction (for musical and textual works, respectively). While so-called "one-stop shops" have been set up in various countries, they often operate as mere email services that copy or transfer authorization requests to the various collectives that may be concerned. Here one assumes of course that at least one collective actually has the authority to license each fragment that a user requires, which may not be the case. In short, even when efficient systems are available, rights clearance may prove a difficult task.

The inherent difficulty in rights clearance in today's world is perhaps best illustrated by way of examples. If one were to license, say, use of music on the Internet, at least four rightsholders or collectives would be involved, namely the holder(s) of the right of:

- Reproduction on the emission server;²²
- Authorization of communication to the public in territory of emission;
- Communication to the public in territory of reception;
- Reproduction in territory of reception.²³

The rights matrix is even more complex when one considers that there are three levels of rights involved, namely those of:

- Composers and lyricists;
- Performing artists;
- Makers (producers) of the sound recording.

22. Unless, at the time the copy is made, it is a "private copy". Even then theories based on the right of destination might apply.
23. Which is also potentially a "private copy".

The matrix thus looks like this:

Figure 1.1: Rights matrix to license a point-to-point Internet communication of a sound recording containing a performance of a protected musical work

Right → Rightsholder ↓	Composer/Lyricist	Performer	Producer
Reproduction on emission server	C/PC?	C/PC?	PC?
Authorization of communication in territory of emission	C	C/R	C/R
Communication to the public in territory of reception	C	C/R	C/R
Reproduction in territory of reception	C/PC?	C/PC?	PC?

Legend:

C: Right likely administered by a collective

PC: Use possibly covered by private copying regime

R: Right is only to remuneration (as opposed to exclusive)

In short, twelve different analyses are required (actually, if the composer and lyricist's rights are administered separately or if multiple authors and performers are involved, the matrix would be considerably larger). Naturally, there are ways in which the situation could be simplified, notably agreements (such as the "Santiago Agreement")²⁴ among collectives that, to paraphrase Professor

24. The five basic principles of the "Santiago Agreement", initially entered into among BMI (US), BUMA (Netherlands), GEMA (Germany), PRS (UK) and SACEM (France) are as follows:

- (1) A licence is granted to the content provider who is the responsible party for deciding or approving the content of the database;
- (2) Secondly, the licensor of the respective content provider shall be the society of the country where the content provider has its actual and economic location (see by analogy the EU "television without frontiers" directive which determines the applicable law to broadcasters according to the criterion of the de facto/actual

Becker's account, allow one participating collective to grant a worldwide license on behalf of all other participating entities, especially with respect to the right of communication to the public. Still, one must proceed with each of the rights analyses in the grid above to avoid a potential finding of infringement. In other words, the rights clearance process involves multiple layers of rights. Clearing each of these rights can be a labyrinthine process even if each such process is in itself efficient. This may be analogized to a maze whose point of entry and exit are hard to find, and where the path to completion remains filled with obstacles and hurdles. Now imagine not one maze but three additional mazes stacked on top: the copyright works (or substantial parts of works) used, the subdivision of rights in respect of each such work, the various rightsholders associated with each of those rights, and the particulars of each market/territory where the rights must be cleared. Because rights ownership and licensing arrangements change through time, the maze becomes more like a four-dimensional matrix.²⁵

Rights analyses concerning audiovisual works are even more complex. A film might include rights to a screenplay, a book on which the screenplay was based, musical works incorporated in the film, any art or photographs used in the setting, as well as the end product of the film itself. Each of the works²⁶ in turn involve several different rights fragments and, consequently, multiple rightsholders and systems of rights clearance, and possibly also guilds or unions. Some rightsholders may have moved or died. And of course anyone of the rightsholders who has an exclusive right may prevent the use and stop or force a rearrangement of the entire project. Collectives can help because they usually cannot or will not refuse an authorization. However, several organizations may

- (3) The licence granted to the content provider is a worldwide licence granted on a non-exclusive basis which means that all the content providers will have equal and non-discriminatory access to the repertoire;
 - (4) A swift distribution of the collected royalties should take place;
 - (5) Collectives apply the tariff in the country of the destination of the download, if there is any.
- See Prof. Dr. J. Becker "Santiago Agreement and 'Fast Track'" (2001), GEMA at the MIDEM in Cannes on 23 January, 2001, *GEMA News* 163, online: <www.gema.de/eng/communication/news/163/santiago.shtml> (last visited: 17 October 2005).
25. When collectives are considered as an additional subsystem of copyright, as suggested by Prof. Dietz (see Prof. Dr. J. Becker, "The Collecting Societies in the European Single Market" Symposium of the Institute for Copyright and Media Law at the Munich Media Days (2002), *GEMA News*, Issue 166, online: <www.gema.de/eng/communication/news/166/medientage_becker.shtml> (last visited: 18 October 2005)). Complexity increases on a formal level but in fact the role of collectives, it could be said, is to decrease the complexity and at times chaotic nature of rights clearance.
 26. Or object of a related right.

be involved. Additionally, one collective society may represent a creator for part of his or her repertoire, and another collective for the remainder.²⁷

To use simple examples, during the shooting of the film, permission to include incidentally a statue or painting may have to be obtained. Or perhaps there will be a scene where characters rent a movie, of which thirty seconds will be shown in the other movie, leading to yet another rights clearance transaction. In addition to the number of varying rights and rightsholders in each of these nations, each country will also have its own unique system of rights clearance which may or may not involve anywhere from one collective society and upwards to an almost unlimited amount. For example, under French law, a director has an unwaivable and non-transferable right to remuneration for several forms of exploitation of the film in France, including video rentals.²⁸ The studio/producer will acquire rights in the film, either as full copyright in the United States or, as in Europe, a neighbouring right as producers of the "first fixation" of the audiovisual work.²⁹ And of course, each element of this puzzle, including copyright transfers, will change through time.

After this analysis of the problems that copyright faces, illuminated by the spotlight of history and public policy and of the chaotic nature of copyright and related rights, it is time to turn to the role that collectives are playing or may be called upon to assume in finding a way out of this rights maze.

3. WAYS FORWARD

3.1. COLLECTIVE MANAGEMENT IN HISTORICAL PERSPECTIVE

The story of the rise of CMOs has become a quaint and famous tale. It begins with the French playwright Pierre-Angustin Caron de Beaumarchais in the dark and dingy Parisian theatres in the 1700s. Theatrical companies at the time were enthusiastic in their encouragement of promoting plays and artists, but were less generous when it came time to share in the revenues. The term "starving artist" was more literal than figurative.³⁰

Beaumarchais was the first to express the idea of collective rights management. In 1777, he created the General Statutes of Drama in Paris. What

27. Many composers change their US performing right affiliation from ASCAP to BMI, or vice versa, and may thus have rights that at a certain point in time were administered by one society and later by another.
28. A. and H.-J. Lucas, *Traite de la Propriete Litteraire et Artistique*, 2e edn. (Paris: Litec, 2001), 1132 at 222-3.
29. *Ibid.* at 172. See also EC Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (2002), O.J. L. 346/61 [Rental Directive], Arts 2, 7 and 9, online: <europa.eu.int/smartapi/cgi/sga_doc?smartapi!lexnav!prod!CELEXnumdoc&lg=EN&numdoc=31992L0100&model=guichet> (last visited: 14 September 2005).
30. While this may be an exaggeration on the authors' part, this cliché remains, nonetheless, a somewhat accurate portrait of financially struggling artists both then and now.

began as a meeting of 22 famous writers of the *Comédie française* over some financial matters turned into a debate about collective protection of rights. "They appointed mandatories (agents), conducted the now famous pen strike and laid a foundation for the French Society of Dramas' Authors (*Société des auteurs dramatiques*)."³¹ In 1838, Honoré de Balzac and Victor Hugo established the Society of French Writers,³² which was mandated with the collection of royalties from print publishers.

The net of authors' societies, shaped by the cultural environment of each country, slowly spread throughout the world. The collective management of copyright was seen as a practical and efficient way of allowing creators to be compensated. In Italy the SIAE, under the direction of Barduzzi, was so efficient that the state also empowered them to collect theatre and cinema taxes.³³ Problems were not limited to the domestic scene, however. As CMOs flourished in their own national states, the need for cooperation and harmonization on the international level became apparent. In 1925 Romain Coolus organized the Committee for the Organization of Congresses of Foreign Authors' Societies. This Committee was founded to tackle some of the insurmountable problems involving international issues.³⁴

Around the same time, Firmin Gémier succeeded in creating the Universal Theatrical Society.³⁵ Both of these initiatives led to the founding congress meeting in 1926 of the International Confederation of Societies of Authors (CISAC³⁶). The founding members identified the need to establish both uniform principles and methods in each country for the collection of royalties and the protection of works, and to ensure that literary and artistic property³⁷ were recognized and protected throughout the world.³⁸ Today, CISAC

31. See CPTeach's Page on Collective Management of Copyright, online: <www.cptech.org/cm/copyrights.html> (last visited: 17 October 2005).
32. Société des gens de lettres, see online: <www.sgdl.org/fr_his.htm> (last visited: 17 October 2005).
33. For a complete historical account of the formation of CMOs, see International Confederation of Societies of Authors and Composers (CISAC), *As Long as There are Authors* (Paris: International Confederation of Societies of Authors and Composers, 1996), p. 64.
34. As one commentator noted:
 "The Portuguese Society of Authors offered to represent French authors, and the theatre managers of Lisbon immediately threatened to boycott French plays. The Spanish society SGAE would not allow the SACD to deal with its members on an individual basis."
Ibid. at 10.
35. The biography of Firmin Gémier may be found (in French) online: <www.theatre-odeon.fr/public/document/biographie/gemier.htm> (last visited: 17 October 2005).
36. See online: <www.cisac.org> (last visited: 17 October 2005).
37. The French law on authors' rights (the civil law version of copyright) is actually known as the Code of Literary and Artistic Property, Law No. 92-597 of 1 July 1992, as amended by Laws Nos 94-361 of 10 May 1994, and 95-4 of 3 January 1995.
38. By "world", I am referring only to the Western World. This is inclusive of the Anglo-Saxon and *droit d'auteur* traditions of copyright.

has 207 member societies in 109 countries,³⁹ a majority of which license either the public performance and communication of musical works or the "mechanical reproduction" of those works. Other CISAC members license reprography and reproduction of works of the fine arts and performance in theatres (the so-called "grand rights").

While the formation of national and international CMOs may have once been considered revolutionary, the pivotal role that they continue to play as facilitator in the copyright industry is more properly characterized as evolutionary. CMOs facilitate the establishment of unified methods for collecting and dispersing royalties as well as negotiate licensing arrangements for works. Yet, licensing and royalty payment, while still important, is not the only preoccupation of CMOs. Over time the role of collectives has evolved to oversee copyright compliance, fight piracy and perform various social and cultural functions.⁴⁰

Since the inception of CMOs, countries have fostered the growth of such societies through legislative initiatives in the belief that collectives offer a viable solution to the problem of individually licensing, collecting and enforcing copyright. In theory, collective licensing enables creators to exercise rights in a fair, efficient and accessible manner. It ensures copyright protection when individual management of it becomes difficult and often, unfeasible from an economic perspective. For example, tens of thousands of radio stations worldwide cannot possibly clear individually the rights of authors, composers, performers and producers of each song they play.⁴¹

While CMOs were initially promoted as an efficient way to collect and disburse monies to compensate rightsholders for copyright works, increasingly the structure of CMOs, both on a national and international level, has raised questions about the efficiency of CMOs.⁴² In addition to those significant structural issues, the market conditions and business trends of copyright owners are changing, and collectives must adapt.⁴³ Just as the role of CMOs is evolutionary, so is their underlying stated efficiency.⁴⁴ While the current milieu of CMOs

39. See online: <www.cisac.org> (last visited: 17 October 2005).
40. See M. Fiesor, *Collective Management of Copyright and Related Rights* (Geneva: World Intellectual Property Organization, 2002), 165 at 99-106.
41. Although the extreme concentration of media ownership in certain countries may progressively render this kind of licensing "less impossible".
42. For example, often rights are governed by multiple CMOs within a particular nation. Coordination is therefore required not only between national CMOs, but then on an international basis between CMOs. There is a significant lack of standards among many CMOs. Identification alone of an underlying right and rightsholder can be a convoluted process.
43. As one author notes, "efficiency will be what, in the end, members and music users most want and will most easily recognize, however it is measured". See J. Hutchinson, "Collection and Distribution of Performing and Mechanical Royalties: A View from the UK" (1998), 84 *Copyright World* 30, at 32.
44. As Peter Drucker notes, "efficiency is doing better what is already being done". See P. Drucker, *Innovation & Entrepreneurship: Practices and Principles* (New York: Harper

may have served both creators and users reasonably well in the past, the system must adapt to remain both efficient and relevant.⁴⁵

Collective management of copyright was promoted as an effective way for authors and other rightsholders such as performers, publishers and producers to monitor and, in some cases, control certain uses of their works that would be otherwise unmanageable individually due to the large number of users worldwide or due to the development of new technologies. The use of music for broadcast by radio stations is perhaps the best example of such a use. As already mentioned, thousands of radio stations worldwide cannot possibly clear individually the rights for each song they play. Nor would those rightsholders want to receive, and have to respond to, those individual requests.

Collective management has also allowed authors to use the power of collective bargaining to obtain more for the use of their work and negotiate on a less unbalanced basis with large multinational user groups.⁴⁶ That being said, most collective schemes value all works in their repertory on the same economic footing, which may be unfair to those who create works that may have a higher value in the eyes of users. Additionally, collective management ensures that users will have easy access to rights needed to use material protected by copyright.

To a certain extent, CMOs facilitate the market between creators/producers of copyright works, and the users of these works. In some respects, CMOs can be seen as the axel or pivot point on a balanced teeter-totter – users on the one side and creators on the other. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.

Inasmuch as CMOs may be seen as a balancing force between authors and users, it is important that they constantly adapt to ensure that they are best able to facilitate this process. Their continued justification, in some respects, relies on their ability to act as effective facilitators. Where CMOs are unable to effectively play this role, and where they may actually impede or hamper the system by unreasonably preventing the use of works, a re-evaluation of both their role and value becomes necessary.

& Row, 1983), 277. Drucker discusses the nexus between technology, innovation and efficiency.

45. Licensing, collecting and enforcing copyright may now be done on an individual basis through the aid of technologies such as digital rights management systems. While most authors do not adopt the view that collectives will no longer have a role to play in the digital environment, the point is that new technologies alleviate some of the concerns relating to the inefficiency of individual licensing, collecting and enforcement of copyright.
46. For instance, imagine if corporations such as music video television (e.g. MTV) negotiated the use and fee for each song/video it broadcasted with individual artists. While artists such as U2 or Madonna would be in a position to negotiate on a balanced power basis, the same would not be said for new groups struggling to find any airtime.

3.2. COLLECTIVE LICENSING AND THE INTERNET

Collectives have been dealing with the challenges of the digital age for some time now. They have been called upon to answer criticisms of copyright management. Indeed, claims that "copyright does not work" in the digital age are quite often the result of the inability of users to use protected material lawfully.⁴⁷ Especially with the Internet, users of copyright material can (and want to) easily access millions of works and parts of works, including government documents, legal, scientific, medical and other professional journals, music, video excerpts, e-books, etc. While digital access is fairly easy once a work has been located (though it may require identifying oneself and/or paying for a subscription or other fee), obtaining the right to use the material beyond its primary use (which is usually only listening, viewing or reading) is more difficult unless already allowed under the terms of the licence or subscription agreement or as an exception to exclusive rights contained in a nation's copyright regime.⁴⁸

When the unavailability of a legitimate option to access material online is not the result of the rightsholders' unwillingness to authorize the use but rather the unavailability of realistic licensing options, both rightsholders and users are losers: rightsholders because they cannot provide authorized (controlled) access to their works and lose the benefits of orderly distribution of their works, and users because there is no easy authorized access to the right to reuse digital material.⁴⁹ It is also a risky path to follow. The pervasive nature of the Internet and the increasing tendency to link various appliances and devices such as cell phones, Personal Digital Assistants (PDAs) and also television sets, stereo receivers, watches, etc. to the global network means that keeping any material that can be digitized off the Internet will become increasingly difficult, technically, commercially, or both. While a combination of technology and law might allow rightsholders to keep material off major servers in a number of countries (though not all countries have copyright laws) and/or request that Internet service and access providers (ISPs/IAPs) block access to websites that provide access to illegal material, should user/consumer demand for digital access ultimately prevail?⁵⁰

47. Some of this text is an updated version of an article by this author, D. Gervais, "Lock-It Up or License", in H. Hansen, (ed.), *International Intellectual Property Law & Policy*, vol. 6, (New York: Juris Publishing, 2001), 1200.
48. For example, common law-based copyright regimes allow for exceptions such as fair dealing or fair use. Under such exemptions, users are allowed to perform acts which they would otherwise not be authorized to do. For example, users are often allowed to "tinker" with the source code of a computer program for the purpose of enhancing and adapting such programs. This is known as reverse engineering.
49. This may be characterized as the all or nothing approach. If a creator makes available a work on the Internet, the ability to control the dissemination and use of the work is lost. The alternative is simply not to make available works over the Internet. For a discussion of the feasibility and desirability of stopping file-sharing, see D. Gervais, *supra* note 12.
50. It is important to note that the market remains immature. It is too early to conclusively determine that users will opt en masse to download free pirated versions of copyright works

A large amount of copyright material is (and more will be) available through digital networks and that this "market" will need to be organized in some way. The term "organized" suggests here that users will want access and the ability to reuse material lawfully; and rightsholders will be able to meet those needs in a reasonably efficient way.⁵¹ These uses include putting the material on a commercial or educational website or an Intranet, emailing it to a group of people, reusing all or part of it to create new copyright material, storing it and perhaps distributing on a CD or other storage device. Authors and other rightsholders will want to ensure that they can put reasonable limits on those uses and reuses and get paid for commercially significant uses of their material (absent, of course, a specific exemption in the relevant copyright law).

Collective management offers the most workable solutions and best represents key principles of intellectual property amid rapid technological advances.⁵² CMOs can be instrumental in facilitating relations between copyright holders and users of content providing they remain efficient. Their expertise and knowledge of copyright law and management may be essential to make copyright work in the digital age. Under this theory, the individual exercise of rights in the digital environment is rendered impractical if not futile due to the possibility and ease of disseminating works. Collectives, therefore, are critical intermediaries, provided they are able to adapt to both the needs and concerns of the creators they represent and to the market. Their expertise and knowledge of copyright law and management may be viewed as essential to make copyright work in the digital age.⁵³

On the other hand, it may be that, with the aid of technology such as Digital Rights Management (DRM), the individual exercise of rights will become not

A good example of this is the MP3 phenomenon. While Napster may have been shut down, other sites have since emerged to facilitate file-swapping of music. This, however, is not determinative of the state of the market. Companies offering on-line subscription services for downloading music have likewise seen a steady increase in sales. There is a common thread to both of these phenomena, accessing works in digital format is something that consumers want. See also the study mentioned in the previous note.

51. The example of ring tones comes to mind in that respect.
52. See for example: J. Hutchinson, *supra* note 49; and C. Jarvis, "Broadcasts: Collective Licensing - The End or a New Beginning?", in J. Kendrick, (ed.), *Collective Licensing: Past, Present and Future* (Netherlands: MAKLU Publishing, 2002), 384.
53. Others have advanced the view that collectives are preferred to individualized transactional licensing based on the "balanced footing" argument. For example, C. Jarvis articulates: "And would it not be the case that setting up a 'digital shop' offering works at set prices via the Internet will surely remove any user's ability to negotiate according to individual circumstances. And, probably more importantly, how will the user know that the price is fair and reasonable? It is also not clear how any user will be able to work out who a particular copyright owner might be in such an environment (the collecting societies provide a unique 'portal' in this respect) - so this could create another barrier to use that does not exist currently". See C. Jarvis, *ibid*.

only feasible but a more efficient solution, at least in certain cases.⁵⁴ Or that a layer of individually or collectively managed transactional uses will coexist with a free or uncontrolled space. That space could be covered by a general license, even one that would be paid as part of a monthly Internet or other subscription. The role that collectives will play in managing transactional uses and/or general licenses (which one could then compare to a compensation regime) is unclear, and it depends in large part to the degree that they can facilitate and develop new business models. Thus it may be the case that the advancement of new technologies will minimize the role of CMOs, but it could also lead to a significant expansion. Whatever view is taken, the rationalization of the collective management of copyright remains an important task. In fact, if CMOs are to play the role of intermediary fully and efficiently, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks. The ability of collectives to meet the needs of both authors and users is dependent on the evolution of both their internal practices, and the framework in which CMOs work to alleviate the many concerns of fragmentation within the current system.⁵⁵ All nations and CMOs throughout the world must adapt their laws and infrastructure to meet the challenges of digital technology and multimedia products. This challenge arises irrespective of the philosophical underpinnings of a nation's copyright system, whether it is rooted in economic rights, natural/human rights, utilitarian rights and any combination of these.

54. M. Kretschmer, "The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments" (2002), *European Intellectual Property Review* 126, at 133. Under this theory, rightsholders will use digital rights management systems to control and disseminate the use of their works. The author explains: "In short, the transaction cost argument for collective administration from the cost of individual contracting may support not a universal rights administration system (to which all rightsholders have access on similar terms), but a system where the major rightsholders selectively decide, supported by sophisticated information technology, whether collecting licence fees is worthwhile".
55. The proliferation of digital technology presents problems both to authors and copyright holders as well as for users. As one author notes: "The advent of the digital age has allowed for new technologies to put the power of creation in the hands of the masses as never before. Similarly, digital technologies have allowed works of compilation (especially those that are in multimedia format) to develop at an unprecedented rate. For both creators of works, especially those that are not significant in size or value, and for those creating compilations or other works that require licensed rights from a large number of rights holders, the Copyright Act creates a formidable hurdle. Transaction costs in clearing rights (i.e., getting appropriate licences and authorizations) are often extremely high relative to the value of the work being created and certainly as compared to the value of the work being cleared. Rights clearance is undoubtedly one of the central copyright issues for the first half of the 21st century". S. Handa, *Copyright Law in Canada* (Markham: Butterworths, 2002), 490 at 354.

The advent of digital technologies is not to be mistaken for the one and only or main problem of the collective management of copyright. Identification of the various rights involved coupled with finding the rightsholders associated with the underlying rights is perhaps aptly entitled, "organized chaos".⁵⁶ Digital technology and the rights clearance of multimedia products merely highlight problems that already exist in the current system.⁵⁷ An examination of the use of multimedia products and their intersection with collectives allows us to take a closer look at some of the problems of the collective management of copyright. In this respect, it is like putting the cell of a diseased specimen under the lens of a microscope – while it does not illustrate the entire problem, it allows us to see the symptoms.

Collectives may also face competition from new players. Commercial entities that offer music on the Internet, whether on a subscription basis or individual song downloads, could combine their service with rights management in order to circumvent collectives altogether. This is unlikely to work for individual authors, given the sheer number of composers and lyricists concerned, but could apply to other rightsholders, especially publishers and producers, in light of the high concentration of the music market and the decreasing distance between music publishers and producers. In countries where collective management is not mandatory or non-exclusive (e.g., the United States), one could see these new entities offering their services to authors as well. New "de facto collectives" of that sort could operate on a trans-national basis, which raises the spectre of territoriality.

3.3.

DERAGMENTATION AND SIMPLIFICATION

Rights clearance systems are often based on the rights fragments discussed in Part I, and each tends to come with its "practices" and other idiosyncrasies. This means that even if each such "sub-system" (for a clearance process requiring several clearance transactions performed through different intermediaries (including several collectives) is efficient, the efficiency of the process as a whole is in jeopardy.

Collective management is not a neutral service. Given the fragility of Internet-based business models for delivery of copyright content on the Internet, economically efficient clearance "should ensure that copyright

56. See note 24, *supra*, where the idea of chaos theory was introduced and paralleled with fragmentation. Chaos theory looks at unstable, aperiodic behaviour. That is, there is no regular repetition of values making future prediction impossible. Oddly enough, however, one would expect such "chaos" to prevent any form of organization when, in fact, a coherent, albeit somewhat intangible, system emerges.

57. In an Australian copyright study it was noted that, "identifying and finding copyright owners for the purpose of obtaining clearances was the issue most strongly identified by the producer respondents as their copyright concern in relation to multimedia". See J. Fitzgerald, "Licensing Content for Multimedia" (July 1998), 84 *Copyright World* 23 at 23.

administration favours no one delivery method over another".⁵⁸ In fact, regardless of whether digital technology is involved, the standardization of practices amongst CMOs would lead to greater efficiencies and would alleviate some of the fragmentation under the current system. To play that role fully and efficiently, however, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks. Additionally, CMOs will need to cooperate more fully both on a national and international scale to fully achieve their role as facilitators of rights clearance. The following suggestions are offered as potential means to achieve this goal.

Technology and, in particular, electronic rights management systems,⁵⁹ are a useful tool in copyright clearance, especially in the digital environment. To borrow from the four dimensional matrix discussed earlier, such technologies would operate like a joystick to a videogame. The joystick is a mechanism of control – it facilitates rights clearance in that it aids the user in jumping over hurdles steering them towards proper identification of the rightsholders involved and the rights that will need to be cleared. While it does not guarantee the success of the player, the joystick greatly increases the likelihood of successfully navigating through the matrix.

A copyright management system (Copyright Management Systems (CMS)) are basically databases that contain information about content – works, discrete manifestations of works and related products and, in most cases, the author and other rightsholders.⁶⁰ may be used by individual rightsholders or by third parties who manage rights on behalf of others. A rightsholder might use the system to track a repository of works or products embodying such works (or substantial parts thereof), or an organization representing a group of rightsholders might use a CMS to track each rightsholder's rights and works. Such an organization might be a literary agent representing a number of writers, or, more commonly, a collective management society.

Rights management functions are made much easier with computers, which act both as huge rights databases and automated licensing engines. Computerized systems allow rightsholders to automatically grant transactional licenses to users without human intervention, which has the benefit of keeping transaction costs low and making licensing an efficient, Internet-speed

58. M. Einhorn and I. Kuriantzick, "Traffic Jam on the Music Highway" (2002), 8 *Journal of the Copyright Society of the USA* 417, at 420.

59. Electronic rights management systems (ERMS) are also referred to as digital rights management systems (DRMS) and copyright management systems (CMS).

60. See J. Cunard, "Technological Protection of Copyrighted Works and Copyrighted Management Systems: A Brief Survey of the Landscape". ALAI Congress 2001. See also D. Gervais, "Electronic Rights Management and Digital Identifier Systems" (March 1999), 4:3 *Journal of Electronic Publishing*, online: <www.press.umich.edu/jep/04-03/gervais.html> (last visited: 17 October 2005).

process: licences to use a specific work can be granted online, 24 hours a day, to individual users. Ideally, such licences will be tailored to a user's needs.⁶¹ For example, a company may want to post a flattering newspaper article on its website or send it via email to its customer base; an individual author may decide to purchase the right to use an image, video clip, or song to use in her or his own creative process; a publishing house might purchase the right to reuse previously published material. CMS may also be used to deliver content in cases where the user does not have access to such content in the required format or to create licensing sites or offer licensing options at the point where the content is made available. Finally, digital rights management (DRM) can also be used to enforce licensing terms by restricting or tracking usage.

In order to be optimally efficient and able to deal with digital usage information, online member and work registration, user requests and online transactional licensing (where such licensing on reasonably standard terms is possible), CMOs need rights management systems with both an efficient "back-end" system and a user-friendly online interface ("front-end"). However, building an all-encompassing online multimedia licensing system operated jointly by all collectives in a country is hard to justify under current licensing practices or indeed in light of prevailing market conditions.⁶²

The sheer number of collectives that may be involved in the licensing of a single economic use of a protected work (or works and possibly combined with one or several related rights) poses another problem. In order to implement an efficient system, collectives should cooperate within appropriate groupings (i.e., CMOs having a sufficient degree of commonality) to limit the number of rights management systems to be developed and they should develop compatible systems to ensure that the exchange of data will be possible.⁶³

A repertoire license (i.e., one which allows the user to use any work or object contained in the repertoire of works licensed by a collective) presents an attractive alternative. The two most relevant uses of such licenses are where there are inherent difficulties in advance clearance of rights and where consolidation is more practical from a user's (and sometimes creator's) perspective.

61. Many licenses to use a work are granted where the user obtains permission for several different uses of a work. It may be the case that the user only requires the work for a specific purpose. Why should the user pay to acquire rights to use a work in a manner for which he/she has no intention of using it for?
62. These systems often perform several functions. The first, if so required, is to break down the rights in a work (more the case with multimedia works). The second function is to identify the rightsholder(s) of the work. The third function is then to clear these rights, followed by establishing license terms, and payment of fees for the use of a work. Such technologies facilitate the expediency and efficiency of licensing content online. See T. Koskinen-Olsson, "Secure PR-Content on the Internet", ALAI Congress 2001.
63. These would seem to follow the best practices emerging from ongoing efforts in countries other than the US. This will be explored in greater detail when addressing centralized licensing regimes or one-stop-shop services.

From a functional point of view, CMOs are a practical substitute for a legal license due to the multitude of uses and the difficulty of advance clearance. This solution has the advantage of being fairer to users and potentially achieves administrative efficiencies for both creators and users. Such a system would be fairer to users in that there would no longer be a discrepancy in fees to be paid for similar uses of a work.⁶⁴ In essence, a single tariff could be established for different types or uses of works. A user would pay an "admission fee" at the entrance.

In Europe, problems of fragmentation and the challenge of licensing multimedia products are being addressed both at the different national and international governmental levels. New rights clearance centres have been established in many countries on the national level; a central clearance centre for all of Europe has yet to emerge. A common characteristic of these clearance centres is that the multimedia producer can clear all rights for a project by stopping and shopping at one single centre. Several countries implemented "one-stop-shop" centres – some of which are not doing too well at present.⁶⁵ In the late 1990s and early in this century the European Commission also funded ten pilot projects on multimedia rights clearance systems: INDECS,⁶⁶ EFRIS,⁶⁷

64. As it stands, collectives sometimes negotiate different licensing terms and fees with users regardless of whether the actual "use" of the work is similar in nature.
65. These are discussed in the national and regional chapters in Part II. They include: In France: SESAM, created in 1995, was the first clearing centre to be established in Europe. It incorporates five CMOs: ADAGR, SADC, SACEM, SCAM, and SDRM (See SESAM's website, online: <www.sesam.org> (last visited: 18 October 2005)). A good overview of SESAM's use of digital rights management systems may be found in B. Salvas, "La gestion collective à l'heure d'Internet" (2000), 13 *Cahiers de propriété intellectuelle* 139, Germany: In Germany, CMMV was formed in 1996 and is comprised of nine collecting societies: GEMA, GVL, VG WORT, GÜFA, GWPF, VG BILDKUNST, VFF, VGF, and AGICOA (See online: <www.cmmv.de> (last visited: 18 October 2005)). *Netherlands*: CEDAR was formed in the Netherlands exclusively to address multimedia rights clearance. Its wide variety of members consist *inter alia* of: Stichting Beeldrecht, Burafo, Buma/Stema, Leenrecht, MusiCopy, Reprorecht and Stichting de Thuiskopie. Many of these members are, in turn, comprised of a multiple of societies. (See online: <www.cedar.nl> (last visited: 18 October 2005)). Others include the Finland's KOPIOSTO, Italy's STAE, Norway's CLARA, Spain's OM and Sweden's COPYSWEDE.
66. INDECS is the Interoperability of Data in E-Commerce Systems. See M. Schippan, "Purchase and Licensing of Digital Rights: The VERDI Project and the Clearing of Multimedia Rights in Europe" (2000), 22 *European Intellectual Property Review* 24, at 26:
"The subject of the INDECS project is the creation of a common format – a unique metadata code – to achieve a high level of interoperability between different identification systems."
67. EFRIS stands for the Extended Frankfurt Rights Information System. See M. Schippan, *ibid.*
"The aim of the EFRIS project is to intensify the transaction around the Frankfurt Book Fair by encouraging the adoption of Internet-based-standards and thus facilitating the trade with multimedia rights."

TV FILES,⁶⁸ PRISAM,⁶⁹ ORS,⁷⁰ BONA FIDE,⁷¹ before copyright,⁷² COMPAS,⁷³ RCTRIDW,⁷⁴ and VERDI.⁷⁵ A "one-stop-shop" multimedia clearance center was also attempted in Japan. For example, the "Japan Copyright Information Service Center (J-CIS)" contained a database that provides users with information about copyrights in multiple fields, but it does not yet go as far as handling rights clearance.⁷⁶ Japan is also the home of the Copymart project launched several years ago by Professor Zentaro Kitagawa.⁷⁷

Meanwhile, voluntary licensing of digital uses by CMOs is already in place in the United States. Many performing rights CMOs have tariffs relating to the public performance/communication of music on the Internet. Copyright

68. The TV FILES project refers to the Intellectual Property Rights for TV Programmes. *Ibid*. "TV FILES seeks to establish a database with audiovisual works to create a contact network between European TV programme buyers, film producers and multimedia producers."
69. PRISAM refers to the Producers Rights Information System for Audiovisual and Multimedia. *Ibid*.
70. PRISAM's aim is to create a "one-stop information shop" to facilitate negotiations between European producers and editors of multimedia products on the one hand and rights-holders on the other... The one-stop information shop will contain all sorts of audiovisual works needed for the development of multimedia products, except for news and sports events."
70. ORS refers to Open Rights System. *Ibid*.
"The subject of ORS is to construct prototype software which would enable producers of multimedia software to obtain from right owners the necessary authorization to use objects or works protected by intellectual property rights."
71. BONA FIDE is the Broker-Based Network Architecture for Fair-Safe IPR Clearance of Digital Content. *Ibid* at 27:
"BONA FIDE aims to develop a pilot broker system designed to register, store, distribute and monitor usage of multimedia material."
72. *Ibid*.
"The 'before copyright' project foresees the establishment of a network-connected agency whose main task is to co-ordinate the activities of multimedia producers in the audiovisual sector at a very early stage."
73. COMPAS is the Copyright Management and Multimedia Rights Clearance Best Practices for Educational Multimedia. *Ibid*.
"The aim of COMPAS is to identify the main difficulties involved in funding, producing, distributing and marketing multimedia products designed for training and educational purposes, review current procedures for managing multimedia rights and streamline them by developing common reference standards."
74. RCTRIDW is the Rights Clearance for a Trans-Regional Integrated Digital Warehouse. *Ibid*.
"RCTRIDW sets out to study the feasibility of creating a multimedia rights clearance system for a digital multimedia warehouse operating across seven European minority-language regions and designed to allow transregional commercial exploitation of public sector film, TV and radio archive."
75. VERDI is the acronym for "Very Extensive Rights Data Information". See *ibid*.
76. See the chapter by Professor Okumura.
77. See the chapter on Japan and Zentaro Kitagawa, (ed), "Copymart: The Product and its Prospects", Proceedings of the Berlin Symposium, (Kyoto: IIAS, 2003). See also, online: <www.copymart.gr.jp/english/tophome_chnl> (last visited: 18 October 2005).

Clearance Center, Inc. (CCC) licenses reproduction of printed material for inclusion in "digital coursepacks", reuse of material on websites, intranets, CD-ROMs and other digital media. CCC also offers a repertory-based license for internal digital reuse of material by corporate users. Interestingly, in the latter program, users can only scan material not made available by the publisher himself in digital form.⁷⁸ CCC's ability to license digital uses is entirely based on voluntary and non-exclusive rights transfers from rightsholders.

The "one-stop-shop" clearance centers greatly facilitate rights clearing with multimedia products and are seen as a solution originating with the market.⁷⁹ Central licensing has been heralded as an efficient way of rights clearance for both collective society members and users.⁸⁰ Central licensing, however, is not a solution free of criticism. These central licensing agents are administered on a national basis; coordination on a European basis and further, on an international basis remains largely unexplored.⁸¹ The extent of collaboration and standardization, therefore, is somewhat restricted to the domestic market. Furthermore, there are concerns that users will begin to "shop" deals — advantageous for users but potentially disadvantageous for creators. As one author noted:

A deeper tension lies between some of the European collecting societies themselves all intent on being the one to offer the one-stop license and as this power struggle is played out, the situation has arisen that it now becomes possible to shop around the various territories to get the best rates and widest territorial licenses. All of this in front of the backdrop of the failure to conclude a memorandum of understanding between collecting societies and rights owners for either international or European-wide on-line licensing and question... of who licenses whom.⁸²

Finally, pre-clearance of rights on a transactional basis at a one-stop-shop is a fairly complex, long and expensive process even when done using an efficient ECMS and even with the added benefit of having a single point of departure in the rights maze. It may work for professional users seeking to create

78. See online: <www.copyright.com> (last visited: 18 October 2005).
79. While such systems may be fostered and funded by governments, they are often voluntary. Likewise, market players have had a large influence in the establishment and terms of operation of such one-stop-shop systems.
80. J. Hutchinson, *supra* note 43 at 32.
81. Although one important step in this direction is the so-called Santiago Agreement, which clarifies among performing rights collectives that the licensor of a content provider shall be the society of the country where the content provider has its actual and economic location and that the license granted to the content provider is valid worldwide. See J. Becker, *supra* note 29. If applied successfully, this may not deal with all applicable rights (including public performance/communication to the public and reproduction, and only covers a specific use). Still, it is a step in the right direction.
82. J. Channon, "Ring Tones" in *Collective Licensing: Past, Present and Future*, *supra* note 59 at 85.

a CD-ROM, but in its current form and application, is much less viable for mass market uses.⁸⁵ This also begs the question of whether the acquisition and management of (multimedia) rights should be facilitated by legislative or contractual mechanisms. A market solution may not be the most efficient or feasible solution. On the other hand, an over-riding central licensing system may require legislative backing.⁸⁴

Multilateral agreements between CMOs represent another potential solution. CMOs can set up agreements with one another to set standards and establish cooperative compensatory regimes, so that a user could approach any of these societies, and obtain the information necessary to clear the right to use a work — they would not have to go from point to point in search of the relevant information. This is best characterized as a standardization effort.

3.4.

THE EXTENDED REPERTOIRE SYSTEM

The extended repertoire system (ERS — also known as extended collective licensing) is used in all Nordic countries⁸⁵ and is spreading to other parts of the world, including Central and Eastern Europe, Africa and possibly also Canada.⁸⁶ It is a voluntary assignment or transfer of rights from rightsholders to the collective with a legal extension of the repertoire to encompass non-member rightsholders. It greatly simplifies the acquisition of rights. It has been called a “backup legal license”, but this expression is confusing because the rightsholder can opt out of the system. This, of course, is generally not possible under a true compulsory or legal licence.⁸⁷

ERS may be an appropriate and effective method in facilitating rights clearance. This license works as follows: as soon as a “substantial” number of rightsholders in a given category agree to join forces in a collective, the repertoire of the appropriate collective is automatically extended, not only to other domestic rightsholders in the same category but also to all relevant foreign rightsholders. The license also extends to deceased rightsholders, particularly in cases where estates have yet to be properly organized. Substantiality is contextual. A new

83. This is not to say that, as both technology and practices evolve, such a system would be unworkable at the mass market level, but that such a system for individual users is not yet feasible.

84. Mandating non-voluntary central licensing centers, however, may raise issues of competition law.

85. See the chapter by Tarja Koskinen-Olsson.

86. See D. Gervais, “Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation (2003)”, study prepared for and published by the Government of Canada, online: <www.poh.gc.ca/progs/ac-cal/progs/pda-cpb/pubs/regime/regime_e.pdf> (last visited: 18 October 2005).

87. Internationally, very few countries have adopted compulsory licensing of digital uses. Such a system exists in the Danish legislation but has yet to be applied in practice. It would be an extension of the license existing under ss. 13 and 14 of the Danish Copyright Act, 14/06/1995, No. 395.

collective organizing rightsholders in a given area for the first time should have a much lower substantiality threshold to pass than a well-established collective trying to obtain an extension of repertoire for a new licensing scheme.

The extended repertoire is an interesting model for countries where, on the one hand, rightsholders are reasonably well organized and informed, and, on the other hand, a great part of the material that is the object of licenses comes from foreign countries. It is often more difficult and time-consuming to obtain an authorization for the use of foreign material. The extended repertoire provides a legal solution for this situation, as the agreements struck between users and rightsholders will include all non-excluded domestic and foreign rightsholders. Finally, by accelerating the acquisition of rights, the extended repertoire also increases the efficiency and promptness of royalties’ collection. The monies redistributed to rightsholders are thereby increased.

Any proposal to facilitate rights management should be compatible with the TRIPS Agreement. As such, anything that may be considered a restriction or exemption must pass the three-step test.⁸⁸ For the same reason, any compulsory license, i.e. the deletion of the author’s exclusive right, must comply with TRIPS and the Berne Convention, which was incorporated into TRIPS.⁸⁹ The WTO panel in the US/Europe dispute concerning Section 110(5) of the US Copyright Act⁹⁰ confirmed that this meant that the negotiating history of the Berne Convention also made part of TRIPS.⁹¹ Another argument raised against the ERS is its compatibility with Article 5(2) of Berne, which prohibits formalities concerning the existence and exercise of the rights granted by virtue of the Convention. This argument must fail.

Article 5(2) came into being in the very early days of the Berne Convention. It was then and remains part of the Convention’s provisions dealing with the treatment of foreign authors (i.e., national treatment) and place of (first) publication. In the first draft of the Convention published in 1834⁹² the relevant part of Article 2 read as follows:

Authors who are nationals of one of the countries of the Contracting Countries shall enjoy in all the other countries of the Union, in respect of their works, whether in manuscript or unpublished form or published in one of those countries, such advantages as the laws concerned do now or will hereafter grant to nationals. The enjoyment of the above rights

88. See *supra* Part 2.2.

89. By its Article 9(1), except for the moral right (Article 6bis and provisions related thereto). See D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2nd edn. (London: Sweet & Maxwell, 2003), 580 at 124-130.

90. World Trade Organization, “United-States-Section 110(5) of the US Copyright Act, Report of the Panel” (15 June 2000), WTO doc. WT/DS160/R, online: <www.wto.org/english/news_e/news00_e/1234da.pdf> (last visited: 18 October 2005).

91. *Idem*, at para. 6.63.

92. See WIPO, *Berne Convention Centenary: 1886-1986* (Geneva: International Bureau of Intellectual Property, 1986), 241 at 94.

shall be subject to compliance with the conditions of form and substance prescribed by the legislation of the country of origin of the work or, in the case of a manuscript or unpublished work, by the legislation of the country to which the author belongs.⁹³

It is clear from the above that the principal intent was to grant to foreign authors the same rights as nationals. This was confirmed by the Drafting Committee, which also clarified the meaning of the expression "conditions of forms and substance": originally a German proposal, which was changed to "formalities and conditions". The Minutes of the First Conference held in Berne in 1884 are very useful to illuminate the meaning and purpose of the expression:

Dr. Meyer said the following: 'It is merely a question of noting that the wording proposed by the German Delegation, '*conditions of form and substance*' has been replaced by the words '*formalities and conditions*', and that the word '*formalities*' being taken as a synonym of the term '*conditions of form*', included, for instance, registration, deposit, etc.; whereas the expression '*conditions*', being in our view synonymous with '*conditions of substance*', includes, for instance, the completion of a translation within the prescribed period. Thus the words '*formalities and conditions*' cover all that has to be observed for the author's rights in relation to his work to come into being, whereas the effects and consequences of protection, notably with respect to the extent of protection have to remain subject to the principle of treatment on the same footing as nationals.

The President noted that the Conference agreed with Dr. Meyer on the scope of the words '*formalities and conditions*'.⁹⁴

The Report of the 1896 Paris Conference contains the following:

Under the text of the Convention, the enjoyment of copyright shall be subject to the accomplishment of the *conditions and formalities prescribed by law in the country of origin of the work*. The meaning of this provision does not seem to be seriously debatable. As a result of it, the author needs only to have complied with the legislation of the country of origin, to have completed in that country the conditions and formalities which may be required there. He does not have to complete formalities in the other countries where he wished to claim protection. This interpretation, which is in keeping with the text, was certainly in the minds of the authors of the 1886 Convention... (Emphasis in original).⁹⁵

93. *Ibid.*

94. *Ibid.* at 94-95.

95. *Ibid.* at 137.

Clearly, the conditions and formalities are those mentioned in 1884, namely registration, deposit, mandatory translation or publication etc., not the need to sign contracts, file statements of claims in courts, join or otherwise deal with copyright agencies etc. This was further reinforced at the 1908 Berlin Conference, a slightly different version of Article 2, which from 1908 until 1967 became 4(2) - now Article 5(2) - was adopted. There it was very clear that the provision is related to publication and similar requirements. The relevant part read as follows:

Authors who are nationals of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to their nationals as well as the rights specially granted by this Convention. The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.⁹⁶

The Report of the 1908 Conference is also worth quoting *in extenso* on this point. It begins with a statement that the provision does not apply to domestic authors and then explains the shift from the single formality requirement (in the country of origin) to the no formality formulation we have in the Convention text today:

The enjoyment and exercise of these rights shall not be subject to any formality. It should be noted that it is exclusively the rights claimed by virtue of the Convention that are involved here. The legislation of the country in which the work is published and in which it is nationalized by the very fact of publication continues to be absolutely free to subject the existence or the exercise of the right to protection in the country to whatever conditions and formalities it thinks fit; it is a pure question of domestic law. Outside the country of publication, protection may be requested in the other countries of the Union not only without having to complete any formalities in them, but even without being obliged to justify that the formalities in the country of origin have been accomplished. This is what results, on the one hand, from a general principle which is going to be stated and explained and, on the other, from the deletion of the

96. *Ibid.* at 149.

third paragraph of Article 11 of the 1886 Convention. This paragraph provides that:

"It is, nevertheless, agreed that the courts may, if necessary, require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished, in accordance with Article 2".

That Article does indeed state, at the beginning of its paragraph 2, that "the enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work" and, to remove difficulties which had arisen in certain countries, the Paris Interpretative Declaration had emphasized the idea – which was evidently that of the authors of the 1886 Convention – that the protection depends solely on the accomplishment, in the country of origin, of the conditions and formalities which may be required by the legislation of that country. This was already a great simplification which will be appreciated if it is recalled that there was a time not so long ago when, to guarantee a work protection in a foreign country, even by virtue of an international convention, it was necessary to register and often even to deposit that work in the foreign country within a certain time limit.

The new Convention simplifies matters still further since it requires no justification. Difficulties had arisen with regard to the production of a certificate from the authority of the country of origin – this production having been considered, occasionally, as the preliminary to infringement action, which caused delays. The new provision means that a person who acts by virtue of the Convention does not have to provide proof that the formalities in the country of origin have been accomplished, as the accomplishment or non-accomplishment of these formalities must not exert any influence. However, if it is in his interest to produce a certificate to establish a particular fact, he cannot be prevented from doing so (the article in the draft only refers to *formalities*, but it is meant to cover the *conditions and formalities* to which the 1886 Convention refers.)⁹⁷ (Emphasis in original)

Unquestionably, in light of the above, the formalities that are prohibited under Article 5(2) are essentially registration with a governmental authority, deposit of a copy of the work or similar formalities when they are linked to the existence of copyright or its exercise, especially in enforcement proceedings.

Interestingly, in its pre-1908 incarnation, the provision was arguably derogating from national treatment, though it was clearly not intended as such. Rather, Convention drafters saw it as a simplification of the multiple registration/deposit requirements.⁹⁸ If "pure" national treatment had been applied, it

97. *Ibid.* at 148.

98. *See ibid.*

would have been sufficient to grant protection to foreign authors on the condition of accomplishing the same formalities as nationals in every country. In 1908, the provision was realigned along the principle of national treatment by making it a provision against mandatory formalities while maintaining the meaning of the expression "conditions and formalities" defined in 1884–6. Formal requirement in existence at the time essentially involved registration, deposit (in national libraries) and, in rare cases, translation. For many reasons, while it was necessary to respect each country's ability to impose such requirements, they had to be decoupled from copyright. Deposit is still required for published works in many countries,⁹⁹ but the sanction for failure to provide free copies to the national library cannot be the removal of copyright.¹⁰⁰ The issue of mandatory translation is similarly separate from copyright, though its political importance led to the adoption of the Appendix to the Paris Act in 1971 allowing developing countries to impose compulsory translation licenses. The provision does not prevent requirements of other types.

This is further confirmed in WIPO's latest commentary on the Convention:

Formalities are any conditions or measures – independent from those that relate to the creation of the work (such as the substantive condition that a production must be original in order to qualify as a protected work) or the fixation thereof (where it is a condition under national law) – without the fulfillment of which the work is not protected or loses protection. Registration, deposit of the original or a copy, and the indication of a notice are the most typical examples.¹⁰¹

"Enjoyment" is thus the very existence of the right while exercise refers in particular to enforcement.¹⁰² It would be patently incongruous to read Article 5(2) as preventing the mandatory doing of anything. Should authors just have to walk into a courtroom (itself a "formality") without having to file a statement of claim? Not have to deal with foreign publishers and distributors because those are "formalities"? Not have to deal with foreign tax authorities to avoid deductions at source in a foreign country? Not have to deal with foreign collectives to ensure the protection of their rights in cases where they cannot or do not want to join a world-wide system through their national collective (if any)? That is

99. National Library Act, R.S.C., c. N-12, s. 13. *See also* P. Goldstein, *International Copyright: Principles, Law and Practice* (Oxford: Oxford University Press, 2001), 618 at 187–189.

100. S. 13(4) of the National Library Act, *supra*, provided for a fine. The maximum is currently USD 2,000 for an individual and USD 100,000 for a corporation. That section will be replaced by s. 10 of The Library and Archives of Canada Act 2004, c. 11.

101. M. Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Geneva: WIPO, 2004), [pages] at 41. *See also* WIPO, *WIPO Intellectual Property Handbook* (Geneva: WIPO, 2004) at 262 ("... protection is granted automatically and is not subject to the formality of registration, deposit or the like").

102. *See Ficsor, ibid.* at 42.

clearly not the intent or meaning of Article 5(2). Those are all normal acts that authors and other copyright holders must perform routinely to exploit their copyright works and not – as was made abundantly clear during the adoption and revision of the Convention –, “formalities” prohibited under Article 5(2).

Article 5(2) seems to hinge on whether the formality is (a) copyright-specific and (b) government-related. On the first element, as examples above show, it is self-evident that authors are not somehow free of all civic or judicial formalities. The second element is a distillate of the drafting history of Article 5(2). It cannot simply be assumed that the prohibition on government (legislatively imposed) formalities such as registration or deposit necessarily extend to dealings with private entities, which most CMOs are.

A government-operated levy or tax system that would replace exclusive rights guaranteed by the Berne Convention by a compensation regime (e.g. a levy) would not only have to comply with the three-step test (to validate the exception) but may also constitute a prohibited formality.

To consider restriction on the freedom to exercise one's rights fully, the following chart may be helpful:

LEVEL	TYPE OF RESTRICTION
0	Full Individual Exercise
1	Voluntary Collective Management (opt in)
2	Collective Management with Extended Repertoire (and opt out)
3A	Mandatory Collective Management/Presumption
3B	Limitation of Damages to Tariff
4	Compulsory Licensing
5	Exception ¹⁰³

Several countries routinely impose restrictions of levels 3A, 3B and 4.¹⁰⁴ Damages available to a rightsholder are limited to what would be available under a tariff, if that rightsholder was a member. In effect, while membership is not mandatory, the effect of membership is. In other cases, as in Germany, there is a “presumption” that all rightsholders are members of the collective. Those are simply ways in which the exploitation of the works concerned is organized and tasks that copyright holders must fulfill. Even at Level 0, authors must still

103. Admittedly, level 5 is conceptually different from the other types of restriction, but for our purposes it can be argued that it is a compulsory license with a tariff of 0 for all users who benefit from the exemption. The link between the three-step test and Article 5(2) is thus established.

104. See, e.g., s. 68.2(2), 70.17 and 76(3) of the act. See also D. Gervais, “Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective” (2001), online: <www.pch.gc.ca/progs/ac-cal/progs/pda-cpb/pubs/index_e.cfm> (last visited: 18 October 2005).

negotiate and sign exploitation contracts, file statements of claim, testifying in court or before arbitration panel, etc. and, of course, deal with CMOs.

ERS is not a prohibited formality under Berne. If it is a restriction at all, ERS is a mild one. It guarantees an orderly exploitation of the repertoire that will be licensed but offers authors the option of going back to Level 0 by sending a simple notice, perhaps even as simple as an email. The ERS provides collectives with the immediate ability to license all or almost all works that users may need to license. While not impacting the scope of exceptions, it ensures that users need to license. While not impacting the scope of exceptions, it ensures that users need to go beyond such exceptions are paid for, i.e. that the objective of providing a fair reward is fulfilled. At the same time, licensing removes the (theoretical) obstacle and frustrating attempts by certain rightsholders to stop Internet use. This would fulfill the other side of the equation, namely the promotion of the public interest in the encouragement and dissemination of works of the arts and intellect.

4. CONCLUSION

CMOs are easier to defend to the extent that the level of quality of services is acceptable and efficient to both authors and users, taking into account the administrative technologies available. Initially, CMOs developed out of necessity, it was not feasible for authors and publishers to maintain a direct relationship with users. With the advent of new technologies, however, authors and publishers are increasingly able to initiate and maintain a direct relationship with users. While this does not necessarily diminish the role of CMOs, it highlights the need to reform the existing collective society structure in order to justify their continued existence on one level, and to alleviate the problems stemming from the fragmentation of both copyright rights proper and rights clearance. This is not to say that the role or justification of CMOs is vanishing. It is that they are changing.

There is a similar motif that runs through each of the outlined solutions: that some form of centralization and standardization is an absolute prerequisite to efficiency, particularly in the context of the digital era. There may in fact be a greater role for collectives in the area of file-sharing. If copyright's excludability does not easily reach end-users, neither does it reach without difficulty users who have no direct (one-on-one) transactional contact with the rightsholders concerned.

To maximize efficiency, it seems that copyright's power to exclude should be limited, therefore, to cases where an exclusive distributorship (or other form of dissemination) is negotiated by the first owner of copyright or someone else who acquired rights from that first owner, and in cases of commercial piracy. It was thus not an obvious step for copyright to try to reach Internet users who do not consider themselves pirates, nor act with intent of commercial gain.

What does it mean for the future of copyright? We should recognize that copyright is not intended to be used to stop (exclude) end-users. Copyright

works best, as an exclusion tool, when its rules are internalized by players (professional publishers, producers or broadcasters presumably want to be seen as obeying the rules of the road – they are also easy to sue) or when physical objects are involved (the typical example would be pirated CDs or DVDs).

Even if one were to abandon attempts to stop end-users, copyright would remain as an entitlement to remuneration when users reach the level of interference with normal commercial exploitation. This dynamic notion of “normalcy”, a part of the Berne three-step test, allows rightsholders to claim payment/compensation for massive Internet uses that are not covered by an exception such as fair dealing or educational uses. Unfortunately, by treating file-sharers as pirates, they may push the majority of Internet users into the “deviant” camp, and damage respect for the rule of law.¹⁰⁵ The solution – at this point, the only solution – is to license massive Internet uses, in a way that respects all those involved in the creation, performance, publication, production and use of copyright content. Naturally, this includes respect for existing exceptions. Soft enforcement measures may be used to help convince users to accept the scheme, but it cannot be said enough that the best way to ensure adoption is to offer users practicable terms they will perceive as fair. And the best way to achieve this, barring a major technological paradigm shift, is collective management.

Chapter II Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?

*Dr. Mihály Ficsor**

1. INTRODUCTION

It is a kind of legal commonplace that the exclusive right of authors to exploit their works or authorize others to do so is a basic element of copyright, and, where recognized, such a right is also important for the beneficiaries of related (neighbouring) rights. The exclusive nature of a right means that its owner – and its owner alone – is in a position to decide whether he authorizes or prohibits the performance of any act covered by the right, and if he does authorize such an act, under what conditions and against what amount of remuneration. It also goes without saying that an exclusive right may be enjoyed to the fullest possible extent if it is exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the exploitation and dissemination of his work,¹ and he may closely monitor whether his rights are duly respected.

Around the time of the establishment of the international copyright system, there were certain rights – first of all, the right of public performance of non-dramatic musical works – in the case of which individual exercise of rights was very difficult. Later, with the advent of ever newer and better technologies, the areas in which individual exercise became equally difficult, and – in certain cases – even impossible, began widening. It was in those cases that rightsholders established collective management systems.

* Former Assistant Director General of the World Intellectual Property Organization in charge of copyright, President, Hungarian Copyright Council.
1. In this chapter, unless the contrary follows from the given context, “copyright” means also related rights, and “work” also means objects of related rights.

works best, as an exclusion tool, when its rules are internalized by players (professional publishers, producers or broadcasters presumably want to be seen as obeying the rules of the road – they are also easy to sue) or when physical objects are involved (the typical example would be pirated CDs or DVDs).

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Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, pp. 37–83

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105. See Gervais *supra* note 12 at 48–50.

In a traditional, fully fledged collective management system, rightsholders authorize CMOs to monitor the use of their works, negotiate with prospective users, grant licenses under certain conditions, collect remuneration, and distribute it among the rightsholders. In such a system, many elements of the management of rights are standardized – and, in fact, even “collectivized”: the same tariffs, the same licensing conditions and the same distribution rules apply to all works which fall into a given category – and sometimes also social and/or “cultural” deductions are made, etc.

There are certain cases where rightsholders do not authorize an organization to carry out all the functions just mentioned but only some of them. For example, in certain countries, authors of dramatic works leave collective bargaining and the establishment of framework agreements (with the representatives of theaters, etc.) to their societies, but as a rule they directly conclude contracts with theaters and only entrust their societies with monitoring performances, collecting remuneration and transferring it to them. This form of exercising rights is sometimes referred to as “partial collective management”.² However, it may also be regarded as a kind of agency-type management of rights.

For corporate rights owners – producers, publishers, etc. – it is also inevitable or, at least, desirable in certain situations that, for exercising their rights, they form a collective management organization. Although some of them – for example, music publishers in several countries – are members of “traditional” CMOs and accept the rules thereof, some others prefer to choose other forms of exercising rights with as few “collectivized” elements as possible. This leads to a kind of agency-type system, where the only or main task of the jointly established organization is the collection and transfer of royalties as quickly, precisely and economically as possible, and as much in proportion with the value and actual use of the productions involved as possible. The most developed form of such agency-type systems – managed by so-called “rights-clearance centers” – is where the tariffs and licensing conditions are individualized, but a single licensing source is offered with significant reduction of transaction costs for both rightsholders and users. Since, in this system, there are no real “collectivist” elements, it is usually referred to as “centralized management” in order to differentiate it from real, “traditional” “collective management”. In legal literature, the expression “joint management” has been chosen to cover both “collective management” and “centralized management” in contrast with “individual exercise” of rights.³

Fully fledged collective management organizations (CMOs) and such agency-type bodies function side by side. Sometimes they also establish

2. See for this, M. Ficsor, *Collective Management of Copyright and Related Rights* (Geneva: World Intellectual Property Organization, 2002), 165 at 57–60 [WIPO Collective Management Book].
3. See WIPO Collective Management Book, *ibid.* at 22–24.

alliances or “coalitions” in order to pursue common interests or to exercise and/or enforce certain rights together.

There is a form of collective management which deserves special mention here, namely the management of mere rights to remuneration (where the reason for which the management system is not “full” is that the rights themselves are not exclusive rights). It is important to note that there may be quite significant differences between the various rights to remuneration from the viewpoint of their roots and their copyright status. In some cases, what is involved is a limitation of an exclusive right to a right to remuneration (for example, as regards “private copying” and reprographic reproduction, where in several countries the exclusive right of reproduction – at least in certain cases – is limited to a mere right to remuneration); in other cases, the right itself is established as a mere right to remuneration (such as the “*droit de suite*” (resale right) or the “Article 12 rights”⁴ of performers and/or producers of phonograms); and still in other cases, the right to remuneration is a “residual right” (for example, the European Community’s Council Directive (EBC) No. 92/100 of 19 November 1992, on rental rights and lending right and on certain rights related to copyright in the field of intellectual property has introduced such a right – an “unwaivable right to equitable remuneration” – for authors and performers in respect of the rental of phonograms and audiovisual works (into which their works or performances, respectively are incorporated)).⁵

Digital technology, and in particular the ever more widespread use of the Internet, on the one hand, has raised complex challenges to the rightsholders, and on the other hand, individual exercise of rights – through the application of technological protection measures (TPMs), electronic rights management information (RMI), and their combination as complex digital rights management systems (DRMs) – has become possible and practical in a broadening field. This influences the scope of those exceptions to and limitations of exclusive rights that may be justified and acceptable on the basis of the “three-step test” provided for in Article 9(2) of the Berne Convention for the protection of literary and artistic works (Berne Convention), Article 13 of the Agreement on

4. The expression “Article 12 rights” refers to the rights provided in Article 12 of the Rome Convention which reads as follows: “If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration”. (Article 16.1(a) of the Convention provides for the possibility of reservations to Article 12, which may go even so far as to no application of the article.) It is to be noted that Article 15 of the WPPT also provides for similar rights to remuneration for performers and producers of phonograms.
5. EC, Council Directive 92/100/EBC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (2002), O.J. L. 361/61 [Rental Directive], online: <europa.eu.int/smartapi/cgi/sga_doc?smartapi:celexapiprod:CELEXnumdoc&lg=EN&numdoc=31992L0100&model=guestbet> (last visited: 14 September 2005).

Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Article 10 of the WIPO Copyright Treaty (WCT) and Article 16 of the WIPO Performances and Phonograms Treaty (WPPT). For example, the distribution of copies through interactive transmissions supported by DRM – resulting in what is regarded now as “private copying” – is becoming a basic form of exploitation of works; therefore, in the cases where rightsholders apply DRM systems, and in particular TPMs, it would not be in accordance with the requirements of the “three-step test” to reduce the exclusive right of reproduction, in general, to a mere right to remuneration.⁶

Since, as mentioned above, collective management – in particular, when it results in fully fledged “collectivization” of the various management elements – from the viewpoint of rightsholders amounts to a quite extensive restriction of their exclusive rights, it is justified to raise the question of in which cases, and under what conditions, such restriction may be justified and acceptable. In this chapter, this question is discussed in respect of three forms of non-voluntary collective management – mandatory collective management (Part 2), presumption-based collective management and extended collective management (Part 3) – on the basis of the international copyright norms and the *acquis communautaires* of the European Union. A thorough analysis of these various forms of collective management is particularly justified since there are suggestions that collective management may be a global solution to the problems of exercising copyright and related rights in the digital networked environment. Following this analysis, the chapter reviews two specific problem areas where the application of collective management systems in the digital, networked environment is in the focus of lively debates: first, the question of what kind of role collective management may play in the exercise of the right of “making available to the public” (Part 4); and, second, the issue of the “interface” between technological protection measures and private copying (from the viewpoint of “levy-based” right to remuneration exercised through CMOs) (Part 5). The chapter ends with brief conclusions (Part 6).

2. MANDATORY COLLECTIVE MANAGEMENT

Before any analysis of the Berne Convention regarding when and under what conditions mandatory collective management may be permitted (of course, this analysis is relevant also from the viewpoint of the TRIPS Agreement and the

6. It is another matter that, in some specific cases, such as copying of certain works, for example, in the framework of distant education program – with appropriate guarantees that only the intended beneficiaries may get access to the works – exceptions and limitations may be justified.

WCT, which incorporate the substantive provisions of the Berne Convention by reference),⁷ it is worthwhile asking the following prior questions: (i) Is it determining/imposing a condition if somebody is in the position of doing something but it is provided in the law that he can only do so in a certain way? (ii) Is it determining/imposing a condition if somebody owns something but it is provided in the law that he can only use it in a certain manner? (iii) Is it determining/imposing a condition if somebody is granted a right but it is provided in the law that he can only exercise it through a certain system?

It seems obvious that an affirmative answer should be given to each of these questions.

The Berne Convention contains provisions – namely Article 11bis(2) and Article 13(1) – under which it is a matter for legislation in the countries of the Berne Union to determine the conditions under which certain exclusive rights may be exercised. Article 11bis(2) reads as follows (emphasis added):

It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph⁸ may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Article 13(1) reads as follows (emphasis added):

Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any, but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

7. See Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT. Under the preceding paragraph – paragraph (1) of the same article – “[a]uthors of literary and artistic works shall enjoy the exclusive right of authorization: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work”.

In general, these provisions are regarded as a legal basis for the application of non-voluntary licenses, since they define the minimum requirement to be respected when such conditions are applied; namely that they must not, under any circumstances, be prejudicial to the right to obtain an equitable remuneration. This does not mean, however, that non-voluntary licenses may be regarded as the only possible "conditions" mentioned in those provisions; also other conditions of the exercise of the exclusive rights concerned may be applied.

Mandatory collective management of rights is such a condition, since it means – referring to the questions above – (i) that, although the owners of these rights are in the position of doing something (namely, enjoying the exclusive right of authorizing the acts in question), it is provided that they can only do so in a certain way; (ii) that although they own such exclusive rights, it is provided that they can only exploit them in a certain manner; and (iii) although they are granted such rights, it is provided that they can only exercise their rights through a certain system (namely, collective management).

Since the possibilities of "determining/imposing conditions" are provided for in the Berne Convention in an exhaustive way, on the basis of the *a contrario* principle it can be deduced that, in general, mandatory collective management of exclusive rights may only be prescribed practically in the same cases as non-voluntary licenses (which result in mere rights to remuneration).

In the previous paragraph, the words "exclusive rights" are emphasized. This is necessary for pointing out that what is discussed above should not be interpreted as to mean that mandatory collective management may only be prescribed in cases where, in the provisions of the Berne Convention – or other international norms on copyright and related rights – the expression "determine/impose conditions" (under which the rights concerned may be exercised) is used. Mandatory collective management is permissible also in cases where: (i) a right is not provided for as an exclusive right of authorization but rather as a mere right to remuneration (as in the case of the resale right under Article 14ter of the Berne Convention, or, speaking about related rights, the so-called "Article 12 rights" of performers and producers of phonograms); (ii) where the restriction of an exclusive right to a mere right to remuneration is allowed on the basis of some other wording (as is the case in respect of Article 9(2) concerning the right of reproduction);¹⁰ or (iii) where what

9. See footnote 4, above.

10. Article 9(2) uses the expression "to permit the reproduction of ... works". This may mean – subject to the said test – either free uses or, as it is clarified in the report of Main Committee I of the 1967 Stockholm Revision Conference (see paragraph 85 of the report), the reduction of the exclusive right to remuneration to a mere right to equitable remuneration. It is on this basis, that, in case of widespread and uncontrollable private copying, in certain countries, a right to remuneration is applied (usually in the form of a levy on recording equipment and material) to which, of course, the obligation to grant national treatment extends without any reasonable doubt whatsoever.

is concerned is a "residual right"; that is, a right to remuneration (usually of authors and performers) which "survives" the transfer of certain exclusive rights (such a residual right "by definition" cannot be in conflict with the exclusive nature of the right concerned, since it is only applicable after that the latter has been duly exercised.)

With regards to "residual rights", the best example is the "unwaivable right to remuneration" under Article 4 of the Rental Directive.¹¹ Since it is mentioned here, it is justified to begin the review of the *acquis communautaires* from the viewpoint of the issue of mandatory collective management, with the provisions on this right.

First, paragraph 3 of Article 4 of the Rental Directive provides that "[t]he administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers"; then, paragraph 4 deals with the question of possible prescription of mandatory collective management. Its relevant part reads as follows: "Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed ..."

This provision is significant from the viewpoint of the issue of mandatory collective management not only because it indicates that, in the case of this "residual right", collective management may be imposed (that is, may be made mandatory), but also because it has an *a contrario* implication. Since the Directive has found it necessary to state that, in this case, collective management may be imposed, by this it indicates implicitly that, under the *acquis communautaires* – unless this possibility does not follow directly from the provisions of an international treaty to which the Member States are party – there is a need for such a permission; or in other words: mandatory collective management is not allowed where the international norms on copyright (such as the provisions of the Berne Convention, as discussed above) – or where, in respect of rights not covered by international norms (such as the right of rental), the *acquis communautaires* – do not explicitly permit it.

The Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission goes further for, in the case of cable retransmission, it not only permits the imposition of collective management, but it makes such management mandatory.¹² Article 9.1 of

11. *Synra* note 5. Paragraph 1 of Article 4 of the Rental Directive provides as follows: "Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental." And paragraph 2 of the same Article adds that "[t]he right to obtain an equitable remuneration for rental cannot be waived by authors or performers".

12. EC Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (1993), O.J. L. 248/15 [Satellite and Cable Directive],

the Directive provides as follows: "Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society" [emphasis added]. The Directive also regulates the legal technique through which it may be achieved that all such rights of copyright owners and holders of related rights may be concentrated in the repertoire of a collective management organization (or possibly more than one organization from which holders of rights may choose one).¹³

The provision of the Satellite and Cable Directive just quoted is in accordance with the above-stated principle – namely that, in the case of an exclusive right, mandatory collective management may only be prescribed where the relevant international norms allows to do so, either through permitting the prescription of conditions for the exercise of exclusive rights (imposing collective management being obviously a condition) or through limiting it to a right to remuneration in certain cases (in which cases, the exclusive nature of the rights concerned disappears not only in respect of the decisive "upstream" stage – that is, in the relationship between the rightsholders and the CMOs – but also in respect of the "downstream" stage between the CMOs and the users). This is so since, in respect of authors' "exclusive right of authorizing... any communication to the public by wire... of the broadcast of [their] works" granted by paragraph (1) of Article 11bis of the Berne Convention, paragraph (2) of the same Article provides that "[i]t shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised...". (In the case of related rights, neither the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting

online: <europa.eu.int/eurlex/lexUriServ/lexUriServ.do?uri=CELEX:31993L0083:EN:HTML> (last visited: 18 September 2005).

13. Articles 9.2 and 9.3 of the Satellite and Cable Directive, *ibid.*, provide as follows:

"2. Where a rightsholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightsholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightsholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and collecting society which is deemed to be mandated to manage his rights as the rightsholders who have mandated that collecting society and he shall be able to claim those rights within a period to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.

3. A Member State may provide that, when a right-holder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive".

Organizations (Rome Convention) nor the *acquis communautaires* provide for exclusive rights of authorization concerning cable retransmissions. This situation has not changed with the adoption of the Satellite and Cable Directive. The international norms adopted in the meantime – the relevant provisions of the TRIPS Agreement and the WPPT – also have not introduced such exclusive rights).

Article 10 of the Satellite and Cable Directive provides for an exception to mandatory collective management of cable retransmission rights; namely for such rights of broadcasting organizations.¹⁴ This refers to one of the basic principles concerning collective management, according to which collective management, even if it might be possible from the viewpoint of the international norms and the *acquis communautaires*, is only justified where individual exercise of rights – due to the number of rightsholders, the number of users or other circumstances of uses – is impossible or, at least, highly impracticable. Broadcasting organizations are relatively less numerous (in contrast with authors and the owners of related rights other than the rights of broadcasting organizations); they are better suited to manage their rights individually.¹⁵

The Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art does not prescribe mandatory collective management for the collection and distribution of the royalties due for the resale right, but allows Member States to do so.¹⁶ Its Article 6.2 reads as follows: "Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1". As discussed above, in this case, the prescription of mandatory collective management is allowed under the international copyright norms, since it corresponds to the nature of the resale right (*droit de suite*) under Article 14ter of the Berne Convention, namely that it is a mere right to remuneration (and it is also only such a right under Article 1 of the Resale Right Directive).

14. Article 10 of the Satellite and Cable Directive, *ibid.*, provides as follows: "Member States shall ensure that Article 9 [prescribing mandatory collective management] does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights".

15. It is another matter, that broadcasting organizations still have found collective management of their cable retransmission rights advantageous. They have established the Association for the International Collective Management of Audiovisual Works (AGICOA) of which one of the most important tasks is exactly the collective management of cable retransmission rights.

16. EC Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (2001), O.J.L. 272/32 [Resale Right Directive], online: <europa.eu.int/eurlex/lexUriServ/lexUriServ.do?uri=CELEX:32001L0084:EN:HTML> (last visited: 18 September 2005).

As emphasized above, it may be deduced from the *a contrario* principle that, where the international copyright norms and/or the *acquis communautaires* provide for an exclusive right that can be exercised individually and the relevant norms do not allow the prescription of conditions for its exercise (nor permit its limitation to a mere right to remuneration), it would be in conflict with those norms to submit the exercise of such a right to the condition that it may only be exercised through collective management. For example, no provision on mandatory collective management is allowed under the international copyright norms (and, consequently, under the *acquis communautaires*) in the case of the right of public performance (Article 11 of the Berne Convention), the right of public recitation (Article 11ter of the Berne Convention) or the right of "making available to the public" (Article 8 of the WCT and Articles 10 and 16 of the WPPT).¹⁷

This does not mean that rightsholders may not, and do not, create collective management systems where it is not mandatory, since, for example, the oldest and the most efficiently functioning collective management system, both at national level and – through the International Confederation of Societies

17. Articles 10 and 16 of the WPPT provides separately for "rights of making available" of fixed performances and phonograms, while, under Article 8 of the WCT, such a right is provided for as a "sub-right" of the right of communication to the public in the following way: "Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(f) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them" (the text relating to the right of "making available", as a sub-right of the right of communication to the public, is emphasized). It is to be noted that the 1996 Diplomatic Conference having adopted the WCT has also adopted an agreed statement concerning the above-quoted Article 8 which states as follows: "It is understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2)" [of the Berne Convention]. Article 11bis(2) provides for the possibility of countries of the Berne Union "to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised". The rights mentioned in that "preceding paragraph" – paragraph 11bis(1) – are the right of broadcasting and the rights of retransmissions and certain "public communications" of broadcast works; that is sub-rights of the right of communication to the public clearly other than the right of making available to the public. Thus, Article 11bis(2) of the Berne Convention is obviously not applicable in respect of the right of "making available". It is another matter that paragraph (26) of the Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (2001), O.J. L. 167/10) contains the following statement: "With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned". This is another matter since encouraging collective management does not mean making it mandatory.

of Authors and Composers (CISAC) – at an international level, has been established exactly for the management of the public performance right. In such cases, also extended collective management systems may be applied (see below). However, in the case of voluntary collective management, any owner of rights may decide not to authorize the collective management organization to represent and exercise his rights, and, also in the case of extended collective management, as discussed below, there is the possibility of any owner of right to "opt out" from the collective system.

3. PRESUMPTION-BASED AND EXTENDED COLLECTIVE MANAGEMENT

One of the most important advantages of fully developed collective management systems is the possibility that CMOs may grant blanket licenses to users for the use of the entire world repertoire of works or other protected subject matter concerned as regards the given right of the given category of rightsholders.

It is to be noted, however, that even where the system of bilateral agreements is fairly developed (such as in the case of musical "performing rights"), the repertoire of works in respect of which a collective management organization has been explicitly given the power to manage exclusive rights is practically never an entire world repertoire (since, in certain countries, there are no appropriate partner organizations to conclude reciprocal representation agreements, or because certain authors do not include their works in a collective system).

There are two basic legal techniques for ensuring the operation of blanket license systems. The first one is the "guarantee-based" system which involves the following elements: (i) the lawfulness of authorizing the use of works not belonging to the repertoire of the given organization is recognized by law (either by statutory law or by case law); (ii) the organization guarantees that individual rights owners will not claim anything from users to whom blanket licenses are granted, that, if they still try to do so, such claims will be settled by the organization and that any user will be indemnified for any prejudice and expense caused to him as a result of justified claims by individual rightsholders; and (iii) the organization also guarantees that it treats rightsholders who have not delegated their rights to it in a reasonable way, taking into account the nature of the right involved. In this system, there is such an "automatism" that may not be compatible with the exclusive nature of the rights involved. If it does not extend to the possibility of "opting out" (see below), its compatibility with the relevant international norms is doubtful.

The other legal technique for ensuring the conditions for blanket licenses seems to be more appropriate in the case of exclusive rights, since it avoids the paradoxical situation of leaving the solution to the problem of those rightsholders who do not wish to participate in the collective system to the very collective management organization in which they do not wish to participate

(as in the case of the "presumption-based" systems). This legal technique is the so-called extended collective management. The essence of such a system is that, if there is an organization authorized to manage a certain right by the overwhelming majority of – both domestic and foreign – rightsholders and, if it is sufficiently representative in the given field, the effect of such collective management is extended by the law also to the rights of those rightsholders who have not entrusted the organization to manage their rights, with however the possibility of the latter to "opt out" from the collective system.

In an extended collective management system, there should be special provisions for the protection of the interests of those rightsholders who are not members of the organization and who do not wish to participate in the collective system. Those rightsholders should have the option of freely choosing between either claiming individual remuneration (as in the case of the application of the guarantee-based system) or "opting out" (that is, declaring that they do not want to be represented by the organization). (In the latter case, of course, they are supposed to take care of the exercise of their rights.) As regards "opting out" from the collective system, a reasonable deadline should be given to the organization in order that it may exclude the works or objects of related rights concerned from its repertoire, but the procedure of "opting out" should be simple and should not be burdensome (for example, an owner of right should be able to "opt out" in a simple declaration with all his present and future works, without being obliged to offer an exhaustive list, since without this, the "opting out" system might be transformed into a *de facto* formality).

The fact that an extended collective management system better corresponds to the exclusive nature of rights – and to the related requirements of the international copyright norms and/or the *acquis communautaires* – than a simple "guarantee-based" system is duly recognized also under the *acquis communautaires*.

This is clearly reflected in Articles 2 to 4 of the Satellite and Cable Directive. After that Article 2 provides that "Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works . . .", and Article 3.1 adds that "Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement" (that is, it must not be subject to a non-voluntary licensing system). Article 3.2 outlines what may be regarded as an extended collective management system. It reads as follows:

A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightsholders of the same category who are not represented by the collecting society, provided that: – the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and

collective agreement
to collect. limit

Copyright and Related Rights in the EC...
–the unrepresented rightsholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively [emphasis added].¹⁸

This provision authorizes Member States to introduce an extended collective licensing system (the "may" language indicates this), which reflects the position that such an authorization is needed, and that, where it is not granted, in the fields expressly covered by the *acquis communautaires*, no extended collective management may be appropriate (not mentioning, of course, mandatory collective management).¹⁹

This is confirmed by Articles 3.3 and 4 of the Satellite and Cable Directive which indicate that even extended collective management may only be justified where it is truly indispensable, and where rightsholders usually do not intend to – or could hardly – exercise their exclusive rights on an individual basis. Article 3.3 identifies a category of works where this is not the case. It provides that "[p]aragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography", while Article 3.4 underlines the exceptional nature of extended collective management by introducing a specific notification procedure.²⁰

There is one more directive in which mention is made of extended collective management, namely Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, which, in paragraph (18) of its preamble, states: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses".²¹

It seems obvious that this may hardly be interpreted as an authorization for applying any kinds of arrangements – including extended collective management systems – in respect of any uses and any category of protected subject matter. The principles reflected in Article 3 of the Satellite and Cable Directive certainly must be duly taken into account.

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18. *Supra* note 12.

19. For example, the right of public performance of authors is not covered by the *acquis communautaires*. In the case of that right, for example, extended collective management may be justified (but, since it is an exclusive right, mandatory collective management obviously is not permitted).

20. Article 3.4 provides as follows: "Where the law of a Member State provides for the extension of a collective agreement in accordance with the provisions of paragraph 2, that Member State shall inform the Commission which broadcasting organizations are entitled to avail themselves of that law. The Commission shall publish this information in the *Official Journal of the European Communities* (C series)".

21. EC Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (2001), O.J. L. 167/10 [Copyright Directive], online: <europa.eu.int/eurlex/en/consleg/pdf/2001/en_2001L10029_do_001.pdf> (last visited: 19 September 2005).

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4.

THE "MAKING AVAILABLE" RIGHT AND THE
RIGHT OF COMMUNICATION TO THE PUBLIC:
THE RELATIVE FREEDOM OF LEGAL
CHARACTERIZATION OF ACTS COVERED
BY COPYRIGHT

4.1. PREPARATORY WORK: THE EMERGENCE OF THE "UMBRELLA
SOLUTION"

A general agreement emerged quite early in the course of the preparatory work of the WCT and the WPPT, precisely that the inclusion of works and objects of related rights into, and their interactive transmission through, the Internet and in similar possible future networks should be subject to an exclusive right of authorization of rightsholders. There was also a general wish to apply existing norms to this new phenomenon (since, on the basis of such norms, established practices had emerged, long-term contractual relations had been based, and so on). When the existing rights were considered for the application of interactive transmissions, it had to be seen that digital interactive transmissions blurred the borderline between the two traditional – and clearly separated – groups of economic rights: copy-related rights and non-copy-related rights.²²

Digital interactive transmissions have blurred the borderline between these two groups of rights in two ways. First, dissemination of protected material in interactive networks may, and ever more frequently does, take place with the application of technological measures which allow access and use only if certain conditions are met by the members of the public. Thus, the actual extent of use is not necessarily determined at the moment of the making available of a work or object of related rights and by the person or entity alone who or which carries out the act of "making available". It is the given member of the public, who, through a virtual negotiation with the system, may obtain access and the possibility to use the protected material, and who, through this system, chooses whether the use will be "deferred" (on the basis of obtaining a more than transient copy) or "direct" (such as on-line studying of a database, on-line watching of moving images, on-line listening to music). Second, with

22. Copy-related rights (such as the right of distribution, the right of rental or the right of public lending (where recognized)) cover acts by means of which copies are made available to the public and are typically for "deferred" use, since the act of making available and the perception (studying, watching, listening to) of the signs, images and sounds in which a work is expressed or a sound recording (that is, the actual "use") by the members of the public differ in time. Non-copy-related rights (such as the right of public performance, the right of broadcasting, the right of communication to the public by wire), on the other hand, cover acts through which works or objects of related rights are made available for direct – that is not "deferred" – use (perceiving, studying, watching, listening to) by the members of the public. (There is also a third category of economic rights, namely that of the transformation rights – such as the right of adaptation and the right of translation – which, however, are not relevant from the viewpoint of digital transmissions.)

digital transmissions, some hybrid forms of the making available of works and objects of related rights emerge which do not respect the pre-established border between copy-related and non-copy-related rights (when a copy is obtained, it is also through the transmission of electronic impulses, and, when protected material is used on-line, even in "real time", it also involves the making of at least temporary copies).

In view of this nature of interactive transmissions, it was hardly a surprise that, when it came to the question of which existing rights should be applied to cover such transmissions, the various countries did not find themselves necessarily on the same side of the copy-related rights/non-copy-related rights border. Two major trends emerged: one trying to base the solution on the right of distribution and another preferring a kind of general communication right to the public right. It was not merely on some theoretical bases that this or that country favored this or that solution. The positions very much depended on the existing national laws (which rights, for whom, and to what extent, existed), and, as a consequence, on the related national interests involved.

When it became clear that the international copyright community was faced with two basic options – the application of the right of distribution or the application of the right of communication to the public – (and, of course, also with the further possibility of combining these options somehow), it was soon recognized that the adoption of either of those options would not be a simple task and more would be required than a simple decision which would settle the rest automatically.

First, it did not seem possible to apply the traditional concepts of distribution and communication to the public directly without certain clarifications. As far as the concept of distribution is concerned, in many countries, it closely relates to the transfer of property and/or possession of tangible copies. Thus, if the right of distribution was to be applied, it had to be accepted and clarified that distribution through reproduction through transmission – that is, making available copies by making such copies, through transmission of electronic signals, in the receiving computers and/or in the terminals linked to them – is also covered by the concept of distribution. Similar clarifications were needed concerning the concept of communication to the public. It had to be accepted and clarified that this concept extends not only to the acts that are carried out by the "communicators" themselves (that is, to the acts as a result of which a work or object of related right is, in fact, made available to the public and the members of the public do not have to do more than, for example, just to switch on an apparatus necessary for its reception), but also to the acts which consist of making the work accessible to the public, and in the case of which the members of the public still have to cause the system to make it actually available to them. Further clarification was needed in respect of the notion of "public", more precisely in respect of what is to be regarded as being made available (accessible) "to the public". It had to be made clear that on-demand transmissions were covered.

Second, as far as the international norms were concerned, the said clarifications were not sufficient, since the Berne Convention does not provide for a right of distribution for all categories of works, but only for cinematographic works,²³ and, although the coverage of the right of communication to the public is broader, it still does not extend to all categories of works in all forms.²⁴ In order for any of the above-mentioned solutions to work, the gaps in the international norms had to be eliminated – the coverage of the rights involved had to be completed.

Third, and this appeared to be for a long while the most difficult problem, it had been found that it would be difficult for the various countries to select only one of the two basic “candidate rights” without allowing any alternative choice at the national level.

In view of these problems, a compromise solution was worked out which contained the following elements: (i) the act of interactive transmission should be described in a neutral way, free from specific legal characterization (for example, as making available a work to the public by wire or by wireless means, for access by members of the public); (ii) such a description should not be technology-specific and, at the same time, it should express the interactive nature of digital transmissions in the sense that it should go along with a clarification that a work or an object of related right is considered to be made available “to the public” also when the members of the public may access it at a time and at a place freely chosen by them; (iii) in respect of the legal characterization of the exclusive right – that is, in respect of the actual choice of the right or rights to be applied – sufficient freedom should be left to national legislation; and, (iv) the gaps in the Berne Convention, in the coverage of the relevant rights the right of communication to the public and the right of distribution, should be eliminated. This solution was referred to as the “umbrella solution”, and it was adopted by the diplomatic conference as a basis for the provisions on the rights concerning interactive transmissions.

4.2. APPLICATION OF THE “UMBRELLA SOLUTION” IN ARTICLE 8 OF THE WCT

In Article 8 of the WCT, the “umbrella solution” is applied in a specific way. Since the countries which preferred the right of communication to the public as a general option seemed to be more numerous, the Treaty, first, extends the applicability of the right of communication to the public to all categories of works, and then clarifies that that right also covers transmissions in interactive systems described in a legal-characterization-free manner: “including the

23. See Articles 14(1)(g) and 14bis(1) of the Berne Convention.

24. See Articles 11(1)(ii), 11bis(1), 11ter(1)(ii), 14(1)(f) and 14bis(1) of the Berne Convention.

making available to the public of [...] works in such a way that members of the public may access [them] from a place and at a time individually chosen by them”. As a second step, however, when this provision was discussed in Main Committee I, it was stated – and no delegation opposed the statement – that Contracting Parties are free to implement the obligation to grant exclusive right to authorize such “making available to the public” also through the application of a right other than the right of communication to the public or through the combination of different rights as long as the acts of such “making available” are fully covered by an exclusive right.²⁵ By the “other” right, of course, first of all, the right of distribution was meant, but a general right of making available to the public might also be such an “other” right.

The above-mentioned statement concerning the possible alternative ways of implementation of Article 8 seems to be valid, not only because it was not opposed by any delegation participating in the diplomatic conference, but also because it is in accordance with an old practice followed by the member countries of the Berne Union in the application of the various rights granted by the Convention (a practice the compatibility of which with the Berne Convention has never been questioned), namely, that the legal characterization of a right is frequently not the same under national laws as under the Convention. The most obvious example is that, in certain countries – such as France and the United States of America – the right of public performance covers not only those acts which are referred to in the provisions of the Berne Convention as public performances of works, but also the acts covered by the right of broadcasting and the right of communication to the public which, under the Berne Convention, are separate rights.²⁶ With the “umbrella solution”, the differing legal characterizations may involve crossing the border between copy-related rights and non-copy-related rights, but this is just the consequence of the fact that, with digital interactive transmissions, for the first time, hybrid acts have emerged, as discussed above.

It is important to underline, however, that the acceptability of the differing legal characterizations of acts depends on whether or not the obligations to grant a minimum level of protection, in respect of the acts concerned, are duly respected. If, for example, the right of broadcasting were extended to acts which, under the Berne Convention, are qualified as communication to the public by wire (“cable-originated programs”), and a compulsory license were

25. See Records of the 1996 Geneva Conference at 675, para. 301.

26. For example, (i) the French copyright law traditionally distinguishes between two basic economic rights: the right of reproduction which extends to all copy-related rights, and the right of public performance (*représentation*) which covers all non-copy-related rights (See Article L.122-1 of the Intellectual Property Code); (ii) Section 106(4) of the US Copyright Act provides for a right of public performance, and its Section 101 defines “to perform a work” as “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible”.

also applied for the latter act, citing the fact that Article 11bis(2) of the Berne Convention allows such licenses for broadcasting; this would be in conflict with those articles of the Berne Convention, which does not allow such licenses for “cable-originated programs”.²⁷

In the case of the right of distribution, the WCT has also eliminated the gaps existing in the Berne Convention. Article 6(1) of the WCT provides for an exclusive right to authorize the making available to the public of originals and copies of works through sale or other transfer of ownership; that is, for an exclusive right of distribution. It is to be noted that the agreed statement added to Articles 6 and 7 (on the rights of distribution and rental) – according to which “as used in these Articles, the expressions ‘copies’ and ‘original and copies’ being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects” – does not contradict the applicability of the right of distribution for digital, interactive transmissions in the framework of the “umbrella solution”. The agreed statement only indicates the minimum level of protection (in the sense that the minimum obligation is to grant a right of distribution in respect of the making available of tangible copies); there is, however, no obstacle under the WCT to extend the application of this right beyond the minimum level prescribed therein (in the sense that any country party to the Treaty may extend the right of distribution also to distribution through reproduction through transmission and to apply this broader right of distribution on the basis of the “umbrella solution”).

4.3.

THE EFFECT OF THE RECOGNITION OF A COMPREHENSIVE RIGHT OF COMMUNICATION TO THE PUBLIC BEYOND THE EXTENSION OF ITS COVERAGE TO INTERACTIVE TRANSMISSIONS; THE SECOND SENTENCE OF THE AGREED STATEMENT CONCERNING ARTICLE 8 OF THE WCT

Article 8 of the WCT, before the clarification concerning interactive transmissions (“including...”, etc.), contains two elements. The first element is a mere safeguard reference to the provisions of the Berne Convention concerning different forms of communication to the public (by wire or by wireless means); that is, to Articles 11(1)(ii), 11bis(1), 11ter(1)(ii), 14(1)(ii) and 14bis(1). It is made clear that these provisions continue to be applicable (it is to be noted, however, that all these provisions cover “traditional”, non-interactive acts of communication to the public). Of these provisions, Article 11bis(1) on the right of broadcasting and related acts extends to all categories of works, but the others only grant a right of communication to the public by wire in

27. See Articles 11(1)(ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention.

respect of certain categories of works in certain forms: Article 11(1)(ii) only in respect of dramatic, dramatico-musical and musical works in the form of performances; Article 11ter(1)(ii) only in respect of literary works in the form of recitations; and Articles 14(1)(ii) and 14bis(1) only in respect of works in the form of cinematographic adaptations and of cinematographic (and other audiovisual) works themselves.

The second element in the text of Article 8 before the clarification concerning interactive transmissions (“including...”, etc.) is the provision on a general right of communication to the public, irrespective of whether it is carried out by wire or by wireless means (or through the combination of the two ways of communication), which extends to all categories of works.

Through this extension, on the basis of Article 8 of the WCT, the right of communication to the public by wire has become generally applicable also in respect of “traditional”, non-interactive transmissions and also for those categories of works which are not covered by Articles 11(1)(ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1)(ii) of the Berne Convention (such as musical works in the form of sheet music; literary works in any form other than in their recitals, including computer programs; graphic works; photographic works; and so on).

The second sentence of the agreed statement concerning Article 8 (which, in fact, is a separate statement since its subject matter is different from that of the first sentence of the agreed statement) makes it clear that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2) of the Berne Convention. As discussed above, Article 11bis(2) is interpreted as authorizing the application of non-voluntary licenses. There is, however, an important proviso in the text: “but these conditions shall apply only in the countries where they have been prescribed”. In the case of satellite broadcasting, where a program is frequently communicated (sometimes explicitly targeted) to the public in other countries, any “conditions” would have an impact – would “apply” – in those other countries, and, by this, the non-voluntary license may be “exported”. Therefore, in such cases, the application of non-voluntary licenses would conflict with the said proviso, and thus with the Berne Convention (as well as with the TRIPS Agreement (through its Article 9.1) and the WCT (through its Articles 1(4) and 8)).

Interactive transmissions do not qualify as broadcasting (since the concept of the latter presupposes an active communicator and passive recipients) and thus Article 11bis does not apply to them. If, however, as a result of new technologies, such as those serving as a basis for “webcasting”, “simulcasting”, “streaming”, any kind of non-interactive communication to the public takes place through the global digital network which might be regarded as being covered by Article 11bis of the Berne Convention, the said “no export” proviso, due to the global impact of such communication, would certainly not allow the application of non-voluntary licenses thereto. (As regards the question of how this principle may be applied to mandatory collective management, it is discussed, below.)

4.4. FULLY FLEDGED APPLICATION OF THE "UMBRELLA SOLUTION" IN THE WPPT

In the preceding paragraphs, above, there is a description about the discussions on the "candidate rights" for interactive transmissions (the right of distribution and the right of communication to the public with their sub-rights) and the emergence of the "umbrella solution".

As discussed earlier, the basic element of the "umbrella solution" is a neutral, legal-characterization-free description of interactive transmissions (neutral in the sense that it does not refer either to distribution or to communication to the public of works and objects of related rights). As also described above, the diplomatic conference, in respect of copyright, applied this solution in a special way: first, it included the neutral description of interactive transmissions in Article 8 of the WCT on a general communication to the public right, but then it adopted a clarification that the obligation to provide for an exclusive right for such interactive transmissions may also be fulfilled by granting a right other than the right of communication to the public (with the right of distribution in mind as such a possible "other" right) or a combination of rights. In contrast with this, Articles 10 and 14 of the WPPT apply the "umbrella solution" in a fully fledged manner using the neutral description of interactive digital transmissions directly.

The flexibility of the legal characterization of the rights concerned, which was manifested in the adoption of the "umbrella solution" and the way it was applied in the WCT is, of course, also applicable for the implementation of Article 10 of the WPPT. This means that the obligation under this Article may be fulfilled not only through granting a separate exclusive right of "making available to the public" as described therein, but also through the application of a right of distribution, a right of communication to the public (in a way similar as in the case of Article 8 of the WCT), or through the combination of these rights. It is, however, important to stress that this freedom of legal characterization is relative; the right or rights to be applied must fully correspond to the nature and level of protection required. That is, for example, the right of communication to the public may only be applied concerning the acts covered by Article 10 if it is an exclusive right of authorization and not a mere right to remuneration as under Article 15 of the WPPT.

4.5. THE RIGHTS OF "MAKING AVAILABLE" AND COMMUNICATION TO THE PUBLIC UNDER THE WPPT

While Article 8 of the WCT requires the recognition of an exclusive right for communication to the public (in the broader meaning applied there), Article 15 of the WPPT only provides for a right of producers of phonograms and performers to a single remuneration for broadcasting and other "traditional" forms of communication to the public, and it also allows – by means of reservations – limiting this right to certain uses or in some other way, or not to apply Article 15

at all. (This results in more or less the same kind of right to remuneration as that provided for in Articles 12 and 16.1(a) of the Rome Convention). This is due to the fact that, in respect of phonograms and the performances fixed therein, the majority of countries were not ready to grant exclusive rights for such acts. Since, in the case of interactive transmissions, the recognition of an exclusive right was indispensable, the application of the same solution as in Article 8 of the WCT was impossible in the WPPT context. The two rights – at the level of minimum obligations – had to be separated in Articles 10 and 14, on the one hand, and in Article 15, on the other.

It is to be noted, however, that the 1996 Diplomatic Conference also adopted an agreed statement in connection with Article 15 of the WPPT. It reads:

It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.²⁸

This agreed statement reflects the discussions and negotiations, *inter alia*, about the so-called "near on-demand" forms of broadcasting and communication to the public by cable, such as subscription services. In respect of such services, it could hardly be said that they only involve "secondary" uses. The demand of rightsholders seems to be quite justified that, at least a right to remuneration, but, in those cases where such services most seriously conflict with a normal exploitation of the rights in phonograms, more preferably an exclusive right, be granted. An example of existing legislation trying to respond to such a demand may be found in Sections 106(6), 114(a) and 114(d) to (j) of the US Copyright Act.²⁹

4.6. NO MANDATORY COLLECTIVE MANAGEMENT OF THE RIGHT OF MAKING AVAILABLE TO THE PUBLIC

It follows from the description and analysis of the right of making available to the public as provided for in the WCT and the WPPT, that

- (i) this right must be granted as an exclusive right of authorization both for owners of copyright and for owners of related rights;

²⁸ See Records of the 1996 Geneva Conference at 80.

²⁹ Copyright Act of 1976, 17 U.S.C. (1976) [US Copyright Act], online: <www.copyright.gov/title17/citr92.pdf> (last visited: 20 September 2005). For a concise description of the complex provisions on this issue, see B. Schwartz and D. Nimmer, "United States", in P. Geller and M. Nimmer, eds. *International Copyright Law and Practice* (New York: Matthew Bender, 1988), point §811[bb][v].

- (ii) it is not allowed to reduce this right to a mere right to remuneration in the form of non-voluntary licensing or otherwise, since the two Treaties do not allow to determine/impose such kinds of conditions for the exercise of this right;
- (iii) for the same reasons, it is not allowed to prescribe the condition that this right may only be exercised through collective management; it should be left exclusively to the rightsholders to choose in which way they wish to exercise this right;
- (iv) the fact that an agreed statement adopted by the 1996 WIPO Diplomatic Conference declares the continued applicability of Article 11bis(2) of the Berne Convention, does not change what is indicated under (ii) and (iii), since this provision only relates to broadcasting which is a form of non-interactive communication to the public not covered by the concept of making available to the public;
- (v) although the principle of freedom of legal characterization of acts covered by exclusive rights allows to include the right of making available to the public as part ("sub-right") of a broad right of communication to the public – along with rights concerning non-interactive communication to the public, such as broadcasting or, in the case of rights of performers and producers of phonograms, any non-interactive communication to the public (in respect of which, it is sufficient to grant a right to a remuneration to be exercised through collective management) – due to the limited nature of this freedom (as discussed above), this must not result in the limitation of the right of making available to the public the way mentioned under (ii) and (iii); therefore, mandatory collective management, which may be possible in other (non-interactive) acts covered by the broadly construed concept of "communication to the public", must not be extended to the right of (interactive) making available to the public.

4.7. NO MANDATORY COLLECTIVE MANAGEMENT EITHER FOR
NON-INTERACTIVE COMMUNICATIONS TO THE PUBLIC
THROUGH THE INTERNET

It is stated above, that where, as a result of new technologies – such as those serving as a basis for "webcasting", "simulcasting", "streaming" – any kind of non-interactive communication to the public takes place through the global digital network which might be regarded as being covered by the concept of "broadcasting", and thus by Article 11bis of the Berne Convention, Article 11bis(2) cannot be applied with respect to transmissions through the Internet.

Article 11bis(2) of the Berne Convention allows to determine conditions for the exercise of the right of broadcasting and for the rights concerning secondary communication of broadcast programs also covered by Article 11bis(1). It is stated, however, that "these conditions shall apply only in the countries

where they have been prescribed". The Internet is a global network, and in the case of any communication through it, the impact of the conditions mentioned in Article 11bis(2) would normally extend much beyond the territories of the countries that intended to apply them. Thus, in the case of this kind of communication, the imposition of conditions for the exercise of rights would not be allowed. Conditions of exercise of the rights, as discussed above, may mean not only the application of non-voluntary licenses, but also mandatory collective management. Therefore, in such a case, the prescription of this mandatory collective management would hardly be compatible with the Berne Convention.

As regards the right of producers of phonograms and of performers (whose performances are embodied in phonograms) under Article 15 of the WPPT, as discussed above, the minimum obligation is only to grant a right to remuneration for (non-interactive) communication to the public (and reservations may be made even in respect of this obligation). It seems quite clear, however, that, in the digital, networked environment, the recognition of a right of communication to the public for these beneficiaries of related rights is indispensable, at least, in certain cases. Furthermore, it is desirable that this right be granted to them as an exclusive right of authorization rather than a mere right to remuneration. The agreed statement quoted above reflects this recognition. The agreed statement does not identify concretely those cases where an exclusive right of authorization is justified. It seems, however, that the general description of such cases clearly fits to the so-called "near-on-demand" digital transmissions (such as those based on subscription systems) and also, in general, to transmissions through the Internet (even if not in an interactive way). From the considerations serving as a basis for the agreed statement, and from the exclusive nature of the rights to be granted, it also follows that, in these cases, it would be hardly allowed to prescribe mandatory collective management.

5. PRIVATE COPYING IN THE DIGITAL NETWORKED
ENVIRONMENT: INDIVIDUAL EXERCISE OF
RIGHTS THROUGH DRM – OR COLLECTIVE
MANAGEMENT OF LEVY-BASED RIGHTS TO
REMUNERATION

5.1. THE APPLICATION OF THE "THREE-STEP TEST", INTRODUCTORY
REMARKS

In order to judge the copyright status of private copying, first, it is necessary to review the international norms concerning the conditions of the application of exceptions to, and limitations of, the right of reproduction, in particular, those on the "three-step test" adopted, for the first time by the 1967

Stockholm Diplomatic Conference to revise the Berne Convention, as included in Article 9(2) of the Convention.

The nature of Article 9(2) differs from that of the other provisions of the Berne Convention on exceptions and limitations. It does not provide for any specific limitation or exception, but rather fixes the rules for the application of limitations and/or exceptions at the national level.

The origin of the expression "three-step test" may be found in the way Main Committee I of the 1967 Stockholm Revision Conference described how to apply paragraph (2). The relevant part of the report reads as follows:

If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interest of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.³⁰

It is to be noted that since 1967, the technological nature and the impact of reprographic reproduction – which was chosen for the examples in the report – have changed fundamentally. Therefore, these examples may not be necessarily relevant under the present circumstances. However, the description in the report of the way Article 9(2) should be applied continues to be valid in respect of the indication of the structure of the test – that is in respect of it being a "three-step test". In this context, it should be stressed that, although the condition that the exception may only be allowed in special cases is mentioned at the end of this description, in fact, it is the first condition to be checked. Not only because it is the first one mentioned in the text of the paragraph, but also because it is obvious that, if it is found that the coverage of a proposed exception is broader than just a special case, it is needless to consider the other two conditions; in such a case, the exception is not allowed under the Convention.

30. Stockholm Intellectual Property Conference, 1967, *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967* (Geneva: World Intellectual Property Organization, 1971), 1588 at 1145–46 [Stockholm Records].

5.2. FIRST STEP: THE MEANING OF "SPECIAL CASES"

Although neither the text of the Convention nor the report of Main Committee I of the 1967 Stockholm Revision Conference contains a precise definition of the cases that may be regarded "special", the proposals and debates about limitations of, and exceptions to, the right of reproduction, as reflected in the records of the conference, as well as the context of the Convention offer sufficient orientation in this respect.

On the basis of these sources of interpretation, it may be stated that the concept of "special cases" includes two aspects: first, an exception or limitation must be limited as regards to its coverage as no broad exception or limitation with a general impact is permitted and, second, it must be also special in the sense that there must be a specific and sound legal-political justification for its introduction. "Sound legal-political justification" means that exceptions and limitations cannot serve any kind of political objective. There is a need for a clear and well-founded justification, such as freedom of expression, public information, public education and the like for an author's rights may not be curtailed in an arbitrary way.

5.3. SECOND STEP: THE MEANING OF "[CONFLICT WITH] NORMAL EXPLOITATION"

The meaning of the word "exploitation" seems to be quite clear: it is the activity by which the owner of copyright employs his exclusive right to authorize reproduction of his work in order to extract the value of this right. What requires interpretation in this context is rather the adjective "normal". It may be understood in two different ways: either as an empirical conclusion about what is common in a given context, or as an indication of some normative standards. The records of the Stockholm Revision Conference, in the form of the following statement, clearly indicate that the latter meaning was taken into account: "all forms of exploiting a work, which have, or likely to acquire, considerable economic or practical importance, must be reserved to the authors" [emphasis added].³¹

With technological development, it is becoming even clearer that the adjective "normal" simply cannot be of a mere descriptive, empirical nature, and that it is rather a normative requirement. New means and forms of reproduction keep emerging, and when, at the beginning, they are applied for the first time, certainly it would be difficult to speak about a form of exploitation that might be described – in the empirical sense of the word – as "usual", "typical" or "ordinary". At the same time, these new forms of reproduction may be very important for the owners of copyright to extract market value from the right

31. *Ibid.* at 112.

of reproduction, the more so because they usually replace some other, more traditional forms.

5.4. THIRD STEP: THE MEANING OF "UNREASONABLE PREJUDICE TO THE LEGITIMATE INTERESTS OF AUTHORS"

The 1967 Stockholm Revision Conference applied the term "legitimate interests" in its "legal interests" sense (in the sense as it is expressed by Masouyé in his Guide: "all copying is damaging [prejudicial] in some degree")³² and it was the adverb "not unreasonably" [prejudicing such interests] that had been included to offer a basis for determining the permissible scope of exceptions. This is also reflected by the unchallenged statement of the Chairman of Main Committee I of the Stockholm Conference: "Since any exception to the right of reproduction must inevitably prejudice the author's interests, the Working Group had attempted to limit that prejudice by introducing the term... 'unreasonable'."³³

5.5. PRIVATE REPRODUCTION IS COVERED BY ARTICLE 9(1) AND (2)

Article 9(1) of the Berne Convention provides for an exclusive right to authorize reproduction "in any manner or form". Any kind of reproduction is covered by this right. Thus, also private copying is covered. Exceptions to the right of reproduction are only permitted if they fulfill the conditions of the "three-step test", and this also applies for private reproduction.

This is confirmed by the negotiating history of Article 9. There was a proposal at the Stockholm Revision Conference to allow new exceptions to the right of reproduction directly in certain cases without subjecting them to the "three-step test", and private reproduction would have been one of those cases.³⁴ The Conference, however, rejected this proposal.³⁵ Thus, it is clear that, under the Berne Convention, no general exception for private reproduction is permitted. Any exception to the right of reproduction for such reproduction is only allowed if it corresponds to the "three-step test"; that is, (i) if it may be regarded a special case; (ii) if it does not conflict with the normal exploitation of works; and (iii) if it does not unreasonably prejudice the legitimate interests of authors and other owners of copyright.

All this means that, under the Berne Convention, there is no such "right" of consumers as might be characterized as a "right to private copying". Consumers

32. C. Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Geneva: World Intellectual Property Organization, 1978), 177 at 56.

33. Stockholm Records, *supra* note 30 at 883.

34. *Ibid.* at 113.

35. *Ibid.* at 687.

may benefit from an exception to the right of reproduction for private copying in cases that fulfill the requirement of the "three-step test".

5.6. ARTICLE 13 OF THE TRIPS AGREEMENT ON LIMITATIONS AND EXCEPTIONS

The basic provision of the TRIPS Agreement on limitations of, and exceptions to, copyright is contained in its Article 13 on "Limitations and Exceptions" which reads as follows:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the works and do not unreasonably prejudice the legitimate interests of the right holder.

This is not, however, the only relevant provision of the TRIPS Agreement. Article 9.1 of the Agreement provides that the Members of WTO must comply with Articles 1 through 21 of the Berne Convention (except for the provisions on moral rights – Article 6*bis* – "and the rights derived therefrom"). This means that all the provisions of the Berne Convention on exceptions and limitations are also applicable under the TRIPS Agreement.

In substance, the three conditions provided for in Article 13 are identical with the three conditions under Article 9(2) of the Berne Convention. The following slight wording differences do not change this fact:

- Article 9(2) of the Berne Convention does not use the expressions "limitations and exceptions", but, nevertheless, as discussed above, what it does is that it allows the application of exceptions (free use) and limitations (non-voluntary licenses);
- Article 13 of the TRIPS Agreement provides that Members of WTO must confine limitations or exceptions to the cases mentioned in it, if the conditions provided in it are fulfilled; this is completely equal to what Article 9(2) of the Berne Convention does in respect of the exclusive right of reproduction: it authorizes countries party to the Convention to permit – as the analysis above indicates, in the form of exceptions or limitations – reproduction (but only) in the cases mentioned there (and only) if the conditions provided in it are fulfilled;
- Article 9(2) of the Berne Convention speaks about the legitimate interests of the author, while Article 13 of the TRIPS Agreement about the legitimate interests of the right holder; this, however, does not produce any substantive difference, since it is obvious that the Berne Convention applies not only to the rights of authors but also to the rights of other owners of copyright.

The really substantive difference – and this is quite an important one – is that, while Article 9(2) of the Berne Convention only covers the right of reproduction, Article 13 of the TRIPS Agreement provides for possible limitations and exceptions “to exclusive rights” in general; that is, to all economic rights under Articles 1 to 21 of the Berne Convention, and also to the right specifically provided for in the Agreement; namely the right of rental (concerning computer programs and cinematographic works). This difference, however, is without real importance from the viewpoint of the scope and conditions of an exception for private copying.

5.7.

THE WCT AND THE WPPT ON EXCEPTIONS AND
LIMITATIONS IN THE DIGITAL, NETWORKED ENVIRONMENT;
THE PREAMBLE OF THE WCT

The fifth paragraph of the Preamble of the WCT reads: “Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention. . . .” This reflects the recognition that, in the Berne Convention, there is “a balance between the rights of authors and the larger public interest”, and that there is a need for maintaining this balance “as reflected in the Berne Convention”.

In this paragraph of the Preamble, reference is made to “the rights of authors and the larger public interests”. Certain interests are supposed to be balanced with others. Therefore, the “balance” about which this paragraph speaks, in fact, is to be achieved between the interests of authors – along with the underlying larger public interest in granting “protection of the rights of authors in their literary and artistic works in a manner as effective [. . .] as possible” providing by this “an incentive for literary and artistic creation” (as indicated in the preceding paragraphs of the Preamble) – on the one hand, and, on the other hand, the “larger public interests”, that is, all the other relevant public interests.

This paragraph makes it clear that what is needed is only maintaining such a balance since it does exist already in the Berne Convention. Therefore, the balancing requirement must not be regarded as a new principle, it has rather been simply “decompiled” from the present balance of interests as manifested in the existing norms of the Berne Convention. In this context, it is also important to note that the balancing of interests in the Convention is supposed to be under the control of the basic objective of the Convention, namely the protection of copyright “in a manner as effective [. . .] as possible”. The same principle of “balancing” must also prevail in the WCT.

Certain aspects of public interests – namely, “education, research and access to information” – are also referred to in the fifth paragraph. It is exactly with respect to these interests that the Berne Convention provides for certain

specific limitations and exceptions. The text of the paragraph itself underlines this in clarifying that what is meant is a balance “as reflected in the Berne Convention”. Therefore, it is quite obvious that the Diplomatic Conference did not intend to introduce any new element into the existing principles of the Berne Convention. (It is to be noted that, as mentioned below, an agreed statement concerning Article 10(2) of the WCT confirms again the principle of “unchanged balance”, since it reads as follows: “It is understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention”.)

5.8.

ARTICLE 10 OF THE WCT AND THE AGREED STATEMENT
RELATED TO IT

Article 10 of the WCT on “Limitations and Exceptions” reads as follows:

- (1) Contracting Parties may, in their national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
- (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The Diplomatic Conference has adopted the following agreed statement concerning this Article:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered applicable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

The coverage of the entire Article 10 of the WCT is similar to that of Article 13 of the TRIPS Agreement, in the sense that it also extends to all rights under copyright. However, while the latter consists of one single provision which is applicable for both those rights which have been incorporated from the Berne Convention and the new right – the right of rental – provided for in it,

Article 10 of the WCT is composed of two paragraphs. The result is, however, the same: the “three-step test” is applicable for exceptions to, and limitations of, all economic rights protected under the WCT, irrespective of whether they are covered by the provisions of the Berne Convention incorporated in the WCT by reference or specifically provided by the WCT.

5.9. THE IMPACT OF ARTICLE 10(2) OF THE WCT ON
THE APPLICATION OF THE PROVISIONS OF THE BERNE
CONVENTION CONCERNING EXCEPTIONS AND LIMITATIONS AS
INCORPORATED, BY REFERENCE, INTO THE WCT

It is mentioned above that the cumulative effect of the two paragraphs of Article 10 of the WCT is similar to the effect of the single provision of TRIPS Article 13. From this, it follows that the impact of these paragraphs – and, in particular, paragraph (2) of the WCT which addresses exactly this issue – on the application of the provisions of the Berne Convention concerning exceptions and limitations as incorporated into the WCT by Article 1(4), is supposed to be similar. That is, Article 10, and, in particular its paragraph (2), is to be regarded as a mere interpretation tool.

In the case of Article 13 of the TRIPS Agreement, the finding that, for the exceptions and limitations provided for in the Berne Convention and incorporated by reference, it does not have either an extending or a restricting effect, and that it is not more than an interpretation tool, is based on the interpretation of that provision of the Agreement. With regards to the WCT, the 1996 Diplomatic Conference itself clarified, through the adoption of an agreed statement concerning Article 10(2) of the Treaty, that this interpretation is the adequate one. As quoted above: “It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention”.

It is important to stress that the agreed statement should be interpreted in the light of the obligation of applying the “three-step test” provided for in Article 10 of the WCT. Existing exceptions and limitations may be carried forward to the new environment, but when this happens, it should be guaranteed that they still correspond to the conditions of the “three-step test” also under the new circumstances. This is indispensable due to the fact that digital technology and the global information network dramatically change both the ways works may be normally exploited and the consequences of the application of certain possible exceptions from the viewpoint of the legitimate interests of copyright holders. The result of a new assessment of the existing exceptions and limitations on the basis of the “three-step test” before carrying them forward may be that they turn out to be inapplicable in the new environment or that, although they may be carried forward, the extent and conditions of their application should be adapted to the new environment. At the same time, certain exceptions may be carried forward without any significant change, and

as the agreed statement also clarifies, the introduction of certain new exceptions or limitations may also be justified specifically in view of the digital, networked environment.

5.10. ARTICLE 1(4) OF THE WCT AND THE AGREED STATEMENT
RELATED TO IT: APPLICATION OF ARTICLE 9 OF THE BERNE
CONVENTION IN THE DIGITAL ENVIRONMENT

By virtue of paragraph (1) of Article 9 of the Berne Convention, the coverage of the right of reproduction extends to reproduction “in any manner or form”. This language can hardly be interpreted in good faith in any way other than that, unless an exception or limitation is permitted under paragraph (2) of the same Article, the right of reproduction is applicable to any kind of reproduction. In other words, if an act is reproduction, it is covered by the right of reproduction, and it may only be excluded from the operation of the right of reproduction if it is done through appropriate exceptions and limitations.

The 1996 WIPD Diplomatic Conference adopted the following agreed statement linked to Article 1(4) of the WCT, which provides for the obligation of complying with Articles 1 to 21 of the Berne Convention, and, thus, also with its Article 9:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

It seems that the first sentence of the agreed statement is unnecessary, since it states what is obvious: “The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form”. The reason for which this sentence is unnecessary is that there is no reason whatsoever for which doubts might emerge that the expression “any manner or form” also covers digital form. If a work is transformed from analogue form into any digital form, unless some substantive changes are made during this transformation, reproduction takes place (in case of substantive changes, the applicability of the right of adaptation may emerge). The work itself – the text, the picture, the musical creation – remains the same, just the format in which it is embodied changes. If a work is digitized, it may not be qualified in any other way than that a new copy is made – that is that reproduction takes place. Therefore, both paragraph (1) of Article 9 on the exclusive right of reproduction and its paragraph (2) on the possible exceptions and limitations of these rights are fully applicable in the digital environment.

As regards the second sentence of the agreed statement, it concerns the concept of reproduction, and it only confirms in a legally binding way what was clarified by a WIPO/UNESCO body as early as in 1982,³⁶ namely that storage of works in a computer memory is also reproduction.³⁷

5.11.

THE WPPPT ON EXCEPTIONS AND LIMITATIONS

Article 16 of the WPPPT provides as follows:

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations and exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

The 1996 WIPO Diplomatic Conference stated that the agreed statement adopted concerning Article 10 of the WCT – quoted above – applies, *mutatis mutandis*, also in respect of Article 16 of the WPPPT. Also, the Diplomatic Conference adopted the same kind of agreed statement, *mutatis mutandis*, concerning the right of reproduction and the exceptions and limitations of it as in respect of the same right under the WCT (also quoted above).

Article 15 of the Rome Convention contains two types of provisions on exceptions and limitations. First, in paragraph 1, it identifies four concrete cases of “exceptions”; second, in paragraph 2, it extends the applicability of all kinds of “limitations” allowed under copyright to the rights covered by the Rome Convention (except for compulsory licenses). Article 13 of the TRIPS Agreement has extended the applicability of the “three-step test” – originally introduced in Article 9(2) of the Berne Convention concerning the right of reproduction – to all rights under copyright, but not to related rights.

Article 16 of the WPPPT has brought about two changes. First, it has eliminated the reference to concrete cases and, with some wording modifications, it has only maintained – in its paragraph (1) – the reference to the exceptions and limitations that Contracting Parties provide for in their national laws in the field of copyright. In the desirable – and typical – case, where a Contracting Party is

also party to the WCT, this means the same scope of permissible exceptions as under the WCT. (It is clear under paragraph (1), however, that a Contracting Party is only allowed to make use of the possibility of applying an exception or limitation permitted by the WCT in respect of the rights of performers and/or producers of phonograms, if its national law provides for the same exception or limitation concerning copyright.) Second, and this is the more fundamental change, paragraph (2) of Article 16 has submitted all exceptions and limitations to the rights of performers and producers of phonograms to the “three-step test”. This is particularly important in respect of private copying which, thus, has also been put under the control of the test.

Since, for the reasons just discussed, the scope and conditions of applicability of exceptions and limitations to the rights of performers and producers of phonograms are the same under Article 16 of the WPPPT as under Article 10 of the WCT – even the agreed statements concerning these Articles are, on a *mutatis mutandis* basis, the same – the comments made above on the WCT Article, are also applicable, in a *mutatis mutandis* manner, here.

5.12.

APPLICATION OF THE “THREE-STEP TEST” FOR PRIVATE COPYING AS A RESULT OF DIGITAL DELIVERY THROUGH INTERACTIVE NETWORKS

Private copying through the global information network is emerging as a major form of exploitation of works (as the p2p phenomenon indicates, this is not only a possibility but very much a reality). Accepting the idea that every user of the network should have the privilege to make a reproduction freely for private, personal purposes – considering the breathtaking growth of the Internet population – would mean accepting that normal exploitation of works would become impossible, and not only on the global network but, as a consequence of the free availability of perfect copies, also in major “off-line” markets. Such a practice greatly conflicting with basic forms of normal exploitation of works should not be allowed under Article 9 of the Berne Convention (and equally not under the TRIPS Agreement and the WCT which incorporate this provision by reference). What rightsholders are faced with is a serious conflict with normal exploitation of works and objects of related rights and not only some “simple” unreasonable prejudice to their legitimate interests. It is not sufficient to handle the problem through the recognition of a mere right to remuneration – with all the inadequacies of such remuneration systems.

The maintenance – or the introduction – of such remuneration schemes may only be justified where the rightsholders are unable to exercise their exclusive right to authorize reproduction. While, in the case of “traditional” off-line and off-air “home taping”, the exercise of an exclusive right was impossible, in the digital, networked environment – on the basis of technological measures and rights management information – it is fully possible. This is a very important fact, since Article 9(2), Article 13 of the TRIPS Agreement, Article 10 of the

36. See, “Second Committee of Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works” (June 7th-11th, 1982), 18 *Copyright* at 239-247.

37. *Ibid.* at 246-47.

WCT and Article 16 of the WPPT certainly do not allow denying the exclusive right of reproduction to rights owners or to reduce it to a mere right to remuneration, where this would conflict with a major form of exploitation and where there is no obstacle to copyright owners to exercise their rights.

5.13. ADAPTATION OF THE RIGHT OF REPRODUCTION TO THE DIGITAL, NETWORKED ENVIRONMENT IN RESPECT OF PRIVATE COPYING AT NATIONAL AND REGIONAL LEVEL – CASE LAW SOLUTION

The US Green Paper³⁸ and White Paper³⁹ which prepared both the US position to be represented at the 1996 Diplomatic Conference and the Digital Millennium Copyright Act,⁴⁰ did not address the issue of private copying in such a specific way as it discussed library and educational uses. This was due to the fact that, while the US Copyright Law contains quite detailed specific provisions on library and educational exceptions, it leaves the issue of private copying to the general provisions on fair use.

What the Green Paper did (and the White Paper did not go further, in this respect) was that it analyzed the four factors provided in Section 107 of the US Copyright Act to be taken into account in determining whether or not a given case is a fair use – (i) the purpose and character of the use; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used; and (iv) the impact of the use on the potential market – and then it expressed confidence that, on this basis, courts will be able to answer the questions raised in connection with the use of works in digital networks.⁴¹

The developments in the United States have shown that this confidence in the case-law-powered fair use system was justified. It was possible to see this already in the outcome of the famous *A&M Records v. Napster* case.⁴²

It is to be noted that the case had many aspects. Napster's direct liability did not emerge since it only offered services for "file-swapping"; the acts of uploading and downloading were carried out by its subscribers. Thus, the issue, in fact, was whether or not Napster was liable for infringements committed by its subscribers on the basis of contributory or vicarious liability. Such liability, however, may only exist if there is also a directly liable infringer.

38. *United States, Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights* (Chairman B. Lehman), published by the Information Infrastructure Task Force, July 1994 [US Green Paper].
39. *United States, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, (Chairman B. Lehman), published by the Information Infrastructure Task Force, September 1995 [US White Paper], online: <www.uspto.gov/web/offices/com/doc/infinitipmii.pdf> (last visited: 20 September 2005).
40. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 [DMCA].
41. US Green Paper, *supra* note 38 at 51–52.
42. *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004 (9th Cir. 12 February 2001).

The Ninth Circuit Court of Appeal upheld the District Court analysis and found that Napster's subscribers' activities were not excused by the fair use doctrine. This served as a basis for establishing Napster's contributory liability since it knowingly facilitated such activities. From the viewpoint of the issue of private copying, however, the subscribers' activities are relevant.

The Ninth Circuit analyzed the subscribers' acts mainly from the viewpoint of the first and fourth factors listed in Section 107 mentioned in the preceding point above, namely the nature and purpose of the use and its impact on potential markets.

Regarding the first factor, the court found that the subscribers' activities were of a "commercial" nature, a factor that questions the applicability of the fair use doctrine. This finding may sound unusual, since on the basis of the generally recognized meaning of the word making copies for personal enjoyment could hardly be regarded "commercial". However, this is certainly true if it is taken into account that the "private copying" activity of the customers of the system was suitable to compete with the copyright owners' market for the work.

This is truly important since, if a use competes with the copyright owners' market – that is, using the term appearing in Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, Article 10 of the WCT and Article 16 of the WPPT, as part of the "three-step test", if a use conflicts with a normal exploitation of the work – no exception or limitation to the exclusive right of reproduction may be allowed under the said international norms.

The court offered a thorough and valuable analysis from this viewpoint (which, in the US context, meant the viewpoint of the fourth factor in Section 107: the impact of the use on the potential market for the work). The findings of the court are in perfect harmony with the correct interpretation of the term "normal exploitation" as appearing in the above-mentioned Berne Convention, TRIPS Agreement, WCT and WPPT provisions. In this term ("normal exploitation"), the tiny one-letter article "a" indicates clearly that what must be avoided is not "the" normal exploitation of a work in general, in which the various elements might be neglected if some overall normal exploitation may still be guaranteed. "A normal exploitation" means any normal exploitation of the work or object of related rights. In conformity with this, the court took into account both the "traditional" off-line market (sale and rental of copies) and the emerging market for online distribution. The Ninth Circuit court upheld the District Court's finding that the use of Napster had a detrimental impact on CD sales which was clearly identifiable around college campuses where Napster use was particularly intensive. It is perhaps more important, however, that the Ninth Circuit recognized the independence and the significance of a new form of exploitation. It pointed out that it was irrelevant that Napster might not harm traditional forms of exploitation: "lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works". (In fact, this was particularly relevant in the case of on-line music distribution, since Napster's activities were a major obstacle for rights-holders to introduce their business models for such distribution: obviously,

they wanted to get something for their works embodying the results of their creative efforts and/or investments, and in that way they did not have real chance in face of the unfair competition by Napster which offered freely the same.)

5.14.

ADAPTATION OF THE RIGHT OF REPRODUCTION TO THE DIGITAL, NETWORKED ENVIRONMENT IN RESPECT OF PRIVATE COPYING

The EU Copyright Directive⁴³ offers an exhaustive list of exceptions and limitations that Member States may apply, and thus it was inevitable for it to also deal with the thorny issue of private copying.

The regulation of the private copying exception or limitation – as many other exceptions and limitations listed in Article 5(2) and (3) of the Copyright Directive – has two aspects. First, provisions on the exceptions and limitations themselves, and, second, provisions on how they may prevail in case of application of technological measures of protection. This paper only deals with the first aspect, since it is the one which concerns collective management.

In the exhaustive lists of Article 5 of the Copyright Directive, the private copying exception is provided in paragraph (2)(b). Under it, exceptions or limitations may be provided “in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned”.⁴⁴

Paragraph (5) of Article 5 of the Copyright Directive, however, limits the freedom of Member States in providing such exceptions or limitations since it subjects all of them to the conditions of the “three-step test”. Therefore, paragraph 2(b) is only a kind of framework provision. When a Member State is to determine whether in a given case free, private reproduction may be allowed, or the introduction of a right to remuneration is justified, or again the exclusive right of reproduction should be maintained, a thorough “three-step test” analysis is needed.

5.15.

CONFLICTS OF INTERESTS CONCERNING THE CHOICE BETWEEN INDIVIDUAL EXERCISE OF THE EXCLUSIVE RIGHT OF REPRODUCTION IN RESPECT OF PRIVATE COPYING AND THE COLLECTIVE MANAGEMENT OF A RIGHT TO REMUNERATION FOR SUCH COPYING

A number of issues have emerged concerning the interpretation of Article 5(2)(b) of the Copyright Directive. The issue that seems to involve the

43. *Supra* note 21.44. *Ibid.*

strongest conflicts of interests closely relates to the question of what kind of role collective management may play in the digital networked environment.

It was as early as in the German Copyright Act of 1965 that a right to remuneration was recognized for private copying of phonograms in the form of a so-called “levy system”.⁴⁵ This solution remained isolated for quite a long period, but then, from the beginning of the 1980s, other countries followed suit, and, by the end of the century, its application became quite widespread. The right to remuneration in such a system was mainly applied concerning the private copying of phonograms and audiovisual works in the form of “levies” imposed on equipment and/or on recording material used for private copying. The levy was to be paid by the manufacturers or importers of such equipment and media, and was collected and distributed to the rightholders by CMOs. WIPO has dealt with this kind of levy systems for private copying. On the basis of a number of studies and discussions at various meetings of governmental experts, it has been clarified that:

- (i) in certain cases, in particular in the case of phonograms and audiovisual works, private reproduction has become so widespread that it already unreasonably prejudices the legitimate interests of rightholders;
- (ii) under these conditions, free private copying is in conflict with the “three-step test”, provided for in Article 9(2) of the Berne Convention, which does not allow exceptions that result in such unreasonably prejudice;
- (iii) due to privacy considerations, in such a case, the exercise of exclusive right of reproduction would be impossible;
- (iv) it is possible, however, at least, to reduce the prejudice to a reasonable level through the application of a right to remuneration in the form of the above-mentioned “levy system”;
- (v) if a country can choose, between allowing unreasonably prejudice, on the one hand, and, on the other hand, reducing the prejudice in that way to a reasonable level, it follows from Article 9(2) of the Berne Convention that it should choose the latter;
- (vi) appropriate methods (sampling, etc.) are available in order to distribute the remuneration thus collected in a way that more or less those rightholders receive a certain share whose works and/or objects of related rights are most frequently reproduced in the form of private copying; the remuneration is due to the interested rightholders for the reproduction of their works and objects of related rights; thus, it is obvious that this right to remuneration is part of the rights of copyright and related rights owners under the relevant international conventions;
- (vii)

45. Law on Copyright and Neighboring Rights of 9 September 1965, *Bundesgesetzblatt*, Teil I, 1965, p. 1273.

- (viii) consequently, if the recognition of such a right to remuneration could be regarded as going beyond the minimum obligations under the relevant international conventions, it would be clearly covered by the obligation to grant national treatment;
- (ix) since, however, under the “three-step test”, it seems to be an obligation, at least, to reduce the unreasonable prejudice caused by widespread private copying to a reasonable level where the possible means for doing so is available – and the application of a right of reproduction based on a levy system is such a means – a member country of the Berne Union may deny granting such a right to remuneration to the nationals of another member country if the latter does not provide for such a right in similar cases.⁴⁶

The amounts collected on the basis of such levy systems in certain countries have become quite big. The remuneration has either become part of the distribution system of the given organization or, in certain countries, from the viewpoint of rightsholders, a kind of “semantic catastrophe” occurred. The governments did not recognize the real legal nature of the payment – namely, that it is a remuneration due to rightsholders on the basis of their right of reproduction – but simply took the “dictionary meaning” of the word “levy”, and intended to handle it as a kind of “cultural tax”; they took away a smaller or bigger part of the remuneration for general “cultural purposes” – or ordered the CMOs to do so – and, in certain cases, on the basis of some “helpful” (but from the viewpoint of the existing international norms, completely unfounded) legal theories, they denied the enjoyment of the same right of remuneration to foreign rightsholders.

When digital technology appeared in the traditional copyright fields with the advent of CDs and, in particular, when the digital private copying of such digital phonograms became possible, it was logical to extend the remuneration systems introduced in the analog environment also to this new digital environment. Furthermore, due to the fact that the quality of digital copies do not degenerate with digital reproduction, the need for, at least, a right to remuneration emerged even in countries where such right had not yet been recognized. In principle, the same may be said about the advent of DVDs and the possibility of private copying of audiovisual works in digital format.

However, when the DVDs appeared in the market, the circumstances were fundamentally different from those which existed at the time of the advent of CDs, and since then the differences have turned out to be even more important. The new developments took place, first, in the field where phonograms – included in digital form in CDs – were mainly interested. With the “ripping”

46. For a detailed description of the discussions on the issues of private copying under the aegis of WIPO, see M. Ficsor, *The Law of Copyright and the Internet – The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford University Press, 2002), §44 at 310–317 (Oxford Book).

technology and through the so-called p2p systems, it became an ever more widespread practice uploading and downloading digital phonograms through the Internet. This practice started undermining the possibility of phonogram producers for normal exploitation of their reproduction and distribution rights (and, in the context of the Internet, their “making available” right). With the increased capacity of the computer and telecommunication systems, and due to certain new software solutions, later the same kind of practice appeared in respect of DVDs and the audiovisual works embodied in them in digital form. Such illegal use of audiovisual works in digital form, however, had the potential of having even more detrimental effects than what was perceived in the case of phonograms. The obvious difference follows from the fact that the creation and production of audiovisual works requires much more important creative and financial investments, for the recouping of which there is only hope if producers and distributors can duly exploit these works in the different markets in well-established sequence. The unauthorized reproduction and distribution of audiovisual works through the Internet is suitable to destroy this sequence of markets, and by this to undermine the economic basis for the creation, production and distribution of new valuable works.

These developments began to dramatically change the copyright landscape and to undermine the existing balance between the fundamental public interest of granting appropriate incentives to creators and producers for the creation and production of works and other cultural and information productions indispensable for cultural, social and economic development and certain private interests, such as the interest of members of the public obtaining copies in the most convenient way possible – preferably free of charge – and, more importantly the interests of those organizations which, by making available the means necessary for obtaining unauthorized free copies, gain profit in a parasitic way.

There was only one possible way to stop the destruction of the copyright system and to re-establish the balance of interests – with due recognition of the public interest serving as a basis for an adequate and effective copyright system as mentioned above, namely, by “answering to the machine by the machine”. This legendary saying by Charles Clark⁴⁷ was a short-hand reference to the possibility of using digital technology by rightsholders in response to the above-mentioned ever more dangerous and detrimental challenges raised by the same technology. The answer became possible by using technological measures (such as encryption systems) and digital rights management information (such as digital identifiers) for the protection and exercise of their rights in the digital networked environment. Technological protection measures (TPMs) and rights management information (RMI) are frequently used together. The systems in which this combination takes place are referred to as digital rights management (DRM) systems.

47. Charles Clark worked as Copyright Advisor of the Publishers Association (of the United Kingdom) and the General Counsel to the International Publishers Copyright Counsel.

It was recognized quite early that it is not sufficient to apply TPMs and RMI; there is also a need for their adequate protection. Articles 11 and 12 of the WCT and Articles 18 and 19 of the WPPT obligate Contracting Parties to grant such protection against the unauthorized circumvention of TPMs and against the unauthorized removal or alteration of RMI. (In the meantime, it has been clarified that a country may only grant adequate protection against the circumvention of technological measures if the protection extends (i) to both access-control and use-control – in particular copy-control – measures, and (ii) not only to the final act of circumvention, but also to the unauthorized manufacture, importation and distribution of circumvention devices or unauthorized services for circumvention.)⁴⁸

It is obvious that, when the due balance of interests is re-established by the application of DRM systems and by the adequate protection provided for them, it should be avoided that the balance of interests be upset in the opposite way, namely by eliminating the possibility of benefiting from certain exceptions to copyright and related rights that are justified by other important public interests. In the countries where the WCT and the WPPT have been implemented due attention has been paid to this and adequate legal provisions and mechanisms (in the form of direct exceptions to the prohibition of circumvention, administrative rule making, intervention systems) have been introduced in order to maintain an appropriate balance. The DMCA adopted in the United States of America in 1998 and the Copyright Directive of the European Union are the best examples for this.⁴⁹

There are, however, certain theories and arguments that suggest that the application and effective protection of TPMs is not the right way. The spectrum of these theories and arguments is quite broad. Some of the theories are of a defeatist nature (stressing that it would be in vain to try to protect TPMs since they inevitably may be circumvented sooner or later), while others suggest that by the application of TPMs, the balance of interests may be upset in favour of rightsholders (an allegation that has not proved to be justified in those countries where the relevant provisions of the WCT and the WPPT have been duly implemented), still others are based on some misleading theories (“information must be free”)⁵⁰ or on some short-sighted ideas (expressed in

48. See Oxford book, *supra* note 46 at 549–554.

49. DMCA, *supra* note 40 and Copyright Directive, *supra* note 21. See also Oxford book, *supra* note 46 at 556–562.

50. The slogan “information must be free” is used frequently in a misleading way in this context for the following reasons: information as such is free under copyright. Everybody can use information (facts, data, news of the day, etc) as such for the creation of works: what is only protected is the original way of presenting information. The slogan, however, uses the word “information” in a way that it means not only information as such, but also works presenting information in an original way as well as works that, in fact, do not contain information according to the genuine meaning of the word (for example, musical works expressing feelings, or works of art expressing impressions).

such slogans as “music must be free”).⁵¹ There is, however, something that is common in these different theories and ideas, namely that, when it comes to the question of how the legitimate interests of owners of copyright and related rights might, nevertheless, still be taken into account and respected, the answer of the advocates of these theories and ideas (at least of those who do not go so far as to completely neglect these interests) frequently is that a simple right to remuneration should be introduced which – normally – may be administered by collective management organization. Where then certain details are offered about these proposed solutions, usually the outlines of some kind of levy system emerge (where the levy would not be imposed necessarily on equipment or recording media, but might be added, for example, to the fees to be paid to service providers).

Thus, a system of collective management of remuneration rights would emerge as an alternative to – and, in fact, more than that: a way of elimination of – exclusive rights. The rightsholders would lose control over the exploitation of their works and other productions, the use of which would become free, and they might only receive a certain payment *post factum*, which would not be fixed by them, but by certain statutory norms or through a collective system that they might only influence in a very much indirect and marginal way, if any. Also, such a uniform, lump sum-type system would hardly be suitable for taking into account the differing levels of cultural and market value of the works and other productions concerned and of the creative efforts and financial investments necessary for their creation and production.

This description is also valid concerning the existing levy systems, which contribute to creating the impression that these remuneration systems are some specific taxes. In fact, this opinion is quite widely shared by the members of the public and even by many politicians. Where a right to remuneration – based on “levies” – is truly the only possible or reasonable way to reduce the level of prejudice caused to the legitimate interests of rightsholders, and where it is applied in a way that rightsholders may get a share from the amounts collected as proportionately as possible according to the use of their works or other productions, this opinion is hardly justified. Such a right to remuneration should be regarded as a secondary, complementary part of the copyright system in which exclusive rights should continue to be the typical and clearly dominant element. In spite of this, the above-mentioned opinion still exists, and politicians are tempted to handle these levies as kinds of taxes on the basis of which the governments may support creativity and cultural production – and since taxation is a matter for national sovereignty, only, or at least mainly, national creativity and cultural production. The payments made from the levies are not regarded as being due to the rightsholders on the basis of their right of

51. Those who spread this kind of slogan forget that free use of music would mean the absence of incentives for the majority of composers and text-writers to create, and for producers to invest into production and dissemination of musical works. Thus, this freedom would end up meaning free access to both a lesser quantity and quality of music.

reproduction, but rather as a mere subsidy the granting or not granting of which is up to the discretion of governments.

Taking this into account, it is not hard to foresee what fate copyright would be faced with if exclusive rights were replaced step by step by mere rights to remuneration administered by CMOs. The original objectives, the special legal nature and the social justification of copyright would be forgotten. These levies inevitably would be perceived ever more as cultural taxes and as sources of subsidies, and they tended to be handled accordingly.

Since, in such a system, not the interested rightsholders were in the position to fix the remuneration for the use of their works, but rather the legislators and/or governmental authorities, and since the levies would be perceived as specific taxes serving as sources for cultural subsidies, fiscal and general cultural policy considerations would tend to determine the amount of the levies and would influence the scope of their distribution. Levies and taxes are regarded as burdens on tax payers, companies and consumers, and, with the fading away of the specific social and legal justification of what is supposed to be a right of remuneration due to owners of copyright and related rights, it might happen very easily that such adjectives would appear in front of the word "burden" as "unnecessary", "unjustified" or "unreasonable". And from this, it would follow that ideas and proposals might emerge for decreasing – or even eliminating – this burden.

This is more than just a probable scenario. This is a trend that is prevailing ever more clearly in several countries. Equipment and recording material manufacturers, as well as consumer organizations are intensively lobbying for decreasing the amounts of levies and for limiting their application as much as possible, even where the primary purpose of the equipment or material is strongly linked to the use of protected works, and thus where such equipment or material would become useless and would lose their markets to a great extent without the works for the use of which, on the basis of the levies, the creators and producers would receive some remuneration. In the lobbying campaigns of these manufacturers and consumer organizations, the levies are presented the way it is described in the preceding paragraph: as a fiscal burden, as a tax that "increases the price of the equipment and material", and for which, therefore, no other adjectives are fitting than the ones mentioned. And these lamentations quite often find open ears in governmental circles.

Along with the trend that the amount of levies is decreasing due to governmental decisions neglecting the legitimate interests of rightsholders and the sound social justification thereof, there is another development that contributes to undermining the role of levy systems. This development relates to the fact that the capacity of carriers containing protected material and the distribution lines is increasing in an accelerating way, and thus the costs of manufacture and distribution of copies of works are decreasing at a similar accelerating pace. It may be a reasonable demand that the decreasing manufacturing and distribution costs be reflected in the price of the products. The costs of the creation and production – and the social value – of works the copies of which are manufactured

and distributed at an ever lower price, however, do not decrease at all in the same way. This means that, in the products embodying works, the proportion of the value of the works is increasing to an ever greater extent. Therefore, if the levies remain fixed at the same – in general quite low – percentage of the price of the products (and, in general, they do so) they produce ever less income and get ever farther away from making it possible to reduce the prejudice to a reasonable level.

Of course, this is not justified, and rightsholders may expect of governments that they should not sacrifice the important public interests serving as a basis for adequate and effective copyright protection on the altar of giving in, in the hope of short-term political advantages, to demands behind which there may be nothing else but some demagogue, populists slogans and/or mere greed of certain strong lobby groups that want to increase their profit no matter the cost paid by others. However, the political reality is that it is a difficult uphill battle for rightsholders to try to persuade governments about this, and that it is quite rare that they fully succeed.

All of these problems would be multiplied, strengthened and deepened if generalized levy or other lump sum-based collective management systems were introduced to settle the problems raised by the ever more widespread private copying through the Internet, in particular through the various P2P systems. This would, first, be regarded by the general public and policy makers as a combination of taxes and subsidies. Then it might easily become *de facto* – and later perhaps also *de iure* – truly that kind of system, with the consequence of losing the specific social justification for copyright as well as losing the hope that, through these declining fiscal sources, the objective for which the "traditional" exclusive rights were granted – namely to offer appropriate incentives for creation and production of new valuable works – could still be duly served. This kind of reproduction has become a major form of normal exploitation of works. Thus, it must be under the control of rightsholders based on their exclusive right of reproduction; and, in the digital networked environment, this is only possible through the application of DRM systems – in particular, TPMs – and through adequate legal protection of such measures the way it is mentioned above.

It is on the basis of these considerations that Article 5(2)(b) and (5) of the EU Copyright Directive may be interpreted and applied appropriately. Under it, as quoted above, private copying may be allowed, provided that it corresponds to the "three-step test", and in particular that rightsholders receive "fair compensation" in respect of which, however, the application or non application of technological measures must be taken into account. In this context, it goes without saying that, under the Berne Convention, the TRIPS Agreement, the WCT and the WPPT, "fair compensation" cannot be anything else but remuneration based on a right to remuneration in accordance with the criteria and requirements mentioned in the paragraph above. What may, and in fact does, raise some interpretation problems is the expression "application or non application of technological measures" (which must be taken into account when it

comes to the question of whether – and to what extent – the application of a right to remuneration is justified).

The application of TPMs makes the individual⁵² exercise of the exclusive right of reproduction possible, while the limitation of this right to a mere right to remuneration inevitably means that a collective management organization would administer such a right. This seems to be the reason for which certain CMOs (mainly those which administer the rights of authors and performers) prefer that kind of interpretation of Article 5(2)(b) which allows the continued application – or even the extension – of levy-based remuneration systems. At the other end of the spectrum, equipment and recording material manufacturers may be found who insist that where technological measure are available – irrespective of whether or not they are applied by rightsholders – the levy systems should be abolished. Between these two interested groups, some others may be found – such as producers of phonograms and producers of audiovisual works – who do not regard levy-systems as an optimal solution and would prefer exercising their exclusive right of reproduction on an individual basis through the application of appropriate TPMs, but who still are in favour of maintaining the levy systems as a fallback solution – in order to at least reduce the prejudice they suffer from widespread private copying to a reasonable level – as long as the necessary TPMs are not available in a way that they may adequately apply in practice (that is, as long as such measures either are not available yet at all, or although they are available in principle at the given level of technological development, there is no chance for their adequate application – since, for example, equipment manufacturers, citing “no mandate” provisions, do not provide the necessary interface in the recording devices, or there is no adequate legal protection against the circumvention of access-control and/or copy-control measures and against the manufacture and distribution of devices and offering services for unauthorized circumvention).

This paper deals with the issues of collective management from the viewpoint of the freedom of choosing between individual exercise and the collective management of rights. From this viewpoint, in spite of the lively debates on other aspects, the meaning of Article 5(2)(b) of the Copyright Directive – as well as the meaning of the relevant international norms referred to above – is crystal-clear. Where, in such a case as the massive private copying through the Internet, it is possible for rightsholders to exercise their exclusive right of reproduction, and they wish to make use of this possibility (for which, in the digital, networked environment, the practical applicability of technological protection measures is needed), they must not be constrained to choose a collective system based on a mere right to remuneration.

52. The expression “individual exercise” is used in this context as a form of exercise other than collective management. “Individual exercise” does not mean, therefore, necessarily case-by-case, work-by-work exercise of rights. Rightsholders may exercise their rights “individually” with respect of entire catalogues in which they have rights.

Recital 39 of the EU Copyright Directive confirms that this is the only adequate interpretation of Article 5(2)(b):

When applying the exception or limitation on private copying, Member States should take account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. *Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.* (Emphasis added.)

From the viewpoint of the choice between different forms of exercising rights, this means that it is not allowed to inhibit the individual exercise of the right of reproduction where it is possible through technological protection measures by replacing it with collective management of a mere right to remuneration (usually based on a levy system). (Neither is it allowed, of course, for the reasons discussed above, to introduce mandatory collective management of such a right in a way that, although it is characterized, in principle, as an exclusive right, it is limited, at the same time, by the condition that it can only be exercised through a collective system.)

6. CONCLUSIONS

The most important findings of the analysis of the issues of collective management covered in this paper may be summed up as follows:

- (1) Under the international copyright and related rights norms (Berne Convention, the Rome Convention, the TRIPS Agreement, the WCT and the WPPT), mandatory collective management may only be prescribed in the case of rights to remuneration (where certain rights are provided for as such and where it is allowed to limit exclusive rights to a mere right to remuneration).
- (2) Blanket licensing on the basis of presumption-based collective management – the way it is described above, may only be prescribed in the same cases as those mentioned in point (1), above.
- (3) Extended collective management is allowed under the international copyright and related rights norms also in the case of exclusive rights, but only if there are guarantees necessary for maintaining the exclusive nature of those rights.
- (4) The right of making available to the public as provided for in Article 8 of the WCT and in Articles 10 and 14 of the WPPT is an exclusive right in the case of which the principles outlined in points (1) to (3), above, should be fully respected. Its limitation to a mere right to remuneration (in the form of a non-voluntary licensing system or otherwise) or the

prescription of mandatory collective management for its exercise would be incompatible with the said provisions of the two Treaties.

(5) Consequently,

(i) while – under paragraph (2) of Article 11bis of the Berne Convention (in the context of the TRIPS Agreement and the WCT clearly subjected to the “three-step test”) – it is allowed to prescribe mandatory collective management (as well as non-voluntary licenses, which frequently is just equal to the limitation of the exclusive right to a mere right to remuneration usually exercised through collective management organization) for the exercise of the right of broadcasting (as well as of the rights to authorize secondary uses of broadcast works), it is not allowed to do the same in respect of the right of making available to the public under Article 8 of the WCT, in spite of the fact that both the right of broadcasting and the right of making available to the public are covered in the general concept of communication to the public under that Article;

(ii) while, under Article 12 of the Rome Convention and Article 15 of the WPPT, the only obligation is to provide for a right to a single equitable remuneration – normally exercised through collective management – for producers of phonograms and performers (and a country party to the Convention or the Treaty can even reduce the scope, or get fully rid, of this obligation through reservations) for communication to the public (in a “traditional” non-interactive way) of phonograms published for commercial purposes, under Articles 10 and 14 of the WPPT, in the case of the obligation to grant an exclusive right of authorization for the making available to the public of phonograms (and performances embodied in them), it is not allowed to introduce mandatory collective management (or non-voluntary licensing) as a condition of exercising that right.

(6) The limitation of the exclusive right of reproduction under copyright and related rights to a mere right to reproduction (usually based on a levy system) to be exercised through mandatory collective management is possible and even desirable under the “three-step test” where this is necessary in order to at least reduce the prejudice caused to rights-holders by widespread private copying to a reasonable level. However, this kind of limitation of the right of reproduction is not allowed under the “three-step test” where private copying goes beyond the scope of a “special case” or where otherwise it gets into conflict with a normal exploitation of works and objects of related rights. Private copying in the digital, networked environment (in particular through p2p systems) has become a possible form of normal exploitation and it could hardly be characterized any more as a special case (in the sense that it either would be limited in scope or that there were any sound social-political

justification for allowing it to be covered by an exception or limitation). Thus, it would not be in accordance with the three-step test to cover such private copying by a mere levy-based right to remuneration exercised through CMOs. Where effective technological measures are available and may be applied under reasonable conditions, the individual exercise of the exclusive right of reproduction should be made possible concerning this form of private copying, and, where the possibility of double payment emerges, there is only one acceptable way to avoid it, namely to “phase out” the levy systems covering the same cases of private copying.

Chapter III Collective Management of Copyright and Human Rights: An Uneasy Alliance

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1. INTRODUCTION

Public and private organizations that collectively administer copyright and neighboring rights on behalf of creators and rights owners operate under a diverse array of contracts, laws and regulations. At the center of this regulatory matrix are agreements that define the organizations' relationship with the individuals and corporations that are its members. These agreements address issues such as the criteria for membership and affiliation, the licensing, monitoring, and enforcement authority that the organizations possess, and the rules for allocating and distributing royalties. Moving outward from this contractual core are specialized laws that recognize the existence of collective management organizations (CMOs) and regulate their activities. Laws of general applicability form the outermost layer of regulation. These laws include copyright statutes, legislation regulating corporations and business associations, and, most famously, competition laws that prevent abuses of the dominant market positions that often follow from the concentration of licensing authority within a single entity or a very small number of entities.¹

Given this complex regulatory environment of contracts and statutes, it may be surprising and perhaps unwelcome news to CMOs and their members that another body of law is relevant to the collective administration of

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1. For a comprehensive discussion of these laws, regulations, and contracts, see D. Sinacore-Guinn, *Collective Administration of Copyrights and Neighboring Rights: International Practices, Procedures, and Organizations* (Boston: Little Brown & Co., 1993), 866 at 519-620.

copyright. Yet for more than fifty years, treaties and customary international law have recognized certain moral and material interests of authors, inventors, and other intellectual property creators as human rights. Until very recently, the conceptualization of these intellectual property interests as internationally protected human rights was all but unexplored. True, both the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR or "the Covenant") protect the moral and material interests of authors and inventors,² as well as the public's right "to enjoy the arts and to share in scientific advancement and its benefits."³ Without elaboration, however, these provisions provide only a skeletal outline of how to develop human rights-compliant rules and policies for governments to promote creativity and innovation. They also leave unanswered the critical question of how those rules and policies interface with existing intellectual property protection systems.

Recent events have highlighted the need to address these issues and to develop a distinctive "human rights framework" for intellectual property law and policy.⁴ Over the last decade, intellectual property rights have expanded dramatically, both in their subject matter and in the scope of the economic interests they protect. Nation states have also linked these rights to the world trading system, creating new opportunities for enforcement at the international and national levels. These twin developments have made intellectual property protection rules relevant to an expanding array of value-laden economic, social, and political issues, including public health, education, agriculture, privacy, and free expression.⁵

This chapter considers one discrete aspect of this emerging human rights framework – the relevance of the intellectual property provisions of the ICESCR to the collective administration of copyright in general and to the

2. Universal Declaration of Human Rights, Art. 27(2); International Covenant on Economic, Social and Cultural Rights, Arts 15(1)(c) & 15(1)(b).
3. UDHR, *ibid.*, Art. 27(1).
4. A comprehensive human rights framework for intellectual property should include not only an analysis of substantive rules and policy objectives – including different nature of the "rights" protected by each legal system – but also an assessment of whether those rules and policy objectives are (or ought to be) instantiated in legally binding obligations or non-binding norms. In addition, the framework must take into account the different international and domestic institutions (both legislative and judicial) by which state and non-state actors articulate and enforce those rules and policies, and the processes by which those actors influence their development, evolution, and adherence. Although an extended treatment of these issues is well beyond the modest objectives of this chapter, I allude to these broader questions where appropriate in the analysis below.
5. For further discussion of these trends, see L. Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" (2004), 22 *Netherlands Quarterly of Human Rights* 167, at 171–75; L. Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004), 29 *Yale International Law Journal* 1, at 26–45.

policies and practices of CMOs in particular.⁶ The chapter focuses in particular on two documents recently drafted by the Committee on Economic, Social and Cultural Rights ("the ICESCR Committee" or "the Committee").

The Committee is a supervisory body of eighteen human rights experts who monitor the implementation of the Covenant – a treaty that imposes legally binding obligations upon more than 150 member nations.⁷ Because many of the Covenant's provisions are ambiguously worded, one of the Committee's principal functions is to provide guidance to member nations as to the treaty's meaning. This guidance takes the form of nonbinding but highly persuasive recommendations that can serve as focal points for legal change at the national level. Formally, these recommendations are directed to governments and other state actors. But their scope – like that of the ICESCR itself – is not limited to public laws or regulations. They extend as well to individuals, groups, and business associations – including CMOs – whose actions implicate social, economic and cultural rights. Although these non-state actors have no direct human rights responsibilities under the Covenant, governments are required to regulate their activities to satisfy their own treaty obligations.⁸

The ICESCR Committee's initial foray into the intellectual property arena began in the Fall of 2001, when it published an official Statement on Human Rights and Intellectual Property⁹ that contained a preliminary analysis of

6. Institutions within the UN human rights system have recently taken up another aspect of this framework, producing studies, reports, and resolutions that address the politically and emotionally charged issue of access to patented medicines for HIV/AIDS and its implications for the right to health. See, e.g., Office of the High Commissioner for Human Rights, "Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria", Commission on Human Rights Resolution: 2004/26 (16 April 2004), online: <ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4.RES_2004_26.doc> (last visited: 12 August 2005); Report of the High Commissioner, "The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights", E/CN.4/Sub.2/2001/13 (27 June 2001), online: <www.unhcr.ch/Huridocda/Huridocaansf/Symbol/E.CN.4.Sub.2.2001.13.En?OpenDocument> (last visited: 12 August 2005); Canadian HIV/AIDS Legal Network & AIDS Law Project, South Africa, "TRIPs and Rights: International Human Rights Law, Access to Medicines, and the Interpretation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights" (November 2001), online: <www.aidslaw.ca/Maincontent/issues/csr/TRIPs-brief.htm> (last visited: 12 August 2005).
7. Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (3 June 2005), online: <www.ohchr.org/english/bodiests/doors/RatificationStatus.pdf> (last visited: 20 September 2005).
8. For a thoughtful and influential analysis of these issues, see A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1996), 422.
9. Committee on Economic, Social and Cultural Rights, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, Follow-up to the day of general discussion on Article 15.1(c), Monday, 26 November 2001" (14 December 2001), E/C.12/2001/15 [Statement on Human Rights and Intellectual Property], online: <www.unhcr.ch/tbs/doc.nsf/01e1f4514f8512432c1256ba6003b2cc6/\$FILE/G0146641.pdf> (last visited: 12 August 2005).

the treaty's intellectual property provisions and their relationship to other economic and social rights. The Statement contemplated that the Committee would eventually publish more extensive "general comments" on the ICESCR's intellectual property provisions.¹⁰ The first of these general comments, an exegesis on Article 15(1)(c) – "the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" – was published by the Committee in the Fall of 2005.¹¹

These two documents provide a partial outline of a human rights framework for intellectual property, one aspect of which I analyze in the remainder of this chapter. Most importantly, the documents demonstrate that such a framework is not restricted to protecting creators and innovators and the fruits of their intellectual endeavors. Rather, it gives equal importance to protecting the rights of the public to benefit from the scientific and cultural progress that intellectual property products can engender. However, one of the most challenging tasks for the ICESCR Committee – and for advocates of a human rights framework for intellectual property – is how to strike an appropriate balance between these two sets of rights – a balance that promotes compliance with the treaty obligations and the underlying values of human rights law and that provides a coherent interface with existing national and international intellectual property protection systems.

A few caveats are in order before turning to an analysis of how these issues play out in the specific context of CMOs. This chapter assumes that readers have at least a rudimentary understanding of copyright and neighboring rights laws and how creative works protected by such laws are collectively administered,¹²

10. *Ibid.*, at para. 2. In addition to reviewing periodic reports by states on the measures they have taken to comply with the Covenant, the ICESCR Committee periodically issues "general comments" that infuse the treaty with greater clarity and meaning. Although these interpretative statements do not bind states parties, they create widely shared expectations as to the meaning of the treaty's text. See M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995). The general comment specifically states commitments in far greater detail than the treaty itself, for example by identifying certain "core obligations" for states to provide "at the very least, minimum essential levels of each of the rights" in the treaty. See Committee on Economic, Social and Cultural Rights, "General Comment No. 3. The nature of States parties obligations (Art. 2, par. 1 of the Covenant)" (1990), E/1991/23 at para. 10 [General Comment No. 3], online: <[www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+3.En?OpenDocument)> (last visited 15 August 2005), (where core obligations are distinguishable from "obligations of result", which states may achieve by a variety of means over time).
11. Committee on Economic, Social and Cultural Rights, "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Art. 15(1)(c) of the Covenant)", General Comment No. 17 (21 Nov. 2005) [hereinafter General Comment], available at <www.ohchr.org/english/hoddes/cescr/docs/gc17.doc>.
12. For a "basic definition" of the functions that collective management organizations perform, see M. Ficsor, *Collective Management of Copyright and Related Rights* (Geneva: World

but it does not presume familiarity with international human rights law in general or its recent application to intellectual property in particular. In addition, the chapter does not provide an exhaustive treatment of the many inter-sections between human rights and copyright,¹³ but instead analyzes a selection of salient legal and policy issues relating to collective administration and leaves a more comprehensive treatment of other aspects of a human rights framework for intellectual property to future studies.

The remainder of the chapter proceeds as follows. Part 2 provides an overview of the ICESCR Committee's statement on human rights and intellectual property and of its General Comment. It highlights basic distinctions between the Committee's approach to protecting authors and creators and the approach adopted in intellectual property treaties and national intellectual property laws, with the goal of making the Committee's analysis more accessible to intellectual property lawyers and legal scholars. Part 3 provides an overview of the key concepts in the Committee's analysis relevant to the collective administration of copyright and neighboring rights. It argues that a human rights framework for intellectual property supports many of the functions that CMOs already perform. Part 3 notes, however, that certain practices and policies of CMOs may be in tension with the analysis of the Covenant enunciated by the ICESCR Committee. Part 4 considers in greater depth two specific legal and policy issues with important human rights implications: whether membership in CMOs should be mandatory or voluntary, and whether CMOs should promote national culture. Part 5 concludes with an analysis of the practical implications of adopting a human rights framework for analyzing the collective administration of copyright and for the international intellectual property system more generally.

2. INTRODUCING A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY

If intellectual property lawyers were asked to list the freedoms and liberties that international human rights law protects, they would likely name widely recognized civil and political rights, such as the prohibitions of slavery, torture, and the crime of genocide, or perhaps due process rights and freedom of expression,

Intellectual Property Organization, 2002), 165 at 17 (stating that the "owners of rights authorize collective management organizations to monitor the use of their works, negotiate with prospective users, give them licenses against appropriate remuneration on the basis of a tariff system and . . . collect remuneration, and distribute it among the owners of rights").

13. Readers seeking additional analysis of these issues may wish to consult the following sources: P. Torremans, ed., *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy* (The Hague: Kluwer Law International, 2004), 181; J. Griffiths and U. Sultersanen, eds., *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005), 474; J. Sterling, *World Copyright Law* (London: Sweet & Maxwell, 2003), 1557.

association, or privacy. More internationally-minded responses might mention economic and social guarantees, including the right to health care, food, and education. These are also internationally protected human rights, although their precise scope – as well as their recognition by countries such as the United States – remains a subject of genuine debate.

But few observers, if any, would list the rights of authors and inventors as human rights. Yet such rights were recognized at the birth of the international human rights movement. No less an august statement of foundational principles than the UDHR includes in its catalogue of rights and freedoms a statement that “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author”.¹⁴ The UDHR’s drafting history makes clear that the protection of authors’ rights was no accident, even if the drafters’ precise intentions remain elusive.¹⁵ Support for these rights also finds expression in nearly identical language in the ICESCR, an international agreement that makes the UDHR’s economic and social guarantees binding as a matter of treaty law.¹⁶

The endorsement of “authors’ rights”¹⁷ in these documents establishes broad areas of overlap between human rights law and intellectual property law.

14. UDHR, *supra* note 2, Art. 27(2).
15. J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), 378 at 220–221. As one scholar recently observed, although the motivations of governments who favored inclusion of Article 27 in the UDHR are somewhat obscure, the proponents appear to be divided into two camps:

What we know is that the initial strong criticism that intellectual property was not properly speaking a Human Right or that it already attracted sufficient protection under the regime of protection afforded to property rights in general was eventually defeated by a coalition of those who primarily voted in favour because they felt that the moral rights deserved and needed protection and met the Human Rights standard and those who felt the ongoing internationalization of copyright needed a boost and that this could be a tool in this respect.

P. Torremans, “Copyright as a Human Right” in *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy*, *supra* note 13 at 6.
16. See M. Green, “Drafting History of the Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights” (October 9, 2000), E/C.12/2000/15, online: <www.unhcr.ch/hts/doc.nsf/0/872a8777569823cc1256999005c3088/\$FILE/G00448399.pdf> (last visited: 13 August 2005).
17. The Anglophone phrases “the rights of authors” and “authors’ rights” are confusing similar to, but legally distinct from, the Francophone *droit d’auteur*. Broadly speaking, *droit d’auteur* refers to the legal rights granted to authors and creators in countries that follow the civil law tradition of protection for literary and artistic works. See A. Strowel, *Droit D’auteur et Copyright: Divergences et Convergences* (Paris: Librairie générale de droit et de jurisprudence, 1993) (comprehensively comparing *droit d’auteur* and copyright). By contrast, the references to “authors’ rights” and similar phrases in this chapter describe the legal entitlements for creators and inventors that are recognized in international human rights law. As explained in greater detail below, these legal protections are not coterminous with those of *droit d’auteur*.

But these texts also suggest many important differences between the two fields: differences in philosophy, differences in regulatory objectives, and differences in the subject matter and scope of legal protection for the products of human creativity.

In part, these differences are themselves textually engendered. The thrust of multilateral intellectual property treaties such as the Berne, Rome, and Paris Conventions and the TRIPs Agreement is to establish minimum standards of protection for authors, inventors, and other owners of intellectual property products.¹⁸ These treaties also recognize the public’s interest in the distribution of and access to those products. However, they do so principally in the form of carefully constrained exceptions and limitations to authors’ and inventors’ exclusive rights. Two provisions of the TRIPs Agreement, which set out the treaty’s “objectives” and “principles”, indicate that the protection and enforcement of intellectual property rights should contribute to the “mutual advantage” of “producers and users of technological knowledge”¹⁹ and should “promote the public interest in sectors of vital importance to [members’] socio-economic and technological development”.²⁰ But these provisions are, at least at present, under-enforced and have yet to affect the interpretation of TRIPs’ substantive intellectual property provisions by WTO dispute settlement panels.²¹

In contrast to this approach, a human rights framework for intellectual property puts the public’s interest front and center and on an equal footing with property rights in intangibles. Indeed, the very same ICESCR article that protects the rights of authors also requires states to protect “the right of everyone” to “enjoy the benefits of scientific progress and its applications”, and to take steps “necessary for the conservation, the development and the diffusion of science and culture”.²² The Committee will eventually elucidate these rights of the public when it issues general comments interpreting the relevant provisions of the Covenant. In the discussion that follows, however, the analysis focuses more heavily on the authors’ rights provisions of the ICESCR, inasmuch as only those provisions are the subject of the recently published General Comment.

18. Berne Convention for the Protection of Literary and Artistic Works [Berne Convention]; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations [Rome Convention]; Paris Convention for the Protection of Industrial Property [Paris Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPs Agreement].
19. TRIPs Agreement, Art. 7.
20. *Ibid.*, Art. 8.1.
21. See R. Howse, “The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times”, (2000) 3 *Journal of World Intellectual Property* 493 at 502; R. Okeedji, “Public Welfare and the Role of the WTO: Reconsidering the TRIPs Agreement”, (2003) 17 *Emory International Law Review* 819 at 914.
22. ICESCR, *supra* note 2, Arts 15(1)(b) & 15(2).

2.1. THE ICESCR COMMITTEE'S GENERAL COMMENT

The challenge now facing the ICESCR Committee is how to expand the distinctive textual outlines in Article 15(1)(c) of the Covenant into a coherent framework for analyzing intellectual property from a human rights perspective. The Committee's General Comment on authors' rights reveals the difficulties of this task. The draft is a lengthy, densely worded, and somewhat repetitive document of 57 paragraphs divided into six parts: (1) an introductory section that explains the basic premises of the Committee's analysis; (2) a close textual reading of Article 15(1)(c)'s "normative content"; (3) a section outlining states parties' legal obligations, including general, specific, core, and related obligations; (4) an analysis of actions or omissions that would violate the Article; (5) a section on how authors' rights are to be implemented at the national level; and (6) a short discussion of the obligations of non-state actors and intergovernmental organizations.

This organizational structure is likely to seem unfamiliar or even mystifying to intellectual property lawyers, in particular the distinction between "legal obligations" and "violations". But the methodology should be recognizable to foreign ministries, human rights scholars, and others familiar with social and economic rights, who have followed the Committee's efforts, in past general comments, to provide detailed and concrete interpretations of the ICESCR's many ambiguous clauses. The Committee has struggled to clarify the meaning of a treaty whose open-ended provisions are to be realized over time, taking into account the limited resources available to member states, particularly to developing countries.²³ To prevent these limiting principles from emptying the Covenant's economic, social and cultural rights of all meaning, the Committee has developed a "violations approach" that distinguishes "core obligations" – to which all states must give immediate effect – from other obligations that may be achieved progressively as additional resources become available.²⁴

These core commitments include obligations to respect, to protect, and to fulfill the rights of authors. As the Committee explains:

The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The

23. The ICESCR requires states parties to "take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means". ICESCR, *supra* note 2, Art. 2(1). These provisions establish programmatic and flexible commitments that are to be achieved over time. For a detailed analysis of Article 2(1), see D. Weisbrodt, J. Fitzpatrick and F. Newman, *International Human Rights: Law, Policy, and Process*, 3rd edn. (Cincinnati: Anderson Publishing, 2001), 1196 at 88–93.

24. General Comment No. 3, *supra* note 10 at para. 10. See also A. Chapman, "Conceptualizing the Right to Health: A Violations Approach" (1998), 65 *Tennessee Law Review* 389.

obligation to protect requires States to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of Article 15, paragraph 1(c).²⁵

These three core obligations, although framed in the distinctive language of human rights law, should, upon further reflection, seem reasonably familiar to intellectual property lawyers and scholars. Taken seriatim, they bar states from violating authors' material and moral interests themselves, most notably in the form of infringements by government agencies or officials;²⁶ they mandate "effective protection" of those interests by means of legislation recognizing authors' rights and specifying the modes for their protection, including protection of "works which are easily accessible or reproducible through modern communication and reproduction technologies";²⁷ and they require states to provide judicial and administrative remedies and other measures for authors to prevent unauthorized uses of their works (i.e. injunctions) and to recover compensation for such uses (i.e. damages), and, more broadly, to facilitate authors' participation in decisions that affect their moral and material interests.²⁸

These obligations also overlap with certain provisions in intellectual property treaties, most notably the Berne Convention's reproduction right, the "making available" right in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and the enforcement provisions in the TRIPS Agreement.²⁹ This commonality suggests that states can meet the requirements of Article 15(1)(c), at least in part, by ratifying international intellectual property agreements and by enacting national copyright and neighboring rights laws. The ICESCR's state reporting procedures strongly support this claim.³⁰ Since the early 1990s, states parties have regularly cited to such treaties and laws to demonstrate their compliance with the authors' rights provisions in the Covenant.³¹

25. General Comment, *supra* note 11 at para. 28; see also *ibid.* at paras 44–46 (discussing actions and omissions that violate these three obligations).

26. *Ibid.* at paras 30 and 44.

27. *Ibid.* at paras 31 and 45.

28. See *ibid.* at paras 34 and 46.

29. Berne Convention, Art. 9; WIPO Copyright Treaty, Art. 8; WIPO Performances and Phonograms Treaty, Art. 10; TRIPS Agreement, Arts 41–51 & 61.

30. ICESCR, *supra* note 2, Art. 16 (requiring states to submit periodic "reports on the measures they have adopted and the progress made in achieving the observance of the rights recognized" in the Covenant).

31. See, e.g., Committee on Economic, Social and Cultural Rights, "Implementation of the International Covenant on Economic, Social and Cultural Rights, Third periodic report: Cyprus" (6 June 1996), E/1994/104/Add.12 at para. 420, online: <www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.1994.104.Add.12.En?OpenDocument> (last visited: 15 August 2005), (citing ratification of Berne Convention and domestic copyright

Notwithstanding the commonalities between these two legal regimes, the Committee's core obligations approach to authors' rights leaves many issues unresolved. Most notably, it does not define the content of "moral and materials interests" which states are required to "respect, protect, and fulfill". Nor does it specify whether — and if so how — a human rights framework for authors' rights differs from the legal rules contained in intellectual property treaties and domestic legislation. The next section considers the Committee's treatment of these key definitional issues.

2.2. DEVELOPING A DISTINCTIVE HUMAN RIGHTS FRAMEWORK FOR AUTHORS' RIGHTS

The General Comment gives detailed attention to the differences between authors' moral and material interests and the provisions of intellectual property treaties and statutes. The Committee begins with the basic and uncontroversial assertion that the "scope of protection" of authors' rights in Article 15(1)(c) "does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements".³² But what, precisely, are these differences in scope?

The Committee first compares foundational principles. It notes that "human rights are fundamental as they are inherent in the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity for the benefit of society as a whole".³³ Since intellectual property rights are granted by the state, they may also be taken away by the state. They are temporary, not permanent; they may be "revoked, licensed or assigned";³⁴ and they may be "traded,

- legislation to demonstrate compliance with Article 15(1)(c)"; Committee on Economic, Social and Cultural Rights, "Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial report: Israel" (20 January 1998), E/1990/S/Add.39(3) at paras 782–788, online: <www.unhchr.ch/hbs/docs.nsf/(Symbol)/416674c42affb048025661700476885?OpenDocument> (last visited: 15 August 2005) (discussing evolution and expansion of copyright legislation and ratification of numerous international agreements to demonstrate compliance with Article 15(1)(c)); Committee on Economic, Social and Cultural Rights, "Implementation of the International Covenant on Economic, Social and Cultural Rights, Second periodic report: Jordan" (23 July 1998), E/1990/6/Add.17 at para. 151, online: <www.unhchr.ch/hbs/docs.nsf/(Symbol)/7eb0986e8af5f29c802567240056ca4c?OpenDocument> (last visited: 15 August 2005) (citing amendments to Copyright Protection Act that conform to international copyright treaties and government's intent to ratify such treaties to demonstrate compliance with Article 15(1)(c)).
32. General Comment, *supra* note 11 at para. 2; see also *ibid.* at para. 3 ("It is... important not to equate intellectual property rights with the human right recognized in Article 15, paragraph 1(c)").
33. *Ibid.* at para. 1.
34. *Ibid.* at para. 2.

amended and even forfeited",³⁵ commensurate with the regulation of a "social product [that] has a social function".³⁶ By contrast, human rights are enduring, "fundamental, inalienable and universal entitlements . . ." ³⁷ These statements reflect a vision of authors' rights that exist independently of the vagaries of state approval, recognition or regulation.

Turning from lofty principles to specifics, the Committee identifies several distinctive features of authors' rights in the Covenant. For example, Article 15(1)(c) applies only to "individuals, and under certain circumstances groups of individuals and communities".³⁸ Corporations and other legal entities are expressly excluded.³⁹ This represents a profound departure from Anglo-American copyright laws, which have long recognized that legal entities can enjoy the status of authors of intellectual property products, for example of works made for hire.⁴⁰

Moreover, the protections provided to natural persons have a distinctive human rights flavor. Consider the issue of equality. A cornerstone of intellectual property treaties is the "national treatment" of foreign authors.⁴¹ A human rights framework for authors' rights also encompasses the notion of equality between domestic and foreign owners of intellectual property products. But it goes much further, including many additional prohibited grounds of discrimination and mandating equal access to legal remedies for infringement, including access for "disadvantaged and marginalized groups".⁴² Equality also has process dimension, which requires states to provide authors with information "on the structure and functioning of . . . legal or policy regime[s]", and to

35. *Ibid.*
36. Statement on Human Rights and Intellectual Property, *supra* note 9 at para. 4.
37. *Ibid.* at para. 6.
38. General Comment, *supra* note 11 at para. 1.
39. See *ibid.* at para. 7 (stating that the drafters of ICESCR Article 15 "considered authors of scientific, literary or artistic productions to be natural persons"); Statement on Human Rights and Intellectual Property, *supra* note 9 at para. 6 (contrasting human rights approach authors' rights with that of intellectual property regimes which "are increasingly focused on protecting business and corporate interests and investments").
40. See 17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and . . . owns all of the rights comprised in the copyright").
41. See, e.g., S. Rickesson, *The Berne Convention for the Protection of Literary and Artistic Works, 1886–1986* (London: Centre for Commercial Law Studies, Queen Mary College, 1987), 981 at 17–38; D. Xaver, "The National Treatment Requirements of the Berne and Universal Copyright Conventions" (1986), 17 *International Review of Industrial Property and Copyright Law* 577.
42. General Comment, *supra* note 11 at para. 39; see also Statement on Human Rights and Intellectual Property, *supra* note 9 at para. 7 (stating that "human rights instruments place great emphasis on protection against discrimination", and that the rights guaranteed in the Covenant "must be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

facilitate their participation in “any significant decision-making processes with an impact on their rights and legitimate interests”.⁴³

These comparisons between human rights law and intellectual property law have some surprising consequences. If the moral and material interests of creators are fundamental, then the ability of governments to regulate them – either to protect other human rights or to achieve other social objectives – ought to be exceedingly narrow. Indeed, the Committee has developed a stringent test for assessing the legality of state limitations of social and economic rights,⁴⁴ a standard that it reaffirms in the General Comment on Article 15(1)(c).

According to this test, governmental restrictions on authors’ rights must be “[1] determined by law, [2] in a manner compatible with the nature of these rights, [3] must pursue a legitimate aim, and [4] and must be strictly necessary for the promotion of the general welfare in a democratic society”.⁴⁵ In addition, such limitations must “be [5] proportionate, meaning that [6] the least restrictive measures must be adopted when several types of limitations may be imposed”.⁴⁶ This restrictive, multipart standard is an intellectual property owner’s dream. And it is far more constraining than the now ubiquitous “three-step test” used to assess the treaty-compatibility of exceptions and limitations in national copyright laws.⁴⁷

Yet if restrictions on authors’ rights are to be so rigidly scrutinized (and, presumably, so rarely upheld), how, then, are governments to strike a balance between authors’ rights on the one hand and the public’s interest in access to knowledge on the other – a balance that the Committee views as a key feature of Article 15(1)(c) and that it emphasizes throughout the draft?⁴⁸ A close parsing of the text suggests a blueprint from which the Committee may ultimately construct a distinctive human rights framework for intellectual property.

The key to understanding this framework is to identify the purposes of recognizing authors’ moral and material interests as human rights. According to the Committee, such rights serve two essential functions. First, they “safeguard the personal link between authors and their creations and between people or

43. General Comment, *supra* note 11 at paras 18 and 34.

44. See Committee on Economic, Social and Cultural Rights, “General Comment No. 14 – The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)” (8 November 2000), E/C.12/2000/4 at para. 28, online: <www.unhcr.ch/hs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument> (last visited: 16 August 2005) (discussing government’s burden to demonstrate legality of limitations on the right to health).

45. General Comment, *supra* note 11 at para. 22 (bracketed numbers added).

46. *Ibid.* at para. 23 (bracketed numbers added).

47. See J. Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (2001), 187 *Revue Internationale du Droit d’Auteur* 3; M. Fissor, “How Much of What?: The ‘Three-Step Test’ and Its Application in Two Recent WTO Dispute Settlement Cases” (2002), 192 *Revue Internationale du Droit d’Auteur* 110.

48. See General Comment, *supra* note 11 at paras 22, 35 and 39.

other groups and their collective cultural heritage”.⁴⁹ And second, they protect “basic material interests which are necessary to enable authors to enjoy an adequate standard of living”.⁵⁰

These two statements, which recur throughout the document,⁵¹ suggest the existence of an irreducible core of rights – a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent intellectual lives that are essential requisites for any free society.⁵² Legal protections in excess of those needed to establish this core zone of autonomy may serve other salutary social purposes. But they are not required under Article 15 of the Covenant and, as a result, are not subject to the restrictive exceptions and limitations test quoted above. Stated differently, once a country guarantees authors and creators these two core rights – one moral, the other material – any additional intellectual property protections the country provides “must be balanced with the other rights recognized in the Covenant”, and must give “due consideration” to “the public interest in enjoying broad access to ‘authors’ productions”.⁵³ The ICESCR thus gives each state discretion to eschew these additional legal protections altogether or, alternatively, to shape them to take account of the particular economic, social, and cultural conditions within its borders.⁵⁴

Seen from this perspective, a human rights framework for authors’ rights is both more protective and less protective than the approach endorsed by copyright and neighboring rights regimes. It is more protective in that rights within the core zone of autonomy are subject to a far more stringent test for derogations than the one applicable to exceptions and limitations in copyright and neighboring rights treaties and national laws. It is less protective, however, in that a state need not recognize any additional authors’ rights lying outside of this zone or, if it does recognize such rights, must give appropriate

49. *Ibid.* at para. 2. This “personal link” is protected by legislation that enables authors “to claim authorship for their works and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their works, which would be prejudicial to their honour or reputation”. *Ibid.* at para. 41(b). The Committee’s language closely tracks the moral rights provisions in Article 6bis of the Berne Convention and in many national laws. *Ibid.* at para. 2.

50. The Committee repeats variants of the “personal link” language a total of six times, and it reiterates the “adequate standard of living” formulation no less than nine times – repetitions that suggest the importance of these concepts to its analysis.

51. Cf. Torremans, *supra* note 13 at 5 (drafters of UDHR believed that the best way to avoid recurrence of abuses of science, technology, and copyrighted propaganda that occurred during Second World War would be “to recognize that everyone had a share in the benefits and that . . . those who made valuable contributions were entitled to protection”).

52. General Comment, *supra* note 11 at paras 22 and 35. See also *ibid.* at para. 11 (stating that nothing in Article 15(1)(c) prevents states parties from “adopting higher protection standards” in intellectual property treaties or national laws, “provided that these standards do not disproportionately impede the enjoyment by others of their Covenant rights”).

53. See *ibid.* at para. 18 (stating that “the precise application” of authors’ and inventors’ moral and material interests “will depend on the economic, social and cultural conditions prevailing in a particular State party”).

weight to other human rights, to the public's interest, and to other policy objectives — calibrations that may permissibly vary from one state to another.

3. HUMAN RIGHTS AND THE COLLECTIVE ADMINISTRATION OF COPYRIGHT: A PRELIMINARY ASSESSMENT

Where does the collective administration of copyright and neighboring rights fit within this emerging legal paradigm? Although the General Comment references issues of collective administration only sparingly, the Committee's detailed analysis of Article 15(1)(c) suggests a number of ways in which CMOs can help to enhance a human rights framework for authors' rights. However, that analysis also reveals certain collective management practices that are in tension with the Covenant's intellectual property provisions. The discussion below provides an overview of these competing perspectives.

The only express mention of CMOs in the General Comment appears in the discussion of how to protect authors against infringement by third parties. This is hardly surprising, inasmuch as the obligation "to protect" is the legal "hook" that the ICESCR Committee has used to require governments to regulate the activities of non-state and private actors (in contrast to other Covenant provisions that impose obligations on state actors alone).⁵⁵ One method for states to provide such protection is "by establishing systems of collective administration of authors' rights."⁵⁶ Collective administration is particularly appropriate, in the Committee's view, where works are "easily accessible or reproducible through modern communication and reproduction technologies."⁵⁷ A second, more oblique reference to CMOs appears in the discussion of the obligation "to fulfill", which requires governments "to promote the realization" of Article 15(1)(c).⁵⁸ These conditions include funding and other affirmative measures to facilitate "the formation of professional and other associations", and "to ensure the active and informed participation" of authors in those associations to protect their moral and material interests.⁵⁹

3.1. CMO ACTIVITIES THAT ENHANCE THE HUMAN RIGHTS OF AUTHORS AND USERS

Although the references to collective administration in the General Comment are sparse, the document's overall analysis supports many of the activities that

55. *Ibid.* at para. 31; see also General Comment No. 14, *supra* note 44 at paras 33, 35 (discussing states' affirmative obligation "to protect" against infringements of the right to health by third parties).
56. *Ibid.* at para. 31.
57. *Ibid.*
58. *Ibid.* at para. 46.
59. *Ibid.* at paras 34 and 46.

CMOs perform. In fact, where prevailing modes of exploiting protected works make it difficult or impossible for authors to control their creations on an individualized basis, CMOs are likely to be essential features of human rights-compliant, 21st century copyright systems.

Distilled to their essence, CMOs enable authors to enforce their rights where the transaction costs of negotiating individual licenses and pursuing individual enforcement preclude mutually beneficial transactions with users.⁶⁰ In particular, CMOs perform two functions that the Committee identifies as necessary for the "effective protection" of authors' rights: (1) they prevent infringement by third parties, and (2) they collect and distribute compensation for authorized uses of protected works.⁶¹ CMOs also make it possible for authors to retain exclusive control over their creative output in situations in which user groups are likely to pressure legislators to convert such control into the lesser right to receive remuneration from compulsory licenses.⁶²

In addition to these core functions, CMOs also carry out a variety of ancillary activities that provide human rights benefits. These include representing the interests of creators before legislatures and administrative agencies, providing social services such as health benefits and pensions for authors, and promoting creativity through awards, prizes, and fellowships.⁶³ By engaging in these additional functions, CMOs not only assist states in complying with their obligations under Article 15(1)(c), but with other economic, social, and cultural rights in the Covenant as well. It is not surprising, therefore, that several states parties to the ICESCR have referred favorably to legislation establishing collective management systems in their reports to the Committee.⁶⁴

60. See L. Helfer, "World Music on a U.S. Stage: A Berne/Trips and Economic Analysis of the Fairness in Music Licensing Act" (2000), 80 *Boston University Law Review* 93 at 110 ("These [transaction] costs include identifying numerous potential licensees in disparate locations, negotiating with them over payment terms, monitoring compliance with each licensing agreement and taking legal action to prevent infringements.")
61. See General Comment, *supra* note 11 at paras 31 and 45. See also Helfer, *ibid.* at 110 (stating that CMOs "reduce transaction costs in several significant ways. They provide a clearing-house for users seeking licenses, they collect and distribute revenues to the songwriters, composers and publishers who are their members, they monitor the activities of licensees and they take enforcement action where necessary to vindicate their members' rights").
62. See Ficsor, *supra* note 12 at 17 (arguing against pressures to abolish exclusive rights and convert them to a "mere right to remuneration" and proposing collective management of rights as an alternative).
63. See, e.g., Ficsor, *supra* note 12 at 149–50; Sinacore-Guinn, *supra* note 1 at 211–12.
64. See, e.g., Committee on Economic, Social and Cultural Rights, "Initial report: Mauritius, Implementation of the International Covenant on Economic, Social and Cultural Rights" (14 October 1994), E/1990/5/Add.21 at para. 381, online: <www.unhchr.ch/bs/doc.nsf/(Symbol)/7d47498c72a3ab758025655a004c46c7?OpenDocument> (last visited: 20 August 2005) (referring to enactment of "legislation for the setting up of a Collective Copyright Administration Society"); Committee on Economic, Social and Cultural Rights, "Initial report: Switzerland, Implementation of the International Covenant on Economic, Social and Cultural Rights" (18 September 1996), E/1990/5/Add.33 at para. 806, online: <www.unhchr.ch/bs/doc.nsf/(Symbol)/ae56b4924cd5690880256691003a1ad4?OpenDocument> (last visited: 20 August 2005) (referring to "new patrimonial rights, whose exercise

Collective management of copyright also enhances the rights of user groups under Article 15 of the Covenant, although the benefits are more equivocal than those accruing to authors.⁶⁵ Blanket licenses, the mainstay of so many CMOs, authorize the unlimited use of all works within the organization's repertoire for a specific period of time. Such licenses avoid the time and expense of negotiating specific uses for specific works. For users who require immediate access to a broad array of creative content, blanket licenses also promote spontaneity in exploiting protected works.⁶⁶ For those with more particularized needs, however, the benefits of blanket licenses are less clear, since the "all or nothing" bargains they embody compel consumers to purchase more works at higher prices than they would otherwise be willing to pay.⁶⁷ Whether the aggregate benefits to users outweigh the costs depends in part on the extent to which governments regulate CMO licensing practices, a subject addressed in greater detail below.

- is subject to mandatory collective management, constitute a major source of additional income for the creators of cultural property"); Committee on Economic, Social and Cultural Rights, "Second periodic reports: Belgium, Implementation of the International Covenant on Economic, Social and Cultural Rights" (5 March 1998), E/1990/6/Add.18, online: <www.unhcr.ch/tbs/doc.nsf/09b1e65657fa69e08025678a00318b6b?OpenDocument> (last visited: 20 August 2005) (describing provisions of new copyright law that "provides for the formation of royalty management companies (or collective management)" which "makes it obligatory for these societies to intervene to ensure that certain types of remuneration are received"); Committee on Economic, Social and Cultural Rights, "Summary record of the 7th meeting: Poland" (13 April 1993), E/C.12/1992/SR.7 at para. 25, online: <www.unhcr.ch/tbs/doc.nsf/(Symbol)/e9860b68da4590c2802565802e8f59?OpenDocument> (last visited: 20 August 2005) ("As far as writers were concerned, a new bill on copyright envisaged the establishment of a body to protect writers' interests and provide collective management of their rights.");
65. See generally G. Davies, "The Public Interest in the Collective Administration of Rights" (March, 1989), *Copyright* 81 at 84-87.
66. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (1979), 441 U.S. 1 at 20 (United States Supreme Court), online: <caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=441&invol=1> (last visited: 20 August 2005) ("Most users want unplanned, rapid, and undifferentiated access to any and all of the repertoire of compositions, and the owners want a reliable method of collecting for the use of their copyrights."). This need for immediate access is one reason why blanket licenses are the norm for public performance rights for musical works. See Fiesor, *supra* note 12 at 37-48 and Sinacore-Gunn, *supra* note 1 at 747-68.
67. See A. Katz, "The Potential Demise of Another Natural Monopoly: New Technologies and the Future of Collective Administration of Copyrights" (May 2004), *U Toronto Law and Economics Research Paper No. 04-02*, online: <ssrn.com/abstract=547802> or <law.bepress.com/legl/wnewontent.cgi?article=1034&context=alea> (last visited: 20 August 2005); Stanley M. Besen, S. Kirkby and S. Salop, "An Economic Analysis of Copyright Collectives" (1992), 78 *Virginia Law Review* 383 at 393.

3.2. CMO ACTIVITIES THAT DETRACT FROM THE HUMAN RIGHTS OF AUTHORS AND USERS

Some form of collective management of authors' rights is essential to ensure compliance with Article 15(1)(c) where the transaction costs of individual licenses are high. Not all of the functions that CMOs perform are human rights enhancing, however. To the contrary, the monopoly position that CMOs enjoy – both in relation to users and, in some cases, in their dealings with the creators who are their members – generate incentives for the organizations to behave in ways that limit the human rights of both groups. These incentives highlight the need for governments to regulate (1) the licenses that CMOs offer to users, (2) the relationships between CMOs and their members, and (3) the relationships among the members themselves.⁶⁸

As to the first issue, governments in nearly all countries in which CMOs operate exercise some form of regulatory control over licensing practices to prevent abuse of their dominant positions. The source, extent and enforcement of these regulations vary widely, however. In some countries, copyright laws limit CMO activities. In others, administrative agencies, tribunals, or other specialized regulatory bodies monitor CMO activities and adjudicate complaints by licensees. And in still other nations, users seek relief from the courts by filing competition or antitrust claims against CMOs, leading to judicial monitoring of licensing practices in the form of detailed consent decrees.⁶⁹

How do human rights principles inform government regulation of CMO abuses? As explained above, a human rights framework for intellectual property requires a balance between the rights of authors and the rights of the public. In striking this balance, "the private interests of authors and inventors should not be unduly advantaged and the public interest in enjoying broad access to new knowledge should be given due consideration."⁷⁰ Regulation of licensing practices is one way to avoid such undue advantage. According to the ICESCR Committee, states must prevent private parties from imposing "unreasonably high" license fees or royalties that interfere with other rights in the Covenant, including the right to education and to culture.⁷¹

The consequences of this statement for government regulation of CMOs are somewhat uncertain, however. The Committee provides no guidance for

68. Cf. Sinacore-Gunn, *supra* note 1 at 237 ("The disadvantages of private [CMOs] fall into two general categories: problems in relationship to the organization's activities on the creator's behalf and problems related to the relationship between the organization and the creator."); See Fiesor, *supra* note 12 at 142-44; Helfer, *supra* note 60 at 110-11 & n. 64; see also S. Helm, "Intellectual Property in Transition Economies: Assessing the Latvian Experience" (2003), 14 *Fordham Intellectual Property Media & Entertainment Law Journal* 119 at 200-01 (discussing supervisory functions performed by Ministry of Culture in relation to Latvian copyright collectives).
69. General Comment, *supra* note 11 at para. 35; see also Statement on Human Rights and Intellectual Property, *supra* note 9 at para. 17 (similar quotation).
70. General Comment, *supra* note 11 at para. 35.
71. General Comment, *supra* note 11 at para. 35.

determining when royalties are unreasonably high. And the examples that it identifies as potentially problematic – high fees for access to essential medicines, plant seeds, schoolbooks, and other learning materials⁷² – do not include the works of entertainment or popular culture that are often subject to collective management. Nevertheless, the Committee's reference to the price that users pay to access copyrighted works as part of the overall balance of authors' rights, suggests that states must provide some form of meaningful regulation of CMO licensing practices to comply with their obligations under the Covenant.

The second and third areas of human rights scrutiny concern the relationship between CMOs and their members, and among their members *inter se*. Two provisions of the General Comment are relevant to these issues: the restriction of authors' rights to natural persons, and the more capacious equality norms that the ICESCR endorses.

The exclusion of corporations and other business entities from the rights protected in Article 15(1)(c) suggests that states parties must give special solicitude to individual creators who are compelled, either by law or as a practical matter, to enforce their rights through collective management systems. This is particularly true for CMOs organized in a form other than an authors' association, in which creators may exercise somewhat greater control.⁷³ Government supervision to ensure equal treatment for individual creators encompasses a broad range of issues, including the terms of CMO membership, transfers of rights from individuals to the collective, the distribution of royalties among authors, and participation by authors in CMO decisions that affect their interests.⁷⁴

Corporate and equality issues also arise in another area of CMO governance – the relationship between individual creators and business owners who belong to the same collective management organization. Several scholars have noted the growing conflicts between these two classes of rights holders from the agglomeration of intellectual property-related businesses and the concomitant expansion of corporate influence over CMO decision making.⁷⁵ Although principles of "equity" and "solidarity" among rightsholders are enshrined in many CMO charters, the recent erosion of these principles highlights the

72. *Ibid*.

73. See Sinacore-Guinn, *supra* note 1 at 235–36 (discussing distinction between "membership organizations" and "corporate nonmembership organizations").

74. See Ficcor, *supra* note 12 at 21, 132 and 143. Where a CMO is a public entity – as is often true in developing countries – the government is required to address these issues as part of its obligation "to respect" the rights of creators. See General Comment, *supra* note 11 at paras 30 and 44.

75. See R. Wallis, C. Baden-Fuller, M. Kretschmer and G. Klimis, "Contested Collective Administration of Intellectual Property Rights in Music: The Challenge to the Principles of Reciprocity and Solidarity" (1999), 14 *European Journal of Communication* 5 at 6–8 (analyzing the consequences of increasing concentration of ownership and integration in the music industry); G. Jokhadze, "The Big Ones of the Music Industry: Copyright and Human Rights Aspects of the Music Business" in I. Ziemele, ed., *Expanding The Horizons of Human Rights Law* (Boston: Martinus Nijhoff Publishers, 2005), 290 at 237–38 (same).

potential of the Covenant's broader nondiscrimination rules to bolster equality for individual authors in their relations with corporate rights owners.⁷⁶

4. TWO HUMAN RIGHTS CONCERNS OF COLLECTIVE ADMINISTRATION: MANDATORY MEMBERSHIP AND PROMOTING NATIONAL CULTURE

The preceding section provided a thumbnail sketch of a human rights framework for the collective administration of copyright and neighboring rights, emphasizing both the benefits and the detriments of CMOs for achieving the balanced protection of authors' rights required by the ICESCR Committee. This section contains a more detailed analysis of two legal and policy questions with important human rights implications: (1) whether participation in collective management organizations should be voluntary or mandatory, and (2) whether such organizations should promote national culture in addition to the licensing, enforcement, and royalty distribution activities that comprise the core of their work.

4.1. SHOULD MEMBERSHIP IN CMOs BE MANDATORY OR VOLUNTARY?

The question of whether creators should be required to join collective management organizations has long vexed intellectual property commentators. On the one hand, mandatory membership – and the exclusion of other modes of exploitation it implies – helps to achieve the economic efficiencies and practical benefits that justify collective administration in the first instance, such as issuing blanket licenses and reducing the costs of negotiations, enforcement actions, and royalty distributions. But mandatory participation in a CMO also raises serious concerns for creators. In its most extreme incarnation, compulsory membership precludes creators from issuing individual licenses for their own works, compels participation in an organization whose policies they may disfavor (and which they may be legally or practically precluded from modifying), and requires affiliation with other creators with whom they may not wish to associate.⁷⁷

76. See Wallis *et al.*, *supra* note 75 at 14–15, 19 and 22–23.

77. For a discussion of these competing viewpoints, see Sinacore-Guinn, *supra* note 1 at 289–303. For an analysis of when compulsory membership is compatible with international copyright and neighboring rights agreements, see M. Ficcor, "Collective Management: Voluntary? Extended? Obligated? International Norms and the Acquis Communautaire" (2003), Eleventh Annual Conference on International Intellectual Property Law and Policy, Fordham University School of Law, New York City, April 24–25, 2003, online: <www.simmellaw.com/PDF_Publications/SW_Fordham_2003_Paper_MF_041103.pdf> (last visited: 21 August 2005).

For many years, these competing positions were issues of mostly theoretical interest.⁷⁸ As a practical matter, certain modes of exploiting protected works required collective action, and creators had little choice but to license these works collectively rather than individually. It thus made little difference whether a state formally mandated CMO membership by statute or whether its decision to confer monopoly status on a particular CMO effectively compelled creators to join the organization.⁷⁹ Recently, however, three legal and technological developments have drawn fresh attention to mandatory participation and increased the issue's salience from a human rights perspective.

First, the widespread ratification of the TRIPs Agreement, the Berne Convention, and so-called "TRIPs plus" treaties over the last decade has led a growing number of developing states to enact or revise copyright and neighboring rights legislation. Although these laws provide *de jure* protection for authors, they do not automatically (or necessarily) enhance national culture and creativity. Indeed, many developing countries have only limited experience in encouraging creativity within their borders and in promoting the licensing of protected works by user groups. As one commentator has explained:

[T]he national cultural industries in these developing nations are frequently underdeveloped and the national repertoire underutilized. . . . From the government's perspective, and that of many creators as well, [initiatives to promote creativity] will be weakened to the extent that a significant number of national creators fail to participate in this collective effort. Furthermore, in many such countries, the number of creators involved is relatively small and so lacking in income that there is little potential for the native industry to develop without a coordinated comprehensive (and often subsidized) governmental effort.⁸⁰

Mandating membership in CMOs is an appropriate response to these economic and social conditions. It centralizes public and private efforts to promote local culture and creativity in a single entity, enhancing their effectiveness. Such an approach is also consistent with a recognition of the special needs of developing countries that the Committee emphasizes in the General

78. Sinacore-Guina, *supra* note 1 at 289 (stating that the issue of "voluntary versus nonvoluntary collective affiliation" is "rarely addressed directly in the legal literature or by governmental authorities").

79. World Intellectual Property Organization, "Collective Administration of Copyright and Neighboring Rights" (1989), *Copyright* 309 at 342 (WIPO, *Collective Administration*).

80. Sinacore-Guina, *supra* note 1 at 291. See also E. Nwauwue, "Intellectual Property Rights, Copyright and Development Policy in a Developing Country: Options For Sub-Saharan African Countries" (2003), Copyright Workshop, Zimbabwe International Book Fair, 30 July 2003, at 10, online: <www.kopinor.org/content/download/1777/13422/file/zbpf.pdf> (last visited: 21 August 2005) ("Apart from South Africa where the collecting societies began operations in the sixties, most of the other [Sub-Saharan African] collecting societies are of a recent origin.").

Comment.⁸¹ Admittedly, the freedom of choice and associational rights of individual creators may be constrained somewhat by a compulsory membership rule.⁸² Under the conditions described above, however, in which collective management not only generates royalties but also helps to build the requisites of a national copyright culture, restrictions on the rights of individual authors can be justified even under the stringent standard that the ICESCR Committee endorses.⁸³ As the economic and cultural situation in developing countries improves, of course, such restrictions will become increasingly difficult for governments to justify.

Online licensing of copyrighted works is a second development that affects the choice of a CMO's membership rules. Digital media and Internet technologies create new opportunities for exploiting protected works, opportunities that collective rights management can greatly facilitate. But the ease of digital communications, the pervasive labeling of works with rights management information, and the security provided by technological protection measures also enable creators to negotiate with users directly and to license their works themselves.⁸⁴

The practical feasibility of issuing individual licenses substantially raises the stakes associated with selecting a CMO's membership rules. Many, perhaps most, creators will continue to manage their works collectively. For these individuals, it may seem of little consequence whether membership is mandatory or permissive. In fact, the collective enterprise as a whole may suffer if rights owners are not required to participate.⁸⁵ This is particularly true if global media companies that control large portfolios of protected works withdraw them from the system.⁸⁶ It is also a risk if popular creators or performing artists opt out of the collective to demand higher royalties than a CMO could negotiate on

81. See General Comment, *supra* note 11 at para. 40.

82. The Covenant protects these associational rights expressly. See ICESCR, *supra* note 2, Art. 8(1)(a) (recognizing the right "of everyone to form trade unions and join the trade union of his choice. . . . for the promotion and protection of his economic and social interests").

83. See General Comment, *supra* note 11 at paras 22-23; see also *supra*, Part I.B.

84. See C. Graber, C. Govoni, M. Girsberger, and M. Nenova, eds., *Digital Rights Management: The End of Collecting Societies?* (Berne: Staempfli Publishers Ltd., 2005), 251; Fricor, *supra* note 12 at 96-106; D. Gervais, "Collective Management of Copyright and Neighboring Rights in Canada: An International Perspective" (2002) 1 *Canadian Journal of Law and Technology* 21, online: <cjlt.dal.ca/vol1_no2/pdftarticles/gervais.pdf> (last visited: 21 August 2005).

85. A. Dietz, "Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe" (2002), 49 *Journal of the Copyright Society of the U.S.A.* 897 at 911 (noting arguments that "an unduly rapid transition from collective management to individual management of rights [in digital networks] could disturb the established, socially balanced system of distribution").

86. Wallis, *supra* note 75 at 21-22 (discussing the "threat to the stability of collecting societies" from the withdrawal of multinationals' repertoires from collective administration).

their behalf as part of a blanket license.⁸⁷ In either case, it is smaller and less well known individual creators who may suffer.⁸⁸

Whether and to what extent these dark predictions in fact come to pass affects whether state regulation of CMO membership rules is consistent with the Covenant. If a mass exodus of corporate rights owners or popular creators from the collective results denies other authors the opportunity "to enjoy an adequate standard of living"⁸⁹ from their creative endeavors,⁹⁰ then a human rights framework for authors' rights may require governments to compel exclusive participation in such organizations and to refocus state regulations on providing members with the means to hold CMOs accountable and to participate in CMO decisions that affect their interests.⁹⁰

On the other hand, individual and collective licensing may coexist harmoniously in certain media. If so, then a human rights framework weighs strongly in favor of giving creators the freedom to decide which option to pursue, including the decision to license their works both individually and as part of the collective. A human rights framework may also support allowing creators to exit from an existing CMO to form a new organization.⁹¹ The case for establishing rival or competing collection societies is far less compelling, however, since a multiplicity of licensing organizations reduces the benefits that collectivization engenders and creates additional burdens for user groups. A third trend that may alter the calculus of whether CMO memberships should be mandatory or voluntary concerns the rise of Creative Commons and similar organizations that promote open content licensing of copyrighted works.⁹² Open content licenses authorize third parties to exercise some or all of a creator's exclusive rights without remuneration for such uses. In doing so, they facilitate sharing of ideas, information, and protected content between authors

87. See Fisor, *supra* note 12 at 97-98 (noting this possibility but arguing that it is counterproductive for individual creators and for the collective as a whole).

88. As one group of commentators recently stated:

The threats [from recent challenges to CMOs] are greatest to those who earn modest royalties, especially from companies not linked with [major multinational conglomerates]. These artists... will find themselves squeezed twice. First, the collective agencies may ignore them, as their needs are costly to service. Second, the companies which represent them will have to be more aggressive if they are to survive.

Walls, *supra* note 75 at 25.

89. General Comment, *supra* note 11 at para. 2.

90. *Ibid.* at paras 18 and 34.

91. Cf. Gervais, *supra* note 84 at 26 ("In the same way that rightsholders should be free to decide whether they want to be part of a collective scheme (except perhaps where individual management is impossible), they should be free to create new Collective Management Organizations").

92. See, e.g., "Creative Commons", online: <creativecommons.org/> (last visited: 21 August 2005); "A Guide to Open Content Licenses", online: <pzwart.wdka.hro.nl/ndf/research/llhang/open_content_guide/> (last visited: 21 August 2005); "Open Content", online: <opencontent.org/> (last visited: 21 August 2005); "Open Music", online: <openmusic.llnuxtag.org/modules/freecontent/content/openmusic/> (last visited: 21 August 2005).

and users, and directly promote "the public interest in enjoying broad access to new knowledge"⁹³ — two goals endorsed by Article 15 of the Covenant and by the ICESCR Committee.⁹³ Some advocates of open content licensing also make the more controversial assertion, that a limited relinquishing of exclusive rights promote creativity more effectively than existing proprietary models.⁹⁴

Whatever the merits of this claim, there can be little doubt that open content licenses challenge the economic interests of CMOs.⁹⁵ They thus create potential conflicts between CMOs and their members that raise human rights concerns. One recent proposal would resolve these conflicts by allowing creators to assign all of their works to CMOs on a nonexclusive basis, thereby preserving the right to distribute those same works through open content licenses.⁹⁶ This approach accords with the diversity of arrangements (many of them nonexclusive) by which creators currently transfer their rights to CMOs.⁹⁷ But it elides the difficulties that widespread open content licensing would create for copyright and neighboring rights collectives which produce human rights benefits for both authors and users.⁹⁸

More nuanced solutions are needed to balance the competing interests at stake. These could include requiring creators to transfer exclusive rights to the collective for an initial term of years or authorizing transfers on a work-by-work basis, thereby preserving some works for open content licensing. A more comprehensive solution might involve adapting the extended collective licensing system used in Scandinavian countries. Under this system, "as soon as a substantial number of rightsholders of a certain category agree to participate in a collective scheme, the scheme is automatically extended not only to other national rightsholders in works of the same category, but to all foreign ones as well".⁹⁹ Creators are not required to participate, however, and they may opt

93. ICESCR, *supra* note 2, Art. 15(2) (requiring states parties to take steps "necessary for the conservation, the development and the diffusion of science and culture"); General Comment, *supra* note 11 at para. 35 (asserting that states parties must give "due consideration" to "the public interest in enjoying broad access" to productions of authors).

94. See, e.g., *A Guide to Open Content Licenses*, *supra* note 92 (discussing models of collaborative production that are alternatives to copyright).

95. See Gervais, *supra* note 84 at 28 & fn. 77 (reproducing statement by a Canadian collecting society urging authors to "be prudent in granting free permissions", since the frequent grant of such permissions could be interpreted "as a lack of support for the collective licensing system", and urging authors to forward all requests for free licenses to the CMO for processing).

96. See [A2k] Comments: Article 8.1, online: <lists.essential.org/pipermail/a2k/2005-May/000360.html> (last visited: 21 August 2005) (proposing for inclusion in new "Access to Knowledge Treaty" a provision to "ensure that copyright holders that are members of collecting societies are entitled to make available individual works outside of the framework of collecting societies").

97. See Gervais, *supra* note 84 at 27-32.

98. See *supra* Part 3.1.

99. Gervais, *supra* note 84 at 29.

out of the collective system or veto the use of their works.¹⁰⁰ Such an approach places the burden on creators to exclude their works from the collective.

4.2. SHOULD CMOs PROMOTE NATIONAL CULTURE?

In addition to collecting and distributing royalties on behalf of their members and enforcing their rights against licensees and infringers, many CMOs engage in a broad range of social, educational, and cultural activities. In the cultural field, these activities seek to “promot[e] the creation of new works and the use of all national works” through grants to creators; competitions, awards and scholarships; workshops and educational programs; and promoting works by local artists, creators, and performers.¹⁰¹ In some countries, these cultural activities are mandated by statute; in others they are permitted but not required by law; and in still others, cultural promotions are wholly private ventures.¹⁰²

Commentators continue to debate the legality and wisdom of entrusting CMOs with the promotion of culture. Those who favor such an entrustment argue that cultural activities provide at least an indirect benefit to CMO members by encouraging public respect for creators and their works. Cultural promotions also provide additional incentives for creativity (especially by new or impecunious authors) and highlight classes of works that would otherwise go unnoticed or underappreciated by consumers.¹⁰³

Opponents counter that authorizing CMOs to perform promotional activities conflicts with creators’ exclusive rights and risks diminishing the public legitimacy of CMOs. As to the first issue, opponents claim that authors give only nominal consent for expenditures on cultural activities by joining an organization that already engages in such practices. As to the second issue, the monopoly licensing powers that CMOs possess already generate suspicion of collective entities in the eyes of user groups. “In the face of such suspicion, it is appropriate that the collective only undertake to do that which is absolutely essential to its primary mission: the administration of creative rights.”¹⁰⁴

To balance these competing perspectives, the amount deducted for cultural activities has remained generally ten per cent or less of royalties collected.¹⁰⁵ Within the last decade, however, some CMOs have urged their fellow organizations to reduce or even eliminate the deduction for cultural activities, both to maximize the distribution of royalties and to ensure that foreign authors do not subsidize the promotion of culture in other countries.¹⁰⁶ This trend has

100. Sinacore-Guinn, *supra* note 1 at 405 and 407.

101. *Ibid.* at 479 and 484–85.

102. See Dietz, *supra* note 85 at 912–13.

103. See *ibid.* at 913; Sinacore-Guinn, *supra* note 1 at 484–93.

104. Sinacore-Guinn, *supra* note 1 at 499.

105. WIPO, *Collective Administration*, *supra* note 79 at 348.

106. See Competition Commission of the United Kingdom, “Performing rights: A report on the supply in the UK of the services of administering performing rights and

been most pronounced among CMOs operating in common law countries; it has made less headway in European collection societies.¹⁰⁷

The cultural activities that CMOs perform – and the debates over their propriety – have never been assessed in human rights terms. Commentators employing a traditional intellectual property perspective make a strong case that the promotion of culture by CMOs can weaken authors’ exclusive rights. But a human rights framework for intellectual property proceeds from a very different premise. So long as collective management organizations perform their core functions and provide sufficient remuneration for authors “to secure . . . an adequate standard of living” from their creative endeavors, then the state – by assisting CMOs to perform these functions – has complied with Article 15(1)(c)’s mandate to protect authors’ “basic material interests.”¹⁰⁸

Having satisfied this obligation, however, any additional royalties that the organizations collect need not be distributed to their members. Such royalties fall outside the zone of author autonomy mandated by Article 15(1)(c) and within the scope of a state’s discretion to weigh creators’ private interests in receiving additional remuneration against other cultural goals that benefit the public at large.¹⁰⁹ It is a proper exercise of this discretion for states parties to delegate to CMOs a broad array of functions “necessary for the conservation, the development and the diffusion of science and culture.”¹¹⁰ Such functions undoubtedly include the promotional activities that CMOs already perform. And there is no reason – from a human rights perspective, at least – why funding for such activities should be limited to ten per cent of royalties collected.¹¹¹

Of course, nothing in the ICESCR requires states parties to appoint CMOs as their agents to conserve, develop, and diffuse national culture. Many other options are available, including the creation of educational, not-for-profit, or other specialized entities dedicated to studying, preserving, and disseminating cultural products.¹¹² These activities may be undertaken by government agencies directly or by private actors operating with state support.

Alternatives that decouple the promotion of culture from CMOs’ core functions have the advantage of respecting the wishes of creators who object to cultural subsidies but who are required, either by law or as a practical matter,

film synchronisation rights” (1 February 1996) at 141, online: <www.competition-commission.org.uk/rep_pub/reports/1996/fulltext/378c9.pdf> (last visited: 21 August 2005). The full version of the report can be viewed online: <www.competition-commission.org.uk/rep_pub/reports/1996/378performing.htm#full> (last visited: 21 August 2005).

107. *Ibid.*

108. General Comment, *supra* note 11 at para. 2.

109. See *supra* Part 2.2.

110. ICESCR, *supra* note 2, Art. 15(2).

111. The more complex legal issues raised by funding cultural activities with the royalties collective on behalf of foreign creators are discussed in greater detail below.

112. See Sinacore-Guinn, *supra* note 1 at 505–07 (discussing alternative methods for promoting culture by entities other than CMOs).

to participate in the collective administration of their works.¹¹³ However, such alternatives require governments to fund the promotion of culture from public revenues that are already overburdened. Officials may therefore be tempted to place the financial burden of promoting culture on CMOs rather than diminish the "available resources" for more pressing government programs, including those implementing other social and economic rights protected by the Covenant.¹¹⁴

One final area of CMO cultural activities requires separate analysis: the promotion of national culture in developing countries with funds acquired from the licensing of works of foreign creators. Commentators have long noted the tension between cultural promotion activities by CMOs and the national treatment rules of intellectual property treaties. Because foreign rightsholders do not benefit from most cultural programs undertaken in other nations, the argument goes, they do not receive same treatment that domestic rights owners enjoy.¹¹⁵ Consequently, "deductions for cultural activities" are only allowed if "... foreigners, directly or indirectly (through their representatives) approve them."¹¹⁶

This issue continues to be debated in intellectual property circles. According to one influential report by the World Intellectual Property Organization (WIPO), the Berne and Rome Conventions categorically preclude member states from imposing cultural deductions on foreign authors in their national laws, at least with respect to exclusive rights protected by those treaties.¹¹⁷ But a more recent WIPO study, written by a leading scholar of collective management of copyright and neighboring rights, suggests a way to resolve the national treatment issue voluntarily in the case of developing countries. According to the study, the "foreign partner organizations [of developing country CMOs] may find it appropriate to allow an even higher level of cultural and social deductions [than ten per cent] in order to assist those organizations to establish an appropriate management system and copyright infrastructure and to encourage creativity."¹¹⁸

113. See *supra* Part 4.1.

114. ICESCR, *supra* note 2, Art. 2(1) (requiring states parties to "take steps... to the maximum of [their] available resources" to fully realize the rights in the Covenant). See also S. Chavula, "Cultural, Social and Economic Aspects of Authors' Rights: Legal and Practical Challenges in a Developing Country", Kopinor 25th Anniversary International Symposium, Oslo, Norway, 20 May 2005 at 5, online: <www.kopinor.org/content/download/2156/15475/file/legal%20and%20practical%20challenges-kopinor.pdf> (last visited: 21 August 2005) (stating that "[c]ulture is generally... given very low priority in the national budget [of Malawi] as compared to health, agriculture and education").

115. Shacore-Gunn *supra* note 1 at 491 and 502; WIPO, *Collective Administration, supra* note 79, at 348.

116. WIPO, *Collective Administration, supra* note 79 at 348.

117. *Ibid.* (unequivocally responding in the negative to the question whether "any discrimination by collective administration organizations or by legislation regulating their activities [is] permissible to the detriment of rights owners who are... foreigners").

118. Fisor, *supra* note 12 at 151.

A human rights framework for intellectual property favors this special solicitude for developing states and eschews an expansive interpretation of national treatment for foreign authors. "International assistance" from rich to poor nations is an important dimension of rights protection in the ICESCR.¹¹⁹ More importantly, the Covenant provides special rules for developing countries, which "with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."¹²⁰

At first glance, this text appears to conflict with the national treatment rule to the extent that it authorizes developing countries to enact legislation that mandates or permits public or private CMOs to discriminate against foreign authors and rightsholders.¹²¹ The Committee's interpretation of this provision, however, suggests that the authors' rights provisions of the Covenant apply both to foreigners and to a State's own nationals.¹²² This interpretation also raises – but does not resolve – the more difficult question of how to resolve conflicts between a state's obligations under a human rights treaty and the commitments the state has undertaken by ratifying intellectual property conventions.¹²³

5. CONCLUSION: THE PRACTICAL CONSEQUENCES OF A HUMAN RIGHTS FRAMEWORK FOR COLLECTIVE MANAGEMENT OF COPYRIGHT

This chapter has explored how a human rights framework for intellectual property – as outlined by the ICESCR Committee in the General Comment on Article 15(1)(c) and in the Statement on Human Rights and Intellectual Property – intersects with the collective administration of copyright and

119. ICESCR, *supra* note 2, Art. 2(1).

120. *Ibid.*, Art. 2(3).

121. Of course, no treaty prevents foreign CMOs and their members from entering into agreements with CMOs in developing countries to authorize the withholding of foreign works royalties for cultural purposes in those countries. See Fisor, *supra* note 12 at 151. The plausibility of such voluntary contributions seems questionable, however. If, as noted above, rights holders are pressuring CMOs to reduce or eliminate domestic cultural promotions, it seems unlikely that they will support cultural deductions that provide benefits only in other countries.

122. General Comment, *supra* note 11 at para. 19 n. 15.

123. Perhaps surprisingly to intellectual property lawyers, the Committee has suggested that these conflicts should be resolved in favor of compliance with human rights treaty obligations. See Statement on Human Rights and Intellectual Property, *supra* note 9 at para. 12 (emphasizing that "any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the State party"). For an overview of the murky and unresolved rules for reconciling treaty conflicts, see L. Helfer, "Constitutional Analogies in the International Legal System" (2003), 37 *Loyola of Los Angeles Law Review* 193 at 216–219.

neighboring rights. In concluding this preliminary analysis of these issues, it is worth considering two broader questions: first, what are the practical consequences of a human rights framework for intellectual property for the regulation of CMOs; and second, does that framework improve upon the existing legal and policy landscape?

In answering the first question, it bears reemphasizing that the Committee's analysis of the interface between human rights and intellectual property is still in its infancy. In particular, the Committee has yet to begin work on general comments interpreting the remaining subsections of Article 15 which protect the rights of the public. Until the Committee completes its intended analysis of all four interrelated clauses of Article 15, a human rights framework for intellectual property will remain a work in progress, subject to revision and, possibly, contestation by states parties.

Recall too that the Committee's general comments are only nonbinding, albeit highly persuasive, interpretations of the ICESCR. Given this soft law status, it remains open to governments to challenge the Committee's legal analysis. States have opposed past general comments issued by other UN human rights treaty bodies.¹²⁴ And such opposition may again be a plausible option for some industrialized countries if the Committee ultimately interprets Article 15 to give primacy to the Covenant's economic and social rights over the obligations of intellectual property treaties – a result foreshadowed by its preliminary review of the human rights-intellectual property interface.¹²⁵

Assuming, however, that most states parties endorse or at least acquiesce in the Committee's analysis, the general comments on Article 15 can serve more useful and less contentious functions. They can assist governments in reporting to the Committee on the steps they have taken, and the difficulties they have encountered, in implementing the treaty domestically.¹²⁶ The general comments can also act as a catalyst for generating information about state practice concerning the human rights dimensions of intellectual property, including the regulation of CMOs.¹²⁷ From this fund of knowledge and experience, the Committee can then provide more detailed guidance to governments on

124. A decade ago, the United States objected to a general comment issued by the UN Human Rights Committee, the treaty body that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR). See General Comments – Government Responses, *Observations on General Comment No. 24 (52), on Issues Relating to Reservations or Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, United States of America*, CCPR A/50/40/Vol.1, Annex VI (1995) (contesting the authority of the UN Human Rights Committee to issue binding interpretations of the ICCPR), online: <www.bayefsky.com/general/a_50_40_vol_1_1995.php> (last visited: 21 August 2005).

125. See Statement on Human Rights and Intellectual Property, *supra* note 9 at para. 12.

126. ICESCR, *supra* note 2, Arts 16–17 (setting forth reporting obligations of states parties to the ICESCR).

127. Given the many complex and contested issues that Article 15 encompasses, however, the Committee will need to make a particular effort to discuss collective societies in its dialogues with government representatives during the state reporting process.

how to balance the competing human rights concerns raised by the collective administration of copyright, including the issues discussed in this chapter.

The answer to the second question posed above – whether a human rights framework for intellectual property improves upon the existing legal and policy landscape – depends in part on whether affected parties believe that the current system is in need of reform. In the past, user groups have been the most frequent and vociferous critics of collective management of copyright.¹²⁸ But recent developments, such as the online distribution of protected works and the growing number of works controlled by corporate rights owners,¹²⁹ are increasing conflicts among actors who create and exploit intellectual property products – including tensions between individual authors and corporate rights owners and between CMOs and their members.¹³⁰ In this climate, a consensus may eventually develop on the need for change. If so, a human rights framework for intellectual property offers a possible focal point around which all parties can structure a revised regulatory regime.

It is uncertain, however, whether all of the relevant actors will in fact endorse the approach to CMO regulation that is implied by the Committee's analysis. For one thing, not all countries are bound by the ICESCR. This includes, most significantly, the United States, which has signed the Covenant but shows no intention of ratifying it.¹³¹ The fact that the Committee has not – or at least not yet – provided a fully developed vision of how to regulate the collective administration of copyright consistently with human rights treaty rules is one potential impediment to improving upon the existing system. But it is more disturbing still if all relevant parties are not governed by the same set of legal norms. This increases the risk of destabilizing the two international regimes, an outcome manifested by a growing number of treaty conflicts, the application of different rules to different nation states, and an increasingly uncertain regulatory climate for private actors whose conduct transcends national borders.

Although the dangers of fragmentation and incoherence are real, they are not insuperable. The intellectual property provisions in the Covenant and the Universal Declaration have remained hidden in the shadows for far too long. And the Committee has only just begun the slow and difficult process of giving a more precise meaning to these provisions. To convince observers of the value of adopting a human rights framework for intellectual property, including collective management, the Committee must lead with the persuasive force of its reasoning. Only by demonstrating the values of this approach can the Committee hope to alter the behavior of governments and, through them, private parties, and thereby affect the lives of the individuals and groups whose rights it is charged with protecting.

128. See Helfer, *supra* note 60 at 113–19; Sinacore-Guinn, *supra* note 1 at 238–39.

129. See Graber, *supra* note 84; Jokhadze, *supra* note 75; Wallis, *supra* note 75.

130. See *supra* Part 3.2.

131. See Weissbrodt, *supra* note 23 at 122 and 134–143.

Chapter IV Collective Management in the European Union

Dr. Lucie Guibault and Stef van Gompel***

1. INTRODUCTION

With the rapid growth of the Internet and mobile telephones, the market for legitimate music delivery services has literally exploded in recent years. Since online music services are accessible across the European Union (EU), the need for multi-territorial licensing that spans throughout the European territory is more acute than ever. In order to avoid liability for copyright infringement, online content providers must currently obtain a licence from each and every relevant collective management society in each territory of the EU in which the work is accessible. Rights clearance for the exploitation of non-domestic repertoire now occurs via a network of reciprocity representation arrangements between collective management societies. The multi-territorial licensing of online music is but one illustration of the difficulties caused by the lack of a coherent system of cross-border licensing of copyright protected works in Europe.¹ For this reason alone, the role and functioning of collective management societies in the exploitation of copyright protected works in Europe should be

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1. See Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No. COMP/C2/38.014-IP/1 'Simulcasting', (30 April 2003) O.J. L. 107/58 (EC) [FPPI Simulcasting], online: <europa.eu.int/eur-lex/pr/en/oj/dat/2003/L_107/L_10720030430en00580084.pdf> (last visited: 2 October 2005).

re-examined in order to develop innovative and effective solutions for the licensing of the aggregate repertoire of works administered by all European societies.²

Improving the cross-border licensing of copyright protected works raises an important corollary question: should the market for collective management of rights be liberalized for rights owners and users? The proponents of this solution have argued that the most effective model for achieving multi-territorial licensing of legitimate on-line music would be to enable rights holders to authorize a collective management society of their choice to manage their works across the entire EU. Similarly, users should also be able to obtain a licence from any society within the European Union, even if located outside of the user's territory of economic residency.³ In principle, increased competition between collective management societies should be beneficial for both authors and users, as the societies would have to compete on the basis of their economic efficiency, transparency and accountability.⁴

The importance of these matters has not escaped the European legislator. The creation, at the European level, of a level playing field for collective management societies has been an item on the European Commission's agenda at least since the publication of the Green Paper of 1995.⁵ Discussions have intensified recently, however, as evidenced by the European Parliament's Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights,⁶ and by the European Commission's Communication on the Management of Copyright and Related Rights in the Internal Market.⁷ Furthermore, the establishment of a regulatory framework

2. L. Gubault, "When will we have cross-border licensing of copyright and related rights in Europe?" (April-June 2005), *Copyright Bulletin*, UNESCO, online: <portal.unesco.org/culture/en/file_download.php/810ded8497789602cd8a2e38f6256499gubault_en.pdf> (last visited: 2 October 2005).
3. Commission of the European Communities, Notice published pursuant to Article 27(4) of Council Regulation (EC) No. 1/2003 in Cases COMP/C2/39152 - *BUMA* and COMP/C2/39151 *SABAM* (Santiago Agreement - COMP/C2/38126), (17 August 2005) O.J. C. 200/11, online: <europa.eu.int/eur-lex/lex/lexUriServ/lexUriServ.do?uri=CELEX:52005XC0817(03):EN:HTML> (last visited: 2 October 2005).
4. For an article expressing doubt on this point, see: P.B. Hugenholz, "Is concurrentie tussen rechteorganisaties wenselijk?" (2003), *AMT* 203, at 205.
5. Commission of the European Communities, "Green Paper on Copyright and Related Rights in the Information Society of 19 July 2005", COM(95) 382 final, online: <www.ejblida.org/eurplex/com95382.doc> (last visited: 2 October 2005).
6. The European Parliament, "European Parliament Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights" (2002/2274(INI)), (15 January 2004), (P5_TA(2004)0036), [Community Framework Resolution] online: <www.europarl.eu.int/omk/omnsapir:so/calendar?APP=PDF&TYPE=PV2&FILE=p004011SEN.pdf&LANGUE=EN> (last visited: 2 October 2005).
7. Commission of the European Communities, "Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - The Management of Copyright and Related Rights in the Internal Market", (16 April 2004), COM(2004) 261 final, [Management of Copyright Communication] online: <europa.eu.int/eur-lex/en/com/encl/2004/com2004_0261en01.pdf> (last visited: 2 October 2005).

for collective management societies has been included as part of the European Commission's Work Programme for 2005.⁸ In this context, the European Commission recently published a comprehensive study on the cross-border collective management of legitimate online music services setting out the possible options for regulation.⁹ If the publication of these documents suggested one thing, it is that a European regulatory instrument on the subject of collective management societies would be part of reality within a not too distant future.

The structure and operations of collective management societies have never been harmonized at the European Community level. External control has been exercised strictly on the basis of the European rules on competition. Over time, the European Court of Justice (ECJ) and the European Commission have developed an impressive body of jurisprudence putting the alleged anti-competitive behaviour of collective management societies to the test of Articles 81 and 82 of the EC Treaty.¹⁰ Assuming that the monitoring of the European collective management societies' competitive behaviour will remain unaffected, what would a directive on collective management of rights actually harmonize? Arguably, a new regulatory framework would aim at establishing principles of good governance within collective management societies, as well as at creating a uniform external control mechanism. Would harmonization in this area effectively contribute to the establishment of a level playing field between societies? Would such a harmonization be likely to fulfil its objective of fostering creation within the Internal Market, in the light of the current practical problems encountered by collective management societies?

This chapter attempts to provide some answers to these questions in three main parts. Section 2 provides a brief overview of the current regulatory framework concerning collective management societies in Europe, first at the European Union level and second, at the Member State level. Section 3 examines the main aspects of the intended Community framework on collective rights management as evidenced by the several documents issued by the different European bodies. On the basis of the findings of Sections 2 and 3, Section 4 analyzes whether there is an actual need for harmonization with respect to multi-territorial licensing and to the principles of good governance and supervision of collective management societies. This Section also examines the options

8. Commission of the European Communities, "Commission Work Programme for 2005 - Communication from the President in agreement with Vice-President Wallström", (26 January 2005), COM(2005) 15 final, [Commission Work Programme] online: <europa.eu.int/eur-lex/lex/lexUriServ/site/en/com/2005/com2005_0015en01.pdf> (last visited: 2 October 2005).
9. Commission of the European Communities, "Commission Staff Working Document - Study on a Community Initiative on the Cross-Border Collective Management of Copyright" (7 July 2005), [Commission Staff Working Document] online: <europa.eu.int/com/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf> (last visited: 2 October 2005).
10. See IFPI Simulcasting, *supra* note 1 at para. 59 (with reference to, *inter alia*, *Belgische Radio en Televisie (BRT) v. SABAM* (1974) E.C.R. 51 [BRT v. SABAM]; *Musik-Vertrieb Membran GmbH v. GEMA* (1981) E.C.R. 147; *GVL v. Commission*, (1983) E.C.R. 483).

available to the Community legislator to implement such a legal framework: either in terms of a legislative action or of alternatives hereto. Upon examining the option of a legislative action, this chapter will also consider whether it would meet the basic requirements in the EC Treaty (such as the principles of attribution, subsidiarity and proportionality). Section 5 concludes on the need for Community action with respect to the regulation of collective management societies.

2. CURRENT REGULATION OF COLLECTIVE MANAGEMENT SOCIETIES

Since the structure and the operations of collective management societies have never been the object of harmonization at the European Union level,¹¹ the activities of collective management societies have until now been controlled exclusively under the Community rules on competition. By contrast, collective management societies are usually subject to some form of specific regulation at the Member State level. Often, collective societies will be subject to a dual form of regulation within a Member State: in addition to the control exercised on the basis of competition law, the activities of collective management societies must conform to the requirements of specific national regulatory measures. This section provides a brief overview of the existing regulatory framework concerning collective management societies in Europe, first at the European Union level and second, at the Member State level.

2.1. REGULATION AT COMMUNITY LEVEL

An exhaustive account of the European case law on the subject of collective management societies would go far beyond the objectives of this book. The following pages are therefore limited to giving a broad overview of the main elements of the European competition rules as applied to collective management societies.¹² As discussed below, the intervention of the European Court of

11. H. Cohen Jehoram, "Harmonizing Intellectual Property Law within the European Community" (1992), 23 *International Review of Industrial Property and Copyright Law* 632. For further reading, see I. Govaere, *The use and Abuse of Intellectual Property Rights in E.C. Law* (London: Sweet & Maxwell, 1996), 337; D.G. Goyden, *EC Competition Law*, 4th edn. (Oxford: Oxford University Press, 2003), 660; F.L. Fine, "The Impact of EEC Competition Law on the Music Industry" (1992), *Entertainment Law Review* 6, at 11; T. Kaufmann, "Competition issues relevant to copyright and the information society" (1995), European Commission Legal Advisory Board meeting on "The Information Society: copyright and multimedia", Luxembourg, (26 April 1995), online: <www.europa.eu.int/SP/legl/en/lab/950426/kaufmann.html#fn1> (last visited: 4 October 2005); E. Lui, "The Eurovision song contest: A proposal for reconciling the national regulation of music collecting societies and the single European market" (2003), *Entertainment Law Review* 67 at 73; and

Justice and of the Commission has traditionally addressed three broad issues: 1) the relationship between collective management societies and their members; 2) the relationship between collective management societies and users; and 3) the reciprocal relationship between different collective management societies.

2.1.1. The Relationship with Members

The main aspects of the legal framework regarding the relationship between collective management societies and their members are still laid down in the early decisions rendered by the European Commission involving the German collective management society, GEMA. In the *GEMA I* case¹³ the Commission made at least two important rulings. First, the obligation set by a collective management society requiring its members to assign unduly broad categories of rights, e.g., to exclusively assign all their current and future rights with respect to all categories of works worldwide could constitute an abuse of dominant position. This aspect of the decision was later confirmed by the ECJ in the *BRT v. SABAM* case.¹⁴ In the Court's opinion, the decisive factor when examining the statutes of a collective management society in the light of the European competition rules, is whether the statutes exceed the limits absolutely necessary for effective protection (the "indispensability" test) and whether they limit the individual copyright holder's freedom to dispose of his work no more than necessary (the "equity" test).¹⁵ In this case, the Court ruled that "a compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal".¹⁶

Second, the European Commission stressed in the *GEMA I* case that collective management societies may not discriminate among members as regards the distribution of income.¹⁷ The Commission held that GEMA had abused its dominant position by paying supplementary fees, from revenue collected from the membership as a whole, only to those members who had been ordinary members for at least three years. Moreover, the Commission ruled that collective management societies may not refuse nationals of other EU Member States as members, nor impose discriminatory terms concerning their membership rights, e.g. by preventing a foreign rightsholder to become an ordinary

13. K.J. Koelman, "Collectieve rechtenorganisaties en mededinging – deel I" (2004), *AMT* 45, at 49–50.
 14. *Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte (GEMA) v. Commission of the European Communities* (1971) O.J. L. 134/15 [GEMA I].
 15. *BRT v. SABAM*, *supra* note 10.
 16. *Ibid.* at paras 8–11.
 17. *Ibid.* at para. 12.
17. See e.g. Fine, *supra* note 12 at 12; and L. Bently and B. Sherman, *Intellectual Property Law*, 2nd edn. (Oxford: Oxford University Press, 2004), 1231 at 285.

GEMA I

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or extraordinary member (a voting member).¹⁸ According to the Commission, such practices must automatically be regarded as an infringement of Article 82 of the EC Treaty, as they run counter to the principle of equal treatment resulting from the prohibition of "any discrimination on grounds of nationality" in Article 12 of the EC Treaty. Moreover, the refusal to accept the membership of nationals of other Member States directly under the special prohibition of discrimination under Community competition law, as contained in Article 82(c) of the EC Treaty. In this respect, the European Court of Justice confirmed, in the *Phil Collins* case,¹⁹ that domestic provisions containing reciprocity clauses cannot be relied upon in order to deny nationals of other EU Member States rights conferred on national authors.

2.1.2. The Relationship with Users

Regarding the application of Community competition law to the relationship between a collective management society and its users, the European Court of Justice and the European Commission have developed an important body of jurisprudence over the years. The seminal case in this area remains the ECJ's judgement in the *Tournier* case.²⁰ In this case, French discotheque owners had complained that the fees charged by the French collective management society SACEM were excessive, in particular because the discotheque owners mainly used popular dance music of Anglo-American origin while the SACEM's fees were calculated for the use of the worldwide repertoire. As a result, the discotheque owners attempted, without success, to obtain a license directly from the relevant foreign collective management societies.

The *Tournier* case delivered a ruling on at least three important points. First, the ECJ ruled that a national collective management society may only refuse to grant direct access to its own national repertoire to users established in other EU Member States for efficiency reasons. For example, if it would have been too burdensome to organize its own management and monitoring system in these countries. However, if the refusal were the result of agreements or concerted practices between the national collective management societies in the Member States in which the users are established, this would have the object or effect of restricting competition in the common market contrary to Article 81 of the EC Treaty.²¹ Second, the Court considered whether collective management societies could refuse to grant licenses for only parts of their

repertoire.²² Instead of a blanket license, the discotheque owners had asked SACEM to grant them licenses for only the part of its repertoire that they actually used (popular dance music of Anglo-American origin), but SACEM refused. The Court ruled that the refusal by a collective management society to grant national users authorization limited solely to the foreign repertoire which it administered in the territory in question would not be prohibited under Article 81 of the EC Treaty, unless access to a part of the protected repertoire could entirely safeguard the interests of the rightsholders without thereby increasing the costs of managing contracts and monitoring the use of protected works.²³

Third, in relation to SACEM's tariffs, the Court observed that one of the most pronounced differences amongst collective management societies in the Member States lies in the level of operating expenses. The discotheque owners complained that SACEM charged excessive, non-negotiable and unfair royalties. The Court considered that a national collective management society imposes unfair trading conditions in the meaning of Article 82 of the EC Treaty, if the royalties charged are appreciably higher than those charged in other Member States, unless the differences were justified by objective and relevant factors.²⁴

2.1.3. The Reciprocal Relationship Between Collective Management Societies

Early on, the European Commission held that the collective management societies in the different Member States must compete against each other, at least in certain areas. In 1985, the Commission held that the practices of GEMA, who charged royalties on sound recordings manufactured in Germany, even where the licensee had obtained a mechanical license from a collective management society in another Member State, constituted an abuse of a dominant position.²⁵ According to the Commission's Press Release announcing the settlement of this case,²⁶ a license granted by a collective management society in a Community Member State is valid throughout the Community and authorizes manufacture of sound recordings in any Member State. In other words, once a mechanical license has been granted in a Community Member State, this exhausts the right of a collective management society in a Member State where the sound recordings are imported to charge another licensing fee. As a consequence, collective management societies in Europe now have to compete

18. See also: *GVL v. Commission*, (1981) O.J.L. 370/49. See also *GVL v. Commission* (1983) E.C.R. 483 (ECJ).

19. *Phil Collins v. Imtrat Handelsgesellschaft GmbH* (1993) 1 E.C.R. 5145 (*EMI Electrola GmbH v. Patricia Im- und Export* was a joined case) [*Phil Collins*].

20. *Ministère public v. Tournier*, (1989) E.C.R. 2521 [*Tournier*].

21. *Ibid.* at paras 16-26. See also *Lucazeau v. SACEM* (1989) E.C.R. 2811 at paras 10-20 [*Lucazeau*].

22. See e.g. Kaufmann, *supra* note 12; Hugenholz, *supra* note 4 at 205; Bently & Sherman, *supra* note 17 at 288 and J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht: Auteursrecht, Naburige Rechten en Databankrecht* (Deventer: Kluwer, 2005), 762 at 466.

23. See *Tournier*, *supra* note 20 at paras 27-33.

24. *Ibid.* at paras 34-36; Lucazeau, *supra* note 21 at paras 21-33.

25. See e.g. Fine, *supra* note 12 at 8-9; Kaufmann, *supra* note 12 at 49.

26. Commission's Press Release of 6 February 1985, 2 *Common Market Law Review* 1.

against each other for so-called "Central European Licensing" deals, allowing any user to acquire a mechanical licence from one collective management society which is valid throughout the Community.²⁷

In the *Journier* and *Lucazeau* cases, the ECJ addressed the reciprocal relationship between collective management societies and concluded that such reciprocal agreements did not, as such, fall under Article 81(1) of the EC Treaty, provided no concerted action was demonstrated. Accordingly, the reciprocal representation agreements appeared in those days to be economically justified in a context where physical monitoring of copyright usage was required.²⁸

More recently, the Commission investigated two sets of reciprocal representation agreements, known as the *Santiago Agreement* and the *BIEM Barcelona Agreement*.²⁹ According to these agreements, each of the participating societies may issue multi-territorial licences for on-line use of copyrighted works of their repertoire.³⁰ In the *IFPI Simulcasting* decision, the Commission ordered the parties to amend their reciprocal agreement to allow users established in the territory of the European Economic Area³¹ to approach any collective management society, established within the territory and party to the agreement, to seek and obtain a multi-territorial simulcasting licence.³² The Commission considered that the monitoring task of collective management societies in the on-line environment can easily be carried out directly on the Internet and can therefore take place from a distance, which means that the traditional economic justification for collective management societies not to compete in cross-border provision of services no longer applies in this context.³³ Moreover, the parties in this case must undertake to increase transparency as regards the payment charged, by separating the tariff which covers the royalty proper from the fee meant to cover the administration costs.³⁴ This transparency in pricing should enable users to recognize the most efficient societies and to seek their licenses from the society that provides them at the lower cost.

27. See M. Kretschmer, "The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments" (March 2002), 24 *European Intellectual Property Review* 126, 133, online: <www.cipprn.org.uk/pdfs/kretschmer_cipr_032002.pdf> (last visited: 5 October 2005).
28. *Journier*, *supra* note 20 at paras 34-46; and *Lucazeau*, *supra* note 21 at paras 21-33.
29. Notification of IFPI Simulcasting agreement (COM/P/C/238/014), O.J.C. 231/18 (2001), Notification of Santiago agreement (COM/P/C/238/126), O.J.C. 145/02 (2001) and Notification of BIEM Barcelona agreement (COM/P/C/238/377), O.J.C. 132/18 (2002).
30. See Guitbaull, *supra* note 2, for more details about the competition aspects and the Commission's viewpoints of these agreements.
31. The European Economic Area (EEA) consists of all the EU Member States plus Norway, Iceland and Liechtenstein.
32. *IFPI Simulcasting*, *supra* note 1 at paras 27 and 28.
33. *Ibid.* at para. 61.
34. *Ibid.* at para. 103.

2.2. REGULATION AT MEMBER STATE LEVEL

A rapid survey of the legislation in force in the twenty-five Member States of the European Union shows a significant disparity between the national regulatory systems applicable to collective management societies. Each Member State has established its own set of rules regarding the formation and operation of collective management societies, accompanied in most countries by a supervisory authority. At first glance, only the laws of Luxembourg and Estonia would seem not to provide for the creation of any supervisory body.³⁵ Approximately one third of all Member States have preferred to enact the provisions dealing with collective management societies in a separate piece of legislation (Austria,³⁶ Czech Republic,³⁷ Germany,³⁸ Greece,³⁹ The Netherlands,⁴⁰ Portugal⁽⁴¹⁾), while the vast majority of the European national legislators have chosen to incorporate the relevant provisions inside the general copyright act (Belgium,⁴² Cyprus,⁴³

35. Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données, Memorial A - No. 50, 30 April 2001, as amended by Loi du 18 avril 2004 modifiant 1) la loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données, Memorial, A - No. 61, 29 April 2004, 942 Art. 66, online <www.legilux.public.lu/leg/laarchives/2004/0612904/2004A09421.html> (visited 12 October 2005); Copyright Act of Estonia (Adopted on 11 November 1992 as amended by Act of 22.09.2004, Riigi Teataja I 1999, 54, 580 Arts 76-79a online: <www.legaltext.ee/text/em/X40022K6.htm> (visited 12 October 2005).
36. Federal Law concerning collecting societies, 1936, BGBl. 112/1936, *Bundesgesetzblatt für die Republik Österreich*, online: <www.urts.bka.gv.at/bundesrecht> (visited 12 October 2005).
37. Law No. 237 of 27 September 1995 on the collective administration of copyright and neighbouring rights and on the modification and amendment of certain laws, Štírkova sákona č. 237/1995, Částka 64, Strana 3499 online: <www.wipo.int/lea/docs_new/pdf/en/cz/ez03en.pdf> (visited 12 October 2005).
38. Law on the Administration of Copyright and Neighbouring Rights (Copyright Administration Law) of September 9, 1965, *Bundesgesetzblatt*, Teil I, 1965, 1294 and Teil I, 2003, 1774 online: <transpatent.com/gesetze/turhwg.html> (visited 12 October 2005).
39. Presidential Decree No. 311/1994 as amended by Law No. 2557/1997. Articles of Association of the "Copyright Organization", *Official Journal (FEK)* 06/10/1994, No. 165 A and 1997, No. 271 A, online: <www.wipo.int/lea/docs_new/pdf/en/gr/gr216en.pdf> (visited 12 October 2005).
40. Act on the Supervision of Collective Management Organizations for Copyright and Related Rights (2003), *Gazette* 2003, 20 March 2003, 111, online: <www.virni.vvetten.nl/wetrechtcollectieve.html> (visited 12 October 2005).
41. Act No. 83/2001 of 3 August 2001, online: <www.gda.phnovidades/lei_gestao_collectiva.html> (visited 12 October 2005).
42. Law of 30 June 1994 on Copyright and Neighbouring Rights, *Moniteur belge/Belgisch Staatsblad*, 27 July 1994, 19297 and 5 November 1994 (erratum), 27467 last modified by Act of 22 May 2005 *Moniteur belge/Belgisch Staatsblad*, 27 May 2005, 24997, online: <www.droit-technologie.org/legislations/loi_droit_auteur_SI_220505.pdf> (visited 12 October 2005).
43. The Copyright Law No. 59, of 3 December 1976, as amended by Laws 63/77, 18(D)1993, 54(D)1999, 12(D)2001, 128(D)2002 and 128(T)2004, online: <www.ltlaw.com.cy/services/intellectual.htm> (visited 12 October 2005).

Denmark,⁴⁴ Finland,⁴⁵ France,⁴⁶ Hungary,⁴⁷ Ireland,⁴⁸ Italy,⁴⁹ Latvia,⁵⁰ Lithuania,⁵¹ Malta,⁵² Poland,⁵³ Slovakia,⁵⁴ Slovenia,⁵⁵ Spain,⁵⁶ Sweden,⁵⁷ and the United Kingdom⁵⁸).

44. Consolidated Act No. 164 of 12 March 2003, Arts 47–52, online: <www.kum.dk/sw4550.asp> (visited 12 October 2005).
45. Law No. 404, of 8 July 1961, as last amended by Law No. 748, of 9 October 1998, Art. 26c and following, online: <portal.unesco.org/culture/en/file_download.php/a211212947dd52866031787ed9e9109Copyright_Act.pdf> (visited 12 October 2005).
46. Intellectual Property Code, Legislative Part, L. No. 92-597, 1 July 1992, as last amended by Act 2004-1338 of 8 December 2004, Arts L. 321-1–L.321-13, online: <www.iripi.ccp.fr/code-proprete/index.html> (visited 12 October 2005).
47. Act No. LXXXVI of 1999 on Copyright, of 6 July 1999 Arts 85–99 completed by Decree No. 16/1999, (XI. 18.) NKOM of the Minister of National Cultural Heritage on the rules governing the records of societies concerned with the collective administration of authors' rights and neighboring rights, online: <www.lphouh.englishjoggorras/1999_16NKOM.html> (visited 12 October 2005).
48. Copyright and Related Rights Act, 2000 (No. 28 of 2000), of 10 July 2000, Art. 149 and following, online: <www.uicc.ie/law/iri/statutes/2000_28.htm> (visited 12 October 2005).
49. Act of 22 April 1941, No. 633 (last modified by legislative decree of 9 April 2003, No. 68), Arts 180–185, online: <www.patent.it/leggi/find.asp?argomento=Copyright&Ricerca=633&Descrizione=Diritto+d%27autore+%28Copyright%29> (visited 12 October 2005).
50. Copyright Law (of 6 April 2000), Arts 63–67 online: <www.km.gov.lv/UVImageBinary.asp?imageid=360> (visited 12 October 2005).
51. Law on Copyrights and Related Rights No. VIII of 18 May 1999, as amended by Law No. IX-1355 of 5 March 2003, Arts 71 and 72, online: <www3.lrs.lv/cbind/eng/preps2?Condition1=226598&Condition2=> (visited 12 October 2005).
52. Copyright Act, Chapter 415 as amended by Act No. IX of 2003, *Government Gazette of Malta* No. 17467, 2 September 2003, Arts 52–58, online: <docs.justice.gov.mt/legislation/english/legvol_13/chap415.pdf> (visited 12 October 2005).
53. Act of 4 February 1994 on Copyright and Neighboring Rights, Monitor Polski, 23 February 1994, No. 24, item 83, as amended by Act of 1 April 2004 (Ustawa o zmianie ustawy o prawie autorskim i prawach pokrewnych z dnia 1 kwietnia 2004 r.), Arts 104–100, online: <ks.sejm.gov.pl/procd/ustawy/2465_u.htm> (visited 12 October 2005).
54. Copyright Act, No. 618/2003 of 4 December 2003, Arts 78–86, online: <www.culture.gov.sk/english/doc/copyright.pdf> (visited 12 October 2005).
55. Copyright And Related Rights Act of 30 March 1995, Uradni list Republike Slovenije, 14 April 1995, No. 21, as amended by Act Amending the Copyright and Related Rights Act, *Official Gazette RS* No. 43/04, Art. 162, online: <www.uil-sipo.si/Laws/ZASP_EN_04.pdf> (visited 12 October 2005).
56. Real Decreto Legislativo 1/1996, de 12 de abril (BOE 22-4-1996), por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, constituye la piedra angular de la regulación sobre propiedad intelectual en España, Art. 159, online: <www.mcu.es/propint/les/LeyProp_Intelectual_modif72.pdf> (visited 12 October 2005).
57. Act 1960:729 on Copyright in Literary and Artistic Works, as amended by Act 2005:359 of 26 May 2005 Art. 42a and following, online: <www.sveoedon.gov.se/content/1/c6/01/51/95/69b07709.pdf> (visited 12 October 2005).
58. Copyright, Designs and Patents Act 1988 (c.48), Her Majesty's Stationary Office June 1995, Art. 145 and following [CDPA], online: <www.opst.gov.uk/facts/acts/1988/Ukpga_19880048_en_1.htm> (visited 12 October 2005).

In practice, the specific regulations in the Member States diverge widely on both scope and efficiency. The national provisions establishing a control mechanism vary from "strict supervision" to "*de minimis* supervision", where most national legal systems take up an intermediate position. An exhaustive account of the national regulatory framework in force in each Member State on the subject of collective management societies would go far beyond the objectives of this book.⁵⁹ The following pages are therefore restricted to giving a portrait, by means of examples, of the main elements of each of the three types of regulatory systems.⁶⁰

2.2.1. Strict Supervision

Examples of a "strict supervision" system can be found in the German, Austrian and Portuguese legislation. In Germany, the administration and exploitation of all collective management societies is regulated under the 1965 Law on the Administration of Copyright and Neighboring Rights (LACNR).⁶¹ This act establishes a regulatory and supervisory legal system subjecting all collective management societies to the control of the German Patent and Trade Mark Office (GPTO). This German legislation is said to constitute "the most comprehensive legal system" of control of collective management societies on the international level,⁶² and indeed, many important elements of collective rights management in Germany are supervised by the GPTO. One of the most fundamental characteristics of the German legislation, to be found in Article 1 of the LACNR, is that anyone who wants to conduct business in the collective management of rights must obtain prior authorization.

Once the authorization is granted, a collective management society remains under the permanent supervision of the GPTO. The GPTO controls whether a collective management society faithfully discharges the obligations incumbent on it under the LACNR (Article 19(1) LACNR). This should ensure that the collective management society does not abuse its powers in its relationship

59. On the supervision systems of France, Germany, the Nordic Countries and the United Kingdom see the relevant chapters elsewhere in this book.
60. For a more comprehensive account of certain national regimes, see: Y. Gendreau, ed., *Copyright Administrative Institutions* (Montreal: Editions Yvon Blais 2002), 678.
61. Law on the Administration of Copyright and Neighboring Rights of 9 September 1965, *Bundesgesetzblatt*, Teil I, 1965, p. 1294 [LACNR].
62. See e.g. A. Dietz, *Copyright Law in the European Community: A Comparative Investigation of National Copyright Legislation, with Special Reference to the Provisions of the Treaty Establishing the European Economic Community* (Alphen aan den Rijn: Sijthoff & Noordhoff 1978), 312 at 219; and J. Reinbothe, "Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten (Urheberrechtswahrmehrgesetz)" in: G. Schrieker, *Urheberrecht, Kommentar*, 2nd edn. (Munich: Beck Juristischer Verlag, 1999), 2145 at 1823.

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copyright

with both rightsholders and users and that it renders account to the society as a whole.⁶⁵ To that end, the Act sets out a comprehensive legislative framework, with strict obligations for collective management societies. In addition, the LACNR provides for an arbitration procedure for the amicable settlement of disputes between collective management societies and users regarding tariffs and licensing conditions.

Legeslative

2.2.2. Intermediate Supervision

The legislation of the vast majority of Member States falls under the category of intermediate supervision. Besides imposing a number of requirements of transparency and accountability, the national acts will subject the exercise of the activities of the collective management societies to the supervision of an independent person or administrative body. Often, the minister responsible for copyright matters will receive the task of exercising control over the operations of the collective management societies. In addition to this supervisory authority, certain Member States have also set up a dispute settlement mechanism, the competence of which will vary from one country to another.

The legislation of the Netherlands provides a good illustration of an intermediate degree of supervision. Under the Act on the Supervision of Collective Management Societies (ASCMS)⁶⁴, not all collective management societies are subject to specific supervision. Only those societies which, after appointment or consent of the Minister of Justice, enjoy a *de jure* or state-supported monopoly fall under the jurisdiction of the supervisory body. Without providing an explicit framework of obligations for these societies, the ASCMS sets out a comprehensive list of elements, which are controlled by the Supervisory Commission on a permanent basis. The general statutory task of the Supervisory Commission is to exercise supervision on the collection and distribution of the payments by the collective management societies. Furthermore, the Supervisory Commission must, according to the Act, ensure that a collective management organization:

- a) provides adequate awareness of its general and financial policy to rights-holders and those obliged to make payments;
- b) is adequately equipped to be able to fulfil its duties properly;
- c) lawfully distributes the payments it has collected amongst the rights-holders in accordance with the re-allocation regulations;
- d) takes adequate account of the interests of those obliged to make payments when carrying out its work;

63. Reinbothe, *ibid.* at 1909.

64. Act on the Supervision of Collective Management Organizations for Copyright and Related Rights (2003), *Gazette* 2003, 111, online: <www.ivir.nl/wetten/nl/wetvoorzichtcollectieve.html> (visited 12 October 2005).

- e) makes use of a reliable dispute resolution scheme for rightsholders;
- f) treats similar cases in a similar way.⁶⁵

The Dutch Act does not provide a dispute settlement regulation, however. Moreover, the ASCMS explicitly states that the Supervisory Commission will not maintain supervision over the societies to the extent that such supervision is already exercised by the Dutch competition authority. The Dutch competition authority also controls all other collective management societies. To that end, it may fully apply the provisions of Dutch competition law, as well as of Community competition law.

2.2.3. De minimis Supervision

Contrary to most other Member States, the legislation of Ireland,⁶⁶ Poland,⁶⁷ and the United Kingdom⁶⁸ merely establishes a “*de minimis* supervision” system, where the external control is essentially limited to the tariffs. Taking the United Kingdom’s Copyright, Designs and Patents Act (CDPA) as an illustration, no provision in the Act sets out requirements regarding the formation of collective management societies or the regulation of their activities. Furthermore, there exists no specific authority that permanently supervises the societies. The only regulation contained in the CDPA is an *ad hoc* control in cases of complaints. The Copyright Tribunal, which has been established for this purpose, has jurisdiction to hear and determine matters arising from a relationship between a collective management society and its users.

The British Copyright Tribunal’s general jurisdiction to settle matters regarding licenses and licensing schemes is broadly limited to two kinds of cases. First, it has jurisdiction to hear disputes arising in respect of an individual license (the so-called “application”), for example, when a collective management society unreasonably refused to grant a license or when the terms and conditions of a proposed license are deemed unreasonable. These “applications” may be referred to the Tribunal by individual users seeking a license. Second, the Copyright Tribunal has jurisdiction where the terms and conditions of a licensing scheme as a whole are contested (the so-called “reference”). In this respect, a “licensing scheme” is defined as a scheme specifying the circumstances and terms under which a licensing body is willing to grant licenses. These “references” may be referred to the Tribunal by associations of users claiming that they require a license, and, when the scheme is operational, also by individual users seeking a license under this scheme. In other words, the Tribunal’s general competence is limited solely to disputes

65. See: House of Representatives, *Parliamentary Report of the Dutch Lower Chamber (2000/2001)*, 27 775, No. 3 (Explanatory Memorandum), at 6–7.

66. *Supra* note 48.

67. *Supra* note 53.

68. *Supra* note 58.

between collective management societies and their users, and not to disputes arising between the societies and their members. Moreover, the Tribunal can only entertain references brought to it by users, and not by members or on its own initiative.⁶⁹

In summary, the significant differences in the regulation of collective management societies at the Member State level are due, in particular, to the various forms of supervision under specific legislation. As regards the application of competition law, the national regulatory systems show relatively little disparity. Moreover, where Community competition law is put into effect and applied equally throughout the Member States, this aspect of regulation seems to be fully harmonized.

3. INTENDED COMMUNITY FRAMEWORK ON COLLECTIVE RIGHTS MANAGEMENT

As mentioned in the introduction, the creation, at the European level, of a level playing field for collective management societies has been an item on the European Commission's agenda at least since the publication of the Green Paper of 1995.⁷⁰ Discussions have intensified during the past year, which have resulted in the adoption of several documents by the different European bodies.⁷¹ The following pages describe the main aspects of the intended Community framework on collective rights management as evidenced by the several documents issued by the different European bodies.

3.1. THE RESOLUTION OF THE EUROPEAN PARLIAMENT

The European Parliament's Resolution of January 2004 on the subject sets out a number of policy considerations, which the European Commission should take into consideration when the time comes to draw up the text of a directive.⁷² At the outset, the European Parliament emphasized the importance of the cultural and social aspects of collective rights management and the traditional and still necessary role of collective management societies.⁷³ The Parliament points out that in the area of copyright and related rights, a proper, fair, and professional system of collective rights management is crucial for financial as well as cultural success. Collective rights management can constitute an

69. See: U. Suthersanen, "An Overview of the Practice and Policy of the United Kingdom Copyright Tribunal", in *Copyright Administrative Institutions*, *supra* note 60 at 487.

70. *Supra* note 5.

71. See: Community Framework Resolution, *supra* note 6; Management of Copyright Communication, *supra* note 7; Commission Staff Working Document, *supra* note 9.

72. Community Framework Resolution, *supra* note 6.

73. See A. Dietz, "European Parliament versus Commission: how to deal with collecting societies?" (2004), *International Review of Intellectual Property and Competition Law*, 809 at 810-814.

important factor in stimulating creativity and influencing the growth of cultural and linguistic diversity. Nevertheless, the Parliament is rather critical about the actual state of collective rights management in the European Union. It notes, for instance, the deficit in the internal democratic structures of collective management societies, the lack of transparency in the financial policy of the societies and the absence of rapid dispute settlement mechanisms. In addition, the European Parliament observes that there are major structural differences in the regulation and efficiency regarding the external control of collective management societies in the different Member States. Therefore, the European Parliament believes "that a Community approach in the area of the exercise and management of copyright and related rights, in particular of effective collective rights management in the internal market, must be pursued".

In this respect, the European Parliament presents several possible solutions.⁷⁴ One of them would be the creation of common tools and of comparable parameters and the coordination of collective management societies' areas of activity. With respect to the societies' internal democratic structure, a proposal is made to establish minimum standards for organizational structures, transparency, accounting and legal remedies. Furthermore, the European Parliament calls for the adoption of provisions requiring the publication of tariffs, distribution keys, annual accounts, a listing of appropriate management costs and information on reciprocal representation agreements. A framework of minimum standards for the calculation of tariffs and of uniform coding standards for works should also be instituted in order to simplify the exercise of rights. With regards to the cooperation between collective management societies, a call is made for an efficient exchange of information between the societies and the discontinuation of so-called "B contracts" in reciprocal representation agreements.⁷⁵ Finally, the European Parliament makes a general call for the instauration of efficient, independent, regular, transparent and expert control mechanisms and for comparable and compatible arbitration mechanisms in all EU Member States.

However, together with the introduction of equitable, transparent and balanced rules for collective management societies, the European Parliament also appeals to the restriction of competition law to cases of abuse, in order to safeguard rights management effectively both now and in the future. According to the Explanatory Statement to the Resolution, a misguided insistence on competition would lead to further fragmentation of the markets, chaos in the clarification of rights and dumping tariffs. Furthermore, the European Parliament sees collective management societies as an important safeguard in the

74. *Ibid.* at 819.

75. See paras 45 and 56 of the Community Framework Resolution, *supra* note 6. In the current system of reciprocal representation agreements, there are two kinds of agreements. Under the "A agreements" a reciprocal transfer of royalties collected is provided for, where under the "B agreements", no money or data is transferred and each society collects and distributes royalties used in its territory only to its own rightsholders.

world of media concentration. It stresses that the monopoly of collective management societies should not be replaced by a monopoly of the media industry.

3.2. THE COMMUNICATION FROM THE COMMISSION

In contrast to the Parliament's Resolution, the European Commission's Communication on the Management of Copyright and Related Rights in the Internal Market is a rather technically and legally oriented document.⁷⁶ The European Commission states that in order to safeguard the functioning of collective rights management throughout the Internal Market and to ensure that it continues to represent a valuable option for the management of rights benefiting rightsholders and users alike, a legislative approach at Community level is required. Although the Commission recognizes that competition rules remain an effective instrument for regulating the market and the behaviour of collective management societies, it takes the view that an internal market in collective rights management can be best achieved if the monitoring of collective management societies under competition rules is complemented by the establishment of a legislative framework.

According to the Commission, complementary action is needed on those aspects of collective rights management, which impede the full potential of the Internal Market as regards the cross-border trade of goods and provision of services based on copyright and related rights. In this respect, the efficiency, transparency and accountability of collective management societies are of particular importance. To improve the functioning of collective rights management in the Internal Market, the Commission intends to establish a level playing field in which general conditions for several features of collective rights management are defined. These features are:

a) The establishment and status of collective management societies. The Commission would want the establishment of collective management societies to be subject to similar conditions in all Member States. These conditions should relate to the persons who may establish a society, the status of the latter, the necessary proof of efficiency, operability and accounting obligations, and a sufficient degree of representativity. On the other hand, the Commission sees no need to bring uniformity as regards the legal form of organization of collective management societies, as it reasons that the efficiency of a society is not linked to its legal form.

b) The relationship with users. In their relation to users, the Commission deems it necessary to safeguard the functioning of collective management societies as one-stop-shops for licensing. Common ground should therefore be required on the grant of licenses under reasonable conditions, the transparency in the pricing policy of the collective management societies and the reasonableness of the tariffs. Furthermore, the Commission finds it essential for users to

76. *Supra* note 7.

be in a position to contest the tariffs before national courts, specially created mediation tribunals or with the assistance of supervisory authorities.

c) The relationship with rightsholders. In their relation to rightsholders, the Commission wishes to achieve a level playing field as regards the acquisition of rights (the mandate), the conditions of membership and the termination of membership. The mandate should offer rightsholders a reasonable degree of flexibility on its duration and scope. In principle, rightsholders should also have the possibility, in the light of the deployment of Digital Rights Management (DRM) systems, to manage certain rights individually if they so desire. Moreover, the Commission would want similar conditions to exist on the representation and the position of rightsholders within the society, for example, as regards their influence on the decision-making process and their access to internal documents and financial records in relation to distribution and licensing revenue and deductions. In this respect, the leading principles must be the good governance, non-discrimination, transparency and accountability of the collective management societies.

d) The external control of collective management societies. Finally, the Commission wishes to create a level playing field with respect to the external control of collective management societies. The external control should cover such matters as the behaviour of collective management societies, their functioning, the control of tariffs and licensing conditions and the settlement of disputes. The Commission would like to see adequate external control mechanisms be established throughout the Community and, to that end, make sure that specific supervisory bodies (such as specialized tribunals, administrative authorities or arbitration boards) will become available in all Member States. In addition, the Commission would want to establish common ground on the powers of these bodies, on their composition and on the binding or non-binding nature of their decisions.

When considering the possible options to achieve the objectives outlined in the Communication, the Commission expressly states that it does not seem to be an option anymore to abstain from legislative action. For the Commission, it neither appears to be an appropriate option to rely on soft-law or on codes of conduct agreed upon in the market place. Therefore, the Commission expresses the intention to propose a legislative instrument.

3.3. THE COMMISSION WORK PROGRAMME 2005

As a logical consequence of the Communication, the Commission announced that the adoption of a legislative proposal on collective rights management in the Internal Market would be part of its Work Programme 2005.⁷⁷ This should create a level playing field which would enhance both rightsholders'

77. Commission Work Programme, *supra* note 8 at 16.

and users' trust into collective management societies. The main objectives of such a legislative framework would be:

- to ensure the transparency and efficiency of collective management societies;
- to ensure that the control of collective management societies is exercised in such a way that a similar general interest protection level can be guaranteed in all Member States;
- to enhance competitiveness of creative industries, including small ones as well as individual authors and artists, to strengthen innovation and to promote culture and cultural diversity;
- to reinforce the existing *acquis communautaire* in the field of intellectual property.⁷⁸

In order to meet these objectives, the Commission discussed the possibility of adopting either a directive or a regulation. It concluded that although a regulation would have the advantage of being directly applicable, it would also require very detailed and precise harmonization. A regulation would not only lead to a major overhaul of the different laws and traditions existing at present, but it would also result in regulatory over-complexity and would take considerable time and resources to negotiate. On the other hand, a directive – once implemented – would provide for a certain level of harmonization and of legal certainty for all parties involved, without imposing over-complex rules. Moreover, it would allow agreement on essential requirements at Community level while providing for the necessary flexibility for Member States. According to the Commission, the most appropriate way to achieve the objectives mentioned, therefore, appeared to be the adoption of a directive.⁷⁹

3.4. THE STUDY ON CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT

The very latest document published by the European Commission on the subject of collective management societies focuses on the cross-border collective management of copyright.⁸⁰ Although it is not entirely clear whether the recommendations made in the study concern the broad issue of cross-border collective management of copyright, or only the cross-border collective management of legitimate online music services, one could interpret the document as reflecting

78. See: Commission of the European Communities, "Roadmaps – Commission Work Programme 2005" (2005), at 35 [Commission Roadmaps] online: <europa.eu.int/comm/loff/work_programme/20050128_clwp_roadmaps.pdf> (last visited: 5 October 2005).

79. According to the Commission Roadmaps, *ibid.*, the planned date of adoption of the proposal is October 2005.

80. Commission Staff Working Document, *supra* note 9.

the Commission's wish to first adopt the principles set out therein with respect to online music services, before expanding the cross-border collective licensing system to copyright management as a whole.

The study reveals that the main problem encountered in the cross-border collective management of copyright is that the core service elements "cross-border grant of licences to commercial users" and "cross-border distribution of royalties" do not function in an optimal manner and hamper the development of an innovative market for the provision of online music services. Three different policy options are available:

- Option 1: to abstain from Community action;
- Option 2: to eliminate territorial restrictions and discriminatory provisions in the reciprocal representation agreements concluded between collective management societies;
- Option 3: to give rightsholders the choice to authorize a collective management society of their choice to manage their works across the entire EU.

Option 2 would limit EU policy to improving the traditional way in which national collective rights societies in the 25 Member States cooperate in order to ensure the cross-border management of copyright. It would introduce a single entry point and choice for commercial end users but it would not introduce increased choice as to collective rights manager at the level of rightsholders. This solution would also improve the way reciprocal agreements function, by improving the way the affiliate society monitors, collects royalties and transfers them back to the management society. In relation to licensing, this option would ensure that the territorial restrictions in classical reciprocity agreements that hinder the affiliate society from licensing the management society's repertoire beyond its own home territory are removed from all reciprocal representation agreements.⁸¹

By contrast, Option 3 would not rely on reciprocal representation agreements to give 25 collective management societies licensing authority over a homogeneous product. Instead, it would give all rightsholders across the EU the possibility to adhere to any collective rights manager of their choice for the EU-wide exploitation of their online rights. Option 3 would effectively cut out the intermediary – the affiliate society – in favour of direct membership in a collective rights manager who, by choice of the rightsholder, could receive an EU-wide mandate to manage this rightsholder's copyright protected works. Option 3 would therefore introduce choice and competition at the level between rightsholders and collective rights manager. The study concludes that in the long-term, Option 3 would offer the most effective model of cross-border management of copyright.⁸²

81. *Ibid.* at 34.

82. *Ibid.* at 54.

The scope of issues addressed in this study appears much narrower than that of the European Parliament's Resolution or of the Commission's Communication. According to the European Commission, both issues are inter-related, however, since the enhancement of competition between societies would bring about the enhancement of transparency, accountability, royalty distribution and the quality of enforcement. At this point, two questions arise, however. First, is there an actual need for harmonization in this area or should the whole be left to the forces of the market? Second, how does the European legislator intend to transpose into practice the Parliament recommendations concerning the creation of a legal framework for collective management societies, or Option 3 of the study on cross-border licensing of on-line music services? Should this be achieved by means of recommendations or through the adoption of a directive?

4. TOWARDS A HARMONIZATION IN RESPECT OF COLLECTIVE MANAGEMENT SOCIETIES

As seen in Section 2 above, the significant differences in the regulation of collective management societies at Member State level are due to a large extent to the various forms of control under specific legislation. On the other hand, the application of European competition law in the different Member States seems to be fully harmonized. If Section 5 revealed one thing, it is that the intentions of the European Commission concerning the harmonization of the rules on collective management were not the clearest, ranging from the broad issue of the good governance and supervision of collective management societies to the narrower problem of the multi-territorial licensing of rights. Do the differences in the national legislation concerning the good governance and supervision of collective management societies and the problems associated with the cross-border licensing system justify engaging in the process of harmonization?

The following pages will take a closer look at the question of whether there is an actual need for harmonization, both with respect to the cross-border licensing issue and to the rules on good governance and supervision of collective management societies. They will then consider the options available to the European legislator, in terms of a legislative action and in terms of measures designed to promote self-regulation, with a special look at whether legislative action would meet the basic requirements in the EC Treaty, such as the principles of attribution, subsidiarity and proportionality.

4.1. ACTUAL NEED FOR HARMONIZATION

The *JFPY Simulcasting* case⁸³ presents a patent example of circumstances where both aspects of the collective management of rights may benefit from

⁸³. *Supra* note 1.

harmonizing measures across the European Union. Not only did the case address the complex issues involved in the multi-territorial licensing agreements, but it also touched upon the need to establish principles of good governance within collective management societies. For, in the opinion of the European Commission, the facilitation of the multi-territorial licensing of rights cannot be fully achieved without a fair and transparent collective management system. Absent proper measures, there would be no level playing field for all collective management societies across Europe and neither rightsholders nor users would be in a position to decide which European collective management society is best suited to their needs. Let us consider both types of issues.

4.1.1. Multi-territorial Licensing

With respect to the multi-territorial licensing of rights, the European Commission has expressed its distinct preference for the option, which would give rightsholders the choice to authorize a collective management society of their choice to manage their works across the entire EU.⁸⁴ The main advantage of such a competitive cross-border licensing system is the possibility given to each collective management society of functioning as a "one stop-shop", where each society would be in a position to grant a single multi-territorial simulcast license covering the repertoire of all other collective management societies. Moreover, all protected recordings, regardless of origin, would be subject to the same conditions for all users in the same country, in accordance with the principle of national treatment, as a result of which, administration costs would be lower and these efficiencies could be passed on both to the rightsholder and to the user.

According to the recent study published by the European Commission, effective structures for the cross-border collective management of copyright for legitimate online music services would require regulatory intervention. The main reason for this lies in the fact that the market has failed to produce effective structures for cross-border licensing and cross-border royalty distribution; and that it has not rectified a series of contractual restrictions preventing authors or other rightsholders from seeking the best collective rights management service across national borders.⁸⁵ In all likelihood, the Commission would not limit itself to the regulation of the cross-border licensing of online music services but would probably aim at all types of multi-territorial licensing.

The European Commission stresses that this model would not only be interesting for successful rightsholders, but also for less successful rightsholders. The benefits for successful rightsholders are indeed obvious: for them, it is of particular importance to find the collective management society that gives them the highest royalties. Therefore, they will invest time and money to find the most efficient society. Arguably, not all rightsholders – especially not the less

⁸⁴. Commission Staff Working Document, *supra* note 9 at 54.
⁸⁵. *Ibid.* at 30.

→ voir a legement de l'exercice de l'option
dans la forme

successful ones – would invest as much time and money in looking for the most efficient and cost-saving society. The Commission's assumption according to which most if not all rightsholders would switch to another collective management society may not become reality. Moreover, the Commission admits that Option 3 would not achieve the single access point for all European repertoire for all European territories because the European repertoire will be split among a small number of collective management societies.⁸⁶ In addition, it may encourage the development of a few larger collective management societies (the most efficient and cost-saving societies) where the successful rightsholders gather. This could bring about the negative consequence that commercial users would want to contract only with these few larger societies since they represent the most popular musical works. Such a concentration in the market for collective management of rights could be detrimental to the dissemination of cultural works over the Internet.

Of course, it is impossible at this time to predict how a competitive market for multi-territorial licensing of online music services – or of any other online copyright protected work – would evolve. Any prediction in this sense is pure speculation. Nevertheless, it is not entirely clear that any measure towards the liberalization of the market for collective management of rights will actually yield the advantages mentioned in the European Commission's study.

4.1.2. Principles of Good Governance and Supervision

With the liberalization of the market on the collective management of rights, collective management societies would have to compete among themselves to attract rightsholders. This implies that all rightsholders, authors, composers, publishers, performers or others, should be treated equally, irrespective of their domicile, by the creation of effective structures to enhance transparency, and accountability. In the Commission's own words, this option could provide a still higher level of transparency for rightsholders, since the collective rights manager of their choice would be accountable for all use made of works across the Community and for the redistribution of royalties in exact proportion to this use. If the rightsholder were not satisfied with the society to which he adhered, he would have the choice to seek Community-wide clearance services elsewhere. This would constitute a strong incentive to carry out optimal and transparent clearance and royalty payment services. Empowering rightsholders to choose their collective rights manager would lead the latter, in order to attract or retain business, to adapt their business practices and become more efficient in relation to their management services. The case previously made in the Commission's Communication for the introduction of transparency requirements and rules of good governance and accountability would be achieved, according to the Commission, by the societies themselves without regulatory intervention. Whether this would actually come true in practice remains to be seen!

86. *Ibid.* at 40.

At the Commission's own admission, the liberalization of the market for collective management of rights would be more favourable to rightsholders than to commercial users. Such a regime could therefore lack the necessary safeguards for users. Where users have no alternative but to seek a license from a collective management society holding a monopoly position – and, in the case of EU-wide mandates a super-monopoly position – there could be risk that such a powerful society would abuse its position. The failure to implement comparable regulatory regimes could affect the free circulation of goods and services with respect to the functioning of collective management societies in their relationship with users, for instance, as regards the regulation of tariffs and licensing conditions. In Member States with more lenient regulations, collective management societies may be tempted to charge excessive tariffs or to impose unreasonable licensing conditions. Without a proper regulation, these societies may arbitrarily determine the price and other conditions of a license.⁸⁷ As a result, small commercial users could be unable or unwilling to pay the price of such licenses and could be prevented from negotiating more advantageous licensing conditions. Such a practice may ultimately form a barrier to the free movement of copyright-based goods and services within the Community.

Without the harmonization of the rules on collective management of rights, existing disparities in the laws of the Member States relating to the functioning of collective management societies in their relationship with rightsholders may cause obstacles to the free movement of goods and services. If one Member State regulates the societies' acquisition of rights ("the mandate"), and the other one does not, this may create discrepancies in the scope of rights that the different societies are allowed to manage on behalf of their members. If no statutory safeguard exists in the legislation of certain Member States, rightsholders may be obliged, for instance, to assign all their rights for the whole world and for the duration of the copyright protection. Such an obligation could clearly hinder the freedom of rightsholders to "shop around" for the services of collective management societies in other Member States in respect of certain categories of rights or in respect of the exploitation of their rights in some countries.⁸⁸ Moreover, such an obligation could hamper the exploitation of works in the digital environment by preventing rightsholders from managing certain rights individually or from contracting directly with users by means of Digital Rights Management systems.

To summarize, the European legislator has in respect of the regulation of the cross-border licensing issue essentially two choices. Either, he decides to implement Option 2, thereby eliminating territorial restrictions and discriminatory provisions in the reciprocal representation agreements concluded between collective management societies. In this case, the European legislator may need

87. See M. J. Freegard, 'Quis Custodiet? The Role of Copyright Tribunals' (1994), *European Intellectual Property Review* 286.

88. See *Greenwich Film Production v. SACEM and Société des Éditions Labrador* [1979] E.C.R. 3275 [*Greenwich Film Production*]. See also Fine, *supra* note 12 at 14.

to solve existing disparities in the laws of the Member States concerning the good governance of collective management societies in their relationship with *rightsholders*, since discrepancies in the acquisition or management or enforcement of rights may cause obstacles to the free movement of goods and the provision of services. Or, the legislator decides to implement Option 3, thereby giving rightsholders the choice to authorize a collective management society of their choice to manage their works across the entire EU. In this case, the European legislator may need to solve existing disparities in the laws of the Member States concerning the good governance of collective management societies in their relationship with *users*, where discrepancies in the regulation of tariffs and licensing conditions could create obstacles to the free movement of goods and the provision of services.

In general, competition authorities are not equipped to supervise the good governance of collective management societies, since their primary mandate is to ensure the maintenance of a competitive market and not to control the efficiency, transparency, accountability and non-discrimination of individual undertakings. Since the tools currently available for the control of the activities of collective management societies are limited to the rules on competition law, an argument could be made in favour of the establishment of a regulatory framework with respect to the good governance of collective management societies. Collective management societies could be subject across the European Union to positive requirements to ensure their efficiency, transparency, accountability, and non-discrimination.⁸⁹ In addition, the establishment of an easyly accessible dispute settlement mechanism competent to hear any individual cases involving a collective management society – whether the complainant is instituted by a rightsholder or a user – would certainly be in the interest of all stakeholders.

4.2.

THE HARMONIZATION THROUGH LEGISLATIVE ACTION

The European Commission expressed its clear intention in the Commission and the work-programme 2005 to adopt a legislative instrument, preferably in the form of a directive, to tackle the problems in the field of collective rights management. A Community framework directive would provide for common minimum rules on how collective management societies should account for revenue collected, how they should distribute the revenues among rightsholders – including rightsholders in other EU Member States – and how the collective management of rights should be organized. This Section examines whether such an instrument can cater the needs for harmonization in the field. In this respect, a review of the question of whether the adoption of a legislative instrument

89. Guitbaut, *supra* note 2; and Koelman, *supra* note 12 at 46 (who describes that economical theories predict that monopolies, especially the *de jure* monopolies, can become lazy and arrogant and that therefore additional supervisory rules are required).

would be in conformity with the basic requirements of the EC Treaty seems appropriate,⁹⁰ since these requirements determine to a large extent the limits to Community action. Accordingly, we must find out whether the Community legislator has the power to establish the intended legislative instrument and to what extent it may exercise these powers under the principles of subsidiarity and proportionality.

4.2.1. The Attribution Principle

Any new piece of Community legislation must comply with the principle of attributed powers, as set out in the first paragraph of Article 5 of the EC Treaty: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. This provision delineates the powers of the Community from those of the Member States: if no powers have been conferred upon the Community, the powers shall remain with the Member States.⁹¹ The Community powers are restricted to a number of specific purposes. The Community legislator, therefore, has no general power to act. It may act only (a) if and insofar as powers have been conferred upon it by the provisions of the EC Treaty, and (b) with a view to realize the EC objectives.⁹² This principle thus sets the boundaries within which harmonization can be governed at the Community level.

In principle, harmonization must be correlated to the achievement of certain objectives. Harmonization is not an end in itself.⁹³ This rule is derived from Article 3(1)(b) of the EC Treaty, which states that the laws of the Member States can only be approximated “to the extent required for the functioning of the common market”. But what objective would be achieved by a harmonization in the field of collective rights management? According to the Communication, in which the Commission sought to provide arguments for a possible legislative action,⁹⁴ the aim would be to achieve a genuine Internal Market for both the off-line and the on-line exploitation of copyright and related rights.⁹⁵

The general legal basis for the pursuit of such an “internal market objective” can be found in Article 95 of the EC Treaty. According to this provision,

90. See in this respect: *Les Verts v. Parliament* (1986), E.C.R. 1339, at para. 23.

91. See K. Lenaerts and P. van Nuffel, *Europees Recht in Hoofzaken*, 2nd edn. (Antwerpen-Apeldoorn: Maklu, 1999), 911 at 136.

92. See L.A.J. Senden, *Soft Law in European Community Law: Its Relation to Legislation* (Nijmegen: Wolf Legal Publishers, 2003), 558 at 64.

93. See W.T. Eijsbouts, J.H. Jans and F.O.W. Vogelaaar, *Algemeen Deel van het Europees Recht* (Groningen: Europa Law Publishing, 2004), 390 at 119.

94. See F. Gotzen, “Collective Administration of Copyright and Community wide licensing: Copyright and Competition Law revisited” (2004), Conference on Copyright for creativity in the enlarged European Union, Dublin, June 2004, at 7, online: <europa.eu.int/comm/internal_market/copyright/docs/conference/2004-dublin/gotzen_en.pdf> (last visited: 5 October 2005).

95. See Chapter 3.6 of the Management of Copyright Communication, *supra* note 7.

measures may be adopted "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the Internal Market". In other words, the measures taken by the Community legislator must purport to iron out the differences in the legislation of the Member States that are relevant to the establishment and functioning of the Internal Market.⁹⁶ In addition, the European legislator may invoke Article 47(2) in conjunction with Article 55 of the EC Treaty as a basis to a legislative action, since collective management societies are generally held to participate in the commercial exchange of "services" in the meaning of Article 50 of the Treaty.⁹⁷ Directives may therefore be issued "for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as [service providers]". Again, these provisions intend to confer on the Community legislator specific powers to adopt measures intended to improve the functioning of the Internal Market.⁹⁸ Consequently, any measure adopted with respect to collective management societies must contribute to the well functioning of the Internal Market.⁹⁹

The European Court of Justice has consistently held that a measure may satisfy this test in two ways: (1) by removing disparities between the laws of the Member States that are liable to create or maintain distorted conditions of competition, and (2) by removing disparities between the laws of the Member States that are liable to hinder the free movement of goods or the freedom to provide services within the Community.¹⁰⁰ The Court also held that the choice of the legal basis for a measure may not solely depend on an institution's conviction as to the objective pursued. The choice of the legal basis is not a matter of discretion;¹⁰¹ it must be based on objective factors, which are amenable to judicial review, including in particular the aim and content of the measure.¹⁰²

For our purposes, it follows that harmonization in the field of collective rights management through legislative action by the Community legislator may validly rest on Article 95 of the EC Treaty and/or Article 47(2) in conjunction with Article 55 of the EC Treaty, if the said action, judged in the light of its aim and content, intends to improve the conditions for the establishment and functioning of the Internal Market, by actually contributing to the removal of

96. A Dashwood, "The Limits of European Community Powers" (1996), *European Law Review* 113 at 120.

97. See: *IFPI Simulcasting*, supra note 1 at para. 59 (with reference to *BRT v. SABAM*, supra note 10, *Musik-Vertrieb Membran GmbH v. GEMA*, *ibid.*, and *GVL v. Commission*, *ibid.*).

98. See: *Germans v. European Parliament and Council* (2000) I E.C.R. 8419, at para. 87.

99. Dashwood, supra note 96 at 120.

100. Category (1) goes back to *Commission v. Council*, (1991) I E.C.R. 2867 at para. 15, and category (2) to *Spain v. Council*, (1995) I E.C.R. 1985 at para. 33. In general, see also *Germans v. European Parliament and Council*, supra note 94 at paras 76-95 and *British American Tobacco (Investments) and Imperial Tobacco*, (2002) I E.C.R. 1453 at para. 60.

101. See Dashwood, supra note 96 at 116.

102. See: *Commission v. Council* (1987) E.C.R. 1493 at para. 11; and *Commission v. Council*, supra note 100, at para. 10.

distortions of competition or to the elimination of actual or potential obstacles to the free movement of goods or to the freedom to provide services, provided that this is supported by objective criteria. In the Communication, the Commission reasons that harmonization is necessary to remove disparities between the national regulations of the Member States that are liable to hinder the free movement of goods and the freedom to provide services.¹⁰³ In this respect, the European Court of Justice has recognized the possibility that the activities of collective management societies "may be conducted in such a way that their effect is to partition the common market and thereby restrict the freedom to provide services [...]".¹⁰⁴

Contrary to the Commission, it could be argued that harmonization may also be necessary to remove disparities between the national regulations of the Member States that are likely to create or maintain distorted conditions of competition. Disparities that relate to the regulation of the transparency of the general and financial policy of collective management societies, for example, do not seem to create too many obstacles to the free movement of goods or to the freedom to provide services. They may, however, contribute in maintaining distorted conditions of competition in cases where rightsholders are prevented from "shopping around" for the services of collective management societies. This falls squarely within the bounds of the Commission's powers, since the removal of distortions of competition is also a valid ground for harmonization.

Finally, the question must be asked whether the Community is also empowered to establish common rules on the external control of collective management societies. Although harmonization of these rules does not aim as such at the establishment and functioning of the Internal Market, since it does not directly remove distortions of competition or eliminate obstacles to the free movement of goods or services, it would, however, add much value to an efficient control of collective management societies, if there was a higher degree of efficiency and convergence with respect to these rules. In other words, a level playing field in the external control would be desirable in order to realize a true Internal Market in collective rights management. In our opinion, it can therefore be argued that harmonization of these rules may be justified under the "effet utile doctrine", according to which the powers conferred upon the Community must be given full effect to realize the objectives of the EC Treaty.¹⁰⁵

103. This reasoning can be found throughout the Management of Copyright Communication, supra note 7 and in particular in Chapters 1.2, 3.5 and 3.6.

104. See *Greenwich Film Production*, supra note 88 at para. 12.

105. This "effet utile doctrine" is developed in European case law and goes back to *Fédération charbonnière de Belgique v. ECSC High Authority* (1954-1956) E.C.R. 245, and *Walt Wilhelm and others v. Bundeskartellamt* (1969) E.C.R. 1. See Senden 2003, supra, footnote 92, at 66-67.

4.2.2. The Subsidiarity Principle

A subsequent condition in the establishment of Community legislation is marked by the principle of subsidiarity. Once the existence of a Community power has been established, this principle of subsidiarity determines whether that power may be exercised in a given instance.¹⁰⁶ In other words, this principle specifically guides the decision of whether Community powers should actually be used, or whether the objective to be attained could also be achieved by the Member States individually, using their own powers.¹⁰⁷

According to Article 5(2) of the EC Treaty, the Community level is the appropriate level "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". In order to examine whether this condition is fulfilled, three guidelines have been formulated in the Protocol on subsidiarity and proportionality annexed to the EC Treaty.¹⁰⁸ According to these guidelines, Community action may be justified if (a) the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action of the Member States; (b) action by Member States alone or lack of Community action would conflict with the requirements of the EC Treaty or would significantly damage Member States' interests; and (c) action at Community level would produce clear benefits by reason of its scale or effects compared with action at Member State level. In this respect, the Protocol emphasizes that the Community may legislate only to the extent necessary and that its measures should leave as much scope for national decision as possible.

In the present context, the question arises of whether the European Community would be the appropriate level to harmonize the regulatory framework with respect to collective rights management among the different Member States, or whether the matter should be left to the Member States to take appropriate action. In general, little debate should be expected as to whether the Community level would be the appropriate level for a harmonization in this field. Since all collective management societies in Europe operate on the basis of the national law and with respect to the territory of the Member State in which they are established, it would only increase disparities between Member States if the issue was left to them. In order to achieve a true level playing field in the collective management of rights in Europe, action at the Community level would thus be required.

This does not mean, however, that the Community level would necessarily be the appropriate level to deal with all the issues in this area. It seems, for example, that there are valid reasons to leave regulation to the Member States,

106. See Senden, *supra* note 92 at 75.

107. See Dashwood, *supra* note 96 at 115.

108. Protocol (30) on the application of the principles of subsidiarity and proportionality (1997), as has been annexed to the EC Treaty by the Treaty of Amsterdam 1997.

as far as a harmonization of specific rules on the "external control" of collective management societies is concerned. Although it may be possible for the Community legislator to generally instruct the Member States to establish specific supervisory bodies and to set up additional dispute settlement mechanisms, the details thereof can, in our opinion, be satisfactorily regulated by action of the Member States, as long as the authorities in each Member State control the same set of good governance rules. The Commission seems to have a similar opinion, where it indicates in its Work Programme 2005 that the purpose of an eventual legislative proposal would not be to harmonize all the rules governing collective management societies, but "to impose obligations necessary to the smooth functioning of the Internal Market without prejudging the legal mechanisms to be used by Member States in order to implement them".¹⁰⁹

4.2.3. The Proportionality Principle

Once it has been established that the Community has power to act and indeed may exercise this power in a given instance, yet another requirement must be fulfilled before legislation may be adopted by the Community legislator. Hence, Community action must comply with the principle of proportionality, as laid down in the third paragraph of Article 5 of the EC Treaty. This principle of proportionality concerns the intensity of Community action: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".¹¹⁰

The European Court of Justice has consistently held that the principle of proportionality is one of the cornerstones of Community law. By virtue of this principle, Community action must be appropriate and necessary in order to achieve the objectives legitimately pursued by it. This means that the action must be suitable and reasonably effective. In addition, disadvantages caused by the action must not be disproportionate to the objectives pursued. Accordingly, the positive effects and the adverse effects of the action must be balanced. Finally, if there are other equally effective, but less detrimental means to achieve the aim in question, the Community legislator must have recourse to those means. In other words, under this final requisite, the action must be necessary and indispensable.¹¹¹

In the context of the possible establishment of a Community framework in the field of collective rights management, the practical importance of the application of the principle of proportionality is that the Community legislator must not only take account of the Internal Market objectives, but that it also has to consider other issues and interests involved. It seems essential that the Community legislator shall at least take account of the impact that the intended

109. See Commission Work Programme, *supra* note 8 at 16.

110. See Dashwood, *supra* note 96 at 115.

111. See *The Queen v. Ministry of Agriculture, Fisheries & Food, ex parte FEDESA & others*, (1990) 1 E.C.R. 4023 at para. 13; and Senden, *supra* note 92 at 82.

framework may have on the nature of the subject matter, on the cultural and social aspects, as well as on the well-established legislation of the Member States.

In our opinion, the Community legislator cannot harmonize the field of collective rights management without taking due account of the collective management societies' particular responsibility for cultural and social aspects. According to Article 151 of the EC Treaty, the Community has a general aim to "contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore".¹¹² In this respect, the Community legislator is generally required to "take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures".¹¹³ As a consequence, the Community legislator is responsible for ensuring that the national and regional diversity of the cultures of the Member States will be respected. Since collective rights management is considered to be an important factor in influencing the growth of cultural and linguistic diversity,¹¹⁴ it is apparent that this deserves appropriate attention.¹¹⁵

While respecting Community law, the Community legislator should also take care to respect the well-established national arrangements as well as the organization and working of Member States' legal system. That is explicitly stated in the Protocol on subsidiarity and proportionality.¹¹⁶ However, since the rules regulating collective management societies vary from one Member State to another because of historical, legal, economic and, above all, cultural reasons,¹¹⁷ it shall not be easy to respect all these different national legal systems. As an example, we can mention the reserve funds that are set up by collective management societies in most continental European countries, for which deductions are made for social and cultural purposes. Should these "well established national arrangements" be respected by the Community legislator, even though several objections have been made against them, for example by the UK where such reserve funds do not exist?¹¹⁸ Since the Commission is considering the introduction of an obligation requiring collective management societies to indicate clearly the deductions they make for social and cultural

activities,¹¹⁹ it would appear that the Commission intends to respect the reserve funds indeed, albeit under certain conditions.

In summary, the principle of proportionality requires the Community legislator to show restraint in all its harmonization efforts. It must carefully weigh the measures it intends to establish and try to find an appropriate balance between these measures and the various other issues and interests involved. Additionally, the principle of proportionality also requires the Community legislator to show reserve as regards the form of Community action to be taken. According to the Protocol on subsidiarity and proportionality, the form of Community action should be as simple as possible: other things being equal, directives should be preferred to regulations and framework directives to detailed measures.¹²⁰ In other words, when there is a choice between several appropriate measures, recourse must be had to the least onerous. In this respect, the Commission has already indicated that, if it indeed takes legislative action, a directive would be preferable to a regulation,¹²¹ and moreover, that a framework directive seemed to be more appropriate than a detailed measure.¹²²

4.3. ALTERNATIVES TO LEGISLATIVE ACTION

Instead of adopting a directive, the Commission could also issue a recommendation, including a minimum set of principles on good practices regarding the collection and distribution of royalties, in particular regarding the distribution of royalties to rightsholders from other EU Member States. These recommendations would subsequently have to be transposed into a code of conduct by the collective management societies or which could be translated into the Member States' law.¹²³ The Community legislator has increasingly used soft law as an alternative to legislation.¹²⁴ The development of this practice can be derived from the Protocol on subsidiarity and proportionality, since it explicitly provides that the Community should legislate only to the extent necessary, that its measures should leave as much scope for national decision as possible and that the form of Community action should be as simple as possible.¹²⁵

The question that arises in this context is to what extent harmonization in the field of collective rights management could be achieved through

112. Article 151(4) of the EC Treaty.
 113. Article 151(4) of the EC Treaty.
 114. See Community Framework Resolution, *supra* note 6, No. 22.
 115. See Dietz, *supra* note 73 at 811-14 (which states that a clear focus on the cultural and social aspects can contribute to a "modern justification of copyright" that may help to defend the existence of collective management societies and their regulation).
 116. Point 7 of the Protocol on subsidiarity and proportionality, *supra* note 108.
 117. See Community Framework Resolution, *supra* note 6, Nos. 26 and 35.
 118. See, e.g., H. Cohen Jehoram, "De toekomst van auteursrechtenbureaus" (2000), *Infor-maatierecht/AMI* 156, at 160-161; H. Cohen Jehoram, "The future of copyright collecting societies" (2001), *European Intellectual Property Review* 134, at 137-38; and M. Ficsor, "Collective Management of Copyright in the International Environment" (2003), *Zeitschrift für Urheber- und Medienrecht* 3, at 9-11.

119. See T. Lüder, "Legislative and Policy Developments in the European Union" (2005), Thirteenth Annual Conference on International Intellectual Property Law and Policy, Fordham University School of Law, New York, April 2005, online: <europa.eu.int/comm/internal_market/copyright/docs/docs/fordham2005_en.pdf> (last visited: 5 October 2005).
 120. Protocol on subsidiarity and proportionality, *supra* note 108, point 6.
 121. Commission Roadmaps, *supra* note 78 at 35.
 122. Commission Work Programme, *supra* note 8 at 16.
 123. Lüder, *supra* note 119.
 124. Senden, *supra* note 92 at 21-23.
 125. *Ibid.* at 21. See also Points 6 and 7 of the Protocol on subsidiarity and proportionality, *supra* note 108.

the use of soft law, more in particular, through the issuance of guidelines or recommendations.

In order to answer this question, one must first determine what the Commission exactly means by the issuance of "recommendations". Recommendations are not uncommon in Community law, although they are not binding according to Article 249 of the EC Treaty.¹²⁶ The term "recommendations" can generally be understood as referring either to rules of conduct that aim to provide guidance as to the interpretation and application of Community law, and more particularly, to indicate the way in which a Community institution will apply Community law provisions in individual cases (i.e. the use of principles as a decisional instrument),¹²⁷ or to rules of conduct that primarily aim to steer or guide behaviour or action prior to, at the same time as, subsequent to, or independently of Community legislation (i.e. the use of principles as a steering instrument).¹²⁸ Accordingly, as the *acquis communautaire* does not yet contain legislation governing rules in the field of collective rights management, the term "recommendations" should in this context be interpreted in the latter meaning, i.e. as a steering instrument.¹²⁹

Since recommendations do not constitute a binding general Community instrument and, therefore, have only gained relative significance in the Community legal order,¹³⁰ the question can be raised, on which legal basis recommendations may be adopted by the Community institutions. According to Senden, a specific legal basis is not required for the adoption of soft law. Although the author argues that the attribution principle does indeed also apply in the case of adoption of Community soft law, it would be sufficient "that one [could] speak of a power implied in another power or task that has been specifically assigned to a Community institution".¹³¹ In this respect, it must also be noted that several provisions of the EC Treaty leave room for the adoption of soft law instruments, where they contain very general terms regarding the way in which the Community institutions should act.¹³² In this respect, we may, for instance, point to Article 95 of the EC Treaty, which allows "measures" to be adopted, without any specification of the instruments that may be used. Since the Commission has announced that recommendations should be designed in such a way that collective management societies can easily transform them into a "code of conduct", the rules of conduct to be laid down in these recommendations must be naturally intended to influence the behaviour of their addressees.

126. Article 249 of the EC Treaty mentions regulations, directives and decisions (hard law) and recommendations and opinions (soft law) only.

127. See Senden, *supra* note 92 at 156–57 (to be read in conjunction with p. 137–140).

128. *Ibid.* at 165–69.

129. Note, however, that "guidelines" may also be adopted under the heading of other soft law instruments.

130. Senden, *supra* note 92 at 169.

131. *Ibid.* at 340–41.

132. *Ibid.* at 52.

This means that the rules need to be of a normative nature.¹³³ In this respect, recommendations setting out rules on the good governance of collective management societies should not be too difficult to establish.

The question remains, however, whether possible future recommendations may also contain rules on the establishment of adequate mechanisms of external control. The answer to this question depends to a large extent on who is the intended recipient of these possible recommendations: the collective management societies or the Member States? If the Community legislator merely aims at the coordination of self-regulatory action, the recommendations would be addressed to the collective management societies only. This way, future recommendations would contain no rules on the external control of collective management societies. On the other hand, if the Community legislator also wanted to achieve a certain level playing field in the external control of the collective management societies, it would need to coordinate legislative action at the Member State level and would therefore address part of these recommendations to the Member States as well. Given the two available options, it would be desirable that each Member State regulate the control of collective management societies in their relationship with both rightsholders and users. At least part of the recommendations would therefore also have to be addressed to them.

One of the benefits of using a soft law instrument over the use of a legislative instrument is that it is possible to define more precisely the intention of the Community legislator regarding the rules to be established. For instance, whereas a possible framework directive may generally instruct the Member States to establish external control mechanisms without addressing exact details of such mechanisms, recommendations may provide additional information on the structure of an external control mechanism, for example, as regards the powers of the supervisory bodies, their composition and the binding or non-binding nature of their decisions. Of course, Member States remain free to choose whether to follow such detailed instructions and even whether to establish external control mechanisms at all. But if most Member States indeed paid attention to it, this could result in an approximation of the laws of the Member States on aspects, which could hardly be harmonized through the use of a legislative instrument.

On the other hand, the use of a soft law instrument also has its drawbacks. The downside of using soft law instruments is, in particular, that they are not directly enforceable in legal terms since they are voluntary measures. In principle, recommendations may be ignored by their addressees. The risk is that they miss their goal. These drawbacks should not be over-exaggerated. Although soft law instruments can generally be characterized by their lack of inherent legally binding force, that is not to say that these instruments are incapable of having an incidentally legally binding force or certain legal effects.¹³⁴ In the

133. *Ibid.* at 249.

134. *Ibid.* at 22 and 52 and, in detail, at 261–458.

Grimaldi case, for example, the European Court of Justice ruled that national courts may be bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.¹³⁵ Although a recommendation is a soft law instrument, it cannot, therefore, be regarded as having no legal effect at all.¹³⁶

It is also worth pointing out that if the recommendations do not achieve the desired effects within a reasonable delay, the Community legislator can always decide to adopt a Community legislative framework. In this respect, if the European legislator would choose to proceed through the adoption of recommendations, it would be advisable to include a deadline for their implementation into codes of conduct. In other words, the European legislator should prescribe a certain delay within which collective management societies would have to transform the principles into a code of conduct. In summary, it is argued that recommendations could be used as a complement to Community legislation in order to achieve proper harmonization in the field of collective rights management.

5. CONCLUSION

The discussions around the establishment of a European legal framework for collective management societies have shifted over the past few years from the wish to harmonize rules on the good governance of collective management societies to the need to solve the more pressing multi-territorial licensing issues. In this respect, the European Commission has argued that effective structures for the cross-border collective management of copyright for legitimate online music services require regulatory intervention. The main reason advanced for this lies in the fact that the market has failed to produce effective structures for cross-border licensing and cross-border royalty distribution; and that it has not rectified a series of contractual restrictions preventing authors or other rightsholders from seeking the best collective rights management service across national borders.

On 18 October 2005, the European Commission issued a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services.¹³⁷ Considering the Commission's repeated intention to regulate the matter by means of a directive, the adoption of a soft

law instrument came somewhat as a surprise. Less surprising is the fact that the Commission decided to favour Option 3 of its Staff Working Document, to give rightsholders the choice to authorize a collective management society of their choice to manage their works across the entire Union. The Recommendation is therefore addressed to the Member States and to "all economic operators which are involved in the management of copyright and related rights within the Community."

The Recommendation sets out principles with respect to the good governance of collective rights management societies and the multi-territorial licensing of legitimate online music services. Member States are invited to take steps necessary to facilitate the growth of legitimate online services in the Community by promoting a regulatory environment which is best suited to the management, at Community level, of copyright and related rights for the provision of legitimate online music services. The Recommendation further contains a number of requests directed to collective right managers. It emphasizes for example that rightsholders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the rightsholder.

Rightsholders should, in addition, be able to determine the online rights to be entrusted for collective management, the territorial scope of the mandate of the collective rights managers. Rightsholders should also, upon reasonable notice of their intention to do so, have the right to withdraw any of the online rights and transfer the multi-territorial management of those rights to another collective rights manager, irrespective of the Member State of residence or the nationality of either the manager or the rightsholder. This entails that where a rightsholder has transferred the management of an online right to another collective rights manager, without prejudice to other forms of cooperation among rights managers, all collective rights managers concerned should ensure that those online rights are withdrawn from any existing reciprocal representation agreement concluded amongst them.

Collective rights managers are also urged under the Recommendation to inform rightsholders and commercial users of the repertoire they represent, any existing reciprocal representation agreements, the territorial scope of their mandates for that repertoire, the applicable tariffs and any changes to the above. Collective rights managers are invited to abide by the principle of non-discrimination in the grant of licenses to commercial users as well as in their relationship with rightsholders. Royalties should be distributed according to principles of equity and fairness. Collective rights managers should operate in a transparent manner. In particular, they should specify vis-à-vis all the rightsholders they represent, the deductions made for purposes other than for the management services provided as well as report on licenses granted, applicable tariffs and royalties collected and distributed. With respect to the establishment of a dispute settlement mechanism, Member States are invited under the

135. See: *Grimaldi v. Fonds des maladies professionnelles* (1989), E.C.R. 4407 at para. 18. See, e.g., F. Beveridge and S. Noth, "A hard look at soft law", in: P. Craig & C. Harlow (eds), *Lawmaking in the European Union* (London: Kluwer Law International, 1998), 548 at 290.

136. See Sanden, *supra* note 87 at 467.

137. Commission Recommendation 2005/737/EC on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, O.J. L 27/6/54, 21 October 2005.

Recommendation to provide for effective solutions in particular in relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of online rights.

Of course, the Recommendation being a non-binding instrument, the Commission could set no deadline for implementation. The Recommendation does invite Member States and collective rights managers to report, on a yearly basis, to the Commission on the measures they have taken in relation to the Recommendation and on the management, at Community level, of copyright and related rights for the provision of legitimate online music services. The Commission intends to assess, on a continuous basis, the development of the online music sector, in the light of the Recommendation, and to consider the need for further action at Community level.

Only time will tell whether the Recommendation will carry enough weight to bring about the changes envisaged by the Commission with respect to the licensing of legitimate online music services. Time will also tell whether the changes brought about with respect to this narrow aspect of the collective rights managers' activities will spill over to the rest of their activities, thereby eliminating the need for a regulatory instrument on the good governance of collective rights managers. The impact of the principles set out in the Recommendation also remain uncertain particularly with regard to the relationship between collective societies and commercial users.

Chapter V Collective Management in France

*Nathalie Piskowski**

1. INTRODUCTION

The issues related to collective management are not framed in the same terms as they were ten years ago. And yet, some have condemned collective management a bit too quickly.¹ The history of the emergence of collective societies contains in itself the reasons for their existence. The oldest date back more than a century, and they either accompanied or actually preceded the creation of copyright. It is true that they may appear to have remained unchanged for some time. This stasis was not a problem in itself, as all means of consumption of works and other protected objects were known and controlled and the works were materialized and thus easily identifiable. Each new discovery and technological advance put the industries concerned at risk. Instead of using collective societies as constructive and aggressive tools, these industries used them as defensive weapons whose main role was to channel the development and consumption of works. Only in the last few years has the approach seemed more constructive and open, but it is already very late. The music industry in France has seen its volume of sales drop by 30 per cent in less than two years,² mainly due to the development of piracy, which has followed the technical evolution and expanded exponentially. What in the analog era was the preserve of just a few experts has become a common practice, facilitated by the spread and improved performance of high-speed Internet access. One no longer needs to be a computer scientist or a technician to build a tailor-made, low-cost music or video library. This structural modification of piracy has had a definite impact on collective management and its place in the evolution of copyright and the consumption of culture.

* Legal Advisor.

1. A. Bertrand, *La Musique et le Droit de Bach à Internet* (Paris: LITTEC, 2002), 216 at 87–115.
2. Source: Syndicat National de l'Édition Phonographique

Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, pp. 153–192
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These environmental transformations have also had an impact on the status of collective societies, and on how they are overseen. As long as their role was limited to the management of a few well-identified uses, the public authorities were content with a fairly superficial oversight, but as they have begun to manage greater numbers of uses and increasing amounts of money, there has been a strong demand for close supervision of these activities. Collective societies have thus been subjected to new laws more strictly prescribing the conditions for their collection and distribution activities. Today, one of the crucial problems in copyright is the issue of management of remuneration.³

The second part of this chapter will describe the nature of collective management in France, through the history of how the societies were formed. The third section will examine more in depth how these societies work and look at modalities of oversight of collective societies. Finally, this chapter will attempt to sketch out the issues and future prospects for these societies.

2. HISTORY AND NATURE OF COLLECTIVE MANAGEMENT IN FRANCE

In France, collective societies are called royalty collection and distribution societies (RCDs), a term used in the Act of 11 March 1957, which was modified by the Act of 3 July 1985.⁴ This section gives a short history of collective societies, then an overview of the categories of main RCDs and the sectors and rights covered by collective management.

2.1. HISTORY OF COLLECTIVE SOCIETIES IN FRANCE

Collective management was born in France. Its evolution paralleled the development of copyright. Discussion of authors' societies and societies managing neighbouring rights will be done separately, as the latter notion developed only in the second half of the twentieth century.

2.1.1. The Birth of Copyright Collective Societies

The history of copyright began under the *Ancien Régime*. At the time, the term used was not copyright, but "property of the product of genius". This term, far from being insignificant, influenced the approach to copyright protection throughout its history.⁵

3. T. Paris, *Le Droit d'Auteur. L'Idéologie et le Système* (Paris: Presses Universitaires de France, 2002), 232 at 25-26.
4. Law No. 85-660 of 3 July 1985 concerning copyright and the rights of performers, phonogram producers and audiovisual communication enterprises (available in French at <adminet/lois85-660.html> (last visited: 7 November 2005)).
5. I. Inchauspé and R. Godéau, *Main Basse sur la Musique: Enquête sur la Sacem* (Paris: Calmann-Lévy, 2003), 239 at 140-55.

Playwright Pierre Augustin Caron de Beaumarchais created the first ever collecting society. At the time, actors, not authors, were all-powerful within the Comédie Française. This theatre in effect held a monopoly on the performance of plays, and it pressured authors to abandon their rights. Beaumarchais refused to accept this situation and maintained that if a work has an economic life, its author must be associated with the revenues that it generates.

On 3 July 1777, Beaumarchais and twenty of his fellow writers met at the Hôtel de Hollande and created a bureau of theatre legislation, which quickly formed a collection agency, Agence Framery, named after the man authorized by notorial deed to collect copyright fees throughout France. This agency later became the Société des Auteurs et Compositeurs Dramatiques, when Beaumarchais engaged in a strike and stopped writing for three years. He won his battle: he succeeded in establishing that the basis for calculation of copyright would be clearly determined and that the purchase of plays for a lump sum would be forbidden.⁶ A large body of jurisprudence on protection of copyright was compiled over the years based on what Beaumarchais had achieved. A statute enacted on 21 July 1793 and the ensuing decree on 3 September of that year laid the foundation for all modern legislation on intellectual property by extending protection of the property rights of all types to music composers, painters, and draughtsmen.⁷

It was in this context that the second collective society, Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM), was born. One evening in 1847, the composer Ernest Bourget went to a concert café called Les Ambassadeurs. He ordered a glass of sugar water and when his bill arrived, he was indignant that he had to pay extra for having listened to his own composition while he was drinking his glass of sugar water. He therefore refused to pay the inflated bill and sued. The business court of the Seine ruled in favour of Bourget, forbade Les Ambassadeurs to play his pieces, and sentenced the manager to pay damages to the composer, although the manager objected and repeated the banned activity. The decision established jurisprudence with regard to protection of musical works.

With this success under his belt, Bourget formed a union with Victor Parizot and Paul Henrion, two playwrights, with the financial support of a publisher, Jules Colomier. In 1850, the union began to collect payments from café owners for all public performances of musical pieces, under the name Agence Centrale pour la perception des droits des auteurs et compositeurs de musique; it was renamed SACEM on 28 February 1851.

6. A decision by the Conseil du Roi dated 9 December 1780 provided that "the author must preserve for himself and his descendants in perpetuity the privilege of publishing and selling his works".
7. Ministère de la Culture, *La mise en œuvre du droit d'auteur et des droits voisins en France: leur gestion en 1990 et 1991 par les sociétés de perception et de répartition* (March 2003), report presented by the sub-directorate of legal affairs of the directorate of general administration of the Ministère de la Culture, Paris, 1993.

A fraternal conception of the body corporate was behind the creation of the first collective societies,⁸ and it endured through the years that followed. A group of writers led by Victor Hugo formed the Société des gens de lettres (SGDL), which then gave rise to the Société des compositeurs et auteurs multimédia (SCAM), to manage the rights for new audiovisual processes. In 1935, music authors and composers created the Société pour l'administration du droit de reproduction mécanique (SDRM), an outgrowth of the performing rights society, the Société des auteurs, compositeurs et éditeurs de musique (SACEM), to collect fees for reproduction using modern processes. In the 1950s, graphic artists created the Société des auteurs des arts visuels (known as SPADÉM) and the Société des auteurs dans les arts graphiques et plastiques (ADAGP).⁹

Then, new collective societies were formed as new rights were created – sometimes, even before they were created. SOFIA, for instance, was created in 1999 by publishers of printed works, on the initiative of the SGDL, which had actively lobbied for the implementation of royalties for library lending, as set out in the European Communities' Rental Directive;¹⁰ these royalties came into being with a law enacted on 18 June 2003.¹¹ This process led to the development of societies for collective management of neighbouring rights.

2.1.2. The Birth of Collective Societies for Neighbouring Rights

The Act of 3 July 1985 introduced neighbouring rights to copyright into French legislation for the first time, by applying the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which France had signed in 1961 and which it then ratified on 3 April 1987.¹² However, the 1985 statute did not create neighbouring rights, but simply affirmed a long history of jurisprudence that obliged public and private radio organizations to obtain permission from artists and producers for all broadcasts of their performances and sound recordings.

8. P. Y. Gautier, *Propriété Littéraire et Artistique*, 5th edn. (Paris: Presses Universitaires de France, 2004), 864 at 755.
9. In the graphic arts sector, these two societies, which resulted from a split, were competitors. This rivalry was resolved when SPADÉM was dissolved in 1996.
10. EC Council Directive 92/100/EBC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (2002), O.J. L. 346/61 [Rental Directive], online: <europa.eu.int/smartapi/cgi/sga_doc?smartapi:lexapiprod:CELEXnumdoc&lg=EN&numdoc=31992L0100&model=guchet> (last visited: 18 October 2005).
11. Law 2003-517 of 18 June 2003 concerning the remuneration for library (public) lending and reinforcing the social protection of authors, available in French at <www.culture.gouv.fr/culture/droit-pretexte_loi.html> (last visited 7 November 2005).
12. Law No. 85-660 of 3 July 1985 on Authors' Rights and on the Rights of Performers, Phonogram and Videogram Producers and Audiovisual Communication Enterprises (O.J. of 7 March 1985).

While this statute introduced neighbouring rights for producers of sound recordings and performers, in the form of both exclusive rights and legal licenses, it also brought the need to form organizations to collect and distribute royalties in order to implement some of the rights that had been created. Until 1985, the Syndicat National de l'Édition Phonographique (SNEP) collectively managed some of the producers' rights. For instance, the public radio network, Radio France, had paid royalties to SNEP from 1946 to 1974. In 1984, record producers gave the society a mandate that resulted in a contract with the television network Canal Plus authorizing the network to broadcast SNEP members' music videos.

In 1980s, two collective societies were created: the Société pour l'exercice des droits des producteurs de phonogrammes (SCPP) in 1985, which represented mainly, but not exclusively, multinational record companies, and the Société des Producteurs de Phonogrammes en France (SPPF) in 1987, which represented "independent" record producers. The artists' societies had been created far before in the 1950s: the Association de défense des droits des artistes musiciens et interprètes (ADAMI) in 1955, to manage the rights of solo artists and audiovisual artists, and the Société de Perception et de Distribution des Droits des Artistes-Interprètes de la Musique et de la Danse (SPEDIDAM) in 1959, to manage other musicians' rights.

When the 1957 statute was first enacted, and even more in 1985,¹³ France had a large number of collective societies, although there were not yet the 27 that exist today. It was thus important to set up a legal environment that would regulate how these societies were created and operated.

2.2. EXISTING COLLECTIVE SOCIETIES

It is not easy to determine an appropriate typology for the existing collective societies. However, there are several categories found in the annual report of the Commission permanente de contrôle des SPRD,¹⁴ which are particularly interesting in that they cover two different realities of collective management. Primary management collective societies are in direct contact with their members and often take on other missions, such as defence of their members' legal and economic interests. Intermediary societies respond to a concern with rationalization of collection and are a sort of "common gateway" for one category of rights or works. Generally, the objective of these societies is limited to collection of royalties and their distribution to their member primary management collective societies.

13. See note 4.
14. *Rapport Annuel de la Commission Permanente de Contrôle des SPRD*, June 2004.

2.2.1. Primary Management Collective Societies

For the purposes of brevity, this chapter will only discuss authors' societies and the main neighbouring rights societies in the various cultural sectors.

2.2.1.1. Authors' societies

In the music sector, collective societies were created in light of the types of rights that they had to manage. As in many countries, the most complete rights-management systems were created to manage "small rights", or rights of execution in certain musical categories (notably, songs).¹⁵ "Grand rights" are rights having to do with musical-theatre works (plays, operas, etc.) and are usually managed individually. All of these authors' societies were originally created to manage rights in the context of voluntary collective management. They were then used to manage rights under obligatory collective management, such as remuneration for private copying, for lending rights, for reprography, and for simultaneous, complete, unchanged cable retransmission.

2.2.1.1.1. SACEM

As mentioned above, SACEM is one of the oldest collective societies in the world. Its mandate is to operate and administer, in all countries, all rights involving public execution, public performance, and mechanical reproduction, and notably the collection and distribution of royalties arising from the use of these rights.¹⁶ SACEM's repertoire is made up of musical compositions, documentary works dealing with exclusively musical subject matter, most poems and sketches (SACEM, SCAM, and SACD all accept them), excerpts from dramatic and musical-theatre works shorter than 20 minutes for television and 25 minutes for radio, dubbing and subtitles for foreign films and audiovisual productions that apply to the works in the SACEM repertoire (notably music videos). SACEM manages the rights of its members worldwide on the basis of obligatory property contributions. It distributes the royalties that it collects for public performance and mechanical reproduction to its members and to foreign authors' societies with which it has concluded reciprocal representation contracts. Through these contracts, it is mandated to manage the repertoire of all of these foreign societies within its territory (mainly France, Luxembourg, and Monaco).

Royalties collected are first allocated to works and then shared among the respective rightsholders. SACEM represents more than 108,000 authors and manages a repertoire of more than 8 million works. In 2003, the society

15. M. Fiesor, *Collective Management of Copyright and Related Rights* (Geneva: WIPO, 2002), 165 at 37-49.

16. Article 4 of SACEM's corporate statutes.

collected EUR 708.5 million and redistributed EUR 577.8 million. It also devoted EUR 16.1 million to assistance to creation, distribution of live shows, and training of artists.¹⁷ Royalties are distributed as follows: one third each for the composer, the lyricist, and the publisher.

2.2.1.1.2. SACD

The Société des auteurs et compositeurs dramatiques was founded in 1777. It has three categories of members: authors and composers, heirs and legatees, and assignees admitted as members. The society manages adaptation and performance rights for the plays of its members and their right to authorize and forbid communication of their works to the public by any method whatsoever, other than dramatic performance, as well as reproduction by any method and use for publicity or advertising purposes. SACD's repertoire is made up of dramatic works such as plays, musical-theatre works (operas), choreographed works, pantomimes, and audiovisual works such as cinematographic, television, multimedia, and radio works. SACD is one of the few societies to have incorporated a form of individual management within its collective management activities.¹⁸

2.2.1.1.3. SCAM

Members of the Société Civile des Auteurs Multimédias are authors of multimedia works other than plays and musical works. SCAM's repertoire is made up of documentary audiovisual works, audio works that are neither musical nor dramatic, written works, still images, and documentary interactive works. Members may contribute their rights in management or in property for the lifetime of the society. Acting with contributions in property, SCAM manages, in whole or in part, the reproduction and performance rights for works in its repertoire as well as translation rights for published books, and the right to authorize or forbid publication of these works. Even if an author resigns, the law provides that SCAM will continue, within the limit of the author's contribution, to collect royalties due when the works declared by the author before his resignation are exploited. When works are contributed for management only, SCAM's mission is limited to overseeing executions of contracts concluded by the author (notably the collection of sums due thanks to such executions and their payment to the author). Nevertheless, if the author has so specified, SCAM is also authorized to negotiate and conclude contracts with users on the author's behalf concerning exploitation of his works.

17. Source: SACEM.

18. See paragraph 3.2.1, below.

2.2.1.1.4. ADAGP

The Société des Auteurs Dans les Arts Graphiques, Plastiques et Photographiques long shared management of graphic-art works with another society, SPADÉM, from which it split. The two societies competed fiercely until SPADÉM folded in 1996. ADAGP's sphere of activity is the visual arts and thus involves paintings, sculptures, architecture, computer graphics, photographs, illustrations, and so on. The members contribute their rights to ADAGP, which provides collective management of the performance, reproduction, and following rights for the works in its repertoire.

Nevertheless, individual management has been a part of the society's operations since it was founded. Thus, members are consulted and give their prior agreement for the publication of books, for separate reproductions, for media involving a transformation of the work, for three-dimensional reproduction, and for reproduction for advertising purposes.

2.2.1.1.5. SOFIA

SOFIA was created in 1999, on the initiative of the Société des gens de lettres, later joined by the Syndicat National de l'Édition, in order to collect the new rights created by the Act of 18 June 2003 implementing the European Lending Right Directive, and by the Act of 17 July 2001¹⁹ making authors the beneficiaries of the royalties for private copying on digital media of their works.²⁰ SOFIA began to collect these royalties and, since it was approved on 14 March 2005, it has collected remuneration for library lending rights on behalf of writers and publishers. It is administered on a parity basis by authors and publishers of books exclusively.

SOFIA's management is based on mandatory contributions with regard to lending rights and remuneration for digital private copying. On the other hand, management of new rights to come from exploitation of works on digital networks is based on optional contributions of rights.

2.2.1.2. *Neighbouring rights societies*

Unlike authors' societies, most societies that manage neighbouring rights were created to fulfil a mission of obligatory collective management attached to the non-voluntary licensing system implemented for exploitation of sound recordings. Only over time have these societies developed a greater and greater share of voluntary collective management, upon request of their members.

19. Art. 15 and following of the Law No. 2001-624 of 17 July 2001 concerning various social, educational and cultural matters (O.J. No. 164 of 18 July 2001, page 11496) available in French at <www.legifrance.gouv.fr/WAspad/UnTexteDeLoi?numjo=MESX0100056L> (last visited: 7 November 2005).

20. Measure implemented by decision No. 4 of the Commission Copie Privée, 10 June 2003.

2.2.1.2.1. The sound recording producers' societies (SCPP and SPPF)

SCPP (Société civile des producteurs phonographiques) was created in 1985; SPPF (Société Civile des Producteurs de Phonogrammes en France) in 1987, when the Act of 3 July 1985,²¹ implementing the measures of the Rome Convention, came into force. The members of these two societies are rightsholders from the same category, with the small distinction that SPPF members are exclusively "independent" producers, while SCPP's members are both independent producers and multinational record companies, thus representing more than 80 per cent of the rights of French producers. The repertoire of these societies comprises sound recordings published for commercial and music-video purposes. Both societies manage the same kinds of rights: they both distribute the royalties collected by SPRE for obligatory collective management of rights arising from the broadcasting of sound recordings and their communication in public places, as well as royalties collected by SORECOF for private copying. In addition, over time, they have developed a large share of voluntary collective management for broadcasting of music videos on television networks and for use of excerpts of sound recordings, whether on the Internet, for mobile telephones, or for on-demand listening in points of sale. Many types of uses remain under individual management by the producers themselves. When a new use emerges and producers wish to assign management to their society, the society institutes optional mandates that can be revoked without the member having to resign, which allows the impact of the mode of management of the new use to be measured in terms of remuneration. With this flexible and open approach, not only have few mandates been revoked but a growing number are entrusted to these societies.

There is another difference between these two societies: SCPP is authorized to give permission for use only within France, while SPPF has a worldwide mandate for a great number of uses. This is explained by the difference in the structure of rightsholders that belong to each society. SCPP involves mainly, though not exclusively, international record companies, which have subsidiaries in all European countries and in almost every region of the world. Each subsidiary belongs to the collective society in the country in which it operates and can thus easily control the management of its rights in each territory. SPPF involves only independent producers, many of which are small companies that do not have the resources to control the use of their catalogues abroad. It is thus more rational for these companies to provide their collective society with a mandate that is territorially broader than if they had subsidiaries in each national territory.

Unlike ADAGP and SPADÉM in the past, SPPF and SCPP do not compete fiercely. They coexist in a climate of mutual trust and sometimes pool their collected funds (particularly for collection for the use of sound recordings for telephone call waiting), and coordinate some of their distribution rules for

21. See note 4 *supra*.

greater homogeneity in order to avoid double collections. In any case, these steps toward harmonization are taken in utter respect for the national and European rules on competition and are proof that two societies may coexist and manage similar rights while responding to different expectations by rightsholders even though those rightsholders are of the same nature. SSCP and SPPF joined up very early (in 1987) within a joint society, SCPA, which represents them in organizations that allocate to categories of rightsholders the product of fair remuneration and private copying. It also pools collection for some uses arising from exclusive rights in the context of voluntary collective management (use of sound recordings for telephone call waiting).

Aside from its rights-management mission, SSCP delivers to its producer members an ISRC (International Standard Recording Code) number that identifies all sound recordings and music videos.

2.2.1.2. Artists' societies (ADAMI and SPEDIDAM)

ADAMI, the Société pour l'administration des droits des artistes et musiciens interprètes, created in 1955, is the main society for collection and distribution of neighbouring rights for performing artists; it began as a professional association affiliated with the union of performing artists. SPEDIDAM, the Société de perception et distribution des droits des artistes interprètes de la musique et de la danse, was created in 1959 by the Syndicat national des musiciens. The membership in these two societies is divided as follows: ADAMI represents performing artists, variety artists, and solo singers, dancers, and musicians, known as "label artists" (an artist is presumed to be a "label artist" when his name figures in the credits or on the label of the sound recording), and SPEDIDAM manages the rights of performing artists whose names do not appear in the credits or on the label of sound recordings. Both societies collect the same types of remuneration – that from non-voluntary licenses and from management of exclusive rights on secondary uses of the artists' performances – according to a distribution formula set out by arbitration concluded between the two parties on 11 July 1987. Divergences of interpretation that arose concerning the arbitration ruling led to a long dispute, which finally ended on 28 June 2004, when ADAMI and SPEDIDAM concluded a framework agreement that led to the creation of a joint society, the Société des Artistes Interprètes, on 29 November 2004. Under this framework, the new society makes joint distributions on the basis of distribution formulas agreed to between ADAMI and SPEDIDAM.

2.2.1.3. Producers' societies (ANGOA and PROCIREP)

For audiovisual works, the principle is that of individual management. Nevertheless, when it comes to rights for simultaneous and complete retransmission by cable and remuneration for private copying, the French law sets out obligatory collective management. Two societies have been created for this purpose, ANGOA and PROCIREP.

ANGOA (Association nationale de gestion des œuvres audiovisuelles) was created in 1981. It manages simultaneous, complete, unchanged broadcasts of audiovisual works. It collects and distributes payments on behalf of French and foreign producers registered with AGICOA (Association de gestion Internationale collective des œuvres audiovisuelles), and it exists only because management of cable-distribution rights cannot be individual under Article 8 of the Satellite and Cable Directive.²² By majority will of the producers, audiovisual collective management constitutes an exception and usually comes into effect only when it is made mandatory by the statute.

PROCIREP (Société Civile pour la répartition et la répartition des droits de représentation publique des films cinématographiques) was created in 1964 to provide collective management of audiovisual producers' royalties for private copying and for educational uses of their works by teachers. Aside from the producers that it represents, PROCIREP also has a mandate from INA (Institut National de l'Audiovisuel, which manages the audiovisual archives of French television channels and the legal deposit for audiovisual works) and broadcasters.

2.2.2. Intermediary Collective Societies

These societies are "intermediary" because they constitute an extra layer in the flows of remuneration. Characteristically, their members are primary collective societies. These common-law companies are designed to realize economies of scale. With the exception of SDRM and SESAM, they also fall within the framework of obligatory collective management.

2.2.2.1. SDRM

The Société pour l'administration du droit de reproduction mécanique was founded in 1935 and manages the mechanical reproduction rights of authors, composers, and publishers of music. Its members are SACEM, SACD, and SCAM, linked to SGDL (Société des gens de lettres); ADAGP; and a publishers' group. SDRM issues authorizations to fix to a medium and to reproduce from this recorded medium the works in the répertoires managed by its member societies. The royalties due for reproduction of sound recordings are calculated as a function of the sale price of the sound recording at 8 per cent of the retail price or 11 per cent of the wholesale price published to retailers. The royalties collected by SDRM are then distributed among the member societies on a basis

22. EC Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (1993), O.J. L. 248/15 [Satellite and Cable Directive], online: <europa.eu.int/eur-lex/lex/UrServ/LexUrServ.do?uri=CELEX:31993L0083:ENHTML> (last visited: 18 October 2005).

of 25 per cent for the author, 25 per cent for the composer, and 50 per cent for the publisher.

SDRM also receives from SORECOF and Copie France the share of remuneration for private copying due to authors and distributes these monies among the authors' societies, which then distribute the payments among their members. Nevertheless, SDRM does not have true management autonomy. Its functions essentially through SACEM's management system.

2.2.2.2. SESAM

This society was founded in 1996 and groups together authors' societies (SACD, SACEM, SCAM, ADAGP). It manages rights linked to production of multimedia programs (that is, when more than two pre-existing works are used). SESAM has always been viewed in France as the first experiment with a "common gateway" for authors, in that it was asked to manage complex requests for permission concerning multimedia productions that use several types of works (music, still and animated images, texts, graphics, etc.). It has had access to the databases of its member societies in order to fulfil its mission.

2.2.2.3. Copie France and SORECOF

Copie France (Société pour la rémunération de la copie privée audiovisuelle) was created in 1986 to collect remuneration for the reproduction of works on video media reserved strictly for the private use of the person who produces them. Copie France's board of directors includes representation from SDRM, ADAMI, SPEDIDAM, PROCIREP, and SCPA.

SORECOF (Société pour la rémunération de la copie privée sonore) is the counterpart to Copie France for private copying of sound recordings. SDRM, ADAMI, SPEDIDAM, and SCPA are members of SORECOF.

Copie France and SORECOF are the only societies authorized under the management mandates provided to them by their member societies to collect and distribute royalties for authors, performers, and producers, or their assignees, for the reproduction for private use of sound or video recordings.

The remuneration for private copying is paid by importing manufacturers or entities that make intra-community acquisitions of usable recording media for the private reproduction of sound or video recordings. It is being updated by an administrative committee created for this purpose by the CPI, for both analog and digital media.

The Act of 17 June 2001 instituted remuneration for authors and publishers of the written word and still images, while the system in place up to then included only musical and audiovisual works. Following a decision by the administrative committee on 10 June 2003, this category of rightsholders became part of the body of authors.

2.2.2.4. CFC

The Centre Français d'Exploitation du droit de Copie was created in 1996 with the mission of administering, under a legal license, the reprography rights entrusted or assigned to it by authors or their rightsholders. Its members are authors and authors' societies (Société des Gens de Lettres and Syndicat National de l'Édition), and newspaper and book publishers. Distribution is done on a parity basis between author and publisher with regard to book publishing. It is determined by an *ad hoc* committee for newspaper publishing.

2.2.2.5. SPRE

The Société civile pour la perception de la rémunération équitable groups two societies of performing artists (ADAMI and SPEDIDAM) and SCPA (which groups the two sound-recording-producer societies, SSCP and SPPF). SPRE has the mandate of collecting a "fair" remuneration with regard to certain forms of public communication of sound recordings provided for in Article L.214-1 of the Code de la propriété intellectuelle (CPI), namely cable broadcasting and retransmission, and performance in public places provided the recording is not being used as part of a show. Concretely, SPRE collects directly from radio and television networks and from discothèques. However, since 1990 SPRE has mandated SACEM to collect from sites with PA systems.

On the other hand, SPRE, which, according to its statutes, should be authorized to collect sums related to use of sound recordings in shows on behalf of performing artists, uses for which the members must have given prior authorization, has proved to be not very active in this area, due to the long conflict between ADAMI and SPEDIDAM. Thus, theatre operators must deal separately with these two societies.

3. COLLECTIVE MANAGEMENT AND OVERSIGHT OF COLLECTIVE SOCIETIES IN FRANCE

Part 3 of this chapter describes how collective societies work in three parts: their legal establishment, royalty-collection operations, and the process of distributing the royalties collected. It also examines the oversight of collective societies.

3.1. CONSTITUTION AND STATUS OF ROYALTY COLLECTION AND DISTRIBUTION SOCIETIES

The Act of 3 July 1985 devoted an entire chapter to "royalty collection and distribution societies" in the Code de la propriété intellectuelle (CPI).

3.1.1. Legal Form

Article L.321-1 of the CPI states that all RCDs, whether they are administering copyright or neighbouring rights, must be established as civil-law companies whose members are the holders of the copyright or neighbouring rights, depending on the case. The following Article (Art. L.321-2) draws the logical conclusion, in conformity with French business law, that "Contracts concluded by the civil law societies of authors or of owners of neighbouring rights, in implementation of their purpose, with the users of all or part of their repertoire shall constitute civil law instruments". One author has called attention to the fact that this capacity is a sort of "guarantee of civil quality" made to the members, themselves corporate bodies,²³ excepting, of course, producers and publishers, which are usually businesses.²⁴ If one examines the preparatory work for the act, it seems quite obvious that the legislature intended to place all of the management of literary and artistic property rights under the aegis of civil law.²⁵

This determination has a number of consequences. First, the courts with jurisdiction if there is a dispute are the common-law civil courts. Second, collective societies are not supposed to make a profit and must be content with pooling their resources to serve their members. Third, collective societies are not subjected to taxation or to commercial legislation, which is reserved for businesses. Their civil character does not allow them to evade competition law, as a case brought before the Cour de Cassation regarding SDRM has shown.²⁶ Finally, RCDs, as civil-law companies, fall under Article 1845 for civil-law companies, but only insofar as set out by the CPI.

3.1.2. Legal Bases for Activity

A collective society may, in principle, act freely if the government ministry of culture has not demanded its dissolution at the high court.²⁷ However, for certain types of collection expressly set out in the CPI, a collective society must obtain approval. Once it is established, it must obtain from its members the right to collect royalties on their behalf.

3.1.2.1. Approval

Collective societies in certain collection sectors are subject to approval, which is issued or withdrawn by the Minister of Culture. This procedure is still quite rare,

23. Gautier, *supra* note 7 at 757.
24. B. Edelman, *Droits d'Auteurs et Droits Voisins: Droit d'Auteur et Marche* (Paris: Dalloz, 1993), 360.
25. *Senat Report*, 4 April 1985, *JO Sénat CR*, 5 April 1985, at 162.
26. *Chambre Commerciale de la Cour de Cassation*, 5 November 1991, *Dalloz*, 1993, 63, note Daverat.
27. See paragraph 3.4.2.1, *below*.

as the principle remains that there is freedom of establishment and collection when societies are duly authorized by their member rightsholders. Approval is implemented mainly for copyright and neighbouring rights under obligatory collective management. Currently, approval must be issued in three categories of exploitation. The first is collective management of the reprography right, for which Act 95-4 of 3 January 1995 set out approval according to the criteria of professional qualification of the officers, the human and material resources proposed, and the equitable nature of the proposed means of distribution. Another statute, Act 97-283 of 27 March 1997, sets out an approval procedure for societies charged with management of rights for simultaneous, complete, unchanged retransmission in France of works broadcast on television in one of the member states of the European Union. Finally, a more recent act, dated 18 June 2003, requires approval for societies managing remuneration for library book lending, according to the same criteria as those above. Approval requires that the conditions for performing the activity under consideration be fulfilled, but it also requires that these conditions be respected over time, or the society may have its approval withdrawn. To date, none of the approvals issued by the ministry of culture have been withdrawn. On the other hand, some approvals have still not been issued, which is keeping certain societies from proceeding with collection. This is the case, in particular, for neighbouring rights societies, which, until recently, still did not have approval by the ministry to collect royalties for simultaneous cable retransmission of programs from member states of the European Union due to a legal dispute between producers and performers.

3.1.2.2. Assignment or mandates

Members of RCDs are not members like others. Aside from corporate members, such as film producers, record producers, and publishers of printed works, most members are individuals. It is in fact in the spirit of collective management to place at the service of a group of individuals the means to negotiate for and collect royalties that they would be incapable of collecting individually. It therefore follows that the contributions used to constitute the capital will very rarely be cash inputs. Usually, collective societies ask a prospective member to pay in a symbolic right representing one or several (depending on the case) capital shares. The contribution made by members is thus usually a contribution in kind, often – but not always (for example, societies representing corporations such as record producers) – a transfer of property for current and future rights from the member to the collective society.²⁸ Nevertheless, and

28. For example, Articles 1 and 2 of SACEM's corporate statute stipulate that its members contribute to it the right to authorize or forbid the public performance and the mechanical reproduction of their works as created, in order to permit the society to achieve its goal. For SACD, the contribution is limited to the right to authorize or forbid audiovisual

this is what creates the particularity and the infringement in common law by civil-law companies, these contributions of rights are not of the same nature as contributions to companies set out by the Civil Code. In effect, they are considered assignments on a fee basis²⁹ and are not incorporated into the capital.³⁰ Similarly, members do not share in the profits as a function of the society's results but collect a royalty that is a function of the use that is made of their works.

3.1.2.2.1. Assignment contributions

With regard to these contributions, some have evoked Article L.131-1 of the CPI, according to which "total transfer of future works shall be null and void". Of course, the directors of SACEM appeal to the spirit of the statute, which is to protect authors from overly committing themselves under pressure from the users of their works and they maintain that this provision thus cannot apply to relations between authors and their collective society – the *raison d'être* of which is to protect the authors against promoters of their works. The jurisprudence is unanimous in validating the legal basis of SACEM's activities. However, ambiguity remains as there is no agreement on what these contracts should be called. The Civil Division of the Cour de Cassation terms them fee-based transfers,³¹ while the Criminal Division tends to call them simply management mandates.

Nevertheless, an analysis of these contributions may convince us that they resemble a fiduciary operation,³² in that the collective societies manage the rights that have been contributed to them not on their own behalf, but on behalf of their members. There is indeed a property transfer, but a member may take his rights back from the collective society when he leaves without having to pay to repurchase them.³³ This concept is equivalent to a trust deposit by the member in his collective society. The contribution formula presents the advantage for the societies that use it of facilitating infringement actions, notably by providing proof of ownership of rights of the members whom it represents.

distribution. In other societies, the contribution is limited to certain types of use expressly provided for in their statutes.

29. T. Desurmont and J.-C. Desurmont, *Propriété Littéraire et Artistique*, Fasc. 1574, No. 8.
30. In this regard, Article 2ter of SACEM's corporate statute specifies that patrimonial rights contributed to it are not used in the formation of its capital.
31. Three decisions by Cour de Cassation, 1ère chambre civile of 1 March 1988. See A. Lucas, "Lecture de France", 12 *Cahiers de propriété intellectuelle*, available at <www.robic.cul/epi/Cahiers/12-1/12-1-%2012LucasAndr.htm>.
32. A. and J.H. Lucas, *Traité de la Propriété Littéraire et Artistique*, 2nd edn. (Paris: Liiec, 2001), 1132 at 699; Gautier, *supra* note 8 at 405.
33. See, however, the corporate statute of SCAM, which has rights for certain exploitations contributed to it in a limited list for the lifetime of the society, even if a member leaves.

3.1.2.2.2. Mandates

The other legal basis for the activity of collective societies is the mandate. In copyright management, the usual legal basis of rights management is the contribution; with regard to neighbouring rights, however, the mandate is mentioned expressly in legal texts (Article L. 321-10 of the CPI). Might one therefore deduce that this provision of the CPI requires neighbouring-rights societies to use the mechanism of the mandate to represent their members? Some think that this may not be the case, insofar as the legislature cannot interfere in the relations between societies and their members, and the chapter in which this Article is included is aimed at all RCDDs.³⁴ This is not the opinion expressed in this chapter, however, because this provision is aimed expressly at societies managing the rights of sound-recording producers and performing artists, and therefore the adage *specialis generalibus derogant* may very well apply. In addition, one may greet with scepticism the idea that the legislature may not meddle in the relationship between members and their society, since it has already interfered in this relationship, notably with regard to information on members.

Mandates are, by nature, revocable. Revocability presents the limitation that it leads *ipso facto* to the member withdrawing from the collective society.³⁵ Mandates also give members greater control over their society's activity and provide an important means of pressuring the society to be more transparent. There are two main types of mandates: obligatory exclusive mandate and optional mandate. Although the member may not, in principle, select the works that he wishes to have administered, he may determine which rights he wishes to have administered or assigned to his society. For instance, DG IV of the European Commission has validated SSCP to change its "music videos" mandate, authorizing it to collect royalties from television stations broadcasting music videos of its members provided that it is no longer either exclusive nor obligatory.

One drawback of the mandate, however, is that it reduces the certainty of the repertoire available to users, which can weaken the society's negotiating position. Another is that it makes infringement suits more complex because the collective society must prove that it is mandated by its members, notably when it represents foreign rightsholders, to pursue the case in the court and that they are in fact holders of the rights infringed.

While the sound-recording producers' societies manage the rights of their members solely on the basis of exclusive or optional mandates (for some uses on the Internet), artists' societies sometimes resort to the technique of contribution of rights.³⁶

34. A. and J.H. Lucas, *supra* note 32 at 709.
35. Nevertheless, see the optional mandates of SSCP with regard to interactive uses of the photographs in its repertoire. All members who have given this mandate to SSCP may revoke it and remain a member of SSCP.
36. SPEDIDAM changed its statutes in 1994 so that it would hold the exclusive right to authorize and forbid the reproduction and communication to the public of artists' performances

3.2. COLLECTION OF REMUNERATION

Collection of remuneration is the reason that collective societies exist. A study of the modalities of collecting remuneration reflects the relations that the collective societies maintain with the users of protected works or objects. In this context, it is useful to distinguish whether one is talking about copyright or neighbouring rights. On the one hand, the applicable provisions show clear differences related to the fact that the legislation on copyright predates that on neighbouring rights; on the other hand, neighbouring rights are governed, exceptionally, by a legal license system, which has a certain impact on modalities of collection, even though copyright is also subjected to obligatory management for certain uses, as we have seen above.

3.2.1. Collection of Copyright Royalties

Collective management of copyright in France takes a contractual approach,³⁷ in that uses are protected by exclusive rights (except for copying for the private use of the copier and lending royalties, which fall under legal licences). The nature of these contracts is regulated by the CPI. Article L.321-2 of the Code provides that contracts concluded with users by civil-law companies of authors in implementation of their objective for all or part of their repertoire are civil acts. This specificity seems superfluous given that the RCDDs are civil-law companies, but it was designed to decisively shield the statutes of the societies from other constraining legislation applying to commercial statutes. Article L.132-18 also defines the nature of the contracts that authors' societies are authorized to conclude with users. For instance, "representation" contracts are those "under which a professional body of authors grants to an entertainment promoter the right to perform, for the duration of the contract, the existing or future works constituting the repertoire of such body under the conditions stipulated by the author or his successors in title".³⁸

Under these contracts, the user may be a single party who may collect a specific authorization from each rightsholder. What exactly is the legal nature of the subject of the contract? Is it a royalty paid in exchange for authorization?³⁸ Or is it only a precarious authorization to use with no transfer of property?³⁹ There appear to be stronger arguments in favour of the latter despite these contracts having been attacked in court by certain categories of promoters on the charge of abuse of dominant position.⁴⁰

37. A. and J.H. Lucas, *supra* note 32 at 688.

38. *Ibid.* at 706.

39. Gautier, *supra* note 8 at 344. The author supports his thesis by citing the express infringement on the interdiction on global assignment of future works, which is not legally possible unless there is no transfer of property.

40. Discothèque operators attacked SACEM and its representation contracts in a lawsuit that lasted more than ten years and was resolved in favour of the society in a decision of

For SACD, contracts with users take a different form in that playwrights wish to preserve the possibility of negotiating directly with theatre operators the financial conditions for performance of their play. This is why SACD has concluded a framework agreement with theatre operators or their union defining the general conditions for use of works, but leaves to each rightsholder the possibility to negotiate his royalties. These royalties are nevertheless paid out to SACD, which will be responsible for then paying them out to the member concerned.

The nature of remuneration for use of the subject of the contract may vary. It may consist of a percentage of the user's receipts, as is the case for the general contracts concluded by SACEM with radio broadcasters, or take the form of a lump-sum payment.

The problem of compatibility of collective contracts with individual contracts has been raised regarding contracts concluded by SACD with the television networks. In effect, movie producers are legally the beneficiaries of a presumption of assignment of the rights of authors and thus pay remuneration to them. However, these authors have, at the same time, contributed their rights to SACD. The television networks thus contested what they considered to be a double payment, one of which had no basis. The courts decided in favour of the SACD, ruling that the basis was materialized by the services provided by the society.⁴¹ It is true that the contribution of audiovisual rights to SACD is statutorily submitted to the reservation that the society collects the royalties for authors from broadcasters.

3.2.2. Collection of Neighbouring Rights

3.2.2.1. Collection of royalties arising from exclusive rights

Article L.321-10 of the CPI determines the tool for collection of neighbouring rights.⁴² What is particularly interesting in this provision is that the contract through which the collective society represents its members is no longer termed a "general representation contract" but is called a "general contract of joint interest"; this refers directly to the notion of the mandate, since, indeed, the

3 December 1985. For a complete discussion of this case, see T. Desmuntz, "La Saocem et le droit de la concurrence" (1989), 140 *Revue internationale du droit d'auteur* 117, and A. Francon, "Le conflit entre la Saocem et les discothèques devant la Cour de Justice des Communautés Européennes" (1990), 144 *Revue internationale du droit d'auteur* 51.

41. TGI Paris 28 January 1987, *Revue internationale du droit d'auteur* 77; TGI Paris 23 September 1992, *Revue internationale du droit d'auteur* 257.

42. "The societies that collect and distribute the royalties of phonogram and videogram producers and performers shall have the faculty, within the limits of the instructions given to them by all or part of the members, or by foreign bodies having the same purpose, to collectively exercise the rights afforded by Articles L213-1 and L215-1 by concluding general contracts of joint interest with the users of phonograms or videograms for the purpose of improving the dissemination of the latter or of promoting technical or economic progress."

mandate's main characteristic is that it is of joint interest. It seems that this change in terminology is linked to problems that SACEM encountered with the discothèques. The expressly mentioned goal of these contracts, "improving the dissemination of" videos and sound recordings and "promoting technical or economic progress", is aimed at giving collective societies a way out of being accused of abuse of dominant position. Some consider, however, that the scope of this provision cannot be limited to societies managing neighbouring rights, as there is no justification for a difference in treatment between copyright and neighbouring rights, especially if this distinction goes against the interest of the former.⁴³ In any case, this provision is not strong enough to exempt collective societies, pure and simple, from the French and European rules on competition. It means only that the conclusion of a contract between a collective society, representing all of its members, and users does not constitute in itself an abuse of dominant position. If other elements characterizing such abuse accumulate, however, the collective society will not be exempt from application of the relevant positive law.

As they do for copyright, all contracts for neighbouring rights concluded with users require the users to send declarations of use, without which the royalties collected cannot be distributed among rightsholders. This aspect is considered by jurisprudence to be a fundamental obligation, which users must respect. This is the case mainly in collection of fair remuneration from radio organizations, since the modalities for calculating these royalties were set out in the Act of 20 July 1993⁴⁴ and a decision by the Administrative Committee on 22 December 1993.⁴⁵ Because the rate of broadcast of sound recordings in radio programs constitutes an element in the calculation of royalties, supplying broadcast declarations becomes a legal obligation, and the failure to do so legally actionable.⁴⁶

Users have the right to know the list of members of RCDSS. They may consult it on the premises of the society or ask for a copy. In the latter case, the collective society has the right to invoice the cost of the copying.

The CPI sets out few constraints with regard to collection in the framework of voluntary collective management. It does, however, oblige collective societies to arrange for a reduction in remuneration for associations on the ground of

43. C. Joubert, "Les sociétés de perception et répartition des droits" (1986), 128 *Revue internationale du droit d'auteur* 185.

44. Act No. 93-924 of 20 July 1993, setting the terms for calculating remuneration due to performing artists and sound-recording producers by private broadcast services, *Journal Officiel* of 21 July 1993.

45. Decision du 22 décembre 1993 de la Commission créée par l'article L.214-4 du Code de la Propriété Intellectuelle complétant la décision du 9 septembre 1987 (O.J. of 4 January 1994). Available at <www.spre.fr/artidos_bareme.asp#22dec> (last visited: 7 November 2005).

46. Sentencing of Radio France in 2000. Nevertheless, the case ended with a transaction, with Radio France agreeing to pay a lump-sum royalty for the past. The collective societies for sound-recording producers had come to agreement with Radio France on a statement format for the future.

joint interest.⁴⁷ Although this provision figures in the statutes of all collective societies, overall it has not been much applied by some societies, notably because it is not easy to define precisely what "associations of general interest" means.⁴⁸ The law does not set the rate of this reduction, leaving collective societies free to determine it.

3.2.2.2. *The collection of remuneration from non-voluntary licenses*

3.2.2.2.1. *Collection of "fair remuneration"*

Fair remuneration is the royalties due for direct communication of a recording in a public place, when it is not used in a show, on a radio broadcast,⁴⁹ or in the simultaneous and complete cable retransmission of this broadcast. The institution of the legal licence was accompanied by the obligation to set up collective management – moreover, joint collective management – since Article L.214-1 of the CPI sets out not only the basis for the remuneration, which must be based on the user's operating receipts or assessed on a lump-sum basis, but also the distribution formula at half each to artists and producers. The producers and performing artists entrusted this task to SPRE.

Another administrative committee, created by Article L.214-4 of the CPI, is responsible for determining the schedules for "fair remuneration". This committee has set the applicable schedules for various categories of broadcasters.⁵⁰ Although these decisions have given a certain basis for collection, they have not quelled the numerous court cases with users, to the point that the legislature has sometimes been compelled to intervene so that SPRE is able to collect remuneration under a decision whose term has expired.⁵¹

For fair remuneration in public places with a PA system, it is again SACEM that does the collecting, on its own behalf and for SPRE. However, users pay

47. Article L.321-8 of the CPI:

"The statutes of the royalty collection and distribution societies shall lay down the conditions under which associations of general interest shall enjoy, in respect of events for which no entrance fee is charged, a reduction on the amount of authors' royalties and of the royalties of performers and phonogram producers which they are required to pay."

48. See T. Des Moines, "La gestion collective des droits" in *Lamy Droit des Médias et de la Communication* (Paris: Editions Lamy, 2002).

49. The precise determination of what a legal license covers has generated cumbersome and complex litigation between rightsholders and users. See, notably, *SPRE v. M6 and Canal Plus* on broadcasting of music videos. The decision of the Cour de Cassation of 16 November 2004 ended a case that had lasted more than twelve years by ruling that a video recording incorporating a sound recording constitutes a distinct work submitted to the exclusive right to authorize by producers and performing artists.

50. Decision of 9 December 1987, modified 22 December 1993 for private radio stations and 1 January 2002 for discothèques.

51. In the private radio sector, the schedule, applicable until 31 December 1993, had to be validated by Parliament in the Act of 20 July 1993.

two separate invoices: SACEM's and SPRE's. SACEM then pays SPRE a global remuneration sum and invoices it for its intervention.

3.2.2.2.2. Collection of remuneration for private copying

The system is again different for the collection of remuneration for private copying. This remuneration falls under a non-voluntary license, since the act of copying for the private use of the copier was not controllable at the time when it was instituted. The modalities of collection and the remuneration schedule, payable by makers of blank media, were determined by the CPI and again by decisions by an *ad hoc* administrative committee.

The royalties are collected in the framework of joint collective management by two societies, SORECOF for private copying of sound recordings, and Copie France, for private audiovisual copying. The Private Copying Committee, which had determined the schedule for analog private copying in 1987, met again in March 2000 in order to determine the schedules for private copying done on various digital media.⁵²

3.3. DISTRIBUTION OF REMUNERATION

3.3.1. Sums Distributed

3.3.1.1. The distribution formulas

Distribution of remuneration, except for under legal licences, is not regulated by law; Article L.214-4 of the CPI provides that fair remuneration will be shared half and half between sound-recording producers and performing artists. With regard to private copying, Article L.311-7 determines the distribution formula between categories of rightsholders.

Remuneration for private copying of sound recordings goes one half to authors, one quarter to performing artists, and one quarter to record producers. Within the body of artists, distribution is done according to the provisions of a 1985 arbitration decision that remuneration would be awarded in totality to SPEDIDAM when the label does not bear an artist's name and in totality to ADAMI when the names of all the performers appear on the label.⁵³

Within the body of sound-recording producers, distribution of remuneration for private copying of sound recordings was done on a lump-sum basis at the rate of 75 per cent for the SSCP and 25 per cent for the SPPF up to 1995. After this date, it was agreed between the two societies that it would be done

52. Commission Copie Privée, Decision No. 1 of 4 January 2001; Decision No. 3 of 4 July 2002.
53. See P. Alleys, "La ventilation des répertoires entre sociétés de gestion collective", *Mémoire*, at 21. Available at <www.u-paris2.fr/adipdex/dea/promo_2003/memoire_alleys.pdf> (last visited: 7 November 2005).

"reflecting reality", which means, for example, that for 2002, 86.4 per cent went to SSCP and 13.6 per cent to SPPF.

Remuneration for private copying of audiovisual material goes in equal thirds to authors, producers, and artists.

Finally, remuneration for private copying of books goes one half each to authors and publishers.

Outside of these specific cases, the terms for distribution of remuneration collected are set out in detail in the general regulations of the respective collective society – regulations that are, as previously mentioned, submitted to the ministry of culture for scrutiny of their formulation and modification. Thus, depending on the rightsholders and the uses, the distribution formulas will be very different from one society to another. Many collective societies, notably societies of authors, have set up schedules that classify the works and sometimes even the authors.

When the declarations of use are too imprecise to use or do not exist, some societies (record producers' societies) proceed by sampling or surveys.

In all cases, each society expects its members to declare their work, their production, or their performance so that it has the elements necessary to identify the protected object in the declarations of use provided by users, unless it uses the database of another collective society.⁵⁴

3.3.1.2. Levies on monies collected

Management fees are levied on the remuneration allocated to rightsholders. These fees vary widely from society to society and depending on the use. The nature and rate of the levy on collection, which is used to fund management costs, are set by the decision-making bodies of the respective societies (board of directors and annual general meetings). On average, the percentage of the levy for all collective societies in France is around 15 per cent,⁵⁵ but this figure does not mean much since it covers situations that are very different from one society to another. In general, it is observed that the levies charged by intermediary collective societies are lower than those charged by primary societies. For instance, SCPA, SORECOF, and Copie France had a levy rate of less than 1.5 per cent in 2002, while artists' and producers' societies had a rate of below 10 per cent.

The rates for authors' societies widely vary: from 11.9 per cent (SACD) to 19.6 per cent (ADAGP). A low rate does not mean that the management charges are low; it means only that the society has other means of financing its activities. ADAMI, for example, made the policy decision to reduce the levy rate on collections from 16.5 per cent to 6.1 per cent in 2002, although its management charges grew by 9 per cent.

54. This is the case for ADAMI, which uses SSCP's database.

55. Commission permanente de contrôle des sociétés de perception et de répartition des droits, *annual report*, June 2004, p. 33.

In this regard, a representative of the Cour Permanente de Contrôle noted that the levy rates announced by the RCDDs did not correspond to reality in the sense that “the money sometimes transits through several RCDDs and what is levied on the financial products does not necessarily appear in the accounts: the figure is thus closer to 25 to 35 per cent. For all societies together, the average is 23 per cent”.⁵⁶

3.3.2. Sums that It Was Not Possible to Distribute

French law requires RCDDs to devote part of the monies collected to assistance to creation. These are monies that the societies were not able to distribute. First, this section will look at the nature of the undistributed funds, and second, at how they are used.

3.3.2.1. *The nature of undistributed funds*

Here, we must distinguish between sums allocated by law to activities of general interest and those that are allocated by the conventional route, even if they are legally framed. These undistributable funds have their basis in Article L.311-2 of the Code de la propriété intellectuelle.⁵⁷

3.3.2.1.1. The undistributed sums collected under a legal license

The CPI provides that French collective societies shall use for assistance to creation, dissemination of live shows, and training of artists, 25 per cent of the sums from remuneration for private copying and all of the sums from “fair remuneration” that could not be distributed whether due to international agreements or because the rightsholders could not be identified. There is a similar provision for sums collected for authors under reprography rights.

These sums are collected for works or sound recordings not transcribed in France or the European Union, which the exclusionary clauses of France at the time of the signature of the International Conventions kept from being distributed to rightsholders. The 25 per cent levied on private copying is a lump-sum evaluation corresponding to these situations.

56. “Les droits d’auteur, un système ‘opaque’ et d’‘un fonctionnement trop cher’”, interview with Jean-Pierre Guillard and Marie-Thérèse Cornette-Artus, president and rapporteur, respectively, of the Commission Permanente de Contrôle, *Le Monde*, 9 July 2005.

57. “On the basis of international agreements, the right to remuneration mentioned at Article L.214-1 [fair remuneration] and in the first paragraph of Article L.311-1 [remuneration for private copying] is distributed between the authors, the performing artists, the sound-recording or video producers for sound and video recordings fixed for the first time in France.”

Many authors have criticized this legal appropriation, without the consent of rightsholders, of remuneration that belongs to them,⁵⁸ and, what is more, for purposes that do not represent an “immediate general interest”.

3.3.2.1.2. Undistributed sums collected under obligatory management

Similarly, the CPI provides that French collective societies shall use for assistance to creation all of the copyright and neighbouring rights royalties collected for the simultaneous, complete, and unchanged retransmission of programs broadcast from another member state of the European Union that could not be distributed, either under the international conventions to which France is a signatory or because the recipients could not be identified or found before the expiration of a ten-year period from the date of collection.

3.3.2.2. *Appropriation of sums that it has been impossible to distribute*

Before the Act passed on 1 August 2000,⁵⁹ certain collective societies had interpreted Article L.321-9 as establishing two categories of undistributable sums:⁶⁰

- Undistributable sums in the strict sense – that is, sums that have been collected but that it has been impossible to distribute because they were not due under the Rome Convention (performing artists or producers not from a member country of the European Union or a signatory to the Rome Convention or for transcription of the sound recording outside of the European Union and the Rome Convention).
- “Undistributable” funds collected under the right to fair remuneration and the right to remuneration for private copying, which were due because they belonged to rightsholders eligible for distribution under the law but whom it had not been possible to identify or find.

The old version of Article L.321-9 left some of the undistributable sums unallocated, which enabled collective societies to fund their management costs with these sums, in conformity with the regulations. The Act of 1 August 2000⁶¹ ended this practice in the sense that there is no longer any distinction between the two categories of sums collected. Referring to sums “that could not be

58. A. and J.H. Lucas, *supra* note 32 at 562; M. Fissor, *supra* note 15 at 147-149.

59. Art. 11 and following of the Law No. 2000-719 of 1 August 2000 amending Law No. 86-1067 of 30 September 1986 concerning the freedom of communication (O.J. No. 177 of 2 August 2000), available in French at <admi.ne/fo/20000802/MCCX98001491.html> (last visited: 7 November 2005).

60. For a discussion of the situation before the Act of 1 August 2000 and the questions that this system is already raising, see A. Latrelle, “Droits voisins: la notion de sommes non répartissables” (1999), 163 *Legipresse* 97.

61. See note 59 *supra*.

distributed” either because of international conventions or because the rightsholders could not be identified, the act allocates these funds in totality to assistance to creation. In addition, the allocation of these sums is controlled, as we shall see below, by the Commission Permanente de Contrôle.

All other sums that could not be distributed for other reasons (public domain, for example, as well as sums due from the exercise of exclusive rights) are outside the scope of this chapter. It seems that at the end of the prescribed period of time, certain societies distribute the funds allocated to unidentified rightsholders to existing rightsholders according to a formula identical to the initial distribution.

The collective societies wondered about the scope and nature of the assistance to creativity actions targeted by the CPI's new Article L.321-9, but the State Council gave these actions a very restrictive interpretation in its decision of 8 December 2000,⁶² in which it specifies that the assistance to creation mentioned in Article L.321-9 should not be understood as “the use of funds for the support of activities, operations, or manifestations which would not have the direct objective of the creation of works”. Given the confusion raised by this decision, the French government gave a more detailed description of the nature of operations authorized by Article L.321-9 in a decree dated 6 September 2001,⁶³ which reiterates the State Council's restrictive interpretation.

3.3.3. Prescription of Actions in Payment

In principle, the prescription applicable to royalties for rights was that in the common law – thirty years – but the Act of 27 March 1997⁶⁴ made this regime more flexible. Nevertheless, the system adopted by French regulators does not stand out for its clarity. As one author has remarked, the prescription applicable to remuneration that has not been claimed should be the same as that applicable to periodic claims – that is, five years.⁶⁵ But the CPI sets out a two-track prescription:

- One provision in the CPI sets the prescription for payment of remuneration collected by collective societies at ten years, starting from the date of collection.
- But elsewhere in the statute, the sums that cannot be distributed may be used for assistance to creation at the end of the fifth year following their

62. Conseil d'Etat, 8 December 2000, Nos 202076 and 203626, association “protection des Auteurs Droits” and others.

63. Decree No. 2001-809 of 6 September 2001 modifying Article R.321-9 of the Code de la Propriété Intellectuelle (O.J. Numéro 208 du 8 Septembre 2001), available at <www.admi.nefj/20010908/MCCB0100470D.html> (last visited: 7 November 2005).

64. Law No. 97-283 of 27 March 1997 implementing in the Intellectual Property Code provisions from European Community Directives Nos 93/83 of 27 September 1993 and 93/98 of 29 October 1993.

65. Gaunter, *supra* note 8 at 766.

being made available for distribution, and this, the CPI specifies, “without prejudice to claims for payment of non-statute-barred royalties”.

In other words, at the end of a five year term, the collective society may use the royalties collected that it has not been able to distribute to a specific rightsholder for the purpose of “assisting creators”. But if this rightsholder turns up in the five years following the use of these sums, the collective society will be required to reimburse the sums due. This provision creates a legal insecurity that is incompatible with the management of such large sums. In addition, it accentuates the concern that often weighs over the use of sums belonging to rightsholders for purposes of general interest. One may hope that the legislature will provide a bit more clarity and, especially, more simplicity.

In this regard, a recent decision by the Court of Appeal specified that “fair remuneration, like remuneration for private copying, is independent of any membership in a collective society” and that even if society general rules subjected payment of this members' remuneration to a declaration of sales, payment cannot be refused to a member for the period before he joined, because the collective society is required to reserve its portion of the member's royalties throughout the period of legal prescription.⁶⁶

The complex organization of collection and distribution of copyright and neighbouring rights royalties is today the object of oversight by the public authorities. This oversight has evolved clearly in the last five years into a completely separate tool serving the ministry of culture as the “trusteeship authority” over collective societies.

3.4. OVERSIGHT OF COLLECTIVE SOCIETIES

The system for monitoring collective societies has not always been the way it is today. Until about five years ago, it was small and not very restrictive for collective societies. A socialist senator, Michel Charasse, led a movement that resulted in a major reform of the system for monitoring the operations of collection and distribution societies. There are both internal oversight systems and external types of monitoring.

3.4.1. Internal Oversight

There are two types of internal oversight systems: monitoring performed by the members of their society, and the audit performed annually by the statutory auditor.

66. *P. Gaviglio v. S.C.P.P.*, (2003) [published] (*Cour d'Appel de Versailles*, 1ère chambre, 1ère section.).

3.4.1.1. *Monitoring by the members*

Before 1 August 2000, Article L.321-5 of the CPI set out a short list of documents that members could obtain in the context of their right to communication. The 1985 Act⁶⁷ thus did not provide for a direct application of Article 1855 of the Civil Code, which sets up permanent access to information for members by authorizing them to ask questions about corporate management in writing to the directors of companies. In this sense, Article L.321-5 of the CPI overrides the common law of civil-law companies.⁶⁸ This is explained by the fact that many collective societies have large numbers of members and express concern with protecting these societies against abusive and untimely requests. But the Act of 1 August 2000⁶⁹ modified this approach greatly by providing that "the right to communication provided for in Article 1855 of the Civil Code shall apply to royalty collection and distribution societies, but without a member being able to obtain communication of the amount of royalties distributed on an individual basis to any other rightholder than himself".

A decree dated 17 April 2001⁷⁰ described the right to communication of all members of RCDDs. The right to information has a permanent aspect and a recurrent aspect.

Under the permanent right to communication, the member may ask the society of which he is a member, at any time, to communicate the list of company managers; a table showing over a five-year period the annual amounts collected and distributed and the levies for management fees and other levies; a document describing the applicable distribution rules; the total royalties due to him over the last twelve months; and a description of the manner in which this product is determined.

The right to recurrent communication may be exercised only during annual general meetings – thus, once a year. It is provided that before the annual general meeting at which the accounts are approved, any member has the right to see a certain number of documents to which members of civil-law companies must have access under common law. This right may be exercised during the two months preceding the annual general

67. See note 4 *supra*.

68. This in effect is what a decision by the Chambre Civile of Cour de Cassation of 9 October 1991 stated: "In listing four series of documents about which the members of collection societies have the right to obtain communications, Article L.321-5, which transposes to collection and distribution societies the rules [of commercial law], has the objective of overriding, by these particular provisions, the provision of Article 1855 of the Civil Code." (See comment *above*). *Revue internationale du droit d'auteur* 291.

69. See note 59 *supra*.

70. Decree No. 2001-334 of 17 April 2001 "portant modification de la partie Réglementaire du code de la propriété intellectuelle et relatif au contrôle des sociétés de perception et de répartition des droits", (O.J. No. 91 of 18 April 2001), available at <admin.net/jof/20010418/MCCB01001811D.html> (last visited: 7 November 2005).

meeting. However, the member must make the request in writing to the society specifying the documents that he wishes to see. The collective society may organize to have documents consulted on its premises, without the member being able to make a copy. This is a simple right to consultation. Aside from these documents linked to collective management, the decree extends the right of communication to documents of common law such as annual accounts, the text of resolutions at the annual general meeting, the directors' reports, the amount of the five or ten highest pay-outs, the list of investments with their yield rate, a table of organizations in which the society has shares, and a statement of the main categories of users and the amount of royalties paid during the year.

Any member who is refused communication may appeal to a special committee composed of at least five members elected at the annual general meeting from among those who are not corporate officers. Every year, this committee must make a report and transmit it to the ministry of culture.

The decree sets out another precaution to ensure that the member's right to communication is respected: an officer of a collective society that refuses to communicate the list of items mentioned in the pertinent articles is liable for the fines set out for third-class infractions.

The decree also set out limits to the right of communication with a view to protecting collective societies against demands that could put them at risk. For instance, this right could be exercised only within the limits of the rules of confidentiality and commercial confidentiality with regard to third parties. In addition, the member could not have access to personal information, documents made in preparation for decisions by corporate bodies, or documents related to an ongoing court case. Similarly, a collective society confronted with repetitive and abusive demands would be well founded in refusing access to the maker of these demands. However, this provision was in large part squelched by the State Council, which left as a single firewall the protection of collective societies against repetitive and abusive demands.⁷¹

In general, both before and after the Act of 1 August 2000⁷² came into effect, disputes between members and collective societies have been quite rare. Among the few examples are the disputes between ADAMI and a collective of performing artists,⁷³ a dispute that implicated SACEM, and a dispute between

71. Decision by the State Council of 25 October 2002. This decision deemed that in setting out the limits to the right to information of members other than those resulting from the act (the member could not obtain information on distributions made to a member other than him), the authors of the decree did not set the terms for exercising the right to communication but defined its extent and thus ignored the provisions of the act.

72. See note 59 *supra*.

73. The Cour d'Appel de Paris, 4ème chambre, referred 21 January 1998, unpublished, had refused the members of ADAMI the right to require adding to the agenda of an annual general meeting a question regarding conditions and terms of laying off an officer of a society because "the rights to information and communication recognized for members

SCFP and one of its producer members concerning an ongoing court case. In this last case, the SCFP had refused to communicate a certain number of items to a member who had requested them because the court case had not been decided and the production of these documents would have put SCFP's legal strategy in peril. It is regrettable that the provisions of the decree limiting this type of request were deleted.

Before the Act of 1 August 2000 was passed, some emphasized that the rarity of these disputes could be interpreted as a sign either that members were totally satisfied with the provision of information to them or that they were completely ignorant of their rights.⁷⁴ It seems that the latter interpretation prevailed, given the cumbersome system in place. It is true that the level of information set out prior to the Act of 1 August might have seemed insufficient. However, from this observation, the diametrically opposed conclusion was reached; this had the effect of mobilizing large numbers of staff within collective societies, with corresponding budgets, and it nevertheless did not really protect collective societies against untimely demands. It may have been possible to envisage a middle road between the two alternatives.

Aside from these provisions, the CPI allows members to force the designation of a minority expert. This faculty is inspired by the system for corporations and was already present in the statutes of some collective societies⁷⁵ in various forms. As stated at the end of Article L.321-6, paragraph 1, "Any group of members representing at least one-tenth of the membership may take legal action for the designation of one or more experts to be entrusted with submitting a report on one or more administrative operations". The same provision gives the equivalent power to the public prosecutor.

This internal oversight is accompanied by oversight by the statutory auditor. This control is, however, less specific and relates much more to the legal status of collective societies as civil-law companies.

3.4.1.2. Oversight by statutory auditors

The provisions concerning the appointment of auditors are taken from the act on commercial businesses and are not remarkable. Article L.321-4 of the CPI states, "The royalty collection and distribution societies shall be required to appoint at least one auditor and one alternate" from an official list. This text also subjects the auditors to penal provisions in the business act that crack down on non-revelation of tortious facts and the confirmation of false information.

are specifically defined by the provision of the Code de la propriété intellectuelle and in particular by Article L.321-5⁷⁶.

74. F. Mariani Duchay, J.F. de Canchy, M. Lê Nhat Binh, and M.C. Vitoux, "Les sociétés de perception et de répartition des droits d'auteur et droits voisins" (February 2000), available from the Ministère de la Culture, at 114.

75. SACEM, ADAMI, PROCIREP, SACD.

Alongside elements of internal auditing required by law are external auditing structures, which have become much more complex and in-depth since the Act of 1 August 2000.⁷⁶

3.4.2. Mechanisms for External Audit

There are two types of external audit measures. First, audits are conducted by the ministry in charge of culture (and, incidentally, by the judicial authority) through a right to information. Second, after 1 August 2000 a permanent audit committee was set up dedicated to ongoing monitoring of the activities of collective societies.

3.4.2.1. Audit by public authorities

Prior to the Act of 1 August 2000, there was only one type of external audit, along with, of course, the audit by the judge who intervened to sanction, if necessary, an improperly held meeting, questionable distributions, or any other behaviour subject to credit guarantee. But this type of audit is self-evident in any legal system with a minimum of organization.

The government had, and still has, an audit power that is manifested in two ways: first, it benefits from a right to information that enables it to intervene in the case of irregularities; and second, it intervenes indirectly in the process of formulating certain types of remuneration.

3.4.2.1.1. Audit through the right to information

In the bill that was to become the Act of 3 July 1985, it was proposed that RCDs would be subjected to the approval of the Minister of Culture because certain members of Parliament felt that the collective societies were exerting a monopoly resembling a monopoly of fact.⁷⁷ However, this approach was not selected. The mechanism adopted was the following: the minister in charge of culture may require an audit of RCDs when they are formed and at certain key times in their existence.

3.4.2.1.1.1. When RCDs are formed

In general, the minister of culture does not have an active audit power at the time that a collective society is formed. The CPI accords the minister a right to intervene *a posteriori*. In fact, when a collective society is formed, it must send its draft statutes and general rules to the Minister of Culture, who may, within a month after receiving them, demand that a civil-law judge dissolve them if he feels that there are real, serious obstacles (such as obvious illegalities) to the

76. See note 59 *supra*.

77. Hearing of Jack Lang before the Commission spéciale du Sénat, *Rapport Tolbois*, No. 212, Vol. 1, at 89.

creation of the society. The criteria for evaluation are essentially linked to the professional qualifications of the society's founders and the human and material resources that they propose to implement to ensure recovery of royalties and exploitation of the repertoire. This power has been used by the government only twice in twenty years, when the Minister of Culture appealed to a civil-law judge upon the occasion of the constitution of PASA France and of JAPAS. The first represented American artists, the second Jamaican artists, and 90 per cent of the remuneration collected in France on behalf of these artists was not distributed to them.⁷⁸ With regard to JAPAS, its creation was rejected by the high court because the society being formed had no material or human resources. It is indisputable that rejection of this society was well founded. It is regrettable, however, that the message that came out, conveyed by adversaries of collective management, was that foreign collective societies could not be established in France due to the monopolies of fact held by French collective societies. This power seems a bit disproportionate to be truly effective and put pressure on negligent directors.

As previously mentioned, the Minister of Culture may issue or withdraw approval for certain societies responsible for obligatory collective management of certain rights.⁷⁹ However, approval seems to apply only to French RCDSs, as it was considered that the public authorities could not impose approval on RCDSs of the states of the European Union due to the community law principles of freedom of service delivery and freedom of establishment.⁸⁰

3.4.2.1.1.2. At key times in the life of a collective society

This oversight mechanism enables the Minister of Culture to ensure that there have been no irregularities during the life of the society, notably at the time of the annual general meetings, when RCDSs approve the annual accounts and modify their statutes. RCDSs must send their annual accounts to the Minister and inform him at least two months before the annual general meeting studies any plan to modify their statutes or their rules for collection and distribution (usually set out in their general rules). The Minister may also request that RCDSs send him all documents regarding collection and distribution of royalties and a copy of the agreements made with third parties. The Minister may collect these documents on the premises.

On the basis of this provision, the Minister of Culture, with the authorization of the Minister of Finance, had an audit of the management of ADAMI conducted in a joint inspection by the Inspector General of Finance and the Inspector General of Administration of Cultural Affairs, and a report was issued in February 1997. A conflict of an internal nature between a group of

78. A. Bertrand, *supra* note 1 at 96.

79. See Section 3.1.2.1, *above*.

80. *Rapport Laffite*, made for the Commission des affaires culturelles du Sénat on the bill on transposition of directives No. 93/83, of 27 September 1993, and No. 93/98, of 29 October 1993, No. 240, appended to the minutes of the session of 21 February 1996, at 27.

members and the officers of ADAMI had provoked very heavy criticism of the society's management. The report led to a strengthening of the right to information for the Minister in charge of culture and the members of collective societies, implemented by a decree dated 18 November 1998.⁸¹

No sanction has been defined for a situation in which a collective society does not respect the obligation to inform the Minister of Culture. It seems that the only tool the Minister would have is the threat of seizure by the high court because the society has been found guilty of these infractions and would no longer fulfil the conditions for administration of the rights for which it is responsible, but this would seem not very credible. Nevertheless, Article L.321-11 of the CPI provides that if the law is violated, the court may forbid a society from continuing with its collection activities in one sector or for one mode of exploitation. This faculty has never been implemented to date by the French courts, as the sanction is excessive for the minor nature of the infractions.

For approved societies, the threat of withdrawal of approval is probably a more effective means of pressure in that it does not put the very existence of the society at risk. Nevertheless, this type of oversight, which the public authorities have refused to call "trusteeship",⁸² is clearly not meant to meddle in the affairs of collective societies, which manage private property rights. It is intended simply to regulate activities for which the financial stakes are growing year by year.

3.4.2.1.2. Surveillance of the formulation of certain kinds of remuneration

This aspect of the involvement of the public authorities in the activities of collective societies is special. It consists of surveillance and of assistance with the formulation of certain types of remuneration linked to non-voluntary licenses or to obligatory collective management. The CPI provides for the creation of administrative committees with the mission of determining the amount of remuneration and the terms of collection. This determination is made through extensive consultation with representatives of the rightsholders concerned, paying users, the state, and, if necessary (with regard to private copying), consumers.

81. Decree No. 98-1040 of 18 November 1998 amending the Regulations under the CPI (O.J. No. 268 of 19 November 1998), available at <www.admi.net/fo/19981119/MCCB9800751D.html>.

82. Rapport Mariani Ducray, *supra* note 60(?) at 133: "It is definitely not trusteeship in the sense that a person placed under the trusteeship of another may not in general make strategic or management decisions except with authorization or approval for each decision by the trustee". See also the report *Assemblée Nationale* 2235 by M. Alain Richard of 26 June 1985: "The creation of the state's right of review over these societies in no way has the objective of creating a trusteeship over their activities".

To date, two committees have been created. They have met to update the remuneration that they originally set:

– The Commission pour la fixation des montants de rémunération équitable pour la communication de phonogrammes du commerce dans les lieux publics ou leur radiodiffusion. This committee was originally a committee by default and was to meet only if there was no agreement between rightsholders and users. Today, it is the tool for determining and modifying fair remuneration for communication of commercial sound recordings in public places and broadcasting. This committee is chaired by a magistrate and composed of a member of the State Council, a qualified person appointed by the Minister of Culture, and representatives of the rightsholders and users concerned.

– The Commission pour la détermination de la rémunération au titre de a copie privée. This committee is chaired by a government representative and its members are representatives of rightsholders (50 per cent), media manufacturers and importers (25 per cent), and consumers (25 per cent). Its mandate is to determine, for private copying, the types of media, the remuneration rates, and the terms of payment.

This type of involvement does not approach the oversight by public authorities of how RCDDs manage themselves. It is, however, an example of intervention in the essential process of negotiations over remuneration and modes of collection. Recourse to the committees system is closely linked to obligatory collective management.

The recent major reform with regard to oversight of RCDDs has been the creation of the Commission Permanente de Contrôle.

3.4.2.2.

La commission permanente de contrôle

Article L.321-13 of the CPI, introduced through the Act of 1 August 2000,⁸³ created the Commission permanente de contrôle des sociétés de perceptions et de répartitions des droits. This committee's five members, appointed by decree for a five-year term, are magistrates from the Cour des Comptes, the Cour de Cassation, the State Council, and one member each of the Inspection générale des finances and the Inspection générale de l'administration des affaires culturelles. The committee draws a large share of its status from the Cour des Comptes.

The committee's mission is to oversee the accounts and the management of RCDDs. It examines the internal audit procedures; the use of sums for assistance to creation, which constitutes a particularly important aspect of its oversight; the statutes; and, for the largest societies, the distribution procedures. A decree

83. See note 59 *supra*.

describes the details of its operating terms.⁸⁴ The officers of collective societies are required to cooperate with the committee, or they may be taken to court for obstruction or refusal to respond to the committee; if convicted, they may be sentenced to one year of prison and to pay a fine of EUR 15,000.

The committee has a very broad right of access, ranging from any document necessary to the execution of its mission to computer data and software used by the society to make its distributions. It also has the right to ask for a transcription of the computer data by any appropriate processing means so that the data are directly usable in the context of its mission. In addition, it may question the society's auditors, who are then released from their obligation of professional confidentiality, for any information on the societies that it investigates.

The committee makes an annual report, which it sends to the societies concerned under the adversary principle. The societies make observations on the part of the report that concerns them. The observations are appended to the final report, which is then presented to Parliament, to the government, and to the annual general meetings of the societies.

It is important to note that despite its broad investigatory powers, the committee has no decision-making power, and its objective is not to meddle in the management of the societies. Its mission, like that of the Cour des Comptes, is to exercise an oversight of legality and not of opportunity.⁸⁵

From this point of view, the approach has not changed much since the preparatory work mentioned above. The objective is to strengthen oversight of collection and distribution operations (notably the destination and use of the portions of the remuneration collected that are to be used for assistance to creation) and make collective management more transparent.

Although the committee has the ability to present a report, it audits the accounts of RCDDs only every two years, and it has published, to date, two reports (late 2002 and July 2004). Twenty-two out of the twenty-seven existing RCDDs are under oversight. These reports are particularly useful in that they give an overall view of collective management in France.

4. CHALLENGES AND ISSUES FOR COLLECTIVE MANAGEMENT IN FRANCE

The evolution of the uses of protected works or objects due to the advent of Internet communication, which has raised problems and questions that remain unresolved, has led to a questioning of collective management. One of the main issues that must be decided concerns collection of royalties for cross-border uses.

84. Articles R.325-1 to R.325-4 of the CPI.

85. Gaugier, *supra* note 8 at 774.

The problem posed today, in fact, is how to deal with the multiplication and rapidity of uses. Collective management must be sufficiently responsive to react to massive requests for uses and to adapt to their innovative character in order to stem piracy. If piracy continues to exist in a stable market, *a fortiori* the absence of an appropriate response to the new requests for use, or rejections of them pure and simple, will inevitably lead to and intensify the impact of this phenomenon. At the same time that they become more responsive, collective societies must keep in mind that they are above all at the service of their members, the rightsholders.

These two requirements are sometimes difficult to reconcile, since certain categories of rightsholders wish, for legitimate reasons, to hold back the collective management of certain uses and manage other types of exploitation – notably the new forms – individually.

In the perspective of taking into account the expectations of the members while responding to the demands by users for rationalization, some societies have created initiatives, although these have not really resulted in concrete implementation.

4.1.

THE INITIATIVES

For the purposes of this chapter, three initiatives have been selected, two of which, although international, are marked by a very major involvement of two French collective societies and, in this respect, are pertinent here.

4.1.1. Project Harmony/ORS (Open Right System)

The society of sound-recording producers (SCPP) and five partners (CRYO Interactive, a multimedia production company; Imagia and Simina, Belgian collective societies for neighbouring rights; PPL, a British collective society for neighbouring rights; and SELL [Syndicat des Editeurs de Logiciels de Loisirs]), responded to a call for proposals by the European Commission, Info 2000, with a project whose objective was to develop and implement software enabling multimedia producers to obtain from rightsholders the authorizations necessary to use their works or objects protected by intellectual property rights.⁸⁶ The highlight of this project was that it also respected the choice of rightsholders with regard to the type of management of their rights (individual or voluntary collective management).

The software was to allow a search for protected works or objects in databases; identification of works or objects through excerpts and reduced-size reproductions; identification of rightsholders; direct exchange between the rights holder and the user to negotiate rates or simply to obtain information;

86. See the website of SCPP, online: <www.scpp.fr> (last visited: 19 October 2005).

storage of objects in digital form to permit issuance; and secure payment of royalties.

This software was designed to be employed by a range of potential users such as associations of multimedia producers, collective societies, and umbrella societies for a number of rightsholders' associations. With regard to the last, some collective societies, such as IFFRO, showed interest in the project. The partners produced a model that was then presented to the European Commission as part of another program ("eContent"), which was planning to produce a common gateway for authors and sound-recording producers. The project was not selected by the Commission.

4.1.2. Attempts to Institute World Licences

Two French societies have had an important role in international initiatives attempting to rationalize the issuance of authorizations for exploitation of works and sound recordings on the Internet. These are the Santiago Agreement,⁸⁷ implemented under the aegis of CISAC, and the IFPI Simulcasting Agreements.⁸⁸

4.1.2.1.

The Santiago Agreement

Given the massive and daily use of works on the Internet and the intrinsically multi-territorial character of this vector, it is increasingly necessary to set out simple, rational mechanisms for authorization. Bilateral, reciprocal performance agreements already existed between societies of authors permitting them to be represented mutually on their respective home territories. SACEM⁸⁹ and its foreign counterparts concluded a new type of multi-territorial and multi-repertoire agreement in Santiago, Chile, in September 2000. This is in fact a frame contract the goal of which is to allow bilateral agreements between users and collective societies. The Internet user makes a contract for a world licence with the collective society in the territory on which the user's site is installed. Each society is thus able to offer to users the repertoire of third-party collective societies. In May 2004, the European Commission, which had found out about these agreements, made a grievance to SACEM in which it objected to the fact that it was impossible for users to select the collective society of their choice and that the local collective societies therefore had territorial exclusivity.⁹⁰ It is very likely that these agreements, like the Simulcasting Agreement below, will evolve to take account of these concerns.

87. Notification of "Santiago Agreement" (COMP/C2/38.126), O.J. C. 145/02 (2001).

88. Notification of "IFPI Simulcasting Agreement" (COMP/C2/38.014), O.J. C. 231/18 (2001).

89. T. Desurmont, "Les accords de Santiago", *Auteurs et Médias* (2002): 135-39.

90. Notification de l'accord de coopération in O.J. C. 145/2 of 17 May 2001, Case COMP/C/2/38.126, and press release IP/04/586 by the Commission dated 3 May 2004.

4.1.2.2. *The IFPI Simulcasting Agreement*

The French society managing the rights of sound-recording producers, SCPP, did not immediately sign on to the draft IFPI Simulcasting Agreement. Nevertheless, it did participate actively in the formulation of its content. This agreement's objective was to facilitate the issuance of authorizations for simultaneous and complete retransmission of broadcast programs online by issuing worldwide authorizations for a repertoire that is also worldwide. The agreement is based on the principle of the destination country, and the applicable rate is calculated as the sum of the national rates of the territories in which the retransmission took place.

The European Commission at first felt that this agreement clearly reduced competition,⁹¹ but it nevertheless accorded an exception because it believed that this "single gateway" served the interest of promoters and the general public. The exception was accorded in return for two substantial modifications to the accord. First, IFPI and its members had to agree to delete the notion of territorial exclusivity under which, as in the Santiago Agreement, users were obliged to address the society within the territory on which their website was hosted. Second, the accord had to include a limited form of price competition by showing the society's management fees in the applicable rate so that the promoter could choose the collective society with which he wanted to have a contract as a function of more competitive management fees.

Although the concerns of the European Commission with regard to competition are well founded, implementing such propositions is difficult. Indeed, it is hard to imagine in practice that operators of websites hosted in France would negotiate a contract in Austria or Greece even if the management fees appear more competitive than in their host territory. This type of approach bears the risk of two perverse effects: on the one hand, it will favour the wealthiest collective societies, which reflect the advantage of economies of scale in their management fees, thus creating a sort of management oligopoly and, on the other hand, this choice will not be truly interesting except for users with international structures and thus subsidiaries in each territory where programs are received. Therefore, it is not certain that over the long term, this type of contract, as amended by the Commission, favours healthy and balanced competition. An agreement of the same type was formulated between these partners for webcasting uses.

4.1.3. *CSPLA's Work in Collective Management*

The third initiative, aimed at moving collective management toward more simplicity and rationality, arose from the work of the Conseil Supérieur de la Propriété Littéraire et Artistiques CSPLA, created on 10 July 2000, instituted a special committee to investigate the implementation of a common gateway.

91. Case No. COMP/C 2/38.014-IFPI "Simulcasting".

The committee's mission letter stated, "The current complexity of the search to identify the respective rightsholders makes it necessary, in effect, to formulate a simplified management mechanism that will contribute to broader exploitation of works and to richer and more diversified production".

The committee envisaged two formulas: true joint management of all societies' repertoires, or a pooling of all available information that would allow works or objects and rightsholders to be identified. During the committee's deliberations, the participating collective societies emphasized that it would be difficult to implement a "single gateway" due to divergences between the different categories of rightsholders, which would reduce the effectiveness of such a structure. On the other hand, the societies concerned were more in favour of a common gateway system for certain categories of rightsholders.

Finally, the committee issued a statement⁹² in which its recommendation was

"to favour, over the long term, the implementation of an information and orientation platform common to all royalty collection and distribution societies that will ensure, by the interconnection of databases of the different societies, identification in a single consultation of the sought protected works or objects listed in the repertoires of these societies, their rightsholders, and the nature of the rights that can be acquired on them. Users will be directed electronically to the rightsholders, from which they may acquire online rights".

In other words, it was much ado about nothing, especially because this recommendation had no long-term follow-up. The Council is continuing its deliberations on collective management in the digital era. A new special committee was created by an engagement letter dated 22 October 2004, to deal with the legal aspects of multimedia works; the committee will examine the place of collective management with regard to these works.

5. CONCLUSION

Collective management, often burdened by several layers of management, has become more complex over the years, making the system difficult to understand for rightsholders and users. The report by Ms. Martani-Ducray⁹³ presents the architecture of the collection system in France in a fairly meaningful way.

For mechanical reproduction, there are two levels of management between the first collecting society and the final beneficiary rightsholders.

92. Avis du CSPLA 2002-2 regarding implementation of a common gateway.

93. Martani-Ducray, "Les Sociétés de perception et de répartition des droits d'auteur et de droits voisins", February 2000. Available at <www.culture.gouv.fr/culture/actualites/rapports/martani/sonmairie.htm> (last visited: 7 November 2005).

- For fair remuneration, there are two or three levels.
- For private copying, there are, for almost every category of rightholders, three levels between the collecting society and the rights holder receiving the royalty (*see also* appendix 4).

Prospects for mergers exist over the medium and long terms. Some societies are tending to group together in joint societies to achieve economies of scale in the context of identical distribution and in order to be able to present users with a single interlocutor. It is much too early to say with certainty if these groupings will turn into mergers, but the trend is very much in the air.

Another trend in recent years is sharper questions about the right to competition. On the one hand, on the French level, DGCCRF (Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes), which is a directorate of the Ministry of Finance whose mission is to ensure respect for the rules of competition, is more and more often appealed to by mistrustful and often ill-informed users. On the other hand, at the European level, the European Commission intervenes quite frequently in initiatives developed by collective societies, arguing that these may have effects on competition in domestic markets.

Although, collective management does not appear at all threatened by the rapid development and constant innovation of uses, it goes without saying that the societies will have to adapt, become more responsive (at least, some of them) and more truly transparent than they are today. This will happen when French collective societies accept regulation of collective management at the European level, which they have always opposed vigorously. This systematic opposition has been effective, since to date there still is no proposal for a directive on the issue (though the recent report by the Direction Générale du Marché Intérieur on cross-border management of rights may augur a rapid change). In any case, societies find themselves today in a situation in which their activity is regulated case by case by administrative jurisprudence (the IFPI Simulcasting case and, soon, the Santiago Agreement), while the complexity of this activity requires, above all, a global approach, or else it may give rise to unrealistic solutions, as mentioned above.

Collective management is, and will remain, indispensable to the management of rights in the context of new uses. However, it will have to evolve to take account of different, probably more refined forms.

Chapter VI Collective Rights Management in Germany

*Prof. Dr. Jörg Reinbothe**

1. INTRODUCTION

Corresponding to the continental European traditions and principles, copyright protection in Germany has always focused on, and has its origin in, strong rights for authors. For centuries, authors of music, literature and art have been synonymous for German cultural and societal values. To safeguard the economic interests of authors in Germany, authors' societies have developed as collective organizations of authors and have served as intermediaries between authors and users for more than 100 years. As the authors' trustees, such societies were originally designed and founded by the authors themselves and their music publishers to effectively control and collectively manage their rights, and to defend their interests in general.

Today, with more than 80 million inhabitants, Germany has the largest population of all EU Member States. It is at present the biggest domestic market for copyright-based goods and services in Europe. A significant proportion of the German economy is therefore closely related to, if not based on, copyright protection – be it in the area of music, print media, broadcasting or film.¹ Collective rights management carried out by CMOs is now a well-established tool for the effective enforcement and management of copyright protection in Germany, and CMOs form an indispensable part of the German copyright system.

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1. See the study on the economic importance of copyright in Germany of Marlies Hummel, *Die volkswirtschaftliche Bedeutung des Urheberrechts*, Berlin/Munich 1989. See also Commission of the European Communities, "Communication from the Commission: The Management of Copyright and Related Rights in the Internal Market" (16 April 2004), COM (2004) 261 final at 5, fn. 1, online: <europa.eu.int/eur-lex/en/com/comm/2004/com2004_0261en01.pdf> (last visited: 26 September 2005).

- For fair remuneration, there are two or three levels.
- For private copying, there are, for almost every category of rightholders, three levels between the collecting society and the rights holder receiving the royalty (*see also* appendix 4).

Prospects for mergers exist over the medium and long terms. Some societies are tending to group together in joint societies to achieve economies of scale in the context of identical distribution and in order to be able to present users with a single interlocutor. It is much too early to say with certainty if these groupings will turn into mergers, but the trend is very much in the air.

Another trend in recent years is sharper questions about the right to competition. On the one hand, on the French level, DGCCRF (Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes), which is a directorate of the Ministry of Finance whose mission is to ensure respect for the rules of competition, is more and more often appealed to by mistrustful and often ill-informed users. On the other hand, at the European level, the European Commission intervenes quite frequently in initiatives developed by collective societies, arguing that these may have effects on competition in domestic markets.

Although, collective management does not appear at all threatened by the rapid development and constant innovation of uses, it goes without saying that the societies will have to adapt, become more responsive (at least, some of them) and more truly transparent than they are today. This will happen when French collective societies accept regulation of collective management at the European level, which they have always opposed vigorously. This systematic opposition has been effective, since to date there still is no proposal for a directive on the issue (though the recent report by the Direction Générale du Marché Intérieur on cross-border management of rights may augur a rapid change). In any case, societies find themselves today in a situation in which their activity is regulated case by case by administrative jurisprudence (the IFPI Stimulcasting case and, soon, the Santiago Agreement), while the complexity of this activity requires, above all, a global approach, or else it may give rise to unrealistic solutions, as mentioned above.

Collective management is, and will remain, indispensable to the management of rights in the context of new uses. However, it will have to evolve to take account of different, probably more refined forms.

Chapter VI Collective Rights Management in Germany

*Prof. Dr. Jörg Reinbothe**

1. INTRODUCTION

Corresponding to the continental European traditions and principles, copyright protection in Germany has always focused on, and has its origin in, strong rights for authors. For centuries, authors of music, literature and art have been synonymous for German cultural and societal values. To safeguard the economic interests of authors in Germany, authors' societies have developed as collective organizations of authors and have served as intermediaries between authors and users for more than 100 years. As the authors' trustees, such societies were originally designed and founded by the authors themselves and their music publishers to effectively control and collectively manage their rights, and to defend their interests in general.

Today, with more than 80 million inhabitants, Germany has the largest population of all EU Member States. It is at present the biggest domestic market for copyright-based goods and services in Europe. A significant proportion of the German economy is therefore closely related to, if not based on, copyright protection – be it in the area of music, print media, broadcasting or film.¹ Collective rights management carried out by CMOs is now a well-established tool for the effective enforcement and management of copyright protection in Germany, and CMOs form an indispensable part of the German copyright system.

* Prof. Dr., M.C.L. (University of Michigan/U.S.A.), Professor at the University of Saarbrücken/Germany (Europa Institut), Head of Unit in Directorate General Internal Market and Services of the European Commission, Brussels/Belgium.

1. See the study on the economic importance of copyright in Germany of Marlies Hummel, *Die volkswirtschaftliche Bedeutung des Urheberrechts*, Berlin/Munich 1989. See also Commission of the European Communities, "Communication from the Commission: The Management of Copyright and Related Rights in the Internal Market" (16 April 2004), COM (2004) 261 final at 5, fn. 1, online: <europa.eu.int/eur-lex/en/com/comm2004/com2004_0261en01.pdf> (last visited: 26 September 2005).

Apart from their more technical rights management functions, the history and origin of German authors' and performers' CMOs, i.e. those that represent creative natural persons, implies a strong element of solidarity amongst all the rightsholders, whose rights are represented, irrespective of their status or reputation. From the German rightsholders' perspective, in particular amongst authors and performers, both famous and less known, this element of solidarity has traditionally had a similar weight as the enhanced economies of scale and efficiency inherent in the joint management of their rights. At the same time, collective rights management offers significant advantages to users, too, as they can obtain a bundle of rights from the CMO as a one-stop-shop, without the need to address and negotiate with each author individually.

In the following section, the origins and the history of collective rights management will be explained, followed by a presentation of the German law on collective rights management and some perspectives on the future.

2. THE HISTORY OF COPYRIGHT COLLECTING SOCIETIES IN GERMANY

2.1. THE ORIGINS

In Germany, like in other countries particularly of continental Europe, the collective or centralized management of authors' rights and related rights has had a long tradition. Like the protection of authors as such, it has its roots in France.²

Collective rights management, and hence CMOs, occurred as a consequence of the development and further evolution of copyright protection. At the outset, copyright protection or authors' rights consisted of the right to authorize or prohibit the copying and distribution of works, which, at least in principle, could be administered, i.e. controlled and made available individually. However, individual control and rights management became much more difficult, if not to say impossible in practice, when authors began to enjoy other rights to control exploitation, notably the public performance of their works (the right to control the public performance of dramatic works, first protected in France in the late 18th century, could best be managed collectively).

As a consequence, the establishment of the first collective rights management organizations SACD and SACEM in France, in 1829³ and 1851⁴ respectively, was at the origin of, and served as a model for, the founding of CMOs in other European countries including Germany. From the outset, SACD rather

2. This is not to deny the importance of The Statute of Queen Anne, 8 Anne, c. 19 (1710), which can be considered a first step in the direction of recognizing intellectual property.
3. In March 1829, the Bureau de Perception des droits d'auteurs et compositeurs (established in 1791) and another society merged to found the Société des Auteurs et Compositeurs Dramatiques (SACD). See the chapter on collective management in France.
4. The first CMO for composers of non-dramatic musical works, SACEM (Société des Auteurs, Compositeurs et Editeurs de Musique) was established in 1851. See *ibid.*

efficiently safeguarded the interests of French composers of dramatic music. However, foreign authors could only benefit if their works were printed or first performed in France. In other words, works of German origin, which had first been performed and printed in Germany, were not protected through SACD against publication or performance in France, despite the particular popularity of German operas and classical music in France. Later, SACEM also represented several German composers, such as Robert Schumann, Richard Wagner, Johannes Brahms and Max Bruch. However, their influence in SACEM was limited. Moreover, though SACEM became increasingly active outside France, it did not distribute the remuneration that it had collected for German works to German authors as long as performances of French compositions in Germany did not result in payments to SACEM.⁵

First initiatives for a collective protection of authors in Germany date back to the end of the 18th century.⁶ Later, in the 1820s, German composers, including Ludwig van Beethoven, submitted initiatives for legislative action towards authors' protection. They were determined to meet the challenge of the French law in general, and SACEM in particular regarding authors' rights and their collective management.⁷

In 1837, the first German copyright law was enacted. It provided protection for the performance of dramatic musical works and notably operas.⁸ In 1871, German authors and composers of operas founded the Deutsche Genossenschaft dramatischer Autoren und Komponisten to protect and manage their rights. In those days, however, the law and practice of rights management in Germany still focused only to a limited extent on the protection of performances of non-dramatic works of music (concerts).

The Austrian copyright law of 1835 also protected non-dramatic works of music.⁹ Upon the initiative of music publishers, the Austrian CMO ACM (later AKM) was founded on 5 December 1897.¹⁰ It took several years until, on 19 June 1901, the German copyright law was enacted, which granted all composers comprehensive public performance rights.¹¹ This law finally laid the foundation for the establishment of CMOs in Germany.

5. M. Kufferath, "Les Abus de la Société des Auteurs, Compositeurs et Editeurs de Musique" (Brussels, 1897), in A. Dümmling, *Die Musik hat Ihren Wert – 100 Jahre Musikalische Verwertungsgesellschaft in Deutschland*, (Regensburg: ConBrio Verlagsgesellschaft, 2003), at 26.
6. C. Thomasius, "Praktische Beyträge zur Geschichte der Musik" (Leipzig, 1778), in A. Dümmling, *ibid.*, at 19.
7. K. Benyovsky, I.N. Hummel (Prestburg, 1934), p. 306, in A. Dümmling, *ibid.*, at 20.
8. Gesetz zum Schutze des Eigentums an Werken der Wissenschaft und Kunst in Nachdruck und Nachbildung of 11 June 1837, Kingdom of Prussia; cf. R. Kretlle and J. Becker, "Verwertungsgesellschaften" in A. Moser and A. Scheuermann, *Handbuch der Musikwirtschaft*, 6th edn. (Starnberg and Munich: Keller-Verlag, 2003), 1460 at 593.
9. Law on the Protection of Copyright (Gesetz über den Schutz des Urheberrechts) of 1885; see A. Dümmling, *supra* note 5, at 26.
10. Gesellschaft der Autoren, Komponisten und Musikverleger.
11. Law Concerning the Copyright on Works of Literature and Music (Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst, LU(G) of 19 June 1901.

Subsequently, upon the initiative of the composer Richard Strauss, the GDT (Gesellschaft Deutscher Tonsetzer) and AFMA (Anstalt für musikalischen Aufführungssrecht) were founded in 1903 as the first German CMOs. Their repertoire mainly consisted of derivative public performance rights of music publishers.

2.2. THE DEVELOPMENTS FROM 1903 TO 1965

After the establishment of those first two CMOs, other societies appeared fairly quickly. In 1909, AMMRE (Anstalt für mechanisch-musikalische Rechte) was founded to claim rights of authors and music publishers from the sound recording industry. In 1915, the CMO GEMA (Gesellschaft zur Verwertung musikalischer Aufführungsrechte) was established. The Austrian CMO AKM (representing authors, composers and music publishers) had already existed since 1897.¹² As a result, in the 1920's, partial competition regarding rights management on German territory occurred between the three CMOs GEMA, GDT (both German) and the Austrian AKM. To terminate this situation, they formed the Association for the Protection of Music in 1930 (Verband zum Schutze musikalischer Aufführungsrechte für Deutschland).¹³

On 4 July 1933, the first German law dealing specifically with CMOs was enacted. It submitted the activities of CMOs regarding the "management by agents of rights on the public performance of musical works with or without text" to prior authorization. The underlying objective of the law was to create an officially authorized CMO with a monopoly on the collective management of musical performance rights. Consequently, GEMA and GDT merged in September 1933 to form STAGMA, the State-authorized Society for the Management of Musical Authors' Rights (Staatlich genehmigte Gesellschaft zur Verwertung musikalischer Urheberrechte). In 1934, STAGMA obtained the official monopoly status. The STAGMA legislation of 1933/34, through making collective management subject to prior authorization, created a legal monopoly for STAGMA. In addition, it obliged police and other public authorities to assist STAGMA in its control tasks. This obligation largely facilitated STAGMA to fulfil its functions and added significantly to its credibility and legitimacy. The STAGMA legislation also introduced a dispute settlement mechanism in the form of an arbitration board. Its mandate was to settle disputes about tariffs between STAGMA and the music users' association.

In 1945 – after the Second World War – STAGMA changed its name to GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte) and resumed its activities with the approval of the British Military Administration. While both the obligation to seek prior authorization for collective management and the legal monopoly of STAGMA

were declared void by Allied legislation, all other provisions of the STAGMA legislation of 1933/34 remained in force. In 1954, they were approved of by the German Supreme Court, which confirmed that these provisions were politically neutral.¹⁴

Once STAGMA/GEMA had lost its legal monopoly, the door was open again for other CMOs to appear in the German market. Other CMOs were established in Germany, and notably, for the first time, in copyright areas outside of music. The very first CMO of authors of literature (GELU, Gesellschaft zur Verwertung literarischer Urheberrechte) went bankrupt in 1955; since 1958, Verwertungsgesellschaft (VG) WORT manages the rights of authors of literary works and their publishers. Around the same time, Gesellschaft zur Verwertung von Leistungsschutzrechten (GVL) was founded to represent in particular (neighbouring) rights of performing artists and phonogram producers; it is still the most important German CMO for the management of neighbouring rights. Later, a number of other CMOs for the management of different work categories or rights followed, such as Bild-Kunst that manages the rights of authors and agencies in the area of fine arts, photography, and graphic design. GEMA continues to exist in the form of a non-profit association and remains the most important CMO in Germany in terms of turnover and membership.¹⁵

2.3. THE DEVELOPMENTS AFTER 1965

2.3.1. Collective Rights Management in the German Copyright Reform of 1965

The year 1965 marks the beginning of a new era in German copyright law. The ratification of the Brussels Revision of the Berne Convention of 1948¹⁶ and of the Rome Convention of 1961¹⁷ had to be prepared. Moreover, German copyright law had to be adapted to new developments in technology and in the marketing of copyright works, reaching from television to public lending and home taping. This led to the most comprehensive revision in the history of German copyright law and a total reform of the German Copyright Act (Urheberrechtsgesetz).¹⁸ The new German Copyright Act of 1965 made a clear distinction between authors' rights and neighbouring rights; it introduced new

14. Decision of the German Supreme Court of 30 November 1954, BGHZ 15, 338/350 *et seq.* ("Indeta").

15. See below, 2.3.2.

16. Berne Convention for the Protection of Literary and Artistic Works (as revised at Brussels on 26 June 1948) [Berne Convention].

17. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations [Rome Convention].

18. Law on Copyright and Neighbouring Rights of 9 September 1965, Bundesgesetzblatt, Teil I, 1965, p. 1275 [German Copyright Act of 1965].

12. See above, note 10.

13. R. Kreile and J. Becker, *supra* note 8.

rights and exceptions, spelled out moral rights for authors and reinforced their contractual position.¹⁹

In this context, the German legislator held that a new and comprehensive regulation of collective rights management was an indispensable part of the copyright reform package – in the interest of both rightsholders and users. There were mainly three reasons underlying this approach.

Firstly, the German legislator wanted to explicitly recognize the role of CMOs, which it considered to be key for the smooth functioning in practice of the German copyright system. In fact, the legislative documents of the 1965 Copyright Reform extensively elaborate on the functions and nature of CMOs, for all CMOs that had been previously established in Germany entered into limited long lasting contracts with rightsholders.²⁰ The mandate of the societies was to claim such rights on behalf of the rightsholders but in their own name *vis-à-vis* users or their associations. Subsequently, they were to administer and redistribute the revenues to rightsholders according to specific criteria and distribution schemes. Due to the large number of their rightsholders/members, CMOs traditionally enjoyed a considerable degree of discretion. They functioned as trustees of rightsholders. The German legislator confirmed that CMOs were much more than just private agents; their activities were clearly considered to be in the public interest and located in the neighbourhood of State agencies or the Unions.²¹

Secondly, and against this background, the German Copyright Act of 1965 deliberately recognized and further reinforced the economic and cultural position and the importance of CMOs by entrusting them with additional tasks. In several instances, the new German Copyright Act introduced rights to equitable remuneration and made them subject to mandatory collective management by CMOs: the remuneration for the artists' resale right (Art. 26), for rental and lending rights (Art. 27), private copying (Art. 53) or mechanical licensing (Art. 61) could only be claimed jointly by CMOs.

Finally, the German legislator had become increasingly aware of the interface between collective rights management and competition law. It is important to note in this context that in 1957, the first comprehensive German antitrust law, the Antitrust Act GWB (*Gesetz gegen Wettbewerbsbeschränkungen*), had been enacted.²² It drew upon the US Sherman Act and its concept of antitrust regulation. The fact that CMOs usually hold a dominant position in their respective field of activity was amply demonstrated by GEMA and the other CMOs that had been founded after the War. In the view of the German

19. M. Vogel, in G. Schricker ed., *Urheberrecht, Kommentar*, 3rd edn. (Munich: Beck Juristischer Verlag, 2006), at Einleitung Note 79.

20. Explanatory Memorandum of the Government Bill, in Parliamentary Document *Bundestagsdrucksache*, IV/271, at 9 and following; [Explanatory Memorandum].

21. J. Reinbothe, in *Urheberrecht, Kommentar*, *supra* note 17, Vor §§ 1 and following, WahnG, Note 6.

22. Law on Restrictions to Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB), of 15 July 2005, *Bundesgesetzblatt* Teil I, 2005, p. 2114 [German Antitrust Act].

copyright legislator of 1965, CMOs hold dominant positions in their field of activity according to their very nature: already each copyright work is unique and not replaceable and thus a monopoly in itself that results in a monopoly position of its author.²³ The CMO holds many, if not all such monopoly rights of a certain category and may thus even acquire a “world monopoly” of rights for its territory of operation. Such a dominant position based on the bundling of the rights of all rightsholders was considered to be both inevitable and desirable, as being beneficial for rightsholders and users alike and a condition for the efficient management of rights at low cost. At the same time, the legislator wanted to take into account this dominant position by creating a legal basis for a copyright-specific State control over CMOs so as to prevent CMOs from abusing their position *vis-à-vis* users or rightsholders.

On the whole, the German copyright reform of 1965 built upon functioning collective rights management organizations and increased even further their exclusive competences and influence. Moreover, the legislator recognized that, when fulfilling their legal, societal, cultural and social functions, CMOs in Germany discharge the State from those tasks that it would normally have to fulfil itself to safeguard the functionality of copyright. From this perspective, the only consequence was to give the rights and duties of CMOs in Germany an explicit and comprehensive legal basis through the Law on the Administration of Copyright and Neighbouring Rights (LACNR),²⁴ which was enacted simultaneously with the new German Copyright Act on 9 September 1965.

2.3.2. Existing Collecting Societies in Germany

At present, twelve CMOs exist in Germany and have been authorized to engage in collective rights management.²⁵

The oldest and biggest German CMO is the already mentioned GEMA (*Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* r. V.), which has its headquarters in Berlin and Munich. GEMA collectively manages mainly reproduction rights and communication to the public rights of composers, text authors and music publishers on works of music.

Rights of authors of literary works and their publishers are managed collectively by VG WORT r. V. in Munich. Amongst others, VG WORT administers the rights of communication to the public, public lending rights and reproduction rights for press clippings for six categories of rightsholders: (1) authors and translators of literary works of fiction and drama; (2) journalists, authors and translators of literary works of non-fiction; (3) authors and translators of literary works of science and research; (4) publishers of

23. Explanatory Memorandum, *supra* note 20 at 9 and 17.

24. Law on the Administration of Copyright and Neighbouring Rights (*Urheberrechtswahrnehmungsgesetz*) of 9 September 1965, *Bundesgesetzblatt*, Teil I, 1965, p. 1294 [LACNR].

25. For the statutes of these societies see H.-P. Hillig, *Urheber- und Verlagsrecht*, 10th edn. (Munich: Beck Juristischer Verlag, 2003), 533.

literary works of fiction and non-fiction; (5) publishers of dramatic works (for performance on stage); and (6) publishers of literary works of science and research.

The CMO Bild-Kunst rV represents three categories of rightsholders: (1) authors of fine art (paintings, sculptures, etc.); (2) photographers, photo journalists, photo agencies, graphic designers and photo designers; and (3) film, television and audiovisual. Bild-Kunst administers, amongst others, public lending rights, reproduction rights for press clippings, and (for authors of fine art) the artists' resale right (*droit de suite*).

The most important CMO for the management of neighbouring rights is GVL (Gesellschaft zur Verwertung von Leistungsschutzrechten mbH) with headquarters in Hamburg. GVL was founded jointly by the German Association of Orchestras (Deutsche Orchestervereinigung) and the German section of IFPI (International Federation of Phonogram and Videogram Producers). It administers remuneration rights for broadcasting and communication to the public for performing artists, phonogram producers, film producers, video producers, and organizers of public performances.

VG Musik-Edition rV administers neighbouring rights regarding scientific editions and editions of posthumous works, mainly in the area of music, for scientific authors and publishers as well as reproduction rights for sheet music. GÜFA (Gesellschaft zur Übernahme und Wahrnehmung von Filmaufführungsrechten mbH) has its seat in Düsseldorf. It collectively manages remuneration rights for public performance and communication to the public of erotic films for the authors and producers of such films.

VFF (Verwertungsgesellschaft der Film- und Fernsehproduzenten mbH, Munich) administers in particular rights of communication to the public and reproduction for independent film producers, broadcasters and their advertising companies.

Also VGF (Verwertungsgesellschaft für Nutzungsrechte an Filmwerken mbH, Wiesbaden) deals with film rights. It administers rights in the video sector for film producers and distributors.

GWFF (Gesellschaft zur Wahrnehmung von Film- und Fernsehrechten mbH, Munich) administers remuneration rights of public performance, communication to the public and reproduction for film, television and video producers. AGICOA Urheberrechtsschutz-Gesellschaft mbH (Association de Gestion Internationale Collective des Oeuvres Audiovisuelles) administers exclusively remuneration rights of non-German film producers in the redistribution by cable.

VG Media (VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH), formerly VG Satellit (VG Satellit Gesellschaft zur Verwertung der Leistungsschutzrechte von Sendeterminen mbH) is owned by several commercial broadcasters and administers in particular their rights in the redistribution by cable of their broadcasts.

Another CMO, VG Werbung und Musik mbH was established very recently in March 2004. It intends to administer rights in the field of music

with respect to the exploitation of works connected with advertising. To date, however, prospects for this CMO are unclear, as it does not seem to have generated significant, if any, income, and its membership appears to be instable.

A number of other societies exist in Germany that also collect copyright-based remunerations, such as ZPÜ (Zentralstelle für private Überlieferungsrechte), ZBT (Zentralstelle Bibliothekstantieme), ZPS (Zentralstelle Fotokopieren an Schulen), ZVV (Zentralstelle Videovermietung), ZWF (Zentralstelle für die Wiedergabe von Film- und Fernsehwerken) or ARGE DRAMA (Arbeitsgemeinschaft Drama). However, these companies do not qualify as CMOs. They are joint foundations of CMOs for the actual collection of revenues and pass the revenues directly on to the CMOs, who distribute them to their rightsholders. These "cashing" companies, as they are called in German,²⁶ are only technically revenue collectors; they have no contacts with rightsholders and no trustee functions towards them.

Traditionally, CMOs in Germany are organized as economic non-profit associations (rechtsfähiger wirtschaftlicher Verein, r.V.). This continues to be the case for the classical authors' societies like GEMA, VG WORT and others. The more commercial CMOs have the status of a Ltd. Company (Gesellschaft mit beschränkter Haftung, GmbH).

Most of the twelve German CMOs generate considerable revenues each year. In 2003, these revenues totalled almost EUR 1.2 billion, with GEMA having the lion's share of more than EUR 813 million, followed by GVL (almost EUR 151 million), VG WORT (almost EUR 87 million), VG Bild-Kunst (almost EUR 42 million) and VG Media (almost EUR 28 million).²⁷

3. TODAY'S REGULATORY FRAMEWORK FOR COLLECTING SOCIETIES

3.1. THE GENERAL PRINCIPLES ENSHRINED IN THE GERMAN LAW ON COLLECTIVE RIGHTS MANAGEMENT (LACNR)²⁸

The LACNR provides a comprehensive legal framework for collective rights management and the activities of CMOs in Germany. The law is based on several fundamental principles. It is driven by, and based on, the understanding that:

- protecting and fostering creativity is an important function of copyright;
- collective rights management is particularly required for protecting the creativity and defending the rights of natural persons, notably of authors and performers, through CMOs as their trustees;

26. "Inkasso" companies; cf. G. Schulze, in: T. Dreier and G. Schulze, eds., *Urheberrechtsgesetz, Kommentar*, 2nd edn. (Munich: Beck Juristischer Verlag, 2006), at Vor §1 UrhWG, 1457-1458.

27. German Patent and Trade Mark Office (GPTO), *Annual Report 2004*, at 26.

28. *Supra* note 24.

- collective rights management by CMOs is useful and beneficial for all parties, notably rightsholders and users, as well as for culture and society at large in many sectors of copyright (authors' rights and neighbouring rights);
- collective rights management is therefore an indispensable part of the German copyright system; and
- collective rights management can only function well on the basis of a reasonable balance of all rights and interests.

The LACNR to some extent strengthens the position of CMOs *vis-à-vis* users and competition law. However, the LACNR does not grant any CMO a legal monopoly nor does it oblige rightsholders to join a CMO. At the same time, the LACNR recognizes and accepts the *de facto* dominant position of CMOs and takes account of the potential to abuse this position against users or rightsholders.

On the basis of these principles, the LACNR contains the following provisions:

- Chapter 1 ("Authorization for Doing Business") on the establishment of CMOs subject to prior authorization;
- Chapter 2 ("Rights and Obligations of the CMO") on rights and obligations, and on the Arbitration Board and access to the Courts;
- Chapter 3 ("Supervision over the CMO") on the control over CMOs;
- Chapter 4 ("Transitional and Final Provisions").

3.2. THE PROVISIONS OF THE LACNR

3.2.1. Chapter 1: The Authorization/Establishment of Collecting Societies (Articles 1 to 5 of the LACNR)

The LACNR deliberately did not follow the approach of the STAGMA legislation and did not grant any CMO a legal monopoly. At the same time, the legislator in 1965 clearly identified the advantages of CMOs having a dominant position in their field of activity for both rightsholders and users. It saw no benefit in competition between CMOs. The law has, therefore, sought to limit the number of CMOs with a view to safeguarding their sustainable operation. The State was determined to make sure that those CMOs that existed were reliable trustees for rightsholders and reliable partners for users. At the same time, the law seeks to avoid raising any unjustified barriers for the establishment of CMOs, not least in the light of Article 12 of the German Constitution and the EC Treaty provisions on the freedom of establishment.²⁹

29. Article 12 of the German Constitution grants the freedom of profession; Constitution for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland)

3.2.1.1. Article 1 of the LACNR (requirement of prior authorization)

Article 1 of the LACNR provides that engaging in the collective management of authors' rights or neighbouring rights is dependent on prior authorization (*Erlaubnis*).

Collective rights management is defined in Article 1(1) as "managing exploitation rights, exclusive rights or remuneration rights granted under the Copyright Act... jointly and for joint exploitation on behalf of several authors or holders of neighbouring rights...". The LACNR only covers collective rights management, which is a regular business activity; occasional or short-term collective rights management does not qualify, Article 1(2) of the LACNR.

Anyone who engages in collective rights management (as defined), without having prior authorization to do so, is not entitled to claim any of the rights under the Copyright Act, even if rightsholders have entrusted him with rights management, Article 1(3) of the LACNR.

The entire LACNR clearly envisages collective rights management by CMOs as defined in Article 1(4), namely "a legal person or community of persons" that engages in collective rights management as previously defined in Article 1(1). Nevertheless, Article 1(4) of the LACNR also allows natural persons to engage in such collective rights management, and all provisions of the LACNR also apply to a one person collective rights manager. So far, however, collective rights management by a natural person has remained only a theoretical possibility in Germany.

3.2.1.2. Article 2 of the LACNR (application for authorization)

According to Article 2 of the LACNR, the application for authorization as a CMO has to be filed in writing with the supervisory authority, which according to Article 18(1) of the LACNR, is the German Patent and Trade Mark Office (GPTO)³⁰ in Munich. The application has to include the statutes of the society, the names, addresses and citizenship of its representatives, as well a declaration about the number of represented rightsholders and the number and economic importance of the rights, whose management the society is entrusted with.

The GPTO grants the authorization in agreement with the Federal Antitrust Office (Bundeskartellamt), Article 18(3) of the LACNR. This underlines the impact of competition law on collective rights management.

of 23 May 1949, *Bundesgesetzblatt*, Teil III, p. 100-1 [German Constitution]; EC, Treaty Establishing the European Community, (2002) O.J. C. 325/1 at 52, Art. 43 grants the right of establishment. However, competition amongst collecting societies is not considered a desirable option; cf. G. Schulz, in *Urheberrechtsgesetz, Kommentar*, *supra* note 26 at 1454.

30. Its German name is Deutsches Patent- und Markenamt (DPMA).

3.2.1.3. *Article 3 of the LACNR (denial of authorization)*

Only on a limited number of grounds can the authorization be denied. Article 3 of the LACNR includes an exhaustive list of possible reasons for such denial. The authorization can only be denied if the statutes of the CMO do not comply with the provisions of the LACNR; if there are reasonable grounds to expect that representatives of the CMO are not sufficiently reliable; or if the economic basis of the CMO is so weak that no effective management of the rights that the society is entrusted with can be expected. This would be the case, in particular, if the applying society would not represent a sufficient number of rightsholders so as to achieve reasonable economies of scale for both rightsholders and users. However, if none of these shortcomings occur, the authorization must be granted.

A denial of the authorization has to be in writing and accompanied by reasons. As a decision by a public authority (the GPTO), the denial may be appealed before the Courts.

3.2.1.4. *Article 4 of the LACNR (repeal of the authorization)*

To date, all applications for authorization under Article 1 of the LACNR have been granted. This reflects the generally open and constructive approach of the GPTO on authorization. However, the GPTO disposes of a rather effective tool to correct this if needed: it can repeal the authorization. So far, no authorization has been repealed. However, particularly the development of the most recently established CMO VG Werbung und Musik (see above 2.3.2) is being closely scrutinized by the GPTO.

The authorization is to be repealed if any of the reasons for a denial of the authorization occurs or becomes known after the authorization was granted. However, the CMO has to be given the opportunity to improve on the respective shortcoming within a certain delay.

3.2.1.5. *Article 5 of the LACNR (publication of the authorization)*

According to Article 5 of the LACNR, any authorization made under Article 1 of the LACNR, as well as any repeal of an authorization under Article 4 of the LACNR, is to be published in the *Official Journal*. This provision confirms once more the importance that the German legislator attaches to collective rights management and CMOs and the public attention paid to them.

3.2.2. *Chapter 2 (First Part): The Rights and Obligations of Collecting Societies (Articles 6 to 13b of the LACNR)*

The second chapter of the LACNR (Articles 6 to 17) deals with the rights and obligations of CMOs. The provisions contained in Articles 6 to 8 refer directly to the relation between CMOs and rightsholders. Article 9 contains accounting

obligations of CMOs, which are relevant both for rightsholders and the public. Articles 10 to 13b deal with the relation between CMOs and users.

3.2.2.1. *Article 6 of the LACNR (rights management obligation towards rightsholders)*

Article 6 of the LACNR is the key provision for rightsholders that seek the collective management of their rights through a CMO. Article 6 establishes the obligation for CMOs to administer rights; in other words, the CMO is not allowed to reject a rightholder's request to engage in the collective management of his or her rights. It is

obliged to manage, on equitable conditions, the rights and claims belonging to its field of activity upon request of the rightholder, if the rightholder is a German, a citizen of a Member State of the European Union or the European Economic Area, or has his regular residence in Germany, and if an effective management of his rights or claims is otherwise not possible.³¹

The rather complex wording of this provision contains important elements and conditions for its application.

Firstly, the CMO is only obliged to manage rights that belong "to its field of activity", but not other rights or categories of works or subject matter that it is not usually dealing with. However, while the rightholder, if this condition is met, has a right towards the society to get his or her relevant rights administered, Article 6 does not grant him or her the right to become a full member of the CMO. The statutes of many societies make full membership dependent on certain conditions (such as the amount of revenues). As long as these conditions are objective and not discriminatory, they remain valid and are not altered by Article 6 of the LACNR.³²

Secondly, only those rightsholders who are either German, citizens of another EU or EEA (the European Economic Area) Member State, or have their permanent residence in Germany may invoke the obligation under Article 6. If the rightholder is a company, its headquarters are equivalent to the permanent residence of a natural person. This set of conditions corresponds to the habitual provisions regarding the beneficiaries of copyright protection: in principle, only German residents or citizens enjoy protection under the German Copyright Act and related laws including the LACNR. In its Phil Collins decision, the European Court of Justice confirmed that the

31. Article 6, *supra* note 24 (translations provided by the author).

32. For those rightsholders, whose rights are managed by the CMO without being its ordinary members (usually because they only generate little revenues), Article 6(2) contains a specific safeguard clause: the CMO is obliged to establish a special common representation of those rightsholders and to reflect rules of their representation in its statute.

general non-discrimination clause contained in Article 12 of the EC Treaty results in the obligation of all Member States of the European Union to grant each other's citizens unconditional national treatment on all intellectual property rights.³³ The Agreement on the European Economic Area extends this obligation to all its Member States, which are, besides the EU Member States, Norway, Iceland and Liechtenstein, i.e. all European Free Trade Association (EFTA) States with the exception of Switzerland. This condition of Article 6 of the LACNR is, therefore, an explicit repetition of the generally applicable rules under German and international law.

Thirdly, the collective rights management obligation under Article 6 of the LACNR only applies if no other effective rights management would be possible – in other words, if the collective rights management by the CMO in question is a precondition for the effective management of the rightholder's rights. It is the rightholder who has the burden of proof in this respect. However, proving that there is no viable alternative option to the rights management by one particular German CMO should not be overly difficult, provided the society in question is the main, if not the only society in Germany that administers the rights in question. For instance, that a composer with residence in Germany can oblige GEMA to engage in the collective management of his or her remuneration rights of the type that GEMA also administers for other composers, should almost go without saying and hardly requires any specific proof from the side of the composer.

Article 6 of the LACNR obliges the CMO to manage rights for rightholders "on equitable conditions". This term is crucial for the relation between the rightholder and the CMO: the CMO has to offer the rightholder fair contractual conditions for the management of his or her rights. The contractual conditions are fair, and thus equitable, if: the society does not charge exaggerated administrative fees (German CMOs usually charge and deduct around 10 per cent from the revenues for administrative purposes); the CMO does not impose undue "packaging" conditions for the bundling of certain rights; it leaves the rightholder sufficient flexibility to cancel the rights management contract; and rightholders have enough say within the CMO on the way it operates.

Article 6 of the LACNR, and specifically Article 6(2), with its provisions on the representation of rightholders in the society, confirms once more how the German legislator sees CMOs: not as independent economic entities, but rather as the rightholders' "own" organizations that function as their trustees and under their close control.

3.2.2.2. *Article 7 of the LACNR (distribution of revenues)*

One of the most important aspects of collective rights management from the rightholders' perspective is certainly the redistribution of collected revenues.

33. Joint cases C-92/92 and C-326/92, *Phil Collins v. Imvros Handelsgesellschaft Handelsge-sellschaft mbH and Leif Emanuel Kraul v. EMI Electrola GmbH*, 1993 C.M.L.R. 773; E.C.R. 1993, I-5145.

The general principle of fair redistribution of revenues to rightholders cannot already be derived from the "equitable conditions" requirement in Article 6 of the LACNR: the distribution of revenues is not a condition of rights management; rather it is the result of the latter. Article 7 of the LACNR contains specific rules on the distribution itself and on the principles of the distribution schemes.³⁴

The first sentence of Article 7 obliges every CMO to establish an explicit distribution plan (*Verteilungsplan*) with clear rules on how, and according to which criteria, the distribution is to take place. The purpose of this provision is, as the law states, to "exclude any distribution at random", and to provide for transparency. Accordingly, the principles of the distribution plan must be laid down in a society's statutes (third sentence, Article 7).

The second sentence in Article 7 contains a rule, which highlights again the particular responsibility that CMOs carry in the view of the legislator: "The distribution plan should comply with the principle that culturally important works or [neighbouring rights] subject matter are to be promoted". This provision entrusts CMOs with the promotion of culture through their distribution keys. In other words, while the distribution should follow transparent rules and not be done at random (first sentence of the same Article), it may and is encouraged to deliberately differentiate to the extent that this is appropriate for the promotion of culturally important works or subject matter.

However, this provision does leave some question marks: which works or subject matter have a higher cultural value than others? Which measure should be applied to differentiate within the distribution keys for the sake of promoting culture? German CMOs have found an answer. In the area of music, for example, composers or performers of classical music or jazz obtain a proportionally higher share of the revenues than their pop music colleagues. Another example is literary works, where authors of scientific or research books or articles obtain a higher share than their fellow authors of fiction. In addition, CMOs regularly promote concerts or other projects of young authors and artists.

In any event, the principles of distribution, as well as the distribution plan itself, are subject to the approval by the rightholders, whose rights are represented by the CMO through the representative bodies of the society, including the regular assembly meetings.

3.2.2.3. *Article 8 of the LACNR (social assistance and funding)*

Article 8 of the LACNR reflects the social function of CMOs and is, like the entire law, based on the idea that they are rightholders' trustees and bound to practice loyalty amongst them.

Article 8 of the LACNR states that "the CMO should establish mechanisms of social security and support for the owners of the rights or claims that they administer". Though this provision establishes no strict obligation for the

34. J. Reinbothe in: *Urheberrecht, Kommentar*, supra note 19, §7 LACNR, Note 5.

societies, it has been implemented at least by all those German CMOs that administer rights for authors or performers as natural persons.³⁵ Socially disadvantaged authors or performers receive welfare or other forms of support from "their" CMO. As a general rule, it can be said that CMOs spend up to 10 per cent of their revenues on such social purposes; this amount is considered to be appropriate.³⁶

It goes without saying that these social funding activities of CMOs are subject to approval by their representative bodies including the assemblies, and therefore by their own rightsholders represented therein.

3.2.2.4. Article 9 of the LACNR (accounting rules)

Articles 9(1) through (7) of the LACNR lay down detailed accounting rules for CMOs. The degree of detail and the rather severe nature of these rules demonstrate the desire of the German legislator to safeguard the good governance of German CMOs.

Regarding the contents of Article 9, it may suffice to mention that each CMO has to establish every year its annual account (*Jahresabschluss*) indicating in a clear and transparent manner the income, payments and losses. In addition, it has to submit an annual report (*Jahresbericht*) describing the activities of the society and an evaluation of its situation.

The annual account and the annual report have to be assessed by recognized accountants in compliance with the law and the society's statute. Within eight months after the end of the reporting year, the CMO has to publish the annual account and the annual report with the approval of the accountants in the German Federal Gazette (*Bundesanzeiger*).

3.2.2.5. Article 10 of the LACNR (right of information)

Article 10 is the first of six provisions that govern the relationship between CMOs and users. It obliges the CMO "to provide anyone upon written request with information as to whether it administers rights on a specific work or [neighbouring rights] subject matter for a specific author or rightholder".

35. G. Schulte in: *Urheberrechtsgesetz, Kommentar*, supra note 26 at 1488-1489; naturally, this applies to a lesser extent or not at all to CMOs that represent legal persons. When a recently published study paper from the services of the European Commission describes "social and cultural, promotional and funding activities" as "other services... which are not linked to the collective management of copyright", it does not differentiate between these different kinds of CMOs of Commission of the European Communities, "Study on a Community Initiative on the Cross-Border Collective Management of Copyright", (Brussels: 7 July 2005), at 7, online: <europa.eu.int/comm/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf> (last visited: 30 September 2005).

36. J. Reinbothe in: *Urheberrecht, Kommentar*, supra note 19, § 8 LACNR, Note 3; cf. M. Ficsor, *Collective Management of Copyright and Related Rights* (Geneva: World Intellectual Property Organization, 2002), 165 at 149 and following.

Article 10 of the LACNR thus intends to facilitate the exploitation of a protected work or subject matter: anyone, including any potential user, is entitled to obtain relevant information from all CMOs in Germany. At the same time, the provision works both ways: it deprives users of any possible excuse that it was too difficult to find out if a work or subject matter was protected and who managed the respective rights.

The message is clear – in case of any doubt about the existence and/or allocation of rights, potential users should knock at the door of CMOs. They are entitled to get an answer.

3.2.2.6. Article 11 of the LACNR (obligation to grant exploitation rights)

Article 11 of the LACNR is for users what Article 6 is for rightsholders. From the perspective of users, Article 11 of the LACNR contains, no doubt, the key provision of the entire Collective Rights Management Law. Article 11(1) obliges the "CMO, on the basis of the rights it administers, to grant anyone upon request exploitation rights on equitable conditions".

This means, first of all, that the CMO cannot refuse granting a license. This is true even if it administers exclusive rights (to authorize or prohibit exploitation). This obligation to allow exploitation (*Kontrahierungszwang*) enshrined in Article 11 is the price for the dominant position that a CMO usually holds in its field of activity.

Second of all, the CMO is obliged to grant the users "equitable conditions". The same term is used in Article 6 of the law for the relationship between CMOs and rightsholders. In the context of the exploitation of rights and in relation to users, it basically means equity: the conditions of exploitation, particularly the license fee, the frequency and the kind of use of protected works or subject matter, have to be in balance; they have to be appropriate – not too much, and not too little. What is an equitable condition may vary and can only be assessed on a case by case basis.³⁷

At first sight, the obligation under Article 11(1) of the LACNR seems to have two important, negative consequences for the CMO: the society has no means to prevent the potential user from going ahead with the intended exploitation, and it is deprived of any negotiating power as far as the license fee is concerned.

However, CMOs are better off than it seems. Article 11(2) of the LACNR provides:

If no agreement can be reached on the remuneration for granting the exploitation rights, the rights are considered to be granted as soon as the amount of the licensing fee recognised by the user is paid to the

37. J. Reinbothe in: *Urheberrecht, Kommentar*, supra note 19, § 11 LACNR, Note 5, with further references.

collecting society, and the additional part of the licensing fee as claimed by the collecting society is paid to the collecting society under reservation or deposited to its benefit.³⁸

True, also under Article 11(2), the CMO must, in principle, grant any request for exploitation provided it holds the rights in question. But the potential user must first pay. Moreover, he or she cannot go ahead with the exploitation simply and only on the basis of the license fee that he or she is ready to pay (and thus determined unilaterally by him or her). In turn, the CMO cannot bypass its obligation under Article 11(1) of the LACNR (to allow the exploitation of rights) through setting the licensing fee too high. Article 11(2) achieves this by splitting the license fee claimed by the CMO in two parts: the part, which is not contested, has to be paid to the society, whereas the part of the fee, which is in dispute, has to be paid under reservation or to a deposit. The CMO can only dispose of this latter part to the extent that the dispute is settled in its favour.³⁹

Article 11(2) of the LACNR compensates for the CMO's inherent loss of negotiating power and, at the same time, serves users by giving them the possibility to exploit and contest the amount of the license fee asked by the CMO. Another significant advantage for CMOs is that they receive immediate – though sometimes in their view too modest – payment for each act of use. In many other countries, CMOs do not receive any payment until the successful conclusion of (sometimes lengthy) litigation, though the act of exploitation has already taken place.

In any case, Article 11 of the LACNR requires the potential user to turn to the CMO and ask for permission. Acts of exploitation, which have not been registered with the CMO in question, are not covered by Article 11 and remain illegal.

3.2.2.7. Article 12 of the LACNR (umbrella agreements with users)

Article 12 of the LACNR obliges the CMO:

to conclude, on equitable conditions, umbrella agreements on the rights and claims that it administers with associations whose members exploit works or subject matter protected, or are obliged to pay equitable remuneration, under the Copyright Act, unless the collecting society cannot reasonably be expected to conclude such an agreement, in particular because membership of the association is too small.⁴⁰

38. *Supra* note 24.

39. Access to the Courts and to the Arbitration Board remains open in any case: *see below*: 3.2.3.1.1 (on the mandate of the Arbitration Board, Article 14(1) of the LACNR) and 3.2.3.4 (on Article 16 of the LACNR, dealing with access to justice).

40. *Supra* note 24.

While Article 11 is designed to facilitate for individual users the exploitation of rights administered by CMOs on the basis of individual agreements, Article 12 of the LACNR focuses on framework or umbrella agreements, to which users' associations are a party. In fact, umbrella agreements between CMOs and associations of users are common practice in Germany and often the only way for an effective collective rights management of the numerous rights of the numerous rightsholders *vis-à-vis* a large number of users. Such agreements have obvious advantages for both parties. They are beneficial for CMOs: it is much easier, for example, to collect the remuneration for acts of private copying from producers of blank recording material on the basis of a framework agreement with their association than to conclude agreements with each producer individually. And umbrella agreements are beneficial for users, too, because they usually pay reduced license fees that were negotiated by their association as part of the umbrella deal.

There is one exception to the obligation of CMOs to enter into such umbrella agreements. It is stated in the last part of Article 12 – CMOs may refuse an umbrella agreement with associations that do not have enough members to provide the CMO with the economies of scale usually inherent in such agreements.

Like Article 11 of the LACNR, Article 12 provides that the conditions of the agreement have to be “equitable”. This term has a very similar meaning as in Article 11 – there should be a balance of what both parties give and take. The conditions of the umbrella agreement have to be appropriate – what each party, the CMO and the users' association, provide, should not be too much, and not too little in relation to each other. What is an equitable condition may vary and can only be assessed on a case by case basis.⁴¹

3.2.2.8. Article 13 of the LACNR (tariffs)

Another obligation that CMOs have *vis-à-vis* users in particular, and towards the public in general, relates to the transparency and fairness of the tariffs. Article 13 of the LACNR contains several specific rules in this respect, under Articles 13(1) and (2) focusing on transparency, and Articles 13(3) and (4) on fairness.

It has to be clear from the outset, however, that the rules contained in Article 13 on tariffs only relate to the tariffs asked by the CMO and are without prejudice to their validity. In other words, while the CMO establishes its tariffs unilaterally, they only become valid if and when agreed upon with the user(s).

3.2.2.8.1. Rules on tariff transparency

The first sentence of Article 13(1) spells out the general obligation that “the CMO has to establish tariffs on the remuneration that it asks on the basis of the

41. *See* note 37, *above*.

rights and claims it administers". The second states that "to the extent umbrella agreements have been concluded, the remuneration agreed upon therein is considered to be tariffs". It is in the own interest of CMOs to have a transparent framework of tariffs. The obligation under Article 13 of the LACNR corresponds, therefore, to general practice. All CMOs have detailed tariffs for the different rights and acts of use. For example, GEMAs tariff framework includes more than 80 different tariffs. Likewise, CMOs distinguish individual tariffs from those based on umbrella agreements. The latter are usually more beneficial to users.

Under Article 13(2), CMOs have to publish their tariffs without delay in the German Federal Gazette (*Bundesanzeiger*). All CMOs do anyway provide potential users upon request with information leaflets on their tariffs. However, due to the obligation to publish all tariffs in the Federal Gazette, the latter is the most comprehensive source of tariffs of all German CMOs and therefore particularly useful for potential users and their associations.

3.2.2.8.2.

Rules on the fairness of tariffs

Articles 13(3) and (4) contain rules on the fairness of the tariffs. However, these are recommendations rather than strict obligations.

According to Article 13(3): "the basis of calculation of the tariffs should, as a general rule, be the financial benefits that are generated by the use... or a different basis, if it provides indications of the benefits, which can be assessed with a reasonable amount of effort". In any event, the CMO, when establishing its tariffs, should take due account of the share of the exploitation of the protected work in relation to the entire act of use (Article 13(3), third sentence). Finally, the fourth sentence of Article 13(3) provides that both the tariffs of the CMO and the collection of the remuneration should "take due account of the religious, cultural and social interests" of the users, including "aspects of the promotion of young people". On the whole, Article 13(3) of the LACNR thus calls upon the fairness and the particular cultural and societal responsibilities of CMOs. If users are the "weaker part", CMOs should take this into account not only in the calculation of their tariffs, but also in their methods of collecting the remuneration – and they actually do; in such cases, CMOs regularly offer reductions or flexible methods of payment.

Also, Article 13(4) of the LACNR relates to the fairness of the tariffs. This provision has rather recently been added to Article 13 of the LACNR.⁴²

42. This paragraph was added to Article 13 of the LACNR by the German Law on the Regulation of Copyright in the Information Society (Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft) of 10 September 2003. *Bundesgesetzblatt*, Teil I, 2003, p. 1774, in implementation of Article 5(2)(b) of EC Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (2001), O.J. L. 167/10, [EU Directive on Copyright in the Information Society], online: <europa.eu.int/eur-lex/en/consleg/pdf/2001/len_2001L0029_do_001.pdf> (last visited: 19 September 2005).

It focuses on the relation between the payment of equitable remuneration for acts of private copying and photocopying (Articles 54 and 54a of the German Copyright Act) and the application of technological protection measures (DRM or Digital Rights Management systems).⁴³ When "establishing the tariffs for the remuneration based on Articles 54 and 54a [of the] Copyright Act, it should also be taken into account, to what extent technological protection measures under Article 95a [of the] Copyright Act [protection of technological measures] are being applied on the respective works or [neighbouring rights] subject matter". Obviously, this provision must be seen as the German legislator's attempt to avoid the often quoted anticipated risk of "double payment" ("double" in the sense that producers of blank recording material, for example, have to pay a lump sum equitable remuneration for private copying to CMOs, whereas the consumer may have to pay directly for the same acts to those who run the DRM system).⁴⁴ Under Article 13(4), the CMOs are actually encouraged to gradually phase down their tariffs for such remuneration. However, as this is not an obligation, and DRM systems are still developing, it remains to be seen how the mechanism of Article 13(4) is actually applied in practice.⁴⁵

3.2.2.9.

Article 13a of the LACNR (obligations of users/organizers)

Whereas Articles 10 to 12 of the LACNR constitute obligations of CMOs in relation to users, Articles 13a and 13b present certain obligations that users have to comply with. Both provisions were inserted into the law in 1985. They reflect the desire to further help CMOs to fulfil their tasks accurately.

In principle, it should go without saying that potential users have to contact the CMO before they engage in an act of exploitation of protected works or subject matter.⁴⁶ However, this may be less obvious in case of rights of equitable remuneration, where no exclusive right to authorize or prohibit use is involved. It was deemed appropriate by the German legislator to insert an obligation of organizers of public performances into the law with a view to facilitating the control of CMOs over public performances of works. Article 13a(1) of the

43. On the protection of DRM systems and its origin in the WCT and WPPT see J. Reinbothe and S. von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (London: Butterworths, 2002), 581. Article 11 WCT, Note 10 and following; cf. J. Reinbothe in: E. Becker, W. Bulse, D. Günnewig and N. Rump, eds., *Digital Rights Management – Technological, Economic, Legal and Political Aspects* (Berlin: Heidelberg, 2003), 805 at 410 and following.

44. On the risk of double payment see G. Schulte in: *Urheberrechtsgesetz, Kommentar*, *supra* note 26 at 1517 with references.

45. Cf. S. Richters and J. Schmitt: "Computerrecht – Die urheberrechtliche Pauschalvergütung für PCs – Zulässigkeit einer pauschalen Vergütungspflicht vor dem Urheber-, verfassungs- und europarechtlichen Hintergrund der erstinstanzlichen Entscheidung des LG München" (2005), 21 *Computer und Recht* 473.

46. See also above, 3.2.2.5, on Article 10 of the LACNR (Right of Information), and 3.2.2.6, on the obligation to allow exploitation (Article 11 of the LACNR).

LACNR therefore states explicitly that "organizers of public performances of copyright protected works have to seek permission of the CMO administering the exploitation rights on such works before the event".

Moreover, under the first sentence of Article 13a(2), the organizers have to provide the CMO after the event with a listing of all used works. It should be noted, however, that the second sentence of the same Article exempts organizers from this obligation of "a communication to the public of a work from a recording, a communication to the public of a broadcast of a work, and organizers of events, where regularly works in the public domain or insignificantly modified works are performed". This means, in short, that the obligation to send listings of the used works under Article 13a(2) applies mainly to live performances.

Article 13a(3) includes a specific obligation of broadcasters *vis-à-vis* CMOs – again, with a view to facilitating the operations of the latter, in particular regarding the distribution of the collected revenues to rightsholders.

To the extent that, for the distribution of revenues from the management of rights of communication to the public of broadcasts, information from the broadcasters is needed, these broadcasters are obliged to provide the collecting society with this information against payment of the costs involved.⁴⁷

As the provision is designed to help the CMO with one of its own and most genuine tasks – redistribution of the revenues to rightsholders – it seems only fair that the society has to reimburse the broadcaster for its costs in this respect.

3.2.2.10.

Article 13b of the LACNR (presumption of legitimacy)

Article 13b of the LACNR establishes presumptions for the legal standing of the CMO regarding two types of claims of CMOs *vis-à-vis* users: rights of information (Article 13b(1)) and rights of equitable remuneration (Article 13b(2) to (4)). The underlying idea is that users should not be able to undermine any such claims by casting doubts on whether the CMO exercising them does in fact represent all relevant rightsholders. In practice, each CMO in Germany has a dominant position, if not a monopoly, in its area of activity. A few exceptions apart, it cannot be doubted that each CMO does represent all rightsholders in its area, and often even the world repertoire based on agreements with its foreign sister societies. Article 13b, therefore, basically confirms reasonable practice and addresses possible cases of doubt as well as the treatment of outsiders.

For the purpose of this brief description of the LACNR, it may suffice to summarize in short the four paragraphs of Article 13b.

Article 13b(1) provides that "if the CMO claims a right of information that can only be exercised through a CMO, it is presumed to represent the rights

of all rightsholders". In fact, exercising a right of information cannot be made dependent on how many rightsholders the CMO actually represents. Moreover, a CMO which does not represent at least a significant number of rightsholders, would not obtain the authorization to engage in collective rights management in the first place.⁴⁸

The first sentence of Article 13b(2) of the LACNR provides that:

if the collecting society claims a right of equitable remuneration under Articles 27 [public lending right], 54 (1) [private copying], 54a(1) or (2) [reprography], 77(2) [reproduction and distribution of recorded performances], 85 (4) [reproduction, distribution and making available to the public of sound recordings], or 94(5) [reproduction, distribution, public performance and making available of films] Copyright Act, it is presumed to represent the rights of all rightsholders.⁴⁹

This presumption is qualified in the second sentence of the Article, which states that, if more than one CMO is entitled to claim such rights of equitable remuneration, "the presumption only applies, if all entitled CMOs present their claims together". (This is regularly being done in the case of private copying, where all entitled CMOs in Germany operate and present their claims of equitable remuneration together under the heading of ZPÜ).⁵⁰ Finally, the third sentence of the Article obliges the CMO that benefits from the presumption to keep the user from whom the remuneration is collected, free of possible claims from those rightsholders that the society actually does not represent.

Article 13b(3) and (4) of the LACNR deal with a very specific issue, namely the collection of remuneration rights for cable redistribution under Article 20b of the Copyright Act. Under the latter, the authors' right of equitable remuneration for acts of cable redistribution can only be administered by a CMO – except, if a broadcaster claims the remuneration right in relation to its own broadcasts. In combination with the presumption of ownership or representation in Article 13b(2) of the LACNR, several issues may occur between CMOs and broadcasters, amongst CMOs, and between CMOs and authors that do not want to be represented by a CMO (so-called outsiders).

Article 13b(3) and (4) of the LACNR offer detailed solutions to these situations. These provisions basically implement Article 9 of the EU Satellite and Cable Directive.⁵¹ Article 13b(3) creates a fiction of entitlement: if an author has not assigned his remuneration right for cable redistribution under Article 20b(1)

48. See above, 3.2.1.1 to 3.2.1.4, on Articles 1 to 4 of the LACNR.

49. *Supra* note 24.

50. On the ZPÜ see above, 2.3.2. third to last paragraph.

51. EC Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (1993), O.J. L. 248/15 [EU Satellite and Cable Directive], online: <europa.eu.int/eur-lex/lex/lexUriServ/lexUriServ.do?uri=CELEX:31993L0083:EN:HTML> (last visited: 18 September 2005).

47. *Supra* note 24.

of the Copyright Act to any CMO, the CMO that usually administers rights of this kind is considered to be entitled to also administer the rights of the said "outsider". If there is more than one CMO dealing with such rights, they are considered to be entitled together; if the author chooses the society himself, only this one is considered to be entitled to exercise his rights. However, these rules do not apply to rights held by the broadcaster whose broadcasts are redistributed by cable. Article 13b(4) concerns the relation between the "outsider" and the CMO. It states that, as a consequence of the presumptions contained in Article 13b(3), in principle the author has the same rights and obligations in relation to the CMO as if he had assigned his rights to the CMO himself.

3.2.3. Chapter 2 (Second Part): The Arbitration Board and Access to the Courts (Articles 14 to 17 of the LACNR)

Like the Articles 6 to 13b of the LACNR, the provisions contained in Articles 14 to 17 belong to Chapter 2 of the LACNR entitled "Rights and Obligations of the collecting society". They do not form part of a separate subsection, and yet, they are special. Articles 14 to 17 of the LACNR deal with the Arbitration Board ("Schiedsstelle") and access to the Courts. These provisions created in 1965 a new and comprehensive mechanism for copyright litigation involving CMOs. The German legislator rightly assumed that, while copyright litigation is already something for experts and not easily accessible to general Courts, cases involving CMOs and their sometimes complex dealings with users are even more complicated. In particular, assessing the economic impact of an umbrella agreement under Article 12 of the LACNR between the CMO and an association of users on rights of remuneration for private copying, rights of communication to the public or public lending rights may be easiest for the parties themselves with the assistance of neutral experts. Hence, the idea to establish an institutionalized public arbitration board, the "Schiedsstelle", was born.⁵² Articles 14 to 17 include detailed provisions on the mandate of the Arbitration Board, its composition, the nature and consequence of its decisions, and the role of the proceedings before the Arbitration Board in relation to access to the Courts.

3.2.3.1. Article 14 of the LACNR (*arbitration board*)

3.2.3.1.1. The mandate of the Arbitration Board

The mandate of the Arbitration Board is set out in Article 14(1) of the LACNR.

52. On the nature of the Arbitration Board as an administrative body see J. Reinbothe, *Schlichtung im Urheberrecht* (Munich: Beck Juristischer Verlag, 1978), 188; A. Strittmatter, *Tarife vor der urheberrechtlichen Schiedsstelle* (Berlin: Berlin Verlag, 1994), 202; G. Schütze in: *Urheberrechtsgesetz, Kommentar*, supra note 26 at 1540.

Under Article 14(1), each of the parties may turn to the Arbitration Board:

for disputes to which a collecting society is a party if a) the disputes concern the exploitation of works or subject matter protected under the Copyright Act or b) if the disputes concern the conclusion or modification of an umbrella agreement.⁵³

The Arbitration Board is hence involved in all the classical disputes between CMOs and users, be it in the context of individual agreements under Article 11, or in the context of umbrella agreements under Article 12 of the LACNR. Parties to such disputes are the CMO on the one side and individual users or user associations on the other.

Under Article 14(1)2., each of the parties may turn to the Arbitration Board "for disputes to which a broadcaster and a cable re-distributor is a party, if the disputes concern the obligation to conclude an agreement on the redistribution by cable".

This provision was added to Article 14 of the LACNR in 1998, when the right of cable redistribution was introduced in Article 20b of the Copyright Act. It implements Article 11 of the EU Satellite and Cable Directive.⁵⁴ While the disputes described in Article 14(1)2. do not involve CMOs and are, strictly speaking, not about the collective management of rights, the German legislator wanted to make available and apply the proven mechanism of the Arbitration Board also to such disputes.

Article 14(1) of the LACNR grants all parties a right to initiate the proceedings before the Arbitration Board – in writing, as Article 14(4) requires. Of course, they are not obliged to do so; however, at least in principle, none of the kind of disputes mentioned in Article 14(1) can be brought before the Courts without prior proceedings before the Arbitration Board having taken place.⁵⁵ Moreover, agreements on private arbitration board settlements for future disputes must not prejudice the right of each party to invoke the proceedings before the Arbitration Board and to seek a decision by the Courts (Article 14(6)). Therefore, *de facto*, the proceedings before the Arbitration Board are some sort of a first instance prior to Court proceedings on matters described in Article 14(1) and have precedence over private settlement agreements. This is confirmed by Article 14(7) of the LACNR which states that initiating proceedings before the Arbitration Board has the same effect of interrupting prescription as initiating Court proceedings. Moreover, the settlements before the Arbitration Board are enforceable under the law of civil procedure (second sentence of Article 14(5)).

53. *Supra* note 24.

54. See *supra* note 51, *above*; J. Reinbothe in: *Urheberrecht, Kommentar*, supra note 19, §14 LACNR, Note 1.

55. For details see *below*, 3.2.3.4 (on Article 16 of the LACNR).

The first sentence of Article 14(5) describes the mandate of the Arbitration Board in very general terms: it is "to promote an amicable settlement of the dispute".

3.2.3.1.2. The composition of the Arbitration Board

According to Article 14(2) of the LACNR, the Arbitration Board is established "at the supervisory authority (Article 18 (1))", i.e. the German Patent and Trade Mark Office (GPTO). It is composed of three members, including the chairperson, who must have a complete legal education with the qualification to become a judge.

The Federal Ministry of Justice appoints the three members of the Arbitration Board for an initial (and renewable) term of four years. Article 14(3) of the LACNR explicitly states that the members are independent and not subject to instructions.

3.2.3.2. Articles 14a, 14b, 14c and 14d of the LACNR (proposal for agreement)

The general mandate and composition of the Arbitration Board according to Article 14 of the LACNR gives the impression that it functions like a first instance peace judge. In fact, the original Arbitration Board of 1965 did have a similar function. Originally, only the chairperson was appointed by the public authority (each party appointed one additional member), and the judgments of the Arbitration Board were binding on the parties. But this model met with little acceptance by the copyright world; the "old" Arbitration Board was hardly ever used, and where it was, it took years to arrive at a decision.⁵⁶

For these reasons, the structure of the Arbitration Board, and in particular its decision making power were completely revised in 1985. The Articles 14a, 14b, 14c and 14d of the LACNR contain the main elements of the 1985 revision. They focus on the content and the effects of the Arbitration Board's decisions. The Arbitration Board of today may still look like a first instance peace judge tribunal – but, in fact, it is not. The Explanatory Memorandum of the 1985 government proposal describes the Arbitration Board as an administrative body established at the supervisory authority.⁵⁷ The Arbitration Board now really focuses on what it was always meant to be: a body that facilitates amicable agreements between the parties.⁵⁸

56. On the original Arbitration Board of 1965 see I Reinbothe in: *Urheberrecht, Kommentar*, supra note 19, Vor §14 Waurnig, Note 2, with further references; GPTO, Annual Report 2004, at 50 (where it states that between 1998 and 2004, the "new" Arbitration Board received 270 requests, presented 167 decisions and handled in total 222 requests).

57. Explanatory Memorandum of the Government Bill, in: Parliamentary Document (*Bundestagsdrucksache*) 10/837, at 24.

58. GPTO, Annual Report 2004, at 28.

3.2.3.2.1. Article 14a of the LACNR

The acceptance and success of the Arbitration Board is mainly due to the nature of its decisions. According to Article 14a, the Arbitration Board does not issue judgements. With the simple majority of its (three) members, it adopts a decision and submits it to the parties as a "proposal for an agreement" (Article 14a(1) and (2)). If the proposal is not contested by any of the parties within one month (for disputes about cable redistribution rights: three months), the proposal is considered accepted by the parties and becomes the valid settlement of their dispute (Article 14a(3)).

3.2.3.2.2. Article 14b of the LACNR

Article 14b of the LACNR provides the Arbitration Board with an important exception to its rather comprehensive mandate under Article 14(1)(a) of the LACNR regarding disputes between CMOs and individual users.⁵⁹ If, in the context of such disputes, the application and appropriateness of the tariff (Article 13 of the LACNR) as well as other facts are contested, the Arbitration Board may limit its proposal for an agreement to the application and appropriateness of the tariff – which is, in fact, its genuine mandate. Following the same logic, if the tariff itself is not contested at all, the Arbitration Board may even refrain from submitting any proposal for an agreement.

3.2.3.2.3. Article 14c of the LACNR

Article 14c deals with the content and effect of the Arbitration Board's decisions regarding disputes in the context of umbrella agreements under Article 12 of the LACNR between CMOs and users' associations. Article 14c(1) provides that, for such disputes under Article 14(1)(b) of the LACNR,⁶⁰ the Arbitration Board proposes the contents of the umbrella agreement. Since umbrella agreements are usually of a longer duration, the Arbitration Board may also, upon request of a party, propose provisional measures (Article 14c(2)). In practice, however, this provision has not become relevant. Furthermore, Article 14c(3) of the LACNR takes into account the potential effects of umbrella agreements on competition by providing that the Arbitration Board has to keep the German Federal Antitrust Office (Bundeskartellamt) informed about the proceedings.

3.2.3.2.4. Article 14d of the LACNR

Article 14d reflects the additional mandate that the Arbitration Board obtained in 1998 for disputes between broadcasters and cable re-distributors under

59. See above, 3.2.3.1.1.

60. See *Ibid.*

Article 14(1)2. of the LACNR.⁶¹ The legislator held that agreements on cable redistribution are more similar to umbrella agreements than to individual user agreements. Therefore, the same rules apply to such disputes before the Arbitration Board as to disputes on umbrella agreements.

3.2.3.3. *Article 15 of the LACNR (rules of procedure of the arbitration board)*

Under Article 15 of the LACNR, the Federal Minister of Justice has the competence to regulate on the rules of procedure before the Arbitration Board, on the compensation for its members and on its fees. The Regulation on the Arbitration Board for Copyright Disputes of 1985 contains detailed provisions on how to initiate the proceedings and on the above-mentioned issues.⁶²

3.2.3.4. *Article 16 of the LACNR (access to the courts)*

Article 16 clarifies the relation between the proceedings before the Arbitration Board and access to the Courts in copyright disputes. The provision confirms that, as a matter of principle, there is always access to the Courts in copyright matters, even in those cases where Article 14(1) of the LACNR entrusts the Arbitration Board with a particular mandate.

However, Court proceedings have to be preceded by proceedings before the Arbitration Board in three cases: first, for disputes between CMOs and individual users according to Article 14(1)1.a) of the LACNR, if "the application or the equitability of a tariff is contested"; second, for disputes between CMOs and users' associations about umbrella agreements according to Article 14(1)1.b); and third, for disputes about cable redistribution rights according to Article 14(1)2. of the LACNR.

3.2.3.5. *Articles 16(4) and 17 of the LACNR (competent court)*

The LACNR contains two specific provisions on the competent Court. According to Article 16(4), for all disputes regarding umbrella agreements and cable redistribution agreements under Article 14(1)1.b) and 2. of the LACNR respectively, the Munich Court of Appeals is the competent Court of First Instance. As mentioned above, in these cases prior proceedings before the Arbitration Board are mandatory.⁶³

Article 17 of the LACNR provides that complaints of CMOs regarding the alleged infringement of their rights or claims can only be filed with the

61. *Ibid.*

62. Order Concerning the Mediation Body for Copyright Disputes (Urheberrechtsschiedsstellenverordnung) of 20 December 1985, *Bundesgesetzblatt*, Teil I, 1985, p. 2543 and as amended in Teil I, 24 June 1994, p. 1325.

63. See above, 3.2.3.4.

Court where the infringement took place or where the infringer has his or her residence.

3.2.4. **Chapter 3: The Control over Collecting Societies (Articles 18 to 20 of the LACNR)**

One of the main motives behind the LACNR was to submit CMOs to comprehensive State control so as to cope better with the potential risks that result from their dominant position and their function as trustees. This specific State control, which is contained in Chapter 3, Articles 18 to 20 of the LACNR, applies side by side with the control by the German Federal Antitrust Office (Bundeskartellamt) and other forms of supervision by the State, depending on which organizational structure the CMO has chosen.⁶⁴

In general, CMOs may, therefore, be subject to three different forms of supervision. However, only the supervision spelled out in Articles 18 to 20 is copyright-specific and, so to speak, tailor-made for the functions of CMOs. The LACNR takes account of the possible interfaces between these different forms of control over CMOs.

3.2.4.1. *Article 18 of the LACNR (supervising authority)*

The supervisory authority for CMOs is the GPTO, the German Patent and Trade Mark Office (Deutsches Patent- und Markenamt, DPMA) in Munich (Article 18(1)). The GPTO can take its two most important decisions, namely on the granting (Article 1 of the LACNR) and the repeal (Article 4 of the LACNR) of the authorization, only if the German Federal Antitrust Office agrees (Article 18(3) of the LACNR). In this respect, the GPTO depends on the latter. Public authorities that exercise other forms of control over CMOs due to their organizational structure, for example under company law, have to coordinate with the GPTO (Article 18(2)).

3.2.4.2. *Article 19 of the LACNR (supervision)*

The main substance of the supervision is outlined in Article 19 of the LACNR. It draws upon the German State control over banks and insurance companies,⁶⁵ but contains several specific features with reference to collective rights management.

First of all, the GPTO is obliged to safeguard compliance of the CMOs with their obligations under the LACNR (Article 19(1)) and may take all appropriate measures to this effect (Article 19(2)). This is of particular importance for

64. See above, 2.3.2.

65. J. Reinbothe in: *Urheberrecht, Kommentar*, supra note 19, §18 LACNR, Note 1.

users⁶⁶ and also for the rightsholders⁶⁷ that are represented in a CMO. For the latter, the supervision by the GPTO has a particularly protective function. It includes the control over the appropriate influence of the rightsholders in the society. In the view of most scholars, and apparently also the GPTO, rightsholders are directly entitled to claim appropriate action from the GPTO.⁶⁸ Foreign rightsholders benefit from this right, too, in accordance with international law.

Under Article 19(3) and (4) of the LACNR, the GPTO has an extensive right of information *vis-à-vis* CMOs and can attend their Assemblies and meetings. Furthermore, it can require the removal of representatives, who are not deemed sufficiently reliable (Article 19(5)).

3.2.4.3.

Article 20 of the LACNR (procedural obligations of collecting societies)

With a view to facilitating the GPTO's tasks, Article 20 obliges CMOs to provide it regularly, and on their own initiative, with information about any change in the executive staff, the statute, about the tariffs, umbrella agreements, agreements with foreign CMOs, decisions of the Assemblies, the supervisory board and all committees, the annual report, the annual account, and, upon request of the GPTO, all decisions of Courts and public authorities, to which they were a party.

3.2.5.

Chapter 4: The Transitional and Final Provisions (Articles 21 to 28 of the LACNR)

Most of the transitional and final provisions contained in Articles 21 to 28 of the LACNR have become obsolete over the years and are not worth mentioning here: after all, as of 1 January 2006, the LACNR will have been in force for forty years.

Nevertheless, one provision deserves to be highlighted. It is the former Article 24 of the LACNR, which had inserted a specific provision on the control of CMOs under competition law into the German Antitrust Act, the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) of 1957.⁶⁹ Under this provision, CMOs were explicitly exempted from the prohibition of horizontal and vertical agreements and of pricing arrangements. At the same time, CMOs continued to be subject to the control of a possible abuse of their dominant position under competition law.⁷⁰

66. Cf. the obligations under Articles 10, 11, 12 and 13 of the LACNR, *supra* note 24.

67. Notably regarding the obligations under Articles 6, 7 (first sentence) and 9 of the LACNR, *supra* note 24.

68. J. Reinbothe in: *Urheberrecht, Kommentar*, *supra* note 19, §18 LACNR, Note 2, with further references.

69. See *supra* note 22.

70. J. Reinbothe in: *Urheberrecht, Kommentar*, *supra* note 19, §24 LACNR (Article 102a/30 GWB), Note 2.

Over the years, this specific exemption for CMOs under the German Antitrust Act has been modified and adapted to the jurisprudence of the European Court of Justice (ECJ) on the same subject. In fact, the ECJ has tackled on several occasions the issue of abusive behaviour of CMOs under Article 82 of the EU Treaty.⁷¹ Most recently, the German legislator has decided to remove the exemption for CMO altogether from the GWB in the implementation of the obligation under EC Regulation 1/2003⁷² to remove any explicit sector exemptions from the antitrust legislation.⁷³ Apart from the obligation under the EC Regulation, the reasoning for this step is plausible: it is not contested that CMOs fulfil legitimate functions and are, as such, not cartels. No specific exemption is needed, therefore, from the application of those provisions of the GWB that refer to horizontal or vertical agreements and pricing arrangements, as they do not apply in the first place. By the same token, abuse control has always applied and will continue to do so.

3.3.

CONCLUSIONS

The LACNR provides solutions for all copyright-related issues regarding collective rights management in Germany:

- it contains rules on who may establish a collecting society under which conditions (Articles 1 to 5);
- it regulates on the relation between collecting societies and rightsholders, including the obligation of societies to administer rights, the principles of the distribution of the revenues and of accounting and reporting (Articles 6 to 9);
- the LACNR provisions on the relation between collecting societies and users include obligations of collecting societies to provide information, grant licenses and conclude umbrella agreements under equitable conditions, and to publish tariffs that are transparent and based on fair criteria (Articles 10 to 13b);

71. Cf. F. Gotzen, "A new perspective for the Management of Copyright and Competition Law in the Internal Market" in: A. Ohly, T. Bodewig, T. Dreier, P. Götting, M. Haedicke, M. Lehmann, (eds), *Perspektiven des Geistigen Eigentums und Wettbewerbsrechts, Festschrift für Gerhard Schricker* (Munich: Beck Juristischer Verlag, 2005), 944 at 299 with references. EC, Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2002), O.J.L. 1/1 [EC Regulation 1/2003], online: <europa.eu.int/eur-lex/phil/obj/dat/2003n1_001/1_00120030104en00010025.pdf> (last visited: 1 October 2005).

72. Seventh Law on the Amendment of the Law on Restrictions to Competition (Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen) of 7 July 2005, *Bundesgesetzblatt*, Teil I 2005, p. 1954. Cf. Explanatory Memorandum of the Government Bill (in preparation of the Law of 7 July 2005 amending the Antitrust Act (GWB), in: Parliamentary Document (*Bundestagsdrucksache*) 15/3640 of 12 August 2004 at 49–50; cf. EC Regulation 1/2003, *ibid.*

- detailed provisions deal with the Arbitration Board and access to justice (Articles 14 to 17); and
- the LACNR provides for the supervision of collecting societies by the GPTO, which constantly examines whether the conditions for granting the authorization to engage in collective rights management continue to exist and ensures that the collecting societies fulfil their duties under the LACNR.⁷⁴

The LACNR reflects in a comprehensive manner the economic, cultural and societal functions of collective rights management in Germany. The law leaves the establishment of CMOs and their operations to a large extent to the market. However, through its provisions, it has succeeded in ensuring the good governance of CMOs. The LACNR has made sure that CMOs are reliable trustees for rightsholders and reliable partners for users. And it has provided for the general acceptance of collective rights management in Germany today.

On the whole, the LACNR has achieved its purpose and passes the practice test continuously. It has, in fact, safeguarded the pragmatic and sustainable operation of collective rights management and CMOs as an important element of the German copyright system.

Indeed, the LACNR almost seems to be a model for successful regulation in this field. The concepts chosen in 1965 have been reasonably future-proof. They have already worked for four decades and have been accepted by all players. Basically, only three amendments had to be applied over the years: one in 1985, to improve on the functioning and acceptance of the Arbitration Board; one in 1998, to implement the EU Satellite and Cable Directive;⁷⁵ and one in 2003 to implement the EU Directive on Copyright in the Information Society.⁷⁶

4. FUTURE PERSPECTIVES FOR COLLECTIVE RIGHTS MANAGEMENT IN GERMANY

The environment of intellectual property is changing. The digital revolution and notably the Internet and the new digital products and services have had the highest impact on copyright protection ever – comparable only to the appearance of commercial printing (copying), and certainly much more radical than the appearance of new forms of exploitation based on new technology in the early 20th century.

The digital revolution and its effects on the economy, on communication habits and on culture has done at least two things to copyright: it has changed the perception of copyright protection and it has further stimulated the move of copyright away from authors' rights to producers' rights. The discussions

74. Cf. GPTO, *Annual Report 2004*, at 26.

75. *Supra* note 51.

76. *Supra* note 42.

about the so-called private copy levies and the role of DRM (Digital Rights Management) systems are, at the same time, testimony, proof and catalyst of these developments.

Authors' rights or producers' rights – individual rights management by producers and publishers or collective rights management by CMOs – DRM systems or equitable remuneration schemes – these are the issues. And they all directly affect the mandate and function of CMOs and of collective rights management as such. Governments and legislators must tackle those issues without delay.

In countries without a particular history and tradition of collective rights management, these issues may raise no particular problems. They do so, however, in most Member States of the European Union, including and in particular Germany, with a long and successful tradition of collective rights management and its comprehensive legal framework, the LACNR.

As far as the LACNR is concerned, it continues to function in the new environment of digital services. Only one adjustment due to the new features of the Information Society had to be applied in 2003, namely to Article 13,⁷⁷ and the regular reporting of the control authority confirms that collective rights management continues to function well and to the benefit of all players.⁷⁸

At the same time, the German Federal Ministry of Justice has recently presented a draft Bill as the "Second Basket" of envisaged Internet-related copyright amendments.⁷⁹ It remains to be seen if and, if so, how this Bill is pursued by the new German parliament and government elected on 18 September 2005, even more so, since the opinions on the draft Bill are divided and several of its provisions have been criticized for being unbalanced. In fact, the relation of the draft to the subtle structure of the LACNR, particularly its provisions relating to the establishment of tariffs applying to the equitable remuneration for acts of private copying that seem to deviate to some extent from the principles of the present Article 13 of the LACNR, will have to be subject to thorough analysis and scrutiny. It can hardly be expected, after all, nor would it appear reasonable neither from an economic nor from a cultural perspective, to put at risk the balance of interests reflected in the LACNR.

Developments in Germany will have to be seen in the European Union context. However, the recent signals at European Union level about collective rights management in its relation to competition and the EU Internal Market seem to indicate that there is no particular focus on the specificities that the mandate and function of CMOs are based on in the cultural context. While a European Commission Communication of 2004⁸⁰ highlights their position as

77. *See above*, 3.2.2.8, and note 42.

78. GPTO, *Annual Report 2004*, at 26.

79. "Referentenentwurf für ein Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft", Bundesministerium der Justiz, Berlin, 26 January 2006.

80. "Communication from the Commission: The Management of Copyright and Related Rights in the Internal Market", *supra* note 1, at 14.

trustees, a paper issued by the European Commission's services in July 2005⁸¹ seems to confirm that they see little if any difference between CMOs and other service providers such as banks and insurance companies.⁸² Of course, it is mainly up to EU Member States and to the European Parliament to decide on the appropriate way forward for collective rights management, at least as far as EU legislation is concerned. Against the background of the principles enshrined in the LACNR and its vast experience in this field, Germany may be expected to have an influential voice, when the EU legislative institutions want to define together the future of collective rights management in the European Union.

81. "Study on a Community Initiative on the Cross-Border Collective Management of Copyright", Commission Staff Working Document of 7 July 2005; cf. BNA Patent, *Trademark & Copyright Journal*, Vol. 70, July 22, 2005, No. 1729, at 367. EC, Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005), O.J.L. 27/6/54, online: <europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_27/6/2005l1021en0540057.pdf> (last visited: 16 November 2005).
82. For details on developments at EU level, see above Chapter 4, Collective Management and the European Union.

Chapter VII Collective Management in the United Kingdom (and Ireland)

*Prof. Dr. Paul L. C. Torremans**

1. INTRODUCTION

One does not need to dwell here on the fact that it is in many circumstances virtually impossible for an individual owner of an intellectual property right to police all potentially infringing uses. This gave, as we know, rise to the idea of collective licensing, whereby rights are assigned to a society or such a society is given the right to grant licenses on behalf of the rightowner. The society is also given the right to enforce those rights against infringers.¹ This essay will look at collective licensing,² mainly in the United Kingdom, but also in the Republic of Ireland. Before this essay focuses on these societies and the way in which they are regulated, it will first provide a historic overview of their development within the UK.

2. HISTORY AND NATURE OF COLLECTIVE MANAGEMENT

2.1. HISTORY

Collective licensing in the United Kingdom started early in the twentieth century. The Copyright Act 1911 gave the impetus and even before the Act was

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1. See K. Garnett, J. Rayner James and G. Davies, eds, *Copinger and Stone James on Copyright*, 14th edn. (London: Sweet & Maxwell 1999), at 1490–1491.
2. See in general terms P. Torremans, *Handbook and Torremans: Intellectual Property Law*, 4th edn. (Oxford: Oxford University Press, 2005), 665 at 281; L. Bently and B. Sherman, *Intellectual Property Law*, 2nd edn. (Oxford, Oxford University Press, 2004), 1231 at 267–269 and W. Cornish and D. Llewellyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 5th edn. (London: Sweet & Maxwell, 2003), 895 at 481–482.

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- * City Solicitors' Educational Trust Professor of Intellectual Property Law, School of Law, University of Nottingham, UK, and Professor of Private International Law, Faculty of Law, University of Gent, Belgium.
1. See K. Garnett, J. Rayner James and G. Davies, eds. *Copinger and Skone James on Copyright*, 14th edn. (London: Sweet & Maxwell 1999), at 1490–1491.
2. See in general *lexis P. Torremans, Holboak and Torremans: Intellectual Property Law*, 4th edn. (Oxford: Oxford University Press, 2005), 665 at 281; L. Bently and B. Sherman, *Intellectual Property Law*, 2nd edn. (Oxford, Oxford University Press, 2004), 1231 at 267–269 and W. Cornish and D. Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 5th edn. (London: Sweet & Maxwell, 2003), 895 at 481–482.

Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, pp. 227–255
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adopted the Mechanical Copyright Licenses Company Ltd (MECOLICO) was formed in order to collect and distribute mechanical royalties from the gramophone companies.³ Soon afterwards, in 1914, the Performing Rights Society Ltd (PRS) saw the light of day. Its specific aim was the collective administration of public performance rights in musical works.⁴

The next phase in the development of collective licensing was prompted by the *Cawardine* case.⁵ In this case, it was established that the Copyright Act 1911 gave full copyright to sound recordings. There was therefore a new need to administer the public performance rights in sound recordings and this is what Phonographic Performance Ltd (PPL) set out to do from its creation in 1934 onwards.⁶

For a while this seemed to be the end of developments in this field and amongst themselves the three collecting societies seemed to cover the whole area of collective licensing. So comprehensive seemed the coverage at the time that the review of copyright undertaken by the Gregory Committee led to a mention in a 1952 report⁷ that the PPL and PRS were effectively quasi-monopolies. The emphasis therefore shifted to the regulatory aspect. The Gregory Committee saw the need for the establishment of a tribunal that could, if necessary, revise and review the tariffs and conditions which the quasi-monopolists PRS and PPL imposed. The Copyright Act 1956 followed up that recommendation and created the Performing Right Tribunal, which is now known as the Copyright Tribunal.⁸

Technological developments and the emergence of inexpensive copying techniques brought the next phase in the development of collective licensing that started in the late 1970s.

A first new phenomenon that needed to be dealt with was the extent of photocopying that was being carried out in educational institutions such as schools and universities. When this problem was considered by the Whitford Committee⁹ as part of its review of copyright, all parties involved saw collective licensing as the only feasible solution. What emerged as a solution was a system of negotiated blanket licenses that were to be administered by a collecting society. Despite the fact that the Committee's recommendations were not followed to the letter, the scheme eventually went ahead. A number of publishers' and authors' associations took the initiative in 1982 to create the Copyright

3. Copyright Act 1911, 1 & 2 Geo. V, c. 46.
4. See H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright and Designs*, 3rd edn. (London: Butterworths, 2000), at 943–944.
5. *Gramophone Co. Ltd v. Stephen Cawardine & Co.* [1934] Ch 450. See Cornish, *supra* note 2 at 351.
6. See Garnett, *supra* note 1 at 1496–1497.
7. Copyright Committee, *Report of the Copyright Committee*, (Chairman H. S. Gregory), Cmd 8662, Board of Trade, 1952, at paras 136 and 146.
8. Copyright Act, 1956, 4 & 5 Eliz. II, c. 74.
9. Committee to consider the Law on Copyright and Designs (Whitford Committee), *Report of the Committee to consider the Law of Copyright and Designs*, (Chairman the Honourable Mr. Justice Whitford), CMD 6732, HMSO, 1977, Chapter 4.

Licensing Agency Ltd (CLA). The CLA then opened negotiations with the representatives of schools and universities with the aim to come to a system of blanket licenses. Some of the members of the CLA backed these negotiations up with well publicized copyright infringement actions. As a result, the schools and universities on the other side of the table were made acutely aware of the risk and the extent of their potential liabilities for this form of widespread copyright infringement. What emerged was a first set of three year blanket licenses and over the years the CLA and its system of blanket licenses have gone on to cover the whole educational sector. The extensive coverage of the scheme and monopoly position of the CLA have meant that the Copyright, Designs and Patents Act 1988 (CDPA) has expanded the jurisdiction of the Copyright Tribunal to include the CLA schemes.¹⁰ The Act also provides a legal framework to ensure the smooth operation of the schemes.¹¹

Schools and universities did not only engage in photocopying however. The increased use of recording equipment, such as tape recorders and video recorders, also led to widespread recording of radio and television broadcasts, with the aim of using them for educational purposes. Due to the multitude of rightsholders involved, it was once more not practicable to negotiate individual licenses for each such recording. The CDPA therefore contains an incentive to come to some form of compulsory collective licensing scheme.¹² It does so by making the off-air recording by educational establishments for educational purposes free of charge until a certified licensing scheme is put in place. In order to receive compensation, rightsholders needed to come up with an acceptable licensing scheme. Eventually, two schemes saw the light of day and have been in place since 30 May 1990. The first one is operated by the Educational Recording Agency Ltd (ERA) and the second one was operated by Guild Sound and Vision Ltd. The latter has since been replaced by Open University Educational Enterprises Ltd.¹³

Later on in the 1990s the emphasis moved to performers. They were for the first time given property rights in relation to their performances by means of the Copyright and Related Rights Regulations 1996,¹⁴ which made changes to the relevant sections of the CDPA.¹⁵ These property rights can be transferred

10. Copyright Designs and Patents Act 1988, c. 48, online: <www.ukincomp.co.uk/s-BG-9-copyright-designs-and-patents-act-1988.html> (last visited: 21 August 2005) [CDPA].
11. See, e.g., *ibid.*, s. 36.
12. *Ibid.*, ss. 36 and 143.
13. See Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Guild Sound and Vision Limited) Order 1990, Statutory Instrument 1990/2007, online: <www.wipo.int/lea/docs/new/pdf/en/gb/bb31en.pdf> (last visited: 21 August 2005) (revoking the Guild Sound and Vision scheme) and Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Open University Educational Enterprises Limited) Order 1990, Statutory Instrument 1990/2008 (certifying the Open University Educational Enterprises scheme).
14. The Copyright and Related Rights Regulations 1996, Statutory Instrument 1996/2967, online: <www.opsi.gov.uk/si/si1996/UKSI_19962967_en_1.htm> (last visited: 21 August 2005).
15. CDPA, *supra* note 10, ss. 182–184 and 182A–182C.

very much like copyright itself and it is therefore logical that the performers can also transfer them to a society that will enforce them on their behalf. Rental rights provide a stark example of this. The performer can transfer the rental right in a sound recording or film to the producer, but even then the performer retains a right to equitable remuneration for the rental. That right to equitable remuneration is not assignable *inter vivos*, with one exception. That exception is indeed the assignment of the right to a collecting society with the aim to enforce the right on behalf of the performer.¹⁶

For the sake of completeness, one should also refer to the publication right in this respect. This right gives a copyright style property right to whoever publishes for the first time an unpublished work once the copyright protection in the work has expired. All the provisions on collective licensing apply also to such a publication right, as if a proper copyright was involved.¹⁷

On the basis of this very brief historic overview, this chapter now examines each of the societies that operate under the regulatory framework. Afterwards, it will consider the regulatory framework for collective licensing, as it is currently in place in the CDPA.

2.2. EXISTING COLLECTING SOCIETIES IN THE UK

This section will try to describe the current collective licensing landscape in the United Kingdom from the perspective of the collecting societies that are active in the UK. As it will be shown, there are now quite a number of them and to simplify the task, they will be divided into a number of categories:¹⁸

- reprographic rights societies;
- mechanical rights societies;
- licensing bodies for off-air recordings;
- performing rights societies;
- multi-purpose collecting societies.

2.2.1. Reprographic Rights Societies

2.2.1.1. *The copyright licensing agency ltd (CLA)*

The CLA¹⁹ was established in April 1982 and deals generally with the copying from books, journals and periodicals. Its board contains an equal number of representatives from author's associations and from publishers' associations.

16. CDPA, *supra* note 10, ss 191G(1), (2) and (6).
17. See The Copyright and Related Rights Regulations 1996, *supra* note 14, Regulations 16 and 17.
18. See Laddie, *supra* note 4 at 952-976.
19. See online: <www.cla.co.uk/> (last visited: 21 August 2005). See also Garnett, *supra* note 1 at 1529-1531 and Laddie, *supra* note 4 at 952-956.

The CLA grants licenses for the copying of works contained in books, journals and periodicals. In order to grant these licenses, the CLA obtains mandates from authors and publishers. The mandates grant the CLA a non-exclusive right in relation to all literary works in which all concerned authors and publishers have an interest in the copyright. In this respect, the CLA works with the Authors' Licensing and Collecting Society Ltd (ALCS) and the Publishers Licensing Society (PLS). The latter two effectively grant (sub-) licenses to the CLA in respect of the reproduction of the works by reprographic means. In return, the CLA distributes to the PLS and the ALCS their share of the license fees, minus its administrative fee, as well as the relevant information in order to allow the PLS and the ALCS to distribute the income to those members whose works have been copied.

The first main aspect of the CLA's activity consists of a licensing scheme for educational establishments. Under the terms of these licenses, teachers are free to copy up to 5 per cent of a book. One short story or poem in a collection may also be copied in its entirety if it does not exceed ten pages. For universities, the scheme allows the copying of 5 per cent of a book, a single chapter or a single article out of a periodical. There is a list of excluded works – typically newspapers, printed music, maps, charts and photographs, but also a number of literary works, and also works published in some other countries than the UK are included in the scheme. There is also a rapid clearance centre "CLARCS" for staff who wish to produce course packs that involve copying on a larger scale than permitted by the license.

The licenses that are granted by the CLA are typically blanket licenses that enable the licensee, within the permitted limits, to copy anything from CLA-controlled works without having to seek prior permission. Typically these licenses do not include scanning and electronic storage and reproduction, but since 1999, separate digitization licenses are available. At the time of writing, these still require the use of the CLARCS system on each occasion, but it is understood that negotiations for a proper blanket scanning license are all but complete.

The second main aspect of the CLA's activity focuses on similar reproduction licenses for other major users of copyrighted works. These include charities, local and central government as well as businesses. Again a combination of blanket licenses and the CLARCS system is an option.

The CLA mainly works with a blanket license or collective user arrangement. In this case, a global level of copying is assumed and a global fee is paid. In certain cases though, the CLA can also offer a transactional user arrangement. For these there is no global fee; instead, fees are paid per copied page at a fixed rate. In both cases, licensees are to supply information on the works that are copied. This is straightforward for the transactional arrangements and for the collective user arrangements, a rotating sampling system has been put in place. The information thus collected allows the CLA to distribute the fees amongst the rightholders by using the PLS and ALCS as intermediaries.

Finally, it is important to keep in mind that the CLA license schemes effectively replace, in most cases, Section 36 of the CDPA. The latter has a restrictive maximum of 1 per cent that can be copied and it is specifically provided that that system will only operate in the absence of a licensing scheme.

2.2.1.2. *The music publishers' association ltd*

This is really the trade association of the main music publishers in the United Kingdom. As such, the Music Publishers' Association (MPA) is not concerned with licensing schemes and is not a licensing body.²⁰ The MPA is however indirectly involved as it has acquired ownership of the Mechanical Copyright Protection Society Ltd (MCPS) which collects the mechanical royalties on behalf of most of its members.

It is however important to note that the MPA does not at present run a licensing scheme for the reprographic copying of sheet music. All that is in place at present is a code of practice that allows copying in certain circumstances, e.g., when the work is out of print or when the original copies have not been supplied on time.²¹ Infringements outside the code are prosecuted by the MPA and its members. Individual licenses obtained from the individual publishers are therefore still the norm in this area.

2.2.1.3. *Design and artists copyright society ltd*

The Design and Artists Copyright Society Ltd deals with works of visual art and will negotiate and collect revenue from their exploitation. Membership of the Design and Artists Copyright Society (DACS) is open to all visual artists.²² This group includes illustrators, designers, printmakers, animators, photographers, sculptors, architects and craftsmen, as well as painters and obviously for all of them their successors in title. The society gets an exclusive mandate to collect fees in the United Kingdom from its members, but the artists remain free to make their own individual arrangements.²³ In its dealings with users of the works, DACS licenses the reproduction of the artistic works of its members. These members are free to impose restrictions on the use that can be authorized. It is for example often the case that the artists exclude the use of their work in the context of advertising.

DACS works with standard licenses and fee scales that are independent of the fame of the artist concerned. Licenses can be granted for a one-off use or as a blanket license.

20. See also Laddie, *supra* note 4 at 956.
21. See online: <www.mpaonline.org.uk> (last visited: 21 August 2005).
22. See online: <www.dacs.org.uk/> (last visited: 21 August 2005). See also Garnett, *supra* note 1 at 1531–1532 and Laddie, *supra* note 4 at 957–959.
23. They should notify DACS though.

In relation to the photocopying of its works by educational establishments, DACS had appointed the CLA as its agent. These establishments do therefore no longer have to deal separately with DACS and the DACS license can be included in their CLA license.

2.2.1.4. *The newspaper licensing agency ltd*

The copying of newspaper articles is, as we have seen above, not included in the standard CLA license. Instead, the licensing of the making of copies of newspaper articles is a matter for the Newspaper Licensing Agency (NLA).²⁴ Newspaper publishers assign the copyright in the typographical arrangement of the published editions of any of their works, as well as the copyright in the literary and artistic works that appear in the newspaper to the NLA. The system also covers those works in which the newspaper publishers themselves only have a license. For these, the publisher agrees to indemnify the NLA if a license it grants is unduly wide and amounts to unauthorized licensing. The licenses that are granted to users cover the making of articles in as far as the whole or a substantial part of the newspaper is copied.²⁵

Press cutting agencies are major users of the NLA licenses. Its clients can in turn make further copies for internal use. They will then need a license from the NLA. The NLA can require press cutting agencies to assist in persuading infringers to obtain a license and to notify the NLA if one of their clients does not have a license.²⁶ For its other licensees, the NLA offers two types of licenses. These enable the licensees to make copies from newspapers for internal management purposes and to distribute these copies within their organization by means of photocopies or faxes. External use is not permitted under the licenses. A Form A type of license is in essence a blanket license. The licensee is not required to keep records of every single copy that is made. The license fee depends on the size²⁷ of the licensee and the amount of copies that is likely to be made over a 12 month period.²⁸ The alternative Form B license does require the licensee to keep records of every single copy that is made. A return is then submitted to the NLA on a quarterly basis and the fee is calculated on the basis of the copies actually made.

24. See online: <www.nla.co.uk/> (last visited: 22 August 2005). See also Garnett, *supra* note 1 at 1535–1537 and Laddie, *supra* note 4 at 959–962.
25. See *Newspaper Licensing Agency Ltd v. Marks & Spencer Plc* [2003] 1 A.C. 551, [2001] 3 W.L.R. 290, [2001] 3 All E.R. 977.
26. *Romeike & Carltice Ltd v. Newspaper Licensing Agency Ltd* [1999] E.M.L.R. 142. The Copyright Tribunal held that it was reasonable to include these conditions in a license granted to a newspaper cutting agency.
27. Calculated on the basis of its number of members of staff, or in the case of a commercial organization also potentially its turnover.
28. Estimated on the basis of sampling in the initial two to four week period.

Special types of licenses exist for schools where the normal admission age is 16 years or under and persons in professional practice who as part of their service provide clients with copies from newspapers. All copies made under any of the licenses also need to carry a copyright notice. And the basic licenses can be extended to electronic use to allow the licensee to distribute electronic copies for the permitted purposes or to archive the cuttings in an electronic database.

2.2.2. Mechanical Rights Societies

2.2.2.1. *The mechanical copyright protection society ltd*

The Mechanical Copyright Protection Society (MCPS) covers a wide range of uses of works through its activities.²⁹ These include the recording of music for audio and video recordings, films, television and radio programmes and radio and television commercials. The society is the only surviving society in this field and was created through mergers with societies over the years in the twentieth century. It is a subsidiary of the Music Publishers' Association Ltd and is now part of the MCPS-PRS Alliance.³⁰ The society's members are composers, authors and arrangers of music, as well as music publishers.

Unlike many other societies, the MCPS does not take an assignment or license of the copyright of its members. Instead, the society acts as an agent for its members in granting licenses and in collecting revenue.

A major part of the MCPS's business is found in its dealing with record companies. Its licenses and tariffs for these purposes changed dramatically once the CDPA entered into force and they were finally settled by the Copyright Tribunal in *British Phonographic Industry Ltd v. Mechanical Copyright Protection Society (No 2) and Composers' Joint Council (Intervener)*.³¹ Three standard licenses are available. The standard starting point is a blanket license to record any musical work within the MCPS scheme, but it excludes first recordings unless these have been granted directly by the MCPS or a rightholder who is a member of the MCPS. All formats of recording, such as CDs, tapes, digital audio tapes etc. are covered and a standard 8.5 per cent royalty rate applies. Within the limits imposed by moral rights, record companies may make those modifications to the works which they consider necessary in relation to the recording product they want to make. The AP1 version of the license requires royalties to be paid on sales, in arrears and on a quarterly basis. Under it, the record company also needs to inform the MCPS in advance of any product it intends to manufacture. The AP2 version of the license requires payment in advance on actual pressings. The MCPS then hold on to the money and

29. See also Garnett, *supra* note 1 at 1534-1535 and Laddie, *supra* note 4 at 962-964.

30. See online: <www.mcps-prs-alliance.co.uk/aboutus/> (last visited: 22 August 2005).

31. *British Phonographic Industry Ltd v. Mechanical Copyright Protection Society (No 2) and Composers' Joint Council (Intervener)* [1993] E.M.L.R. 86.

payments to members can only take place on the basis of notification of actual sales on a regular basis by the record company involved. And finally the AP2A version of the license allows the record company to defer payment for a stated period. This version is mainly used for smaller record companies in order to protect their position.

There are also other licenses available for other users and other uses. These include use in relation to films, videos and TV programmes. Blanket licenses are in place for the major broadcasters. Under these licenses, unrestricted use of works is permitted even if arrangements and parodies are restricted somewhat, but in exchange the broadcasters need to keep records that will allow the MCPS to distribute the fees to the appropriate rightholders. Video licenses require the payment of a fee within a stated time limit and only those works specifically listed by the licensee can be used. These licenses are normally also limited in their territorial scope to the United Kingdom.

2.2.3. Licensing Bodies for Off-air Recording

2.2.3.1. *The educational recording agency ltd*

The Educational Recording Agency (ERA) deals with off-air recordings of television and radio broadcasts by schools and other educational establishments.³² The Copyright Designs and Patents Act 1988 has an exemption to copyright infringement that exempts such recordings in as far as they are made for educational purposes until a certified licensing scheme is brought into existence.³³ The ERA and its licensing scheme was created in 1989 to use the latter option. On the licensor side, the ALCS, the DACS, the British Phonographic Industry, the MCPS, the Musicians' Union, Equity, the Incorporated Society of Musicians, the Independent Television Network Ltd and the major broadcasters (BBC, Channel Four Television, Channel 5 Broadcasting, S4C), as well as the Performing Rights Society Limited and Phonographic Performance Limited are members of the ERA. Under the licensing scheme schools and educational establishments can make off-air recordings of anything broadcast by the members of ERA, with the exception of those broadcasts produced by the Open University. But recent changes mean that the rights licensed will cover not only the making of recordings of broadcasts off-air for educational purposes, but also the "communication" of such recordings to students and teachers within the premises of licensed educational establishments. This extended use helps to reflect increased use of computers for access to material stored on school servers and the use of white boards for presenting material in classrooms.

32. See online: <www.era.org.uk/> (last visited: 22 August 2005). See also Garnett, *supra* note 1 at 1533-1534 and Laddie, *supra* note 4 at 964-965.

33. CDPA, *supra* note 10, s. 35.

The recordings that are made may be kept and archived and additional copies for educational purposes within the establishment may be made. Editing of the recordings is however not permitted. And the license fee is calculated on a per capita basis and depends on the type of establishment.

2.2.3.2. *Open university educational enterprises ltd*

As we have seen above, Open University productions are excluded from the ERA licensing scheme. An off-air recording licensing scheme for these productions is operated by Open University Educational Enterprises Ltd for the benefit of schools and educational establishments.³⁴ Under the terms of the scheme, off-air recordings can be made for educational purposes in exchange for a fee that is payable on a per programme basis and that depends on the type of educational establishment concerned.

2.2.4. **Performing Right Societies**

2.2.4.1. *The performing right society ltd*

The membership of the Performing Right Society (PRS) comprises composers, authors and publishers of music.³⁵ The society aims to protect music from unauthorized exploitation. It does so by taking an assignment of its members from the public performance right and the broadcasting right, plus in the case of writers, the film synchronization right in any work that is composed primarily for the purpose of being included in the soundtrack of a particular film.³⁶ The PRS is however not concerned with the right to control the presentation of a musical work in dramatic form, when the work was originally written for a dramatico-musical work or for a ballet. This right remains vested in the author or the publisher and they deal with it independently of the PRS.

The PRS collects in practice license fees for the public performance and broadcast of the musical works of its members.³⁷ It does so as part of an alliance it has formed with the MCPS. That MCPS-PRS alliance as it is known manages common activities, services both societies and is jointly owned by them.

PRS licenses are normally granted as blanket licenses to the proprietors of premises in which public performances take place. Under such a license, the licensee can perform or authorize the performance in public of the entire PRS repertoire. The PRS rarely deals directly with the performers of copyright music. The license fees are based on a series of tariffs depending on the type of

34. See online: <www.open.ac.uk/foijs/secondary-companies/p9.shtml> (last visited: 22 August 2005). See also Laddie, *supra* note 4 at 965.
 35. See also Garnett, *supra* note 1 at 1538–1540 and Laddie, *supra* note 4 at 966–970.
 36. *Music Gallery Ltd v. Direct Line Insurance Plc* [1998] E.M.L.R. 551.
 37. See online: <www.prs.co.uk/> (last visited: 22 August 2005).

licensee, e.g. in relation to the basis for the calculation of the tariff.³⁸ Licenses are granted annually and are renewed automatically. A sophisticated sampling system based on itemized returns of some licensees is put in place to guarantee a fair distribution of the fees that are collected.

2.2.4.2. *Phonographic performance ltd*

According to the Phonographic Performance (PPL) website:³⁹

PPL is the UK collecting society for record companies and performers. PPL licenses radio stations, TV stations and other broadcasters who use sound recordings (records, tapes, CDs etc) in their transmissions. PPL also licenses clubs, shops, pubs, restaurants and thousands of other music users who play sound recordings in public. The license fees that PPL collect are then distributed to the rightful owner of the sound recording copyright – usually the record company responsible for creating the track – and also the performers who played on the track.⁴⁰

As such, the PPL is an association of the record companies. On their behalf, the PPL takes an assignment of and administers the performing and broadcasting rights in the sound recordings of its members. However, in relation to the internet, the PPL only deploys limited services.

The PPL operates a number of standard tariffs. In principle licensees are giving blanket licenses under the terms of which they can use any of the recordings in the repertoire of the society. Licenses are available for one-off events or on an annual basis.⁴¹

Most licensees are direct users, but there are also licenses for those companies that provide music systems hardware and/or software.

For broadcasters individually negotiated licenses are the norm, but the commercial radio licenses follow a common pattern as a result of the AIRC case.⁴² Its rates are based on a percentage of advertising revenue.

On the distribution side, the PPL works with a computerized return from the major licensees to structure the distribution of revenues. The return sets out the extent of playing time for each recording during the licensed period. For those licensees that do not produce returns, figures are produced by matching them up with comparable licensees that did produce returns.

38. See *British Airways Plc v. The Performing Right Society Ltd* [1998] E.M.L.R. 556, [1998] R.P.C. 581, *The Performing Right Society Ltd v. Bozoi* [1999] E.M.L.R. 359 (CA).
 39. See also Garnett, *supra* note 1 at 1541–1542 and Laddie, *supra* note 4 at 970–973.
 40. See online: <www.ppluk.com/> (last visited: 22 August 2005).
 41. See *British Sky Broadcasting Ltd and Another v. The Performing Right Society* [1998] E.M.L.R. 193, [1998] R.P.C. 467.
 42. *Association of Independent Radio Companies Ltd (AIRC) v. Phonographic Performances Ltd* [1994] R.P.C. 143, [1993] E.M.L.R. 181.

One should however add that a number of outlets do not need a PPL license. Indeed, public performance through the showing or playing of a broadcast including the sound recordings to a non-paying audience is not an infringing act and no license is therefore required e.g. for playing a radio in a restaurant or pub.⁴³

2.2.4.3.

The performing artists media rights association

The emergence of the Performing Artists Media Rights Association (PAMRA) is intricately linked with the introduction of a right to equitable remuneration.⁴⁴ More specifically the collecting society deals with the right to equitable remuneration of performers whenever a commercially published sound recording is included in a broadcast or is played in public.

Membership of PAMRA is open to all performers whose performances have been included in a commercially published sound recording.⁴⁵ The society operates by taking an authorization from its members to collect the performers' share of the equitable remuneration and to enter into negotiations with organizations of performers and producers in order to obtain remuneration. Agreements can also be concluded with foreign collecting societies operating in the same field. PAMRA is authorized by its members to operate a licensing scheme that may include blanket licenses.

In practice the PPL collects the fees and PAMRA receives a share. Income generated from the broadcast of commercially released recordings is therefore collected from broadcasters and public performance venues by the record labels' collecting society, the Phonographic Performance Limited (PPL), and shared between the record companies and the performers who have contributed to the recordings.

2.2.5. Multi-purpose Collecting Societies

2.2.5.1. *Authors' licensing and collecting society ltd*

The Authors' Licensing and Collecting Society (ALCS) administers the secondary rights in literary, dramatic, musical and artistic works.⁴⁶ These secondary rights include the reprographic right, the cable retransmission right, the blank tape levies collected abroad, the educational off-air recording rights (it does so as a member of ERA), the lending right, the rental right and the

43. See CDPA, *supra* note 10, ss. 19(3) and 72.

44. See online: <www.pamra.org.uk/> (last visited: 22 August 2005). See Laddie, *supra* note 4 at 973-975.

45. Foreign performers can become associate members. PAMRA will then collect their remuneration arising in the UK only.

46. See online: <www.alcs.co.uk/> (last visited: 22 August 2005). See also Garnett, *supra* note 1 at 1527-1528 and Laddie, *supra* note 4 at 975.

German public lending right. ALCS acts on behalf of its members, who are the authors of the works concerned and the Society of Authors, as well as the Writers' Guild. A lot of the licensing work is franchised out to the CLA.

2.2.5.2. *Video performance ltd*

Video Performance Ltd (VPL) deals exclusively with music videos or rather with certain rights in the latter.⁴⁷ Its membership is made up of the makers of music videos and the owners of the public performance rights in them, the owners of the rights to broadcast music videos and the owners of the right to dub these videos. These members assign to VPL their public performance and related dubbing rights and they grant VPL a non-exclusive license of the broadcasting and related dubbing rights. VPL then operates a licensing scheme for these rights.⁴⁸

2.2.5.3.

The directors' and producers' rights society

The Directors' and Producers' Rights Society (DPRS) is the collecting society which represents British film and television directors.⁴⁹ It collects and distributes money due to directors for the exploitation of their work. Its main sources of income are found abroad. Throughout the European Union, and in several other countries, film and television directors are legally recognized as being authors of their work. This right of authorship may give directors an entitlement to receive payment for certain uses of their work, such as cable retransmission, private copying and video rentals.

The DPRS collects these fees for its member directors through an international network of authors' collecting societies. The DPRS has for this purpose concluded agreements with societies in over 20 countries.

Traditionally the position of directors has been weaker in the UK, but under the terms of the Directors' Rights Agreement agreed with broadcasters and independent producers in 2001, the DPRS receives an annual payment to compensate freelance television directors for the secondary use of their work.

The DPRS is also charged by its members with the responsibility of devising, implementing and administering a scheme for the distribution of payments to individual directors. This takes account of the type of programme, and the length and the form of the secondary use. The Scheme is based on information supplied by broadcasters.

47. See also Garnett, *supra* note 1 at 1542 and Laddie, *supra* note 4 at 976.

48. See online: <www.musicall.co.uk/vpl/mm_design.nsf/splash?topenpage> (last visited: 22 August 2005).

49. See online: <www.dprs.org/> (last visited: 22 August 2005). See also Garnett, *supra* note 1 at 1532-1533.

3. THE CURRENT REGULATORY FRAMEWORK

3.1. LICENSING SCHEMES AND LICENSING BODIES IN GENERAL

The CDPA starts its approach to copyright licensing by setting out a series of provisions on licensing schemes and licensing bodies.⁵⁰ Section 116 deals with definitions in the following way:

- (1) In this Part a "licensing scheme" means a scheme setting out –
- (a) the classes of case in which the operator of the scheme, or the person on whose behalf he acts, is willing to grant copyright licences, and
- (b) the terms on which licences would be granted in those classes of case; and for this purpose a "scheme" includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name.
- (2) In this Chapter a "licensing body" means a society or other organisation which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licences, and whose objects include the granting of licences covering works of more than one author.

In a first set of provisions, contained in Sections 118 to 123 CDPA, these licensing schemes are regulated in as far as they are operated by licensing bodies, cover works of more than one author and relate to licenses for:

- (a) copying the work;
- (b) rental or lending of copies of the work to the public;
- (c) performing, showing or playing the work in public; or
- (d) communicating the work to the public.⁵¹

The first situation that is envisaged in these provisions is that in which a group of persons claims that they may require licenses. An organization claiming to represent such persons is then given the right to refer to the Copyright Tribunal the terms of a proposed licensing scheme which is to be operated by a licensing body. The users of the works to be covered by the scheme can therefore take the initiative to create a licensing scheme, rather than remain dependant on individual licenses. The Copyright Tribunal will first check that the reference is not premature. If this is not the case, the Tribunal will consider the request and may confirm or modify the proposed scheme. Its final decision, which may put a scheme in place, requires the form of an Order of the Tribunal.⁵²

50. See in general terms, Torremans, *supra* note 2 at 281.

51. CDPA, *supra* note 10, s. 117.

52. CDPA, *supra* note 10, s. 118. The effects of such an Order on the licensing scheme are dealt with in detail in s. 123 of the CDPA.

A second situation that is envisaged arises when a licensing scheme is in operation. A conflict may indeed arise between the operator of the scheme and a person who claims he or she requires a license or an organization representing such persons. The latter have the power to refer the conflict to the Copyright Tribunal. The Tribunal will hear the case and will resolve the conflict by means of an order. Such an order may either confirm the terms of the scheme or it may make changes to them.⁵³

A third situation that is envisaged deals with the refusal to grant a license. The straightforward scenario is that where, in a case covered by the scheme, a person claims that the operator of the scheme has refused to grant a license in accordance with the scheme or has failed to grant such a license within a reasonable time after being asked. This case is straightforward because it deals with a case that is covered by the licensing scheme. A more difficult scenario arises when one is concerned with a case that is excluded from the licensing scheme. This will, for the current purpose, be the case on the one hand where the scheme provides for the grant of licenses subject to terms excepting matters from the license and the case falls within such an exception, or on the other hand, where the case is so similar to those in which licenses are granted under the scheme that it is unreasonable that it should not be dealt with in the same way. In either of these circumstances, the person also needs to demonstrate that it is unreasonable in the circumstances that a license should not be granted. One may however also be concerned with a case where the potential licensee claims that the operator of the licensing scheme proposes terms for a license which are unreasonable. In both scenarios the persons affected may apply to the Copyright Tribunal. If the Tribunal, upon examination, finds the claim to be well founded it will make an order by which it declares that the applicant is entitled to a license and the Tribunal may also determine the terms of such a license.⁵⁴

A second set of provisions, contained in Sections 125 to 128 of the CDPA, applies to licenses which are granted by a licensing body otherwise than in pursuance of a licensing scheme and cover works of more than one author. It does so in so far as these licenses authorize:

- (a) copying the work;
- (b) rental or lending of copies of the work to the public;
- (c) performing, showing or playing the work in public; or
- (d) communicating the work to the public.⁵⁵

The applicant for such a license may refer the terms of the proposed license to the Copyright Tribunal. The Tribunal may, if it decides to take up the matter,

53. CDPA, *supra* note 10, s. 119.

54. CDPA, *supra* note 10, s. 121.

55. CDPA, *supra* note 10, s. 124.

confirm or alter the terms of the license by means of an order.⁵⁶ Similarly, "a licensee under a license which is due to expire, by effluxion of time or as a result of notice given by the licensing body, may apply to the Copyright Tribunal on the ground that it is unreasonable in the circumstances that the license should cease to be in force".⁵⁷

There is also a specific provision which imposes a notification obligation in respect of licenses or a licensing scheme for excepted sound recordings. Section 128A, which was introduced in 2003, applies solely to a proposed license or licensing scheme that will authorize the playing in public of excepted sound recordings included in broadcasts in those circumstances in which, by reason of the exclusion of excepted sound recordings from Section 72(1) CDPA, the playing in public of such recordings would infringe their copyright. Any proposed license or licensing scheme for these excepted sound recordings must be referred to the Secretary of State before it comes into operation.⁵⁸

A different set of provisions of a more general nature are set out as factors that are to be taken into account by the Copyright Tribunal in making its determinations. First of all, the concept of reasonableness appeared on several occasions in the foregoing paragraphs. The Act now offers the following indications on unreasonable discrimination.

In determining what is reasonable on a reference or application under this Chapter relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to –

- (a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances, and
- (b) the terms of those schemes or licences, and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.⁵⁹

Secondly, the Act contains specific provisions on specific factors that are to be taken into account in relation to:

- licenses for reprographic copying;⁶⁰
- licenses for educational establishments in respect of works included in broadcasts;⁶¹
- licenses to reflect conditions imposed by promoters of events;⁶²

56. CDPA, *supra* note 10, s. 125.

57. CDPA, *supra* note 10, s. 126.

58. CDPA, *supra* note 10, s. 128A.

59. CDPA, *supra* note 10, s. 129.

60. CDPA, *supra* note 10, s. 130.

61. CDPA, *supra* note 10, s. 131.

62. CDPA, *supra* note 10, s. 132.

- licenses to reflect payment in respect of underlying rights;⁶³ and
- licenses in respect of works included in re-transmissions.⁶⁴

A final set of provisions deals with the use as of right, but against payment, of sound recordings in broadcasts. Such use takes place outside a license or licensing scheme, but payments need to be made to the licensing body.⁶⁵

3.2. PROVISIONS ON SCHEMES AND LICENSES FOR REPROGRAPHIC COPYING

Here the aim is to cover as many as possible of the works that are available for licensing. That comprehensive coverage is coupled with the fact that a licensee does then not need to seek prior permission for each individual act of copying. The licensee is entitled to rely on the license and to assume that it covers all works controlled by the licensing body, unless he or she receives a specific notification to the contrary, e.g., by means of a notice placed on top of the photocopier. The assumption takes as a starting point that the publishers that are part of the scheme do indeed own the copyright in all the works that are part of the scheme. This, however, is not necessarily the cases and in certain cases, the copyright in the work may be owned by the author or authors of the work. This undermines the assumption and inadvertently puts the licensee at risk of an infringement action by the author or authors that have retained the copyright in the work. As the latter was not assigned to the publisher, the latter could not assign it to the licensing body, which in turn had no right to license it to its licensee in respect of such a work. This loophole could affect any such scheme significantly and the government therefore moved to close it. The result of the matter is that section 136 of the CDPA now provides an implied indemnity in favour of the licensee whenever the latter made copies within the scope of the scheme or license.

It is important to precisely determine the exact scope of this implied indemnity. It applies to those licensing schemes that cover the reprographic copying of published literary, dramatic, musical or artistic works as well as the typographical arrangements of published editions and to licenses granted for such copying by licensing bodies. This application is conditional on the fact that the scheme or license does not specify the exact works to which it applies with such a specificity that it enables the licensee to determine whether an individual work falls within the scheme or license by means of a simple inspection of the scheme or license on the one hand and the work on the other hand.⁶⁶ The effect of the implied indemnity is that it implies into each scheme or license an undertaking

63. CDPA, *supra* note 10, s. 133.

64. CDPA, *supra* note 10, s. 134.

65. CDPA, *supra* note 10, ss. 135A-H.

66. CDPA, *supra* note 10, s. 136(1).

by the operator of the scheme to indemnify a person granted a license under the scheme and by the licensor to indemnify the licensee against any copyright liability whenever the copy was made within the apparent scope of the scheme or license. The indemnity covers obviously any sums payable in respect of the infringement, as well as costs that are reasonably incurred by the licensee. The procedural operation of the indemnity, such as the deadlines by which it is to be invoked and the conduct of any subsequent proceedings, can be stipulated within the bounds of reason in the rules of any particular licensing scheme.⁶⁷

3.3. REPROGRAPHIC COPYING BY EDUCATIONAL ESTABLISHMENTS

Once again, comprehensive coverage in terms of works is the major strength of the CLA scheme. However, in principle nothing stops an individual rightholder or any group of rightholders from not joining the existing scheme and from instead setting up their own scheme. The CDDPA addresses this potential problem by giving the Secretary of State the power to extend the coverage of existing licensing schemes and by giving the Secretary of State the power to impose a statutory license if no scheme exists and if no voluntary scheme has been created following a recommendation by an inquiry.⁶⁸

3.4. THE POWER TO EXTEND THE COVERAGE OF A SCHEME

This power of the Secretary of State to extend the coverage of a licensing scheme is the next instrument, after the implied indemnity, which needs to be analysed in a bit more detail. This instrument is first of all concerned with licensing schemes that are operated by licensing bodies or with licenses which authorize the making by or on behalf of educational establishments for the purposes of instruction of reprographic copies of published literary, dramatic, musical or artistic works which cover the works of more than one author or of the typographical arrangements of published editions or in the case of the publication right, the works of more than one publisher. Secondly, it must appear to the Secretary of State that works that conform to a description that is very similar to those that are covered by the scheme or license are excluded from its scope without a good reason. If, additionally, it would appear to the Secretary of State that making these works subject to the scheme or license would not conflict with the normal exploitation of these works or would not unreasonably prejudice the legitimate interests of the copyrightsholders or the owners of the publications then the Secretary of State may make an order under

67. CDDPA, *supra* note 10, ss. 136(2) to (5) and The Copyright and Related Rights Regulations 1996, *supra* note 14, Regulation 17.

68. CDDPA, *supra* note 10, ss. 137-141 and The Copyright and Related Rights Regulations 1996, *supra* note 14, Regulation 17.

Section 137 of the CDDPA by which it is provided that the scheme or license shall extend to these works. Whenever such an order is envisaged, there is an obligatory consultation exercise that needs to be completed before an order can be made and that involves all interested parties. These parties then have a right to make representations before an order is made and once an order is made, it is obviously subject to appeal to the Copyright Tribunal. In practice this is very much a tool that is not designed to be used. Its very presence in the Act seems to deter all interested parties from creating the very problem it is supposed to address. In that sense, Section 137 is very effective even though no order has yet been made under it.⁶⁹ Section 138 of the CDDPA adds the opportunity to vary or discharge any order. The procedural aspects of such a variation or discharge are similar to those for putting an order in place.

3.5. IS A NEW SCHEME OR A NEW LICENSE REQUIRED?

Despite its obvious advantages, Section 137 of the CDDPA does not cover all scenarios, e.g., because its conditions refer explicitly to works that contain the works of more than one author. This means that in a number of situations one is still left with the basic proposition of the current legislative framework that it is up to the interested parties themselves to take the initiative to set up a scheme or a license. There may be various reasons why this may not work in a particular case though. The CDDPA recognizes the problem and addresses it by granting the Secretary of State a right of initiative. The situation one becomes concerned with here is one which is outside the scope of Section 137 and where it appears to the Secretary of State that certain descriptions of published literary, dramatic, musical or artistic works or the typographical arrangement of published editions are not covered by an existing licensing scheme or by a general license. In such a situation, the Secretary of State may appoint a person to inquire whether a new licensing scheme or general license is needed to authorize educational establishments or someone on their behalf to make for purposes of instruction reprographic copies of those works or arrangements.⁷⁰ The Secretary of State will then take regulations to set out the procedure for the inquiry.⁷¹ It must include notice being given to all interested parties, both on the side of the rightholders and on the side of the educational establishments, and these parties must also be given the opportunity to make oral and written representations.⁷² The inquiry may only recommend the creation of a new licensing scheme or general license though if two requirements are found to be met. On the one hand, there must be evidence that it would be an advantage for educational

69. See Laddie, *supra* note 4 at 948.

70. CDDPA, *supra* note 10, s. 140(1) and The Copyright and Related Rights Regulations 1996, *supra* note 14, Regulation 17 for the publication right.

71. CDDPA, *supra* note 10, s. 140(2).

72. CDDPA, *supra* note 10, s. 140(3).

establishments to be authorized to make reprographical copies of the works involved. On the other hand, there must also be evidence that the grant of a general license or the establishment of a licensing scheme would not conflict with the normal exploitation of the works involved or would not unreasonably prejudice the interests of the copyright or publication rightholders.⁷³ The inquiry will also need to suggest the terms of such a licensing scheme or general license,⁷⁴ but the charges payable are left for the parties involved to negotiate. The parties have essentially one year to act upon the recommendation and to agree upon the charges of such a licensing scheme or general license. In the absence of an agreement after the expiration of the one year period, the Secretary of State may make an order by which the making of reprographic copies by educational establishments in accordance with the inquiry's recommendations shall be treated as licensed.⁷⁵ This effectively puts a fair amount of pressure on the rightholders to come to an agreement as any license imposed by the Secretary of State will be royalty-free. As with Section 137, Section 140 has up to now not been put into practice.⁷⁶ The interested parties have always been able to take the initiative themselves, but Section 140 clearly plays a role in inciting them to agree voluntarily.

3.6. THE CERTIFICATION OF LICENSING SCHEMES

The current regulatory framework relies heavily on the private initiatives that are taken by the parties as we have seen already, but in the absence of a licensing scheme or a general license there are some very limited statutory copyright exemptions that have been put in place by the CDDPA:

- Section 35 deals with the recording of broadcasts by educational establishments;
- Section 60 deals with the making and issuing of copies to the public of abstracts of scientific or technical articles published in a periodical;
- Section 66 deals with the licensed lending to the public of copies of literary, dramatic, musical or artistic works, sound recordings or films pursuant to an order of the Secretary of State;
- Section 74 deals with the provision of subtitled copies of television broadcasts by certain designated bodies.

These activities may later form the subject of a licensing scheme or an agreed general license. The legislator felt that it would clearly not be advisable to have

73. CDDPA, *supra* note 10, s. 140(4).

74. CDDPA, *supra* note 10, s. 140(5).

75. CDDPA, *supra* note 10, s. 141 and The Copyright and Related Rights Regulations 1996, *supra* note 14, Regulation 17 for the publication right.

76. See Laddie, *supra* note 4 at 949.

both an agreed licensing scheme or general license in place between a number of parties that have signed up to it and a statutory scheme of minimal exemption that was being relied upon by those that had not become part of the licensing scheme or of the general license. Specifically on the enforcement side, this would have caused a fair amount of confusion.

Such confusion is avoided through the use of the certification mechanism that is put in place by Section 143 CDDPA. This section gives the Secretary of State the power to certify a licensing scheme or a general license and when that is done the minimal exemptions provided for in the relevant sections of the Act referred to above lapse. Anyone performing any of these previously statutorily exempted acts will then infringe copyright unless he or she has a license under the licensing scheme or is covered by the general license.

Additionally there is the possibility for the Secretary of State to certify under Section 143 a licensing scheme for the reprographic copying of published works by educational establishments. For the licensing body there is a dual advantage. Firstly, the scheme or license is given publicity and the parties concerned that have not yet signed up to it are encouraged to do so and secondly, the imposition of a royalty-free statutory license in application of Section 141 CDDPA is avoided.

The certification mechanism is mechanical in nature. The Secretary of State will not examine, let alone approve the terms of the licensing scheme or the general license. Any judgment on the reasonableness of such a licensing scheme or license is left to the Copyright Tribunal. According to Section 143(2) of the CDDPA:

The Secretary of State shall by order made by statutory instrument certify the scheme if he is satisfied that it –

(a) enables the works to which it relates to be identified with sufficient certainty by persons likely to require licences, and

(b) sets out clearly the charges (if any) payable and the other terms on which licences will be granted.

But it is the case that the mechanism of certification enables the interested parties to make such a reference to the Copyright Tribunal.

As far as performers' rights are concerned, the opportunity to apply for certification is limited to licensing schemes that relate to the lending to the public of sound recordings or films.⁷⁷ Anyone who operates or proposes to operate such a scheme can apply to the Secretary of State to have it certified, which has as its main advantage that in case of certification, the Secretary of State is precluded from treating the rental of the sound recordings or films that are covered by the scheme as sound recordings or films licensed by the performer subject only to the payment of a reasonable royalty as foreseen in

77. CDDPA, *supra* note 10, Sch. 2 at para. 14A.

paragraph 14A(1) of Schedule 2 of the CDPA. Obviously certification does not flow automatically from the application. But if the licensing scheme clearly sets out any charges that are payable as well as the terms on which the licenses will be granted *and* the Secretary of State is satisfied that the scheme enables the works included in it to be identified with sufficient certainty by any person that may require a license, then certification of the scheme will follow.⁷⁸ The certification can be revoked if it appears to the Secretary of State that the licensing scheme is no longer operated or if it is no longer operated according to its terms.⁷⁹

4. COLLECTIVE MANAGEMENT IN THE REPUBLIC OF IRELAND

4.1. THE LEGAL FRAMEWORK

The Copyright and Related Rights Act, 2000 (CRA) contains extensive provisions dealing with collective management and licensing schemes.⁸⁰ These provisions show a lot of similarities with the provisions in the United Kingdom which were discussed above. In Ireland, the Controller of Patents, Designs and Trade Marks fulfils the role of the Secretary of State though and appeal against the decisions of the Controller can be brought in the High Court, but in general only appeals on points of law are permitted.⁸¹

A licensing scheme can be created by means of a reference of its proposed terms to the Controller, who will then rule on the proposed scheme by means of an order. Or, as Section 151 of the CRA puts it:

(1) The terms of a licensing scheme proposed to be operated by a licensing body may be referred to the Controller by an organisation which claims to be representative of persons who claim that they require licences in cases of a description to which the scheme would apply.

[...]
(4) Where the Controller decides to consider a reference under subsection (1), he or she shall consider the subject matter of the reference and make an order, either confirming or varying the proposed scheme, as the Controller may determine to be reasonable in the circumstances.⁸²

78. CDPA, *supra* note 10, Sch. 2 at para. 16.

79. CDPA, *supra* note 10, Sch. 2 at para. 16(5).

80. Copyright and Related Rights Act, 2000, number 23 of 2000, online: <www.irishstatutebook.ie/ZZA28Y2000.html> or <www.bailii.org/ie/legis/num_act/2000/2000-28.html> (last visited: 22 August 2005) [CRA].

81. *Ibid.*, s. 366.

82. See also *ibid.*, s. 267 in relation to rights in performances.

Similarly, disputes concerning licensing schemes that are in operation can be referred to the Controller, who may then if necessary vary the scheme by means of an order. Section 152 enables this in the following terms:

(1) Where a licensing scheme is in operation and a dispute arises with respect to the scheme between the operator of the scheme and –
(a) a person claiming that he or she requires a license in a case of a description to which the scheme applies, or
(b) an organisation claiming to be representative of such persons, that operator, person or organisation may refer the scheme to the Controller in so far as it relates to cases of that description.

[...]
(4) The Controller shall consider the matter referred to him or her and shall make an order, confirming or varying the scheme, as the Controller may determine to be reasonable in the circumstances.⁸³

A person who has been refused a license can also appeal to the Controller, who may then grant the license by order when appropriate, as set out in Section 154 of the CRA:

(1) A person who claims, in a case to which a licensing scheme relates, that the operator of the scheme has refused to grant or to procure the grant to him or her of a license in accordance with the scheme, or has failed to do so within a reasonable period, may apply to the Controller for an order under subsection (4).

(2) A person who claims, in a case excluded from a licensing scheme, that the operator of the scheme –

(a) has refused to grant or to procure the grant to him or her of a license, or has failed to do so within a reasonable period and that in the circumstances it is unreasonable that a license should not be granted, or

(b) proposes terms for a license that are unreasonable, may apply to the Controller for an order under subsection (4).

[...]
(4) Where the Controller is satisfied that a claim under this section is well-founded, he or she shall make an order declaring that in respect of the matters specified in the order, the applicant is entitled to a license on such terms as the Controller may determine to be applicable in accordance with the scheme, or as the case may be, to be reasonable in the circumstances.⁸⁴

83. See also *ibid.*, s. 268 in relation to rights in performances.

84. See also *ibid.*, s. 270 in relation to rights in performances.

Up to now we have dealt mainly with licensing schemes, but similar mechanisms are in place for licenses. Section 158, e.g., deals with references to the Controller of terms of proposed licenses and Section 159 with references to the Controller of expiring licenses.⁸⁵ The Controller may then vary the terms of the license or extend the term of the license respectively by means of an order.

All these provisions, like their UK counterparts, refer to the concept of reasonableness. Section 162 of the CRA then goes on to clarify how the Controller is to use and interpret this concept and criterion:

(1) In determining what is reasonable, on a reference or application under this Chapter relating to a licensing scheme or license, the Controller shall have regard to –

(a) the availability of other schemes, or the granting of other licenses, to other persons in similar circumstances, and

(b) the terms of those schemes or licenses, and shall exercise his or her powers so as to ensure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or license to which the reference or application relates and licensees under other schemes operated by, or other licenses granted by, the same person.

(2) *Subsection (1)* shall not affect the obligation of the Controller in any case to have regard to all relevant circumstances.⁸⁶

Additional sections of the Act then list further factors which the Controller shall take into account in relation to licenses for various types of works.⁸⁷

Licensing schemes can also be certified by the Minister for Enterprise, Trade and Employment upon application by the society operating the scheme concerned. The Minister will only issue an order satisfying the scheme if he or she is satisfied on the one hand that the licensing body in charge of the scheme is representative of a substantial number of rightsholders in the category of works to which the scheme is designed to apply, and on the other hand that the scheme sets out clearly the charges payable and the other terms and conditions on which licenses are to be granted.⁸⁸

And finally, a register of copyright licensing bodies is established by the Controller. Section 175 of the CRA sets out how this is to be done:

(1) The Controller shall establish and maintain a register of copyright licensing bodies in such form and manner and containing such particulars as the Minister may prescribe to be known as the “Register of Copyright Licensing Bodies” and referred to in this Part as the “Register”.

85. See also *ibid.*, ss. 274 and 275 in relation to rights in performances.

86. See also *ibid.*, s. 278 in relation to rights in performances.

87. *Ibid.*, ss. 163–166.

88. *Ibid.*, s. 173.

(2) The Controller shall keep the Register in such form so that the Register is capable of being used to make a copy of any entry in the Register.

(3) The Register shall be kept at such place as may be prescribed by the Minister and, subject to the payment of such fee as may be prescribed by the Minister with the consent of the Minister for Finance –

(a) the Register shall be made available for inspection by a person at such times and in such manner as may be prescribed by the Minister, and

(b) where a request is made to the Controller for a certified or uncertified copy of, or extract from, an entry in the Register, the Controller shall issue a copy of the entry or extract to the applicant.

(4) An application for registration or renewal of a registration of a licensing body shall be made to the Controller in such form and manner as may be prescribed by the Minister and shall be subject to the payment of such fee as may be prescribed by the Minister with the consent of the Minister for Finance.

(5) The Controller shall register an applicant or renew a registration where the Controller is satisfied that –

(a) the applicant complies with the definition of a licensing body specified in section 38 or 149, and

(b) the applicant has provided such information and satisfied such conditions as may be prescribed by the Minister for the purposes of registration. [...]

4.2.

THE IRISH MUSIC RIGHTS ORGANISATION

The Irish Music Rights Organisation (IMRO) deals with performing rights in copyright music. Its website summarizes its activities and role as follows:

IMRO is a national organisation that administers the performing right in copyright music in Ireland on behalf of its members – songwriters, composers and music publishers – and on behalf of the members of the international overseas societies that are affiliated to it. IMRO's function is to collect and distribute royalties arising from the public performance of copyright works. IMRO is a not-for-profit organisation.

Music users such as broadcasters, venues and businesses must pay for their use of copyright music by way of a blanket license fee. IMRO collects these monies and distributes them to the copyrightsholders involved. The monies earned by copyrightsholders in this way are known as public performance royalties. [...]

IMRO issues licenses to those wishing to use copyright music in public and in the on-line environment.

IMRO's tariff setting policy is based on negotiating agreements with trade bodies representing the various sections of the music using public in Ireland. It has been singularly successful in this policy and all of the bodies representing the main music users in the country have now agreed tariffs with IMRO – the Irish Hotels Federation, the Restaurant Owners Association of Ireland, the Licensed Vintners Association, the Vintners' Federation of Ireland, the Association of Independent Radio Stations, Radio Teilifís Éireann and so on.⁸⁹

IMRO takes an assignment of the performing right from its members for the purposes of issuing licenses and collecting fees on behalf of its members. Concerning these licenses the IMRO website provides the following details:

IMRO licenses are in the form of contracts which run from year to year until cancelled by either party. They are blanket licenses, authorising the public performance of any of the millions of works which IMRO controls on behalf of both of its members and of the members of its affiliated societies throughout the world. The royalties payable under IMRO licenses vary as the nature or extent of music usage changes in the premises concerned. The general nature of the license contract is that it authorises the licensee to perform, or to cause or authorise the performance of IMRO's copyright repertoire, in consideration for which the licensee undertakes to pay the appropriate royalty. Naturally, it does not oblige the performance of all or any part of IMRO's repertoire. The extent to which that repertoire is performed, within the terms of the license, is the licensee's choice entirely. It would obviously be quite impracticable for IMRO to monitor every performance given by each of its licensees, just as it would be intolerable for most licensees to keep a precise check on the nature and extent of all performances in their premises. Therefore, IMRO must be told immediately of any reduction of music usage if it is to agree to a corresponding reduction in the royalty. Similarly, increased music usage must be promptly notified.

IMRO's licenses cover both 'live' performances and performances by mechanical means, e.g. juke boxes, radio and television, video, record, CD and tape players, and so on. Licenses are in issue for numerous categories of premises, including cinemas, clubs, concert halls, discos, town halls, church halls, public houses, restaurants, shops, factories, universities, ships, aircraft, sports stadia, theatres and many others. Nearly 30,000 establishments are covered by the IMRO license in Ireland. In certain cases, permits are issued for the use of IMRO's repertoire, or sometimes for specified works, either at a single performance or at a short series of performances at premises not licensed for those occasions.

89. See <www.imro.ie/about/what_we_do.shtml> (last visited 7 November 2005).

If a copyright musical work is performed in public without the copyright owner's consent then the copyright owner has a claim against not only the promoter of the performance but also the proprietor of the premises (unless he can show that he had no reason to believe that infringement would take place) and the performers. It is not IMRO policy to grant licenses to performers (other than to brass and military bands as such, for performances in public places). IMRO normally issues its license to the proprietor of the hall or other premises concerned, so relieving the promoter of a musical entertainment there from having to apply for a special permit. Promoters should make a point, when hiring premises for a function involving music, of ensuring that the proprietor holds an IMRO license which will cover the occasion.⁹⁰

4.3. THE MECHANICAL-COPYRIGHT PROTECTION SOCIETY (IRELAND) LTD

The Mechanical-Copyright Protection Society (Ireland) (MCPSD) deals with mechanical royalties.⁹¹ Its membership comprises composers and music publishers and its income is generated from the recording of music onto many different formats. It shows strong similarities with MCPS in the UK.

4.4. THE IRISH COPYRIGHT LICENSING AGENCY

The Irish Copyright Licensing Agency (ICLA) is Ireland's reproduction rights organization.⁹² Under Irish copyright law, a license is mandatory for any educational establishment wishing to make multiple copies of a variety of copyright-protected works and ICLA operates the only scheme in Ireland whereby such a license can be obtained. ICLA also licenses users in business, industry and the professions to photocopy extracts from books, journals and periodicals, particularly by means of a blanket license to businesses wishing to make multiple copies of copyright material for distribution to members of staff. ICLA's licenses do not impose a strict record keeping obligation. Instead surveys are carried out every three years on a rotational basis.

ICLA is a non profit-making organization and all license fees with a deduction for administrative expenses go to the authors and publishers whose works have been copied.

90. Online: <www.imro.ie/music_makers/members_handbook4.shtml> (last visited: 10 September 2005).

91. See online: <www.mcps.ie> (last visited: 22 August 2005).

92. See online: <icla.ie> (last visited: 22 August 2005).

4.5. PHONOGRAPHIC PERFORMANCE IRELAND

Phonographic Performance Ireland (PPI) controls the public performance rights and broadcasting rights of record labels and operates licensing schemes and a total of 57 different tariffs⁹³ depending on the type and size of user in its dealings with the owners of premises and the promoters of events. It also deals with the rights of performers in this respect. Its websites summarize its role as follows:

Whenever a sound recording (CD, Tape, LP) or music video is played in public, broadcast on the radio or carried over a cable service (TV), a royalty must be paid to the company that produced the recording. Playing a radio or television for your customers is treated exactly the same as if you are playing recorded music.

Phonographic Performance (Ireland) Limited was established in 1968 to act as a central administrator of record company rights in the public performance, broadcasting and reproduction of their recordings. PPI is owned by its members – Irish and multinational record companies – and membership is open to all record companies, big & small.

Record companies have a right to be paid whenever their recordings (CDs, tapes, LPs, etc) or music videos are played in public. Performers have a right to be paid when sound recordings they have contributed to are played in public.

PPI collects both of these payments in one single license fee and then distributes the money to record companies and performers through Recorded Artists And Performers Ltd.

PPI's members consist of record companies including all the well-known multinational and major Irish record companies. All of PPI's income (less administration charges) is distributed every year to its members and to performers signed to member record companies.⁹⁴

5. CONCLUSION

The above overview has demonstrated that collective management and collective licensing has become highly organized and structured in both the United Kingdom and the Republic of Ireland. Complex provisions have been put in place in the copyright acts of both countries to regulate this part of copyright and it is quite remarkable that a lot of these provisions are administrative in

93. See, e.g., the decision of the Irish High Court in a case opposing the Irish Nightclub Industry Association (INIA) and the Irish Hotels Federation (IHF) on the one hand and the Phonographic Performance (Ireland) Limited (PPI) on the other hand. See online: <www.algoodbody.ie/news/load.asp?file=PUB:1064> (last visited: 22 August 2005).
94. See online: <www.ppitd.com> (last visited: 22 August 2005).

nature in the sense that they involve to a large extent the intervention of government ministers and administrative tribunals such as the Copyright Tribunal in the UK.

In practice, the system of collective management seems to work well, covering the relevant areas of copyright almost comprehensively. One can of course have doubts on whether the system can collect all fees due, whether the distribution of the fees really gives to each rightholder what he or she is due or whether the societies operate effectively without deducting too much for costs and overheads, but this is a matter that has been addressed in more depth in various other chapters of this book.

It is likely that the system of collective management in the United Kingdom and the Republic of Ireland will continue to grow in the foreseeable future. There are already signs of expansion to include Internet use of copyright works in the operation of the societies, but this development is still in its infancy and the territorial restrictions on the scope of operations of the societies seriously hinder this development. More international interaction and cooperation between societies will be required and the societies will also have to find their place in the broader European wide framework which the European Commission has started to put in place. Further developments are therefore guaranteed, even if the shape of things to come is not yet exactly clear.

Chapter VIII
Collective Management in the
Nordic Countries

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1. INTRODUCTION

All the Nordic countries – Denmark, Finland, Iceland, Norway and Sweden – are relatively small countries. They have a long-standing tradition of working together in copyright related matters, based on similar legislation since the early 1960s.

Different forms of cooperation exist among groups of rightsholders in each Nordic country. For instance in the field of related rights, performers and phonogram producers have joint organizations in most Nordic countries. Coalition types of joint copyright organizations represent a large number of different rightsholders. These “umbrellas”, as coalitions are sometimes called, work mainly in the field of reprography and secondary use of audiovisual works. Rightsholders are used to working together in a number of ways and do so also when new uses arise.

One of the guiding principles has been to provide legal access in a swift and cost effective manner. Pragmatic solutions marked by the desire to make copyright function in practice offer benefits to users, rightsholders and the society at large.

Legislators have paid special attention to the position of users and their legal certainty. A special legal technique that combines exclusive rights and

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voluntary agreements based on free negotiations with legal certainty is called an "extended collective license". Its origins stem from the beginning of the 1960s when primary broadcasting was at stake. The latest provisions are found in the national implementations of the EU Copyright Directive¹ in the various Nordic countries.

This chapter describes how collective management organizations (CMOs) function in the Nordic countries, with a special emphasis on the extended collective license (ECL) also referred to as the "extended repertoire system" (ERS). This legal technique addresses the issue of fully covering licenses, licensing being one of the core elements in collective management. While there are various legal techniques to safeguard the user's position in collective licensing, the ECL has proven its applicability and flexibility as one viable solution.

2. HISTORY AND SHORT OVERVIEW OF COLLECTIVE MANAGEMENT

The scope and area of main CMOs in the Nordic countries is described below sector by sector. In some sectors licensing is supported by an ECL provision, either in part or in whole. The implementation of the Copyright Directive into national laws has brought some novelties and offers new licensing possibilities for Nordic CMOs. This implementation took place in Denmark at the end of 2002 and in Finland, Norway and Sweden during 2005. Implementation in Iceland was in the pipeline at the time of this writing, and was expected to be in place in 2006.

2.1. PERFORMING AND MECHANICAL RIGHTS IN THE FIELD OF MUSIC

In comparison with Europe, Nordic CMOs in the field of music are semi-old, most of them were established in the 1920s. The organizations are KODA (Denmark), STEF (Iceland), STIM (Sweden), TEOSTO (Finland) and TONO (Norway). NCB (Nordisk Copyright Bureau) originally started as a Danish performing rights organization, but now works with mechanical rights covering all Nordic countries and the Baltic States (Estonia, Latvia and Lithuania).

The ECL was introduced as an answer to technological progress long before we knew anything about digital technologies. In the late 1950s, broadcasting organizations demanded adequate solutions to their copyright concerns in primary broadcasting. As a real mass use case, it would be impossible for

1. EC Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (2001), O.J.L. 167/10 [Copyright Directive], online: <europa.eu.int/eur-lex/en/consleg/pdf/2001/en_2001l0029_do_001.pdf> (last visited: 17 October 2005).

a broadcaster to clear rights individually for all literary and musical works that are broadcast over time, and collective management is the only feasible solution. Nordic broadcasters paid attention to the representativity issue and wanted safeguards from the legislators. As a consequence, ECLs were established in all Nordic countries for broadcasting of literary and musical works.

The challenge was to combine the exclusive rights of authors and the demands of broadcasters to get a watertight license without needing to face possible claims from outsiders, irrespective of their country of origin. Whereas the global coverage of performing rights organizations is now fairly extensive, that was not the case in the late 1950s. And even though the need for special legislative measures may be smaller today, Nordic broadcasters have continuously pleaded for the maintenance of an ECL for primary broadcasting.

2.2. RELATED RIGHTS IN THE FIELD OF MUSIC

As stated above, current Nordic copyright laws stem from the beginning of the 1960s as a result of joint preparation and Nordic committee work. Neighbouring rights or related rights, as they are called today, were introduced at that time. Performers and phonogram producers established new CMOs to provide adequate answers to legislation. Joint organizations for performers and phonogram producers exist in all Nordic countries but Sweden. The organizations are GRAMEX (Denmark and Finland), GRAMO (Norway) and SFH (Iceland). In Sweden, SAMF and the Swedish Group of IFPI cooperate. Collection of remuneration rights for broadcasting and later on for other public performances form the core activity of these CMOs.

Over time, discussions have taken place to change remuneration rights of related rightsholders to exclusive rights with an ECL as a support mechanism. Related rightsholders have demonstrated on several occasions that the mere existence of a compulsory license radically weakens their bargaining power and gives an undue advantage to users. For instance in Finland, the Government Proposal³ concerning the implementation of WIPO Treaties of 1996⁴ and the Copyright Directive describes how this issue has been under consideration since the beginning of the 1980s, with a concrete consideration in the 1995 amendment process as well as in the current proposal.

In Sweden and Denmark, the right of making available to the public was changed already in the middle of the 1990s so that related rights have a similar status as authors' rights. The exclusive right is subject to an exception and

2. The Swedish Artists and Musicians Interest Organization, online <www.sami.se> (last visited: 17 October 2005).
 3. HE 28/2004 (Government Proposal).
 4. WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

compulsory license as to broadcasting and other public performance. Thus as yet, related rightsholders do not benefit from an ECL.

2.3. VISUAL ARTS AND PHOTOGRAPHY

Visual authors and photographers have CMOs in all Nordic countries, established in 1970s and 1980s. The organizations are BONOS (Norway), BUS⁶ (Sweden), Copy-Dan Pictorial Art⁷ (Denmark), KUVASTO (Finland) and MYNDSTEF⁸ (Iceland). A major part of remuneration comes from the resale right in Denmark, Finland and Sweden.⁹

The use of works of art is common in exhibition catalogues and similar promotion materials. The Copyright Directive allows an exception or limitation in certain cases.¹⁰ However, the narrow scope of the permitted exception has led to the introduction of new ECLs in some Nordic countries, in order to facilitate reproduction and dissemination of catalogues even in the digital environment. For instance in Denmark, an ECL covers use of works of art in general informative presentations (Article 23(2)).

2.4. RIGHTS IN LITERARY WORKS

Specialized CMOs for literary authors are a relatively recent phenomenon in the Nordic countries. Established in 1995, ALIS¹¹ in Sweden is the oldest, followed by similar organizations in Norway (LINO)¹² and Finland (SANASTO)¹³. Literary works are frequently used in broadcasting and this use is covered by the original ECL provisions concerning literary and musical works in broadcasting.

5. Norwegian Visual Artists Copyright Society, online: <www.bonono.no> (last visited: 17 October 2005).
6. "Pictorial Art, Copyright in Sweden" online: <www.bhus.se> (last visited: 20 October 2005).
7. "Part of Copy-Dan, the Joint Collecting Society", online: <www.copydan.dk> (last visited: 20 October 2005).
8. Established in 1991, Myndstef is the representative organization in the field of visual arts and photography, online: <www.myndstef.is> (last visited: 20 October 2005).
9. Norway has a special Fund, but legislation is under consideration due to the implementation of the EC Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (2001), O.J. L. 272/32 [Resale Right Directive], online: <europa.eu.int/eur-lex/lex/UrSrv/lexUrSrv.do?uri=CELEX:32001L0084:EN:HTML> (last visited: 20 October 2005).
10. Copyright Directive, *supra* note 1 Art. 5.3(f): "use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use".
11. "The Administration of Literary Rights in Sweden", online: <www.alis.org> (last visited: 20 October 2005).
12. Established in 1996, online: <www.lino-org.no> (last visited: 20 October 2005).
13. Established in 2005, online: <www.sanasto.fi> (last visited: 20 October 2005).

National writers' unions¹⁴ or the above mentioned CMOs are the negotiating parties with broadcasting organizations.

2.5. REPROGRAPHY AND CERTAIN DIGITAL USES

Reprography posed a critical mass use situation and challenge to collective management in the late 1960s and the early 1970s. The first country to react was Sweden where a specialized CMO called BONUS¹⁵ was established in 1973. It negotiated a voluntary contract with the Government to cover photocopying in schools and universities.

A joint Nordic law revision process was underway in the 1970s. The solution based on an ECL was "reinvented" and introduced to cover widespread photocopying for educational purposes. Finland went one step further and the 1980 amendment to the Copyright Act¹⁶ introduced an ECL that covers photocopying not only in schools and universities, but also in administration and businesses. The other Nordic countries widened the scope of the ECL in later amendments.

New CMOs emerged in the 1970s and the early 1980s. They are called coalitions or umbrellas representing a number of different groups of authors and publishers: BONUS-PRESSKOPIA (Sweden), Copy-Dan Writing (Denmark), FJÖLIS (Iceland), KOPPOSTO (Finland) and KOPINOR (Norway). Their scope of activity was originally reprography, but with technological developments certain digital uses have been added. Denmark was the first country to introduce an ECL to cover digital copying for educational purposes in 1998.¹⁷ With the implementation of the Copyright Directive, new stipulations have been added to cover digital uses in the Nordic countries.

2.6. SECONDARY USES OF AUDIOVISUAL WORKS

Off-air recording of television programs for educational purposes presents a similar copyright clearance issue as reprography. In Finland, the issue was raised in conjunction with adoption of reprography stipulations in 1980, but it was stated in the parliamentary discussions that evidence from mass scale recording of television programs was missing. Consequently, a survey was needed to show the volume of television recordings. In 1984, the legislation was amended and a new ECL was introduced to cover recording of television programs for educational purposes.

14. The Writer's Union of Iceland concludes the agreement with the State Broadcasting Service, online: <www.vrsl.is> (last visited: 20 October 2005).
15. "Bonus-Presskopia 1999", online: <www.b-pk.se> (last visited: 20 October 2005).
16. Act 897 of 19 December 1980, (published 23 December 1980) amending the Copyright Act (Law No. 404 of 8 July 1961).
17. Copyright Act, Law No. 407 of 26 June 1998.

During the same time another real mass use situation, retransmission of broadcasts, was considered jointly in the Nordic countries. Neighbouring countries' television programs had long been popular in spill-over areas and demands to relay these programs wider either by re-broadcasting or by cable was actively promoted by the public.

Clearing copyright programme by programme for retransmission is a factual impossibility as one television channel includes some 10,000 individual programs during a year. In the middle of the 1980s, an ECL was found to be a workable solution also for retransmission of broadcasts. Thus, the Nordic countries tackled the copyright clearance issue far earlier than the Satellite and Cable Directive¹⁸ was agreed upon in the European Union. In Denmark, a compulsory license was introduced in 1985 to cover simultaneous and unchanged retransmission by cable. In 1996, this provision was changed into a voluntary system based on an ECL¹⁹ as a response to the Satellite and Cable Directive stating the following:

- (1) Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators;
- (2) Notwithstanding paragraph 1, Member States may retain until 31 December 1997 such statutory licenses systems which are in operation or expressly provided for by national law on 31 July 1991.²⁰

Coalition types of organizations were needed to clear cable rights, as many different groups of different rightsholders are involved in clearance of these rights. In Denmark and Finland, the existing coalitions (Copy-Dan Cable TV and KOPIOSTO) extended their activities to cover cable retransmission, whereas in Norway and Sweden new coalitions (NORWACO and COPYSWEDE) had been established. These coalitions cover all relevant authors and performing artists and in some countries also cover producers of phonograms and films. Cooperation agreements with broadcasters, either through their collective body or individually with each broadcaster, secure to the users fully covering licenses based on an ECL in the law.

Producers of films have either established their own collective management organizations or they are represented directly in above-mentioned coalitions through producers' associations.

18. EC, Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (1993), O.J. L. 248/15 [Satellite and Cable Directive], online: <europa.eu.int/eur-lex/lex/UrServ/lex/UrServ.do?uri=CELEX:31993L0083:EN:HTML> (last visited: 18 October 2005).

19. With effect from 1 January 1998.

20. Article 8, Satellite and Cable Directive, *supra* note 18.

2.7. PRIVATE COPYING REMUNERATION

Iceland and Finland were among the five first countries in the world to introduce special remuneration systems for widespread private copying. In 1984, both countries introduced indirect remuneration in the price of blank audio and video recording media, known as blank tape levy. Denmark introduced a similar system in 1993. Sweden and Norway had special remuneration based on tax legislation, but changed their systems in 1999 and 2005 respectively.

Collection of revenue is done by one of the existing CMOs: TEOSTO in Finland, Copy-Dan Blank Tape in Denmark and COPYSWEDE in Sweden. In Iceland, IHM has a special arrangement with the customs authorities who are in charge of the collection. Distribution of revenue takes place by the relevant sector specific CMOs. In most countries, these private copying remuneration schemes have been extended to cover certain digital media.

2.8. SUMMARY OF MAIN NORDIC COLLECTIVE MANAGEMENT ORGANIZATIONS

Some characteristics in Nordic rights management are:

- well organized authors, performing artists, publishers and producers;
- high degree of representation in CMOs;
- high degree of cooperation between various CMOs resulting in joint agreements with users.

This point of departure provides a good ground for legislators to consider support mechanisms, such as ECLs, for collective licensing. The very essence of an ECL lies in good representation, with direct representation of most rightsholders whose works are used in a given area.

A summary²¹ of the main Nordic CMOs:

Scope	Denmark	Finland	Iceland	Norway	Sweden
Music performing rights	KODA	TEOSTO	STEF	TONO	STIM
Music mechanical rights	NCB	NCB	NCB	NCB	NCB

21. This list is not all inclusive, but summarizes the areas and organizations mentioned in this chapter.

Scope	Denmark	Finland	Iceland	Norway	Sweden
Music related rights	GRAMEX	GRAMEX	SFH	GRAMO	SAMI (performers) IFPI (producers)
Visual authors	Copy-Dan Pictorial Art	KUYASTO	Myndstef	BONO	BUS
Literary authors		SANASTO		LINO	ALIS
Reprography and certain digital uses	Copy-Dan Writing	KOPIOSTO	FJÖLIS	KOPINOR	BONUS- PRESSKOPPIA
Secondary use of audiovisual works	Copy-Dan Cable TV	KOPIOSTO	IHM ²²	NORWACO	COPYSWEDE
Producers of audiovisual works		TUOTOS			FRF

3. MAIN ELEMENTS OF AN EXTENDED COLLECTIVE LICENSE

An ECL means provisions in the law giving an extension effect to the clauses in a collective agreement in specific areas of the copyright and related rights. This extension applies to rightsholders who are not members of the contracting organization.

3.1. HISTORY OF THE SYSTEM

As indicated above, the first ECL provisions came as a result of the revision of the copyright laws in the Nordic countries in the early 1960s. Revision committees had been working in Denmark, Finland, Norway and Sweden, with Iceland also participating. They proposed the first such ECL in the field of broadcasting of certain categories of works, i.e. literary and musical works. Over the years, the system was deemed successful and as a result, it was extended to new areas.

22. IHM was primarily established for private copying remuneration, but IHM Cable has been authorized by the Ministry of Education to coordinate the licensing of cable retransmission.

The latest legislative amendments for the implementation of the Copyright Directive have now been carried out in all Nordic countries except for Iceland. This process has resulted in new ECL provisions.

Essentially, the same structure exists in all the Nordic countries and the same areas of exploitation of works or productions are covered. However, there are some differences both with regard to the coverage and to certain elements in the system itself. These will be briefly described below; a detailed approach would not serve non-Nordic readers.

Provisions on ECL were originally designed to apply to literary and musical works for use in sound radio and television broadcasts. The application of the system has since been extended to the following areas – at a different pace in each of the Nordic countries, however:

- reprographic reproduction of printed material for educational use and for internal information in administration and businesses;
- recording of radio and television programs for educational use;
- retransmission of broadcast programs by re-broadcasting or by cable;
- library uses of material in digital form.

During the legislative process for the implementation of the Copyright Directive, there were demands to apply collective licensing in other fields. In Sweden for instance, broadcasters requested such a system for the exploitation of material in their archives and for the making available in on-demand services of literary and artistic works and commercial sound recordings used in sound radio or television programs. The Government, however, did not want to address those proposals in the implementation process, but has promised to discuss them at a later date. Denmark, Finland and Norway introduced an ECL for exploitation of old material in broadcasters' archives already at the time of the implementation of the Copyright Directive.

3.2. RATIONALE AND BASIC ELEMENTS

ECL is a support mechanism for freely negotiated licensing contracts, based on exclusive rights. In cases of mass uses, it is seldom the case that a single rightsholder could draw full benefit from his or her exclusive rights by negotiating alone. Collective management organizations represent authors and other rightsholders and negotiate on their behalf.

Once an agreement is reached in free negotiations between a representative CMO and a user, and both are satisfied with the terms and conditions, an ECL mechanism comes into effect. For a user, it is important to know that the license is fully covering and that is exactly what this legal technique addresses: the issue of fully covering licenses in cases of mass uses.

In mass use situations, a CMO and a user, or in most cases a representative of a large user group, negotiate and, sometimes after long negotiations,

conclude an agreement. Once the agreement is concluded, it is made legally binding on non-represented rightsholders as well. This is the so-called extension effect.

A prerequisite is that the organization is representative in its field, i.e. represents by mandate a substantial number of rightsholders on whose behalf it negotiates. If that is the case, it is unlikely that an individual could obtain a better licensing deal by acting alone.

Once an agreement with the extension effect is concluded, the user may legally use the materials covered by the agreement, and does not run the risk to get a claim, either legal or financial, from a non-represented rightsholder. These non-represented rightsholders have, directly on the basis of the law, a right to individual remuneration and in most cases a right to opt out.

In summary, the basic elements of an ECL²³ are:

- the organization and the user conclude an agreement on the basis of free negotiations;
- the organization has to be nationally²⁴ representative in its field;
- the agreement is made legally binding on non-represented rightsholders;
- the user may legally use all materials without needing to meet individual claims by outsiders and criminal sanctions;
- non-represented rightsholders have a right to individual remuneration;
- non-represented rightsholders have in most cases a right to prohibit the use of their works.

An ECL can be supplemented by mediation, arbitration, tribunal procedures or other similar legal arrangements in case the negotiating parties disagree regarding the terms and conditions of the agreement.

3.3. BENEFITS

The system benefits both rightsholders and users, and even society at large.

The rightsholders' benefits lie in the fact that individuals are not able to control all the hundreds of thousands of uses that are made of their works. Collective management is therefore needed in order to safeguard the rights which copyright law intends to give to the authors and other beneficiaries. This is true even in the digital environment where new products and services are being offered protected by digital rights management (DRM) systems. Collective management is needed to license content providers by way of blanket or transactional licensing. It is rather the downstream licensing to consumers and to other end users that benefit from DRM systems.

23. J. Liedes, H. Wager, T. Koskinen and S. Lahinen, *Extended Collective License* (June 1991), leaflet prepared by the Ministry of Education, Finland [Collective License Leaflet].

24. Further specified in law amendments in Denmark, Finland and Norway.

The users' benefits are that they can obtain fully covering licenses and can trust that their exploitation of works and other subject matter would not be hindered or affected by unexpected claims from non-represented rightsholders.

The need to ensure that exploitation is possible in certain important areas, such as education, lies in the interest of the society. The ECL strikes a balance between the interests of the rightsholders and those of the users, providing easy access in a legal manner.

3.4. ALTERNATIVES TO AN EXTENDED COLLECTIVE LICENSE

The problem of outsiders has been approached in different ways and alternatives to the Nordic ECL solution exist in various countries.²⁵ In all these alternatives the aim is the same – to ensure a fully covering license to users of copyright material.

One alternative is to incorporate into an agreement an indemnity clause by which the organization assumes the liability for the payment of remuneration to a non-represented rightsholder. This alternative, however, does not make the use of non-represented works permissible, but only eliminates financial liability under civil law. Agreements cannot transfer liability under criminal law; the user is always responsible for any infringements he has committed. This alternative does not therefore fully safeguard the position of the user.

Another alternative is to incorporate into the law provisions by which a copyright organization is given a general authorization to represent rightsholders or it is presumed that the organization has such right. The practical effects of this alternative hardly differ from those of an ECL, which, however, does not give the organization a general right of representation but only extends an agreement concluded by the organization also to cover non-represented rightsholders.

A third alternative is compulsory collective management,²⁶ where management of an exclusive right is a voluntary act, but rightsholders cannot make claims on an individual basis. In 1995, the legislation in France was introduced and it presented for the first time the concept of compulsory collective management in the area of reprographic reproduction rights. This safeguards the position of users, as an individual rightsholder cannot make claims against them. Besides reprography, compulsory or obligatory collective management is used in other licensing areas, such as cable retransmission rights in a number of European countries.

A fourth alternative would be to incorporate into the law a legal license, either as a compulsory or statutory license, when permitted by international

25. Collective License Leaflet, *supra* note 23.

26. T. Koskinen-Olsson, *Collective Management in Reprography* (Geneva: WIP/O/FRRO, 2005), 60, online: <www.wipo.int/pubs/publ/924/wipo_pub_924.pdf> (last visited: 20 October 2005).

conventions. In both cases, the consent of rightsholders for the use of protected material is not needed, but they have a right to remuneration. A non-voluntary license significantly weakens the negotiating position of rightsholders.

4. EXTENDED COLLECTIVE LICENSES AND GOVERNMENT "OVERSIGHT"

The ECL is a support mechanism for freely concluded contracts. Government "oversight", if this term can be used, consists of provisions in the law concerning representativity of the CMO and the situation of non-represented rightsholders. Different forms of mediation or arbitration and government approval fall more directly under this topic.

4.1. REPRESENTATIVENESS CRITERION

The CMO that grants the rights through an agreement supported by an ECL must be a representative one. It must be truly representative of the rightsholders whose rights are licensed through the agreement. The requirement of representativity is expressed in different ways in the individual Nordic countries.

In most Nordic countries, the representativity criterion concerns a substantial number of authors of works that are used in the country. The Common Provisions on ECL in the Danish Copyright Act²⁷ states the following in Section 50:

Extended collective license according to sections . . . may be evoked by users who have made an agreement on the exploitation of works in question with an organization comprising a substantial number of authors of a certain type of works which are used in Denmark.

This provision has been in force since 2001. Norway and Finland introduced a similar criterion in their implementation of the Copyright Directive. In Sweden and Iceland, the representativity criterion is that the contracting organization must represent a substantial number of national rightsholders.

4.2. GUARANTEES FOR NON-REPRESENTED RIGHTSHOLDERS

The need for guarantees for non-represented rightsholders applies to situations where outside rightsholders are not satisfied with a situation where their works are used in a foreign country on conditions that they are not familiar with or to which they have not agreed. It is thus important that there are certain

27. Consolidated Act No. 164 of 12 March 2003.

guarantees for foreigners. Legislators in the Nordic countries have considered this to be a particularly important aspect and have incorporated legislative provisions to that effect.

Such guarantees could be of two kinds:²⁸

- a right to prohibit the use of their works;
- a right to claim individual remuneration.

Right to prohibit or the "veto right" is designed and applied somewhat differently in the different Nordic countries. To take Sweden as an example, a right to file a prohibition applies in the case of ECL²⁹ in the following fields:

- copying for information purposes within enterprises, organizations, etc (Art. 42b);
- copying for educational purposes (Art. 42c);
- transmission of works between libraries/archives (Art. 42d); and
- primary sound radio and television transmissions (Art. 42e).

In the latter case, transmission on the basis of the ECL must also not take place even if there is no formal prohibition but also if the broadcasting organization has, due to the circumstances in the case, a special reason to assume that the author would object to the transmission.

In the first three above-mentioned fields, the prohibition may be filed with any of the contracting parties. With regards to the fifth extended collective license in Sweden, i.e. retransmission of broadcasts, the author has no right to file an individual prohibition. This is in accordance with the Satellite and Cable Directive.

As to a guaranteed right to remuneration, provisions in the law apply to rightsholders who are not members of the contracting organization. The organization has to see to it that those non-members actually receive the remuneration. For instance, Article 42a of the just mentioned Swedish Act³⁰ prescribes that:

In respect of the remuneration deriving from the [ECL] agreement and in respect of other benefits from the organization that are essentially paid

28. H. Olsson, "The Extended Collective License as Applied in the Nordic Countries" (2005), paper presented at the Kopinor 25th Anniversary International Symposium, Oslo, 20 May 2005, online: <www.kopinor.org/hva_er_kopinor/kopinor_25_ar/kopinor_25th_anniversary_international_symposium/the_extended_collective_license_as_applied_in_the_nordic_countries> (last visited: 20 October 2005).

29. Act on Copyright in Literary and Artistic Works (Act 1960: 729, of 30 December 1960, as amended up to 1 July 2005 (including by Act 2005:359 of 26 May 2005). Available in English at <www.sweden.gov.se/content/1/66/05/42/00/8185f61a.pdf> (visited 8 December 2005).

30. *Ibid.*

for out of the remuneration, the author shall be treated in the same way as those authors who are represented by the organization.

There may be, however, situations where such outsiders are not satisfied with the conditions concerning remuneration that are prescribed in the agreement. One such situation may occur, for instance, when the contracting organization has decided to use the remuneration for collective purposes. In such cases the non-represented rightsholders are entitled to the same treatment as the members. Moreover, most ECL provisions contain a clause that, regardless of the possibility to take part in such collective arrangements, a non-represented rightsholder always has the right to claim individual remuneration. The claim has to be directed only towards the contracting organization and such claims have to be made within a certain period of time, in most cases within three years from the year in which the exploitation took place.

4.3. MEASURES TO ENSURE THAT COLLECTIVE AGREEMENTS ARE CONCLUDED

In most Nordic countries, there are measures based on mediation, arbitration or both. Section 52 of the Danish Copyright Act³¹ includes detailed provisions on mediation, which each party may demand in the absence of any results of negotiations on the making of agreements based on ECL provisions. The demands for mediation shall be addressed to the Ministry of Culture and a mediator will be appointed by the said ministry. The parties may also decide to use arbitration.

In Sweden, there has always been a considerable political resistance against any form of compulsory measures when difficulties arise in the negotiations concerning an ECL agreement. The Swedish law contains no provisions on arbitration or similar measures, but the Government and the Parliament have preferred to have confidence in the good will of the parties to reach a settlement. When the Satellite and Cable Directive was implemented, this approach was, however, put to a test, because Art. 11 of that Directive obliges the EU Member States to have a system of mediation in case negotiations fail. In Sweden, this resulted in a specific provision on a mediation process, based on the provisions in labour law.

4.4. AUTHORIZATION BY PUBLIC AUTHORITIES

It is a matter for national consideration whether there is a need for an authorization by the public authorities (e.g. the Ministry of Culture) in order for an organization to conclude an agreement that could form the basis for an ECL.

31. Act No. 395 of 14 June 1995 on Copyright [DCA].

For instance in Finland, the Ministry of Education and Culture has approved the relevant organization(s) in the field of retransmission of broadcasts, where currently two organizations (KOPIOSTO and TEOSTO) have been approved to license cable retransmission of broadcasts. These two organizations need to put forward their claims *vis-à-vis* users simultaneously. The latest amendment,³² in conjunction with the implementation of the Copyright Directive, extends a formal requirement for an acceptance by the relevant authority to all organizations that conclude agreements supported by ECLs.

Authorization by relevant authorities takes place also in Denmark, Iceland and Norway. Sweden remains the only Nordic country with no authorization from public authorities.

5. PRACTICAL EXAMPLES FROM NORDIC COUNTRIES

While legislation lays down the necessary prerequisite for rightsholders to enjoy and benefit from their ownership rights, both enforcement and management are necessary supplements. Together, they form the three pillars of a well-functioning copyright system.

How to judge the functioning today? A few case studies will be offered, each describing a particular licensing area supported by an ECL, to enable the reader to judge the practical implications of the system. These examples are chosen from different Nordic countries.

5.1. BROADCASTING IN FINLAND

An ECL was adopted in Nordic copyright legislation for the first time in the field of primary broadcasting. The Finnish provision dates back to 1961.³³ The aim was to solve the broadcasters' problem in trying to reach all rightsholders of the content used in daily programming. This provision, which has served as a model of further extended collective licenses, was originally written as follows:

A broadcasting organization that has the right to broadcast works by virtue of an agreement concluded with an organization representing a large number of Finnish authors in a certain field may also broadcast a work in the same field by an author not represented by the organization.

32. Act 821:2005 adopted by the Parliament on 14 October 2005 entering into force on 1 January 2006; partially 1 January 2007.

33. Copyright Act (Law No. 404 of 8 July 1961).

The provisions of this paragraph do not however apply to dramatic works, cinematographic works or even other works if the author has prohibited the broadcasting thereof.³⁴

The main motivation was a practical consideration.³⁵ Since it is practically impossible to reach all rightsholders and to secure all licenses before the actual use, broadcasting music in this case, the user may take full advantage of the blanket license offered by TEOSTO. In practice this means that the broadcasting organization does not need to know whether an author is represented by the organization or not.

Taking into account good national representation and solid foreign representation through reciprocal representation agreements with similar CMOs in other countries, the extension effect has a relatively small application. In 2004, only 3.1 per cent of broadcast revenue³⁶ was allocated to non-represented rightsholders. However, measured by the number of individual rightsholders whose works were performed, 13 per cent fell into the category of non-identified rightsholders, i.e. 6,275 rightsholders of the 48,198 rightsholders' total. This relatively high number is due to many off-main stream broadcasts with foreign repertoire and local programs. Thus, an ECL is a safety net also in primary broadcasting.

The copyright legislations of the other Nordic countries include similar ECL provisions. In Denmark and Norway, the provisions cover not only literary and musical works, but all works except dramatic works.

All Nordic CMOs in the field of creative music represent a substantial number of national rightsholders: more than 110,000 rightsholders have contractual relations with the Nordic organizations via a direct mandate. In 2004, the total domestic performing rights collection in the Nordic countries was EUR 170 million,³⁷ and broadcasting revenue represents a major part of that collection.

5.2. REPROGRAPHY AND CERTAIN DIGITAL USES IN DENMARK

In the late 1970s and early 1980s, the ECL was found to be the proper solution to copyright questions concerning reprography. Later on with technological development, certain digital uses have been added to the scope of application.

The Danish example is an interesting one, as it shows the gradual development of the system. Copy-Dan Writing is the collective management

34. *Ibid.*, Art. 25f.

35. V. Verronen "Extended Collective License in Finland: A Legal Instrument for Balancing the Rights of the Author with the Interests of the User" (2002), 49 *Journal of the Copyright Society of the USA* 1149.

36. Radio broadcasting by the Finnish Broadcasting Company.

37. The revenue does not include royalties received from foreign CMOs.

organization which has been approved by the Danish Ministry of Culture to enter into agreements on the exploitation of works with users pursuant to Sections 13, 14 and 16(b) and to Section 50 (general provisions on extended collective license) of the DCA. These areas of application are described below.

5.2.1. Reproduction within Educational Activities³⁸

The ECL in the Danish Copyright Act, located in Section 13, concerns reproduction of published works for the purpose of educational activities, both public and private.

When the ECL provision was introduced in 1985, it only covered analogue reproduction. However, in light of technological developments in the 1990s, the ECL provision was broadened in 1998 to include all forms of reproduction, hereunder scanning and downloading and other types of digital reproduction.

The standard licensing agreements on reproduction for educational purposes cover almost all public educational institutions at every educational level. Copy-Dan Writing operates with four standard licensing agreements with different scope which the educational institution can choose from according to their specific needs:

- basic: only photocopying;
- course packs: only photocopying and the right to produce course packs;
- scanning: photocopying and scanning;
- scanning and course packs: photocopying, scanning and the rights to produce course packs.

All agreements are based on the same model and variations occur only as a result of the different scope and the price structure derived therefrom.

5.2.2. Reproduction by Institutions, Organizations and Business Enterprises³⁹

Section 14 of the DCA concerns reproduction of descriptive articles in newspapers, magazines and collections, of brief excerpts of other published works of a descriptive nature, of musical works and of illustrations reproduced in association with the text for internal use within public or private institutions, organizations and business enterprises.

Contrary to Section 13 of the DCA covering educational activities, Section 14 only covers analogue reproduction. When extending the scope of

38. Annette Birckmann Dilley, "Copyright clearance of the right to reproduce text in Denmark based on the extended collective license" (2004), Master thesis submitted to Stockholm University, 14-15 and 21-22.

39. *Ibid.* at 15 and 30-31.

Section 13 in 1998, to cover digital reproduction, the Danish Ministry of Culture also proposed extending Section 14 to cover digital reproduction. However, this proposal was met with strong opposition from the publishers, mainly the Danish Newspaper Publishers' Association and the Danish Publishers' Association. It was their opinion that at that time the proposal would cause serious harm to the development of a Danish business within the area of digital publishing.

Subsequently, a majority in the Danish Parliament voted against extending Section 14 to cover digital reproduction on the basis that, within a foreseeable future, newspaper publishers and journalists would be capable of clearing copyright on an individual basis in relation to the digital exploitation of their works.

The standard licensing agreement on reproduction for administrative purposes only covers photocopying from paper to paper, including photocopying of print-outs for example from the Internet, and transmission through fax. This means that downloading works from the Internet and other works in digital form is not permitted, nor is scanning of printed works. This resembles the scope of Section 14 of the DCA.

5.2.3. Reproduction within Public Libraries⁴⁰

In 2002, an extended license provision was introduced under Section 16(b) of the DCA in light of technological developments. The aim of the provision is to facilitate public libraries' copyright clearance in relation to digital reproduction of copyright protected works for interlibrary loans. An interlibrary loan is the process by which a library requests material from, or supplies material to, another library. The purpose of this is to enable a library user to obtain material not available in the user's library.

Pursuant to Section 16(b) of the DCA, public libraries and other libraries which are financed in whole or in part by public authorities may upon request reproduce articles and other short excerpts. The public libraries must however respect any limitations that the rightsholders and libraries have agreed upon concerning grant of access to works. Furthermore, the library user who has ordered and received the scanned materials is prohibited from redistributing the work in digital form.

The provision supplements the exception found in Section 16(a) of the DCA, pursuant to which the public libraries can make single copies of works on specified conditions to be used for the purpose of their activities if this is not done for commercial purposes.

A framework licensing agreement on reproduction for the purpose of interlibrary loans ("Lib-agreement") has been negotiated between the Danish National Library Authority on behalf of the public research libraries and

40. *Ibid.* at 16 and 32.

Copy-Dan Writing. Negotiations had been ongoing since December 2002 and an agreement was concluded in August 2004. The agreement only covers research libraries and not ordinary public libraries.

5.2.4. Situation in other Nordic Countries

In Finland, a general ECL provision has been in force since 1980 and covers all areas of use by reprography. KOPIOSTO, the Finnish coalition, has concluded agreements that cover education, state and municipal administration, church administration, associations and business enterprises. The latest amendment⁴¹ implementing the Copyright Directive introduces new areas of application, based on an ECL:

- Reproduction of work for educational activities and scientific research by other means than reprography (Article 14);
- Reproduction of articles with accompanied illustrations and their transmission for internal information purposes by authorities, businesses and other persons allowed also by digital technology (Article 13a). The rightsholders have a right to prohibit such reproduction and transmission;
- Use of works in archives, libraries and museums with the support of an ECL fall under a new provision (Article 16d).

The Icelandic Copyright Act⁴² includes an ECL covering photocopying in general activities (Article 15a(1)). FJÖLIS is the relevant organization. The Government Proposal to implement the Copyright Directive included a number of new ECL provisions to cover among others:

- Reproduction of published works for educational use (proposed Article 18(1));
- Reproduction of certain types of works in libraries (analogue/digital) (proposed Article 12(2)).

However, in May 2005, it became obvious that the proposal would not be discussed during the current term of the Parliament. A new proposal shall be presented to the next Parliament.

In Norway, an ECL provision was introduced in 1979 to cover reprography in education, and extended in 1995 to cover internal photocopying in enterprises. KOPINOR is the relevant organization that has concluded agreements on all areas of photocopying and included some digital uses on a voluntary

41. *Supra* note 32.

42. The Copyright Act, *Official Journal A*, 1972, No. 73.

basis. The latest amendment to the Norwegian Copyright Act,⁴³ which entered into force on 1 July 2005, includes a number of new ECL provisions, among others:

- The extended license provision for educational use which was extended to cover also digital uses (Article 13b);
- Provisions on internal information in enterprises similarly extended to cover all forms of reproduction (Article 14).

In Sweden, the original 1980 ECL provision on reprography covered only educational activities.⁴⁴ Bonus-Presskopia as the relevant organization has licensed educational uses. Other uses have been licensed on a voluntary basis. The latest amendment implementing the Copyright Directive,⁴⁵ which entered into force on 1 July 2005, introduces some new extended license provisions, among others:

- The Parliament, decision-making municipal assemblies, governmental and municipal authorities as well as enterprises and organizations, for information purposes, by means of reprographic reproduction (Article 42b);
- Copies for educational purposes, including digital copying, unless the author has filed a prohibition against the reproduction with any of the contracting parties (Article 42c);
- Possibilities for archives and libraries to communicate works to the public, etc (Article 42d).

In summary, all Nordic countries have thus introduced or proposed to introduce new ECL provisions to cover certain digital uses.

Representativeness of coalition or umbrella organizations is fairly extensive in all Nordic countries. For example in Finland, KOPIOSTO has 44 member organizations and through them individual mandates from 47,000 rightsholders covering reprography and secondary uses of audiovisual works. Moreover, bilateral agreements with similar organizations in other countries enlarge the organization's representation.

In 2004, domestic collection for reprography and certain digital uses in the Nordic Countries totalled EUR 65 million.

5.3. RETRANSMISSION OF BROADCASTS IN NORWAY

In the latter half of the 1980s, it was noted that collective management was the most expedient alternative regarding retransmission rights. The retransmission

43. Odelstingsbeslutning No. 93 (2004–2005) (Parliament decision of 4 June 2005).

44. Act on Mediation in certain Copyright Disputes, Svensk författningssamling SFS 1980:612.

45. Act 2005:359 of 26 May 2005, Amending the Act 1960:727 on Copyright in Literary and Artistic Works (Svensk författningssamling SFS 2005:359).

of broadcasts – by cable or by re-broadcasting – in practice requires collective management of rights. Cable operators must obtain fully covering licenses, as they cannot themselves influence the contents of the programmes to be retransmitted; they can only decide whether or not to distribute the programmes. Many countries' legislation reduces the rights to a mere right to remuneration. This was the case also in Denmark in 1985. Today, rightsholders in all Nordic countries enjoy exclusive rights, supported by an ECL.

Due to the complexity of copyright clearances in respect of retransmission by cable, the EU Satellite and Cable Directive⁴⁶ opted for compulsory collective management in 1993. According to the Directive, the organization is deemed to be mandated also *vis-à-vis* non-represented right owners. The Nordic solution based on an ECL is in conformity with the Directive.

5.3.1. Cable Retransmission in Norway

In Norway, an agreement between a cable operator and NORWACO⁴⁷ binds all Norwegian and foreign rightsholders, including film producers, and thus provides full indemnity against claims by outsiders. In principle, rightsholders can be grouped into three main groups: authors and performing artists, producers of films and phonograms and broadcasters. NORWACO represents altogether 34 rightsholders' organizations and has been approved by the Ministry of Culture and Church Affairs.

The agreement concerning retransmission of broadcasts in networks is concluded between NORWACO and 27 broadcasting organizations as members of UBON⁴⁸ on one hand and the cable distributor on the other hand. In 2004, the agreement covers 56 channels. The agreements cover 923,000 households connected to a cable network in Norway, out of the 1.7 million households total.

The agreement includes detailed provisions on prohibition of the retransmission of certain programmes. Such a prohibition may only take place in special cases and needs to be notified in advance. Thus the Norwegian agreement recognizes the possibility to prohibit the use of certain programmes despite the law not containing a provision to that effect.

If the parties are unable to agree on the terms and conditions and the remuneration, either party may submit the terms and conditions to a specific committee.⁴⁹ In 2004, the Committee settled a case initiated in 2003 by NORWACO and UBON against three cable television networks that did not conclude an agreement for their retransmission. The reason for refusal was remuneration

46. *Supra* note 18.

47. NORWACO has 34 member organizations, see online: <www.norwaco.no> (last visited: 21 October 2005).

48. Union of Broadcasting Organizations in Norway.

49. Cable Council (Kabeltvistammada).

for Norwegian channels. The Committee concluded in its decision towards the end of 2004 that national channels are to be remunerated irrespective of their possible "must carry" status and further that the claimed remuneration was considered not to be unreasonable.

5.3.2. Situation in other Nordic Countries

Retransmission by cable or by re-broadcasting is licensed by joint copyright organizations also in other Nordic countries. In Denmark, film producers are members of Copy-Dan Cable TV, whereas in Sweden and Finland they have their own CMOs; FRF⁵⁰ and TUOTOS⁵¹ respectively, working in cooperation with COPYSWEDE and KOPIOSTO.

In 2004, remuneration for retransmission collected in the Nordic countries totalled EUR 60 million.

6. CURRENT AND NEW CHALLENGES

When the Copyright Directive was negotiated, the Nordic delegations were conscious about the status of the ECL system in the context of a closed list of possible exceptions that the Directive prescribes in its Articles 5.2 and 5.3. The end result of these deliberations is documented in Preamble 18 which states that:

This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses;⁵²

This makes it clear that the nature of an ECL is a modality concerning rights management. The statement in the Preamble should be seen as a general statement that applies not only to already existing ECL provisions but also leaves a freedom to establish new ones.

During the last ten years, digital uses have been discussed widely and views differ as to the best licensing mechanism. There seems to be a common understanding that exclusive rights are a necessary point of departure. A lot of discussion has taken place concerning a possible need for new ECL provisions in the Nordic countries. Denmark has been in the forefront of development,

50. The Swedish Film Producers' Rights Federation (FRF), online: <www.frfinet.se> (last visited: 21 October 2005).

51. Copyright Association for audiovisual producers in Finland, online: <www.tuotos.fi> (last visited: 21 October 2005).

52. *Supra* note 1.

and already in 1998 ECL provisions on reprography in educational activities (Section 13 of the DCA) were enlarged to cover also digital copying.

Two specific areas have been under special focus in all Nordic countries: digital copying in education and new usages in libraries. To prepare the ground for a decision, both among legislators and rightsholders, surveys have been carried out on user needs and usage patterns.

6.1. USER NEEDS AND USAGE PATTERNS

6.1.1. Educational Establishments

In Finland, the latest amendments⁵³ introduced an ECL for digital copying in education. During the law revision process, the Ministry of Education and Culture and KOPIOSTO concluded a cooperation agreement to survey and study digital copying instances.

A study on digital copying in primary and secondary educational instances was carried out in 2003. According to this study, 51 per cent of teachers had copied material from the Internet to be used in education. Another 14 per cent had copied from digital to digital, whereas scanning had occurred in 9 per cent of cases. Results from vocational establishments and universities show even higher usages. In all cases, over half of the users reported using digital copying from the Internet as their copying source alongside traditional reprography.

The second phase of the above study aimed to study what kinds of web pages are used in education and to find out their instructions concerning copyright and access. More than 1,800 teachers participated in this study and 60 per cent of them had used web pages for educational purposes. In total, 991 web pages are analysed, 85 per cent of them being of Finnish origin and 15 per cent of foreign origin. One of the findings was that only 43 per cent of these web pages contained information on allowed usages and/or copyright.

The following summarizes the findings of the study in all educational establishments:

- The most common method is to print the digital material, copy and distribute it to the students as paper copies;
- The most common source is the open Internet;
- Visual material is copied more frequently than in analogue copying instances;
- The use of web pages in education is highly concentrated on pages developed by public bodies and the publishing industry;

53. *Supra* note 32.

- Usage information and/or copyright provisions are in many cases lacking, and if such information exists it does not take into account different usage situations.

The results of these studies, carried out jointly by the relevant ministry and the CMO form ground for future decision making and negotiations. Would it be possible for rightsholders to control individually such uses? Would users accept an individual rights clearance procedure?

6.1.2. Libraries

Traditionally, libraries have been used to basing their activities on free use provisions. Usages have been limited to cases where the law allows storage, archiving and conservation by traditional means of copying. Based on the latest amendments⁵⁴ in Finland, this kind of "internal" copying will be possible also with the help of digital technology, including browsing of the material on the spot in library intranets. But libraries have been keen to develop new services to their customers. New digital copying instances and network usages will presuppose a license from the rightsholders. An ECL will facilitate rights clearance in the future, when rightsholders and libraries negotiate agreements based on the new provisions.

Digital usages were not born yesterday. A legitimate need to have access to digital material, for instance in libraries, has existed for a long time. Old materials have been digitized and put at disposal through networks. In cases where legislative solutions did not exist, CMOs have developed voluntary licensing options. For instance, KOPIOSTO developed a joint service with the Helsinki University Library in 1997, and older and new Finnish scientific articles can now be offered on the net for libraries, universities, private corporations and even to the Parliament. The new ECL provision will facilitate licensing.

6.1.3. New Ways to Retransmit Broadcasts

Changes in technology and in distribution modes take place at an increasing rate in the audiovisual sector. Besides cable networks, retransmission of broadcasts takes place also in IP-networks. Nordic CMOs have licensed this retransmission with the consent of the original broadcaster.

An interesting trial took place in Finland when retransmission of a German channel "ViVa Plus" and French channel "France 2" to certain models of mobile handsets was licensed by an agreement between Nokia and KOPIOSTO. This trial took place to a selected audience during autumn 2004 and spring 2005.

⁵⁴ *Ibid*

User expectations and requirements were studied during the trial, and mobile TV appeared to be especially attractive for watching TV-series and news.

6.2. NEW EXTENDED COLLECTIVE LICENSES WILL BE TESTED IN PRACTICE

The recent implementations of the Copyright Directive have proven that Nordic Governments were ready to stipulate new ECL provisions. The system had proven its functionality in practice in the analogue era.

With a number of new ECL provisions, both to widen the scope to digital uses and to include new usage areas, it is now up to the CMOs to start negotiations with users. This special rights management technique presupposes a clear mandate from the rightsholders. Thus there cannot be any agreements without their consent. That is the essence of exclusive rights. The organization as such does not possess any rights. The provisions in the law remain as mere options as long as concrete agreements are concluded.

A good point of departure exists in the Nordic countries. Many CMOs have already established licensing on a voluntary basis and these trials can be supported by the new ECL provisions. Surveys and studies on user behaviour and requirements bring valuable information to licensing negotiations.

7. CONCLUDING REMARKS ON NORDIC COLLECTIVE MANAGEMENT

The system of giving extension effect to collective agreements in certain areas is a typical Nordic way of finding copyright solutions to complex situations of mass use of protected works and other contributions.

That system presupposes that there exists a well developed system of organizations and that such organizations represent a substantial number of rightsholders in the field concerned. It presupposes in other words that the "copyright market" is well organized and disciplined. If such is the case, the system is likely to function very well and experience in the Nordic countries has proven that.

Finding a proper balance between the interest of rightsholders and that of the users is a much debated topic these days. The answer looks different depending upon from which side you look at it. But the goal seems to be the same: finding a balance.

In the Nordic countries, collective management plays an essential role. Collective management can be measured by different ways, collection of revenue being one indicator. In 2004, the total revenue collected by CMOs in the Nordic market was some EUR 450 million.⁵⁵ This represents more than 5 per cent of

⁵⁵ Indicative figure, as some overlapping occurs in the collection of figures due to private copying remuneration and retransmission remuneration being collected and distributed by different CMOs.

estimated total revenue in the world. For a market with 25 million inhabitants this is a fair share.

To conclude this short chapter on collective management in the Nordic countries, one should give further thought to the following mission statement:

The task of the CMO is to *facilitate* the possibilities to use works in a *legal* manner.

Chapter IX Collective Management in Commonwealth Jurisdictions: Comparing Canada with Australia

Mario Bouchard*

1. INTRODUCTION

Canada's Copyright Act¹ dates from 1921 and was largely based on the 1911 UK legislation. Yet, Canadian copyright policy is not as firmly rooted in British tradition as some² appear to think. Canada was the first Commonwealth jurisdiction to expressly recognize the moral rights of authors,³ to regulate collective management of copyright otherwise than through generally applicable competition legislation⁴ or to offer a comprehensive regulatory scheme for all dealings between collective management organizations (CMOs) and users of their repertoires.⁵ Collective management in Canada is both prevalent and varied. This is due in part to the power of the Copyright Board of Canada to regulate the relationships of all CMOs with their users and to the manner in which the Board has chosen to exercise that power.

Until the 1980s, Australian copyright legislation closely tracked developments in the United Kingdom. In 1912, Australia adopted *en bloc* the UK Copyright Act of 1911. The current Australian statute⁶ originally reflected the

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1. R.S.C. 1985, c. C-42, as amended [CCA].
2. Including the Supreme Court of Canada: see *Théberge v. Galerie d'Art du Petit Champlain inc.* 2002 SCC 34, [2002] 2 S.C.R. 336.
3. Within three years of moral rights being incorporated in the Berne Convention: Copyright Amendment Act, 1931, 22-23 George V, c. 8, s. 5.
4. *Ibid.*, s.10.
5. Through the introduction of ss. 70.1 and following, CCA, *supra* note 1, in 1988.
6. Copyright Act 1968 (Ch), Act No. 63 of 1968 [ACA].

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underlying principles of the British legislation of 1956. Until the 1970s, the ACA left Australian CMOs unregulated. The ACA still does not contain a comprehensive regulatory scheme for dealings between CMOs and copyright users. Furthermore, when the Australian Copyright Tribunal has the power to intervene, the extent to which it can do so appears more limited than for its Canadian counterpart.

Having compared the situation in both jurisdictions, this writer is left with a somewhat counter-intuitive impression. In Canada, the presence of a specialized authority able to supervise all dealings between CMOs and copyright users has helped collective management to expand and to gain legitimacy. In Australia, by contrast, the absence of such an authority might help to explain the fragmentation of supervision, stifled growth and continued mistrust that seem characteristic of collective management in that country. Outlining some of the similarities and differences between the two jurisdictions might sufficiently whet the interest of scholars in pursuing the matter.

2. A BRIEF HISTORY OF COLLECTIVE MANAGEMENT IN CANADA AND AUSTRALIA

The British PRS set up the Canadian Performing Rights Society (CPRS) in 1925. Starting in 1931, the CCA was amended to require that the CPRS file its statements of royalties; Cabinet could modify the statements following an investigation and report by a commissioner of inquiry.⁷ In 1936, following a recommendation of a Commission,⁸ the CCA was further amended so that performing rights tariffs would have to be certified by a new administrative agency, the Copyright Appeal Tribunal, before coming into force.⁹ The Tribunal issued its first decision within six months. In 1940, BMI Canada emerged as a result of the battles that were then being waged over the use of music on American commercial radio.¹⁰ The evolution of collective management over the next fifty years could be described as slow, quiet and not always successful. In 1971, as soon as record manufacturers secured from the Copyright Appeal Tribunal a tariff for the public performance of "mechanical contrivances", the underlying right was abolished.¹¹ In 1975, CMRRA started acting as agent for the mechanical licensing of musical works. A few French CMOs installed beach-heads in the province of Québec; their presence played a small but significant role in the evolution of collective management in Canada. In 1984, AVLA started acting as agent for the right to reproduce mechanical contrivances. In

7. Copyright Amendment Act, 1931, *supra* note 3, s. 10.
8. "Report of the Parker Commission" (1935).
9. An Act to Amend the Copyright Act, 1931, (1936) 1 Edw. VIII c. 28 s. 2. The Canadian Tribunal predates the British Performing Rights Tribunal by some 21 years.
10. See L. Allen, "The Battle of Tin Pan Alley", *Harper's Magazine*, October 1940.
11. An Act to Amend the Copyright Act, 1970-71-72 S.C., c. 60.

1985, SODRAC started to administer the reproduction right in musical works. In 1988, Canada's first reprographic rights organization, CanCopy, emerged. Uncertainty surrounding the status of CMOs under competition law explained in part the somewhat timid growth of collective management, as did the release of a number of reports that were in part critical of CMOs in other Commonwealth jurisdictions.¹²

The year 1989 represented something of a watershed for Canadian CMOs. The CCA was amended in two important respects. First, the Copyright Appeal Tribunal was replaced by the Copyright Board. The Board was empowered to supervise dealings between collectives and individual users or groups of users in areas other than music performing rights; collective management was legitimized and its relationship with competition law was somewhat clarified. Second, the use of protected works in retransmitted distant radio and television signals was subjected to a compulsory licensing scheme according to which rightsholders could seek remuneration only through a CMO; in that area, collective management became the only possible course of action.

In 1997, collective management received further recognition. The basic framework created in 1989 was expanded. Under the general regime, CMOs were no longer limited to dealing with users on a case-by-case basis; they could secure tariffs that would apply to all current and future users. Even more significantly, Parliament used collective management as the tool of choice in dealing with a number of areas where access had to be guaranteed in exchange for a form of compensation, including music neighbouring rights,¹³ educational uses of television programs,¹⁴ private copying¹⁵ and some forms of ephemeral recordings and transfer of format.¹⁶ These developments led to a further increase in the number of collectives, and to a significant expansion of the role the Copyright Board was asked to play in regulating the relationship between collectives and users.

The evolution of Australian CMOs followed a somewhat different path. APRA, the performing rights society, was created in 1926, again by the British PRS. In 1933, a commission of inquiry recommended the creation of a copyright tribunal,¹⁷ that recommendation was not followed over fears that the compulsory arbitration of disputes might not be consistent with the Berne Convention. CMOs were essentially left to their own devices until the late 1970s.

12. See, e.g., "Merger and Monopolies Commission, Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings" (December 1988), Cm 530.
13. CCA, *supra* note 1, s. 19(2)(e).
14. CCA, *ibid.*, ss. 71-76.
15. CCA, *ibid.*, ss. 79-88.
16. CCA, *ibid.*, ss. 30.8(8), 30.9(6); pursuant to these provisions, exceptions that allow broadcasters to make ephemeral and transfer of format copies do not apply if a CMO offers a license for the use of the relevant work, performance or sound recording.
17. Hon. Mr. Justice Owen, *Report of the Royal Commission on Performing Rights* (1933), [Owen Report].

In 1968, following a comprehensive review of copyright legislation¹⁸ which led to the adoption of the ACA, the Copyright Tribunal was established, largely in response to the perceived need to control CMOs that administered rights in the public performance or broadcast of musical works or sound recordings.¹⁹ The Tribunal's first decision was issued in 1979. Growth in collective management apparently was driven to a large extent by the imposition of a significant number of statutory licenses,²⁰ some of which require that only "declared" societies be active in the relevant market. Amendments to the ACA starting in the 1980s resulted in a progressive expansion of the jurisdiction of the Copyright Tribunal; still, that jurisdiction, though extensive, is not comprehensive. Throughout that time, collective management of copyright attracted considerable attention on the part of government²¹ and of competition authorities.²²

3. CANADIAN CMOs: MARKETS, STRUCTURES, PRACTICES

This part provides an overview of the areas in which Canadian CMOs are currently active and of their various organizational and other characteristics. Some comparisons with the Australian situation are offered.

3.1. SPHERES OF ACTIVITY

It is difficult to present Canadian CMOs in a fashion that is both systematic and useful. The manner in which rightsholders arrange their affairs is, to a large extent, left unregulated. More than one CMO may be active in a given market; conversely, a collective may be active in more than one market. For the

18. *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959) [Spicer Committee Report].
19. Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal Final Report* (2000), para. 1.05 [CLRC Jurisdiction Report (2000)].
20. Labore puts their number at fifteen: see J. Labore, *Copyright and Designs*, 3rd edn. (Sydney: Butterworths, 1996) ¶128,005.
21. Owen Report (1953), *supra* note 17; Spicer Committee Report, *supra* note 18; Australian Government Publishing Service, *Report of the Copyright Law Committee on Reprographic Reproduction* (1976), Canberra (Franki Report); Report of the Copyright Convergence Group, *Highways to Change: Copyright in the New Communications Environment* (1994), Canberra; S. Simpson, *Review of Australian Copyright Collecting Societies, a Report to the Minister for Communications and the Arts and the Minister for Justice* (1995) [Simpson Report (1995)]; Standing Committee on Legal and Constitutional Affairs, *Don't stop the music! A report of the inquiry into copyright, music and small business* (1998); CLRC Jurisdiction Report (2000), *supra* note 19; Final report by the Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement* (2000) (Ergas Report).
22. *Re Applications by Australasian Performing Rights Association* (1999), 45 I.P.R. 53.

purposes of this paper, it is probably most useful to present Canadian collectives according to the types of rights they administer.²³

3.1.1. Music

Collective management of musical rights offers a vivid illustration of how diverse the organization of CMOs can be in Canada. Collective management is divided not only according to rights (performance/communication, reproduction) or subject-matter (work, performance, sound recording), but also to a rightsholder's craft (musician, singer, backup artist) and linguistic background.

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) administers the right to perform or to communicate musical works. Created in 1990 by the merger of its two predecessors, its origins date back to 1925. SOCAN has some 70,000 members, of which about one-third receive royalties every year. As with most performing rights collectives, its network of foreign affiliations is extensive. SOCAN can collect royalties only pursuant to a tariff certified by the Copyright Board.²⁴ In 2004, it collected CAD212M and distributed CAD151M.

The Neighbouring Rights Collective of Canada (NRCC) is the only CMO currently authorized to collect royalties for the equitable remuneration of performers and makers for the performance or communication of sound recordings of musical works. Created in 1997, NRCC is an umbrella organization; it has no individual members, but five member collectives. The American Federation of Musicians and the ACTRA Performers' Rights Society receive royalties for the benefit of most performers, while Artisti manages the rights of some 600 performers (mostly singers) from the province of Québec. The makers' share of royalties is paid to SOPROQ and AVLA, which are described below. NRCC can collect royalties only pursuant to a tariff certified by the Copyright Board. In 2004, NRCC collected some CAD12M and distributed CAD10.2M. Another society, the Société de gestion des droits des artistes-musiciens (SOGEDAM), acts for a small number of Canadian musicians as well as for at least one foreign collective, the French SPEDIDAM.²⁵ Partly as a result of a decision of the Copyright Board that deprived it of any direct source of income, it has been largely inactive since late 1999.

Two collectives administer the right to reproduce musical works, including the so-called mechanical and synchronization licenses.²⁶ The Canadian Musical

23. An expanded description of the collectives can be found on the website of the Canadian Copyright Board. See also D. Gervais, "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" (2002), 1 *Canadian Journal of Law and Technology* 21, at 42, online: <ejl.dal.ca/voll_no2/pdf/articles/gervais.pdf> (last visited: 18 November 2005).
24. This is true in law but incorrect in practice: see *infra* note 72.
25. See the Chapter on France.
26. Christian Copyright Licensing Inc., an American corporation, licenses the reproduction of some religious music.

Reproduction Rights Agency (CMRRA) acts both as a centralized licensing and a collecting agency, for Canadian and American publishers who control approximately 75 per cent of the music recorded and performed in Canada. With some exceptions,²⁷ licensing is done on a per use basis. The Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) was created by the French SACEM and by SPACQ, an association acting for a number of successful French-Canadian authors. It represents some 5,000 members, mostly from the province of Québec; it also acts in Canada for sixty or so foreign societies. SODRAC offers per use and blanket licenses; it also administers some tariffs certified by the Copyright Board. For the year ending in March, 2005, SODRAC collected some CAD21M and distributed CAD16.6M.

Two collectives administer rights in sound recordings and music videos. The Société de gestion collective des droits des producteurs de phonogrammes et vidéogrammes du Québec (SOPROQ) represents mostly Francophone record producers from Québec. The Audio-Video Licensing Agency (AVLA) acts for the majors record companies and for many independent labels, artists and producers who together, "own or control the copyright of over 95 percent of all musical audio recordings and music videos produced and/or distributed in Canada."²⁸ Both collectives administer the copyright in master audio and music video recordings. Both license the exhibition and reproduction of music videos and the reproduction of audio recordings for commercial use. Both receive a part of the makers' share of neighbouring rights royalties and private copying levies.

3.1.2. Reprography

There are two reprographic rights organizations in Canada. Access Copyright (formerly CanCopy) was created in 1988. It represents some 6,000 writers, publishers and other creators. It licenses uses in all provinces except Québec. Access negotiates comprehensive licenses with user groups, such as schools, colleges, universities, governments, corporations. In 2004, it collected CAD27.9M and distributed CAD20.5M. COPIBEC, created in 1997, administers the reproduction right in literary works, including books, magazines, newspapers and digital reproduction. It represents Québec, Canadian and foreign rightsholders in the province of Québec. In 2003-04, it collected CAD8M and distributed CAD7M. Access Copyright and COPIBEC act for each other in their respective territory.

27. Such as the reproduction of musical works by radio stations, for which CMRRA, jointly with SODRAC, asked for a tariff. *see Statement of Royalties to be Collected by CMRRA/SODRAC Inc. for the Reproduction of Musical Works in Canada, by Commercial Radio Stations in 2001, 2002, 2003 and 2004*, (2005) 24 C.P.R. (4th) 228 (Cop. Bd.), online: <www.cb-cda.gc.ca/decisions/28032003-b.pdf> (last visited: 17 November 2005).

28. AVLA website, online: <www.avla.ca/about.html> (last visited: 17 November 2005).

3.1.3. Retransmission of Distant Radio and Television Signals

Eight collectives act for a variety of rightsholders in retransmitted radio and television programs. Each gets a share of the royalties set in a single tariff, certified by the Copyright Board.²⁹ Collectives act for broadcasters (Border Broadcasters' Inc., CBRA, CRAA, CRC), American and other film and program producers (CCC, CRO), sports teams (FWS, MLB) and music composers (SOCAN). Royalties collected in 2004 were in the order of CAD67M. Since most of the CMOs do not publish financial results, it is impossible to determine how much of that amount was distributed to rightsholders.

3.1.4. Private Copying

The Canadian Private Copying Collective (CPCC) was created in 1999. An umbrella collective, it collects the private copying levy pursuant to a tariff certified by the Copyright Board, for the benefit of other collectives who in turn, have secured the right to represent eligible authors, performers and makers of sound recordings of musical works: CMRRA, NRCC, SOGEDAM, SODRAC and SOCAN. In 2004, CPCC collected approximately CAD39M.

3.1.5. Audio-Visual and Multimedia

The website of the Copyright Board lists six entities as CMOs dealing in audio-visual and multimedia rights. The Directors Rights Collective of Canada (DRCC) acts for film and television directors. The Producers Audiovisual Collective of Canada collects royalties on behalf of producers for the sale of blank audiovisual media for the rental and lending of video recordings. In both cases, royalties are mostly from foreign sources. The Société civile des auteurs multimédia (SCAM), a French collective, administers reproduction rights of literary works intended for audio-visual media such as cinema, television and radio. The other three entities mentioned on the website of the Copyright Board are non-theatrical film distributors.

3.1.6. Off-Air Program Taping

Two collectives license off-air taping of television and radio programs. The Educational Rights Collective of Canada (ERCC), established in 1998, collects royalties pursuant to a tariff that is set by the Copyright Board, for the off-air taping and public performance of television and radio programs by educational institutions. It collected less than CAD20,000 in 2004.³⁰ The Canadian

29. See "Television Retransmission Tariff 2001-2003" (22 March 2003), s. 15, online: <www.cb-cda.gc.ca/tariffs/certified/122032003-b.pdf> (last visited: 17 November 2005).

30. Educational institutions apparently prefer to deal with specialized distributors who supply prerecorded videocassettes along with the right to perform the underlying work in the classroom, rather than to make use of the tariff set by the Board.

Broadcasters' Rights Agency (CBRA) licenses the use of programs owned by Canadian private television and radio broadcasters by media monitoring firms and by government entities that operate in-house monitoring services, pursuant to a combination of individual licenses and a tariff set by the Copyright Board. CBRA's media monitoring royalties are in the order of CAD800,000 per year.

3.1.7. Collective Management in Other Areas

A variety of other CMOs play a role in distributing royalties collected in Canada or elsewhere. The Canadian Screenwriters Collection Society (CSCS) deals in royalties payable to film and television writers under Canadian and foreign copyright legislation, including retransmission royalties.³¹ The Playwrights Union of Canada, a service organization for professional playwrights, also acts as agent for the distribution of rights and collection of royalties. SACD, a French collective, represents authors, composers and choreographers of dramatic and audiovisual works. SOQAD redistributes to playwrights whose works are performed in pre-school, primary and secondary schools, royalties (around CAD90,000) agreed to with the Ministry of Education of the Province of Québec.

Three collectives deal in visual arts. The Canadian Artists' Representation Copyright Collective (CARCC), established in 1990, negotiates terms for copyright use and licenses users of works of visual and media artists. The Société des droits d'auteur en arts visuels (SODART) negotiates agreements with museums, exhibition centres, magazines, publishers, audio-visual producers, etc. It has more than 360 members in the province of Québec; another 650 joined only for reprography rights. SODART acts for approximately fifteen foreign collectives. Its revenues for 2003-04 were in the order of CAD250,000. SODRAC also is active in that market. Its Visual Arts and Crafts Department grants licenses for the public exhibition, communication to the public by telecommunication and reproduction of foreign and Canadian works on any media, including audiovisual and multimedia.

3.2. CHARACTERISTICS AND PRACTICES OF CANADIAN CMOs

In Canada, a CMO is a "collective society", a term defined since 1997 as

a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 [neighbouring rights] or 81 [private copying] for the benefit of those who, by assignment, grant of license, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

31. CSCS receives retransmission royalties through another collective society, CRC.

(a) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or

(b) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act;³²

That definition is very broad. There are no conditions respecting the corporate structure of a CMO, the manner in which it secures the repertoire it administers or the nature of its relationship with rightsholders or users. Not surprisingly, then, practices vary considerably, and interactions between CMOs are sometimes complex.

3.2.1. Corporate Structure and Business Practices

Most CMOs are not-for-profit corporations. Some (such as SOQAD) are for-profit corporations. The corporate structure of a CMO can change over time: SODRAC, originally a for-profit corporation whose shares were held by SACEM and SPACQ, has been moving to a not-for-profit, membership-based corporate structure since 2003.

Voting structures also vary according to the corporate model adopted. Most collectives operate according to a multiple vote system based on a member's revenues in the previous years, up to a maximum number of votes. SODRAC's founding members, SPACQ and SACEM, each retain the power to appoint one of the eleven members of the Board, even though that CMO has opted for a membership-based corporate structure.

Membership also varies considerably. SOCAN follows the traditional *société de droit d'auteur* model: its members are rightsholders (authors and publishers), as now are SODRAC's. Members of COPIBEC and Access Copyright are organizations representing publishers and creators; rightsholders are affiliates and have no voting rights. CMRRA acts only for music publishers. Umbrella collectives (NRCC, CPCC) have other collectives as members, and no direct contacts with individual rightsholders. Finally, some CMOs (e.g. performers' collectives) limit membership to creators or their assignees.

3.2.2. Nature and Extent of the Repertoire

A CMO can secure its repertoire "by assignment, grant of license, appointment... as... agent or otherwise". All of these approaches are used: SOCAN

32. CCA, *supra* note 1, s. 2.

secures exclusive assignments, and staunchly opposes any form of "back licensing"; COPIBEC secures exclusive licenses; SODRAC generally secures exclusive assignments, but allows authors to retain rights for certain territories and for the Canadian advertising and feature film markets; AVLA administers its repertoire on a non-exclusive basis; CMRRA acts as an agent in the synchronization rights market; licenses directly. Internet uses and secures exclusive assignments of the right to authorize radio broadcasters to reproduce musical works;³³ Access Copyright obtains a non-exclusive mandate to license reprographic uses.

The nature of the rights secured by related CMOs in the same market also varies. SODRAC administers all aspects of the non-paper reproduction of musical works, while CMRRA administers only certain aspects of it. More and more, collectives manage, directly or through an umbrella collective, a variety of rights, usually (but not always) in the same copyright subject matter. AVLA and SOPROQ both receive from umbrella collectives a part of the makers' share of neighbouring rights royalties and private copying levies. SODRAC's repertoire includes artistic as well as musical works. SOCAN not only administers the public performance and telecommunication rights, but also receives for the benefit of some of its members a share of the private copying levy.

The extent to which CMOs represent the available repertoire varies considerably. Only SOCAN and NRCC can claim to represent anything close to the world's eligible repertoire. CMRRA and SODRAC together also probably can make such a claim, at least with respect to the reproduction of musical works by radio stations. AVLA and SOPROQ should be in the same situation as regards certain forms of exploitation of music videos and sound recordings. As for ERCC, the retransmission collectives and CPCC, they collect royalties for all of the eligible repertoires as designed for under their respective regimes.

3.2.3. Pricing Practices, Administrative Expenses and Royalty Distributions

The public availability of terms and conditions of licenses varies considerably. A tariff certified by the Copyright Board is public. For most CMOs, the essential terms of licensing schemes and industry-wide agreements usually are available over the Internet. Some users are able to negotiate terms that are either better adapted to their business models or, because of their bargaining power, more favourable than for smaller users. The results of these negotiations rarely become public unless they are filed with the Board, either pursuant to the general regime³⁴ or in the context of tariff proceedings. Some grids and scales are not readily available, unless requested. Individual licensing agreements often are kept confidential.

33. This was done in order to facilitate the certification of a tariff by the Copyright Board.

34. See Part 4.B. below.

Information concerning revenues and expenses is altogether a different matter. SODRAC, SOCAN and Access Copyright willingly disclose them. CMRRA and AVLA do not divulge their revenues, but do publicize their administrative fee structure. By contrast, while it is easy to infer how much royalties each retransmission collective receives, it is impossible to determine the expenses of those that are privately held.

CMOs account for their expenses in a variety of ways. SOCAN, Access Copyright, CPCC, NRCC and SODRAC pay their expenses before allocating royalties for distribution. CMRRA and AVLA generally charge a straight commission, something that is truly possible only when individual transactions are tracked.³⁵ Expense-to-revenue ratios vary considerably, from as low as 5 per cent to 20 per cent or even more. How meaningful reported ratios are also varies: some CMOs compare gross expenses to gross revenues, but SOCAN uses its "net administrative expenses" (gross expenses offset by investment and rental income), which reduces the declared expense-to-revenue ratio.

CMOs are not required to use any particular methodology when distributing royalties. Distribution can be based on census (music performing rights on television), surveys (music performing rights on radio), be work-by-work (mechanical rights) or rely on a combination of methodologies (radio play and CD sales in the case of private copying). The manner in which monies are allocated when more than one person is entitled to share in the distribution also is left to individual CMOs. At SOCAN, the publisher's share can never exceed 50 per cent, whether or not the publisher is a member. SODRAC allows a non-member publisher to license the publisher's share of a work that is in SODRAC's repertoire; if the publisher is a member, only SODRAC can issue a license. SODRAC apportions royalties according to the shares agreed upon by the author and the publisher. Access Copyright distributes royalties according to a set grid which gives publishers anywhere from 0 to 100 per cent of the royalties. As for CMRRA, since it acts only for music publishers, it pays nothing directly to creators.

3.2.4. Interaction Between CMOs

Canadian CMOs often form strategic alliances. Sometimes, these are dictated by the structure of the regulatory regimes: this explains in part the creation of CPCC and NRCC as umbrella collectives.³⁶ Others respond to the structure of the market. It is considerably easier for CMRRA and SODRAC to jointly seek a tariff for commercial radio stations, since the use of their respective

35. Thus, what CMRRA's practice may be with respect to royalties collected pursuant to a tariff of the Copyright Board remains to be determined.

36. The neighbouring rights regime, under which NRCC operates, requires a single payment for the use of a given sound recording. CCA, *supra* note 1, s. 68(2)(a)(iii). The private copying regime, under which CPCC operates, requires that a single body be designated to collect the levy: CCA, *ibid.*, s. 83(8)(d).

repertoires varies considerably between French- and English-speaking stations. It is also easier for Access Copyright and COPIBEC to act for each other in their respective "home territories".³⁷ Other alliances probably are perceived by the relevant CMOs as shotgun weddings, since the Copyright Board imposes them: such is the case with SOCAN and NRCC in those markets where the Board has certified a single tariff for both collectives.³⁷

Alliances between CMOs can be used to prevent the Copyright Board from dealing with an issue. When two performing rights societies merged to form SOCAN, the need to allocate royalties among them disappeared. By filing a single tariff that applies to commercial radio stations irrespective of their relative use of their respective repertoires, CMRRA and SODRAC are free to apportion between them as they see fit the royalties collected pursuant to the tariff certified by the Board. Having joined CPCC, CMRRA, SODRAC and SOCAN removed from the Board the determination of their individual share of music creators' remuneration for private copying.

Rightsholders also can bring to the table divergent points of view, either through the relevant CMOs or the associated industry associations. Record producers currently oppose a request by CMRRA and SODRAC for a tariff that would apply to the licensing of online music services. The variety of Canadian retransmission collectives is explained in part by the fact that some rightsholders wished to convince the Board to attribute a higher value for the viewing of certain programs than to others.³⁸ One CMO, representing script writers, even filed a proposed tariff with the intention of having the Board determine the share of a television program's royalties that should be paid to the program's scriptwriter.³⁹

3.3. CANADIAN AND AUSTRALIAN CMOs: SOME COMPARISONS

There are eight Australian CMOs. The Australasian Performing Rights Association (APRA) administers music performing rights. The Australasian

37. "Statement of Royalties to be Collected by SOCAN and NRCC in Respect of Commercial Radio (Tariff 1.A - 2003-2007)" (15 October 2005), *Supplement Canada Gazette*, Part I, online: <www.cb-cda.gc.ca/tariffs/certified/m15102005-b.pdf> (last visited: 18 November 2005); "Statement of Royalties to be Collected by SOCAN and NRCC in Respect of Pay Audio Services (2003-2006)" (26 February 2005), *Supplement Canada Gazette*, Part I, online: <www.cb-cda.gc.ca/tariffs/certified/m26022005-b.pdf> (last visited: 18 November 2005).

38. These attempts were unsuccessful: *FWS Joint Sports Claimants Inc. v. Border Broadcasters Inc.* (2001), 16 C.P.R. (4th) 61 (F.C.A.) [*FWS* (2001)].

39. See "Statement of Proposed Royalties to be Collected by CSCS for the Retransmission of Distant Television Signals in Canada, in 2002 and 2003" (14 April 2001), *Supplement Canada Gazette*, Part I, online: <www.cb-cda.gc.ca/tariffs/proposed/r14042000-b.pdf> (last visited: 18 November 2005); the issue was eventually settled between the association representing script writers and the CMO of which they previously had been members.

Mechanical Copyright Owners' Society (AMCOS), whose operations APRA now manages, deals in mechanical rights in musical works. The Phonographic Performance Company of Australia (PPCA) licenses sound recordings and music videos when the underlying rights are subject to a compulsory licensing scheme.⁴⁰ Copyright Agency Ltd (CAL) is the declared collective for the copying of print material by educational institutions and government agencies; it also issues voluntary licenses for other forms of copying of musical, literary and artistic works. The Audio-visual Copyright Society (Screenrights) is the declared CMO for the educational taping and communication of television broadcasts; the use of works in assisting persons with disabilities; government copying of radio and television programs; and retransmission of free-to-air broadcasts. The Visual Arts Copyright Collecting Agency (ViScopy) acts for visual artists. The Australian Screen Directors Authorship Collecting Society (ASDACS) acts for film and television directors and the Australian Writers Guild Authorship Collecting Society (AWGACS) for screenwriters, mostly in respect to royalties payable under foreign legislation.

For the most recent year available, revenue and distribution data for Australian CMOs are as follows: APRA collected AUD124M and distributed AUD108M; AMCOS collected AUD38M and distributed AUD33M; PPCA collected AUD12M, AUD9M was available for distribution; CAL collected AUD86M, 85 per cent of which was available for distribution; Screenrights collected AUD21.5M and distributed AUD16M; ViScopy collected approximately AUD650,000.⁴¹ Data for ASDACS and AWGACS was unavailable.

As can be expected, Canadian and Australian CMOs are at the same time similar and different. Some distinctions are a function of cultural factors. Others flow from differences in the legislative approach to the regulation of collectives in each jurisdiction.

Each Australian collective has one (or more) Canadian counterpart. None competes with another CMO in the Australian market. Canada often knows at least two language-based collectives; eight collectives currently receive a share of retransmission royalties. Consequently, the number of CMOs is much higher in Canada than in Australia.⁴²

Contrary to their Canadian counterparts, all Australian CMOs operate under similar (and significant) organizational or structural constraints.

40. ACA, *supra* note 6, ss. 108 and 109.

41. This includes funds that ViScopy received from declared societies (e.g. CAL) for the benefit of its members.

42. See *supra* note 23. Not too much should be read into this, however. The Canadian definition of "collective society" includes entities that would not be considered CMOs in Australia. Some collectives only receive royalties through a "collective of collectives", such as NRCC and CPCC and do not deal directly with users. The fact that more than one CMO administers a specific right is of little practical impact for users if all CMOs are subject to a single tariff (as is the case for all retransmission collectives) or if each collective acts for the others in a given territory (as do Access Copyright and COPIBEC).

Declared CMOs are subject to a number of statutory⁴³ and regulatory⁴⁴ requirements concerning corporate structure, membership and distribution of funds to members and non-members. In 2002, following a recommendation to that effect⁴⁵ and after APPRA was the subject of a fairly detailed examination of its business practices by the Australian Competition Tribunal,⁴⁶ all CMOs subscribed to a voluntary code of conduct.⁴⁷ The code addresses issues such as membership, dealings with licensees, distribution of royalties, administrative expenses and dispute resolution; in it, voluntary collectives agree to comply with the Attorney General's Guidelines for Declared Collecting Societies.⁴⁸ As a result, the corporate structure and business practices of Australian CMOs are much more similar than those of their Canadian counterparts. All Australian collectives are not-for-profit corporations. All have rightsholders as members. None are as secretive with respect to their revenues, expense or licensing terms than some of their Canadian counterparts: for example, the annual reports of every Australian CMO are available on the Internet. Finally, all of them provide mechanisms for the resolution of disputes with users, something that does not appear to exist in Canada.

Larger Australian CMOs tend to be *de facto* monopolies more than Canadian collectives, again partly because, in Canada, there tends to be one collective operating in each official language. A significant number of Australian CMOs also are *de jure* monopolies.⁴⁹ There is no *de jure* monopoly in Canada.

In Canada, ERCC, CPCC and the retransmission CMOs taken together collect royalties for the entire repertoire, including works or other subject matters owned by non-members. The same is true of "declared" Australian CMOs. However, the way in which each jurisdiction deals with moneys collected on behalf of non-members is significantly different. In Canada, non-members can collect royalties from the relevant collective without becoming a member within a fixed period of time.⁵⁰ In Australia, moneys collected by a declared collective on behalf of non-members must be held in trust for a period set out in the collective's by-laws; however, it would seem that distributions can be made only to members, and nothing specifies what is to happen to moneys collected on behalf of non-members at the end of the trust period.⁵¹

43. ACA, *supra* note 6, ss. 135P(3), 135 ZZB(3) and 135ZZT(3).

44. Copyright Regulations 1969, (Cth) regs 231, 231M, 231L.

45. Simpson Report (1995), *supra* note 21.

46. *Re Applications by Australasian Performing Rights Association, supra* note 22.

47. "Code of Conduct for Copyright Collecting Societies" (2002), online: <www.screen.org.factsheets/COC.pdf> (last visited: 18 November 2005).

48. "Declaration of Collecting Societies, Guidelines" (June 1990), online: <www.copyright.com.au/corporate/declaration%20of%20collecting%20societies.pdf> (last visited: 18 November 2005).

49. See *infra*, text accompanying note 99.

50. CCA, *supra* note 6, ss. 76, 83(11) and 83(13).

51. See Lahore, *supra* note 20, at para. 28-375.

Interactions between CMOs are of a different nature. The need for strategic alliances in the same market between collectives does not exist in Australia, simply because either by choice (as is the case with APPRA) or through a society being "declared", there always is only one collective active for a given set of rights in a given market. Indeed, when one compares the situation with respect to retransmission royalties, it seems that Canadian rightsholders can express their dissatisfaction with an existing collective's view of what their rights are worth much more readily than is the case with an Australian "declared" society – all they have to do is to secede, form a new collective, file a new tariff and force the issue to be addressed by the Copyright Board; Australian rightsholders would have to apply for a cancellation of the collective's declaration, something which has never even been tried to this writer's knowledge.

Other comparisons also could be interesting. For example, the role played by the emergence of compulsory and statutory licenses in the creation of new CMOs seems to have been more important in Australia than in Canada. Finally, it might be helpful to determine why, with respect to the compulsory license granted to educational institutions to copy and use broadcast materials, ERCC collects so little royalties, while Screenrights collects so much.⁵²

4. GOVERNMENT OVERSIGHT OF CANADIAN CMOs

Canadian CMOs are overseen by competition law authorities and by the Copyright Board.⁵³ This part outlines these oversight mechanisms and compares them, in a number of respects, to the mechanisms used to regulate the activities of Australian CMOs.

4.1. OVERSIGHT BY COMPETITION LAW AUTHORITIES⁵⁴

In Canada, pursuant to the Competition Act,⁵⁵ the Commissioner of Competition and the Competition Tribunal oversee business practices in general, including those of CMOs. The application of the regulated conduct

52. The amounts for the most recent year are CAD20,000 and AUD17.5M respectively. One possible explanation may be that the Copyright Board wanted to certify a tariff that would "coexist with the existing distribution market [for educational videos], and not act as a substitute for it". *Statement of Royalties to be Collected by ERCC From Educational Institutions in Canada for the Reproduction and Performance of Works or Other Subject-matters Communicated to the Public by Telecommunication for the years 1999–2002*, (2002), 23 C.P.R. (4th) 352, at 357 (Cop. Bd.), online: <www.cb-cda.gc.ca/decisions/s/25102002-b.pdf> (last visited: 18 November 2005).

53. There is no ministerial oversight of CMOs in their activities as collective societies. This paper does not deal with any forms of oversight that ordinary courts of law may exercise. For an excellent introduction to the subject, see S. Gilker, "Statut des ententes négociées hors du processus de la Commission" in: Y. Gendreau, ed., *Copyright Administrative Institutions* (Montreal: Yvon Blais 2002), 678 at 142–156 [Gilker (2002)].

55. R.S.C. 1985, c. C-34.

defence⁵⁶ limits the matters that can attract the attention of Canadian competition authorities; they would not review the royalties and related terms and conditions set by the Copyright Board.⁵⁷ This limits competition oversight essentially to dealings between collectives and rightsholders; historically, however, the level of involvement of these authorities has been minimal in the area of copyright law generally, and almost non-existent in the area of collective management in particular.

4.2. OVERSIGHT BY THE COPYRIGHT BOARD

The Copyright Board can oversee virtually any dispute between a CMO and its users. This part of the paper outlines the structure of the Board and the regimes under which collectives operate, as well as the procedures the Board follows and the powers it exercises.

4.2.1. The Structure of the Copyright Boards⁵⁸

The Copyright Board is an independent administrative tribunal. It consists of not more than five members, appointed by the government for a set term of up to five years. Members can serve either full-time or part-time; in practice, all members except the Chairman serve full-time. The Board has a small permanent staff which includes a Secretary General, a General Counsel and a Director of Research and Analysis.

The Board presents two singular characteristics for a Canadian regulatory agency. First, for historical rather than practical reasons,⁵⁹ the Chairman must be a sitting or retired judge of a superior court. Second, because the Chairman invariably serves part-time, the Board's direction is two-headed: the Chairman directs the work of the Board, but the Vice-Chairman is its Chief Executive Officer.

4.2.2. Regulatory Regimes Administered by the Board

The Board regulates Canadian CMOs through one of four regulatory regimes. One applies in the absence of another regime. A second targets performing rights in musical works and sound recordings of musical works. A third provides the framework for two compulsory licenses. The fourth concerns the levy for

56. See Competition Bureau Canada, "Technical Bulletin on Regulated Conduct (Draft)" (November 2005), online: <www.competitionbureau.gc.ca/PDF/fsfd1992_rtd.pdf> (last visited: 17 November 2005).
57. Gilker (2002), *supra* note 54, at 152.
58. CCA, *supra* note 1, ss. 66 to 66.5.
59. When the Copyright Appeal Tribunal was set up in 1936, it was a fairly common practice in Canada to ask a judge to preside over the deliberations of administrative tribunals. This is no longer the case.

private copying of sound recordings of musical works. Each regime imposes a different level of constraint on a collective's relations with those who use its repertoire. Those that operate as compulsory licensing schemes as a matter of law or practice impose limits on the ability of rightsholders to decide how to administer their rights and determine some aspects of the relationship of rightsholders with the relevant CMOs.

The residual or general regime⁶⁰ applies to all CMOs that operate "a licensing scheme, applicable in relation to a repertoire of works of more than one author, pursuant to which the society sets out the classes of uses for which and the royalties and terms and conditions on which it agrees to authorize the doing of" a protected act.⁶¹ This includes virtually every form of voluntary collective management of any protected use of works, performers' performances, sound recordings or broadcast signals, unless another regime applies.⁶² This regime is the most flexible; collectives can deal with users in one of four ways.

CMOs and users are free to agree on the terms of a license. They then have the option to file the agreement with the Copyright Board. If they do not, the Board cannot review the terms of the agreement; the contract is enforceable before the ordinary courts of law and is subject to all relevant provisions of the Competition Act. If the agreement is filed with the Board, however, certain provisions of the Competition Act no longer apply. Instead, the Commissioner of Competition may ask the Board to examine the agreement if the Commissioner is of the view that it is contrary to the public interest. The Board then sets the royalties payable under the agreement, as well as the related terms and conditions. The Board has never been asked to examine an agreement pursuant to this aspect of the general regime.

If a CMO and a user fail to agree on the terms of a license, either party can ask the Copyright Board to fix the royalties and the related terms and conditions. The Board will do so unless it is advised before issuing a ruling that an agreement was reached.⁶³ To date, the Board has issued only one decision pursuant to this aspect of the regime.⁶⁴ The extent to which the Board can force a collective to issue a license pursuant to this arbitration scheme remains uncertain. Some are of the view that a CMO always can refuse to issue a license to a recalcitrant user. Others argue that once a CMO offers licenses for a certain

60. CCA, *supra* note 1, ss. 70.1 to 70.6.
61. CCA, *ibid.*, s. 70.1.
62. According to one author, some forms of collective management may escape that definition: "[a] company that licenses the use of works of multiple authors to users can avoid the application [for the general regime]... if that company does not deal with users on a general tariff basis but negotiates each use individually". See P. Grant, "Competition and the Collectives in Canada: New Developments in the Relationship between Copyright and Antitrust Law" (1990-1), 1 *Media and Communications Law Review* 191, at 199.
63. The agreement as such does not have to be filed: CCA, *supra* note 1, s. 70.3(1).
64. See *Society for Reproduction Rights of Authors, Composers and Publishers in Canada v. MusiquaPlus Inc.* (2000), 10 C.P.R. (4th) 242 (Cop. Bd.), online <www.cb-cda.gc.ca/decisions/a16112000-b.pdf> (last visited: 18 November 2005).

type of use to a certain category of users, it no longer can refuse to issue a license for that use to a user within that category, and must accept the Board's jurisdiction.⁶⁵

A final option offered to CMOs pursuant to the general regime is to file proposed tariffs which, once certified, apply to all users who have not reached a separate agreement with the collective.⁶⁶ The process leading to the certification of these and other tariffs is examined below. To date, the Board has certified tariffs pursuant to this aspect of the general regime for the reproduction of radio and television programs for the purpose of media monitoring, for the reproduction of musical works by radio stations and for the reproduction of musical works by distributors of video-copies of feature films. Tariffs currently under examination target the reproduction of musical works in a variety of contexts (online music services, podcasting, Internet generally) and the reprographic reproduction of literary works by educational institutions.

The second regime concerns the performance or telecommunication of musical works and sound recordings of musical works.⁶⁷ This regime currently targets SOCAN and NRCC.⁶⁸ In theory, those who own rights in musical works can avoid the application of the regime by managing their rights on their own; that option is not open to performers and record producers, since only a collective can collect royalties for the performance or telecommunication of sound recordings of musical works.⁶⁹ In practice, there is no difference, since SOCAN's repertoire includes virtually every musical work communicated or performed in Canada. This regime operates in most respects as a compulsory license. All tariffs must be certified by the Copyright Board before they can be enforced. CMOs who do not file proposed tariffs for a given use or market are no longer allowed to seek legal redress for that use or market.⁷⁰ A user who offers to pay the appropriate tariff cannot be prosecuted for violation of copyright, even if the CMO refuses to issue a license.⁷¹ Agreements between a collective and a user probably are null and void as a matter of public policy.⁷²

65. For a detailed demonstration of the proposition, see D. Gervais, "Essai sur le fractionnement du droit d'auteur" (2002), 15 *Cahiers de propriété intellectuelle* 501, at 517-524.
66. Tariffs do not apply to matters covered in individual agreements: CCA, *supra* note 1, s. 70.19.
67. CCA, *ibid.*, ss. 67 to 69.
68. SOGEDAM also is concerned but has no certified tariff.
69. CCA, *supra* note 1, s. 19(2)(a). The remuneration right for the performance or telecommunication of other sound recordings can be paid to either the performer or the record producer: CCA, s. 19(2)(b).
70. Absent a tariff, an action may be commenced with the permission of the relevant Minister: CCA, *ibid.*, s. 67.1(4). In practice, however, that permission has never been sought, and, barring exceptional circumstances, would not be granted.
71. CCA, *ibid.*, s. 68.2(2). SOCAN still can enjoin a person who does not conform to the tariff from using its repertoire; see, e.g., *Society of Composers, Authors and Music Publishers of Canada v. Kids Roadhouse Inc. (c.o.b. How-Dee's)* 2005 FC 528, at para. 27, online: <decisions.fct-ef.gc.ca/fct/2005/2005f528.shtml> (last visited: 17 November 2005).
72. *Gilker* (2002), *supra* note 54, at 140-141. In practice, SOCAN does have agreements with a variety of users. They clarify which tariffs apply to certain uses, offer discounts on the rates

A third regime sets a non-voluntary, statutory license for the retransmission of distant radio and television signals as well as for the reproduction and public performance by educational institutions, of radio or television programs, for educational or training purposes.⁷³ No royalties can be collected except pursuant to a tariff certified by the Copyright Board; all royalties must transit through one or more CMOs, each of which collects a share set by the Board in the tariff. The only right of copyright holders who have not authorized a collective to act on their behalf is to be paid royalties by the collective designated by the Board to that effect; rightsholders are then entitled to the same royalties as if they had authorized the society to collect royalties on their behalf.

Finally, the CCA sets out a compensation scheme for the private copying of published sound recordings of musical works.⁷⁴ The scheme replicates the retransmission regime in all relevant respects but two. First, the levy must be collected through a single collecting body designated by the Board.⁷⁵ Second, rather than apportioning royalties among collectives, the Board sets the share of the levies to which all eligible authors, eligible performers and eligible makers (or record producers) are respectively entitled;⁷⁶ how these shares are then divided within each college of rightsholders is up to the relevant collectives.

4.2.3. Procedures Before the Copyright Board

The procedure leading to the certification of a tariff is similar in all regimes.⁷⁷ A proposed tariff is filed on or before 31 March of the year preceding the year in which the tariff is to come into effect. The Board publishes the proposal in the *Canada Gazette*. Prospective users or their representatives⁷⁸ may object to the proposal within sixty days of the publication. The Board then issues a directive on procedure and sets a timetable for the proceedings.⁷⁹ The CMO and objectors are given the opportunity to argue their case in a hearing before a panel usually constituted of three members.⁸⁰ The Chairman presides over the panel if present; if not, the Vice-Chairman does so. The nature of the evidence

- set out in the tariffs or even set prices for uses that are outside any of the tariffs certified by the Board.
73. CCA, *supra* note 1, ss. 71 to 76.
74. CCA, *ibid.*, ss. 79 to 88.
75. CCA, *ibid.*, s. 83(8)(d).
76. CCA, *ibid.*, s. 84.
77. CCA, *ibid.*, ss. 67.1, 68 (performing rights regime); 70.13 to 70.15 (general regime, tariffs); 71 to 73 (statutory licenses); 83(1) to 83(10) (private copying).
78. In the private copying regime, anyone is entitled to object.
79. The Board's model directive is available, online: <www.cb-cda.gc.ca/aboutus/directive-chml> (last visited: 17 November 2005). The Board has the power to adopt rules of procedure, but has not exercised it.
80. Exceptionally, no hearing will be held if proceeding in writing accommodates a small user or if the issues at hand do not warrant a hearing. The hearing is also dispensed with on most preliminary or interim issues.

offered varies considerably. The Board is not bound by the rules of evidence;⁸¹ participants make liberal use of hearsay. After deliberations, the Board certifies the tariff, publishes it in the *Canada Gazette* and provides written reasons for its decision. A tariff comes into effect on 1 January following the date by which the proposed tariff was filed and is effective for one or more calendar years.⁸² The process is essentially the same when a request for arbitration is made pursuant to the general regime;⁸³ however, the effective period of an arbitration decision need not be a period of one or more calendar years.

4.2.4. The Powers of the Board

As with any administrative tribunal, the Copyright Board has powers of a substantive and procedural nature. Some are expressly granted; others are implicit. Thus the CCA grants the Board the power to issue interim decisions, to vary earlier decisions, to make regulations governing its procedure and to cause the publication and distribution of notices.⁸⁴ The Board also enjoys some of the powers of a superior court of record:⁸⁵ for example, it can compel the production of evidence or the appearance of witnesses. The Board even can formulate its own objections to proposed tariffs.⁸⁶ However, contrary to most Commonwealth copyright tribunals, the Board does not have the power to award costs. The Board has some implicit powers, such as to regulate its proceedings, to decide questions of law that are necessarily incidental to the exercise of its core function⁸⁷ and even to set royalties at a higher rate than what a CMO requested.⁸⁸

The Board's powers are constrained by the CCA regulations, general principles of administrative law and court decisions. The CCA provides that performing rights tariffs must not place broadcasters at a financial disadvantage because of linguistic or content requirements imposed pursuant to the Broadcasting Act,⁸⁹ that the neighbouring rights royalties must be made in a single payment, that the private copying levy must be collected by a single body and that small cable systems are entitled to preferential rates.⁹⁰ The government

81. Indeed, any Canadian administrative tribunal that blindly follows the rules of evidence illegally fetters its discretion: *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471.
82. CCA, *supra* note 1, ss. 67.1(3), 70.14, 71(4), 83(5).
83. CCA, *ibid.*, ss. 70.2 to 70.4.
84. CCA, *ibid.*, ss. 66.51, 66.52, 66.6 and 66.71 respectively.
85. CCA, *ibid.*, s. 66.7(1).
86. CCA, *ibid.*, ss. 68(1), 70.14, 72(2), 83(7).
87. *Canadian Cable Television Association v. Canada (Copyright Board)*, [1993] 2 F.C. 138 (C.A.).
88. *Canadian Private Copying Collective v. Canadian Storage Media Alliance (F.C.A.)*, [2005] 2 F.C.R. 654, at para. 167 and following.
89. S.C. 1991, c. 11.
90. CCA, *supra* note 1, ss. 68(2)(a)(iii) (single payment), 83(8)(d) (single collecting body) and 68.1(4), 74(1) (preferential rate).

can, by regulation, issue policy directions to the Board and establish general criteria that the Board must apply or have regard to.⁹¹ Decisions of the Federal Court of Appeal set other limits; for example, the Board cannot blindly rely on its earlier decisions.⁹²

The Board does not directly determine which CMOs are active in a market, nor does it supervise their operations. Subject to the intervention of Canadian competition authorities, rightsholders are free to organize their affairs as they wish; even when a compulsory licensing scheme applies, nothing forces them to join a given collective or to organize CMOs along predetermined rules: as a result eight retransmission CMOs, some of which administer similar rights, receive a share of the royalties directly from copyright users. The Board does have two obligations that influence the ability of a CMO to enter a market; as noted earlier, it must ensure that the payment of royalties for the performance or communication of sound recordings of musical works is made in a single payment and that the private copying levy is collected by a single collecting body.

The Board has made ample use of its power to certify royalties and their related terms and conditions "with such alterations . . . as the Board considers necessary"⁹³ to influence the structure of CMO markets. It has carved new tariffs out of existing ones to suit the purposes of certain groups of users, imposed reporting requirement, authorized audits and imposed interest on late payment.⁹⁴ The Board is allowed to develop a tariff structure that is completely different from the one proposed by the collective or the users;⁹⁵ in the first retransmission proceedings, the Board set aside eleven separate proposals to adopt a single tariff based on a tariff formula that it developed.⁹⁶ The Board has imposed identical tariff structures on separate collectives; in the case of the performing rights tariff for commercial radio, for example, until SOCCAN became the sole collective, an overall rate was set and then apportioned, instead of dealing with each collective's tariff separately. The Board has even certified single tariffs for the combined use of the repertoires of SOCCAN and NRCC.⁹⁷

91. CCA, *ibid.*, s. 66.91. That power has been exercised only once, with respect to retransmission royalties: see *Retransmission Royalties Criteria Regulations*, SOR/91-690, 28 November 1991.
92. *FWS (2001)*, *supra* note 38, at para. 14.
93. E.g., CCA, *supra* note 1, ss. 68(3) and 70.15(1).
94. See, e.g., *Statement of Royalties to be Collected for Performance or Communication in Canada of Dramatico-musical Works in 1992, 1993 and 1994* (1994), 58 C.P.R. (3d) 79, 83 to 87 (Cop. Bd.) (new tariff); *Maple Leaf Broadcasting Company Limited v. CAPAC*, [1994] S.C.R. 624 (audits); *FWS Joint Sports Claimants v. Canada (Copyright Board)*, [1992] 1 F.C. 487 (C.A.) (interests).
95. *Canadian Broadcasting Corp. v. Copyright Appeal Board* (1986), 17 C.P.R. (3d) 460 (F.C.A.).
96. *Re Royalties for Retransmission Rights of Distant Radio and Television Signals* (1990), 32 C.P.R. (3d) 97 (Cop. Bd.).
97. *Re Statement of Royalties to be Collected by SOCCAN and by NRCC for Pay Audio Services (Tariff 17.B)* (2002), 19 C.P.R. (4th) 67 (Cop. Bd.); *Neighbouring Rights Collective of*

Some have offered the view that the Board could impose a single payment rule in retransmission or even merge tariffs filed pursuant to separate regimes.⁹⁸

4.3. COMPARING CMO OVERSIGHT IN CANADA AND AUSTRALIA

The Australian approach to supervising collective management is different and more complex than in Canada. It involves at least four authorities that, taken together, exert significant influence on every aspect of the operations of CMOs.

The first authority is the Attorney-General who, by declaration, can entrust to specific CMOs the administration of statutory licensing schemes: educational copying of broadcasts, reprographic reproduction by educational institutions, retransmission of free-to-air broadcasts and government uses of materials protected by copyright.⁹⁹ A declaration grants to the relevant collective a monopoly either for all rights involved (for educational copying of broadcasts) or for any given class of copyright holders.¹⁰⁰ The Attorney-General has also adopted guidelines to be applied before declaring collectives.¹⁰¹ Among other things, the guidelines set out fundamental objectives, including that each society collect all the money to which it is entitled, and none to which it is not, that it operate efficiently, that it distribute royalties fairly and that it treat evenly current and future beneficiaries. The guidelines also provide that any element of cross-subsidy between the operation of the scheme for which the society has been "declared" and any other activities be kept to a minimum.

The second authority is the Australian Competition and Consumer Commission (ACCC), overseen by the Competition Tribunal. The interest of competition authorities in collective management seems as intense in Australia as it seems timid in Canada. Input arrangements of CMOs (i.e. their dealings with rightsholders) can constitute a contravention of Part IV of the Trade Practices Act.¹⁰² A collective can avoid being in contravention of these provisions by subjecting these arrangements to the scrutiny of the ACCC. CMOs have attempted to use this mechanism several times in the past. One attempt resulted in a thorough examination of APRA's operations; in the end, the Competition Tribunal refused to authorize APRA's input arrangements until they allowed for a non-exclusive license-back scheme and included a dispute resolution mechanism.¹⁰³ The Competition Tribunal even offered its views

Canada v. Society of Composers, Authors and Music Publishers of Canada (2004), 26 C.P.R. (4th) 257 (F.C.A.).

98. Gervais, *supra* note 67, at 532-3.

99. ACA, *supra* note 6, ss. 135F, 135ZZB, 135ZZT and 182C. In the case of government use, the power of declaration is entrusted to the Copyright Tribunal; ACA, *ibid.*, s. 153F.

100. *Audio-visual Copyright Society Ltd v. Australian Record Industry Association Ltd* (2000), 47 OPR 40.

101. Declaration of Collecting Societies, Guidelines, *supra* note 48.

102. Trade Practices Act 1968, (Cth) Act No. 51 of 1974.

103. *Re Applications*, *supra* note 22.

on the ability of the Copyright Tribunal to regulate APRA's dealings with users.¹⁰⁴

The third authority is the Copyright Tribunal.¹⁰⁵ It is composed of a President and of an indeterminate number of Deputy Presidents and members, appointed by the government for one or more set terms of up to seven years. The President must be a judge of the Federal Court, and Deputy Presidents must be current or past judges of a federal court or of a territorial supreme court. Matters are heard by the President or a Deputy President, unless a party requests a panel, in which case the matter is heard by two or more persons, including the President or a Deputy President. The Tribunal has no permanent staff; its Secretary is a Registrar of the Federal Court.

The Copyright Tribunal oversees statutory license schemes as well as non-statutory licenses involving the public performance or broadcast of literary, dramatic or musical works or an adaptation thereof, or of sound recordings.¹⁰⁶ It does not oversee all forms of licensing;¹⁰⁷ for example, it has no jurisdiction over non-statutory licenses issued by CAL. The Tribunal intervenes only upon request; a licensing scheme, including a statutory scheme, can operate without the Tribunal being asked to examine it. Generally speaking, license schemes continue operation pending order of the tribunal.¹⁰⁸

The ACA usually specifies who can participate in an application before the Tribunal. The Act sometimes adds that an organization cannot file or be party to an application unless the Tribunal is convinced that it is reasonably representative of the class of persons that it claims to represent or that it has a substantial interest in the matter.¹⁰⁹ The Tribunal appears to have applied a fairly rigorous test in this respect.¹¹⁰

The fourth authority "is" the collectives themselves. As noted earlier, all collectives now subscribe to a voluntary code of conduct that deals with membership, relations with licensees, distribution of royalties, administrative expenses and dispute resolution and even provides that voluntary collectives agree to comply with the Attorney General's guidelines for declared societies. The collectives went as far as to ask a former President of the Copyright

104. *Re Applications*, *ibid.*, at 113.

105. ACA, *supra* note 6, ss. 138 and following.

106. ACA, *ibid.*, s. 136. Once the Tribunal does have jurisdiction, however, it is not limited to instances of collective management; the Tribunal can deal with licenses for the use of a single work or works of a single copyright holder.

107. The Copyright Law Review Committee recommended in 2000 an expansion of the Tribunal's jurisdiction to cover all collectively administered licenses; see CLRC Jurisdiction Report (2000), *supra* note 19, at para. 11.100.

108. ACA, *supra* note 7, s. 158.

109. See, e.g., ACA, *ibid.*, s. 155(3) and 155(4).

110. *Universal Music Australia v. EMI Music Publishing Australia Pty Ltd*, [2000] ACOPYT 3 (14 March 2000).

Tribunal to act as independent reviewer of the Code of conduct and its application.¹¹¹

The Canadian and Australian approaches to overseeing collective management offer interesting contrasts. Australian controls are greater on issues such as corporate organization, areas of activity, internal operations, membership, dealings with rightsholders, collection practices, cross-subsidization of operations, dispute resolution and transparency, among others; the imposition of severe constraints on the operation of statutory licenses by declared societies plays a significant role. On the other hand, the Canadian regime allows for almost unlimited control over the structure of all licensing schemes, voluntary or not. *Ex ante* controls take different forms. In Australia, liberal use is made of statutory licensing schemes, coupled with declaration mechanisms, to control market entry and to impose stringent operational requirements. In Canada, any collective can enter the market, but the requirement in some regimes for a certified tariff before any royalties are collected is a form of control over the nature and extent of the collective's dealings before it can start its activities.

Comparisons between the Canadian Board and the Australian Tribunal also are instructive. The Canadian Board has a small permanent infrastructure that provides it with some research capacity; the Copyright Tribunal, having no research capacity, must rely on the parties' evidence and analysis. Dealing with matters in a timely fashion is not an issue, however; the Tribunal is situated within the Federal Court and can call upon its staff. If anything, the Tribunal's record in that respect is better than the Board's: in 2000, the average time taken to finalize matters was about 22 months.¹¹²

In Australia, all hearings are presided by a judge or heard by a judge alone. In the past, the tendency was for matter to be heard by a single judge, which might have had the effect of "judicializing" the process.¹¹³ Recently, however, requests for panels that include lay members (an emeritus professor of law, a practising barrister and a senior lecturer in economics) have become more common. By contrast, over the past fifteen years, more hearings of the Canadian Board have been chaired by one of two Vice-Chairmen, including a non-lawyer, than by one of three judicial Chairmen. With respect to the participation of "strangers", the Canadian Board's policy has been extremely liberal. It has made full use of its ability to control its own proceedings to allow interventions from persons or groups who are not directly interested but who are likely to provide a useful point of view. Nothing seems to indicate that the Australian Tribunal has followed a similar path.

The Copyright Tribunal's jurisdiction is more limited than that of the Copyright Board in a number of respects. The Canadian Board's jurisdiction

111. Online: <www.copyright.com.au/news%20releases/28_11_02.htm> (last visited: 18 November 2005).

112. *CLRC Jurisdiction Report* (2000), *supra* note 19, para. 5.05.

113. Even though s. 164(c) of the ACA, *supra* note 6, requires that the Tribunal proceed with as little formality as possible.

extends to all licensing schemes; the Australian Tribunal's does not. In Australia, licensing schemes can operate without the Tribunal's intervention if the collective and its users come to an agreement; in Canada, it is often impossible for a CMO to collect royalties without a decision of the Board. The extent to which changes can be made to proposed licensing schemes is vastly different. The Australian Tribunal can vary or confirm a scheme put forward by the collecting society, but cannot adopt an altogether different one;¹¹⁴ Canadian Board's discretion in this respect appears to be virtually unlimited.

The manner in which issues can be raised also differs significantly. The Australian Tribunal acts only on application, which can be withdrawn;¹¹⁵ it would seem that, as a result, parties more or less control the agenda. In tariff matters, the Canadian Board can raise its own objections, whether or not users take issue with the collective's proposal. In most cases, withdrawing a tariff results in giving access to the repertoire for free. The Board sometimes is required to take agreements into account,¹¹⁶ but always remains free to ignore them. Finally, as was noted earlier, the Commissioner of Competition can ask the Board to modify an agreement that has been filed with the Board over the objection of the parties.

The costs of proceedings also play a different role. In Australia, both sides have choices to make: they each must ask themselves whether it is worth their while to refer the matter to the Tribunal; the possibility of an award for costs must also have some influence. In Canada, the same question does arise, but somewhat differently. Some CMOs have no choice but to apply for a tariff; it is also clear that the inability of the Board to award costs has sometimes resulted in it having to deal with matters that could have been addressed more expeditiously.

The fact that some Canadian CMOs must obtain a tariff from the Board before collecting any royalties seems to have had other significant effects. This sometimes has accelerated the process leading to the effective implementation of a collective in a market. In Canada, a retransmission tariff was in place less than ten months after royalties became payable.¹¹⁷ In Australia, it took several years and a number of court decisions before CAL was able to enforce the statutory license on educational institutions. The requirement also has allowed the emergence of a form of continuing supervision that does not appear to exist

114. *Reference by Australasian Performing Right Association Limited Re Australian Broadcasting Corporation* (1985), 5 UPR 449.

115. ACA, *supra* note 6, s. 155(7).

116. *Retransmission Royalties Criteria Regulations*, SOR/91-690, 28 November 1991, s. 2(c).

117. Collectives subject to the general regime have even started to use the filing of a proposed tariff as a tool to enter a market and force recalcitrant users to the bargaining table; see "Statement of Royalties to be Collected by CBRA for the Fixation and Reproduction of Works and Communication Signals, in Canada, by Commercial Media Monitors for the Years 2000-2005 and Non-commercial Media Monitors for the Years 2001-2005", (2005), 39 CPR (4th) 152 (Cop. Bd.), online: <www.cb-cda.gc.ca/decisions/mnm29052005-b.pdf> (last visited: 18 November 2005).

in Australia; for example, the Board can ensure a certain level of uniformity in the terms and conditions of the various tariffs without having to wait for a dispute to arise between a collective and its users.

Finally, the manner in which each agency perceives its role appears to be somewhat different. The fundamental rationale for the Copyright Tribunal remains to counterbalance the potential monopoly position of collecting societies through the arbitration of disputes in the absence of agreement. A decade or so ago, the Copyright Board redefined its role: to regulate the balance of market power between copyright holders and users.¹¹⁸ When called upon to determine equitable remuneration, the Australian Tribunal appears to seek to act as a substitute to a non-functioning market, and to reflect the price that would be arrived at by "a willing, but not anxious, licensor, and a willing, but not anxious, licensee" or some other hypothetical bargain.¹¹⁹ Only if neither of these approaches is appropriate will the Tribunal resort to "judicial estimation" based on such factors as previous agreements, earlier negotiations, comparison with foreign rates or with rates in other Australian copyright markets, capacity to pay, administrative costs and the general public interest. By contrast, the Canadian Board has asserted not only that a market price is only one of several possible rational bases for a tariff, but that in certain circumstances, public policy would lead it to ignore market considerations altogether.¹²⁰

5. CONCLUSION

This author's lack of familiarity with the day-to-day realities of Australian collectives makes it difficult for him to speculate on the future of collective management in that jurisdiction. Overall, however, Australian rightsholders appear to be less likely than Canadians to resort to collectives as a means of obtaining compensation for the use of their protected works and other copyright subject matters. Several factors may explain this. One is the perception that collective management, while sometimes useful, poses risks and that the first function of government oversight of collectives is to prevent those risks from materializing. Another may be the size of the Copyright Tribunal, which may prevent it from acting as catalyst for the promotion of collective management (assuming that Australian public policy is to promote collective management). A third could be a continued fear of involvement on the part of competition authorities.

118. *Re Statement of Royalties to be Collected for Performance in Canada of Dramatico-musical or Musical Works in 1990, 1991, 1992 and 1993* (1993), 52 C.P.R. (3d) 23, at 34 (Cop. Bd.) [*SOCAN Tariff 2.4, 1993*], approved by *Canadian Association of Broadcasters v. SOCAN* (1994), 58 C.P.R. (3d) 190, at 196 (F.C.A.).

119. *Copyright Agency Limited v. Department of Education (NSW)* (1985), 41PR 5, 15-16. This is similar to the approach of the American rate court, which has interpreted "reasonable" rates as market rates: see *SOCAN Tariff 2.4, 1993, ibid.*, at 35.

120. *SOCAN Tariff 2.4, 1993, ibid.*, at 34 b-c, 39 c-d.

In Canada, the growth of collective management is difficult to measure, owing in part to the presence of private collectives whose financial data remain unavailable. Still, that growth has been significant, as is the number of areas in which CMOs operate, especially for a common law jurisdiction. This seems to be the result of deliberate policy choices on the part of successive Canadian governments, combined with the ability of the Copyright Board to develop the tools that would allow it to best implement those choices. In effect, it would seem that the evolution of collective management in Canada has been intimately linked to the emergence, in the CCA, of mechanisms to overview the relationship between collectives and copyright users.

The challenges facing collective management in Canada are varied. It takes time to gather a repertoire that is large enough to enter a market, especially when the uses involved are modest and the users dispersed. Addressing that issue may require the implementation of mechanisms such as extended collective licensing.¹²¹ Proceedings before the Copyright Board are generally perceived as expensive, even though the Board has demonstrated an ability to tailor its process to the importance of the issues. Some collectives are fractioning their tariff applications for strategic, not practical, reasons, thereby forcing multiple hearings before the Board where one or two might have proven sufficient; others use the process to obtain information on users' business practices that would not be available in the context of a normal negotiation or to force recalcitrant users to come to the bargaining table. Users have started to complain. It may well be another decade before one can say with some certainty that the future of collective administration in Canada is assured.

121. See D. Gervais, "Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation" (2003), Report prepared for Heritage Canada, online: <aix1.uottawa.ca/dgervais/publications/extended_licensing.pdf> (visited 18 November 2005).

Chapter X Copyright Collectives and Collecting Societies: The United States Experience

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In the United States, as technology and markets have developed to make possible the widespread and dispersed infringement of copyrights, collective management organizations (CMO) have developed in response. These organizations attempt to deal with specific instances of widespread copyright infringement by obtaining licenses from large numbers of copyright owners. These licenses authorize the CMO to act as the copyright owner's agent with respect to certain types of infringement. Armed with a portfolio of licensed works, the collective assumes the responsibility for enforcing, or assisting with the enforcement of, copyrights against certain types of infringement, eliminating the need for duplicative infringement actions. They also provide a single-source or clearing-house for licensing the specific use at issue, and thereby eliminate the need for individually negotiated licenses from each copyright owner. By reducing the transaction costs associated with enforcing, on the one hand, and licensing, on the other, they help convert widespread infringement into markets.

While CMOs can reduce transaction costs in order to create markets, there is a key distinction between a copyright collective and a collecting society. With a copyright collective, the pricing and licensing terms for the portfolio of copyrights licensed to the collective are set by the collective to maximize the revenue of the portfolio as a whole. Competition in pricing or access terms for individual copyrights within the portfolio is, if not altogether absent, severely lacking. In contrast, under the collecting society model, pricing and licensing terms are set by the individual copyright owners. The collecting society does not set those terms itself; it merely enforces, and collects the licensing fees due, given the licensing terms set by the individual copyright owners for the use at issue.

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In the United States, there are three CMOs that follow the copyright collective model: the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music Industry (BMI), and SESAC.¹ All three CMOs developed to address the unauthorized public performance of musical works – a problem too widespread, with each individual infringement too small-scale, to be addressed effectively by individual copyright owners. All three CMOs have obtained licenses from large numbers of copyright owners that authorize the CMOs to license specific musical works for public performance. With their respective license portfolios in hand, all three CMOs, in turn, offer public performance licenses covering their respective portfolios to radio stations, restaurants, and other businesses that engage in the public performance of music.

In the United States, these CMOs are viewed as something of a necessary evil. By reducing the transaction costs entailed in enforcing and licensing the public performance of musical works, they create a market where otherwise there would be only infringement. But they do not merely reduce the transaction costs associated with the public performance right, they also eliminate competition between the individual copyright owners over public performance licensing terms and pricing. Because of this anticompetitive potential, copyright collectives in the United States have faced recurring litigation over whether their licensing practices violate the antitrust laws.

The first such lawsuit was initiated by the Department of Justice in the early 1930s. In the lawsuit, the Department of Justice alleged that ASCAP was an unlawful combination, in the vein of Standard Oil. In the 1940s, the Department of Justice initiated a second set of lawsuits against both BMI and ASCAP, alleging that the collectives' licensing practices unreasonably restrained trade. The parties settled the litigation in 1941 and entered into consent decrees² that have governed the licensing practices of ASCAP and BMI ever since.³ Over

1. SESAC used to stand for the Society of European Stage Authors and Composers, but has since been renamed to SESAC.
2. "A consent judgment is 'an agreement of the parties entered into upon the record with the sanction and approval of the court.'" *New York ex rel. Spitzer v. St. Francis Hosp.*, 289 F. Supp. 2d 378, at 383–84 (S.D.N.Y. 2003) (quoting *Schurr v. Austin Galleries of Ill., Inc.*, 719 F. 2d 571, at 574 (2nd Cir., 1983)).
3. See *United States v. American Society of Composers, Authors and Publishers*, 1941 Trade Cas. (CCH) para. 56,104, 1941 U.S. Dist. Lexis 3944 (S.D.N.Y. 1941) [*US v. ASCAP*]; *United States v. Broadcast Music Industry*, 1940–1943 Trade Cas. (CCH) para. 56,096 (E.D. Wis., 1941) [*US v. BMI*]. Perhaps because of its relatively smaller size, the Department of Justice has not pursued antitrust claims against SESAC, and SESAC's operations are not (as yet) governed by a consent decree. Nevertheless, the omnipresent threat of antitrust litigation likely constrains SESAC's behavior to a considerable degree. On 11 May 2005, Congress conducted an oversight hearing regarding BMI, SESAC and ASCAP, and considered testimony by ASCAP and BMI representatives that the lack of a consent decree governing SESAC's operations gave SESAC an unfair advantage over ASCAP and BMI. See "Oversight Hearing on 'Public Performance Rights Organization,'" Hearing before the House Subcommittee on Courts, The Internet, and Intellectual Property, 11 May 2005, available online: <judiciary.house.gov/Oversight.asp?ID=157> (last visited: 5 December 2005).

the years, the terms of the consent decrees have been adjusted to reflect the developments of new technologies and new markets. Yet, while their precise terms have varied over time, their thrust has remained consistent. In essence, the consent decrees validate the essential role of the collectives in creating a workable market in the public performance right, and then attempt to regulate their pricing and licensing terms in order to limit the collective's anticompetitive potential. It is, at best, an imperfect solution.

More recently, an alternative model for collective enforcement of copyrights has developed in response to the widespread use of copying machines to make photocopies of written works. Like the public performance issue that had developed half a century earlier, the use of photocopying machines led to unauthorized copying both too widespread, and individually too small-scale, to be policed effectively by individual copyright owners. From the copyright owners' perspective, this problem called again for a collective rights management solution. Yet, rather than begin with a fundamentally anticompetitive collective and add an overlay of government regulation intended to make the structure develop as if it were competitive, an alternative collective management structure developed to solve the widespread photocopying problem. The Copyright Clearance Center (CCC) allows copyright owners to register their works with the CCC and to set their own terms and prices upon which photocopying will be allowed. Once the terms are set by the copyright owners, the CCC makes those terms known to potential copiers and arranges for the collection of the appropriate licensing fees.

The CCC thereby solves, as much as a collective would, the transaction costs problem otherwise entailed in enforcing copyrights against widespread photocopying, yet, unlike a collective, it does so without eliminating competition between copyright owners over licensing terms and pricing. Because it does not set price or licensing terms, it is not a collective in the sense that ASCAP, BMI, and SESAC are, but is merely a collecting agent of the copyright owner. So long as CCC allows the individual copyright owners to set their own licensing terms, the anticompetitive potential of the collecting society model is minimal. As a result, CCC is not, as yet, and appears unlikely to be, subject to a consent decree, or other imitations on its licensing practices, as a result of the antitrust laws.

The United States' experience with collective rights management thus reveals two distinct models: (1) a copyright collective; and (2) a collecting society. Both act as agents of individual copyright owners and reduce the transaction costs associated with the enforcement and licensing of copyrights for particular uses. Both thereby create markets where otherwise there would be only infringement. Yet, despite these similarities, the copyright collective, because it sets prices and licensing terms for the individual copyright owners it represents, threatens competition in a way that the collecting society, which allows the individual copyright owners to dictate those terms, does not.

To be sure, the Department of Justice has worked hard to incorporate flexibility into the consent decrees that govern ASCAP and BMI, and has also

attempted to update the decrees to reflect changing technologies and markets. But at the end of the day, the copyright collective model remains fundamentally anticompetitive. As a result, all of the ingenuity that the profit motivation can generate is directed not at developing more flexible and creative licensing options for the benefit of copyright owners and consumers alike, but towards exploiting the loopholes in, and working around, the consent decrees in order to achieve the anticompetitive result that will always remain the copyright collective's true goal. For that reason, attempting to impose some semblance of competition onto the CMOs through the consent decrees has been and will likely remain a constant struggle.

Despite this essential flaw, for years, Americans have tolerated copyright collectives as a necessary evil, adequately restrained by the consent decrees given the markets they create. Yet, with the development of the CCC, and its alternative model of collective rights management, it is apparent that the evils of the copyright collective are not necessary. The market can solve the transaction cost problem that particular instances of widespread copyright infringement create without the need for a uniform price, collectively set. Given the proven viability of the collecting society model, the question thus becomes: How long will the copyright collective model be permitted to endure?

In order to get some sense for the likely answer to this question, this essay will explore the United States' experience with collective copyright management, beginning with the copyright collectives.

1. THE COPYRIGHT COLLECTIVES: ASCAP, BMI, AND SESAC

As discussed, there are presently three major copyright collectives in the United States: ASCAP, BMI and SESAC. All three CMOs provide a method by which the owners of copyrights in musical works⁴ can license their work for public

4. Like most countries, the United States differentiates the protection provided to the underlying musical composition, which is known as the "musical work", and a particular artist's rendition of the composition, which is known as a "sound recording". See 17 U.S.C. § 102(a)(2), (7) (separately recognizing "musical works" and "sound recordings" as works of authorship eligible for copyright protection). However, unlike many other countries, the United States protects both the musical work and the sound recording under its Copyright Act. Yet, the US Copyright Act does not provide the same protection for musical works and sound recordings. Under United States' law, sound recordings receive protection only against exact duplication of the "actual sounds fixed in the recording" (17 U.S.C. § 114(b)) and receive only limited protection, and that only recently received, against public performances. See 17 U.S.C. §§ 106(6) (recognizing the copyright owners exclusive right to "perform [a sound recording] publicly by means of a digital audio transmission"), 114(d) (effectively limiting the sound recording public performance right to a very narrow category of performances, such as interactive digital transmissions over the Internet). The principal opponents of a broader public performance right for sound recordings remain musical work copyright owners, who rightly fear that licensing fees for a broader public

performance, and provide would-be public performers with a practical method for obtaining public performance licenses for a wide variety of copyrighted musical works.⁵ The following sections provide: (i) a brief description of each of the CMOs; (ii) a discussion of the legal right they enforce; and (iii) a discussion of the antitrust litigation and resulting consent decrees that have shaped the licensing practices of the collectives.

1.1. A BRIEF DESCRIPTION OF THE COLLECTIVES

1.1.1. ASCAP

ASCAP was founded in 1914 to protect rightsholders from the unauthorized non-dramatic performances of music in restaurants, bars, and hotels. It is a non-profit, private company that is owned by its members.⁶ To protect its members, ASCAP sues establishments that perform material in the ASCAP repertory without a license. As technology has evolved, these licenses have been issued for radio broadcasters, television broadcasters, movie and television show producers, and webcasters.

Currently, ASCAP has over 200,000 members.⁷ The license fees generated by the ASCAP library amount to hundreds of millions of dollars each year; for example, in 2001, they reached USD 600 million; in 2002, they increased to USD 635 million; and in 2003, they totaled more than USD 700 million.⁸

According to ASCAP's own information, ASCAP has distributed USD 1.7 billion in the past three years; thus, an average of USD 566 million per year has been paid out, after ASCAP has deducted operating costs. ASCAP distributes 86 cents of every dollar collected to its members.⁹

performance right for sound recording would come out of their pockets in the form of reduced licensing fees for the musical work public performance right. Congress tried to prohibit such a direct redistribution of licensing revenues when it recognized the limited public performance right for sound recordings (17 U.S.C. § 114(f)), but if a radio station is already paying the profit-maximizing license fee for a public performance to ASCAP for the musical work performance right, there is simply no other fee that can be charged that would increase the total public performance licensing fees collected in a way that would allow sound recording rightsholders to receive a public performance fee without diminishing that paid to the musical work rightsholders.

5. See *online*: <www.ascap.com/about/> (last visited: 5 December 2005) ("ASCAP protects the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works").

6. See Hoover's Inc., "Hoover's Company Records - Basic Record for American Society of Composers, Authors and Publishers" (2005), available online: <www.hoovers.com/> (last visited: 5 December 2005) (Hoover ID: 51047).

7. See *online*: <www.ascap.com/about/> (last visited: 5 December 2005).

8. See Hoover's, *supra* note 6.

9. See *online*: <www.ascap.com/about/ascapadvantage.html> (last visited: 5 December 2005).

1.1.2. BMI

BMI was founded in 1939 by members of the broadcast industry to create an alternative to ASCAP. BMI also is a private, non-profit company that offers the same service as ASCAP, but with a different library. At the time of BMI's formation, ASCAP held the rights to more than 80 per cent of the music that was played on the radio. Dissatisfied with the licensing terms and prices set by ASCAP, the broadcast industry and the formation of BMI provided radio with an alternative play-list that enabled radio broadcasters to boycott ASCAP in 1940.

Originally envisioned as a competitor to ASCAP that would force ASCAP to offer its licenses at reasonable rates and to deal more fairly with its members, BMI has proven more redundancy than competitor. With ASCAP and BMI both having developed their own large catalogs of copyrighted popular music, would-be public performers today typically obtain blanket licenses from both ASCAP and BMI.¹⁰ As a practical matter, instead of being part of the solution to the monopolistic excesses of ASCAP, BMI today simply adds another monopoly to the mix and has become part of the problem.

BMI's membership is currently over 300,000.¹¹ BMI's website states that earnings for 2004 were USD 672.7 million in revenue. USD 573 million of the revenue was in the form of royalties for members. The earnings for 2003 were approximately USD 534 million.¹² The 2000 royalty collection is estimated at USD 413.9 million.¹³

1.1.3. SESAC

Often, the forgotten sibling due to their limited repertoire,¹⁴ SESAC is the second oldest of the CMOs, founded in 1930. It is a privately held, for-profit organization, as opposed to ASCAP and BMI. As a further difference from

10. See, e.g., *United States v. American Society of Composers, Authors and Publishers* (Application of Muzak, LLC), 309 F. Supp. 2d 566 at 569 (S.D.N.Y. 2004) [ASCAP (Application of Muzak, LLC)] ("Applicants state that, as a practical matter, they are required to obtain licenses with both ASCAP and BMI because each organization has a distinct large and diverse repertoire of works necessary for their programming."); *United States v. American Society of Composers, Authors and Publishers*, 586 F. Supp. 727 at 730 (S.D.N.Y. 1984) (noting that obtaining blanket licenses from both ASCAP and BMI "is the practice all three networks have followed until now").

11. See online: <www.bmi.com/about/background.asp> (last visited: 5 December 2005).

12. See online: <www.bmi.com/about/financial_results.asp> (last visited: 5 December 2005) (stating that the 2004 royalty distribution was 7.4% higher than the amount collected in 2003).

13. See *ibid.* (stating that the 2004 royalty number is 38.4% higher than the amount collected in 2000).

14. See Hearing before the House Subcommittee on Courts: The Internet, And Intellectual Property Committee On The Judiciary, 11 May 2005, available online: <judiciary.house.gov/Oversight.aspx?ID=157> (last visited: 5 December 2005).

the other two, SESAC operates without a consent decree. Originally, SESAC was short for the Society of European Stage Authors & Composers, but now SESAC is the official name. Membership numbers are not available for SESAC; though they are estimated to have the fewest members of the performing rights organizations.

SESAC does not share its sales figures, but it is estimated that SESAC had between USD 52 and USD 92 million in revenue annually for the years 2001 through 2003.¹⁵

1.2. THE LEGAL RIGHT AT ISSUE: PUBLIC PERFORMANCES UNDER UNITED STATES' LAW

In the United States, Congress first extended copyright protection to "musical compositions" in 1831,¹⁶ but initially protected musical composition solely against unauthorized copying.¹⁷ It was not until 1897 that Congress prohibited others from "publicly performing" a copyrighted musical composition without the copyright owner's permission.¹⁸ In the 1897 Act, Congress prohibited unauthorized public performances generally.¹⁹ It did not limit the prohibition to those performances that were "for profit", though it did provide additional criminal penalties for unauthorized public performances that were "willful and for profit".²⁰

In the Copyright Act of 1909, however, Congress retained a prohibition on unauthorized public performances of musical compositions, but limited the prohibition to those done "for profit".²¹ In the Act, Congress further limited the public performance right by excluding from its reach: (i) public performances by "public schools, church choir, or vocal societies" done "for charitable or educational purposes and not for profit";²² and (ii) public performances by "coin-operated machines... unless a fee is charged for admission to the place where such reproduction or rendition occurs" – the so-called "jukebox" exception.²³

Although these express exemptions narrowed the public performance right somewhat, the key legal question that arose initially was over the meaning of the

15. See Company Briefs-Gale Group, 2004 (estimating USD 92 million in sales); Hoover's Inc., Hoover's Company Records – Basic Record for SESAC (2005), available online: <www.hoovers.com> (last visited 6 December 2005) (Hoover ID: 55695) (estimating USD 52 million in sales).

16. Act of February 5, 1831, ch. 16, §1, 21st Cong., 2nd Sess., 4 Stat. 436 at 436.

17. *Ibid.*, §7, 4 Stat. at 438.

18. Act of January 6, 1897, ch. 4, 54th Cong., 2nd Sess., 29 Stat. 481 at 481–82.

19. *Ibid.*, 29 Stat. at 482.

20. *Ibid.*

21. *Ibid.*, §28, 33 Stat. at 1082.

22. *Ibid.*, §1(e), 33 Stat. at 1076.

23. *Ibid.*, §1(e), 33 Stat. at 1076.

phrase "for profit". Within a decade of the 1909 Act's enactment, the question came up in a pair of cases in which copyright owners sued restaurant owners who had hired bands or orchestras to publicly perform copyrighted musical compositions for the entertainment of their patrons.²⁴ Because there was no separate charge for the musical entertainment and because there was no door or cover charge for simply entering the restaurants, the defendants in the cases contended that their performances were not "for profit" within the meaning of the Act. Although the Second Circuit agreed with the defendants, the Supreme Court rejected the notion that there must be some separate, specifically identifiable charge for the musical performance in *Herbert v. Shanley Co.* in 1917.²⁵ As Justice Holmes explained in his sparse, but elegant prose:

The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.²⁶

Having successfully persuaded the Court to adopt a broader interpretation of "for profit", rightsholders established a correspondingly broad need for public performance licenses – a need that initially ASCAP and then the other CMOs attempted to satisfy.

For more than half a century following the *Herbert* decision, the basic legal rule continued to require a license for essentially any public performance of a copyrighted musical composition by a profit-oriented commercial enterprise. The only exceptions to this general rule were the statutory exemptions in the 1909 Act for certain charitable performances and for jukeboxes. As technology evolved, however, another key legal issue developed: What constitutes "publicly performing" a musical composition? Given the Court's decision in *Herbert*, hiring a band or orchestra to play a song for a restaurant's patrons clearly constituted such a performance, but what if a restaurant owner merely turned on the radio. The issue was presented to the Supreme Court in *Twentieth Century Fox v. Aiken* in 1975.²⁷

24. See *Herbert v. Shanley Co.*, 242 U.S. 591 (1917) [*Herbert*]; *John Church Co. v. Hilliard Hotel Co.*, 221 F.229 (2nd Cir. 1915). The name plaintiff in *Herbert v. Shanley Co.*, Victor Herbert, was a founding member of ASCAP, and brought the case as a test case to establish a broader scope for the right of public performance.

25. *Herbert, ibid.* at 594.

26. See *Herbert, ibid.*

27. *Twentieth Century Fox v. Aiken*, 422 U.S. 151 (1975) [*Aiken*].

As the Supreme Court recounted the facts, Aiken owned a small "fast-service" chicken restaurant in downtown Pittsburgh, Pennsylvania.²⁸ Although Aiken did not hire a band or orchestra to play for his customers, he did have a radio receiver connected to four speakers in the restaurant's ceiling. During the business day, Aiken would turn on the radio, so that he, his employees, and his customers could listen to whatever the radio station was broadcasting whether that happened to be "music, news, entertainment, [or] commercial advertising."²⁹ When Aiken refused to take an ASCAP license for his restaurant, two ASCAP members sued him for copyright infringement when their musical compositions were played by the radio station to which Aiken was listening. The copyright owners contended that *Herbert* controlled. Aiken countered by arguing that he was not "performing" the musical compositions; he was merely receiving the radio station's performance.³⁰ By a 7-2 vote, the Court agreed with Aiken, holding that Aiken's actions did not constitute "publicly performing" the musical compositions within the meaning of the 1909 Act.³¹

In agreeing with Aiken, the Court worried that finding Aiken liable "would result in a regime of copyright law that would be both wholly unenforceable and highly inequitable."³² Such a rule would be unenforceable, in the Court's view, because even a collective, such as ASCAP, only reduces the transaction costs of licensing – it does not eliminate them. Even with very low transaction costs, licensing every business with a radio would prove impractical.³³ The Court also believed that such a rule would be inequitable for two reasons. First, even a business that took an ASCAP license would have no way of policing the radio station's airplay to ensure that no performances of non-ASCAP works occurred. Second, allowing ASCAP to charge a public performance licensing fee to both radio stations and businesses playing the radio would lead to double-monopoly exactions and their associated inefficiencies,³⁴ as the CMOs would charge a profit-maximizing and monopolistically-priced license fee first to the

28. *Aiken, ibid.* at 152.

29. *Ibid.* at 153.

30. The radio station held a license from ASCAP for its broadcast of the musical compositions at issue. *Ibid.*

31. *Ibid.* at 162-63.

32. *Ibid.* at 162.

33. As the Court observed: "One has only to consider the countless business establishments in this country with radio or television sets on their premises – bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins – to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them." See *Aiken, ibid.* at 162. In a footnote, the Court went on: "The Court of Appeals observed that ASCAP now has license agreements with some 5,150 business establishments in the whole country, noting that these include 'firms which employ on premises sources for music such as tape recorders and live entertainment.' As a matter of so-called 'policy' or 'practice,' we are told, ASCAP has not even tried to exact licensing agreements from commercial establishments whose radios have only a single speaker." *Ibid.* at 162, fn.12.

34. For a general discussion of the double-monopoly problem, please see H. Varian, *Intermediate Microeconomics: A Modern Approach*, 5th edn. (New York: W.W. Norton, 1999), 600 at 463-65.

radio stations and then a second similarly priced license fee to businesses such as Aiken's.³⁵

A year after the Court decided *Aiken*, Congress enacted the Copyright Act of 1976.³⁶ This was Congress's first wholesale revision of the Copyright statutes since the Copyright Act of 1909, and was intended to update United States' law both: (i) to reflect technological changes since the 1909 Act; and (ii) to bring United States' law closer to the norms reflected in the Berne Convention in anticipation of the United States' subsequent decision to join that Convention in 1988. But the 1976 Act did little to change the applicable rules governing public performances. Although the 1976 Act did away with the "for profit" language of the 1909 Act, the *Herbert* Court's interpretation of "for profit" to incorporate any indirect commercial advantage had rendered the "for profit" limitation largely irrelevant in any event. Similarly, although the 1976 Act specifically defined "performance" broadly enough to incorporate Aiken's conduct, Congress expressly exempted from copyright liability "the public reception of a transmission embodying a performance of a work on a single receiving apparatus" where no separate charge was made to see or hear the transmission.³⁷ The 1976 Act thus overturned the "not a performance" reasoning of the *Aiken* decision, but reaffirmed the ultimate result that Aiken's conduct did not constitute copyright infringement. The 1976 Act also specifically carried forward the statutory exemptions for various charitable and educational performances³⁸ and provided a compulsory licensing mechanism for jukeboxes.³⁹ Yet, if the 1976 Act did not broaden the effective reach of the public performance right, it did not narrow it significantly either.⁴⁰ Congress's continued recognition of the public performance right thus ensured that a large number of businesses, including radio stations, entertainment venues, retailers, bars and restaurants, would continue to need the public performance licenses that the copyright collectives, ASCAP, BMI, and SESAC, provided.

35. *Ibid.* at 162-63 ("[T]o hold that all in Aiken's position 'performed' these musical compositions would be to authorize the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work").
36. Act of October 19, 1976, Pub. L. No. 553, 94th Cong., 1st Sess., 90 Stat. 2586, codified as amended at 15 U.S.C. §§ 1-1332 (2005).
37. *Ibid.* at § 110(1), (2), (3), (4), (6), (8), (9), codified as amended 15 U.S.C. § 110(1), (2), (3), (4), (6), (8), (9) (2005).
38. *Ibid.* at § 110, codified as amended 15 U.S.C. § 116 (2005).
39. *Ibid.* at § 116, codified as amended 15 U.S.C. § 116 (2005). Congress amended this provision in 1988 to provide for voluntarily negotiated jukebox licenses in order to bring United States' law into compliance with the Berne Convention. Act of October 31, 1988, Pub. L. No. 568, § 4(a)(4), 100th Cong., 1st Sess., 102 Stat. 2853, 2855-57.
40. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 at 18-19 (1979) [*BMT v. CBS*] ("Furthermore, nothing in the Copyright Act of 1976 indicates in the slightest that Congress intended to weaken the rights of copyright owners to control the public performance of musical compositions. Quite the contrary is true").

1.3. THE ANTI-TRUST CHALLENGES TO THE COLLECTIVES AND THE RESULTING CONSENT DECREES

With the recognition of the right of public performance, and its broad reading in *Herbert*, the CMOs were in business. For roughly a quarter century, ASCAP was the single source for public performance licenses covering a broad catalog of musical compositions. Rather than compete with each other on price and licensing terms, copyright owners assigned their public performance rights to ASCAP, and ASCAP set the price and licensing terms for the pooled rights collectively. During the 1920s, as music moved to broadcast radio, ASCAP became the dominant source for licensing music on the radio,⁴¹ licensing some 80 per cent of all music played on the radio, and its licensing revenues increased substantially.⁴² Had it been any other industry, the use of such a combination to set prices and access terms for the industry's products would quickly have brought antitrust scrutiny. As it was, it took the Department of Justice two decades before it finally filed suit in 1934 against ASCAP for violation of the Sherman Antitrust Act.⁴³

In its initial lawsuit, the Department of Justice took the position that ASCAP was itself an unlawful combination, in the vein of Standard Oil, and should therefore be dissolved. But after a two-week trial, the Department of Justice obtained a continuance in the case, and essentially dropped its attempt to abolish ASCAP.⁴⁴ Instead, when it filed a second set of antitrust claims, this time

41. The *Herbert* principle was extended and applied to radio airplay by the Sixth Circuit in 1925. See *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F. 2d 411 at 412, cert. denied, 269 U.S. 556 (6th Cir., 1925); see also *M. Whittmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923) (reaching the same conclusion that radio airplay constitutes publicly performing the musical composition for profit).
42. Michael A. Einhorn, "Intellectual Property and Antitrust: Music Performing Rights in Broadcasting" (2001), 24 *Columbia-V.L. A. Journal of Law & the Arts* 349 at 355.
43. *United States v. American Society of Composers, Authors and Publishers*, Equity No. 78-388 (S.D.N.Y., filed 30 August 1934).
44. See *BMT v. CBS*, *supra* note 40 at 10 (1979) ("A criminal complaint was filed in 1934, but the Government was granted a midtrial continuance and never returned to the courtroom"). Lionel Sobel has suggested that the Department of Justice asked for the continuance because the broadcasters and ASCAP agreed on a five-year compromise agreement during the trial. See L. Sobel, "The Music Business and the Sherman Act: An Analysis of the 'Economic Realities' of Blanket Licensing" (1983), 3 *Loyola of Los Angeles Entertainment Law Journal* 1 at 5; see also *United States v. American Society of Composers, Authors and Publishers* (*Application of Buffalo Broadcasting Co.*), Copy. L. Rep. (CCH) para. 27,088, 1993-1 Trade Cas. (CCH) para. 70,153, 1993 U.S. Dist. LEXIS 2566, at *13 [ASCAP (*Application of Buffalo Broadcasting Co.*)] ("As recounted by its long-time General Counsel, Herman Finkelstein, Esq., the Department of Justice filed a criminal antitrust action against ASCAP in this district in 1934, which led to a hearing the next year. Although the hearing was subsequently adjourned, the Government and ASCAP ultimately agreed to the entry of a civil Consent Decree. The Consent Decree was premised on the filing of a civil suit in 1941, which was followed a few months later by court approval of the Decree").

against both ASCAP and BMI, the Department of Justice targeted particular business practices of the collectives, rather than the collectives themselves.⁴⁵

At the time of this second set of suits, both ASCAP and BMI issued only blanket licenses. Blanket licenses provide the licensee with the authority to publicly perform all copyrighted musical compositions in either ASCAP or BMI's catalog for the specified license period, but they are priced as a fixed percentage of the licensee's revenue regardless of the quantity of copyrighted music that the licensee actually used.⁴⁶ Once the license fees are collected, ASCAP and BMI then distribute them to their respective members (ASCAP) or affiliates (BMI) based on sampling of the licensees' public performances.

Blanket licenses were convenient not only for the CMOs, but also for many of the licensees. Variety shows, rather than corporate-dictated play lists, dominated radio airplay at the time. The blanket license therefore provided a convenient fit with the somewhat random and spontaneous nature of radio airplay.

Because the Department of Justice no longer challenged their very existence, BMI and ASCAP both negotiated consent decrees with the Department of Justice to resolve the Department's antitrust lawsuits. These initial consent decrees tried to address four issues. First, they tried to establish some realistic alternative to the blanket license system by: (a) prohibiting the CMOs from obtaining an exclusive assignment of the public performance rights from their members and affiliates, and thus allowing, at least in theory, direct licensing between the copyright owners and the public performance licensees;⁴⁷ and (b) requiring the CMOs to offer per-program licenses as an alternative to the blanket licenses.⁴⁸ Second, it prohibited the CMOs from discriminating in prices or terms between similarly situated licensees.⁴⁹ Third, the consent decree prevented BMI and ASCAP from charging local radio broadcasters for programs performed on network radio broadcasts.⁵⁰ One license issued to the network must cover the simultaneous broadcast of a program containing licensed material. Such "downstream" or "through-to-the-audience" licenses eliminated the need for the local re-broadcaster to obtain a license and prevented ASCAP from charging two license fees for the same performance. Fourth, the consent decree also attempted to ensure an equitable distribution of the collected royalties through provisions governing the internal structure of the CMOs, such

45. See *US v. ASCAP*, *supra* note 3; *US v. BMI*, *supra* note 3.

46. The collectives vary the percentage for different classes of licensees. For example, radio stations pay a higher percentage of their revenue than restaurants, presumably because music plays a more central role in the earning power of a radio station than it does for a restaurant.

47. *US v. ASCAP*, *supra* note 3 at *3.

48. *Ibid.* at *6.

49. *Ibid.* at *4-5.

50. *Ibid.* at *7-8.

as the composition of the Board of Directors and their electoral process⁵¹ as well as the revenue distribution procedures.⁵²

The decree provides for the Department of Justice to "secure compliance with [the] decree."⁵³ The Department of Justice is provided with the ability to enforce the decree through access to the records of ASCAP, as well as employees of ASCAP. ASCAP also consented to the retention of jurisdiction by the Second Circuit for "orders and directions . . . in relation to the construction" or modification of the decree, as well as punishment for violation of the decree.⁵⁴

Yet, these initial consent decrees were not the end of the collectives' antitrust troubles. Only a year later, in 1942, in *Alden-Rochelle, Inc. v. ASCAP*,⁵⁵ one hundred sixty-four cinema owners sued ASCAP for violating Sections 1 and 2 of the Sherman Antitrust Act⁵⁶ because ASCAP required movie producers to distribute their films only to movie theaters with ASCAP licenses.⁵⁷ At the time, movie producers secured rights for using the music in their movies—the so-called synchronization right—directly from the copyright owner of the musical composition at issue. However, the agreements between the CMOs and the rightsholders precluded the latter from licensing the public performance right directly to the movie producer.⁵⁸ As a result, in order to play the movies, the theaters had to obtain a public performance license from ASCAP. The theater owners asserted that the pooling of public performance rights effectively precluded competition between the individual rightsholders and therefore constituted an antitrust violation. In a second case, *M. Whitmark & Sons v. Jensen*,⁵⁹ filed a few years later, the same antitrust issues were raised, but in a slightly different procedural context. In *M. Whitmark & Sons*, the rightsholders initiated the litigation, suing theater owners for copyright infringement based upon the showing of a movie, containing copyrighted music, without an ASCAP license. In response to these claims of copyright infringement, the theater owners asserted the antitrust claims as a defense.⁶⁰

51. *Ibid.* at *10-11

52. *Ibid.*

53. *Ibid.* at *12-13.

54. *Ibid.* at *14.

55. *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 80 F. Supp. 888 (S.D.N.Y. 1948) [*Alden-Rochelle*].

56. See 15 U.S.C. §§ 1 (prohibiting agreements in restraint of trade) & 2 (prohibiting monopolization) (2005).

57. See *Alden-Rochelle*, *supra* note 55.

58. *Alden-Rochelle*, *supra* note 55 at 893 ("The producer does not acquire the performing rights from ASCAP members, because they are prohibited by their arrangement with ASCAP from licensing the performing rights to motion picture producers"). This provision arguably violated the terms of the initial consent decree which prohibited ASCAP "with respect to any musical composition, [from] acquir[ing] or assert[ing] any exclusive performing right". *US v. ASCAP*, *supra* note 3 at *3.

59. *M. Whitmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), appeal dismissed, *sub nom. M. Whitmark & Sons v. Berger Amusement Co.*, 177 F. 2d 515 (8th Cir., 1949) [*M. Whitmark & Sons*].

60. See *ibid.* at 844.

Both district courts found that the pooling of the public performance rights constituted a violation of the antitrust laws.⁶¹ As the court explained in *Alden-Rochelle*: "Although each member of ASCAP is granted by the copyright law a monopoly in the copyrighted work, it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, even if it is for the purpose of thereby better preserving their property rights."⁶² Or as Judge Nordbye wrote in *M. Whitmark & Sons*: "Instead, therefore, of having a single monopoly of a particular piece of copyrighted music and the benefits which that might afford, every copyright owner of music in ASCAP obtains the added economic power and benefit which the combined ASCAP controls gives to them and their associates. Obviously, no one copyright owner would have the monopolistic power over the motion picture industry which ASCAP now enjoys."⁶³

Partially in response to these two cases, and partially in response to the development of, and increase in popularity of television, the Department of Justice negotiated amendments to the consent decree with ASCAP in 1950 (known as the Amended Final Judgment).⁶⁴ The new consent decree provided television stations with the same rights that were negotiated for radio stations in the 1941 decree: "through to the audience" licenses for television networks and producers of shows;⁶⁵ mandatory non-exclusive licenses upon request without discriminating between similar situated users;⁶⁶ and the availability of per-program licenses as an alternative to the blanket license.⁶⁷ The new consent decree provided similar changes in ASCAP's dealings with movie producers and theaters. The decree prohibited ASCAP from collecting performance fees from movie theaters for performances in the movie.⁶⁸ The decree required ASCAP to issue a performance license to movie producers upon request, and not to seek further performance licenses for the movie.⁶⁹ Finally, it prohibited ASCAP

61. See *Alden-Rochelle*, *supra* note 55 at 893 ("Almost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theatres, involve a violation of the anti-trust laws"); *M. Whitmark & Sons*, *supra* note 59 at 849-50 ("It cannot be denied, therefore, that plaintiffs and their associates, acting in concert through ASCAP, fix prices and completely control competition and thereby restrained trade in violation of Section 1 of the Sherman Anti-Trust Act which declares illegal 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States'"). Moreover, it seems inescapable on this record that plaintiffs, through ASCAP, have achieved monopolistic domination of the music integrated in the sound films in the motion picture industry and have effectively monopolized that part of trade and commerce in violation of Section 2 of the Sherman Anti-Trust Act").

62. *Alden-Rochelle*, *ibid*.

63. *M. Whitmark & Sons*, *supra* note 59 at 848.

64. *United States v. American Society of Composers, Authors and Publishers*, 1950-1951 Trade Cas. (CCH) para. 62,595, 1950 U.S. Dist. LEXIS 4341 (S.D.N.Y. 1950) [*US v. ASCAP* 2].

65. *Ibid.* at *7.

66. *Ibid.* at *9 & *11 (§VI and VIII).

67. *Ibid.* at *10-11 (§VII).

68. *Ibid.* at *4 (§IV(E)).

69. *Ibid.* at *7-8 (§V(C)).

members from granting synchronization or recording rights without granting performance rights for movies.⁷⁰ As a result, theaters were no longer required to obtain licenses for movies that contained ASCAP material.

Affecting all participants, Section IV made it clear that any member of ASCAP could issue licenses directly to users. This provided, at least in theory, for the possibility of competition between ASCAP members by allowing public performance licenses to go to the copyright owners directly, rather than to ASCAP. Moreover, the decree provided that the revenue earned by those licenses could go directly to the owner and did not have to be handed over to ASCAP for pooling.⁷¹ This was a change from the original decree, in favor of increasing competition and alternatives in the market for licenses.

Moreover, in an important innovation, Section IX of the consent decree amendment provided that if ASCAP and the applicant could not agree on a fee, the applicant could apply to the United States District Court for the Southern District of New York to set a "reasonable" fee for the license.⁷² Under the consent decree, ASCAP has the burden of proof in establishing that the fee it seeks is reasonable.⁷³ By authorizing a third party to set a reasonable fee, the consent decree removed one of the most important weapons available to ASCAP in its negotiations with licensees. ASCAP could no longer unilaterally threaten to deny a public performance license and thereby expose a potential licensee to the ruinous damages available for copyright infringement as a tactic for pressuring licensees to accept higher priced licenses.

Although BMI was not a party to the 1950 decree, in 1966, the Justice Department amended the consent decree with BMI to mirror ASCAP's amended decree.⁷⁴ But it was not until 1994, that the consent decree was modified to designate the Southern District of New York as the Rate Court for BMI as well.⁷⁵

As with the earlier consent decree, the 1950 ASCAP decree did not end the antitrust litigation. But taken together, the limitations established in the consent decrees, along with the Justice Department's continued endorsement of a legitimate role for the CMOs, began to take hold with the courts and

70. *Ibid.* at *16 (Sect. XVI(B)).

71. *Ibid.* at *5 (Sect. IV(B)) ("Defendant ASCAP is hereby enjoined and restrained from: Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performances"). As Michael Einhorn has noted: "After signing the [1941] Decree, ASCAP immediately moved to require that all direct license revenues be pooled, thereby negating any writer incentive to pursue the alternative licenses that the Department had envisioned". See Einhorn, *supra* note 42 at 355.

72. *Ibid.* at *12-13.

73. *Ibid.*

74. See *United States v. Broadcast Music, Inc.*, 1966 Trade Cas. (CCH) para. 71,941, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. 1966).

75. *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. (CCH) para. 71,378, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. 1994).

served to shield the collectives from antitrust liability.⁷⁶ Thus, in *K-91, Inc. v. Gershwin Publishing Corp.*,⁷⁷ a copyright owner sued a radio station for copyright infringement for publicly performing a musical composition without an ASCAP license. As in *M. Whitmark & Sons*, the defendant asserted antitrust allegations as a defense. But in *K-91, Inc.*, the Ninth Circuit rejected the defendant's antitrust defense and held that ASCAP had not violated the antitrust laws. In reaching that conclusion, the Ninth Circuit pointed to the Amended Final Judgment and specifically, its re-delegation of the power to fix prices from ASCAP to the Rate Court.⁷⁸

In 1979, the Supreme Court finally had its opportunity to consider application of the antitrust laws to CMOs. In *BMI v. CBS*,⁷⁹ CBS asserted that both ASCAP's and BMI's blanket licenses constituted illegal price-fixing in violation of the antitrust laws. When the Second Circuit agreed and found a *per se*⁸⁰ violation of the antitrust laws,⁸¹ the Supreme Court granted *certiorari*

76. As a legal matter, the consent decrees are not binding on persons who were not parties to them, and hence are not a legal defense to antitrust claims brought by such a non-party. See *Sara Fox Publishing Co. v. United States*, 366 U.S. 683 at 690 (1961) [*Sara Fox Publishing*]; see also *BMI v. CBS*, *supra* note 40 at 13. Nevertheless, in evaluating the potential antitrust liability of the collectives, "it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices". *Ibid.*

77. *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir., 1967), cert. denied, 389 U.S. 1045 (1968) [*K-91, Inc.*].

78. *K-91, Inc.*, *ibid.* at 4 ("ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority"); see also *Buffalo Broadcasting Co. v. American Society of Composers, Authors and Publishers*, 74 F.2d 917 at 927 (2nd Cir., 1934) (also pointing to the consent decrees and the Rate Court in rejecting antitrust claims against the collectives) [*Buffalo Broadcasting v. ASCAP*]; *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981) (applying a rule of reason analysis and rejecting antitrust claims asserted against BMI) [*BMI v. Moor-Law*], *aff'd* without opinion, 691 F.2d 490 (3rd Cir., 1982).

79. *Supra* note 40.

80. Under United States antitrust law, "[t]here are...two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. "National Society of Professional Engineers v. United States, 435 U.S. 679 at 692 (1978) [*Professional Engineers*]."

81. *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 562 F.2d 130 at 134 (2nd Cir., 1977).

to review the case and reversed.⁸² In the Court's view, CMOs were necessary to protect and license the right of public performance effectively.⁸³ And the blanket license offered by CMOs differed from the individual use licenses that individual copyright owners could offer sufficiently to avoid characterization as a form of horizontal price-fixing by competitors that would be subject to *per se* liability under the antitrust laws.⁸⁴ Rejecting the *per se* characterization, the Court remanded for consideration of whether the blanket license constituted a violation of the antitrust laws under the so-called rule of reason.⁸⁵

Under the rule of reason, an antitrust plaintiff must demonstrate that the agreement or conduct at issue restrains trade, and that such anti-competitive effects outweigh its pro-competitive effects.⁸⁶ On remand, the district court concluded, and the Second Circuit agreed, that the blanket license had no anti-competitive effects because CBS could negotiate public performance licenses directly with individual copyright owners (or at least, CBS failed to prove that such individually-negotiated licenses were not feasible).⁸⁷ Subsequently, other courts applying the rule of reason to CMOs and their blanket licenses have reached similar conclusions.⁸⁸ As a result, while antitrust claims have continued to be asserted against the collectives, they have, since *BMI v. CBS*, been unsuccessful, at least, so far.

Yet, if the Amended Final Judgment therefore limited the role of private antitrust litigation in regulating CMOs, it created avenues for judicial resolution of two other areas of dispute. First, it carried forward and expanded the rules from the 1941 consent decree regarding ASCAP's internal structure and its methods for distributing the royalty pool to its members.⁸⁹ Second, it created the Rate Court and thereby established a procedure for judicial review of ASCAP's licensing fees.⁹⁰

With respect to ASCAP's internal operations, although ASCAP was a membership-based organization, and therefore supposedly inherently representative, as part of the antitrust claims leading to the 1941 ASCAP consent

82. *BMI v. CBS*, *supra* note 40.

83. *Ibid.* at 19 ("Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale remainder of what Congress envisioned"), and at 22-23 ("ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively.")

84. *Ibid.* at 21-24.

85. *Ibid.* at 24 ("[W]e cannot agree that [the blanket license] should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason.")

86. See, e.g., *Professional Engineers*, *supra* note 80 at 687-92.

87. *Columbia Broadcasting System, Inc. v. American Society of Composers, Artists and Publishers*, 620 F.2d 930 at 936-39 (2nd Cir., 1980), cert. denied, 450 U.S. 970 (1981) [*CBS v. ASCAP*].

88. See *Buffalo Broadcasting v. ASCAP*, *supra* note 78; *BMI v. Moor-Law*, *supra* note 78.

89. *US v. ASCAP 2*, *supra* note 64 at *15, 16-17 (§§ 11, 13).

90. *Ibid.* at *6-14 §§ V, VI, VII, VIII, IX).

decreed, the Department of Justice had "alleged restraint of competition among the Society's members *inter se*, resulting from the asserted domination of the Society's affairs by a few of its large publisher members who, it was claimed, were able to control the complexion of the Board of Directors and the apportionment of the Society's revenues."⁹¹ As a result, the 1941 consent decree set forth the procedures by which the Board was to be elected and the royalty pool distributed.⁹² More extensive rules concerning ASCAP's internal structure and the distribution of the royalty pool were added when the consent decree was amended in 1950. Yet, concerns regarding ASCAP's treatment of its own members persisted. So in 1960, the Department of Justice returned to court for a modification to the Amended Final Judgment.⁹³

In its petition leading to the 1960 modification, the Department of Justice alleged that:

[...] at present complete control over votes and revenues is in the hands of the Board of Directors [of ASCAP], who are a self-perpetuating body, as they are elected by those members with the greatest number of votes which number is in turn determined by the share in revenues, which is determined by rules of distribution enacted by the Board.

The alleged result is that less than 5 percent of the writer-members and less than one percent of the publisher-members have the power to elect all the directors.⁹⁴

The net result was, in the Department of Justice's view, "seniority considerations and the will of the 'controlling' group are emphasized as to members, songs and performance credit averaging to such a degree that young writers and publishers are being discouraged from writing and publishing new songs."⁹⁵

In order to address these concerns, the 1960 modification to the Amended Final Judgment attempted to impose a royalty-distribution system based more heavily on actual performances, as measured by scientifically valid surveys. Less or no weight was to be given to a writer's seniority in allocating the royalty pool, and ASCAP's discretion to vary the distribution by weighting some performances, such as feature performances, more heavily than others, such as background or commercial performances, was limited somewhat.⁹⁶

91. *Sam Fox Publishing*, *supra* note 76 at 685-86.

92. *See US v. ASCAP*, *supra* note 3 at *10-11.

93. *See United States v. American Society of Composers, Authors and Publishers*, 1960 Trade Cas. (CCH) para. 69,612, 1960 U.S. Dist. LEXIS 4967 (S.D.N.Y. 1960) [*US v. ASCAP 3*]; *US v. ASCAP 2*, *supra* note 64.

94. *US v. ASCAP 3*, *ibid.* at *6.

95. *Ibid.* at *3.

96. *See ibid.* at *5 ("The great fluctuation in credit given to different songs performed in the same manner was one of the major grievances brought to the attention of the Justice Department. In the past, it was possible for credit to fluctuate as much as 1,000 to 1 on the performance of different compositions as themes, jingles, background, cue or bridge

Still not satisfied with their treatment by ASCAP, a group of small publishers sought to intervene, as of right, in the antitrust "litigation."⁹⁷ Between the United States and ASCAP, so that they could protect their interests directly. In *Sam Fox Publishing*,⁹⁸ the Supreme Court considered the small publishers' claims and held that they could not intervene as of right.⁹⁹ In so concluding, the Court argued that a Catch-22 situation precluded intervention as of right for the small publishers. The Department of Justice had brought its antitrust claims against ASCAP, both as an entity and as a representative of all the Society's members.¹⁰⁰ The small publishers, as members of ASCAP, were therefore class defendants. However, "the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation."¹⁰¹ To intervene as of right, on the other hand, the small publishers had to show that they would be bound by any judgment in the litigation, yet were not adequately represented. From these two rules, the Court framed its Catch-22 dilemma: If the small publishers were not adequately represented by ASCAP, then they could not intervene as of right because, despite their nominal status as class defendants, they would not be bound by any resulting judgment. If the small publishers were adequately represented by ASCAP, then they could not intervene as of right because their interests were already

music. Under the new system, this ratio has been cut in most instances to at most 10 to 1 and in isolated instances to no more than 100 to 1. The test used to qualify compositions for the 10 to 1 ratio has also been changed to allow more for the performance record of the piece and less for the discretion of the board"). The ASCAP royalty pool is divided based upon performance credits. Performance credits are given based upon the number of times a particular work is performed, as measured by the surveys, but in allocating performance credits, one minute of airtime is not necessarily worth one minute of airtime. In allocating performance credits, performances are weighted based on broadcast type, time of day, and usage category (feature, background, theme, advertising, and promotional). The weights assigned to different music uses are based upon entirely subjective judgments of relative worth. The most valued performance is a feature performance and the ratio of feature performances to commercial performances which are least valued is 1:1 in the U.K., 3:1 in France, 4.5:1 in Germany, and 33.3:1 under ASCAP. M. Holden, "ASCAP and BMI Usage Weightings - Out-of-Step with the World?" (2000), 3 *Film Music Magazine* 3-5. Feature music includes compositions that are the primary focus of audience attention, theme music is used to open and close programs, background music is used to complement screen action, and commercial music includes advertising jingles, public service announcements, and promotional music that pitch other programs.

97. There was, in truth, no active litigation, but the consent decrees gave the district court continuing jurisdiction over the initial antitrust lawsuits. This allowed the district court to amend the final judgment and approve amendments and modifications to the consent decrees in 1950, 1960, and again in 2001.

98. *Supra* note 76.

99. *Ibid.* at 695.

100. *Ibid.* at 691.

101. *Ibid.*

adequately represented.¹⁰² Given this logical conundrum, the Supreme Court rejected the small publishers' motion to intervene as of right.¹⁰³

These attempts to regulate ASCAP's internal operations (as it were) were largely abandoned by the Department of Justice in 2001, when the Department of Justice and ASCAP reached agreement on amending (again) the final judgment (the Second Amended Final Judgment or AFJ2).¹⁰⁴ Apparently believing that competition between BMI and ASCAP for affiliates/members would adequately protect copyright owners from the CMOs' "monopsonistic" buying power,¹⁰⁵ the provisions respecting the collectives' internal structure and election procedures were removed from the consent decrees.¹⁰⁶ Similarly, the provisions respecting the collectives' royalty distribution procedures were loosened to provide the CMOs with more discretion in allocating their respective royalty pools.

The establishment of a procedure for judicial review of ASCAP's licensing rates has also proved a fertile ground for litigation. In addition to the straightforward judicial review of whether ASCAP's rates for its blanket licenses were reasonable, would-be licensees also tried to use the Amended Final Judgment to push for more flexible licensing options. Thus, in *United States v. American Society of Composers, Authors and Publishers (Application of Shenandoah Valley Broadcasting, Inc.)*,¹⁰⁷ a group of television stations, following the procedure set forth in §11 of the Amended Final Judgment, requested a blanket license from ASCAP that would exclude programs obtained either from a television network or from independent film producers.¹⁰⁸ In essence, the local television stations were trying to avoid the same double-licensing problem that led to

102. *Ibid.* In explaining its decision, the Court went on to differentiate the adequacy of ASCAP's representation with respect to the government's two types of antitrust claims. With respect to ASCAP's external dealings with its licensees, the interests of ASCAP and the small publishers were sufficiently aligned so that ASCAP adequately represented the small publishers and hence the small publishers were bound by the aspects of the consent decree governing ASCAP's external dealings. However, with respect to ASCAP's internal dealings with its own members, the interests of ASCAP and the small publishers were not aligned. As a result, ASCAP did not adequately represent the small publishers and the small publishers were not bound by the provisions of the consent decree dealing with ASCAP's internal operations. *Ibid.* at 692.

103. See also *United States v. American Society of Composers, Authors and Publishers (Application of Metromedia, Inc.)*, 341 F.2d 1003 (2nd Cir.) (applying *San Fox Publishing* to a would-be ASCAP licensee and holding that because Metromedia was not a party to the consent decree, it did not have standing to enforce its provisions through contempt motion), cert. denied *sub nom. Metromedia, Inc. v. American Society of Composers, Authors and Publishers*, 382 U.S. 877 (1965).

104. See *United States v. American Society of Composers, Authors and Publishers*, 2001-2 Trade Cas. (CCH) para. 74,474, 2001 U.S. Dist. LEXIS 23707 (S.D.N.Y. 2001) [*US v. ASCAP 4*].

105. See *Einhorn*, *supra* note 42 at 364-66.

106. See *US v. ASCAP 4*, *supra* note 104.

107. *United States v. American Society of Composers, Authors and Publishers (Application of Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117 (2nd Cir.) [*ASCAP (Application of Shenandoah Valley)*], cert. denied *sub nom. Shenandoah Valley Broadcasting, Inc. v. ASCAP*, 377 U.S. 997 (1964).

108. *ASCAP (Application of Shenandoah Valley)*, *ibid.* at 121.

the *Alden-Rochelle* and *M. Whitmark & Sons* litigation by getting the public performance license issue resolved at the time the independent film producer obtained the synchronization license. When ASCAP refused to quote a rate for the proposed license, the local television stations petitioned the Southern District of New York to establish a reasonable rate for the proposed license. In support of their petition, the television stations pointed to the language of Section IX of the Amended Final Judgment, which provided:

Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested.¹⁰⁹

But the Second Circuit rejected the television stations' arguments. Although the Second Circuit acknowledged that "a strictly literal reading of [Section IX] would [...] require ASCAP to quote a fee for any license requested", it felt that such a reading would "ignore [...] both context and good sense".¹¹⁰ The Second Circuit therefore read Section IX as requiring ASCAP to quote a rate only for the two types of licenses otherwise required by the Amended Final Judgment: (1) the blanket license required by Section VI; and (2) the per-program license required by Section VII(b).¹¹¹ Through this restrictive reading of the rate review provisions, the Second Circuit sharply limited the flexibility that a literal reading of Section IX would otherwise have incorporated into the Amended Final Judgment.

Despite this setback, ASCAP licensees have also used the rate review provisions in a more straightforward manner: (i) to limit the rates for ASCAP's blanket licenses; and (ii) to push for per-program license rates that make such licenses a realistic and practical alternative to blanket licenses. In the first appellate decision on these issues, *American Society of Composers, Authors and Publishers v. Showtime/The Movie Channel, Inc.*,¹¹² the Second Circuit laid out the basic approach. As a general matter, the court stated that a "reasonable" rate must reflect the "fair market value" of the blanket license, and defined "[f]air market value [...] as] the price that a willing seller and a willing buyer would agree to in an arm's length transaction".¹¹³ Despite its imprecise phrasing, this standard does not mean that whatever historical prices ASCAP had managed to charge for its blanket licenses conclusively established a "reasonable" rate. After all, the transactions between a monopolist and those who purchase its goods involve willing parties, on both sides, in

109. *Ibid.*

110. *Ibid.*

111. *Ibid.* at 122 ("We construe the sentence as relating to requests for licenses which some other portion of the judgment required ASCAP to grant").

112. *American Society of Composers, Authors and Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2nd Cir., 1990) [*Showtime/The Movie Channel*].

113. *Ibid.* at 569.

an arm's length transaction.¹¹⁴ Yet, the very point of regulating a monopolist's rates is to reduce the prices that willing parties would otherwise have to pay for the monopolist's goods.¹¹⁵ As a result, the Second Circuit held that historical licensing fees, while relevant if otherwise comparable,¹¹⁶ were not controlling, and could be properly discounted to the extent they were artificially inflated by ASCAP's market power or by licensees' perception of such power.¹¹⁷

Yet, if the lack of a competitive market for ASCAP licenses means that market comparables is not the answer, it is a little difficult to see what sort of factual evidence a court should rely upon in setting a reasonable rate.¹¹⁸ In the prototypical case of monopoly rate regulation involving utilities, the rate is set so as to ensure the utility a reasonable return on its investment given its operating costs.¹¹⁹ There is quite simply no way to apply that standard to

114. In *Buffalo Broadcasting v. ASCAP*, *supra* note 78, the Second Circuit missed this point. In analyzing whether the price ASCAP had set for per-program licenses was reasonable, the court asked whether "the price for such a license, in an objective sense, is higher than the value of the rights received". *Ibid.* at 926. But, as discussed, even a monopolist will price its goods so that some consumers value them more than the price. Otherwise, the monopolist will not sell any of its goods.

115. See, e.g., *United States v. American Society of Composers, Authors and Publishers (Application of Turner Broadcasting System, Inc.)*, 782 F. Supp. 778 at 790 (S.D.N.Y. 1991) [ASCAP obvious - that the Decree was designed to limit ASCAP's ability, by pooling copyrights for large amounts of music used in radio broadcasting, to extract unreasonable fees for performance of the music"], aff'd *per curiam*, 956 F.2d 21 (2nd Cir.), cert. denied, 504 U.S. 914 (1992).

116. See *Showtime/The Movie Channel*, *supra* note 112 at 566-67 (noting differences between ASCAP's relationship with two other pay cable services, HBO and Disney, and its relationship with Showtime in discounting weight given to terms of ASCAP's licenses with HBO and Disney in setting the proper rate for Showtime license).

117. *Ibid.* at 570 ("Nor did the Magistrate commit legal error in regarding ASCAP's market power as a relevant consideration in diminishing the weight of the ASCAP licenses to HBO and Disney as comparable sales. The rate court was established as a component of the settlement of the Government's antitrust challenge to ASCAP's licensing practices. Though the rate court's existence does not mean that ASCAP has violated the antitrust law, the court need not conduct itself without regard to the context in which it was created. The opportunity of users of music rights to resort to the rate court whenever they apprehend that ASCAP's market power may subject them to unreasonably high fees would have little meaning if that court were obliged to set a "reasonable" fee solely or even primarily on the basis of the fees ASCAP had successfully obtained from other users").

118. Because of these difficulties, Professor Crace has suggested that the question is not, in fact, an economic one, but a political one: How much of society's wealth should be redistributed to music composers through what, in effect, is a public performance tax? See Prof. Crace, "CBS v. ASCAP: An Economic Analysis of a Political Problem" (1978), 47 *Fordham Law Review* 277 at 298.

119. See, e.g., *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 754-55 (1968) (reviewing application of FPC price-setting formula based on costs of extraction of natural gas and prescribed rate of return).

blanket, or even individual, performance licenses for music.¹²⁰ Alternatively, if we tried to define the socially optimal fee, we would begin by recognizing that a higher fee will re-distribute somewhat more of society's wealth to musical work copyright owners, and will perhaps encourage the creation of somewhat more, or better quality, works; a somewhat lower fee will re-distribute somewhat less. Ideally, then, the fee should be set precisely at the point where the additional works a higher fee would encourage are less valuable to society than the alternative goods or services to which the resources would otherwise be devoted.¹²¹ Although perfectly sound as a theoretical standard, trying to identify such an "ideal" rate in practice would inevitably require so much guesswork, uncertainty, and relative valuation of different productive activities that it is fairly characterized more as a question of policy for the legislature, than a question of fact for the courts.

Rather than approach it from a rate regulation perspective or attempting to define a theoretically ideal rate, courts have defined the "reasonable" blanket fee as the price that would be charged in a competitive market for blanket licenses.¹²² Yet, such a competitive market does not exist. That is precisely why judicial rate setting is necessary in the first place. Nevertheless, given the absence of any other factual basis for setting a "reasonable" rate, courts have been forced to rely on ASCAP's historical prices, discounting them more or less, depending on the court's own sense for the potential influence of undue market power,

120. See *ASCAP (Application of Buffalo Broadcasting Co.)*, *supra* note 44 at *59 ("Not surprisingly, given the nature of the business, we also have no evidence directly relating to the musical equivalent of 'costs of production' or reasonable rates of return"). Moreover, any rate of return approach would inevitably become circular. Any given fee level will generate a certain level of revenue for copyright owners, and if copyright owners are rational, then they will continue to invest in creating additional works until they reach the marginal work - the one for which expected revenue precisely equals the author's reservation price. A higher fee level means more revenue for any given work, but it remains true that copyright owners will continue to invest in additional works until the last work just breaks even.

121. See G. Lunney, "Reexamining Copyright's Incentives-Access Paradigm" (1996), 49 *Yankee Law Review* 483 at 487-92 and 576-79 ("If we broaden copyright, we increase the economic return on any given authorship investment. We can thereby lure resources, in the form of labor and capital, away from other productive endeavors into the production of copyrighted works and lead the market to produce additional works. But to create these additional works, we must strip the resources from other sectors of the economy. As a result, broadening copyright imposes a second critical cost: the lost value society would have associated with the alternative investments to which these resources would otherwise have been devoted").

122. See *ASCAP (Application of Buffalo Broadcasting Co.)*, *supra* note 44 at *57-58 ("Since we are looking at a market for certain types of licenses, the theoretical 'competitive market' that we seek to recreate, in concededly imprecise ways, is not that of competing composers seeking to license their compositions to public performers who are free to choose among available musical offerings. Rather, it is a market of competing licensors capable of offering the type of protection and benefits provided now by ASCAP in the form of its blanket and per-program licenses.")

and adjusting them for differences in circumstance.¹²³ Often, the exercise seems little more than baby-splitting,¹²⁴ picking a license fee somewhere between a low fee proposed by the licensee and a high fee proposed by ASCAP.¹²⁵

In any event, having pretended to set a "reasonable rate" for the blanket license, the next task for the courts was setting a reasonable rate for the per-program licenses. The Amended Final Judgment stated that the fee for per-program licenses was to be set so that radio and television broadcasters "shall have a genuine choice between per program and blanket licenses."¹²⁶ Yet, when the proper rate for per-program licenses was initially litigated in *ASCAP (Application of Buffalo Broadcasting Co.)*, ASCAP proposed to set the percentage-of-revenue for program licenses at a fourfold multiple of any blanket fee amount, and wanted to add an unspecified increment to cover additional expenses that it would have incurred in administering and monitoring the program.¹²⁷ In his report, Magistrate Judge Doniger rejected this proposal. In his view, "ASCAP's current proposal for a per-program license [was] plainly geared to making it unusable for most, if not virtually all, of the television stations."¹²⁸

123. See *United States v. Broadcast Music, Inc (Application of Music Choice, Inc.)*, 316 F. 3d 189 at 194 (2nd Cir., 2003); *Showtime/The Movie Channel*, *supra* note 112 at 566-68; *United States v. American Society of Composers, Authors and Publishers (Application of Capital Cities/ABC, Inc.)*, 831 F. Supp. 137 at 144-45 (S.D.N.Y. 1993) (noting that determination of reasonable rate may consider previously negotiated agreements "as well as changed circumstances that make prior benchmarks outdated measures of fair value"); *ASCAP (Application of Buffalo Broadcasting Co.)*, *supra* note 44 at *60 ("Accordingly, both in agreements and in this proceeding, the parties and the court have focused principally on agreements voluntarily arrived at by the same or comparably situated parties contracting for the same or comparable rights").

124. The inevitable arbitrariness of the rate set undoubtedly contributes to the undue time and expense usually associated with rate setting proceedings. For a discussion of the time and expense associated with rate settings, please see "Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, No. 41-1395" at 29 and 33 (S.D.N.Y. 2000), available online: <www.usdoj.gov/atr/cases/65300/6395.pdf> (last visited: 6 December 2005) [AF12 Memo] ("Rate court proceedings under the AFJ have been protracted and costly for music users, ASCAP, and the Court. Indeed, some proceedings have lasted a decade or longer, even though the purpose of the proceedings was to determine license fees to be charged during a five-year period").

125. See *Showtime/The Movie Channel*, *supra* note 112 at 566 (setting a blanket license rate of USD 15 per subscriber where Showtime asked for a rate of USD 8 per subscriber and ASCAP sought a rate of USD 25 per subscriber).

126. *US v. ASCAP 2*, *supra* note 64 at *11-12 (§ VII(B)(3)).

127. *ASCAP (Application of Buffalo Broadcasting Co.)*, *supra* note 44 at *169-70 ("Once again citing prior agreements, [ASCAP] argues that the per-program license fee should be set at a percentage-of-revenue rate that is four times the effective percentage-of-revenue rate of each station's blanket license fee, together with a separate, undetermined fee designed to cover all of ASCAP's expenses of administering the license. Since the starting revenue base that ASCAP seeks for the per-program license is the same as the revenue base for the blanket license, under this proposal the ceiling for the per-program fee for each station would be 400 percent of its blanket license fee").

128. *Ibid.* at *189.

Instead, Magistrate Judge Doniger designed the per-program license so that a typical local television station would pay ASCAP the same amount under either the blanket or per-program license alternatives, exclusive of additional administration costs. To achieve this equality, Magistrate Judge Doniger found as a factual matter that the typical local station needed an ASCAP program license to cover roughly 75 per cent of its programming. The remainder consisted of network or other program for which the public performance right was already cleared. As a result, Magistrate Judge Doniger set the percentage-of-revenue in the program license at a 1.33 multiple of the blanket rate in order to ensure "revenue equivalence" between per-program and blanket license fees for the typical station.¹²⁹ Magistrate Judge Doniger also added a 7 per cent increment to the per-program rate to compensate ASCAP for the additional inefficiencies and administrative costs that inhere in per-program licensing.¹³⁰ Subsequently, the parties agreed to add a 10 per cent increment to the per-program license for a "miniblanker" to cover a local broadcaster's incidental use of ASCAP music in commercials.¹³¹

Given the additional administrative fees associated with a per-program license, as well as the additional administrative expense that a licensee would itself incur to keep track of its music usage, Magistrate Judge Doniger acknowledged that "[f]or most stations, the blanket license is likely, in the end, to be less expensive."¹³² Nonetheless, the magistrate hoped that the availability of per-program licenses could become "a bridge to source or direct licensing over time."¹³³ With the guaranteed availability of a per-program license, a station could begin the process of negotiating direct licenses with confidence that, if it should prove unable to license all of the musical works at issue, it could cover the remaining performances through a per-program license.

129. *Ibid.* at *230 fn. 111 ("We presume, in very rough terms, that if twenty-five percent of the station's programs contain no ASCAP music, the station's per-program fee at that point - without further changes - will be about 75 percent of the fee ceiling. For this fee to equal the station's blanket license fee, the ceiling must be set at about 133 percent of the blanket fee").

130. *Ibid.* at *246-47 ("Based on the foregoing [discussion of the additional administrative expenses a per-program license will entail], the per-program fee will be calculated on the basis of a ceiling set at 140 percent of each station's blanket license fee").

131. See *Einhorn*, *supra* note 42 at 360. Magistrate Judge Doniger had added a 7.5 per cent increment to the per-program license fee to cover such incidental uses, but that aspect of his decision was overturned on appeal. See *United States v. American Society of Composers, Authors and Publishers (In re Capital Cities/ABC, Inc.)*, 157 F.R.D. 173 at 204 (S.D.N.Y. 1994). In a subsequent case, the Rate Court approved the use of such an increment for radio per-program licenses. See *United States v. American Society of Composers, Authors and Publishers (Application of Salem Media of California, Inc.)*, 981 F. Supp. 199 at 219-20 (S.D.N.Y. 1997).

132. *ASCAP (Application of Buffalo Broadcasting Co.)*, *supra* note 44 at *232; see also *ibid.* at 231 fn. 112 (noting that under the interim regime license, with a somewhat narrower gap between the per-program and blanket license fees, less than one-third of stations took the per-program license option).

133. *Ibid.* at *225.

In June 2001, the Department of Justice and ASCAP reached an agreement on amending the final judgment (referred to as the Second Amended Final Judgment or AFJ2).¹³⁴ As with previous amendments, this decree was adjusted for changes in technology since the last agreement. In addition to television and radio broadcasters, it addressed cable, satellite and internet broadcasting, and unlike earlier decrees, also included language to cover not yet developed performance technologies.¹³⁵ For two classes of music users, foreground/background music services and online music users, AFJ2 required ASCAP to issue "per-segment" licenses very similar to the per-program licenses required for more traditional radio and television broadcasters.¹³⁶

In Section VIII, AFJ2 sided with Magistrate Judge Doniger's interpretation of the fee level required for per-program licenses to offer a "genuine choice".¹³⁷ As the Department of Justice explained in its Memorandum in Support of AFJ2:

Section VIII(b) thus is intended to clarify that a representative user has a 'genuine choice' between a per-program or per-segment license and a blanket license only if it would pay roughly the same total license fee under the per-program or per-segment license that it would have paid under the blanket license (excluding any added administration cost), assuming it did not reduce or directly license any of its performances of ASCAP music.¹³⁸

However, AFJ2 went a bit further by ensuring that the per-program or per-segment license fee would be effectively reduced to reflect any ASCAP material directly licensed from the copyright owner.¹³⁹ In Section VII(A), AFJ2 also incorporated into per-program or per-segment licenses a "mimiblanket" license that would cover "ambient and incidental uses" and prohibited ASCAP from

134. See *US v. ASCAP 4*, *supra* note 104.

135. *Ibid.* at *4 (§II(F)). Because earlier consent decrees were often written to apply specifically to a given distribution technology, questions had arisen as to whether they applied to new distribution technologies. See, e.g., *ASCAP (Application of Turner Broadcasting Co.)*, *supra* note 115 at 781 (considering and rejecting ASCAP's arguments that because cable channels were not specifically mentioned in the 1950 consent decree they were not covered by the decree's requirements).

136. *US v. ASCAP 4*, *supra* note 104 at *13-14 (§VII(A)(2)). In *ASCAP (Application of Mazak LLC)*, *supra* note 10, two foreground/background music services argued that the "per-segment" license provisions required ASCAP to issue licenses for portions (or segments) of its music catalog. The court rejected such a construction of "segment" and held that a "segment" refers to a cohesive unit of the licensee's performance, similar to the unit "program" found on more traditional radio or television broadcasts. *Ibid.* at 568.

137. *Ibid.* at *15-16 (§8).

138. AFJ2 Memo, *supra* note 124 at 29-30.

139. *US v. ASCAP 4*, *supra* note 104 at *16 (in relevant part, §VIII(B) provides: "it shall be assumed for the purposes of this Section VIII(B) that all of the music user's programs or segments that contain performances of ASCAP music are subject to an ASCAP fee").

burdening its licensees with the obligation to monitor or keep records of such uses.¹⁴⁰

Following AFJ2, in *United States v. Broadcast Music, Inc. (Application of AEI Music Network, Inc.)*,¹⁴¹ the Second Circuit addressed the issue of whether the Rate Court could consider per-piece or direct licenses a licensee had otherwise obtained in determining the "reasonable" fee for a blanket license. Predictably, the collective opposed the proposal, as it would provide licensees with an incentive to seek out and obtain public performances directly from the rightsholders. BMI argued that the licensees were seeking a new type of "carve out" license – a license to perform all of BMI's repertoire, except those works otherwise directly licensed. Such a license, BMI continued, was not required by the consent decree, and was foreclosed by the Second Circuit's earlier decision in *Shenandoah*.¹⁴² But the Second Circuit rejected BMI's arguments. In the court's view, "[t]he only modification Applicants have proposed to the traditional blanket license is in the way the fee is calculated, which is, of course, exactly what is contemplated in the rate court provision."¹⁴³ The court therefore remanded the case for an order directing BMI to issue a blanket license with "a fee structure that reflects per piece and direct licenses" otherwise obtained.¹⁴⁴

In *ASCAP (Application of Mazak, LLC)*,¹⁴⁵ a similar gloss was added to AFJ2.¹⁴⁶ Yet, in a subsequent clarification, the *Mazak* court undermined even the trivial incentive towards direct licensing¹⁴⁷ that such a reduction in the blanket license fee would provide. In its clarification, the court explained that while it would consider "direct licensing relationships already in existence at the time of trial in determining a reasonable blanket licensing fee", it would not establish a fee mechanism "that provides credits or discounts for direct licensing arrangements that applicants may enter into during the term of the license".¹⁴⁸ Given the long-term nature of the typical public performance

140. *US v. ASCAP 4*, *ibid.* at *13 (§VII(A)(1), (2)).

141. *United States v. Broadcast Music, Inc. (Application of AEI Music Network, Inc.)*, 275 F.3d 168 (2nd Cir., 2001). Broadcast Music was not governed by the terms of AFJ2, as they applied only to ASCAP, but was bound to a similar consent decree. *United States v. Broadcast Music, Inc.*, *supra* note 74; *United States v. Broadcast Music, Inc.*, *supra* note 75, 275 F.3d at 176-77. For a discussion of [*ASCAP (Application of Shenandoah Valley)*], please see text accompanying notes 107-111 *supra*.

142. *Ibid.* at 176.

143. *Ibid.* at 177.

144. *Ibid.* at 177.

145. *Supra* note 10.

146. *Ibid.* at 578-79.

147. In truth, allowing even one-for-one discounts from the blanket license fee for previously negotiated direct licenses leaves a music user with no savings over simply paying for the blanket license until the user has acquired so many direct licenses that it no longer requires the blanket license at all. Nonetheless, the change is certainly an improvement over the previous rule under which music users who obtained direct licenses had to pay twice for the music – once to the direct licensor and once to the relevant CMO.

148. *ASCAP (Application of Mazak, LLC)*, *supra* note 10 at 592-93. Although this may seem arbitrary, the court felt constrained by its authority under AFJ2 not to issue a new type of license, but only to set a reasonable fee for a blanket license.

license, this interpretation means that a licensee might have to wait years before direct licensing would bear fruit in a blanket license fee reduction.

1.4. CONCLUSION: TRYING TO CAGE THE BEAST

The tale of the CMOs in the United States is thus a sad one. Although the CMOs serve a laudatory goal of allowing copyright owners to obtain some price for their public performance right, we have spent some sixty-four years unsuccessfully trying to reign in the collectives' monopolistic excesses. Rates, at least for ASCAP and BMI, are now regulated, but they are often set based upon earlier unregulated rates. Such an approach to rate setting may prevent ASCAP and BMI from exploiting their market power to a greater degree than they had in the past, but it does little to improve the situation. If, at the end of the day, the excuse for such an approach is that there is no sensible legal or factual basis for determining a reasonable fee, then we should acknowledge as much, admit that determining a reasonable fee is a policy question not susceptible to judicial resolution, and turn the matter over to the legislature.

Similarly, the effort to encourage direct licensing through the consent decrees has also proven uneven and largely unsuccessful. This lack of success comes despite the nearly wholesale shift away from the spontaneous performances that justified a blanket license in the early days of television and radio. Even where the consent decrees have tried to encourage direct licensing, too often, amendments to the decrees have focused on a specific problem facing a specific industry at a specific time without considering how the same problem could arise more generally. Thus, in response to the double licensing issue in *Alden-Rochelle* and *M. Whitmark & Sons*, the 1950 Amended Final Judgment required direct licensing of both the synchronization and public performance right. After all, where a synchronization license has to be obtained from the copyright owner directly in any event, separating the public performance right and then using a CMO to enforce and license it increases, rather than decreases, the transaction costs involved. Yet, the AFJ required direct licensing only for movies and for network programs, and while the AFJ thus corrected the problem in those cases, the same problem arose and has long persisted for non-network television programs and commercials.

Moreover, it is not just a matter of getting a perfect consent decree. Even if that were possible, industry conditions are constantly changing. Instead of adapting and responding to the market, the CMOs often resist adopting more efficient licensing options until forced to do so by yet another set of amendments to the consent decree.¹⁴⁹

149. See, e.g., AFJ2 Memo, *supra* note 124 at 24-25 ("In addition, ASCAP has refused to offer a per-program license or per-program-like license to users other than those named explicitly in the decree, although, over time, such licenses would be practical for more and more types of users").

At the end of the day, the argument nonetheless remains that we have to accept the collectives and the problems they create because there is no other practical option for licensing of public performance rights. Recent developments suggest that there may be another way, however, and it is to the much briefer story of the copyright collecting society that we now turn.

2. THE COPYRIGHT COLLECTING SOCIETY: THE COPYRIGHT CLEARANCE CENTER

2.1. A BRIEF DESCRIPTION OF COPYRIGHT COLLECTING SOCIETIES

2.1.1. Copyright Clearance Center

Formed in 1978, the Copyright Clearance Center (CCC) is a non-profit corporation that enables authors and publishers of work to collect fees for the photocopying of their works, and a centralized location for potential licensees to obtain licenses.¹⁵⁰ Publishers and authors register their works with the CCC, delineating the works they are licensing and the fee for photocopying the works. The CCC provides licenses which grant permission to the licensee to reproduce works that are listed with the CCC. The CCC offers two forms of licenses to users: (i) an annual blanket license with a fee set by CCC; and (ii) a per-copy license with the fees set by the individual copyright owners.

Unlike ASCAP and BMI, the CCC has not been the target of antitrust claims by either individuals or the government.

2.2. OF CHICKENS AND EGGS, MARKETS AND RIGHTS

Ordinarily, as was the case for the other CMOs, one thinks of the legal right coming first, followed by the development of the market. But that is not how it worked in the United States with respect to unauthorized photocopying of scientific journal articles. Instead, the courts did not recognize photocopying as copyright infringement until after a means to license such reproductions had developed.

The issue whether unauthorized photocopying constituted copyright infringement first arose in 1973 in *Williams & Wilkins v. United States*.¹⁵¹ In the case, a publisher of scientific and medical journals, *Williams & Wilkins*,

150. Corporate Overview, online: <www.copyright.com> (last visited 7 December 2005).

151. *Williams & Wilkins v. United States*, 487 F.2d 1345 (Ct. Claims 1973) [*Williams & Wilkins*], aff'd by an equally divided Court, 420 U.S. 376 (1975). After Justice Blackmun recused himself, the remaining Justices of the Supreme Court were split 4-4. Such a disposition affirms the results of the case as between the parties, but does not affirm the reasoning of the lower court.

sued the United States for copyright infringement. Williams & Wilkins alleged that the Department of Health, Education and Welfare, through the National Institute of Health (NIH) and the National Library of Medicine (NLM), had infringed by making unauthorized photocopies of its copyrighted medical journal articles.¹⁵² The government conceded that it was making unauthorized copies. The NIH, for example, "filled 85,744 requests for photocopies of journal articles (including plaintiff's journals), constituting about 930,000 pages" in 1970 alone – all of which were for its own in-house researchers.¹⁵³ Similarly, in 1968, the NLM "[filed] about 120,000 of the requests [for interlibrary loans] [...] by photocopying single articles from journals, including plaintiff's journals".¹⁵⁴

Despite conceding extensive unauthorized copying, the government contended that the photocopying constituted a fair use under United States' copyright law and was not therefore copyright infringement. On appeal, the Court of Claims¹⁵⁵ agreed.¹⁵⁶ At the time, there was no licensing mechanism for photocopying. As a result, in analyzing the impact of the photocopying on the market value of the works at issue, the copyright owners had to prove that the photocopying reduced subscriptions for their journal. But the available evidence did not demonstrate any such reduction. As the court explained, "the photocopying shown here had not damaged plaintiff, and may actually have helped it".¹⁵⁷ On the other hand, a finding of infringement would clearly impair the flow of information to medical and scientific researchers.¹⁵⁸ Together with other factors, the court found that the balance weighed in favor of allowing the use to consider, and as a result, the court labeled the copying "fair".

While, as we have said, this record fails to show that plaintiff (or any other medical publisher) has been substantially harmed by the photocopying practices of NIH and NLM, it does show affirmatively that medical science will be hurt if such photocopying is stopped. Thus, the

152. *Ibid.* at 1346–1347.

153. *Ibid.* at 1348.

154. *Ibid.* at 1349.

155. At the time, the Court of Claims had both trial and appellate jurisdiction over patent and copyright infringement claims asserted against the federal government. In 1982, the appellate jurisdiction of the Court of Claims and that of the Court of Customs and Patent Appeals were merged in creating the new Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §127, 96 Stat. 25, 37 (1982), codified as amended at 28 U.S.C. 1295 (2005).

156. *Williams & Wilkins*, *supra* note 151 at 1362 ("Fusing these elements together, we conclude that plaintiff has failed to show that the defendant's use of the copyrighted material has been 'unfair,' and conversely we find that these practices have up to now been 'fair.' There has been no infringement".).

157. *Ibid.* at 1358.

158. *Ibid.* at 1356 ("There is no doubt in our minds that medical science would be seriously hurt if such library photocopying were stopped. We do not spend time and space demonstrating this proposition. It is admitted by plaintiff and conceded on all sides".).

balance of risks is definitely on defendant's side – until Congress acts more specifically, the burden on medical science of a holding that the photocopying is an infringement would appear to be much greater than the present or foreseeable burden on plaintiff and other medical publishers of a ruling that these practices fall within "fair use".¹⁵⁹

The court noted that "Plaintiff's answer is that it is willing to license the libraries, on payment of a reasonable royalty, to continue photocopying as they have".¹⁶⁰ But in the absence of a viable license system already in place, or of any statutory authority for the court to create one, the court was unwilling to entrust medical research to the mere possibility that some copyright owners might be willing and could find a way to license their works for photocopying.¹⁶¹

Thirty years later, the photocopying issue came before the courts a second time in *American Geophysical Union v. Texaco, Inc.*¹⁶² The facts pertaining to the unauthorized copying were very similar to those in *Williams & Wilkins Co.* Like the NIH, Texaco would circulate copies of the tables of contents from various scientific journals and allow its researchers to request photocopies of particular articles for their own files. But this time, the Second Circuit rejected the fair use argument and determined that the photocopying of articles from a scientific journal constituted copyright infringement.¹⁶³ While there were a few other differences between the cases,¹⁶⁴ the principal one appeared to be the existence of the CCC.¹⁶⁵ Although it remained the case that there was not a market for the "direct sale and distribution of individual articles", the CCC provided a mechanism for licensing articles for photocopying.¹⁶⁶ Given the existence of a practical means to license the photocopying, what had been fair became unfair. As the court explained: "it is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for

159. *Ibid.* at 1359.

160. *Ibid.* at 1360.

161. *Ibid.*

162. *American Geophysical Union v. Texaco, Inc.*, 60 F. 3d 913 (2nd Cir., 1994), writ dismissed, 516 U.S. 1005 (1995) [*American Geophysical Union*].

163. *Ibid.* at 931.

164. The most prominent other distinction appears to be that Texaco was a for-profit entity, while the NIH and the NLB were both non-profit, government agencies. It is also worth noting that *Williams & Wilkins* was decided under the 1909 Act, while *American Geophysical Union* was decided under the 1976 Act. This change should not have been material, however, because the 1976 Act did not change the applicable legal rules with respect to the photocopying issue. Although the 1976 Act formally codified the fair use doctrine in Section 107, Congress expressly stated that in doing so, it intended to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way". H.R. Rep. No. 94-1476 at 66 (1976), quoted in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 at 577 (1994).

165. *American Geophysical Union*, *supra* note 162 at 929–31.

166. *Ibid.* at 930.

the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use".¹⁶⁷

Thus, because a market for the photocopying of journal articles had developed, the court recognized a corresponding legal right.

3. CONCLUSION: SOME NORMATIVE THOUGHTS ON COLLECTIVE RIGHTS MANAGEMENT

A normative evaluation of collective rights management should focus on two issues: (i) the normative desirability of the particular legal right at issue; and (ii) the relative normative desirability of the differing models for collective rights management. In the United States, the primary purpose of copyright is neither to protect the natural or moral rights of authors nor to reward rightsholders. Rather, the primary purpose of copyright is to ensure the public an adequate supply of creative works.¹⁶⁸ Moreover, the point is not to maximize the incentive for the production of such works. Increasing copyright protection entails two significant costs. First, more production of copyrighted works must come at the expense of some other productive activity. Once we acknowledge that these other productive activities would likely have generated positive spillovers as well, the question of where to allocate society's resources becomes an extremely difficult one. Second, more protection means less access to existing works.

If one were to try and determine whether recognition of either a broad right of public performance or a right to control photocopying under the circumstances presented in *Williams & Wilkins* or *American Geophysical Union* would increase social welfare, the normative claim for either right is relatively weak. Recognizing a broad right of public performance will likely re-distribute somewhat more of society's wealth towards songwriting and, by offering a higher return for any given work, may well attract additional resources into the production of songs. It is even possible that these additional resources will lead to more or better musical works. But even were one to accept all of that as true, there is still no reason¹⁶⁹ to believe that the additional works created thereby would be more valuable to society than the alternative endeavors to which those

167. *Ibid.* at 931.

168. See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 at 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired").

169. At least, there is no reason once we put aside the unrealistic assumptions that all other markets are complete (i.e. no positive or negative externalities) and perfectly competitive. Creativity is the resource we are attempting to allocate through the copyright laws, and whatever creativity is allocated in our economy, it will almost certainly create positive spillovers.

resources would otherwise have been devoted.¹⁷⁰ Recognizing the photocopying right is even more problematic. In that industry, the journal authors – the scientists, doctors, and other researchers – typically assign their copyrights to the journal publishers, yet receive no monetary royalties in return. As a result, recognizing the photocopying right will likely redistribute resources from those doing the science to those publishing the science. From a social welfare perspective, there is no clear way in which this might prove desirable. As I have explained elsewhere, "[i]ncreasing the revenue of publishers at the expense of the authors and their underlying research scarcely seems likely 'to promote the Progress of Science,' as the Constitution requires".¹⁷¹

Yet, the working assumption seems to be that once Congress has recognized a legal right, such as the right of public performance, its market value must be recognized as well, and whatever steps are necessary to ensure a working market for the right are therefore justified.¹⁷² And perhaps where Congress has spoken clearly, such an assumption can be justified. For the rights at issue in this essay, however, Congress's intent was not so clear. Instead, the courts took general language with respect to "publicly performing a work for profit" or the "reproduction" of a work, and applied it to circumstances, such as radio or television airplay, or the photocopying of scientific journal articles, that Congress had not expressly considered. While the suggestion may offend those with a strong sense for the procedural niceties, there may be some exclusive rights, formally recognized as belonging to the rightsholder, which ought nonetheless to be left unenforceable. Thus, before we rush to embrace collective rights management or to apply it to new areas, we ought to consider seriously whether the potential market at issue ought to remain outside the scope of the copyright monopoly. With public goods, such as copyrighted works, just because we can convert existing activity into a paying market, through a copyright collective or otherwise, does not mean that we should.¹⁷³

Assuming that we have determined that a given right should be enforced and assuming further that the value of the use at issue is less than the transaction costs of individually negotiated licenses so that some model of collective rights management is required, the second issue is the relative normative desirability of the two models of collective rights management: (1) the copyright

170. See A. Plant, "The Economic Aspects of Copyright in Books" (1934), 1 *Economica* 167 at 170; see also B. Kaplan, *An unhurried view of copyright* (New York: Columbia University Press, 1967), 142 at 75 ("Machinery the headstart and you may conceivably run the risk of attracting too much of the nation's energy into the copyright-protected sectors of the economy"); R. Hurt and R. Schuchman, "The Economic Rationale of Copyright" (1966), 56 *American Economic Review* 421 at 425 and 430; Lunney, *supra* note 121 at 488–89 and 629–35.

171. G. Lunney, "Fair Use and Market Failure: Sony Revisited" (2002), 82 *Boston University Law Review* 975 at 1022.

172. See, e.g., *ASCAP* (*Application of Buffalo Broadcasting Co.*), *supra* note 44 at *56 ("Thus, ASCAP is entitled to be paid for those [public performance] licenses...").

173. See Lunney, *supra* note 171 at 991–96.

collective; and (2) the copyright collecting society. As between these two models, the advantages of the collecting society model are clear. Allowing (or requiring) individual copyright owners to determine the prices for the use at issue with respect to their own works replicates the model that we have adopted for distributing copyrighted works to the public generally. Book publishers are not allowed to get together and agree on a blanket license, under which consumers could read, copy, publicly perform, or prepare derivative works from any book they wanted in return for a set percentage of their income.¹⁷⁴ Despite the transaction costs savings such a blanket license might entail, we nonetheless require these rightsholders to make their own decisions as to the form in which their respective work will be published, hardbound or paperback, its price, and the terms on which they will license their work for copying, public performance, or the preparation of derivative works.¹⁷⁵ Although copyright may grant each author some degree of market power over her own work, they still must pit their "little" monopolies against each other in the marketplace.

It is only because we thought such a system of individually-priced licenses unworkable that we tolerated collective licensing of the public performance right.¹⁷⁶ Yet, the CCC demonstrates that it is practical to offer both individual licenses at prices set by the individual rightsholders and a blanket license at a price set by a CMO. While not all users have the ability to track and monitor their performances of copyrighted works, some do.¹⁷⁷ Requiring members of ASCAP or affiliates of BMI to state their rate for individual public performance licenses, as a requirement for joining such a CMO, would give users a genuine choice as to which works to use and how much to pay – the same choice consumers face in the market for copies of works generally. And the forces of competition would work on such individual pricing decisions directly, just as they do (at least, to some extent) on pricing decisions for copies of works. The ready availability of competitively priced individual licenses could thus become an effective check on the market power of the CMOs as well as a ceiling on the reasonable rate for a blanket license. Moreover, if we require the collectives to provide a clear listing of individual license prices, as set by their members or affiliates, a given user's decision to go with the blanket license would necessarily

174. And if we were to adopt such a system, we would certainly want the fee setting to be done by a competent government authority and not the pool of copyright owners themselves. The idea of such a tax-based compensation scheme is not as far-fetched as it might sound. Indeed, the use of levies on blank recording media and recording technology to compensate copyright owners for instances of private copying represents a similar system.

175. See, *CBS v. ASCAP*, *supra* note 87 ("Trade is restrained, frequently in an unreasonable manner, when rights to use individual copyrights or patents may be obtained only by payment for a pool of such rights...").

176. See, e.g., *BMI v. CBS*, *supra* note 40 at 20 ("Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs and restaurants...").

177. See, e.g., *ASCAP (Application of Muzak, LLC)*, *supra* note 10 at 569.

reflect the efficiency advantages of a blanket license, rather than the lack of a practically available alternative.

It would also allow individual rightsholders to set their own rates to maximize their individual expected utility – something that cannot be done easily with the current CMOs. For example, if an individual rightsholder decides to set the price for licensing her work for photocopying to zero in order to increase access to and the distribution of her work, that result is easily and directly achieved in the collecting society model. The copyright owner simply states her terms to the CCC, and the CCC reports those terms to potential users accordingly. In contrast, under the copyright collective model, a similar result for the public performance right is not so easily achieved. While the consent decrees that govern ASCAP and BMI leave individual copyright owners formally free to license their works for public performances, a radio station or other user could not take advantage of such a "free" public performance offer without obtaining performance licenses covering a large number of other performances as well. Because of the difficulties facing a radio station looking to clear all of the music it wants to play, copyright owners who would like more airplay¹⁷⁸ have not typically offered a discount on their public performance license fee. Instead, they have had to work around the CMOs and their blanket licenses by paying radio stations directly for more airtime – hence, the recurring payola scandals in radio.¹⁷⁹

More generally, for individual licenses to become an effective competitive alternative, it will take more than sporadic or idiosyncratic offering of "free" or low-cost public performance licenses by individual copyright owners here and there. Instead, what we need is a systematic listing of all the works available for public performance and their corresponding prices. Fortunately, the consent decrees provide a convenient means for imposing such a requirement. By amending the decrees to require that each ASCAP member or BMI affiliate identify his or her own performance license price(s) for each of his or her works, we can take a real step towards the creation of a competitive alternative to the current CMOs.

178. Because of the popularity networks inherent in the consumption of certain forms of entertainment, increased airtime leads to increased album sales and sales of other complements, such as concert tickets and merchandise. Copyright's division of music into the musical work copyright and the sound recording copyright, and the differing rights attached thereto, may lead to conflicts between the two copyright owners. Because the musical work copyright owner receives the public performance royalty, but only a relatively low mechanical licensing fee for phonorecord sales, the musical work copyright owner will not be as willing to trade-off a lower public performance royalty for increased album sales. The sound recording copyright owner, on the other hand, receives nothing from the public performance royalty (except for limited digital public performances), but is entitled to the full profit on phonorecord sales (less the mechanical royalty) as well as the profit on concerts and merchandise.

179. R. Caves, *Creative Industries: Contracts between Art and Commerce* (Cambridge, MA: Harvard University Press, 2000), at 286–96 (discussing payola in various industries); R. Blumenthal, "Charges of Payola Over Radio Music" (25 May 2002), *New York Times* at B7.

Chapter XI Collective Management of Copyright and Neighbouring Rights in Japan

*Prof. Koji Okumura**

1. INTRODUCTION

This chapter discusses the history, the current status and the future of collective management of copyright and neighbouring rights in Japan. The analysis in Section 2 demonstrates that the history of collective management can be divided into several distinct periods and the nature of each is unique. Section 3 focuses on the government oversight under the current legal system. Section 4 considers the tension between digital technology and collective management, and provides an alternative approach. Section 5 concludes this chapter.

2. HISTORY AND NATURE OF COLLECTIVE MANAGEMENT IN JAPAN

2.1. PLAGIATE-STORM¹

To mention the “Plagiate-Storm” cannot be avoided when looking back over the history of collective copyright management in Japan.

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1. See generally S. Ohie, *Nippon Chosakukun Mongataru* [The Story of Japanese Copyright], 2nd edn. (Kanagawa: Setzansha, 1999). See also: Chosakukun Hohrei Kenkyukai ed., *Chikujoh Kaisetsu Chosakukentoh Jijyohoh* [Law on Management Business of Copyright and Neighbouring Rights: Text and Commentary] (Tokyo: Yuhikaku, 2001), at 2-3 [Text and Commentary]; F. Sakka, *Shohkai Chosakukentoh* [Detailed Explanation of Copyright Law], 3rd edn. (Tokyo: Gyosei, 2004), at 56-58.

Although Japan has been a member state of the Berne Convention since 1899 and ratified the Berlin Revision, it also declared a reservation to Article 9(3) of the original Convention which dealt with the exception to the performance right of musical works. Japan later withdrew the reservation and amended its copyright law to protect the performance right of musical works in 1931.

It was also in 1931 that Dr. Wilhelm Plage, a German teacher, opened an office in Tokyo, Japan and began to act as an agent for many foreign rightsholders of musical works, especially for Europeans. He sent invoices to NHK (Nippon Hoso Kyokai is the semi-official broadcast station in Japan) and many performers that performed or intended to perform foreign musical works. He charged high royalties for the use of the musical works under his administration.

Dr. Plage employed a hard-nosed tactic. He brought charges of copyright infringement against those who used the musical works without his permission. At that time, lawsuits were unfamiliar to most Japanese people; however, Dr. Plage did not hesitate to file suits against those refusing to pay the royalties. Many Japanese feared being named in a lawsuit filed by Dr. Plage and due to the number of suits filed, his activities were named the "Plage-Storm".

2.2. ENACTMENT OF THE LAW ON INTERMEDIARY BUSINESS OF COPYRIGHT²

The "Plage-Storm" created a backlash against Dr. Plage when he decided to expand his business to the management of copyright of Japanese authors. Consequently, the Japanese government took an active step to exclude him from the collective copyright management business in Japan. In 1939, the Japanese government enacted the Law on Intermediary Business of Copyright, which gave it strong authority to regulate the collective copyright management business.³ In this context, it was not surprising that the government rejected Dr. Plage's application for authorization to operate a collective copyright management business.

2.3. A BRIEF OUTLINE OF THE LAW ON INTERMEDIARY BUSINESS OF COPYRIGHT⁴

A brief outline of the Law on Intermediary Business of Copyright ("Law on Intermediary Business") is as follows:

2. See Ohie, *supra* note 1; *Text & Commentary, supra* note 1 at 2-3; Sakka, *supra* note 1 at 56-58; H. Saito, *Chosakukenhoh* 2nd edn. (Tokyo: Yuhkaku, 2004), at 322, fn 2.
3. Chosakuken ni kansuru Chukai Gyohmu ni kansuru Hohenju, The Law No. 67 of 1939.
4. See *Text & Commentary, supra* note 1 at 3-4; Sakka, *supra* note 1 at 762-763.

2.3.1. Regulated Business

The Law on Intermediary Business, as the title suggests, regulated the intermediary business relating to novels, scripts, lyrics and musical compositions.⁵ Intermediary business relating to other types of copyrighted works, such as paintings, fell outside the scope of the law. According to the definition of the law, "intermediary business" was defined as the business of acting as an agent for a copyright owner with regard to a contract for the use of copyrighted works or intermediating, for the copyright owner's benefit, between the copyright owner and the user relating to such contract.⁶ The definition also included the business of administering, for the benefit of others, copyrighted works the copyrights of which were transferred to the administrator.⁷

2.3.2. Governmental Authorization

The Law on Intermediary Business prohibited any person or organization from conducting intermediary business without authorization from the Commissioner of the Agency for Cultural Affairs ("Commissioner").⁸ Although there was no written policy, it was the practice that the Commissioner authorized only one person or organization per type of copyrighted work.⁹ A person or organization that intended to begin an intermediary business had to obtain governmental authorization not only for the starting of the business but also for the scope and the method thereof.¹⁰ The person or the organization authorized to conduct the intermediary business ("Authorized Intermediary") also had to get government authorization for setting or changing a tariff for the use of the works under its administration.¹¹

2.3.3. Report

The Authorized Intermediary was required to submit to the Commissioner a business report as well as an accounting report every fiscal year.¹²

5. The Imperial Ordinance (The Imperial Ordinance No. 835 of 1939) limited the types of copyrighted works to be regulated to these 4 types.
6. See the Law on Intermediary Business, *supra* note 3, Art. 1(1).
7. See the Law on Intermediary Business, *supra* note 3, Art. 1(2).
8. See the Law on Intermediary Business, *supra* note 3, Art. 2. A person or organization that violated this provision was fined up to JPY 20,000. See the Law on Intermediary Business, *ibid.*, Art. 10; Bakkinoh Rinji Sochihoh [Temporary Measures Law on Fines etc.], Law No. 251 of 1948, Art. 2(1).
9. With respect to scripts, two organizations were authorized. This was an exception.
10. See the Law on Intermediary Business, *supra* note 3, Art. 2. Article 4 of the law required government authorization in order for the Authorized Intermediary to change the scope or the method of the business.
11. See the Law on Intermediary Business, *supra* note 3, Art. 3(1).
12. See the Law on Intermediary Business, *supra* note 3, Art. 5.

2.3.4. Superintendence¹³

In addition, the Commissioner had the authority to require Authorized Intermediaries to report on their business and financial status. Officials of the Commissioner could visit offices of an Authorized Intermediary for an inspection, if necessary. The Commissioner also had the power to order a change of business, to revoke the authorization and to either fully or partially suspend the business.

In sum, the Law on Intermediary Business was so regulatory that it gave the government broad discretion in supervising a person or an organization conducting a collective copyright management business.

2.4. THE AUTHORIZED INTERMEDIARIES

Due to the mechanism of authorization and the practice thereof, the number of Authorized Intermediaries was very limited. There were the following four Authorized Intermediaries at the time, just before the enactment of the new law:¹⁴

for music and lyrics – *Shadan-hohjin Nihon Ongaku Chosakuten Kyokai* [Japanese Society for Rights of Authors, Composers and Publishers] (IASRAC);
for novels – *Shadan-hohjin Nihon Bungei Chosakuten Hogo Dohmei* [Japan Federation for the Protection of Copyright on Literary Works];
for scripts – *Kyodo-kamiai Nihon Shinario Sakka Kyokai* [Japan Writers Guild] and *Kyodo-kamiai Nihon Kyakuhonka Renmei* [Writers Guild of Japan].

2.5. REVIEW OF THE LAW ON INTERMEDIARY BUSINESS OF COPYRIGHT¹⁵

In 1963, a subcommittee of the Copyright Council began to review the Law on Intermediary Business along with the amendment process of the old copyright law. Although, in 1967, the subcommittee released a report which recommended that the Law on Intermediary Business should be amended so as to narrow its applicable scope, the government did not elect to amend the law at that time.

In 1994, the Collective Right Management Subcommittee of the Copyright Council (“Subcommittee”) began to review the law in order to respond to the changing environment for the exploitations of copyrighted works and

13. See the Law on Intermediary Business, *supra* note 3, Arts 6-9.

14. See *Text & Commentary*, *supra* note 1 at 4-5.

15. See *Text & Commentary*, *supra* note 1 at 21-26. See also Sakka, *supra* note 1 at 765.

to eliminate unnecessary government regulations. After the Subcommittee revealed its midterm summary for deliberation in 1997¹⁶ and received public comments, the final report (“Final Report”) was released in 2000.¹⁷

2.6. FINAL REPORT OF THE COLLECTIVE RIGHT MANAGEMENT SUBCOMMITTEE OF THE COPYRIGHT COUNCIL¹⁸

The Final Report first acknowledged that collective copyright management is beneficial to both copyright owners and the users of copyrighted works. Then, it listed the following five basic viewpoints for an analysis of collective copyright management:

- (1) respecting the intention of copyright owners;
- (2) responding to a changing situation for the forms of exploitation of copyrighted works;
- (3) (re-)establishing the credibility of both copyright owners and the users in the collective copyright management business;
- (4) securing transparency in the business; and
- (5) enhancing the capability to provide information relating to copyright.

In light of these basic viewpoints, the Subcommittee pointed out the following five problems concerning the Law on Intermediary Business:

- (1) the law could not respond to the changing situation for the forms of exploitation of copyrighted works because it limited the objects of the regulation to 4 types of copyrighted works, namely novels, scripts, lyrics and musical compositions;
- (2) a copyright owner was not entitled to his or her freedom of choice in a collective copyright management business organization because the number of Authorized Intermediaries per type of copyrighted work was strictly limited;
- (3) it was unable to introduce a dispute-settlement mechanism which would be necessary when the authorization system regarding tariffs was repealed as a result of easing the entry restrictions;
- (4) the law lacked provisions to secure transparency in the business of the Authorized Intermediary; and
- (5) the law giving broad discretion to the Commissioner did not conform to the trend towards deregulation.

16. See “Chosakuten Shingikai Kenri no Syuehu Kanri Shoh-jinkai Semmon-bukai Chukan Matome”, online: <www.crtc.or.jp/houkokuh11_7/h11_7.html> (last visited: 26 May 2005).

17. See “Chosakuten Shingikai Kenri no Syuehu Kanri Shoh-jinkai Houkokusho”, online: <www.crtc.or.jp/houkokuh12_1b/h12_1b.html> (last visited: 26 May 2005).

18. See also *Text & Commentary*, *supra* note 1 at 32-41.

The Subcommittee reached the conclusion that, in order to solve these problems, the Law on Intermediary Business had to be amended and a new legal infrastructure for the collective copyright management had to be developed immediately.

2.7. A BRIEF OUTLINE OF THE LAW ON MANAGEMENT BUSINESS OF COPYRIGHT AND NEIGHBOURING RIGHTS¹⁹

In 2000, the government enacted the Law on Management Business of Copyright and Neighbouring Rights²⁰ "Law of Management Business" based on the recommendations of the Subcommittee. The new law was promulgated on 9 November 2000 and entered into force on 1 October 2001 the same date the Law on Intermediary Business was repealed. A brief outline of the new law is as follows:

2.7.1. Regulated Business

The Law of Management Business regulates the management business of copyright and neighbouring rights, which is defined as a business administering copyright or neighbouring rights under a Management Commission Contract, except for the case where the parties of such a contract have a close mutual capital or personal relationship.²¹

The Management Commission Contract can be classified into two types.²² One is a trust contract under which one party transfers its copyright or neighbouring rights to the other party, entrusts the administration of such rights to the latter party, and vests in such party the right to authorize the use of the work ("work" meaning a copyrighted work, a performance, a sound recording, a broadcast or a cable broadcast) relating to such rights. The other type is the delegation contract under which one party vests in the other the right to act as an intermediary or its agent with regard to the authorization of the use of its work and leaves to such party the administration of the copyright or the neighbouring rights relating to such intermediation or agency. However, the Management Commission Contract does not include a contract under which the entrusting party reserves the right to determine the royalties for its work individually or the delegating party.

Note that while the Law on Intermediary Business covered only copyright and restricted the types of copyrighted works to be regulated, the Law of Management Business covers neighbouring rights as well as copyright and has no limitation on the types of copyrighted works.

19. See *Text & Commentary*, *supra* note 1 at 44-144. See also Sakka, *supra* note 1 at 767-777.

20. Chosakukentoh Kanri Jijyohoh, The Law No. 131 of 2001.

21. See the Law of Management Business, *supra* note 20, Art. 2(2).

22. See the Law of Management Business, *supra* note 20, Art. 2(1).

2.7.2. Registration

The Law of Management Business prohibits any organization from conducting a management business of copyright and neighbouring rights without registration with the Commissioner.²³ Only a legal person (including an unincorporated association) can register with the Commissioner.²⁴ This new law, unlike the Law on Intermediary Business, does not allow the registration of a natural person, while not only a public-interest corporation but also a commercial corporation is eligible for registration.

The items to be registered under the Law of Management Business include the names of an applicant and its officers, the names and locations of its offices, the types of works under its administration, the forms of exploitation on offer and so on and so forth.²⁵ A change in these items also needs to be registered.²⁶ The Commissioner cannot refuse an application for registration if the applicant satisfies all of the statutory eligibility requirements; the Commissioner's discretion is more narrow under this law.²⁷

2.7.3. Notification

An organization operating a management business of copyright and neighbouring rights registered with the Commissioner ("Registered Organization") has to notify the Commissioner when setting or changing the general conditions of contracts with rightsholders and the tariff for the use of the works under its administration.²⁸ The tariff enters into force 30 days after receipt by the Commissioner of such notification.²⁹

2.7.4. Other Major Regulations

A Registered Organization cannot refuse an application for the use of the works under its administration without satisfactory justification.³⁰ The Law of Management Business requires the organization to make an effort to provide the information relating to the works under its administration.³¹ Under this law, the rightsholders contracting with the Registered Organization may have access to the financial statements of the organization.³² Some Registered Organizations

23. See the Law of Management Business, *supra* note 20, Art. 3.

24. See the Law of Management Business, *supra* note 20, Art. 6(1).

25. See the Law of Management Business, *supra* note 20, Art. 4(1).

26. See the Law of Management Business, *supra* note 20, Art. 7(1).

27. See the Law of Management Business, *supra* note 20, Art. 6(1).

28. See the Law of Management Business, *supra* note 20, Arts 11 and 13.

29. See the Law of Management Business, *supra* note 20, Art. 14(1).

30. See the Law of Management Business, *supra* note 20, Art. 16.

31. See the Law of Management Business, *supra* note 20, Art. 17.

32. See the Law of Management Business, *supra* note 20, Art. 18.

which meet the statutory requirements of a Designated Organization (to be defined and discussed below) are regulated more than others.

2.7.5. Superintendence

With respect to the superintendence, the Commissioner has almost the same authority under the Law of Management Business as the Law on Intermediary Business. The Commissioner can require the Registered Organizations to report on their business and financial status.³³ Officials of the Commissioner can inspect offices of a Registered Organization, if necessary.³⁴ The Commissioner also has the power to order an improvement of business to protect the interest of the rightsholders and the users, and to revoke the registration in case of a violation of the law.³⁵

2.8. AFTER THE ENACTMENT OF THE LAW OF MANAGEMENT BUSINESS

The enactment of the Law of Management Business has substantially increased the number of the collective management organizations. While under the Law on Intermediary Business there were only 4 Authorized Intermediaries,³⁶ 36 Registered Organizations are now conducting business.³⁷ Furthermore, it should be noted that there is competition among the Registered Organizations. For example, under the Law on Intermediary Business, JASRAC was the sole Authorized Intermediary with respect to musical copyright administration. Now, a copyright owner has the freedom of choice among 13 Registered Organizations who all manage musical works.³⁸

3. GOVERNMENT OVERSIGHT OF COLLECTIVE MANAGEMENT ORGANIZATIONS IN JAPAN

3.1. CHANGE OF THE FOCAL POINT OF GOVERNMENT REGULATION

The repeal of the Law on Intermediary Business and the enactment of the Law of Management Business changed the focal point of government regulation.

33. See the Law of Management Business, *supra* note 20, Art. 19(1).

34. *Ibid.*

35. See the Law of Management Business, *supra* note 20, Arts 20 and 21.

36. As of April 2001. See *Text & Commentary*, *supra* note 1 at 4.

37. As of 17 July 2005. A Registered Organization can be searched through the website of the Agency for Cultural Affairs. Online: <www.bunka.go.jp/eijigyou/script/tpkenselect.asp> (last visited: 10 September 2005).

38. As of 17 July 2005. Since the scope of business may differ among these Registered Organizations, the number of choices may be less than 13 in a practical sense.

The former law focused on the regulation of entry into the collective copyright management business and gave the government broad discretions; under the latter, the government has less control of entry regulation and cannot refuse to register an applicant as a Registered Organization as long as it satisfies all of the statutory requirements. This change, as mentioned above, has led to an increase in the number of new entrants.

In the area of regulation of royalties the situation is different from the entry regulation. The Law of Management Business repealed the authorization system of tariffs under the Law on Intermediary Business and introduced the notification system as mentioned above. This, however, does not mean that Registered Organizations get freedom to set royalties without any regulation. It should be noted that the Law of Management Business provides four mechanisms to hold down royalties, some of which include government involvement. The mechanisms are as follows:³⁹

- (1) the tariff enters into force 30 days after receipt by the Commissioner of the statutory notification. If the Commissioner has concerns about a change in the tariff, it may extend such period up to 3 months. In the case of a Designated Organization, it also may extend up to a further 3 months;⁴⁰
- (2) the Registered Organization has to make an effort to hear opinions from user groups when it intends to set or change its tariff;⁴¹
- (3) the Registered Organization cannot charge a user higher fees than the royalties set in its tariff;⁴² and
- (4) the Commissioner can designate the Registered Organizations which meet the statutory requirements to be Designated Organizations.

Among these, the system of the Designated Organization was introduced considering the imbalance of bargaining power between collective management organizations and users.

3.2. THE SYSTEM OF THE DESIGNATED ORGANIZATION AND GOVERNMENT INVOLVEMENT

The Final Report pointed out the following characteristics of relations between collective management organizations and users:

- (1) the collective exercise of copyright or neighbouring rights gave the collective management organizations an advantage over the users

39. See Sakka, *supra* note 1 at 771-773.

40. See Law of Management Business, *supra* note 20, Art. 14.

41. See Law of Management Business, *supra* note 20, Art. 13(2).

42. See Law of Management Business, *supra* note 20, Art. 13(4).

because such organizations have the right to stop the use of the works concerned;

- (2) there are several factors that increase the advantage of the organizations. For example, the substitutability of the work is very low because different users have different tastes in the work. Furthermore, there is practically no chance for a plurality of organizations to simultaneously administer the right in the same work, especially in the case where the owner of such right leaves the exercise thereof (including the determination of royalties) to the discretion of the organization; and
- (3) there is every possibility that the organizations set the royalties in an arbitrary manner due to the lack of an objective standard such as cost-plus pricing.

The Final Report proposed establishing a system to set reasonable royalties for the purpose of protecting the users. In particular, it proposed adopting, as a statutory system, inter-institutional negotiations between the organizations and the user groups.⁴³

The system of the Designated Organization was established based on such a proposal and it aims to regulate the royalties in a modest manner. An outline of the system is as follows:

- (1) the Commissioner may designate a Registered Organization as a Designated Organization when two requirements are satisfied.⁴⁴ First, a Registered Organization should receive a considerable proportion of the total amount of royalties for a Specified Form received by all Registered Organizations. (For the purpose of this chapter, the "Specified Form" means the form of exploitation, such as a reproduction or a performance, specified by a type of work, such as a musical work or a sound recording.) Second, one of the following two conditions should be met:
- (a) the total amount of the royalties for the Specified Form received by all Registered Organizations reaches a considerable proportion of the total amount of the royalties for the Specified Form received by all people and organizations including all Registered Organizations, or
- (b) the tariff of the Registered Organization at issue is widely referred to as standard with respect to the Specified Form and there is a special need for the designation in order to promote the use of works;

43. Even under the Law on Intermediary Business, such inter-institutional negotiations had ever been held as a common practice before the authorization of tariffs.

44. See Law of Management Business, *supra* note 20, Art. 23(1).

- (2) the Designated Organization must begin inter-institutional negotiations on its tariff when the User Representative so requests.⁴⁵ The User Representative means the person or the organization whose ratio, with respect to the Specified Form, exceeds:

- (a) 50 per cent in both the User Ratio (the ratio of the number of users who delegate the negotiation to such person or are part of the organization, to the total number of users relating to the same Specified Form) and the Royalty Ratio (the ratio of the total amount of the royalties paid by such person or the users composing such organization with respect to the same Specified Form, to the total amount of the royalties paid by all users with respect to the same Specified Form),
- (b) 50 per cent either in the User Ratio provided, however, that no other person or organization exceeds 50 per cent in the Royalty Ratio, or in the Royalty Ratio provided, however, that no other person or organization exceeds 50 per cent in the User Ratio, or
- (c) 20 per cent, except for the above cases, in both the User Ratio and the Royalty Ratio provided, however, that no other person or organization exceeds or is expected to exceed either the User Ratio or the Royalty Ratio of such person or organization;⁴⁶
- (3) the Designated Organization is obliged to change its tariff based on a negotiated agreement;⁴⁷
- (4) the Commissioner may order the Designated Organization to begin negotiations with the User Representative in the case where such organization refuses the negotiations, and to resume the negotiations in the case where the negotiations break down;⁴⁸ and
- (5) the Designated Organization or the User Representative may ask the Commissioner to arbitrate between them when the negotiations finally break down despite the above Commissioner's order.⁴⁹ In arbitration, the Commissioner may order a change of the tariff, if necessary.

45. See the Law of Management Business, *supra* note 20, Art. 23(2). Inter-institutional negotiations may sometimes raise antitrust concerns. Although the law does not set down any specific provisions with respect to this point, the Japan Fair Trade Commission expressed its opinion that there is no antitrust issue with respect to the negotiations between a Designated Organization and a User Representative except under special circumstances. The special circumstances include that the User Representative prevents its member from negotiating independently and that it disturbs or restricts independent negotiations by the member with the Designated Organization. See *Text & Commentary, supra* note 1 at 121-122; Sakka, *supra* note 1 at 773-774.

46. See Chosakukentoh Kanri Jigyohoh Sekoh Kisoaku [the Ministerial Ordinance of the New Law], The Ordinance of MEXT (Ministry of Education, Culture, Sports, Science and Technology) No. 73 of 2001, Art. 21.

47. See Law of Management Business, *supra* note 20, Art. 23(5).

48. See Law of Management Business, *supra* note 20, Art. 23(4).

49. See Law of Management Business, *supra* note 20, Art. 24.

3.3. CURRENT STATUS OF GOVERNMENT INVOLVEMENT

3.3.1. Designation

As of 17 July 2005, the number of Registered Organizations is thirty-six. Among them, the following six organizations were designated as Designated Organizations:

3.3.1.1. JASRAC

JASRAC is the Designated Organization with respect to many Specified Forms of musical works. About 13,600 rightsholders (including 4,100 lyric writers, 3,000 composers, 4,300 song writers and 2,200 music publishers) entrust their rights to JASRAC.⁵⁰ The annual collection of royalties⁵¹ in the 2004 fiscal year reached JPY 110 billion.⁵²

3.3.1.2. *Writers Guild of Japan*⁵³

The Writers Guild of Japan administering the copyrights of scripts used for television programs etc. is the Designated Organization with respect to the use of these scripts for broadcasting etc. 1,684 scriptwriters entrust the administration of their rights to this guild.⁵⁴ The annual collection of royalties for the 2004 fiscal year reached JPY 2.6 billion.⁵⁵

3.3.1.3. *Japan Writers Guilds*⁵⁶

The Japan Writers Guild equally administering the copyrights of scripts is the Designated Organization with respect to the use of these scripts for the broadcasting of theatrical movies. About 459 scriptwriters entrust the administration of their rights to this guild.⁵⁷ The annual collection of royalties for the 2004 fiscal year was about JPY 575 million.⁵⁸

50. As of 1 April 2005. Online: <www.jasrac.or.jp/profile/outline/member.html> (last visited: 17 July 2005).
51. Please note that this amount covers all royalties collected by this organization as the Registered Organization.
52. Approximately EUR 800 million. Online: <www.jasrac.or.jp/profile/outline/detail.html> (last visited: 10 September 2005).
53. The data are based on the E-mail from the Writers Guild of Japan, dated 4 August 2005 (on file with author).
54. As of 31 March 2005.
55. Approximately EUR 18.8 million. See *supra* note 51.
56. The data are based on the document from the Japan Writers Guild, dated 9 August 2005 (on file with author).
57. As of 31 March 2004.
58. Approximately EUR 4.1 million. See *supra* note 51.

3.3.1.4. *Japan Reprographic Rights Center*⁵⁹

Shadan-hohjin Nihon Fushushaken Senta [Japan Reprographic Rights Center] (JRRC) is the Designated Organization with respect to the in-house reproduction of publications. About 12,000 rightsholders entrust the administration of their rights to the JRRC, which manages about 61,200 publication titles.⁶⁰ The annual collection of royalties for the 2004 fiscal year reached JPY 160 million.⁶¹

3.3.1.5. *Recording Industry Association of Japan*⁶²

Shadan-hohjin Nihon Recodo Kyokai [Recording Industry Association of Japan] (RIAJ) is the Designated Organization with respect to the rights of sound recording producers for the reproduction of sound recordings for broadcasting. RIAJ is also designated, under the Copyright Law (the Law No. 48 of 1970), as the sole organization which could collect, on behalf of the sound recording producers, the secondary use fees for broadcasting commercial sound recordings and the remuneration for the rentals thereof.

The annual collection of royalties for the 2004 fiscal year reached JPY 1 billion and the total of such royalties, fees and remuneration in the 2004 fiscal year reached JPY 7.9 billion.⁶³

3.3.1.6. *Japan Council of Performers' Organizations*⁶⁴

Shadan-hohjin Nihon Geimo Jitsunenka Dantai Kyogi-kai [Japan Council of Performers' Organizations] (GEIDANKYO) is the Designated Organization with respect to the rights of performers for the reproduction of sound recordings for broadcasting. It is also designated, under the Copyright Law, as the sole organization which could collect, on behalf of the performers, the secondary use fees for broadcasting commercial sound recordings and the remuneration for the rentals thereof.

The annual collection of royalties for the 2004 fiscal year reached JPY 8.7 billion and the total of such royalties, fees, and remuneration in the 2004 fiscal year was around JPY 75 billion.

59. See the Business Report of JRRC, online: <www.jrrc.or.jp/disclosure/houkoku.html> (last visited: 12 September 2005).
60. As of 31 March 2005.
61. Approximately EUR 1.2 million. See *supra* note 51.
62. See "The Business Report of 2004 fiscal year" (2005), No. 548 The Record 5 at 7-8. Online: <www.riaj.or.jp/issue/record/2005/200507.pdf> (last visited: 12 September 2005); Document from RIAJ (on file with author).
63. Approximately EUR 57 million.
64. The data are based on the E-mail from GEIDANKYO, dated 29 August 2005 (on file with author).
65. Approximately EUR 62 million (see *supra* note 51) and EUR 535 million.

3.3.2. Revocation

One Registered Organization had its registration revoked for failing to notify the Commissioner of its tariff for more than one year from the date of registration. Due to that fact, the Commissioner found that it had never begun the management business of copyright and neighbouring rights.

4. CURRENT AND EMERGING CHALLENGES OF COLLECTIVE MANAGEMENT IN JAPAN

4.1. REVIEW OF THE NEW LAW

As just 4 years have passed since Japan drastically changed its legal system relating to the collective management, it might be premature to draw any firm conclusions. It will take some time to ascertain whether or not the new system works well.

Subject to Article 7 of the supplementary provision of the Law of Management Business the Contract and Distribution Subcommittee of the Copyright Committee of the Cultural Council began to examine the necessity of revising the law in 2004. The subcommittee invited public comments in the context of its review process. Most comments received by the subcommittee do not suggest further easing the regulation; on the contrary, some comments from users propose even tightening the regulation.⁶⁶ For example, some comments demand consolidating the plurality of Registered Organizations into one, especially in the area of the reproduction use of publications and the performance use of musical works. There are also comments which demand increasing the statutory eligibility requirements or more carefully examining the eligibility of an applicant in order to exclude organizations which are inappropriate for the collective management business, and so-called "phantom organizations" which are not conducting any business. Some other comments demand that the law should oblige Registered Organizations to hear the opinions of the users or the User Representative when such organizations intend to change their tariffs.

As of 15 May 2005, the subcommittee summed up the discussion and posted a draft report on the Web Site of the Agency for Cultural Affairs.⁶⁷ The draft report said that no issue required an immediate amendment of the New Law of Management Business. It also pointed out that continual review, especially based on a fact-finding survey, was necessary.

66. See "Chosakukentoh Kanri Jigyoutoh no Minaosh ni kansuru Houkokusho Ann" [Draft Report of the Subcommittee], online: <www.mext.go.jp/b_menu/shingi/bunka/gijyokai/014/05051102/001.htm> (last visited: 10 September 2005).

67. *Ibid.*

4.2. BEYOND COLLECTIVE MANAGEMENT

4.2.1. Advantages of Collective Management⁶⁸

The collective management business was "invented" as a system to realize easy and inexpensive clearance of copyright and neighbouring rights. It offers a number of advantages for both rightsholders and users. Without collective management, rightsholders themselves would need to invest a good deal of time and money to form contracts with the users of their works, and to police infringements and file suits against infringers. Now they can leave such troublesome issues to collective management organizations. With respect to users, the effort of looking for the rightsholders to get licenses from is eased greatly. In most cases users need not negotiate licensing terms, including royalties, because the collective management organizations usually offer standard terms and conditions.

4.2.2. The Impact of Digital Technology and the Contract Approach

Digital technology and the Internet are changing the situation surrounding collective management. Prior to these, large-scale facilities such as a rotary press or a parabolic satellite antenna were needed to distribute works worldwide. While everyone could create a work, only professionals who could access their means of dissemination could release their works publicly.⁶⁹ It was therefore sufficient for collective management organizations to cover the professionals. Digital technology and the Internet, however, narrow the differences between the professionals and amateurs. The works created by amateurs are also widely used on the Internet so long as they are attractive.⁷⁰ Here, collective management organizations are required to extend their business from the professionals to the amateurs. It is possible for them to do so, however, the concept of efficiency throws doubt on limitless expansion because such expansion of coverage will raise administration costs and lower the efficiency of these organizations.⁷¹

Ironically, the same digital technology proposes an option to handle this situation. In the analogue era, collective management was the sole approach for efficient and practical right clearance of works used widely. In the digital era, however, it is not. By utilizing digital technology, such as digital

68. See generally Sakka, *supra* note 1 at 760.

69. See K. Okamoto, *Daredemo Wakaru Chosakukentō* [Easy to Understand Copyright] (Tokyo: Zen-nihon Shakai Kyohiku Rengohai, 2005), at 16–17.

70. *Ibid.* See also T. Ueno, "ECMS ni okeru Chosakukentō oyobi Chosakusyujinkakuten ni kansuru Ichikohsatsu [A Consideration of Copyrights and Moral Rights in ECMS], in *Critc Shohi Ronbunshū* [The Collection of Critc Prize Papers] (Tokyo: Copyright Research and Information Center, 1997), at 20. An English version is available online: <www.cric.or.jp/cric_e/cujj/cujj99/cujj99_3.html> (last visited: 12 September 2005).

71. See Okamoto, *supra* note 69 at 324 (pointing out the difficulty of organizations collectively managing photographs in extending its coverage from professionals to amateurs).

right management systems (DRM), and the electronic means of payment, it is possible for rightsholders and users to directly form contracts through the Internet.⁷² In other words, the digital technology makes it efficient and practical to clear rights by contract, and complements the collective management approach. We may call this the contract approach as compared with the collective management approach.

4.2.3. Merit of the Contract Approach

The contract approach has another merit.

Historically, the development of new technology such as the photograph, the phonograph, film, etc., triggered the creation of new business and the "invention" of new rights to protect such new businesses.⁷³ This type of correction has been evident since the invention of type-printing by Gutenberg. The development of digital technology, however, has changed the situation.⁷⁴ While digital technology is spreading throughout our daily lives and creating various new business, it will raise various and complex legal issues including copyright issues.⁷⁵ Under such a situation, it is not feasible or even reasonable for us to go about resolving such legal issues by a legislative approach, or by making new laws and creating new rights to solve the problems.⁷⁶ The legislative approach will take a lot of time because solving the complex issues will require a complex legal scheme, which itself will create new complex issues.

As we face the legal issues raised by digital technology, we have to pay attention to the contract approach because contracts have long functioned as a basic nexus between copyright and business.⁷⁷

4.2.4. Execution of the Contract Approach

For the contract approach to work well, three conditions must be satisfied. First, we have to develop marketplaces where rightsholders can offer their works and users can get licenses for the use of the works.⁷⁸

72. See Z. Kitagawa, "Copymart – For activation of Copyrights as a Private Right", in *Festschrift für Andreas Heldrich zum 70. Geburtstag* (Munich: Back, 2005), 242 [Kitagawa [2005]].
73. See Z. Kitagawa, "Copymart as Legal Infrastructure of Information Society", in Z. Kitagawa, *Copymart: The Product and its Prospects – Proceedings of the Berlin Symposium (September 5–6, 2002)* (Kyoto: International Institute for Advanced Studies, 2003), at 57 [Kitagawa [2003a]].
74. See Kitagawa [2005], *supra* note 72 at 238.
75. See generally Kitagawa [2005], *supra* note 72 at 238–239.
76. See Kitagawa [2003a], *supra* note 73 at 58.
77. See Z. Kitagawa, *Copymart* (Tokyo: Yuhikaku, 2003), at 72–73 [Kitagawa [2003b]].
78. See Okamoto, *supra* note 69 at 324.

Second, we have to change the works into "goods" which are suitable for transactions in those marketplaces.⁷⁹ Works in the digital world are not suitable for the transactions because they are defenseless against unlawful access and illegal reproduction. Digital technology such as encryption, watermarks, etc., can protect the works against such illegal uses.⁸⁰

Third, license terms should be embedded into the "goods" just as price tags are put on usual goods in the marketplace.⁸¹ The terms embedded into the "goods" would make it easy for rightsholders and users to form contracts directly at the marketplace.

4.2.5. Copymart⁸²

Copymart advocated by Professor Zentaro Kitagawa is typical of the legal infrastructure which realizes the contract approach and satisfies the above 3 conditions.⁸³

As shown in Figure 1, Copymart consists of two databases (the Copy Market and the Copyright Market) and three parties (the rightsholders, the customers (the users) and the Copymart holder).⁸⁴ The rightsholder registers his or her works with the Copy Market and also registers the corresponding copyright information including licensing terms with the Copyright Market. The users search through the Copyright Market for the works which they want to use and get the copyright information, including licensing terms. The licensing terms can also be directly negotiated between the users and the rightsholder through the Copymart. When they agree on the terms, a contract between them is formed through the Copymart. Then the users obtain the works from the Copy Market and the rightsholder receives the royalties for the works.

79. See Kitagawa [2003a], *supra* note 73 at 59–60; Kitagawa [2005], *supra* note 72 at 243.
80. See Kitagawa [2003b], *supra* note 77 at 88–89.
81. See Kitagawa [2005], *supra* note 72 at 243.
82. The word "Copymart" was first used in Z. Kitagawa, "Copymart: A New Concept – An Application of Digital Technology to the Collective Management of Copyright", in *WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights* (Geneva: WIPO, 1993), at 139–147.
83. Copymart has often been introduced as One-Stop-Shops. See Report of the U.S. Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure* (Lehmann Report) (Washington D.C., 1995), online: <www.medial.org/Dig_Library/Old_MEDICI_docs/Moundos/wg3/wg3.htm#Top> (last visited: 12 September 2005). For more detail, see Kitagawa [2005], *supra* note 73 at 241, fn 13.
84. See Kitagawa [2005], *supra* note 73 at 244–245; Z. Kitagawa, "The Potentials of Copymart – An Introduction and Outline" in Z. Kitagawa, *Copymart: The Product and its Prospects – Proceedings of the Berlin Symposium (September 5–6, 2002)* (Kyoto: International Institute for Advanced Studies, 2003), at 23–24 [Kitagawa [2003c]].

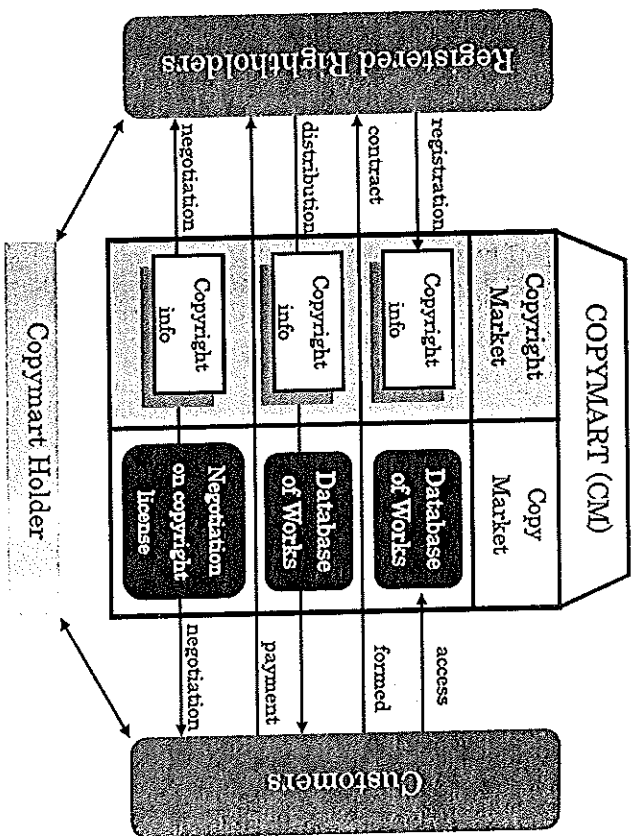


Figure 185

As shown in the above transaction scheme, the Copymart holder does not become a party to the transaction.⁸⁶ The Copymart holder establishes and operates the marketplace as the owner of a flea market does. Anyone, even the rightsholders and the users, may be Copymart holders. This means that various Copymarts will be launched by various people or companies. Since there is no multi-registration restriction imposed on the rightsholders, they may register their works with several Copymarts simultaneously, even if on different terms and thus competition among the Copymarts will be accelerated and the users will be entitled to their freedom of choice.⁸⁷

85. Online: <www.copymart.jp/em/about_e.html> (last visited: 12 September 2005).

86. Since the Copymart holder does not become a party to a contract formed through Copymart, the Copymart holder does not fall within the organization conducting the management business of copyright and neighbouring rights under the Law of Management Business. Furthermore, under the legal model of Copymart, the owner of copyright or neighbouring rights reserves the right to determine the licensing terms including royalties. The law is not applicable to a contract with such reservation. See Kitagawa [2003b], *supra* note 77 at 118-119 and 228-229.

87. See Kitagawa [2003c], *supra* note 84 at 24.

4.2.6. Copymart and Collective Management

The advantages of Copymart over the collective management approach can be summarized into the following two points. First, Copymart is free from an umbrella license problem or a sampling survey problem.⁸⁸ In some cases, a collective management organization adopts an umbrella license instead of an individual license in order to avoid a large transaction cost. For example, JASRAC usually gives a user an individual license, however, it vests an umbrella license in a broadcast station and receives royalties calculated not by the actual use of musical works but by the annual income of such broadcast station. In the case of the umbrella license, a collective management organization has to rely on a sampling survey in order to distribute the royalties received to rightsholders. With the sampling survey method, the more accurate the results one requires, the more costs one will incur. Since Copymart realizes individual licenses efficiently, however, it does not have this problem.

Second, Copymart enables the rightsholder to engage in price discrimination, at least in part. From an economic viewpoint, price discrimination has merit because it may reduce social welfare losses.⁸⁹ Under the collective management approach, however, it is not feasible to set prices one by one considering the form of exploitation and the nature of each work because such individual pricing ruins the efficiency of the collective management.⁹⁰ Since Copymart implements an individual transaction system, the rightsholders, if they want, can engage in price discrimination very easily.⁹¹

Although Copymart has potential as discussed above, currently the collective management approach is superior. While a large volume and wide variety of works can be obtained now through collective management organizations, it will take some time for Copymart to catch up with such organizations in those regards.

In the future, the relationship between Copymart and the collective management system will be somewhat complex. On the one hand, Copymart will reduce the roles of collective management organizations which have no authority for the independent license and vest the umbrella license in the users.⁹² On the other hand, Copymart will co-exist with some of the collective management organizations because of its flexibility. Under the legal model of Copymart as discussed above, anyone is free to launch his or her own Copymart and the Copymart holders are not prohibited from acting on behalf of the rightsholders (or users).⁹³ Therefore, collective management organizations which are

88. See Kitagawa [2003b], *supra* note 77 at 119; Ueno, *supra* note 70 at 24-25.

89. See W. Fisher, "Property and Contract on the Internet" (1998), 73 *Chicago-Kent Law Review* 1203 at 1234-1241.

90. See Ueno, *supra* note 72 at 24.

91. See Kitagawa [2003b], *supra* note 77 at 224.

92. See Kitagawa [2003a], *supra* note 75 at 63.

93. See Kitagawa [2003a], *supra* note 75 at 63.

authorized for the independent license may operate their own Copymarts.⁹⁴ They may also register the rights under their administration with Copymart(s) operated by themselves or others.

5. CONCLUSION

There were three major turning points in the history of the collective management in Japan. Whenever a turning point came, the nature of the collective management system changed drastically. And now, Japan is facing a new turning point – the digital revolution. The development of the contract approach to copyright management, including Copymart, will have an important impact on the future of the collective management. It is uncertain when and how the collective management system will change. It is certain, however, that change cannot be avoided in the near future.

Chapter XII Collective Management in Asia

*Ang Kwee Tiang**

1. INTRODUCTION

Asia is huge, both geographically and demographically. It contains some 3.3 billion of the world's population, and is a diverse hotchpotch of ethnic, cultural, social, economic and political interests and conditions. Several factors have greatly influenced the development of copyright and collective management in Asia. The first factor is historical, more specifically, colonization. British colonization brought its system of copyright to countries such as Brunei, Hong Kong, India, Myanmar, Malaysia, Pakistan, Singapore and Sri Lanka; the Dutch introduced its copyright system to Indonesia; French influence is perceptible in Vietnam; Portuguese law is found in Macau; and the American copyright system exerts itself in the Philippines. These colonial influences exist to this day and are not restricted to the copyright system alone but permeate into many aspects of the legal and administrative life in this region.

The second factor is political ideology. The manner in which copyright systems developed in Asia could also be clearly delineated between those countries that embraced capitalism *vis-à-vis* those countries that adopted socialism or communism. Broadly speaking, those countries that embraced communism had a prolonged period in the 20th century in which there was little emphasis given to copyright protection, and it was only in the last decade that a fresh impetus for protection emerged in these countries.

A third and no less important factor influencing the regional copyright scene is the level of economic development. Of the 3.3 billion people in Asia, 89.7 per cent (2.96 billion) have average annual incomes below USD 900 with approximately half of these, or 1.44 billion people with average annual incomes

* LL.B. (Honours), National University of Singapore, LL. M. (Singapore).

⁹⁴ See Kitagawa [2003b], *supra* note 77 at 119–120.

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94. See Kitagawa [2003b], *supra* note 77 at 119–120.

below USD 500.¹ At the other end of the scale, only 4.7 per cent of the Asian population have average annual incomes over USD 20,000. These figures are important in the context, as there is a correlation between a country's economic development and the level of copyright protection, as well as the viability of collective management organizations (CMOs). Broadly speaking it is more difficult to enforce copyright protection in a country with a low level of economic development.

The fourth factor is the TRIPS Agreement (TRIPS). It would be no exaggeration to generalize that the legislative activities in the field of copyright, which took place in the region particularly in the last decade, may be attributed almost singularly to TRIPS.

Macro factors aside, there are also features that are unique to the Asian creative industries.

1.1. INDUSTRY INFRASTRUCTURE

Many Asian composers deal directly with record companies. Hence, if a composer wanted to have a song recorded and distributed, he or she went directly to a record company and was normally paid a lump sum for the works. With the absence of a publishing infrastructure, many copyright rights are sold to recording companies and the full benefits of collective management are thus unlikely to be enjoyed by the creators. Because of this practice, it has often proven problematic for new CMOs to persuade recording companies to agree to the distribution of 50 per cent of the public performance royalties back to the composers. This has been adversely affecting the proper growth of CMOs in the region. In many instances, local creators, being used to the existing system of selling their rights to the recording companies, or working as employed staff of such companies, find it difficult to break from the system to entrust new rights to a CMO. The foregoing difficulty is compounded by the fact that it normally takes quite a number of years before any meaningful distribution of royalties may be made by a CMO. This also exacerbates the reluctance of many Asian rightsholders from investing or participating in the formation of a CMO and inhibits the development of collective management in the region. In several Asian countries, the first task in the creation of a CMO was in fact to convince copyright holders of the benefits of collective management and to persuade them that they have an economic right worth protecting.

1. Dollar amounts are in USD. The latest statistics compiled by the Asian Development Bank for 2003 showed that 1.85 billion or 57% of Asians still live on less than USD 2 a day. The number of people living in extreme poverty – less than USD 1 a day – was estimated at 621 million or 19.3% of the population. About 93% of those in the latter category lived in India (327 million), South Asian countries apart from India (77 million) and China (173 million).

1.2. LATE ARRIVAL OF COLLECTIVE MANAGEMENT OF COPYRIGHT TO ASIA

Generally speaking, the concept of collective management of copyright was relatively late in coming to Asia. The earliest collective created in the region was JASRAC,² established in Japan in 1939,³ administering the rights in musical works. By contrast, in America or Western Europe, some CMOs date back to the mid 1800s. Moreover, it has to be pointed out that the early establishment of some of the Asian CMOs were, in a number of instances, only on paper. For example, the CMOs in South Korea and the Philippines were not fully operational until 1987 and 1992 respectively.

That said, the recent growth of new and rejuvenated CMOs in Asia has been quite encouraging, as gross incomes from CMOs in the field of music have increased by 529 per cent from USD 11.6 million in 1990 to USD 73 million 2003.

2. THE COLLECTIVE MANAGEMENT OF RIGHTS IN ASIA

2.1. THE ASEAN COUNTRIES

2.1.1. Singapore

The current Singapore Copyright Act,⁴ first enacted in 1987, is largely based on the 1968 Australian Act, which in turn was based on the 1956 UK Act. Singapore is a signatory to the Berne Convention, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

2.1.1.1. *The collective management of rights in musical works in Singapore*

In Singapore, the CMO in the field of musical works is called the Composers and Authors Society of Singapore Limited (COMPASS). It collectively administers the public performance right and, to a limited extent, reproduction rights

2. The Japanese Society of Rights for Authors, Composers and Publishers. See the chapter on Japan.
3. Outside Japan, the first collecting society is Phonographic Performance Limited, an organization administering the public performance rights in sound recordings in India.
4. Copyright Act Revised Edition No. 2 of 1988, *Government Gazette*, 20 February 1987, No. 3. The Singapore Government did not accede to any of the international copyright conventions when this Act was passed. Instead, it legislated to provide bilateral protection to copyright works from the UK (which originally excluded Hong Kong but was subsequently amended to include), and the US. Singapore acceded to the Berne Convention only on 21 December 1998, more than a decade after enacting its copyright law. Prior to 1987, the 1911 UK Copyright Act applied in Singapore.

as well.⁵ COMPASS was legally formed in 1987 through the joint efforts of the Performing Rights Society (UK) and the International Confederation of Societies of Authors and Composers (CISAC), but became operational only in 1991. Due to the fact that Singapore was a British colony until 1963,⁶ PRS had operated a licensing agency in Singapore since 1935.⁷ For a period of time, the PRS agent was a Singaporean law firm. Collections were not insubstantial:⁸ some SGD 150,000 were collected in 1979. A Singapore branch of the PRS was established around 1982. By 1988, gross income collected by the PRS Agency had reached nearly SGD 1 million.

COMPASS did not have an easy birth. In fact, as far back as May 1980, a feasibility study had proposed the creation of the Composers Association of Singapore Limited. However, due to the weak copyright situation at the time⁹ as well as the perceived lack of support by the Singapore government, the project was not advanced. And while COMPASS was eventually incorporated in 1987, it nevertheless remained dormant until 1989. Two events conspired to bring about this delay. First, there were issues raised by major music publishers/recording companies¹⁰ who, *inter alia*, indicated that they would only join COMPASS if they were appointed to the Board of Directors and the provisions concerning the management of mechanical rights by COMPASS (contained in the Articles) were deleted. Second, the negotiations for the payment of royalties by the broadcasting station were problematic. The 1987 Copyright Act had abolished the exemption provided to the then government-owned Singapore Broadcasting Corporation (SBC) from payment of broadcast royalties. Thus, in September 1987, the PRS Singapore Agency started negotiations with SBC to license it for the use of copyright works in its programming. SBC insisted on paying what PRS felt was an unreasonably low sum of royalties¹¹ and the

5. The decision to commence on the collective management of this right was taken in September 1995.
6. Singapore obtained self-government in 1959, became a state of Malaysia in 1963, and an independent republic in 1965.
7. The agency also issued a limited number of licenses to users in Malaysia (such as the one issued to Rediffusion, a cable broadcasting company operating both in Malaysia and Singapore at that time and Malaysian Airline System, the national airline of Malaysia) and Brunei. It also had a number of Malaysian composers as members.
8. Particularly given the fact that the then existing law was the UK 1911 Copyright Act, that Singapore was not signatory to any of the international copyright conventions, and that the sole government broadcaster, Radio Television Singapore, which used to pay some SGD 25,000 (approximately EUR 12,500 as of November 2005) in royalties, became exempt from payment of royalties when Parliament enacted the Copyright (Gramophone Record and Government Broadcasting) Act in 1969. This exemption was continued by statutory provision contained in the law that created the Singapore Broadcasting Corporation as a statutory body in 1980.
9. The applicable copyright law then was the 1911 UK Copyright Act.
10. At that time, the business of music publishing in Singapore was essentially subsumed into the operations of sound recording companies.
11. It initially proposed a maximum sum, which was less than SGD 12,000 per annum as blanket license fee for usage of all local and Anglo-American musical works in all SBC

matter culminated in a referral to the Copyright Tribunal.¹² Due to these negotiations and the subsequent litigation, PRS did not transfer the international repertory of works that was entrusted to it for administration in Singapore to COMPASS until the decision of the Tribunal in June 1991.

Although the Tribunal decided that it was unable to accept SBC's scheme as a reasonable method of placing a value on the broadcast rights of all works in the PRS repertory, and it accepted the percentage principle as the proper method of arriving at a license fee, the actual tariff itself was not quite what rights holders would have liked. The Tribunal increased the number of bands in the PRS license scheme from three to four, and also lowered the percentage payable as follows:

% of music used in programming	Television	Radio
Up to 25% of music	0.1%	0.3%
Between 26–50% of music	0.2%	0.6%
Between 51–75% of music	0.3%	0.9%
Above 76% of music	0.4%	1.2%

Because of this decision, broadcast incomes at COMPASS represent a comparatively low percentage of its overall revenues. In 1992, for example, it represented only 13 per cent.¹³ Compare this against the broadcast incomes of MUST in Taiwan, which accounted for 49.3 per cent of its gross revenues in 2004, and that of CASH in Hong Kong, which represented 56.3 per cent in 2004.

With the conclusion of the litigation, the transfer of operations from PRS to COMPASS was completed. It embraced more than just the international repertory. All existing PRS staff, licenses, and furniture and fixtures were subrogated and Singaporean creators who were PRS members were also asked to transfer their membership to COMPASS made retroactive to 1 January 1990. COMPASS is a public company limited by guarantee. Its Board comprises 14 directors, of which 12 are elected from among members,¹⁴ being

- radio and television productions for a period of 2 years. SBC's final offer before referring the matter to the Tribunal was SGD 66,000. PRS counter offered with a sliding percentage scheme from 0.33% to 1.33% for television and 0.67% to 2.67% for radio, depending on extent of music used.
12. This was the first ever reference to the Copyright Tribunal that was formed under the 1987 Act. An interesting episode occurred at that time. Due to a lapse, no registry of the Tribunal was officially published in the gazette so that when the parties wanted to make the reference, they could not do so. SBC filed the reference under Section 163(2) on 24 January 1990 against PRS. COMPASS applied for and was joined as an interested party to the Tribunal proceeding.
13. In 2004, broadcast incomes represented 12.2% of total revenues. Of course, there are more radio and television broadcasting stations both in Taiwan and in Hong Kong.
14. The members who are elected as directors must be citizens of Singapore.

six writer-members and publisher-members respectively, and one independent director. The Chief Executive Officer makes up the fourteenth member of the Board.

On admission to COMPASS membership, each member is obligated to assign the performing right in his works to the Society, which includes an assignment of rights "which now belongs to or shall hereafter be acquired by or be or become vested in the assignor".¹⁵

Since its eventful beginnings, COMPASS has embarked on a path of sustained growth. Between 1991 and 2004, its gross revenues grew by just over 550 per cent from SGD 1.4 million to SGD 9.2 million respectively while expenses fell from 34 per cent to 16.5 per cent over the same period.

One key measure of any successful CMO is the efficiency and accuracy of its distributions of royalties. In its initial years, COMPASS had entered into a technical services agreement with CASH¹⁶ to carry out the distributions of royalties due to foreign rightsholders.¹⁷ By 1993, COMPASS had completed the computerization of its operations and embarked on its own distributions of royalties due to both local and foreign rightsholders.

2.1.1.2. *Collective management of rights in sound recordings in Singapore*

Singapore copyright law does not accord any public performance, broadcast or cable transmission rights¹⁸ in sound recordings. Thus, the CMO administering the rights in sound recordings, RIPS¹⁹ relies on the rights in music videos (treated as cinematographic films)²⁰ to support its licensing activities.²¹

The set up of RIPS is quite distinct from that of COMPASS. It is a private shareholding company, wholly owned by the Recording Industry Association of Singapore (RIAS),²² an association registered under the Registrar of Societies. All six directors of RIAS are also directors of RIPS, with the CEO of RIPS

15. Deed of Assignment of COMPASS, clause 2.
16. The Composers and Authors Society of Hong Kong Limited.
17. It carried out its first distribution to local members in 1992.
18. However, recent amendments (Section 82(1)(d)) have introduced an exclusive right to make available to the public a sound recording by means of, or as a part of a digital audio transmission. Section 82(3) specifically provides that the term make available does not include the causing of a sound recording to be heard, otherwise than by means of or as part of a digital audio transmission.
19. RIPS stands for the Recording Industry Performance Singapore Private Limited.
20. Section 83 provides *inter alia* that copyright in relation to a cinematograph film is the exclusive right to ... (b) cause the film ... to be seen in public; (c) communicate the film to the public.
21. Prior to 1 July 1998, this function was administered by the SPVA, the Singapore Phonogram and Videogram Association, now known as the Recording Industry Association of Singapore (RIAS).
22. There are two main categories of RIAS membership, namely associate members, with no voting rights, and full members, which are in turn divided into three categories based on

completing the RIPS Board of Directors. Elected directors hold office for two-year terms. Recording companies must first become a member of RIAS before RIPS can administer the public performance right in music videos. Thereafter, the recording company enters into a non-exclusive contractual agreement with RIPS to empower the latter to exercise the rights with respect to the public performance of karaoke and/or music videos, and reproduction of the aforementioned on karaoke-on-demand computers. Given its rather restricted rights, the annual collections of RIPS, which have grown threefold in the last decade from about SGD 0.75 million in 1995 to over SGD 3.1 million in 2004, are noteworthy.

Before an annual distribution is made, deductions for the operating expenses of RIPS and RIAS, which would include, among other things, the costs of anti-piracy operations are factored in. Additionally, a stipend is paid to the IFPI²³ in London and its regional headquarters in Hong Kong. Distribution is decided by the Board of Directors, who take into account factors such as record sales, airplay and cue-sheets provided by the television stations.

2.1.1.3. *Collective management of reprographic rights in Singapore*

Under Section 52,²⁴ educational institutions in Singapore have a compulsory license to make copies of works under certain conditions. Specifically, Section 52(1) provides that an educational institution shall pay to the copyright owner an equitable remuneration for the making of copies as is agreed upon between the owner and the institution or, in default of agreement, as determined by the Copyright Tribunal on the application of either party. Although this provision was introduced back in 1987, the sole CMO in the field of reprographic rights in Singapore, the Copyright Licensing and Administration Society of Singapore Limited (CLASS) was established only in 1999²⁵ and commenced operations in 2000 with one employee. It was started with funding from IFRRO²⁶ and local book publishers. Despite the provisions of the compulsory license requiring the educational institutions in Singapore to pay equitable remuneration, negotiations with the main higher educational institutions took another two years and no royalty payments were made by any Singaporean educational institution to CLASS until 2002. Indeed, it was INSEAD that made the first payment of royalties to CLASS. This delay in royalty payment necessitated another round of fundraising by CLASS.

23. annual subscription fees which then determines the number of votes that each full paying member has in RIAS. See <www.ifpi.org>
24. Singapore Copyright Act, Ch. 63, Act 2 of 1987, Revised Edition 1988.
25. Incorporated on 25 September 1999. However, discussions to create a Singapore RRO could be traced back to 1995: IFRRO, having entered into an arrangement with the CISAC Asia Pacific Regional Office, developed a two-year business plan, which, *inter alia*, required matching funds to be provided by local book publishers and IFRRO.
26. See <www.ifrro.org>.

Like COMPASS, CLASS is a public company limited by guarantee.²⁷ Membership in CLASS is open to all persons who have appointed it their agent²⁸ for the reproduction right in some or all of their works.²⁹ There are two classes of members, namely, author and publisher members. Every member is entitled to one vote.³⁰

There are not less than three, and not more than ten Directors of CLASS,³¹ each elected to a two-years term.³² The Board is composed of three author directors and publisher directors, and three independent directors appointed by the elected members of the Board. Quorum is three, with at least one director from each category present.

There was no licensing income earned until the first license agreement with INSEAD was secured in 2002. Total revenues for that year were SGD 169,000 against expenses of over SGD 175,000. By 2004, CLASS has secured license agreements with all government funded and independent schools, junior colleges, universities and polytechnics. Total revenues earned up to 2004 were slightly over SGD 1.6 million with expenses consuming almost 50 per cent of it.

2.1.2. Malaysia

Like Singapore, Malaysia was a British colony and the 1911 UK Copyright Act applied until independence.³³ Despite gaining independence, the 1956 UK Copyright Act was adopted as the copyright law of Malaysia and it was only in 1969 that Malaysia enacted its own copyright legislation, which was then replaced by the current Act, passed in 1987.³⁴

The Malaysian Copyright Act was further amended on 15 August 2000 to bring the legislation in line with its TRIPS obligations by the introduction of performers' rights. Also, an equitable remuneration right to the performer for the public performance or broadcast or communication to the public was introduced.

2.1.2.1. Collective management of musical works in Malaysia

Efforts to form a CMO for musical works stretched back to 1986 when CISAC commenced discussions with interested parties in Malaysia against the back-drop of the impending 1987 Copyright Act. In the initial stages, the constitution

27. Each member's guarantee is SGD 1.
28. This arrangement differs from that of COMPASS where members assign their copyright to the organization.
29. Articles of Association of CLASS, Art. 4(b).
30. *Ibid.*, Art. 26.
31. *Ibid.*, Art. 33.
32. *Ibid.*, Art. 35.
33. 31 August 1957.
34. Copyright Act 1987 No. 332. *Gazette of Malaysia*, 21 May 1987.

of CASH was used as the basis for forming the Malaysian organization.³⁵ There were, however, certain substantive modifications, in particular, the role played by PRS in CASH³⁶ was agreed to be substituted by CISAC with the further modification that the CISAC representatives would not have any voting rights, unlike the PRS representatives on the CASH Board.

Despite the early and promising start, the unity soon disintegrated such that by early 1988, the music publishers had decided to form their own organization called Malaysian Performing Rights Services Berhad (MPRS) while the writers had founded the Malaysian Authors, Composers and Publishers Berhad (MAS-RAC).³⁷ Given the unhealthy circumstances, CISAC was requested to step in to attempt to bring both groups together. Meetings were held throughout 1988 in this regard and it was agreed that a totally new legal vehicle would be incorporated. However, MASRAC representatives quickly developed second thoughts and backed out of the venture. Subsequently, due to certain representations that were made to the Malaysian government, a meeting was held between CISAC and the Secretary-Generals³⁸ of the Ministry of Trade and Industry in order to explain the situation to the government and to obtain their blessings for continuation of the formative work without the MASRAC representatives. Given this, efforts at forming a new CMO under the umbrella of CISAC continued. Late in 1988, CISAC offered to organize an interest free³⁹ loan of MYR 100,000⁴⁰ if the local music publishers would match it dollar-for-dollar. With the agreement on financing cobbled together, MACP⁴¹ was officially incorporated as a public company limited by guarantee on 7 September 1989. Both the first two MACP employees, the General Manager and the Licensing Manager, attended a CISAC-funded training at CASH soon after commencement of their employment.

Perhaps as compensation for its rather difficult establishment, MACP's growth in its initial years under its dynamic general manager could be described as truly inspiring. By the end of its first year of operations, its royalty

35. The original name for the organization was CIPITA, a Malay acronym for the Composers, Authors and Publishers Association of Malaysia.
36. See the section on Hong Kong *below*.
37. MASRAC was incorporated in October 1987.
38. The Secretary-General, Dato' Ahmad Sarji, was subsequently appointed as Secretary to the Malaysian Cabinet.
39. An interest rate of 5% per annum for three years was subsequently applied as one of the publishers was prohibited from providing interest free loans. In lieu of interest, CISAC requested MACP to set aside the equivalent of the interest amount, that is, MYR 15,000 (approximately EUR 3,500 as of November 2005) to establish a music fund within 30 days of the repayment date of the loan.
40. Approximately EUR 22,000 as of November 2005.
41. Even the name of the new society caused some problems; the Registrar of Companies rejected the original name of MAPAC, and the second option of PROMA (Performing Rights Organization of Malaysia) was also rejected. Finally, the name Music Authors' Copyright Protection (MACP) Berhad was approved.

collections⁴² had already exceeded its expenditures.⁴³ It was particularly inspiring as the state television and radio broadcasting station, RTM did not pay royalties until December 1994. Negotiations with Radio & Television Corporation of Malaysia (RTM) had taken longer than expected.⁴⁴ However, when it did, it also honoured its word and paid royalties back to 1989.⁴⁵ The retrospective payments made by the Malaysian government owned broadcast station is to be greatly respected. In the case of many other users, the tactic adopted has been to prolong negotiations and delay payments, and then as a final condition for taking out a license, to insist on forgiveness of royalties for past periods.⁴⁶

As could be imagined, the licensing activities of MACP in their initial months attracted protests from users. Numerous queries and complaints were made to the government regarding its authenticity and authority, particularly since MASRAC also continued its activities. This thorny issue was finally laid to rest when the Malaysian Trade and Industry Minister attended a copyright symposium in early 1990 organized jointly by MACP and CISAC and took the occasion to officially announce that Malaysia was acceding to the Berne Convention⁴⁷ that year. The importance of this seemingly innocuous event cannot be overstated. By attending the MACP/CISAC symposium, and choosing the event to make the official Berne accession announcement, the government issued a very powerful public statement with regard to the legitimacy of the fledgling CMO. Users grudgingly began to accept the valid claims of MACP and its licensing activities were facilitated greatly.⁴⁸

Up until 2000, MACP only administered the public performance rights in musical works. In 2000, it embarked on a limited administration of the reproduction rights in musical works.⁴⁹ To date, mechanical royalties represent a minuscule portion of its total revenues, accounting for only 0.11 per cent of its 2004 gross revenues of MYR 19.2 million.⁵⁰ Moreover, MACP can be justifiably proud of the fact that its expense, which only consume 13.5 per cent of revenues, is the lowest in the region.

42. Royalty income as of December 1990 was MYR 527,000 or approximately EUR 120,000 as of November 2005. MACP issued its first license contract on 15 April 1990, before the Berne Convention came into effect, for a sum of MYR 3,251.50 (approx. EUR 750).
43. Expenses were MYR 316,200 or approximately EUR 72,000 as of November 2005.
44. RTM entered into a license agreement with MACP on 8 December 1994.
45. It paid MYR 3.35 million or approximately EUR 760,000 (as of November 2005) as royalties covering the period from 1989 to 1993.
46. As the CMOs are new and struggling to cover costs, they are oftentimes compelled to accept such arrangements.
47. Malaysia deposited its instrument of accession with WIPO on 28 June 1990 and the Convention entered into force on 1 October 1990.
48. This could be one of the key reasons as to why MACP was able to break even financially within its first year of operations.
49. Music publishers continued to administer the mechanical rights directly with recording companies. MACP only administered the reproduction rights of those foreign works entrusted to it by sister societies and which are not sub-published by a Malaysian publisher.
50. Approximately EUR 4.3 million as of November 2005.

MACP's growth has been exemplary. Due to this success, it was able to repay its loans from CISAC and music publishers promptly. Its success is also reflected in its membership growth from the original 16 founder members to over 2,100 members as of 2004.

The criterion to qualify as associate writer member or publisher member of MACP is one and five commercially exploited⁵¹ works, respectively. Associate members automatically become full members when they receive a distribution of royalties based on actual monitored usage of works, and full members get downgraded to associate status when they fail to receive such royalties for several years. The key difference between the two classes of membership is the ability of full members to vote and to hold office. Upon election to membership, a member is obligated to assign the public performance rights in his or her works to MACP.

The current MACP Board consists of ten directors, with equal numbers of writer and publisher directors elected by writers and publishers respectively, who hold office for two years. Only full members are entitled to stand for election as directors, who hold office for two years.

2.1.2. *The collective management of the rights in sound recordings*

Sound recordings are listed as one category of works eligible for copyright protection⁵² in the Malaysian Copyright Act, together with literary, musical and artistic works. Section 13(1) expressly provides that sound recordings shall have the identical exclusive rights that are accorded to literary, musical and artistic works.

Public Performance Malaysia Sendiran Bernad⁵³ (PPM) represents Malaysian and international recording companies in the collective management of the public performance rights in sound recordings in Malaysia. It was established in 1988 and is a private shareholding company whose two issued shares are held by an accounting firm as trustee for RIM.⁵⁴ Like RIPS in Singapore, PPM is a wholly owned subsidiary of RIM, and a sound recording company in Malaysia must first become a RIM member before entering into an agency contract with PPM for the collective management of their rights. The Board of PPM is a mirror of the board of RIM.

PPM distributes its royalties based on usage returns whenever such data is available, such as in broadcasts. In terms of royalties from general public performances such as pubs, bars and restaurants, 50 per cent of the royalties are distributed based on market share of sound recordings, with the balance

51. Commercially exploited is defined to mean a work which has either been commercially recorded, published or broadcasted, or performed in public.
52. Malaysian Copyright Act, *supra* note 33, sec. 7(1)(e).
53. Formerly known as Phonographic Performance (Malaysia) Sendiran Bernad.
54. RIM stands for the Recording Industry Association of Malaysia.

being distributed based on available usage returns. Due to the full copyright status of sound recordings in Malaysia, PPM's annual gross revenue⁵⁵ is nearly on par with MACP's collections.

2.1.2.3. *Performers and artists rights (M) Sendiran Berhad (PRISM)*

As mentioned earlier, the amendments made in 2000 to the Malaysian Copyright Act also introduced performers' rights. Additionally, Section 16B now provides that "where a sound recording is . . . publicly performed or used directly for broadcast or other communication to the public, an equitable remuneration for the performance shall be payable to the performer by the user of the sound recording". Following the introduction of these rights, a number of Malaysian performers organized the formation of a performers' rights collective called "Karyawan". At about the same time, a separate performers' organization called PRISM, which had the support of the recording companies, was formed. Eventually, PRISM prevailed as the main CMO representing performers' rights in Malaysia. PRISM is a private limited company. The current Board of Directors consists of eight members, of whom three are in their capacity as artists while the other five represent different performers' organizations in Malaysia. PRISM entered into a Memorandum of Understanding on 17 February 2003 with PPM whereby the latter would carry out the licensing of their rights. In 2004, the first distribution of royalties was made by PRISM involving some two hundred thousand Malaysian dollars collected on its behalf by PPM.

2.1.2.4. *The collective management of the right in literary works in Malaysia*

There is no operational reprographic rights organization in Malaysia at present. The reason for this is somewhat difficult to fathom as the market potential exists for such an organization to function profitably. Discussions either to restart the organization, or to create a new one, have taken place recently, however.

2.1.3. *Thailand*

Thailand has the distinction of being the earliest of the ASEAN countries to introduce its own copyright legislation.⁵⁶ On 17 July 1931, Thailand acceded

55. In 2004, its gross revenue was RM 17.1 million or approximately EUR 3.9 million as of November 2005.

56. In 1894, the National Library issued a pronouncement prohibiting any person from publishing any part of the Vajirayarnises books without prior permission. In 1902 and 1914,

to the Berne Convention, among one of the first independent Asian countries to do so at that time.⁵⁷ The latest Thai Copyright Act⁵⁸ became effective in 1995. Unlike many of the other Asian countries though, the Thai copyright law has a very wide definition of the term "communication to the public", subsuming the public performance, broadcast and cable transmission rights into this term.⁵⁹ Moreover, the Thai law also accords full copyright protection to sound recordings,⁶⁰ much like Malaysia. Another unique feature of the Thai copyright protection system is the establishment of the Central Intellectual Property and International Trade Court in December 1997. The IPIT Court has jurisdiction over civil and criminal cases involving IP matters and is staffed by both career and associate judges.

2.1.3.1. *Collective management of rights in musical works in Thailand*

As early as 1978, several studies⁶¹ were made in relation to the copyright situation, and the feasibility of establishing an authors' society in Thailand. The studies indicated that the environment was somewhat premature for the launch of a CMO, hence, a decision was taken by CISAC with a group of Thai creators to first establish a Copyright Information Office⁶² whose main role would be to conduct public education programmes so that the concepts of copyright protection and collective management were properly disseminated to pave the way for the establishment and operation of a collective. Eventually, the first CMO

the Copyright Acts B.E. 2445 and 2457 were enacted; both protected only the copyright in literary works. In line with Thailand's Berne accession, a new copyright law, the Act for the Protection of Literary and Artistic Works B.E. 2474, encompassing international concepts of copyright protection was enacted on 16 June 1931. Protection for audiovisual works, sound recordings and video broadcast works was given only under Copyright Act B.E. 2521 (1978).

57. However, it is not signatory to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, the WCT or the WPPT.

58. Copyright Act B.E. 2537, *Government Gazette*, 21 December 1994, Vol. 111, Part. 59a.

59. Section 4 defines "Communication to the public" to mean making a work available to the public by means of performing, lecturing, preaching, playing music, causing the perception by sound or image, constructing, distributing or by any other means.

60. Section 6 states that "copyright works . . . means works of authorship in the categories of literary, dramatic, artistic, musical . . . sound recording . . ." Section 15 then goes on to accord a full bundle of exclusive rights to copyright works.

61. Some of these initial studies were carried out by MCCOS on behalf of CISAC, and one was carried out by Professor Alan Latman, New York University Law Center on behalf of UNESCO. Professor Latman's study was on the formation of a national copyright information office, which was taken up by CISAC.

62. The ICIO started operations around December 1986 under the auspices of the Thai Composers Association and was funded by CISAC.

in the field of musical works. Music Copyright (Thailand) Limited (MCT)⁶⁵ was established on 14 June 1994 with fundings⁶⁴ provided entirely by CISAC.

The Thai music market is predominantly local and dominated by two particularly large domestic recording companies.⁶⁵ Against this backdrop,⁶⁶ one could have thought that these two companies would be invited to join MCT as members early on. However, two factors probably played crucial roles in keeping them out of MCT. The first was MCT's insistence that the recording companies agree to distribute 50 per cent of public performance royalties to composers and authors. Historically, Thai creators routinely assigned their entire copyright rights to sound recording producers or were otherwise employed⁶⁷ by these companies with the result that the entire set of copyrights in this body of musical works vested in the sound recording companies. The other hurdle was the requirement by MCT that copyright be assigned to it.

Without the participation of these two large Thai music companies,⁶⁸ and with limited representation of slightly more than 100 composers, MCT's early development was hampered and the rapid growth of the CMOs that was experienced in Malaysia, Singapore and Indonesia could not be replicated here.

2.1.3.2. *The collective management of rights in musical works in Thailand*

One unique feature distinguishes MCT from other music CMOs established in Asia. Based on their lawyers' advice at the time of incorporation to the effect that Thai corporate law did not allow an association to carry out the intended functions of a CMO, MCT was incorporated as a private company. Owing to this legal structure, a provision was then built into its Statutes to ensure that only the following persons may hold MCT shares, namely: (1) any individual author or composer of musical works with at least one published work; (2) any natural or juristic person owning the copyrights in ten or more published musical works; (3) any successors-in-title to copyrights; and (4) any other person approved by the Board of Directors for the specific purpose of

63. His Majesty, the King of Thailand was for a period of time, the royal patron of MCT. This was a rather special privilege as he was seldom known to lend his name to private shareholding companies.
64. Aside from various grants, interest free loans totaling almost THB 7 million (approximately EUR 146,000 as of November 2005) were provided by CISAC to MCT.
65. Grammy Records and RS Records, both of which are estimated to have market share totaling 60–70% of Thai music.
66. Coupled with the history of lump sum buy-outs of the rights in musical works.
67. Section 9 states that "copyright in a work created by author in the course of employment shall vest in the authors unless otherwise agreed in writing, provided that the employer shall be entitled to communicate such work to the public in accordance with the purpose of the employment".
68. One of the companies did join MCT for a couple of years but withdrew its membership and subsequently started a profit making company to carry out the licensing of its public performance rights.

holding MCT's shares which have not been issued. Strong restrictions on the transfer of shares and the issuance of dividends also exist.

The MCT Board of Directors consists of up to eleven Directors comprising three authors, three composers and three music publishers and two other directors nominated by the Thai Composers Association. The corporate articles also provide for the appointment of a general manager who must not be a member of the Board or a shareholder.

MCT, together with FILSCAP in the Philippines, probably had the most difficulty in breaking even financially. It took four years after its formation before gross annual incomes exceeded expenses. However, if cumulative losses were taken into consideration, MCT only managed to generate more income than accumulated expenses by the end of 2000. In fact, it took MCT a full 14 months before it was finally able to issue its first three licenses to two karaoke and one restaurant for a total of THB 108,000. At the end of 1995, 16 months after its inception, its gross revenue was just slightly more than THB 600,000.⁶⁹ However, in 2004, its gross revenues were some THB 14.5 million.⁷⁰ Although these figures are low⁷¹ by international standards, particularly for a market the size of Thailand, the odds with which MCT has had to surmount since its inception is testimony to the hard work behind the royalties being collected thus far.

The pioneering work carried out by MCT in establishing the collective management of rights in Thailand led to a new challenge. A number of Thai recording companies decided to enter the fray by establishing profit-making companies, initially to collect royalties from karaoke establishments utilizing their music.⁷² Due to its profit making nature, the tariffs applied by them were comparatively high. This led to at least one protest organized by a number of karaoke operators. The Thai government did react and issued regulations⁷³ specifying the conditions⁷⁴ under which CMOs could collect public performance royalties for the exercise of such rights.

As a consequence of the situation, MCT and Phonorights, the sound recording collecting society established by IFPI, decided to come together in a joint venture⁷⁵ in 2003 to offer licenses covering both the public performance rights in musical works as well as sound recordings to users in Thailand for

69. This was approximately equivalent to EUR 12,500 as of November 2005.
70. Or approximately EUR 300,000 as of November 2005.
71. On the other hand, it must be borne in mind that MCT's repertory represents only an estimated 25%.
72. These companies now license or attempt to license all categories of establishments publicly performing music.
73. The Minister of Commerce, in his capacity as Chairman of the Central Price Fixing Commission issued a notification under the Price of Goods and Services Act B.E. 2542 in 2003. Such as having a paid up capital of THB 1 million, maintaining a register of members, providing the Department of Intellectual Property with a list of the licensing personnel, etc.
75. The joint venture is called JV 1-Stop and was for an initial period of one year. Due to the success of the joint venture, its operations have been extended beyond this trial period.

primarily international repertory, plus the Thai works that are represented through MCT.

There is a Board of Directors overseeing the functions of the joint venture composed of two directors appointed by each organization. There is no Chairman of the Board and all decisions pertaining to the joint venture are made by way of consensus. Both MCT and Phonorights agreed to make available its own licensing staff to undertake the licensing work of the joint venture. All licenses of each organization then in existence were transferred to the joint venture through the expiry of time, and the joint venture Board determines the new licensing rates and licenses. The joint venture has worked well for both organizations as incomes have increased despite the difficulties caused by the dozen or so private companies attempting to license the exercise of the public performance rights in Thailand. Prior to the formation of the Joint Venture, MCT's gross revenue in 2002 was THB 6.5 million.⁷⁶ In 2004, its collections have more than doubled to THB 14.5 million.⁷⁷

2.1.3.3. *The collective management of rights in sound recordings*

Phonorights (Thailand) Limited started its activities in 1997. It is a private shareholding company whose shares are held largely by the Thai Entertainment Content Association (TECA)⁷⁸ and the representatives of the local recording companies that are its members. The Board of Directors comprises six directors. Although strongly encouraged, a recording company need not become a member of TECA in order to entrust the public performance rights in sound recordings to it for collective management. Presently, all royalties collected by Phonorights, after deduction of its expenses, are given to TECA for anti-piracy operations and are not distributed.

Due to the negative side effects of having multiple CMOs collecting royalties for the public performance rights, the Thai government has been working on numerous drafts of laws to govern the collective management of rights in Thailand. Its representatives have visited countries as diverse as Hungary, the UK and Japan to better understand the situation and work on the draft is ongoing at the time of writing; more developments are expected.

2.1.4. *The Philippines*

Copyright law in the Philippines can be traced back to 1879 when Spanish law was enforced in all its colonies. Then, US copyright law applied after the

76. Approximately EUR 136,300 as of November 2005.

77. Similarly, the gross revenue of Phonorights increased from THB 15.5 million in 2002 to THB 19 million in 2004 (or from approximately EUR 325,000 to EUR 400,000 as of November 2005).

78. The shares are held by its general manager. TECA is largely owned by the subsidiaries of the international recording companies.

country was handed by Spain to the United States in 1898. In 1924, the first Filipino law on copyright was enacted. This was in turn repealed by Presidential Decree 49 of 1972 during the martial law years until replaced by the Intellectual Property Code of the Philippines (Republic Act No. 8293) of 6 June 1997.⁷⁹ The Philippines is signatory to the Berne Convention and became a signatory to the WCT and the WPPT in October 2002. Despite the long history of copyright legislation, the first CMO was created only forty years ago.

2.1.4.1. *Collective management of rights in musical works in the Philippines*

The sole CMO for the rights in musical works is the Filipino Society of Composers, Authors and Publishers, Incorporated (FILSCAP). FILSCAP, incorporated as a non-stock and non-profit corporation on 13 May 1965, is one of the earliest CMOs in the field of musical works in Asia. However, despite its early start, political developments⁸⁰ intervened to put a long hiatus to its development. CISAC attempted to resuscitate the collective in the mid 1980s, after people's power toppled Marcos. Unfortunately economic conditions under the new democratic government were not particularly ideal, with daily blackouts severely disrupting work of all kinds. In 1989, CISAC⁸¹ terminated all financial assistance to FILSCAP as certain conditions were not met. In 1992, at the invitation of the Chairman of FILSCAP, CISAC returned and implemented a comprehensive rehabilitation plan.

When CISAC started on the rehabilitation effort, FILSCAP had a total of six public performance licensees. Annual income that year was about PHP 600,000⁸² while expenses were PHP 50,000 higher. CISAC funded the salary⁸³ of the new general manager who was recruited with its assistance. By February 1995, the total number of licensees had grown to 98 and FILSCAP had turned around the corner. In fact, a modest sum of about PHP 1 million from the 1994 collections⁸⁴ was available for distribution.

As could be imagined, given the many years where FILSCAP existed but was unable to license the users in the Philippines, its revival and renewed

79. This new law came into effect on 1 January 1998.

80. Martial law was declared in 1972 by President Ferdinand Marcos and among others, all broadcasting companies were nationalized. This put paid to the efforts of ASCAP, assisting FILSCAP, having just managed to negotiate an agreement for some of the broadcasters to pay royalties.

81. See <www.cisac.org>.

82. Approximately EUR 10,000 as of November 2005.

83. Training was also arranged and funded by CISAC at COMPASS, CASH, followed by visits to ASCAP and BMI, and a further sum of money was prepared to fund an intended litigation against the broadcasters.

84. Gross collections in 1994 exceeded PHP 3 million or approximately EUR 47,000 as of November 2005.

attempts at licensing were simply ignored.⁸⁵ Given this backdrop, it was apparent that FILSCAP had to begin litigation against selected users in order to put teeth to its revival. The first legal case was brought against Nikko Hotel in 1993.⁸⁶ As a direct consequence of this legal action and its settlement in 1994, FILSCAP was able to enter into an agreement with the Hotel and Restaurant Association of the Philippines (HRAP), which required the HRAP to exhort to all of its members throughout the Philippines to secure public performance licenses from FILSCAP. The importance and significance of this result cannot be overestimated. Firstly, it endowed FILSCAP with desperately needed legitimacy with a key section of the music using market. Secondly, it smoothed the path of negotiations between the society and this category of users. Thirdly, it soon provided sufficient income for FILSCAP to cover its costs and to concentrate on other important market segments, such as broadcasting.

It would not be complete to recount the history of FILSCAP's development to date without mention of its efforts to license the broadcasters in the country. Negotiations with the KBP started soon after the CISAC rehabilitation plan of FILSCAP was put in place. The KBP suggested that negotiations be conducted first for the payment of royalties by FM radio stations. Thus, a Memorandum of Understanding for the payment of royalties by FM stations was signed in December 1995. This was followed by a Memorandum of Understanding for the payment of royalties by AM stations.⁸⁷ Negotiations with the KBP for the payment of royalties by their television station members then started in earnest. However, it eventually became apparent that the KBP was not in a position to move the negotiations forward. FILSCAP broke off negotiations with the association in 2001 and entered into discussions with the two main television stations, ABS-CBN and GMA7 directly. It rejected an offer of PHP 1.3 million⁸⁸ as annual license fees for the use of its worldwide repertory of music and decided to commence litigation, asking for damages as well as preliminary and temporary injunctions in relation to four works used in two prime-time drama series. Against the backdrop of litigation, negotiations were restarted and a contract with ABS-CBN was signed in November 2004 with royalties paid retroactive to 1996, albeit at a much reduced rate. The agreement extends to 2009 and marks the first time in history that ABS-CBN has paid royalties for

85. Indeed, there was much debate within CISAC on whether or not to fund the rehabilitation of FILSCAP as there was a strong view that a new society should be started due to FILSCAP's long but unsuccessful history.
86. Nikko Hotel was a previous licensee who had stopped payment of royalties given the ineffectuality of FILSCAP prior to the rehabilitation effort.
87. It should be highlighted that despite the MOUs, many FM and AM radio stations have still not obtained any license from FILSCAP to date. This shows up the weakness of industry based negotiations and agreements where there is no punitive measure provided for failure to follow.
88. Which is equivalent to approximately EUR 20,500. FILSCAP had in response dropped its earlier tariff of 0.3% of gross advertising revenues less commissions, to PHP 4 million per annum.

the broadcast of musical works in their programming.⁸⁹ However, the honour of being the first Filipino television station to pay such royalties in the Philippines goes to its rival station, GMA7,⁹⁰ which entered into a license agreement with FILSCAP on 1 July 2004. It also paid royalties retrospective to 1996.⁹¹ The licensing of the Filipino television stations probably qualifies as one of the longest negotiating sagas in Asia.

With the successful licensing of the broadcasters, albeit at comparatively low rates, FILSCAP's income for 2004 amounted to PHP 57 million,⁹² a substantial increase from the PHP 600,000 in 1992.

FILSCAP has three categories of members – regular, associate and successors. Regular members are those with published works and are accorded full voting rights.⁹³ Those without published works may join as associate members with no voting rights. In an interesting departure from other societies, successors members have a right to vote,⁹⁴ but cannot become directors. Upon election to membership, a member has to execute an assignment of the public performance right to FILSCAP.

FILSCAP is the only CMO within the ASEAN region to levy an entrance⁹⁵ and annual membership fee.⁹⁶ This provision was introduced in 1993 when the society was in dire need of money, and the introduction of such fees was seen as one of the ways to raise some operational funds. The FILSCAP Board of Directors is composed of fifteen members; nine writers (authors or composers) and at least three publishers who are elected by regular and successor members every other year.

The use of Anglo-American musical works is prevalent in the Philippines, although this has lessened to some degree in recent years. Thus, if distributions to sub-publishers of international works are excluded, a fairly substantial share of FILSCAP royalties is distributed to foreign rightsholders. Section 5 of FILSCAP's Corporate Articles specifically provide, *inter alia*, that royalties collected will be apportioned in accordance with international distribution practices, provided that in no case shall any publisher be entitled to more than 50 per cent of such royalties.

89. The basic license fee is PHP 3 million (approximately EUR 48,000 as of November 2005) per annum.
90. An administrative action before the IPO was filed by FILSCAP against GMA7 for payment of royalties. FILSCAP chose this path with GMA7 in order to determine the speediest method of resolving licensing deadlocks.
91. At more than 68% against the agreed annual lump sum fees to be paid from 2003 to 2005. This figure included back royalties as well as royalties for 2006. It is the approximate equivalent of EUR 900,000 as of November 2005.
92. Each member has one vote, either in person or by proxy.
93. This is however similar to ASCAP provisions. See the US Chapter for more information on ASCAP.
94. Entrance fee is PHP 100 for individuals, PHP 500 for sole proprietorships and PHP 1000 for corporations.
95. Annual membership fee is PHP 50 for individuals, PHP 200 for sole proprietorships and PHP 500 for corporations or approximately EUR 1, 3 and 8 (as of November 2005).

2.1.4.2. *Collective management of other rights in the Philippines*

Filipino copyright law maintains a distinction between copyright works⁹⁷ and objects of related rights.⁹⁸ In relation to the communication to the public right for sound recordings, a single remuneration right⁹⁹ to both producers of sound recordings and performers based on Article 12 of the Rome Convention is provided. The sound recording companies in the Philippines, while operating together as "PARI", have not yet started to license the public performance rights in their products, concentrating their efforts in the fight against piracy.

While Filipino performers created their own CMO called Performers' Rights Society of the Philippines (PRSP) in 2002, it is not operational and without any licensing activity as yet. PRSP is a non-stock, non-profit corporation registered under the Securities Exchange Commission of the Philippines with no fulltime employee. The Executive Director of OPM¹⁰⁰ helps out when needed and OPM is currently also hosting the PRSP office. It has about 100 members with the majority coming from the music industry. To date, the society has been able to put up a database of performing works with funds granted by the National Commission for Culture and the Arts.¹⁰¹ While the well known performers have been able to provide such data, many supporting musicians and actors have been unable to do so.

With regards to literary works, a reprographic rights organization called the Philippine Reprographic Rights Organization Incorporation (PRRO) was registered in 2001. According to its Articles of Incorporation, its primary purpose is to "control the widespread unauthorized copying of works" and for the purpose of centrally managing the exchange of permission to "reproduce works and payment of royalties". The Articles of the PRRO provide for three categories of members, namely founding members, regular and associate members. The organization is to be governed by a Board comprising thirteen members who shall hold office for two years.¹⁰² Despite being formed in 2001, the PRRO is not yet operational.

97. The categories of protected copyright works are set out in Section 172.
98. The rights accorded to sound recordings are set out in Chapter XIII.
99. Section 209 states that "If a sound recording published for commercial purposes... is used directly for broadcasting or for other communication to the public, or is publicly performed with the intention of making and enhancing profit, a single equitable remuneration for the performer or performers, and the producer of the sound recording shall be paid by the user to both the performers and the producer, who, in the absence of any agreement shall share equally".
100. OPM stands for Organisasyon Ng Pilipinhong Mang-aawit or the Organization of Filipino Musicians.
101. Which comes directly under the office of the President of the Philippines.
102. There are special provisions for the first four years after incorporation. See Article V, Section 1.

2.1.5. *Indonesia*

The colonial Dutch government introduced the first copyright legislation into Indonesia in 1912. Although Indonesia became an independent republic in 1945, the 1912 legislation continued in force until it was replaced in 1982. Indonesia's current copyright law¹⁰³ was enacted on 29 July 2002 and came into force exactly one year later. The Indonesian copyright law is unique in Asia in that it simply encapsulates all the exclusive rights of an author into "the exclusive rights to publish or reproduce".¹⁰⁴ Indonesia is of course the first Asian country to accede to the WCT¹⁰⁵ when it also acceded to the Berne Convention.¹⁰⁶ On 15 November 2004, it also ratified the WPPT.¹⁰⁷

2.1.5.1. *The collective management of rights in musical works in Indonesia*

The sole collective in Indonesia, the Yayasan Karya Cipta Indonesia (KCI) was established as a private foundation by twelve persons and one organizational founder, PAPPRI in 1990.¹⁰⁸ At that time, the foundation structure was considered the best choice for the CMO as foundations were generally better regarded, as compared to any other kind of legal vehicle. In this regard, KCI differs from all other CMOs in Asia¹⁰⁹ as composers, authors and music publishers are strictly speaking not members.

The Dutch music collective BUMASTEMRA¹¹⁰ and CISAC were initially involved in KCI's creation. Both organizations extended substantial financial assistance towards its start up. In fact, KCI was the first Asian recipient of financial assistance from the then newly created CISAC Solidarity Fund.¹¹¹ In 1990, a sum of USD 20,000 was provided by CISAC to KCI, while in 1991,

103. Law No. 19 of 29 July 2002 on Copyright, *State Gazette of the Republic of Indonesia*, 2002, No. 85.
104. Article 2(1). The term "publication" is defined in Article 1 to mean "the reading, broadcasting, exhibition, sale, distribution or dissemination of a work, by utilizing whatever means including the Internet, or by any manner so that such work is capable of being read, heard or seen by any other person". Thus, the public performance or communication to the public right is included in this term.
105. It ratified the treaty on 5 June 1997, on the same day that it ratified the Berne Convention. The treaty came into force in Indonesia on 6 March 2002, when the WCT itself came into force with the requisite number of accessions.
106. The Berne Convention became applicable on 5 September 1997.
107. Which came into force on 15 February 2005.
108. Under a new law governing foundations, KCI was re-registered in 2004 with eight individual founders; under this new law, PAPPRI could not continue as a founder-member.
109. A recent similar organization would be VCPMC in Vietnam.
110. See <www.bumastemra.nl>.
111. CISAC members contribute a small part of their collections towards the Solidarity Fund, which is used to finance the creation of new societies, where they do not exist, or to fund the growth and development of developing authors' societies around the world.

another sum of USD 90,000¹¹² was extended. In addition, BUMA/STEMRA extended a further interest free loan of USD 20,000,¹¹³ aside from funding the training of a number of KCI staff and Indonesian government officials. CISAC member-societies also contributed further by agreeing to forgo the distribution of a diminishing share¹¹⁴ of royalties due to their respective members in order to defray the high costs¹¹⁵ associated with its establishment.

Like almost all the new CMOs that were created around this period of time, KCI commenced only with the administration of the public performance rights. In 1992, it entered into an agreement with STEMRA to commence on the administration of the reproduction rights in musical works in relation to foreign works reproduced in Indonesia.¹¹⁶ KCI secured its first licensing agreement with the government broadcaster, TVRI on 25 May 1991. Together with Garuda Airlines, these royalties proved instrumental in its early financial success.¹¹⁷ Both licensees were government owned establishments and KCI's experience in this regard best sums up the pivotal role that governments can play in the early success of CMOs – by respecting the copyright laws enacted by them and paying royalties for the use of works. Sadly, this is not always the case in the region.

KCI has developed exceptionally well in a very quiet and uneventful fashion since its inception. In local currency terms, KCI in fact outperforms all the other ASEAN CMOs in the field of musical works. Its gross revenues grew by some 2,400 per cent between 1991, when its gross income was a tad shy of IDR 500 million to reach IDR 12.3 billion in 2004.¹¹⁸ This achievement is no mean feat if per capita GDP¹¹⁹ is taken into consideration. Moreover, aside from a fall in gross incomes in 1998 caused by the 1997 economic crisis that started with an attack on the Thai Baht, KCI's incomes have maintained an upward path.

112. This sum was provided by way of a three-year interest free loan.

113. It subsequently donated USD 10,000 back to KCI to fund the establishment of a mechanical rights division.

114. Societies agreed that KCI could retain 100%, 60%, 30% of royalties due to the use of international repertory from its first, second and third years of collections. From the fourth year on, all royalties due to foreign societies were to be distributed based on usage returns. As Indonesia did not accede to the Berne Convention till 1997, only American works were protected in Indonesia in KCI's early years. The amount of royalties involved was not insignificant. In 1991, the retained royalties totaled USD 66,605 (approximately EUR 57,000 as of November 2005).

115. It was expressly agreed that these retained royalties were not to be distributed to local members.

116. STEMRA entered into agreements with 2 CD replication plants in Batam and Jakarta for the reproduction of foreign works by them and KCI was involved in administering parts of the agreements with technical support by STEMRA.

117. Royalties from these two users represented 88.5% of KCI's total revenues in 1991.

118. In comparison, COMPASS and MACP registered growth rates of 573% and 1275% respectively over the same period. IDR 12.3 billion is the approximate equivalent of EUR 1 million as of November 2005.

119. In 2001, Indonesia has a per capita GDP of USD 2,900 compared with Malaysia's USD 10,300 and Singapore's USD 26,500.

On the other hand, its expenses have remained relatively high at 30 per cent as compared to 13.5 per cent at MACP and 16.5 per cent at COMPASS. This could in part be due to the size of Indonesia. With a population of 220 million spread out over many islands, KCI currently maintains five branch offices.

In 1991, the Japanese music collective JASRAC¹²⁰ sent, at its own costs, a documentation and distribution expert to assist KCI in setting up such a department. Such friendly assistance reduces the startup expenses of new CMOs and spreads out the costs among a number of more developed collectives. It also avoids prior mistakes experienced by other CMOs, and shortens the learning curve. On 30 March 1992, KCI made its first distribution of royalties to its members. A total of IDR 136 million¹²¹ were distributed to 257 Indonesian composers. From 1994, KCI started to distribute royalties to foreign rightsholders as well, averaging about 15 per cent of its distributable royalties annually.

2.1.6.

Brunei

Rightsholders in Brunei are accorded protection under the Constitution of Brunei Darussalam Emergency (Copyright) Order 1999 which came into force on 1 May 2000. This law is based essentially on the United Kingdom's 1988 Copyright Act. Prior to the enactment of this law, the 1911 UK Copyright Act had force in the country. To date, Brunei has not yet acceded to the Berne Convention. However, its WTO membership obliges it to grant protection compatible with the TRIPS Agreement.

There is as yet no CMO established in Brunei.¹²² Given its small population size, it is unlikely that a full fledge society will be created. The current thinking is to form a membership and licensing office and to contract out the back room operations of documentation and distribution to another society. It is also likely that this office would eventually administer all the different categories of rights.

2.1.7.

Vietnam

Copyright is a relatively new concept in Vietnam and many industry practices are still based on traditional arrangements, usually on agreements between users and rightsholders, rather than on copyright law. The copyright legislation of present-day Vietnam was first enacted in 1986.¹²³ In 1994, the Standing Committee to the National Assembly adopted the ordinance on

120. See the chapter on Japan.

121. Approximately EUR 11,500 as of November 2005.

122. Due to historical links, PRS (UK) issues a couple of licenses to certain users in Brunei.

123. Decree Number 142/HDBT. A new copyright law was passed by the Vietnamese Parliament on 19 November 2005 as part of a new IP Code.

copyright protection. In 1995, the National Assembly approved the civil code of Vietnam with an entire chapter¹²⁴ on copyright.¹²⁵ It acceded to the Berne Convention on 26 October 2004. At the same time, it has bilateral copyright agreements with the United States of America, the European Union and Switzerland.

2.1.7.1. *Collective management of rights in musical works in Vietnam*

The history of collective management in Vietnam started with the Vietnam Musicians' Association (VMA), a non-governmental organization created in 1957 to serve as a liaison centre for all musicians throughout Vietnam. Two committees govern the VMA, namely the Central Committee, consisting of nine members, and the Secretariat, consisting of five members comprising one secretary-general, three vice secretary-generals and one ordinary committee member elected from the Central Committee.¹²⁶ The Secretariat performs the day-to-day functions of the VMA and meets twice a year with the Central Committee. The members of the Central Committee¹²⁷ are elected by its membership¹²⁸ once every five years. The VMA receives annual financial assistance from the government and these monies are spent largely on promoting new works and creativity. The VMA established the Vietnam Centre for Protection of Music Copyright (VCPMC)¹²⁹ to perform the functions of a CMO on 19 April 2002.¹³⁰

The VCPMC is a non-profit and non-governmental organization that operates¹³¹ under the management of the VMA. It administers both the

124. Chapter 1, Part 6.

125. This came into force on 1 July 1996. There also exist a number of other decrees and circulars largely on issues of implementation and enforcement. A new draft copyright law is being circulated for discussions in line with its desire to join the WTO.

126. Apart from the Secretary General and the permanent Vice Secretary General, the members of the Secretariat do not work fulltime. It has approximately 20 employees.

127. And hence also the Secretariat consists of music teachers, critics and performers.

128. It currently has about 900 members of which about 50% are composers while the balance consists of music teachers, critics and performers.

129. The VCPMC is a legal entity that is separate from the VMA.

130. It was officially launched on 22 May 2002.

131. In accordance with Article 3 of the Charter of VCPMC, its "operational objectives" *inter alia* include (1) the exploitation and protection of musical copyright and (2) the support of state management agencies in the development and implementation of copyright policies. Article 5 of VCPMC's Charter sets out its duties as to cooperate with relevant agencies to disseminate knowledge on copyright laws; to inform VCPMC's activities to copyright holders; to exercise rights authorized by rightsholders in the field of music including to issue licenses and collect royalties; to annually distribute proceeds gained from works exploitation; etc. and to cooperate with foreign copyright protection organizations to make full use of their support and to protect mutual legitimate rights.

public performance and reproduction rights in musical works. It is not a membership-based CMO. Instead, management of the rights is based on copyright authorization contracts.¹³² The VCPMC does not obtain a transfer or assignment of rights from rightsholders. Instead, the fiduciary contract authorizes the VCPMC to collectively administer these rights for an initial period of five years, which will automatically renew unless terminated. According to the contract, the VCPMC undertakes to make bi-annual distributions.¹³³ As it is not a membership organization, there are no provisions for members to vote. Hence, the main control mechanism over VCPMC comes from electing the VMA representatives.

The organizational structure of the VCPMC consists of a Management Council (MC), a Board of Directors, a Board of Inspectors and a Board of Consultants, which advises the Management Council and the Board of Directors. The fifteen members of the MC, appointed by the Secretariat of the VMA, meet every six months to review VCPMC's operations and the activities of the Board of Directors. The Board of Directors is nominated by the MC and appointed by the Secretariat of the VMA. The Directors are responsible for the day-to-day management of VCPMC including the recruitment, appointment, suspension and/or dismissal of staff. The Board of Inspectors, appointed by the MC inspects the implementation of the VCPMC's Charter, performs general inspection of assets and finance of VCPMC, and inspects the activity of the Board of Directors.

The VCPMC was able to collect some VND 165 million¹³⁴ in its first year of operations derived from 31 public performance licenses, and a number of licenses for the reproduction of cassettes and compact discs. Vietnamese producers of sound recordings do not voluntarily come to the VCPMC to obtain "mechanical" licenses to make copies. The producers pay royalties only if the VCPMC is able to find out that they have made copies of members' works and approach them for payment. Moreover, there is no fixed license tariff in relation to the issuances of mechanical licenses being applied by the VCPMC. The VCPMC essentially collects whatever the producers are willing to pay, based on existing industry practices according to which record producers pay lump sums directly to the composers. On average, a top composer may be paid roughly USD 500¹³⁵ while lesser known composers may be paid approximately USD 50 for each work, irrespective of the number of copies reproduced. The government owned television station commenced payment of some royalties to

132. Chapter III of Charter of VCPMC. Over 400 composers have entered into fiduciary contracts with the VCPMC, which represents approximately 50% of currently performed works.

133. Note that this differs from the Charter of VCPMC, which provides for an annual distribution.

134. This is equivalent to approximately EUR 9,000 as of November 2005.

135. There are also instances where a popular composer is paid about USD 600 to USD 1,000 to write a new work. Moreover, the situation is changing rapidly.

the VCPMC, albeit for local works only¹³⁶ in 2004 with the result that its gross revenues increased to about VND 1 billion.¹³⁷

2.1.8. Cambodia

The ASEAN jigsaw became complete when Cambodia became its tenth member state in 1999. Cambodia enacted a new copyright law, which came into force on 5 March 2003. It is not yet a signatory to the Berne Convention.

Article 56 of the copyright legislation provides that an author or a related-rightsholder can establish CMOs to protect and manage their economic rights. The establishment of such CMOs requires the recognition of the Ministry of Culture and Fine Arts.¹³⁸ Article 49 states:

If a phonogram has been produced for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or other communication to the public, or is publicly performed, *a single equitable remuneration for the performers and the producer of the phonogram, shall be paid by the user to the organization governing this collective right.*

The law also makes the reproduction and communication to the public of copyright works without authority an offence.¹³⁹

Cambodia is the second least developed country (LDC) to join the WTO,¹⁴⁰ through the full process of negotiation since the WTO was established in 1995. It underwent a difficult and demanding negotiating process and is the eighth ASEAN member of the WTO, leaving Vietnam and Laos still in the process of accession.

There is presently no CMO in Cambodia as the market is considered as not yet commercially viable.

2.1.9. Myanmar

The existing copyright legislation in Myanmar is still the 1911 United Kingdom Copyright Act, which came into force in 1914, a remnant of colonization.

136. At the time of the agreement, Vietnam was not yet a member of the Berne Convention. Moreover, the foreign societies have also not entered into any reciprocal representation agreement with it.

137. This is equivalent to about EUR 53,000 as of November 2005.

138. The establishment of a CMO for broadcasting requires the recognition of the Ministry of Information.

139. Article 64. Such infringements are punishable by one to three months' imprisonment and/or a fine of 1 to CHR 5 million (approximately EUR 200 to 1000 as of November 2005). Where several offences are committed, the punishment is multiplied by the number of offences.

140. It became the 148th WTO member on 13 October 2004.

Although Myanmar is a member of the WTO, it is classified as a LDC and work is ongoing to introduce a new copyright legislation. There is at present no CMO in Myanmar.

2.2. THE EAST ASIAN COUNTRIES

2.2.1. China

1990 witnessed a momentous copyright event when China enacted new copyright legislation, the first in its recent history.¹⁴¹ Another historic occurrence took place when it acceded to the Berne Convention in 1992.

Key amendments were made in 2001. Under Article 43 of the previous Chinese copyright law, a radio or television station that broadcasts a published sound recording for non-commercial purposes did not need to obtain permission from or pay remuneration to the rightsholders. Almost all broadcasters in China saw themselves as public broadcasters and invoke the indemnity under Article 43 and thus they neither obtained permission for their use of copyright works nor paid any royalties. Under the amendments, broadcasters are given a statutory license to utilize published works¹⁴² and sound recordings¹⁴³ in their broadcasts but are required to pay remuneration for such uses. The concluding sentence of Article 43 provides that "specific measures in this regard shall be formulated by the State Council". This has been interpreted as including the level of royalties payable by broadcasters to rightsholders. Unfortunately, the State Council has not yet approved the tariff payable by broadcasters. Hence, from October 2001 until today Chinese broadcasters have yet to pay any royalties for the use of copyright works and/or sound recordings in their broadcasts despite the change in the law.

There are three provisions on the collective management contained in the Chinese Copyright Law. Article 8 provides that copyright and related rightsholders may authorize a CMO to exercise their rights. It further provides that upon authorization, a CMO may, *inter alia*, participate as a party in legal proceedings in its own name for the copyright or related rightsholder. This provision was required because a number of users have sought to challenge the *locus standi* of a CMO to bring legal actions on behalf of rightsholders. The article also expressly requires CMOs to be non-profit entities. Aside from those provisions, the law provides that regulations concerning their establishment, rights

141. Copyright Law (Adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, and Amended According to the Decision on the Revision of the Copyright Law of the People's Republic of China, Adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001).

142. *Ibid.*, Art. 42.

143. *Ibid.*, Art. 43.

and obligations, collection and distribution of fees are to be separately formulated by the State Council.

2.2.1.1. *Regulations governing the collective management of rights*

The first CMO established in China started in 1992. With experience, it became increasingly obvious that some regulatory measures had to be introduced in order to facilitate the functioning of CMOs. The government eventually enacted and brought into effect on 1 March 2005 the Regulations on Copyright Collective Administration. The Regulations prohibit any organization or person from carrying out copyright collective management unless the collective is established in accordance with its provisions.¹⁴⁴ In addition, however, Article 7(2) of the Regulations states that there can only be one CMO in each "field of rights". The Regulations also contain detailed provisions on how a CMO is to be constituted and managed. The Regulations further empower¹⁴⁵ the National Copyright Administration of China (NCAOC) to supervise CMOs by checking their accounts, annual budgets, finance reports and by sending a representative as an observer to attend the general membership and Board meetings. A peculiar provision, perhaps reflecting the situation in China, makes a government official liable for administrative or criminal sanctions if he is negligent in his duty or abuses his power.¹⁴⁶

It is also expressly provided that the general membership, meeting at least once a year, is the institution of power of the CMO.¹⁴⁷ A Board of Directors, comprising no less than nine directors, is also elected for a four-year term.¹⁴⁸ A CMO is proscribed from refusing to administer the rights of a copyright holder who meets its qualifying criteria.¹⁴⁹ Conversely, and dealing a situation that is quite problematic throughout Asia,¹⁵⁰ a copyright holder is not allowed to exercise or authorize any others to exercise the rights that have been entrusted to a CMO for administration.¹⁵¹ Finally, Article 29 of the Regulations provides that all licensing fees collected shall, after deduction for administration fees to maintain its regular activities, be completely distributed among owners and may not be diverted for any other purpose. Distribution records must be maintained for a minimum period of ten years.

144. The Regulations on Copyright Collective Administration, passed by the State Council on 22 December 2004 and announced by Decree Number 429 of 28 December 2004.

145. *Ibid.*, Art. 37.

146. *Ibid.*, Art. 45.

147. *Ibid.*, Art. 17.

148. *Ibid.*, Art. 18.

149. *Ibid.*, Art. 19. This provision is of course also targeted at ensuring that a CMO does not abuse its monopoly position. See also Art. 23(3).

150. This problem of self exercise of rights and/or multiple assignments of the rights that have already been entrusted to a CMO has been experienced in Thailand, Taiwan, Philippines, for example.

151. Regulations on Copyright Collective Administration, *supra* note 144.

Coming as they did more than a decade after its Copyright Law was enacted and its first CMO established, the Regulations provide a perspective on the problems that had developed and required governmental intervention. Countries in the region would do well to ponder the Chinese experience.

2.2.1.2. *The collective management of the rights in musical works in China*

The Music Copyright Society of China (MCSC) was created on 15 September 1992 as a non-profit social organization to administer the public performance and reproduction rights in musical works. The qualifying criterion for membership is one published or performed work at the provincial level or above. Every member has, *inter alia*, the right to be elected as a director of the CMO.¹⁵² Its Articles also provide for representatives from the state copyright administration to be on the Board. In fact, a recent Director General of MCSC was the former Director General of the copyright division of the NCAOC, while the former Deputy Director General of the NCAOC remains the vice-chairman of the organization. This link between the CMO and the national copyright office was probably a blessing¹⁵³ to MCSC, particularly in its formative years, as the close relationship would have given it some legitimacy in the eyes of the public as well as the Chinese government.

A couple of observations may be made about MCSC's development since its inception. Firstly, unlike most South East Asian CMOs, a sizable component of its current revenues flows from reproduction income. For example, 54 per cent and 37 per cent¹⁵⁴ of its 2001 and 2002 gross incomes respectively may be attributed to "mechanical" collections. There is a restricted statutory license¹⁵⁵ for the reproduction of published musical works under Chinese law.¹⁵⁶ Secondly, its real growth only started in 2001¹⁵⁷ when its gross revenues have increased annually by more than 50 per cent each year.¹⁵⁸ Prior to that, its growth could at best be described as anaemic. In 2004, MCSC's net revenues were over 39 million RMB.¹⁵⁹

152. General membership meetings are held once every four years, the longest period among the Asian societies.

153. There is a contrary view that this has in fact hobbled its natural development as the decision making process tended to be conservative and pro-government, and users which are part of the Chinese government machinery tended to pay only lip service to their copyright obligations.

154. It was 43% and 33% in 2003 and 2004 respectively.

155. The approved statutory rate is 3.5% of wholesale price, which is lower than the 5.4% of published price to dealer applicable under an industry agreement throughout much of Asia.

156. Copyright Law, *supra* note 141, Art. 39.

157. In 2000, its gross revenue was RMB 4.9 million. This nearly doubled to RMB 9.7 million in 2001.

158. In fact, its gross income doubled in 2001 over 2000, and doubled again the following year.

159. Approximately EUR 4.2 million as of November 2005.

It is noteworthy that MCSC made its first distribution of royalties to local members in June of 1993, within four months of its formation. However, any conclusion drawn from this impressive fact is likely to be misleading. As mentioned, MCSC's collections in fact remained relatively flat for quite a number of years after its inception and it made its first distribution to overseas societies in 2002 with a sum of RMB 2.02 million.¹⁶⁰ This sum represents royalties due to foreign rightsholders, which had been accumulated over the years and not distributed as the amounts involved were considered too small. Another noteworthy fact is that there is a net surplus of royalties flowing into China versus the distribution by it of royalties to foreign societies. In 2004, it distributed RMB 3.6 million overseas while receiving RMB 4.78 million in return.¹⁶¹ MCSC also has the distinction of making quarterly distributions¹⁶² to its members as compared to the more usual one or two annual distributions of CMOs in the region. The distributions are for different categories of uses, namely mechanical royalties, Internet royalties, performance royalties and overseas royalties.

2.2.1.3. Administration of sound recordings in China

No general public performance or communication to the public right applies to sound recordings in China. There is a right of "making [a sound recording] available to the public through information networks and to receive remuneration therefrom."¹⁶³ While there is no definition provided to explain what this right covers in relation to sound recordings, a similar term for copyright works is defined based on the 1996 WIPO Treaties as "the right to make a work available to the public by wire or by wireless means so that people may have access to the work from a place and at a time individually chosen by them."¹⁶⁴ Given the limited rights accorded by the Chinese law, recording companies had adopted a strategy which has been successfully implemented in numerous Asian countries – they rely on the public performance rights in music videos¹⁶⁵ in order to collect public performance license fees from establishments that use such works.

160. Approximately EUR 215,000 as of November 2005.

161. Approximately EUR 380,000 and EUR 505,000 respectively, as of November 2005. In 2003, it experienced a small deficit, having distributed RMB 2.94 million overseas while receiving RMB 2.54 million (approximately EUR 270,000). In 2002, it experienced a net inflow of royalties.

162. So does KOMCA in relation to certain categories of rights administered.

163. Copyright Law, *supra* note 141, Art. 41, which goes on to state that "anyone who... makes [a sound recording] available to the public through information networks shall, in addition, obtain permission from, and pay remuneration to both the copyright owner and the performer".

164. *Ibid.*, Art. 10(12).

165. Which would be categorized as "cinematographic films".

2.2.1.4. Collective management of rights in literary works in China

While a society to collectively administer such rights has been established in China, it has not yet gone into full operation.

2.2.2. Chinese Taipei

The latest Taiwanese Copyright Act¹⁶⁶ was promulgated on 21 January 1998. Major amendments were passed by the Legislative Yuan on 6 June 2003 which, *inter alia*, introduced an exclusive right of "public transmission",¹⁶⁷ created a Copyright Examination and Mediation Committee¹⁶⁸ charged with handling copyright matters under the Ministry of Economic Affairs – which mediates disputes between CMOs and users concerning compensation for use –,¹⁶⁹ and granted a remuneration right in sound recordings used in public performances.¹⁷⁰ Other provisions in the copyright law that warrant mention include: firstly, a compulsory license¹⁷¹ for the reproduction of musical works that have been commercially released for more than six months;¹⁷² a prohibition on the sale of copies of sound recordings made under such licenses outside of Taiwan;¹⁷³ and Article 81, which provides that "economic rightsholders may, with the approval of the specialized agency in charge of copyright matters, establish copyright intermediary organizations for the purpose of exercising rights or for collecting and distributing compensation for use". Pursuant to this article, the Copyright Intermediary Organization Act was passed.

The history of how a specific law governing CMOs in Taiwan came about bears some recounting. Prior to 1989, Taiwanese law only permitted the formation of one organization in each industry. The Copyright Holders' Association of the Republic of China (CHA), which was formed in 1972, was the sole CMO entitled to carry out collective management of rights. CHA was a multi-rights CMO, with a membership that included composers, book authors, visual artists, even inventors. Towards the late 1980s, it commenced work in the field

166. Copyright Act, Presidential Order No. (87) Hua-Zong-(1)-Yi-Zih 87/000126405. Due to its unique relationship with China, Taiwan is not a signatory to the Berne or any other international copyright or neighbouring rights conventions. Its WTO membership thus provides a crucial link to the international IP community.

167. *Ibid.*, Art. 3.10, which defines it as "making available or communicating to the public the contents of a work through sounds or images by wire or wireless network, or other means of communication, including enabling the public to receive the content of such work by any of the above means at a time or place individually chosen by them".

168. *Ibid.*, Art. 82.

169. *Ibid.*

170. *Ibid.*, Art. 26(3). Prior to this, there was no public performance right in sound recordings.

171. *Ibid.*, Art. 69.

172. *Ibid.*, Art. 12 of the Regulations governing application for approval of compulsory license of musical works fixes the rate at 5.4% of whole sale price of the sound recording with a minimum fee of TWD 20,000 (which may be waived under appropriate circumstances).

173. *Ibid.*, Art. 70.

of collective management of the rights in musical works. As it was not able to secure the rights from foreign CMOs in its early years, it laboriously identified the works that have been broadcast by the television stations and obtained loans from commercial lenders to finance the distribution of royalties to local and foreign¹⁷⁴ rightsholders based on the identified works. With the receipts for these payments, it then negotiated with the stations for payment. In 1989, legal changes removed the restraint that there should only be one CMO in each industry and the number of collectives proliferated.¹⁷⁵ A point was reached when there were a dozen or so CMOs, mainly in the field of musical works. Some were established in name only and conducted little licensing. This multiplicity of CMOs caused confusion among rightsholders and users for many years and not surprisingly, also stunted the proper development of a strong and efficient CMO in Taiwan. In November 1997, the Copyright Intermediary Organization Act (CIOA) was enacted to regulate the establishment and operations of collectives.

2.2.2.1. *The copyright intermediary organization act*

At the very outset, the CIOA makes it illegal for any person, not registered in accordance with the Act, to carry out any collective management activity.¹⁷⁶ In applying to operate a CMO, an applicant is required to submit its proposed license tariffs to the competent authority for approval.¹⁷⁷ Article 10 prohibits a person from joining two or more intermediary organizations managing the same category of works at the same time. The law goes on to state that if a person joins two or more organizations simultaneously, he shall be deemed to have joined none of them, and if he joins at different times, the first in time prevails. The law further expressly states that "a member shall not grant or cause a third party to grant any license (within the scope of management by the society) on his or her behalf". This highlights the perennial difficulty of multiple assignments and dealings over the same set of rights, resulting in conflicting claims among users as well as tripping up distributions. A CMO is not permitted to refuse to administer the rights of a non-member if requested to do so.¹⁷⁸ The CIOA imposes on CMOs the need for its distributions to be

174. These royalties, distributed through CASH in Hong Kong, were not insubstantial. Between 1990 and 1995, CHA remitted some USD 4.1 million to foreign rightsholders while USD 1.8 million was distributed to local members. From 1995, CHA carried out its own distributions. At that time, only works from Hong Kong, the United Kingdom and the United States were protected in Taiwan.

175. By 1990, there were already four CMOs claiming to administer the rights in musical works. Copyright Intermediary Organization Act, promulgated by the President on 5 November 1997, Art. 9. See also Art. 41 for sanctions which include fines and/or imprisonment.

177. *Ibid.*, Art. 4.

178. *Ibid.*, Art. 28.

approved by the Board of Supervisors of the CMO.¹⁷⁹ Another special clause is Article 35, which mandates that a CMO shall allocate 10 per cent of its management fees annually for social, educational and cultural purposes.

The enactment of the CIOA resulted in the formation of a new authors' society for musical works in Taiwan called the Music Copyright Intermediary Society of Chinese Taipei (MUST) in 1999 as CHA could no longer continue in its current form.¹⁸⁰ Despite the enactment of a new law to govern the collective management of rights, there is still more than one CMO in Taiwan in each field of rights. Thus, for example, there are two major collectives in relation to the public performance right in musical works.

2.2.2.2. *Music copyright intermediary society of Chinese Taipei*

MUST was formed¹⁸¹ through the efforts of Taiwanese creators, music publishers and CISAC¹⁸² under the CIOA. Any composer or author who owns at least five musical works and any publisher who represents at least 25 musical works that have been commercially recorded, published or publicly performed or broadcast is eligible to apply for membership of MUST. When MUST was first created, there was only one category of membership, although divided into individual and group membership, and all members have equal rights. However, this was subsequently amended and a new category of associate membership was introduced for those who did not meet the requirements in an attempt to attract more members in competition with other societies in Taiwan.

The MUST Board of Directors has thirteen members consisting of not less than two and not more than seven individual members, and not less than one and not more than six group members. A segregated voting system for directors is in use: individual members can only vote for individual directorships and likewise for publishers. The term of office is limited to two years with a requirement that at least three writers and publishers each must be replaced. In accordance with the requirements of Taiwanese law, there is also constituted a Board of Supervisors comprising not more than three individual and two group supervisors respectively. This practice of having supervisors¹⁸³ appears more prevalent to the societies from the East Asian territories and we see them provided for in the constitutions of societies in China, Japan and South Korea.

179. This has led to at least one known case where the supervisors had refused to sign off and the Board of Directors was compelled to proceed with the distribution with subsequent ratification of its general membership. Under Article 38 of the law, *ibid.*, the relevant government supervisory authority may also call for documents and/or carry out inspections of the business of a CMO.

180. CHA still exists, mainly to bring an end to work still outstanding under the former legal regime.

181. Its application was formally approved by the government in May 1999.

182. CISAC and the music publishers jointly put together a TWD 8.3 million loan to fund the start up of MUST.

183. They are termed as "Councilors" in KOMCA and JASRAC.

In the ASEAN countries, apart from Vietnam, there are no such oversight provisions. In essence, the key responsibility of the Board of Supervisors is to oversee the performance and execution of duties by the Board of Directors. Two specific functions of the Supervisory Board is the auditing of the distribution statements and the business and financial condition of the society.

Another noteworthy feature of MUST's Articles is a provision that its expenses shall not exceed 25 per cent of annual royalty collections in its first year of operations, and that this shall be adjusted annually downwards to be less than 20 per cent from the fifth year of operations on.¹⁸⁴ While the intention behind this provision is to be commended, it did lead to difficult financial constraints in the initial years of MUST's existence. As was to be expected with all start-up operations, expenses in the early years greatly exceeded this limit. In fact, MUST had to seek the approval of its general membership when the time came for it to repay the start-up loans to music publishers, sister societies and CISAC as the repayments would have pushed its expenses beyond the expense limit allowed by its constitution.

Given that MUST was formed with the assistance of CISAC, it is to be expected that foreign societies will enter into reciprocal agreements with it, and it alone will then administer foreign rights in Taiwan. Domestically, its main group of members comprises Mandarin language composers, writers and music publishers, as well as a strong core of local dialect creators and rightsholders. Until 2004, MUST administered only the public performance rights. It is now preparing to commence on an extremely limited administration of reproduction rights in musical works, that is, in relation to the reproduction of Japanese works.

The fact that CHA had been licensing a number of the key users in Taiwan for a number of years coupled with the fact that a couple of key staff of MUST left CHA to join MUST, the new society was able to achieve a relatively decent gross income of almost TWD 25 million¹⁸⁵ in its first year of operations. This jumped substantially to almost TWD 75 million the following year, remained flat for the next two years and then surpassed TWD 119 million¹⁸⁶ in 2004. One final observation about MUST, like MCSC, its foreign income represents a fairly decent portion of its total revenues; 13.9 per cent of its gross revenues in 2001 and 20.5 per cent in 2004.

2.2.2.3. *Music copyright association of Taiwan (MCAT)*

The history of MCAT¹⁸⁷ could be traced back to about 1993, and to efforts to unify the many different groups attempting to carry out the collective

184. Corporate Article 82.

185. Approximately EUR 640,000 as of November 2005.

186. This figure includes some back royalties. It is the approximate equivalent of EUR 3 million as of November 2005.

187. Its original name could be loosely translated as the Joint Association of Rightsholders of Musical Works. The name MCAT was officially adopted on 27 December 2003.

management of copyrights at that time. While amalgamation efforts proved unsuccessful, it spawned MCAT. Following a second unsuccessful attempt at unification in 1997 and the enactment of the CIOA soon after, MCAT became the first CMO to be officially registered under the new law in January 1999. It would be fairly accurate to say that the repertory represented by MCAT comprises only a section of the local "ming nan" dialect composers and music companies. Despite its lesser repertory, it is nevertheless able to collect revenues in the region of that achieved by MUST.

2.2.2.4. *Collective management of the rights in sound recordings*

Although a sound recording is classified as one category of protected works¹⁸⁸ under the Taiwanese copyright law, the rights accorded to it are spelled out separately. Article 26¹⁸⁹ grants a right to remuneration in sound recordings when they are publicly performed. If a performer is involved, the remuneration is shared between them.¹⁹⁰ The society that administers rights in sound recordings is called ARCO. ARCO was founded in September 1989 to collectively manage the broadcast rights in sound recordings and is now also authorized to collect royalties under Article 26. The members of ARCO comprise some 25 sound recording companies in Taiwan. It is governed by a Board of fifteen directors and five supervisors elected for two-year terms.¹⁹¹ Unlike MUST, each member has one vote.¹⁹² Due to its more restricted rights, its collections are only a fraction of that collected by MUST and MCAT.

2.2.2.5. *Collective management of rights in literary works*

There is a limited compulsory license found in the Taiwanese copyright law. Article 47 of the Law provides that "within a reasonable scope, and for the purpose of editing textbooks used for teaching... the works of another person that have been publicly released may be reproduced, adapted or compiled."¹⁹³ Additionally, all schools may publicly broadcast works within a reasonable scope and for the purposes of education.¹⁹⁴ Users are required to notify the rightsholders and pay compensation, as set by the competent authorities,¹⁹⁵ for the use. An application made by a group of writers to establish a CMO in the field of literary works is currently pending before the competent authorities.

188. Copyright Act, *supra* note 166, Art. 5.8.

189. *Ibid.*, Art. 26(3).

190. *Ibid.*, Art. 26(4).

191. Constitution of ARCO, Arts 19 and 25.

192. *Ibid.*, Art. 13.

193. The next paragraph of the same article extends the compulsory license to include supplementary aids which are ancillary to the textbooks.

194. Copyright Act, *supra* note 166, Art. 47.

195. *Ibid.*

2.2.3. Hong Kong

The governing copyright law in Hong Kong was enacted on 27 June 1997,¹⁹⁶ just days before the handover of the territory back to China. It is a well crafted legislation and contained a number of interesting innovations. Through China, Hong Kong continues to be a part of the Berne Convention. Among the innovations are certain provisions governing CMOs.¹⁹⁷ A collective copyright licensing body¹⁹⁸ may be registered with the Registrar of Copyright Licensing Bodies. The basic requirement for registration is that the licensing body must be willing to make publicly available information concerning its royalty rates for different uses. The validity of the registration depends on compliance by the registered licensing body in charging royalties that do not exceed the published rates.¹⁹⁹

Every licensing scheme²⁰⁰ implies that the licensing body undertakes to indemnify licensees against any liability incurred by reason of having infringed copyright in a work in circumstances within the apparent scope of the license.²⁰¹ Where an indemnity is implied, the amount of damages which a court may award in favour of the copyright owner who is not a member of the scheme for copyright infringement must not exceed the amount the copyright owner would have received if he was a member of the licensing body,²⁰² provided that the award will not result in a conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the copyright owner.²⁰³ Any proposed²⁰⁴ or existing²⁰⁵ copyright licensing schemes may be referred to the Copyright Tribunal²⁰⁶ for a determination. In determining the reasonableness of a licensing scheme, the Copyright Tribunal will take into account the public interest and some additional specific matters,²⁰⁷ the overriding consideration

196. Copyright Ordinance, *Gazette*, 27 June 1997, L.N. 92 of 1997. Prior to this, the governing law in Hong Kong was the 1956 United Kingdom Copyright Act.

197. Described as "collective copyright licensing body" in the legislation.

198. Copyright Ordinance, *supra* note 196, Art. 145(4), which defines such a body as one whose main object is to grant copyright licenses covering works of more than one author.

199. Copyright Ordinance, *ibid.*, Arts 149(2) and 150.

200. A licensing scheme means anything in the nature of a scheme, whether described as a scheme or tariff or by any other name: Section 145(4), so far as they relate to copying a work, renting of a computer program or a sound recording, performing the work in public, broadcasting the work or including it in a cable programme service, issuing or making available of the work to the public, making adaptation of the work and any other act restricted by copyright in the work: Section 154.

201. Copyright Ordinance, *supra* note 196, Art. 168.

202. *Ibid.*, Art. 168(6).

203. *Ibid.*, Art. 168(7).

204. *Ibid.*, Art. 162.

205. *Ibid.*, Arts 156 and 163.

206. *Ibid.*, Art. 169 provides that the Tribunal shall consist of one Chairman and one Deputy Chairman, each of whom must be qualified for appointment as a District Judge, and seven other ordinary members.

207. *Ibid.*, Art. 167(1).

being to ensure that the exercise of its power will not result in a conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the copyright owner.²⁰⁸ Moreover, the Copyright Tribunal may, on the application of a person wishing to make a copy of a fixation of a performance, give consent in a case where the identity or whereabouts of the person entitled to the right of reproduction cannot be ascertained by reasonable enquiry.²⁰⁹ Where a reference has been made regarding a proposed or expiring copyright license, the Copyright Tribunal may award interim copyright royalty payment by the licensee to the licensing body²¹⁰ and may order the licensing body not to apply for an interlocutory injunction against the licensee.²¹¹

2.2.3.1.

Collective management of rights in musical works

Much like in Singapore, PRS (UK) had set up a licensing agency in Hong Kong in 1946, which continued its activities till 1977, when the Composers and Authors Society of Hong Kong (CASH) was established to assume its functions. Given its historical roots, CASH, like PRS, is a public company limited by guarantee. Due to the transfer of operations, which included existing licenses, from the PRS Agency to CASH, the society was in the enviable position of being able to immediately register a surplus of revenues²¹² against expenses in its initial 15 months of operations.²¹³

In its early years, CASH administered only the public performance rights in musical works. In 1981, a decision was taken to start²¹⁴ a new division for the collection of mechanical royalties. The administration of reproduction rights by CASH has always been of limited scope as the music publishers, in the main, dealt directly with the recording companies.²¹⁵ In 1989, CASH also started issuing a very limited number of grand right licenses.

CASH has three main classes of members – associate, full and successor. Any person upon becoming a member ordinarily becomes an associate member. Associate and successor members have no voting rights and cannot be elected to

208. *Ibid.*, Art. 167(3).

209. *Ibid.*, Art. 213.

210. *Ibid.*, Art. 164(1).

211. *Ibid.*, Art. 164(2).

212. Gross revenues were HKD 5,479,682.98 against expenses of HKD 480,495.43 + a further sum of HKD 921,479.86 as management fees paid to PRS.

213. From September 1977–December 1978.

214. Actual operation of this division started in 1982 and the first distribution of mechanical royalties was made in August 1983.

215. In 1996, CASH reached an agreement with the Music Publishers Association to represent the latter in licensing broadcasters in Hong Kong on reproduction rights when they produced television programmes for broadcasting purposes. Hitherto, this right had never been exercised in the territory.

office. When voting is by way of a poll, each full member is entitled to one basic vote, and one additional vote for every HKD 5,000 of royalties received by such full member during the preceding financial year. There is an important proviso to this weighted voting clause, however. No full member is entitled to exercise more than 10 per cent of all the votes cast by all full members.²¹⁶ However, if the poll concerns the election of directors, the 10 per cent limit applies to the total number of writer or publisher votes respectively. The rationale behind such a provision is simple enough to understand – a desire to ensure that no one member shall dominate the key decision making processes of the CMO. This is particularly so in relation to the major music publishers as each of their aggregated royalties received from a society is often much larger than that paid to any one individual author or composer.

The CASH Board of Directors, termed the “Council” in its Articles of Association, comprises up to twelve members, namely four Writer Directors elected by Writer Members; four Publisher Directors elected by Publisher Members; and up to four Directors appointed by the CASH Council “from persons who, either are members or, not being members, are prominent individuals in the musical or literary field or alternatively in a position to contribute to the development of the society.”²¹⁷ Directors serve a term of office of three years and may be re-elected or re-appointed. The quorum for the conduct of Board meetings is similarly set at three.²¹⁸ For historical reasons, the CASH Board had four directors who were appointed by PRS from its inception until 1996. The first Chairman of CASH, who served as such from 1977 till 2001,²¹⁹ was appointed by PRS. In 1996, the constitution of CASH was amended and the power of appointment accorded to PRS was abolished and entrusted to the elected CASH directors instead.

In its first five years, distributions of royalties collected by CASH were carried out by PRS. The net distributable incomes for the first year were in fact allocated 30:70 to domestic and international repertory respectively based on agreement between CASH and PRS. This percentage split was used pending the collation of statistics to determine the actual usage patterns. Since then, the upward trend in favour of local members has been maintained, with local members receiving 67.66 per cent of distributed royalties in 2003. The experience of CASH in this connection could well serve as an excellent indication of how a good copyright system, and a CMO can work to encourage and nurture local creativity.

This approach of an established society assisting young start-up collectives is invaluable in the development of such organizations in Asia. In recent years,

216. Articles of Association of CASH, Art. 27c.

217. Articles of Association of CASH, Art. 35a(1) of the Articles of Association of CASH.

218. Articles of Association of CASH, Art. 51.

219. With the change in the Articles of Association, Mr. Malcolm Bennett became a CASH-appointed director after 1996. He retired on 16 January 2001 when the current chairman Professor Chan Wing Wah was appointed.

CASH has also moved to replicate its DIVA computer system²²⁰ in MUST as well as MCSC. In similar fashion, CASH eventually went on to assist CHA,²²¹ MCSC, COMPASS and MACP to carry out international distributions on their behalf in the formative years of these societies.

In terms of collections, CASH is ranked fourth among societies collectively managing the rights in musical works in the Asia Pacific region, behind JAS-RAC, APRA and KOMCA. Its revenues grew from HKD 5.5 million in 1978 to reach HKD 117 million in 2004.²²² As an indication of its achievements, in 1990 the society was co-opted²²³ onto the CISAC Administrative Council, the highest decision making body of CISAC. CASH also participated in the formation of the CISAC Asian Regional Office, which was located within CASH from 1982 to 1989, and conducted training for many of the new general and departmental managers and staff of new CMOs in the region.²²⁴

2.2.3.2.

Collective management of the rights in sound recordings in Hong Kong

Established in 1984 by IFPI, Phonographic Performance (South East Asia) Limited administers the public performance and broadcast rights in sound recordings, music videos and karaoke videos in Hong Kong. It was subsequently transferred to the IFPI (Hong Kong Group)²²⁵ as its subsidiary company in 1998.

2.2.3.3.

Collective management of the rights in literary works in Hong Kong

The Hong Kong Reprographic Rights Licensing Society (HKRRLS), established in 1995, is an agency and operates under the umbrella of International Federation of Reprographic Rights Organizations (IFRRO). Apart from representing local authors and publishers, it represents authors and publishers under the IFRRO²²⁶ umbrella. At present HKRRLS represents 52 local members and other rightsholders from 20 countries. Its authority to collectively administer the rights of its members is acquired by way of an agency arrangement rather than the assignment approach adopted by CASH. Its licensing activities started only in 2000, and in 2003, its gross collections were EUR 128,000.

220. The development of DIVA was started in April 2002 and launched in August 2003.

221. From 1990 to 1995.

222. Approximately EUR 605,000 and EUR 13 million, respectively as of November 2005.

223. In 1992, CASH was elected onto the CISAC Administrative Council. It is the only Asian society, apart from JASRAC, to have been elected so in the history of CISAC.

224. So much so that some jokingly called it the CASH University.

225. The IFPI (HK Group) is a national group of IFPI that represents over 50 recording companies in Hong Kong, which includes all the major local recording companies.

226. See <www.ifpro.org>.

Apart from HKRRIS, members of the Newspaper Society of Hong Kong founded the Hong Kong Copyright Licensing Association (HKCLA) in October 2001 offering a one-stop collective licensing scheme²²⁷ for photocopying of newspapers. HKCLA does not administer its rights directly but has appointed the Hong Kong Copyright Licensing Services Limited (HKCLS) as its exclusive service company to assist it in the delivery of a series of licensing services to individuals and the vast corporate sector.

2.2.4. South Korea

The current Korean copyright law was promulgated on 31 December 1986 and came into force on 1 July 1987.²²⁸ It was subsequently amended on numerous occasions, including major amendments in 2000 and 2003. South Korea acceded to the Berne Convention only on 21 August 1996.²²⁹ It was till then a signatory only to the Universal Copyright Convention.²³⁰ It is still not a signatory to the Rome Convention although it did ratify the 1971 Geneva Phonograms Convention.²³¹ It acceded to the WCT in 2004²³² but has yet to join the WPPT at the time of this writing.

The South Korean Copyright Act contains a number of limitations that impact the collective management of rights. Article 23 provides for a compulsory license for educational institutions at the level of high schools or lower to reproduce "to the extent deemed necessary" a work that has already been published in textbooks.²³³ Article 23(3) further provides that compensation shall be paid to copyright holders according to criteria prescribed by the relevant Ministry. Article 26 provides that it is permissible to publicly perform or broadcast a published work for non-profit purposes and without charging any fees to audience, spectators or third persons, provided that the performers concerned are not paid any remuneration for their performances.²³⁴ The Act also contains provisions concerning the collective management of copyright and neighbouring rights in a chapter entitled "Copyright Management Services". The relevant legal provisions divide such services into two categories, namely

227. HKCLA has been authorized by 12 Hong Kong newspapers to issue photocopy licenses for internal references, instructional purposes (only applicable to kindergartens, primary and secondary schools under prescribed conditions), inclusion in course packs and news monitoring purposes.
228. Copyright Act, Act No. 3916, 31 December 1986.
229. Thus, up till the time South Korea joined the Berne Convention, not all repertoires received copyright protection. For example, US works created prior to October 1987 were then not protected under the UCC.
230. The UCC came into force in South Korea on 1 October 1987.
231. Which came into force on 1 October 1987.
232. 24 June 2004.
233. There is also provision that certain education institutions may publicly perform, broadcast or reproduce a published work to the extent necessary for the purpose of education and no payment or compensation is obligated.
234. Copyright Act, *supra* note 228, Art. 26.

"copyright trust services" and "copyright agency (or brokerage) services". A copyright trust service²³⁵ is the equivalent to the majority of CMOs, i.e., it is about the exercise of copyright or neighbouring rights by the rights-holders themselves organized into a society. The term "copyright agency or brokerage service"²³⁶ is self-explanatory; there is no transfer of rights. This distinction has important repercussions.

A CMO²³⁷ must receive government approval for its operations,²³⁸ while copyright management agencies have only to report its activities to the Ministry for Culture and Tourism.²³⁹ There are over 200 such management agencies in Korea. Due to much stricter requirements for engaging in copyright trust services, there are currently only eight CMOs in South Korea. Moreover, the practice by the Korean government is to allow just one copyright trust service organization for each field of exploitation or right.²⁴⁰ The government's control over collecting societies and copyright agencies extend to requiring reports on their activities to suspension of their activities, if they carry on their business in breach of the provisions of the Copyright Act. Government approval might be withdrawn in extreme cases.²⁴¹

2.2.4.1. The collective management of rights in musical works in South Korea

Established on 8 March 1964, KOMCA ranks as one of the earliest CMOs of musical works created in Asia, second only to JASRAC in Japan. At present, it also ranks as one of the largest CMOs in Asia both in terms of membership, with over 5,000²⁴² members in 2004 and in terms of royalty collections.

235. *Ibid.*, Arts 2-18, which was newly provided as part of amendments introduced on 12 January 2000, defines "copyright trust services" to mean "a line of business in which one holds in trust and continuously manages author's property rights, publication rights, neighbouring rights or exploitation rights on behalf of the holders of the aforementioned rights".
236. *Ibid.*, Arts 2-19, also introduced on 12 January 2000, defines "copyright agency or brokerage services" to mean a line of business in which one acts as an agent (excluding a general agent concerning exploitation) or a broker on behalf of the owner of author's property rights, public rights or neighbouring rights with regard to the exploitation of works or of performance, phonograms or broadcasting, which are the subject matters of neighbouring rights.
237. Termed as an organization offering "copyright trust services" in the Korean Copyright Act.
238. Copyright Act, *supra* note 228, Art. 78(1) stipulates that "any person who intends to engage in copyright trust services shall obtain a permit from the Minister of Culture and Tourism".
239. Amendments to the Korean Copyright Act carried out in 1994 changed the need for such services to obtain operating licenses from the relevant ministry to a reporting system.
240. There is no express legal restriction on the number of trust organizations per category of rights.
241. Copyright Act, *supra* note 228, Art. 80.
242. There were 5,073 members as on 31 January 2004, of which 586 were full members, and 4487 were associate members, including 75 music publisher-members.

It administers both the public performance and reproduction rights in musical works. In the administration of the public performance rights, KOMCA has a monopoly. As for mechanical rights administration, the major music publishers account directly among themselves in relation to the reproduction of "international works" only. Hence, if an independent recording company in Korea reproduces an international work, KOMCA does the royalty collection. Moreover, KOMCA collects reproduction royalties on all local works, unless they are published by one of the local or major publishers, in which case, the major publishers will account directly among themselves while KOMCA will collect royalties from the local recording companies for both the local and major publishers.

Authors, composers, arrangers, and music publishers or any other copyright owner may apply to become a KOMCA member. Article 7 of KOMCA's Statutes divides its membership into ordinary and associate members.²⁴³ All members join as associate members in the first instance. Promotion to ordinary membership is decided by the Board of Directors, who uses a rather convoluted calculation which results in only 12 per cent of its members being full members. Article 12 of KOMCA's Statutes states that once a member becomes an ordinary member, he or she will not be demoted or removed unless he or she commits a serious offence against the society. Only ordinary members can attend and vote at the annual general meeting and are eligible for election to the board of directors. Music publishers²⁴⁴ can join KOMCA as associate members only²⁴⁵ as there is no provision for them to be promoted.

KOMCA's Board of Directors comprises 21 members of which there are four music composers, two national classical music composers, two nursery music composers and ten popular music composers. The President nominates three other directors. Only full or ordinary members are entitled to stand for election or be appointed to become directors.²⁴⁶

Although KOMCA was formally organized in 1964, it could be said to have truly commenced operations only under the new copyright law of 1987. Thus, in 1988, it recorded gross revenues of some KRW 679 million.²⁴⁷ Throughout

243. "Ordinary Members" are described as "those who have engaged in substantial musical creation out of associate members and been approved by the Board of Directors under separately stipulated provisions" while "Associate Members" are defined as "those who have entrusted the management of musical works to the Society or taken over the Copyright Trust Contract".

244. Music publishers are defined as entities which promote domestically and internationally the musical works taking a conditional transfer of the economic rights from the musical rightsholders. KOMCA amended its Constitution to admit publishers as associate members in 1988. In 1995, it had a grand total of two publisher members. This increased to over 50 by 2000.

245. This is a sore point with music publishers.

246. The term of office is three years.

247. Approximately EUR 570,000 as of November 2005.

the last decade of the millennium, its growth was not spectacular, particularly when set against the backdrop of the country's impressive economic progress. At the turn of the millennium, its gross revenue was KRW 27 billion. However, between 2000 and 2004, it more than doubled its gross income to reach KRW 55.5 billion²⁴⁸ in 2004. KOMCA's licensing²⁴⁹ operations are divided into two departments, namely the Licensing Department and the Regional Office Administration Department. The former is further subdivided into four sections covering mechanical licensing, transmission rights licensing, mechanical (piracy) licensing and broadcast licensing. The Regional Office Administration Department oversees the general licensing activities throughout South Korea.

Until January 1990, KOMCA did not enter into any reciprocal representation agreement with any foreign society. A representative of the Ministry of Culture and Information had visited ASCAP and BMI in October 1989, on KOMCA's behalf, to propose the payment of USD 10,000²⁵⁰ for the use of US works from 1987 to 1989 to clear the way for bilateral agreements to be entered into between KOMCA and foreign societies. Bilateral agreements were entered into by KOMCA with the two main US performing rights CMOs, ASCAP and BMI²⁵¹ in mid 1990, followed by an agreement with Hong Kong's CASH (including PRS repertoire).²⁵² In early 1994, the German music CMO GEMA, representing 29 other CMOs, entered into a reciprocal agreement on mechanical rights administration. By April 2001, KOMCA had entered into agreements with 32 collectives in 30 countries for performance rights and 32 CMOs covering 34 countries for reproduction rights.

2.2.4.2. *Collective management of other rights in South Korea*

Korean Society of Authors (KOSA) was founded on 19 May 1984 and was the first CMO established in South Korea for the protection of copyright in literary and scientific works.²⁵³ In 2004, it had some 1,606 individual members and 57 organizational members. Its Board consists of seventeen members, with two auditors. The secretariat consists of four regular employees and a number of part time staff. In 2003, it collected the equivalent of USD 1,569,749 and distributed some USD 906,129 to members.

248. Or approximately EUR 46 million as of November 2005.

249. KOMCA's license tariffs must be approved by the government. Note also that the relevant Korean authorities must also approve any changes to the articles of association of KOMCA, as well as its distribution rules.

250. This arrangement was accepted.

251. See the US Chapter.

252. August 1990.

253. Under its license with the Ministry for Culture and Tourism, KOSA is authorized to operate in the fields of literary works of literature and sciences, dramatic works, cinematographic works, artistic works and photographic works.

2.2.4.3. *Korea reprographic and transmission rights centre (KRTRC)*

The KRTRC started with six member-organizations²⁵⁴ on 1 July 2000. In 2004, some EUR 347,000 were collected. No distribution has yet been made.

2.2.4.4. *Korean television and radio writers association (KTRMA)*

KTRMA was established in December 1957 and has 1,663 individual members in 2003 with collections of about KRW 4.4 billion.

2.2.4.5. *Korea scenario writers association*

Although this association was established in 1954, it was given permission to operate as a CMO only on 21 September 2000. It has 327 members, of which 150 are regular members, 107 are associate members and 70 are special members.

2.2.4.6. *Federation of Korea art performers association (PAK)*

Started on 4 June 1988, PAK currently has thirteen member-organizations.

2.2.4.7. *Korean association of phonogram producers (KAPP)*

The KAPP was started on 5 September 2001 and currently has more than 400 members.

2.2.4.8. *Korean broadcasting performers association*

This organization was started in 2001, has 2,200 members and collected about KRW 30 million in 2003.

2.2.5. *North Korea*

It may come as a surprise to some that North Korea acceded to the Berne Convention, which took effect on 28 April 2003. It is not surprising, however, that there is no other information with regard to copyright and collective management of rights in North Korea.

254. Five authors' association and one publisher association – Korean Society of Authors, Korean Publishers Association, Korea Music Copyright Association, Korea TV & Radio Writers Association, Korean Association of Academic Societies.

2.2.6. *Mongolia*

Mongolia is a large country geographically, but a relatively small one population-wise, with only 2.5 million people with a per capita GNI of USD 430 or less than EUR 400 in 2002.²⁵⁵ About 500,000 people live in the capital Ulan Bator and the rest of the population is still largely nomadic.

Copyright protection²⁵⁶ has existed in Mongolia as part of the civil law since 1963 under the socialist regime. These changed under a new 1992 Mongolian Constitution and with the enactment of a new copyright law in 1993.²⁵⁷ Mongolia is both a signatory to the Berne Convention²⁵⁸ as well as a member of the WTO. It also acceded to the WCT and WPPT on 25 October 2002.

2.2.6.1. *The collective management of rights in musical works in Mongolia*

The only CMO presently in existence in Mongolia is the Mongolian Society for the Rights of Authors and Composers (MOSRAC). It was established in 2000 with a financial loan provided by the Japanese CMO JASRAC. MOSRAC currently has four staff and it administers both the public performance as well as reproduction right in musical works. It has not entered into any reciprocal representation agreement with any foreign CMOs as yet. Moreover, as music publishing does not exist in Mongolia, it has only composer and author members. In its first year of operations, it grossed about MNT 1.2 million²⁵⁹ but expended over 3 million. By 2002, MOSRAC's collections had exceeded its expenses. MOSRAC made its first distribution of MNT 1.14 million²⁶⁰ in royalties at the end of July 2001 to 52 members. Of this sum, MOSRAC retained 30 per cent as service fee. A further 10 per cent of this net distributable income was deducted as income tax. 70 per cent of the remaining distributable royalties were distributed to composers and 30 per cent were distributed to lyric writers. As over 90 per cent of the royalties were "mechanical" royalties, distribution was made based on lists provided by the recording studios detailing the works of MOSRAC's members that were used by them. The lists did not set out the exact number of times a particular work is used. The top composer received a net sum of about MNT 52,300²⁶¹ while four members did not receive any royalties. While the distributed royalties were miniscule by any standards, it was significant in some respects. First, it represented the first ever distribution

255. World Development Indicators Database, April 2004. The World Bank Group.

256. Authors had only a remuneration right and the State and government agencies could exploit without the authorization of and payment to the author.

257. Law of Mongolia on Copyright, [publication info]. Amended most recently in 1999 to bring Mongolia's copyright law into compliance with the country's TRIPS obligations.

258. 12 March 1998.

259. This is equivalent to approx. EUR 1,000 as of November 2005.

260. *Id*

261. Approximately EUR 40.

of royalties by MOSRAC in Mongolia, and secondly, distribution was made within the first year of the society's formation. MOSRAC's distribution rules and system is uniquely different from that practised in the majority of the other CMOs in other parts of the world. While it may be suited to the special circumstances of Mongolia for the present, a time would come for it to move towards a more internationally accepted model.

In conclusion, it is worth noting that Mongolia is one of the rare Asian countries²⁶² that provides for a *droit de suite* (resale right) in its law. Article 12.2 provides for a five per cent resale royalty when an original copy of a work of fine art or applied art is sold through an auctioneer or agent. However, there is as yet no collective management of this right.

2.3. THE SAARC COUNTRIES²⁶⁵

All South Asian countries except Bhutan are WTO members. In this part of Asia, the majority of copyright legislations are essentially based on United Kingdom law.

2.3.1. Bangladesh

Bangladesh acceded to the Berne Convention on 4 May 1999 and amended its 1962 Copyright Ordinance in 2000 to comply with its international obligations. It is classified as a least developed country and its population of 136 million has a per capita GNI of USD 380. There is presently no collective management of rights in Bangladesh.

2.3.2. Bhutan

With the teeming masses in Asia, it is sometimes forgotten that there are also extremely small countries in the region. Bhutan, landlocked between the two Asian giants, India and China, has a population of only 800,000 people. The first copyright legislation of Bhutan was enacted in July 2001²⁶⁴ and it acceded to the Berne Convention on 25 November 2004. The Act contains some provisions, which has reference to or possible impact on the collective management of rights. Sections 12(1)(b)(ii) and 13(a)(iii) provide for the making of copies of works for teaching in educational purposes and by libraries and archives without the authorization of the author provided that, *inter alia*, "there is no collective license available (that is, offered by a collective management organization

262. Only two other Asian countries have *droit de suite*, namely India and the Philippines.

263. Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka have organized themselves into a regional grouping called the South Asian Association for Regional Cooperation (SAARC) in 1985 and there is a working group on intellectual property rights.

264. Prior to this, there was no copyright protection in Bhutan. Indeed, until six years ago, the reception of television signals by ordinary Bhutanese was prohibited.

in a way that the educational institution is aware or should be aware of the availability of the license) under which such reproduction can be made". Hence, if a CMO exists, then these fair dealing exemptions would no longer be valid and the foregoing categories of users would be required to obtain a reproduction license from the CMO. Section 34 empowers the Minister for Trade and Industry "to regulate by order questions whose regulation may be necessary for the implementation of the Act, including the setting up of one or more organizations to administer rights on behalf of the owners of such rights and determining the conditions under which such organizations shall work". Section 25 provides that a single equitable remuneration shall be paid to the performer or performers and the producer of the sound recording if a sound recording, published for commercial purposes, or a reproduction of such sound recording is used directly for broadcasting or for other communication to the public, or is publicly performed.

There is presently no CMO in Bhutan. Given the limited market size,²⁶⁵ the plan is to create some form of collective management of rights within the IP Office.

2.3.3. India

Copyright law in India is governed by the Copyright Act of 1957,²⁶⁶ last amended in late 1999. It became a Berne signatory on 1 April 1928. Chapter VII of the Indian Copyright Act, entitled "Copyright Societies",²⁶⁷ contains various provisions on collective management. Section 33 generally proscribes any person from carrying out the work of a collective except in accordance with registration granted under the Chapter. The proviso to Section 33(3) states that "the central government shall not ordinarily register more than one copyright society to do business in respect of the same class of works".²⁶⁸ Section 36 requires every copyright society to submit to the registrar of copyrights such returns as may be prescribed. With regard to distribution, apart from requiring the society to obtain the approval of members for its distribution procedures, and for non distribution related utilization of royalties,²⁶⁹ the Act specifies that as far as possible it should be in proportion to the actual use of their works.²⁷⁰ There is also a legal provision that a CMO shall not discriminate in regard to

265. The Bhutanese economy, one of the world's smallest, is based on agriculture and forestry, which provide the main livelihood for 90% of the population and account for about 40% of GDP.

266. The Indian Copyright Act, 1957, *Official Gazette*, No. 14 of 1957, adopted many of the principles and provisions of the 1956 UK Copyright Act.

267. *Ibid.*, Art. 2 defines a "copyright society" as a society registered under sub-section (3) of Section 33. There is also an entire Chapter V contained in the Copyright Rules on copyright societies.

268. *Ibid.*

269. *Ibid.*, Art. 35(1).

270. *Ibid.*, Art. 35(2).

the terms of license or the distribution of fees collected between rights in Indian and other works. If the government is of the opinion, based on a complaint by the registrar of copyrights, or a copyright holder, that it is in the interests of members of a CMO to do so, it may, after conducting any inquiry into the complaint, suspend²⁷¹ or cancel²⁷² the registration of the society.

A compulsory license exists under Section 52 of the Indian Copyright Act in relation to the making of sound recordings. The unique feature is that this compulsory license applies not only to sound recordings made of musical works, but extends also to sound recordings made of any literary or dramatic work.

2.3.3.1. *Collective management of rights in musical works*

British colonial rule of India began in the east of the country in the mid eighteenth century and did not end until 15 August 1947 with not only the independence of India but also the creation of the new state of Pakistan.²⁷³ Naturally therefore, prior to the formation of the Indian Performing Rights Society (IPRS) in 1969, performing rights in non-Indian music was administered by PRS (UK) for its own members and affiliated societies. It did this through an agent in Calcutta, Natsin (India) Private Limited (Natsin). The collections made by this agent were for the use of foreign repertory by All India Radio only. The Indian Performing Rights Society (IPRS) was formed in 1969. IPRS began licensing in June 1970²⁷⁴ when it attempted to license cinema theatres in the country. The Eastern India Motion Picture Association resisted this attempt firstly before the Copyright Board, which ruled in favour of IPRS, and then in the High Court of Calcutta,²⁷⁵ which overruled the decision of the Copyright Board. IPRS appealed to the Supreme Court,²⁷⁶ which affirmed the decision of the High Court.

271. Suspension may be for up to a period of one year and the government shall appoint an administrator to discharge the functions of the society.

272. Cancellation of registration could be carried out on the following grounds, namely: the society is being managed in a manner detrimental to the interests of the holders of rights concerned or if the copyright society persistently fails to manage its affairs properly or if it persistently fails to properly maintain its accounts and get them audited or it utilizes its funds for purposes other than the copyright business.

273. East and West Pakistan. East Pakistan subsequently became an independent country, Bangladesh.

274. In accordance with the provisions of Section 33 of the Copyright Act, IPRS published its licensing tariffs on 27 September and 29 November 1969 in the *Statesman* and the *Gazette of India* respectively. A number of persons including various associations of film producers who claim to be owners of films, including the sound tracks thereof filed objections in accordance with Section 34 of the Copyright Act.

275. The High Court held that unless there is a contract to the contrary, a composer who writes a lyric or music for the first time for valuable consideration for a cinematograph film does not acquire any copyright either in respect of the film or its sound track, which he is capable of assigning, and that the owner of the film becomes the first holder of the copyright in the composition.

276. *Indian Performing Rights Society v. Eastern India Motion Picture Association*, Civil Appeal Number 967 of 1975.

On 1 April 1972, IPRS entered into an agency agreement with PRS for the licensing of the international music repertory in India. However, it had to be conducted through the services of Natsin. This was followed in the next year with a reciprocal agency agreement with Mechanical Copyright Protection Society Ltd, London (MCPS) for the administration of the reproduction rights in musical works. In 1975, the Society entered into a reciprocal agreement with PRS whereby the latter was vested the right to administer Indian works outside India. However, the licensing of both Indian and non-Indian music continued to be carried out by Natsin as licensing agent. This state of affairs led a renowned South Indian composer, M. B. Srinivasan to campaign for IPRS members to assume full management of the Society. A case was filed in the Bombay High Court against Natsin and eventually, IPRS was able to terminate its agency contract with Natsin in December 1977 and assumed full operations of the organization. In the immediate aftermath, the agent filed various civil suits against the Society and its staff, severely crippling the activities of IPRS for some time. To make matters worse, the decision of the Supreme Court in the Eastern India Motion Picture Association case that same year was interpreted as preventing IPRS from licensing the performing rights in Indian music. In 1992, upon a review of operations, it was realized that the judgment had the effect of only restricting IPRS from the licensing of musical works when used simultaneously with the film but did not restrict IPRS from the licensing of film music used separately from films. Due to the misunderstanding, IPRS hitherto only collected license fees for the use of Western music and distributed these collections to its members.

Until 1992, IPRS had a reciprocal arrangement with PRS (UK) by which each party was collecting royalties in its own territory on behalf of the other but retained the sums so collected for distribution among its own members.²⁷⁷ This was renegotiated in 1992²⁷⁸ for the royalties collected to be remitted to each other.²⁷⁹ In 1993, IPRS received its first overseas distribution from PRS (UK) in the amount of INR 3,845,110.²⁸⁰ In the same year, PRS admitted publishers-members for the first time. In 1994, IPRS received mechanical royalties for the first time of INR 418,350²⁸¹ from MCPS and also issued its first ever mechanical license for the utilization of Indian music in India.²⁸²

277. IPRS distributed INR 900 to five members in its first distribution in 1973.

278. CISAC provided a grant of USD 9,000 to purchase computers for its distribution system.

279. All foreign repertory continued to be channeled to IPRS through its reciprocal contract with PRS (UK). With effect from 1 January 1996, IPRS started to enter into direct reciprocal contracts with other societies.

280. Approximately EUR 72,000 as of November 2005.

281. Approximately EUR 8,000 as of November 2005.

282. Prior to this, IPRS had sporadically issued licenses in India for the use of international music. In 2004, it took the unusual decision of terminating its administration of mechanical rights.

Despite its early formation, the annual revenue of IPRS remained dismally low for a long time. In 1992, it was only INR 1.9 million²⁸³ while expenses were 1.2 million. With the change in arrangements between IPRS and PRS, the remittances of foreign royalties substantially increased and came to constitute a sizable proportion of its total income. In 2004, for example, foreign income comprised 37.9 per cent of its total incomes. Thus, looking at domestic royalty collections in 2004 (INR 58 million),²⁸⁴ it may be concluded that given its history and size, IPRS has not been able to achieve its market potential in terms of collections.

IPRS ranks among the earliest CMOs that were established in Asia. It is a company limited by guarantee²⁸⁵ and not having a share capital. According to its Memorandum of Association,²⁸⁶ the society is authorized to collectively administer the public performance, broadcast, cable transmission and reproduction rights in musical works. Membership is open to any composer,²⁸⁷ author, writer, or owner, as well as any successor in title. The IPRS Board of Directors comprises up to 24 directors where "the authors, composers, publishers and audio visual publishers shall have equal representation". Here again, the situation at IPRS is unique in Asia, with another provision that "the governing council shall be so composed that equal representation is given to authors and composers from each of the Western, Southern, Northern and Eastern regions of India".²⁸⁸ No other society in Asia has such a provision. By virtue of a rotational system of retirement,²⁸⁹ each director can serve up to three years. A full member must also meet certain unique requirements before being eligible to stand for election as a director.²⁹⁰

2.3.3.2. *Collective management of rights in sound recordings*

The Indian Phonographic Industry (IPI), precursor of the Indian Music Industry, started in 1936 as a non-profit association of producers of sound recordings. In 1994, the association changed its name to The Indian Music Industry (IMI). It is a non-commercial and non-profit making organization affiliated to the International Federation of Phonographic Industry (IFPI). IMI members formed a collecting society in 1941 to administer rights in sound recordings called Phonographic Performance Ltd. (PPL) which is registered

283. Approximately EUR 36,000 as of November 2005.

284. Approximately EUR 1.1 million as of November 2005.

285. Liability is limited to INR 100 per member.

286. Art. IIIA1.

287. A "composer" is defined in Article 1(a)(vi) as "a composer or arranger of any music".

288. Articles of Association of IPRS, Art. 30(e).

289. Articles of Association of IPRS, Art. 50 provides that one-third of directors shall retire by rotation. Furthermore, Article 51 provides that the directors to retire shall be those directors longest in office.

290. Articles of Association of IPRS, Art. 30(d).

with the Registrar of Copyrights. PPL administers broadcasting/telecasting and public performance rights on behalf of over 65 music companies which are its members.

2.3.3.3. *Collective management of rights in literary works*

Members of the Federation of Indian Publishers have registered an organization named Indian Reprographic Rights Organization to collectively manage the rights in literary works. The targeted commencement of operations was at the end of 2005.

2.3.3.4. *Droit de suite*

Section 53A of the Indian Copyright Act establishes a *droit de suite* in the case of resale of an original work of painting, sculpture or drawing, or of the original manuscript of a literary or dramatic or musical work exceeding INR 10,000.²⁹¹ The Copyright Board, who may fix different shares for different classes of works, shall fix the share in the resale price. No CMO presently exists to administer this right in India.

2.3.4. Nepal

The latest Copyright Act of Nepal was enacted in April 2002.²⁹² Further to the enactment, copyright rules were passed in August 2004. At the time of writing, Nepal has just finalized its accession to the Berne Convention, which will come into force on 11 January 2006. It was admitted as a WTO member, together with Cambodia, in 2003 and is categorized as a Least Developed Country (LDC). The Copyright Rules expressly regulate the formation of CMOs. Section 39 provides that generally one CMO shall be formed for each category of rightsholders. There shall be a minimum of 50 members in each organization. The Registrar is empowered under Section 30(2)(a) to monitor and control the CMO. Section 39(2) requires a CMO to be registered with the Registrar. Further, Section 39(5) expressly permits a collective to sue and be sued in its own name.

2.3.4.1. *Collective management of copyrights*

The Copyright Protection Society of Nepal (CPSN) was established in March 1997 as an autonomous corporate body. One of the key objectives of CPSN is to collect and distribute royalties to rightsholders for use of copyright works. Any author protected by the Nepalese Copyright Act including visual artists, book publishers, authors of any literary or artistic works engaged in the audio-visual

291. Approximately EUR 190 as of November 2005.

292. It received royal assent on 15 August 2002.

fields may be admitted to CPSN's membership by its Management Committee (MC). There are at present 100 CPSN members of whom 30 per cent are performers, 40 per cent authors [of music as well as books] and the rest are from different areas of copyright such as photography, computer software, fine arts, book publishers and film producers. There are also a small number of civil servants who are CPSN members. The management committee of CPSN consists of a Chairman, Vice-Chairman, Secretary General and Treasurer and such other members as elected by its membership. General authority is vested in the Secretary General of CPSN including the authority to make arrangements for the payment of royalties to rightsholders by way of determining the amount of royalties to be levied against a user of copyright material for public performances, broadcasting and reproduction.

Since its inception, CPSN has spent a great deal of time lobbying for amendments to the copyright law. Due to the inadequacy in the previous copyright law, CPSN did not commence its management activities. CPSN now intends to act as an incubator for the establishment of CMOs. There is no other collective in Nepal at present.

2.3.5. Pakistan

The governing law in Pakistan is the Copyright Ordinance.²⁹³ Pakistan is a signatory to the Berne Convention.²⁹⁴ Historically, the PRS (UK), like in India, also had an agent in Pakistan till the mid-1990s. This arrangement was terminated and to date, no collective, either in the field of musical works, or any other field, has been formed.

2.3.6. Sri Lanka

The current Sri Lankan copyright legislation is embodied in its Intellectual Property Act²⁹⁵ of 2003. Sri Lanka has been a Berne Convention member since 20 July 1959. There are numerous provisions contained in the latest law that affects the collective management of rights. Section 2(1)(b) creates the position of a Director General of Intellectual Property, who "shall take all necessary steps to promote and encourage the establishment and proper functioning of organizations or societies to protect and administer copyright and related rights". Section 25(1)(a) provides that no person shall commence or carry on the business of a CMO unless authorized under the Act. It is also provided that the Director-General shall not ordinarily register more than one such society to do business in respect of the same class of rights. Every CMO submits to the Director-General such returns as may be prescribed. The Director-General

293. Copyright Ordinance No. XXXIV of 1962, *The Gazette of Pakistan, Extra*, 2 June 1962 (as amended by Copyright (Amendment) Ordinance, 2000 dated 29 September 2000).

294. Which entered into force on 5 July 1948.

295. Intellectual Property Act of 2003, No. 36 of 2003.

may, if he is satisfied that the CMO is being managed in a manner detrimental to the interests of the owners of rights concerned, cancel or suspend the registration of the society and the permission to commence or carry on business. Where the Director-General suspends the registration of a society, he appoints an administrator to carry out the functions of the CMO. Every collective is subject to the control of the rightsholders. All fees distributed among rightsholders are, as far as may be, distributed in proportion to the actual use of their works. An equitable remuneration right in sound recordings is provided.²⁹⁶ This provision is substantially identical to Article 12 of the Rome Convention with one key difference – the Sri Lankan provision extends the remuneration right to include any public performance of a sound recording. It is further implied that the producer collects the royalties from the users and pays half to the performer in the absence of agreement to the contrary.²⁹⁷

2.3.6.1. *Collective management of rights in musical works in*

Sri Lanka

Prior to the enactment of the new law, there existed a CMO called the Sri Lanka Performing Rights Society (SLPRS), which was incorporated as a company limited by guarantee under the Sri Lankan Companies Act in September 1981. SLPRS is no longer in operation. A new CMO is being considered.

3. CONCLUDING REMARKS

TRIPS has been the dominant driving force in the legislative changes that have taken place in the Asia Pacific region particularly in the last decade. Despite TRIPS, copyright law is still non-existent in a number of Asian countries or remain archaic and in need of updating. More and more, however, collective management is accepted as an efficient way of administering certain rights. A trend towards legislative intervention in the field of collective management has also been observed in recent years. However, the collective management of rights remains totally undeveloped in quite a large number of Asian territories. The CMOs that do exist continue to struggle to collect royalties that should rightfully be paid to them. In the former category, there are countries such as Pakistan, Bangladesh, Bhutan, Sri Lanka, Myanmar, Laos, Cambodia and Brunei. In the latter category, there are examples in Thailand, the Philippines, China, Mongolia and India, where CMOs have existed for quite some time with less than optimal results. The collective management of other rights, such as the "mechanical right" in musical works, the reprographic rights in literary works, the visual arts, etc. are largely embryonic and face daunting challenges in their development.

296. *Ibid.*, Art. 19.

297. *Ibid.*, Art. 19(2).

We have seen lively developments in Asia in the last decade and a half. However, the economic benefits are still not being fully realized by the rightsholders. Governments in the region can take the lead in encouraging the development of CMOs by ensuring, *inter alia*, that they pay reasonable amounts of royalties when their departments, and government-linked organizations utilize copyright materials. Another crucial area would be the reform of the judicial systems in some of the Asian countries. Without this latter reform, the continued development in the field of collective management would be quite seriously hampered. We can certainly look forward to another exciting decade in the field of copyright development in the Asia Pacific region at the start of the new millennium.

Chapter XIII Collective Management of Copyright in Latin America

*Karina Correa Pereira**

1. INTRODUCTION

Countries discussed in this chapter are: Argentina, Brazil, Chile, Costa Rica, Mexico, Peru, Uruguay and Venezuela. This group was selected in order to represent different regions of Latin America, each with different social realities as well as various political and cultural environments. The three largest countries – Argentina, Brazil and Mexico – are considered first since those are the most important markets in the region, not only for demographic reasons, but also arguably because of the cultural relevance of these three nations' heritage, both locally and internationally. Peru and Venezuela are members of the Andean Community. Chile is a regional leader and an example of economical growth after the fall of its military regime. Uruguay might be a small player in the regional scene; however it is the current headquarter of LATINAUTOR, a regional cooperation project centralizing Ibero-American Collective Management Organizations (CMOs). Finally, Costa Rica was considered in order to include a representative of Central America.

All countries considered are signatory to major international treaties concerning intellectual property¹ and have enacted "modern" laws protecting copyright and in some cases establishing guidelines for the collective management of copyright. However, the enforcement of national laws is often jeopardized by weak legal institutions and the lack of copyright's awareness by their populations. This lack of awareness, combined with the lower purchasing power

* Brazilian attorney, LL.M., LL.D. candidate, University of Ottawa.

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of most Latin American countries, may lead to increasing piracy of copyright products. It is a market where CMOs can conduct a variety of preventive actions and start litigation procedures.

The purpose of this chapter is to analyze the activities and gain a better understanding of CMOs throughout Latin America based on: (a) organizational and transparency levels achieved by CMOs in each given country and its relation to governmental control; and (b) effectiveness of the activities of CMOs, especially in relation to collecting licensing fees and distributing funds to its members. Those two different criteria are closely related since the latter depends on the former. Furthermore, these two criteria aid in determining whether a governmentally controlled system can be more effective for CMOs than a strictly private one.

2. CMOs THROUGHOUT LATIN AMERICA

This section presents active CMOs in Latin America as well as associations of rightsholders that have an important role in the fight against piracy and the spread of awareness among the local populations. It is important to adequately describe the current situation prior to commencing further analysis.

2.1. BRAZIL

The first Brazilian CMO, Sociedade Brasileira de Autores Teatrais (Brazilian Society of Theatre Authors – SBAT) was established in 1917.² SBAT is still active and is one of the most dynamic CMOs in the country. Originally, it managed only theatrical works but it now collects and distributes amounts related to the commercialization of all kinds of literary works. The widening of its scope caused a change to its initial name to Sociedade Brasileira de Autores, however the name SBAT is still used.

After the creation of this first CMO, many others followed:

- 1942 – UBC – União Brasileira de Compositores (Brazilian Union of Composers);
- 1946 – SBACEM – Sociedade Brasileira de Autores, Compositores e Editores (Brazilian Society of Authors, Composers and Publishers);
- 1956 – SADENBRA – Sociedade Arrecadadora de Direitos de Execução de Músicas no Brasil (Society of Music Performing Rights of Brazil);
- 1960 – SICAM – Sociedade Independente de Compositores e Autores Músicais (Independent Society of Composers and Music Authors);

2. See online: <www.sbat.com.br> (last visited: 15 October 2005).

1962 – SOCINPRO – Sociedade Brasileira de Administração e Proteção de Direitos Intelectuais (Brazilian Society of Management and Protection of Intellectual Property Rights).

The large number of associations made it difficult for authors and users of artistic works to collect and distribute money.³ The principal reason for this was the fact that authors freely got together to establish their own associations, which was easy at the time since governmental approval was not a prerequisite and no formal or legal requirements prevented a CMO from opening its doors at the time.

In an attempt to organize the collection and distribution of amounts related to musical works, in 1973 the government intervened and enacted Federal Law No. 5988/73 providing for the establishment by existing associations of a central office for collection and distribution of amounts related to musical performances. Known as the Escritório Central de Arrecadação e Distribuição (National Collection and Distribution Office – ECAD), its primary function is to collect and distribute money collected from musical performances.

The same law that created ECAD also created a governmental authority called Conselho Nacional de Direito Autoral (National Copyright Council – CNA).⁴ All collective management associations send a copy of their accounts and other relevant information to the CNA,⁵ which was also responsible for enacting the statutes of ECAD. The existence of a governmental authority with control over the activity of CMOs demonstrates the involvement of the Brazilian government. This is perhaps a reflection of Brazilian politics at the time, with the military government restricting cultural manifestations it considered dangerous, at the government's sole discretion. In the 1970s not only did the CNA have authority over Brazilian cultural events, but also the police; no musical concert or event could take place without the authorization of the police. Much has changed since the 1970s – the CNA no longer exists and collective management in Brazil has been completely privatized. For example, the ECAD now acts on behalf of CMOs which, in turn, act on behalf of authors. ECAD represents many foreign CMOs in Brazil.

The associations that are part of ECAD can be “effective” associations or “administered” associations. Effective associations are part of ECAD’s general council, and help set prices, enact collection and distribution rules, etc.

3. According to the organizational criteria, in countries where the government exercises control over the CMO activity there is a smaller number of organizations and less chance of confusion by authors.
4. CNA acted as the auditing agent for CMOs.
5. There was no explanation as to what this relevant information was. It could be anything, at the government’s discretion.

Administered associations do not participate in the administration of ECAD. Associations in both categories, as of today, are:

2.1.1. Effective Associations

- ABRAMUUS – Associação Brasileira de Música⁶ (Brazilian Music Association) was founded in 1982 and as of 2004 had 5,000 authors, publishers, singers, musicians and arrangers as members;
- AMAR – Associação de Músicos, Arranjadores e Regentes⁷ (Association of Musicians, Arrangers and Producers) was created in 1980. It is a Brazilian society that gathers authors, composers, performers, musicians, publishers and independent phonogram producers. AMAR is the outcome of a movement called SOMBRAS, created in the 70's to claim the enactment of specific legislation on copyright, non-existent in Brazil at the time, as well as the restructuring of the CMOs. This CMO is also known as AMAR-SOMBRAS, Associação de Músicos Arranjadores e Regentes-Sociedade Musical Brasileira). It fought for copyright in the 1970s and denounced the control of copyright by the phonographic industry;
- SBACEM – Sociedade Brasileira de Autores, Compositores e Escritores de Música⁸ (Brazilian Society of Music Authors, Composers and Writers) is one of the oldest associations. It has more than 5,000 members, including some of the most renowned Brazilian composers;
- SICAM – Sociedade Independente de Compositores e Autores Musicais⁹ (Independent Society of Music Authors and Composers) is another association that helped establish ECAD. It claims to have more than 38,000 members. This association has taken an initiative to divulge its members' works on the internet by offering downloadable music and licensing of works. Its intention is to spread Brazilian music and culture worldwide;
- SOCINPRO – Sociedade Brasileira de Administração e Proteção de Direitos Intelectuais¹⁰ (Brazilian Society for the Protection and Management of Intellectual Rights) has 13,000 members and it aims to protect the rights of authors, musicians, composers, singers, publishers and producers. SOCINPRO is part of the National Council of Culture Incentive, an action of the Ministry of Culture that offers musical instruments and help of any sort to authors;
- UBC – União Brasileira de Compositores (Brazilian Union of Composers).¹¹ In 1938, although musical composers had their own

6. Online: <www.abramuus.org.br> (last visited: 15 October 2005).
 7. Online: <www.amar.art.br> (last visited: 15 October 2005).
 8. Online: <www.sbacem.org.br> (last visited: 15 October 2005).
 9. Online: <www.sicam.com.br> (last visited: 15 October 2005).
 10. Online: <www.socinpro.org.br> (last visited: 15 October 2005).
 11. Online: <www.ubc.org.br> (last visited: 15 October 2005).

“department” at SBAT, they felt they needed an association of their own to protect their interests. Consequently, Associação Brasileira de Compositores e Autores (ABCA) was created. However, not all composers joined ABCA. Some of them remained at SBAT and in an attempt to unify the efforts conducted in the musical domain by both associations – SBAT and ABCA – musical composers decided to start a third association, namely UBC, in 1942.

2.1.2. Administered Associations

- ABRAC – Associação Brasileira de Autores, Compositores, Intérpretes e Músicos (Brazilian Association of Music Authors, Composers and Performers);
- ACIMBRA – Associação de Compositores e Intérpretes Musicais do Brasil (Association of Music Composers and Performers of Brazil);
- ANACIM – Associação Nacional de Autores, Compositores e Intérpretes de Música (National Association of Authors, Composers and Performers of Music);
- ASSIM – Associação de Intérpretes e Músicos (Association of Performers and Musicians).¹²
- ATIDA – Associação de Titulares de Direitos Autorais (Association of Copyright Holders).¹³ Members of this association are authors (composers) or singers;
- SADEMBRA – Sociedade Administradora de Direitos de Execução Musical do Brasil (Society for the Management of Music Performing Rights of Brazil).

ECAD's collections increased steadily from 2000 to 2004, from BRC 112 million to 157 million in 2001, 177 million in 2002, 209 million in 2003 and 227 million in 2004.¹⁴

While collections increased twofold, distributions over the same period increased by 82 per cent, from BRC 84 million in 2000, to BRC 103 million in 2001, 121 million in 2002, 156 million in 2003 and 188 million in 2004. The percentage of foreign works in ECAD's distributions over the same period varied from a low of 9.88 per cent in 2001 to a high of 18.51 per cent in 2004, perhaps caused by the better availability of foreign works documentation.

12. Online: <www.assim.org.br> (last visited: 24 October 2005).
 13. Online: <www.atida.org.br> (last visited: 24 October 2005).
 14. As of 9 November 2005, 1 BRC is equivalent to: EUR 0.38, USD 0.44. BRC 112 million is the approximate equivalent of EUR 43 million and BRC 227 million is the equivalent of EUR 87 million.

2.1.3. Other Associations

Besides the associations directly linked to ECAD, Brazil has other associations that are active in the defence of copyright.

- Associação Brasileira de Direitos Reprográficos (Brazilian Association for Reprographic Rights – ABDR). Established in 1992, ABDR started collecting reprographic reproduction fees in 1998. Its main objective is the collection of copyright fees for photocopies. It also endeavors to develop an awareness and information about the damages caused by the unauthorized reproduction of books. ABDR, also defends authors and publishers against the violation of their rights in the court. In 2004, it declared 77 publishers and 357 authors as members, and that it had issued 186 licenses to universities, libraries and copy shops;
- ADDAF – Associação Defensora de Direitos Autorais (Association for the Defence of Authors' Rights).¹⁵ This association was created in 1958, by former members of UBC. The aim of ADDAF is to protect mechanical rights, differently than ECAD and its associations that protect the live execution of works. ADDAF is the only association in Brazil that protects only the rights of reproduction. ADDAF is a member of LATINAUTOR;
- AUTVIS – Associação Brasileira de Direitos de Autores Visuais (Brazilian Association for the Rights of Visual Authors).¹⁶ AUTVIS is the first CMO dedicated exclusively to authors of visual works. It was created in November 2002 by a group of photographers, plastic artists and designers.

2.2. ARGENTINA

In comparison with Brazil, the Argentinian legal system allows for higher governmental control of the activities of CMOs. This may explain why there are fewer CMOs in Argentina (the particularities of the Argentinian legal system will be addressed in the next section of this chapter). CMOs currently operating in Argentina are:

- SADAIC – Sociedad Argentina de Autores y Compositores de Música (Argentinian Society of Authors and Composers of Music) is the main CMO in Argentina.¹⁷ SADAIC has been representing authors and composers of all kinds of music since 1936;
- ARGENTORES – Sociedad General de Autores de la Argentina (General Society of Authors of Argentina).¹⁸ ARGENTORES was officially

15. Online: <www.addaf.org.br> (last visited: 24 October 2005).
 16. Online: <www.autvis.org.br> (last visited: 24 October 2005).
 17. Online <www.sadaic.org.ar> (last visited: 24 October 2005).
 18. Online: <www.argentores.org.ar> (last visited: 24 October 2005).

recognized as a CMO in 1973, through Law No. 20.115. This law authorized ARGENTORES to collect copyright remuneration regarding literary works, drama pieces, musical dramas, cinema and television. An agreement between ARGENTORES and Sociedad Argentina de Escritores (SADE) allows ARGENTORES to collect remuneration for works of SADE's members. ARGENTORES is an ordinary member of CISAC and works with the Motion Picture Association Latin America office and the Writers Guild of America;

- SADEM – Sociedad Argentina de Músicos (Argentinian Society of Musicians) plays a role that may seem similar to a labor union.¹⁹ It not only promotes the works of its members and collects remuneration for such works but it also contracts labor agreements with radio stations and television channels representing its members. It acts together with the musicians' labor union SADEM (Sindicato Argentino de Músicos), with the popular school of music EPM (Escuela Popular de Música), FIM (Federación Internacional de Músicos), CGT (Confederación General del Trabajo), COSITMECOS (Confederación Sindical de Trabajadores de los Medios de Comunicación Social), ISETU (Secretariado Internacional de Sindicatos de Artes, Medios de Comunicación y Espectáculos) and PANARTEES (Federación Panamericana de Sindicatos de Artes, Medios de Comunicación y Espectáculos).
- CADRA – Centro de Administración de Derechos Reprográficos (Centre for the Management of Reprographic Rights). CADRA's members are authors and publishers.²⁰ Founded in 2002, the main objectives of this CMO are the licensing of published works, collection and distributions of funds and the legal representation of its members. In 2004 it collected ARS 175, 980 or approximately EUR 50,000.

2.3. MEXICO

CMOs operating in Mexico face a similar situation as those in Argentina, namely strong government oversight and little competition. The existing CMOs in Mexico are:

- SOGEM – Sociedad General de Escritores de México (General Society of Writers of Mexico)²¹ Even though SOGEM was officially established on 23 August 1976, its activities date back to 1902 under the name Sociedad Autoral. In 1976, all prior existing writers societies got together to form SOGEM. The organization aims to foment the intellectual production of its members with the purpose of making national culture

19. Online: <www.sadem.com.ar> (last visited: 24 October 2005).
 20. Online: <www.cadra.org.ar> (last visited: 25 October 2005).
 21. Online: <www.sogem.org.mx> (last visited: 25 October 2005).

- better. It is composed of poets, narrators, playwrights, cinema, video and television writers, periodical publication writers, social, technical and scientific researchers, as well as all others who produce written materials. SOGEM is an ordinary member of CISAC. SOGEM also works as the registrar for works in the following domains: television, cinema, radio, theatre and literature in general. SOGEM was also involved in the fight against retaining income tax from copyright. Traditionally exempt from this tax, authors saw a change in legislation in 2002 make their business less profitable. However, SOGEM was able to obtain an exemption for works charged up to 20 minimum wages in Mexico, which mainly benefits writers in the beginning of their careers. In 2002, SOGEM's collection revenues totaled more than MXN 34 million²² including MXN 21.45 million from television broadcasts, over MXN 9.2 million from theatres and MXN 3.175 million from cinemas;²³
- SACM – Sociedad de Autores y Compositores de Música (Society of Authors and Composers of Music) originated in 1945 as the first assembly of musical authors and composers in Mexico and claims to be the only society authorized to collect music royalties in Mexico;²⁴
 - SOMEC – Sociedad Mexicana de Coreógrafos (Mexican Society of Choreographers). This society received its authorization to operate from INDAUTOR in 1998;
 - SOMAAP – Sociedad Mexicana de Autores de las Artes Plásticas (Mexican Society of Authors of Plastic Arts). This society received its authorization to operate from INDAUTOR in 1998;
 - Asociación Nacional de Intérpretes (National Association of Interpreters); received authorization to conduct business in 2004;²⁵
 - DIRECTORES – Sociedad Mexicana de Directores Realizadores de Obras Audiovisuales (Mexican Society of Directors of Audiovisual Works) was authorized to act as a CMO in 1998 and it protects the rights of movie directors and writers;²⁶
 - Unión Ibero Americana de Humoristas Gráfcos.²⁷ The idea of an association of cartoonists began in Cuba during an international meeting in 1997. The association was formed in 1999 and received its governmental approval in 2002. It is important to note that this CMO has been
22. As of 29 November 2005, MXN 1 is equivalent to: EUR 0.0793, USD 0.09, MXN:34 million is the approximate equivalent of EUR 2.7 million.
 23. Information available online: <www.sogem.org.mx/html/pag34.pdf> (last visited: 25 October 2005).
 24. Online: <www.sacm.org.mx> (last visited: 25 October 2005).
 25. Online: <www.andi.org.mx> (last visited: 25 October 2005).
 26. DIRECTORES was formerly known as Sociedad Mexicana de Directores Realizadores de Cine, Radio Televisión y Videogramas. The decision authorizing the corporate name change is available online: <www.sep.gob.mx/wb2/sep/sep_Resolution_del_26_de_julio_de_2004> (last visited: 25 October 2005).
 27. Online: <www.editorialcarton.com.mx> (last visited: 25 October 2005).

- international from the beginning of its activities, since it originated from the common vision of cartoonists from different parts of Latin America; Centro Mexicano de Protección y Fomento a los Derechos de Autor (Mexican Centre for the Protection and Development of Copyright – CEMPRO) was created in 1998.²⁸ It administers reproduction rights on behalf of Mexican publishers and authors. With its international agreements, it claims to administer rights to 95 per cent of the Mexican repertoire. In the reprographic area, it licenses mostly educational users. Its 2004 collections amounted to MXN 961,633 or approximately EUR 76,000; "EJE" EJECUTANTES (Association of Music Performers) received its authorization to act as a CMO in 1999. It represents the copyright of musical performers;²⁹
- SMAOF – Sociedad Mexicana de Autores de Obras Fotográficas (Mexican Society of Authors of Photographic Works) received its authorization to act as a CMO in 2000;
 - SOMEXFON – Sociedad Mexicana de Productores de Fonogramas, Videogramas y Multimedia (Mexican Society of Producers of Phonograms, Videograms and Multimedia) was authorized to act as a CMO in 2001;
 - SOMEM – Sociedad Mexicana de Ejecutantes de Música – Mexican Society of Music Performers) was authorized to act as a CMO in 2002 and represents the copyrights of music performers;³⁰
 - Sociedad de Autores de Obras Visuales Imagen del Tercer Milenio (Society of Authors of Visual Works – Images of the Third Millennium) was authorized to act as a CMO in 2002 and it represents authors of visual works.³¹
- 2.4. PERU
- Peru is a smaller market compared to those presented above. The government adopts the policy of approving only the operation of CMOs that represent a significant number of artists in their domain. The ones currently approved and operating are:
- APDAYC – Asociación Peruana de Autores y Compositores (Peruvian Association of Authors and Composers).³² Founded on 20 February 1952,
28. Online: <www.cempro.com.mx> (last visited: 25 October 2005).
 29. The decision authorizing EJE EJECUTANTES to operate is available online: <www.sep.gob.mx/wb2/sep/sep_Resolution_del_14_de_junio_de_1999> (last visited: 25 October 2005).
 30. The decision authorizing SOMEM to operate is available online: <www.sep.gob.mx/wb2/sep/sep_Resolution_del_25_de_noviembre_de_2002> (last visited: 25 October 2005).
 31. The decision authorizing this CMO to operate is available online: <www.sep.gob.mx/wb2/sep/sep_Resolution_del_17_de_diciembre_de_2002> (last visited: 25 October 2005).
 32. Online: <www.apdayc.org.pe> (last visited: 26 October 2005).

it was the first CMO in Peru and its foundation documents included the signatures of almost all active musicians in Peru at that time. Today, it claims to represent more than 4,000 authors who are either originally from Peru or who are residents of Peru, in addition to the international authors it represents through CISAC.³⁵

- APSAV – Asociación Peruana de Artistas Visuales (Peruvian Association of Visual Artists).³⁴ This CMO first began its activities in 1996 under the business name Agencia Peruana de Sociedades de Autores Visuales, with the support of VEGAP (Visual Entidad de Gestión de Artistas Plásticos), a Spanish agency that aimed to divulge copyright among visual artists. At that time, visual artists were not aware that they had the same kind of copyright as writers and musicians. So, in the early stage of its activities, APSAV had an information role among visual artists. The change from agency to collective only happened in 1999, when APSAV complied with the legal requirements and obtained its authorization to operate as a CMO. APSAV became a provisional member of CISAC in July 2005.

2.5. VENEZUELA

There are three CMOs legally authorized to operate in Venezuela. They are SACVEN, AUTORARTE and AVINPRO.

SACVEN – Sociedad de Autores y Compositores de Venezuela (Society of Authors and Composers of Venezuela).³⁵ This society started its activities in 1955 and represents authors of musical, dramatic and musical-dramatic works. SACVEN has been, from the beginning of its activities, an important player on the Venezuelan cultural scene. The activities of the 40 authors that initially formed SACVEN ended up reviewing the copyright law of 1928. SACVEN became a member of CISAC in 1964.

Current Venezuelan copyright legislation³⁶ requires CMOs to obtain a license in order to operate. SACVEN received its license on 15 October 1996,

33. CISAC – International Confederation of Authors and Composers. CISAC was founded in 1926 in France and initially had 18 members. The main goal of CISAC was to co-ordinate the work of member societies, to improve national and international copyright law and to foster the diffusion of creative works. In 2004, CISAC was formed by 210 CMOs from 109 different countries. Information available online: <www.cisac.org> (last visited: 26 October 2005).
34. Online: <www.apsav.org.pe> (last visited: 25 October 2005).
35. Online: <www.sacven.org> (last visited: 26 October 2005).
36. Official Journal No. 4,638 (1 October 1993), as amended and with applicable regulations, including the regulation implementing Decision 351 and the Cartagena Agreement. See (in Spanish) <www.analitica.com/biblioteca/home/derechos_del_autor.asp> (last visited November 2005).

but was forced to restructure itself in order to ensure compliance with the new regulations. Following the requirements under the National Copyright Law, SACVEN tariffs are published in two newspapers and become effective 30 days after publication. If a user of SACVEN's services or a broadcasting organization finds tariffs to be abusive, it can require an arbitral procedure before SAPI for a ten-day period following publication.

Assuming its position as a leader in the copyright domain, SACVEN is currently proposing new amendments to the Copyright Law, according to the new Constitution of 2000. Some issues that are considered by the new Constitution and are not included in the Copyright legislation are traditional knowledge and folklore.

AUTORARTE.³⁷ This CMO has been authorized by DNDA³⁸ to operate since 1999. It represents authors of visual works and is a member of CISAC. Unlike SACVEN, AUTORARTE only started its activities shortly before governmental licensing, with its first meetings in 1998. Despite the fact that it started activities recently, it already represents many foreign CMOs.

AVINPRO – Asociación Venezolana de Intérpretes y Productores Fonográficos (Venezuelan Association of Performers and Phonogram Producers).³⁹ This CMO has been authorized by DNDA to operate, but records of its activities are not easily obtained.

2.6. URUGUAY

- LATINAUTOR,⁴⁰ a Latin American authors' rights organization based in Uruguay and a member of CISAC, is a regional co-operation project between Latin American musical and dramatic CMOs, which encompasses most of those in Latin America as well as in Spain and Portugal. It mainly promotes the integration of the musical repertoires across Latin America as well as ensures its correct identification and protection. LATINAUTOR also assists well-structured CMOs and helps small CMOs to establish themselves in local or regional markets with the intent of ensuring that authors, copyright owners, broadcasting organizations, professional users and society in general are confident in Latin American CMOs. LATINAUTOR has also been appointed as an ISWC (International Standard Musical Works Code) Agency.

AGADU – Asociación General de Autores del Uruguay (General Association of Authors of Uruguay) is the main CMO in Uruguay.⁴¹ It collects contributions for its members and also for CUD and SUIDEL.

37. Online: <www.autorarte.org.ve> (last visited: 26 October 2005).
38. DNDA – Directorio Nacional del Derecho de Autor (National Directorate of Copyright).
39. Online: <www.avinpro.com> (last visited: 26 October 2005).
40. Information obtained online: <www.cisac.org> (last visited: 26 October 2005).
41. Online: <www.agadu.org> (last visited: 26 October 2005).

- CUD – Cámara Uruguaya del Disco (Uruguayan Book Chamber).⁴² This association represents phonogram producers, but the collection and distribution of amounts perceived by its members is actually effectuated by AGADU.
- SUDEL – Sociedad Uruguaya de Artistas y Intérpretes (Uruguayan Society of Performing Artists) started its activities in 1951 and was the first one to be legally recognized by the government. It has more than 3,000 members and represents literary and musical authors. The collection and distribution of amounts perceived by its members is also effectuated by AGADU.
- AUTOR, Asociación Uruguaya para la Tutela Organizada de los derechos Reprográficos (Uruguayan Association for the Protection of Reprographic Rights). This Montevideo-based RRO was incorporated in 2005. In its first report to the International Federation of Reprographic Rights Organizations (IFRRO)⁴³ it claims to have 67 members.

2.7.

CHILE

The Chilean situation is marked by the presence of a very strong CMO, Sociedad Chilena del Derecho de Autor (Chilean Society of Authors – SCD), and smaller CMOs that rely on the operational expertise of SCD.

SCD received its authorization from the Ministry of Education in 1992.⁴⁴ It represents authors of musical works, with or without text, synchronized or not with audiovisual, theatrical or choreographic works. SCD represents approximately 2,000 authors as well as 35 foreign CMOs.

It is worth noting that SCD provides its members with the opportunity to receive financial aid. Grants through the program called “Fondo de Fomento a la Producción Musical” are up to 50 per cent of the total project cost and cannot exceed the total amount the author received through the CMO as a return for his work in the year before the author requests the grant. There are also grants that can be received by SCD’s members in case of medical or social difficulties. Furthermore, there are emergency funds available and a “guaranteed minimum right” for authors over 60 years old. This is a guarantee that elderly authors will receive at least a minimum fixed amount even if the collection of amounts for the exploitation of their works does not achieve that minimum amount.⁴⁵

- ATN – Sociedad de Autores Nacionales de Teatro, Cine y Audiovisuales⁴⁶ (Society of National Authors of Theatre, Cinema and Audiovisual Works)

42. Online: <www.cudisco.org> (last visited: 27 October 2005).

43. Online: <www.litro.org> (last visited 9 November 2005).

44. Online: <www.scd.cl> or <www.autor.cl> (last visited: 26 October 2005).

45. Information available online: <www.scd.cl/usuarios/527.htm> (last visited: 26 October 2005).

46. Online: <www.atn.cl> (last visited: 26 October 2005).

is a member of CISAC. The creation of this society was motivated by the challenges imposed by new technologies on the distribution of copyright works. ATN began its operations in December 1995 with the help and assistance of SCD. To cover the costs of its operations, ATN charges from 5 per cent to 10 per cent of the total amounts collected. Unlike other CMOs in other countries, the author is the one who establishes the price for the license of his/her work. There are minimum standards to be followed but the author is the one who puts a final price on the commercialization of his or her work.

- CREAMAGEN represents authors of fixed images, such as photographers, painters, plastic artists and drawers.⁴⁷ Like ATN, it was founded in 1997 with the administrative help and support of SCD. CREAMAGEN protects the copyright of its members, manages the use of the copyright of its members, detects and avoids non-authorized use and establishes reciprocity agreements with other CMOs around the world. CREAMAGEN is also a member of CISAC.
- CHILEACTORES – Corporación de Actores de Chile (Chilean Authors Corporation).⁴⁸ This society, which represents actors, was founded in 1996 with the support of SCD. CHILEACTORES protects the copyright of its members, licenses works, collects and distributes funds.
- SCL – Sociedad Chilena de Intérpretes (Chilean Society of Performers) was founded in 1998 based on the support received from SCD.⁴⁹ This society is a member of FILAIE (Federación Ibero Latinoamericana de Artistas, Intérpretes y Ejecutantes). SCL represents the copyright rights of Chilean nationals abroad and the copyright of foreign authors in Chile. It studies national legislation aiming its improvement and promotes cultural and artistic activities.
- SADEL – Sociedad de Derechos Literarios (Society of Literary Rights). This reprographic rights organization (RRO) was incorporated in 2003. It declared 100 authors and 20 publishers as members in 2004 but had not begun collecting licence fees.

2.8.

COSTA RICA

With fewer than 5,000,000 inhabitants, Costa Rica has only one active CMO. ACAM – Asociación de los Compositores y Autores Musicales de Costa Rica (Association of Composers and Music Authors of Costa Rica).⁵⁰ This non-profit association started its activities in 1990. ACAM has more than 500 members and is a member of CISAC. As the local agent of LATINAUTOR,

47. Online: <www.creamagen.cl> (last visited: 26 October 2005).

48. Online: <www.chileactores.cl> (last visited: 26 October 2005).

49. Online: <www.musicos.cl> (last visited: 26 October 2005).

50. Online: <www.acamcostarica.com> (last visited: 26 October 2005).

ACAM manages copyright's licensing in all countries of Central America. It represents around 25 million musical works. In 1993, ACAM gave birth to SACAM (Compositores y Autores Musicales de Costa Rica, Sociedad Anónima), responding to questions that arose from the Costa Rican Government with regard to the carrying out of the collection of amounts by an association and not by a commercial company. This fact proves that, even though the law mentions that a CMO might have a non-profit nature, the government understands that the collective management of copyright is a commercial business.

3. LEGAL FRAMEWORK AND ITS APPLICATION

All countries included in this analysis are contracting parties to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention).⁵¹ However, as of 15 October 2005, Brazil, Venezuela and Uruguay have not ratified both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).⁵²

Terms of copyright protection varies among the analysed countries, as demonstrated below:

Country	Term of Protection ⁵³
Brazil	70 years.
Argentina	70 years. Copyright over photographic works are protected for 20 years from the first publication of the photograph. Copyright over cinematographic works are protected for 50 years from the death of the last collaborator (director, producer or composer).

Continued

51. Full references to these Treaties are provided at the beginning of the book. More information on the contracting parties to these Treaties can be found at the following websites, online: <www.wipo.int/treaties/en/documents/pdf/e-berne.pdf>, <www.wipo.int/treaties/en/documents/pdf/k-rome.pdf> and <www.wipo.int/treaties/en/documents/pdf/o-phongr.pdf> (last visited: 26 October 2005).
52. More information on the contracting parties to these Treaties can be found at the following websites, online: <www.wipo.int/treaties/en/documents/pdf/wct.pdf> and <www.wipo.int/treaties/en/documents/pdf/wppt.pdf> (last visited: 26 October 2005).
53. The term of protection includes the life of the author plus the term indicated in this table. The indicated term starts from 1 January after the death of the author.

Country	Term of Protection
Mexico	75 years. Protection for the work of performers is of 50 years from (i) the first fixing of the performance in a phonogram; (ii) the first performance of works not recorded on phonograms; (iii) the first transmission by radio, television or other medium.
Peru	70 years.
Venezuela	60 years.
Uruguay	50 years.
Chile	50 years. ⁵⁴
Costa Rica	70 years.

3.1. BRAZIL

As discussed in Section 1 of this chapter, the Brazilian market contains many active CMOs, some of them in the same artistic domain. Live musical performances have their collections and distributions centralized at ECAD, according to Federal Law No. 5988/73. Besides the creation of ECAD, Brazilian legislation does not restrict or regulate collective management societies. The activity is strictly private. With regards to copyright itself, Brazilian legislation is very simple and does not establish guidelines for contracts, as many other countries in the region do. The Brazilian legislator rather leaves contractual provisions to be determined by the parties and does not differentiate the negotiation of copyright from the negotiation of other assets.

3.2. ARGENTINA

In comparison with Brazil, Argentinean CMOs receive stronger guidance from the government. Some of the existing CMOs have had their existence confirmed by the government through the enactment of federal law. However, this is not a legal requirement.

54. Chile has a peculiar exception to the term of protection. According to Article 10 of Law No. 17.336 (1970) on Intellectual Property, *Diario Oficial*, 2 October 1970, No. 27.761, in the event that upon expiration of the 50-year term of protection, the author's widow is still alive or the author's daughters are single or widowed or still, any of the author's sons-in-law are not capable of work, the 50-year term of protection will be extended until the death of the last survivor.

Some categories of domestic copyright works need to be registered in order to be fully protected. Law No. 11.723/33 determines which works must be registered in the National Intellectual Property Register (Registro Nacional de Propiedad Intelectual). This is the case for translated works,⁵⁵ periodical publications,⁵⁶ as well as transfers and assignments of literary, scientific or musical works.⁵⁷ With regard to translated works, no copyright is granted on the translated version prior to registration with the designated authorities. As to transfers and assignments of works, failure to present such works for registration may invalidate the transaction. Failure to present published works for registration suspends copyright protection and obliges the editor to pay a penalty in the amount of 10 times the amount of the work not presented for registration. Independently of the kind of work, registration is compulsory if the work has been created with subsidies from the Argentinean government.

Although registration is not always compulsory, the majority of Argentinean artists tend to present their works for registration in order to safeguard their economic rights. Government regulations requiring certain works to be published and simply not mentioning other kinds of works make it difficult for artists to believe that their rights are protected without registration. Considering that registration is an efficient proof in an eventual dispute over copyright,⁵⁸ one could argue that Argentinean artists would rather register all their works.

3.2.1. The National Intellectual Property Register

The National Intellectual Property Register is a group of collective management organizations and artistic associations, which, under the supervision of the Ministry of Justice, have the duty of registering copyright works, according to governmental directives.

Books and other publications, art work pieces, multimedia works, videos, films and agreements are presented for registration before the Cámara Argentina del Libro (Argentinean Book Chamber—CAL—a publishers' association).⁵⁹ Web pages and works published under legal representation (including theater plays, television, radio and exhibited shows) may be registered at the Dirección Nacional del Derecho de Autor (National Copyright Directorate),⁶⁰ which is a service (not a CMO) provided by the Ministry of Justice.

55. Law No. 11.723 – Legal Intellectual Property Regime, *Boletín Oficial*, 30 September 1933 and 11 November 1998, Art. 23.
56. *Ibid.*, Art. 30.
57. *Ibid.*, Art. 53.
58. Information available online: <www.jus.gov.ar> (last visited: 26 October 2005).
59. Online: <www.editoriales.org.ar> (last visited: 26 October 2005).
60. Online: <www.jus.gov.ar> (last visited: 26 October 2005).

Cámara Argentina Del Libro.⁶¹ This association started its activities in 1938, under the name La Asociación Cámara Argentina del Libro. The validation of its activities only happened in 1941 through a federal decree. The original association later merged with Sociedad Argentina de Editores and Cámara Argentina de Editores de Libros and became CAL.

The main activities of CAL are the fight against piracy, the management of ISBN and the determination of bar codes for all books across the nation. Furthermore, CAL assists its members in negotiating large book sales (CAL's members are mainly editors, publishers and bookstores), especially when sales are for the government. CAL's activities consist on informing its members on the types of books needed by different authorities of the Argentinean government, such as the Ministry of Education, Provincial Ministries and the National Protection Commission of Public Libraries (CONABIP – Comisión Nacional Protectora de Bibliotecas Populares).

Software programs can be registered at CESSI (Cámara de Empresas de Tecnología de la Información de Argentina – Chamber of Information Technology Enterprises of Argentina),⁶² CESSI is not a CMO, but rather a business association that aims to develop the technology information sector in Argentina. CESSI lobbies the government for new measures to increase software production in Argentina and stimulate competition of Argentinean IT products in the international market. CESSI is the result of the merger between the former CES – Cámara de Empresas de Software and CAESCO – Cámara Empresaria de Servicios de Computación – Chamber of Commerce of Computing Services.

Musical works are received for registration by SADAIC, which as mentioned earlier in this chapter is the most important CMO in Argentina.

Periodical publications have to be presented for registration before the Asociación Argentina de Revistas (Argentinean Magazines Association).⁶³ This association was established in 1948 and its members publish 85 per cent of Argentina's magazines.

Phonograms can be presented either at CAPIF (Cámara Argentina de Productores de Fonogramas – Argentinean Chamber of Phonogram Producers), APDIF (Asociación para la Protección de los Derechos Intelectuales sobre Fonogramas y Videogramas Musicales – Association for the Protection of Intellectual Property Rights on Music Videograms and Phonograms)⁶⁴ or at the Fondo Nacional de las Artes (National Arts Fund – FNA).⁶⁵ The FNA was created in 1958 with the purpose of financing cultural activities.

61. Online: <www.editoriales.org.ar> (last visited: 26 October 2005).
62. Online: <www.cessi.org.ar> (last visited: 26 October 2005).
63. Online: <www.editoriales-revistas.com.ar> (last visited: 27 October 2005).
64. As mentioned earlier in this paper, CAPIF and APDIF act jointly. APDIF has its focus on anti-piracy actions. More information is available online: <www.capif.org.ar/Default.asp?CodOp=MDL&CO=1> (last visited: 27 October 2005).
65. Online: <www.fnartes.gov.ar> (last visited: 27 October 2005).

3.3.

MEXICO

Mexican copyright law⁶⁶ has many provisions on copyright contracts. These provisions aim to protect authors during copyright negotiations and might be useful for authors that are on the beginning of their career. However, limitations on how copyright can be negotiated may end up restricting the authors' freedom to negotiate their works. It has been argued that because of unequal bargaining power, this may be required to safeguard the weaker authors' interests.

According to the Mexican copyright law, any transfer of economic rights has to provide remuneration for the author. Remuneration can be either a percentage of the amounts recuperated from the exploitation of the work or a fixed amount.⁶⁷ This provision also indicates that licenses free of charge are not allowed in certain circumstances. Thus, if an author decides to license a given work for free, he or she may be breaking the law.

Legal guidelines also apply to license terms and conditions. If there is no express provision in the license agreement, the term is deemed to be 5 years. Licenses for more than 15 years are only allowed in exceptional cases. Again, this measure restricts the authors' freedom, since it determines for how long his work can be exploited. Although this measure might be helpful for unknown authors who have little bargaining power, well-known authors might have trouble renewing their contracts for a period longer than 15 years. It is important to stress that this limitation does not apply to literary works.⁶⁸

Acts, agreements and contracts by which economic rights are transferred shall be entered in the Public Copyright Register in order to be binding on third parties.⁶⁹

The law also establishes practical measures for the launch of a work, such as who handles costs of publication, distribution, promotion, advertising and publicity; who determines the price that should be set on copies of the work for sale; the obligations of both author (or owner of economic rights) and publisher; information that the printer must display on works he or she prints; the time limit for a work to be placed on sale after made available to the publisher; etc. It also determines reasons for terminating a publishing contract.⁷⁰ One of them is the lack of publisher's ability to provide the necessary number of copies of a work to the public.⁷¹ If a work goes out of print or if the publisher does not distribute the work on agreed conditions, the publishing contract may be terminated.

66. Federal Law on Copyright of 5 December 1996, *Diario Oficial de la Federación*, 24 December 1996, p. 39.

67. *Ibid.*, Art. 31.

68. *Ibid.*, Art. 43.

69. *Ibid.*, Art. 32.

70. *Ibid.*, Art. 56.

71. Which in a number of jurisdictions is linked to the notion of "publication" and/or reversions of right.

Another strong provision is the one that limits the parties' ability to define how to cope with *force majeure* situations. The effects of an audiovisual production contract⁷² lapses if the work does not start on the scheduled date or if there is a *force majeure* event.⁷³ In this situation, rather than permitting the parties to decide what to do once there is a delay on a scheduled event, the law simply terminates the agreement. The parties can always opt to redefine the negotiated terms.

Advertising and commercial announcements have time limitations under the law. They can be broadcast for a six-month period after the first communication. After said period, every new communication is subject to additional payments per six-month period. Three years following the first communication, any new use of the work requires permission from the authors and owners of neighboring rights on the work. This is another provision that could be easily established by the parties exercising their free will, instead of being determined by Federal law. Furthermore, this provision is not needed to protect authors, since advertising agencies have enough bargaining power to negotiate the terms of their deals.

An interesting provision of the law concerns economic rights on works made under an individual employment contract. In this case, the Mexican copyright law determines that in the absence of agreement to the contrary, the economic rights shall be equally shared between the employer and the employee. In the absence of an employment contract, the economic rights shall accrue to the employee.⁷⁴

Mexican copyright law also permits the possibility of publishing or translating a work, without the author's consent, if and when the work is considered to be in the public interest.⁷⁵ Works in the public interest are those considered necessary for the advancement of science, national culture or education. Such a publication or translation will be made against payment of compensatory remuneration. Notwithstanding the fact that the definition of public interest under the law is very broad,⁷⁶ the "government" interest is not always synonymous with the "public" interest. The language of Article 147 allows the Mexican government to publish *any* work.

The collective management of copyright has a specific section under Mexican copyright law. Section 192 defines a collective society as: "a legal entity without gainful intent that is set up under this Law with a view to protecting both national and foreign authors and owners of neighboring rights,

72. According to Section 68 of the Federal Copyright Law, *supra* note 66, an audiovisual production contract is a contract where the authors or owners of economic rights grant the exclusive ownership of the economic rights of reproduction, distribution, communication, to the public and subtitling of the work to the producer.

73. *Ibid.*, Art. 70.

74. *Ibid.*, Art. 84.

75. *Ibid.*, Art. 147.

76. *Ibid.*, Art. 147 posits a work of public interest as one that is "necessary for the advancement of science, national culture and education".

and also collecting and delivering to those persons the sums payable to them by virtue of their copyright or neighboring rights.⁷⁷ The societies "shall be set up with a view to the provision of mutual assistance for their members, and shall base their action on principles of collaboration, equality and equity, in addition to which they shall operate on the principles laid down by this Law, which make them into public-interest bodies".⁷⁸

CMOs can operate only upon prior authorization of the Instituto Nacional del Derecho de Autor (National Copyright Institute – INDAUTOR).⁷⁹ Such authorization shall be published at the *Official Gazette* of the Federation. Authorization may be revoked by the Institute in the following situations: (i) failure to comply with the obligations placed on CMOs by the Law; (ii) if a dispute arises among its members which leaves it without a director or without management, with the result that the purpose and objective of the society is adversely affected to the detriment of the rights of its members. In the circumstances mentioned, prior notice shall be given to the Institute, which shall set a period not exceeding three months for the situation reported to be remedied or rectified.⁸⁰

This provision demonstrates governmental control over those societies. However, individuals may freely choose which society to join or whether to negotiate their rights personally. In the latter case, societies cannot intervene in the collection of royalties. If a member of a society has chosen the society to collect royalties on his or her behalf, he or she can stop the society from collecting royalties by revoking the mandate.⁸¹

The law also foresees the presence of an agent, acting on the author's behalf. The agent has to be a natural person and also needs prior authorization from the Institute in order to collect royalties for the author.⁸² Power of attorneys granted to agents can neither be replaced nor delegated. Power of attorneys granted to collectives shall confer powers for litigation and collection.⁸³

All instruments, agreements and contracts between CMOs and authors, owners of economic rights or owners of neighbouring rights, as well as those between CMOs and users of the works shall be in written format.⁸⁴ The following documents are entered in the Public Copyright Register once a CMO has been licensed to operate: articles of association and statutes; together with their rules of collection and distribution; the contracts concluded with users and the representation contracts that they have with counterpart societies; the instruments and documents by which members of their governing

77. *Ibid.* Translation from the original in Spanish available online: <www.wipo.int/lea/docs/new/em/mx/mx003en.html> (last visited: 27 October 2005).

78. *Ibid.*, Art. 192.

79. *Ibid.*, Art. 193.

80. *Ibid.*, Art. 194.

81. *Ibid.*, Art. 195.

82. *Ibid.*, Art. 196.

83. *Ibid.*, Art. 197.

84. *Ibid.*, Art. 201.

and supervisory bodies; directors and agents are appointed, all within 30 days following approval, conclusion, election or appointment, as the case may be. These provisions relate to the principles of "publicity" and transparency.⁸⁵ The Law also requires some provisions to be included in the societies' statutes, such as how to avoid over-representation of members and the voting system for the exclusion of its members, which shall invariably be one vote per member, and consent shall require 75 per cent of the votes of those present at the Assembly.⁸⁶ The right of publicity appears again in Section 207, which determines that the Institute can require a collective society to provide information of any kind and shall order inspections and audits in the society upon request of at least 10 per cent of the membership.

3.3.1. The National Intellectual Property Register

INDAUTOR is the authority responsible for registration of works, as well as of agreements concerning the licensing of copyright and acts related to CMOs. It is part of the Secretaría de Educación Pública and depends on the Secretaría de Educación Superior e Investigación Científica (Secretariat for Higher Education and Scientific Research).

INDAUTOR's largest activity is the maintenance of the Public Registry Directory, which contains information on all registered, copyright works. Another task performed by INDAUTOR is the maintenance of the Reserved Rights Directory, which contains registered titles, names, distinctive physical and psychological characteristics or original characteristics applied to periodical publications, typical real-life human or fictional or symbolic characters, persons or groups devoted to artistic activities and promotional advertising.

Even though there is an extensive section on collective management organizations in the Mexican copyright law, information obtained from the Legal Directory of INDAUTOR indicates that authorization to start its activities is the only control exercised by the government over these organizations. Once the organization receives its governmental approval, through INDAUTOR, it is free to operate and be administered as their representatives' wish. Given the amount of legislative particularities imposed on Mexican CMOs, however, governmental presence is stronger in Mexico than in both Brazil and Argentina.

3.4. PERU AND VENEZUELA

Peru and Venezuela are members of the Andean Community, which is also formed by Colombia, Bolivia and Ecuador. The Andean Community is a

85. *Ibid.*, Art. 203.

86. *Ibid.*, Art. 205.

subregional organization endowed with international legal status. The Andean Integration System (AIS) is composed of bodies and organizations that aim to intensify Andean subregional integration, to promote its external projection and to reinforce the actions connected with the process.⁸⁷ Decisions taken by the AIS are binding on member countries. National laws do not require reception procedures in order to be fully effective. Furthermore, the Andean Court of Justice has repeatedly emphasized that Andean Community Law prevails over national provisions.

Decision No. 351 of the Cartagena Agreement establishes that the term of protection for copyright cannot be shorter than the life of the author plus 50 years.⁸⁸ Section 28 of the Decision provides for protection of databases under copyright, as long as the selection and arrangement of their contents constitute an intellectual creation. The Decision has a chapter on collective societies, which provides that "societies for the collective administration of copyright and neighboring rights shall be subject to inspection and supervision by the State, and shall be required to obtain the appropriate operating license from the competent national office."⁸⁹ Affiliation to societies is voluntary. National laws can set additional requirements for the grant of license to CMOs, but the Decision establishes that: the corporate object of the CMO has to be the administration of copyright or neighboring rights; the members of the society must have the right to participate in the decisions of the society; the equitable distribution of the amounts collected should be distributed according to the use of the work; except where expressly authorized by a General Assembly, the remuneration collected is not to be used for purposes other than the covering of the actual cost of administering the rights concerned – the balance of remuneration after deduction of such costs should thus be distributed to rightsholders; finally it prohibits CMOs from admitting members of other CMOs of the same type, whether national or foreign, that have not first expressly renounced membership in the other CMO.

Section 50 of the Decision provides that, for the action of CMOs to be enforceable against third parties,

collective administration societies shall be obliged to register with the competent national office, in terms specified by the domestic legislation of the Member Countries, the names and titles of the members of their governing bodies, and also the instruments evidencing the mandates that they exercise on behalf of foreign associations or organizations.

87. Online: <www.comunidadandina.org/ingles/who.htm> (last visited: 28 October 2005).

88. Decision No. 351 of 17 December 1993 of the Commission of the Cartagena Agreement on the Common Provisions on Copyright and Neighboring Rights, *Gaceta Oficial del acuerdo de Cartagena*, 21 December 1993, No. 145 [Cartagena Agreement], online: <www.wipo.int/leal/docs/new/pdf/en/pe/pe002en.pdf> (last visited: 27 October 2005).

89. *Ibid.*, Art. 43.

The licensing, inspecting and supervising of CMOs is realized by National Copyright and Neighboring Rights Offices. CMOs already existing at the time of entry into force of Decision No. 351 would have three months from the date of entry into force to comply with the provisions of the Decision.

3.4.1. Peru

Legislative Decree No. 822 is the Peruvian copyright law.⁹⁰ It defines collective societies as legally constituted, non-profit-making associations under civil law devoted to the management of copyright or neighboring rights of economic character on behalf and in the interest of a number of authors or owners of such rights. Such associations must obtain from the Copyright Office of the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (National Institute for the Defense of Competition and Intellectual Property – INDECOP) an operating license provided for in the Law.

3.4.1.1. The national intellectual property register

The national intellectual property register (managed by INDECOP)⁹¹ is responsible for authorizing and inspecting CMOs. CMOs in Peru are legally prohibited from exercising any religious or political activities, as well as activities not related to their essential purpose. Licenses to start activities are granted upon presentation of the CMOs' statutes to INDECOP. The decision granting authorization or refusing the license to operate is published in the supplement of legal provisions of the Official Gazette *El Peruano*.

CMOs can only operate after governmental authorization. To grant such authorizations, INDECOP uses the following criteria: (i) the number of owners who have undertaken to entrust the management of their rights to the candidate society in the event of authorization being granted to it; (ii) the size of the repertoire that it proposes to manage, and the actual use of that repertoire by the most significant users in the course of the preceding year; (iii) the number and importance of the potential users; (iv) the suitability of the statutes and of the human, technical, financial and material resources available for the achievement of its objectives; and (v) the potential effectiveness of the management of the repertoire that it proposes to manage in other countries, in the form of prospective reciprocal representation contracts with societies of the same nature that operate abroad.⁹²

90. Copyright Law – Legislative Decree No. 822 of 23 April 1996, *Diario Oficial El Peruano*, 24 April 1996, p. 139, 104 [Legislative Decree No. 822], online: <www.wipo.int/leal/docs/new/pdf/en/pe/pe003en.pdf> (last visited: 28 October 2005).

91. Online: <www.indecopi.gob.pe> (last visited: 28 October 2005).

92. Legislative Decree No. 822, *supra* note 90, Art. 150.

These requirements show that even though operation is allowed only after authorization is granted, the CMO has to be sufficiently organized – including having some potential affiliates together with the complete list of the works the CMO will manage – in order for authorization to be granted. These requirements also prove the control exercised by the government over the activities of CMOs in Peru. In this case, governmental control seems to be effective, since it forces CMOs to be organized and maintain clear records of their portfolio. An example is Section 153 which determines obligations to be fulfilled by the management of CMOs.⁹³

Besides those requirements, Peru's copyright law also enlists a series of provisions that have to be included in all CMOs statutes, including the classes of owners of rights included in the scope of its operations; the general rules of the contract of association, which is different from the individual membership contract; conditions concerning acquisition and termination of membership; the principles to which the distribution of amounts collected are subject; and provisions that ensure that the management of the CMOs repertoire is free of all interference from users – preventing any preferential use of works, performances or productions under management.

After the grant of authorization to operate, CMOs have to register all their initial corporate documents – and changes thereto – with INDECOPi. CMOs are also legally obliged to accept membership of any author whose work is under its domain.⁹⁴

The Copyright Office is entitled to impose sanctions on CMOs for infringement of their own statutes or regulations or the relevant legislation, or those that are involved in acts affecting the interests of those that they represent, without prejudice to any criminal sanctions or civil actions that may be appropriate.⁹⁵

INDECOPi provides arbitration services in disputes concerning intellectual property and competition. These services might also be used in the event that a union or association representing users considers that the tariff determined by a CMO is abusive.

3.4.2. Venezuela

The Venezuelan Constitution was enacted on 24 March 2000,⁹⁶ Sections 98 and 124 of which protect intellectual property rights. The Venezuelan copyright law

93. Obligations listed under this section concern the daily administration of a CMO, such as the obligation to enter into agreements to negotiate the rights administered by the CMO; the obligation to collect amounts resulting from the exploitation of works; the obligation to distribute amounts not later than one year after collection; the maximum of 30 per cent from the total of collections of a CMO to be spent with administrative costs; etc.

94. Legislative Decree No. 822, *supra* note 90, Art. 153.

95. Legislative Decree No. 822, *supra* note 90, Art. 165.

96. Published in the extraordinary *Oficial Gaceta* No. 5453.

was enacted on 14 August 1993. It establishes a term of protection of copyright until 60 years after the death of the author. According to the Law – and following the provisions of the Cartagena Agreement previously explained – the collective administration of copyright is under the supervision of the National Directorate of Copyright. CMOs can start operations only after receiving a license from the State. However, Venezuelan Copyright Law provides some basic guidelines to the operation of CMOs.

Like Mexico and Peru, Venezuela has special sections in its copyright law concerning copyright agreements. There is a section on performance contracts, a section on publishing contracts and a section on the assignment of press articles. Even though among the three countries Venezuela has the fewest legal requirements, the number of provisions determining how copyright negotiations should be conducted demonstrates higher governmental presence in the area.

Besides the provisions in the Venezuelan copyright law, there are also specific statutes dealing with books,⁹⁷ national cinematography,⁹⁸ piracy⁹⁹ and statutory deposit.¹⁰⁰ The main purpose of these specific bills is to promote actions aiming to enhance the cultural activity in the country and to protect the cultural heritage.

3.4.2.1. The national intellectual property register

The Venezuelan Intellectual Property Register is Servicio Autonomo de la Propiedad Intelectual (SAPI).¹⁰¹ This authority is under the direction of the Ministry of Production and Commerce and it started its operations in 1998 when the services of both copyright and industrial property were united.

The Copyright division is called Dirección Nacional del Derecho de Autor (National Copyright Directorate – DNDA). DNDA not only registers copyright works, but it also licenses and supervises the activities of CMOs. Another activity exercised by DNDA is arbitration. Arbitration is conducted upon request of one of the parties and might be among copyright holders, CMOs, and their members, CMOs and copyright holders or CMOs and users of copyright works.

97. Law on Books of 18 April 1997, *Gaceta Oficial de la República de Venezuela*, 21 April 1997, No. 36,189. Regulation to the Law on Books, *Gaceta Oficial de la República de Venezuela*, 18 December 1998, No. 5,285.

98. National Cinematography Law of 15 August 1993, *Gaceta Oficial de la República de Venezuela*, 8 September 1993, No. 4,626. Regulation to the National Cinematography Law, *Gaceta Oficial de la República de Venezuela*, 2 February 1994, No. 4,689.

99. Institutional Agreement Against Piracy (4 June 1990), *Gaceta Oficial de la República de Venezuela*, 3 September 1993, No. 4,623. Regulation to the Statutory Deposit Law of July 23, 1997, *Gaceta Oficial de la República de Venezuela*, 13 August 1997, No. 5,163.

101. Online: <www.sapi.gov.ve> (last visited: 28 October 2005).

3.5. URUGUAY

Uruguayan CMOs need to be approved by the Executive Power in order to legally operate. Approval is granted after the opinion of the Consejo de Derechos de Autor (Copyright Council).¹⁰²

The copyright law establishes a set of obligations that need to be fulfilled by CMOs,¹⁰³ such as the need to distribute amounts collected in time periods not superior to one year and to periodically present its accounted expenses to the Consejo de Derechos de Autor. Differently than in other countries analyzed in this chapter, those obligations are more general and mainly concerned with the transparency of a CMO's administration. However, as in other Latin American countries, the government retains the right to supervise and inspect CMOs.¹⁰⁴

3.6. CHILE

Section 21 of Chilean copyright law¹⁰⁵ guarantees the freedom of authors to negotiate their works. The authorization granted by authors to CMOs does not restrict the authors' right to directly negotiate his or her work. As already mentioned, it has been argued that this freedom may not be beneficial for less famous authors when dealing with larger publishers or other users.

The chapter on CMOs has been introduced by Law No. 19.166¹⁰⁶ which updated the copyright law. According to this chapter, CMOs must be private entities. Their sole social purpose must be the activities of management, protection and collection of monies related to the intellectual property rights of their members. Social funds remaining after the distribution of amounts to their members can be used for the promotion of activities or services to their members.

Besides the legal requirements addressed to all private entities, CMOs have to include in their statutes the specification of the intellectual rights they manage; the voting regime; rules for the distribution of amounts collected, as well as the percentage reserved for administrative costs, which in no way can exceed 30 per cent of the total collected; and the destination of the CMO's assets in case of liquidation, as well as the rights of members in such a case.¹⁰⁷

Authorization to start operations is granted by the Ministry of Education,¹⁰⁸ by the publication in the National Official Gazette and presentation of the

102. Law on Copyright No. 9.739 of 17 December 1937, as amended on 10 January 2003, s. 58. Available (in Spanish) as <portal.unesco.org/culture/en/file_download.php/0b94399d33e31543860637a721f432Ley_sobre_derecho_de_autor.pdf> (last visited: 7 November 2005).

103. *Ibid.*

104. *Ibid.*

105. Law No. 17.336 (1970) on Intellectual Property, *Diario Oficial*, 2 October 1970, No. 27.761.

106. *Ibid.*, as last amended on 17 September 1992.

107. *Ibid.*, Art. 93.

108. Online: <www.mineduc.cl> (last visited: 28 October 2005).

statutes to the Ministry, together with proof that the CMO represents at least 20 per cent of national authors in the field of the CMO or of foreign authors with permanent residence in Chile. Another requirement is that the data presented to the Ministry of Education indicate that the CMO has the necessary conditions to safely and duly manage the works of its members.

The Registro de la Propiedad Intelectual is under supervision of DIBAM – Dirección de Bibliotecas, Archivos y Museos (Directorate for Libraries, Archives and Museums).¹⁰⁹ DIBAM is a governmental authority that promotes knowledge and creation and contributes to national development.

3.7. COSTA RICA

Unlike in Chile, the Costa Rican copyright law¹¹⁰ does not dedicate a specific chapter to CMOs. It only mentions CMOs in Section 132, which provides that the mere association to a CMO is enough for the CMO to consider itself as the representative of a rightsholder. There is no need for a specific mandate to represent artists. Furthermore, Section 132 also provides that CMOs can be associations or commercial societies, allowing CMOs to earn profits. This is the first country from all the countries covered in this research that allows the CMO activity to be a commercial business.

The Registro Nacional de Derechos de Autor y Conexos¹¹¹ (Register of Copyright and Related Rights) is attached to the Public Registry of Property and is the authority responsible for registering copyright works.

4. CHALLENGES FACED BY CMOs IN LATIN AMERICA

Even though the group of countries analyzed has myriad detailed legal frameworks to regulate CMO activity, there are some general patterns when it comes to challenges they face. Piracy, lack of awareness of the duty to properly remunerate authors and new digital technologies are the most commonly cited difficulties faced by CMOs in Latin America.

4.1. PIRACY

The piracy of copyrighted materials is sometimes mentioned as a means to finance organized crime activities, including drug trafficking. Besides this

109. Online: <www.dibam.cl> (last visited: 28 October 2005).

110. Law No. 6683 on Copyright and Neighbouring Rights (as last amended by law No. 8039 of 10 October 2000), *La Gaceta*, 27 October 2000, online: <www.wipo.int/lea/docs_new/pdf/en/cr/cr001en.pdf> (last visited: 28 October 2005).

111. Online: <www.registronacional.go.cr> (last visited: 28 October 2005).

fact, the economic situation of countries in the region and the relatively low purchasing power of the populations of many Latin American countries may contribute to the sale of low quality, pirated products on a large scale. According to one source, pirate CDs and DVDs represent 70 per cent of the Brazilian market.¹¹² The fight against piracy is thus one of the most demanding activities conducted by CMOs and associations of rightsholders throughout Latin America.

4.2.

LACK OF AWARENESS

The lack of awareness of the obligation to remunerate authors and other rightsholders properly can also be seen in the Judiciary. To tackle this problem, CMOs organize seminars and educative campaigns in order to make government officials understand that commercial use of copyright works deserves to be properly remunerated.¹¹³ This is not always easy and the effect of the misperception that copyright works should be free even when used in a commercially significant way is reflected in the average amounts collected by CMOs in Latin America. According to information received from the Artists Supervisor of ABRAMUS (Brazil),¹¹⁴ if all outstanding amounts were to be paid, collection values would double. In other words, only half of the due amount is actually collected in Brazil.

Radio channels and television stations are on the top of the debtors' list and this makes the problem even harder to solve. For example, because radio channels and television stations are governmental concessions in Brazil – many of the concessions have been granted to Brazilian politicians who profit from the visibility they gain through communication media – getting those stations to pay copyright fees is politically difficult. To put it differently, besides making use of the high visibility they acquire and the controlling power they have over content, politicians many times see themselves above justice and do not believe they will be judicially compelled to pay amounts they decide not to pay. These facts end up discouraging many CMOs from initiating judicial actions against politicians.¹¹⁵ The same problem is faced by ADDAF (Brazil) for its mechanical works. Many of those works are used in advertising pieces without prior authorization or clearance of rights.¹¹⁶

SADAIC (Argentina) believes that those who refuse to pay often do not discuss the amounts involved but rather the underlying copyright right itself.¹¹⁷

112. Information obtained from an interview with Mr. Chico Ribeiro, Supervisor of Artists at ABRAMUS (Brazil) on 7 July 2005.
 113. Information obtained from an interview with Dr. Maria Huerta, Legal Director of SADAIC (Argentina) on 5 July 2005.
 114. See *supra* note 112.
 115. See *supra* note 112.
 116. Information obtained from the legal department of ADDAF in an interview on 4 July 2005.
 117. See *supra* note 113.

This problem becomes even larger when one considers copyrights that are not related to musical works. This is the problem faced by SOCEM, the Mexican Society of Choreographers. This CMO suffers from the non-acceptance of its right to charge contributions for the works of its members.¹¹⁸ Besides SOCEM, the only society that also collects and distributes amounts related to the performance of choreographers in Latin America is ARGENTORES (Argentina).¹¹⁹ Visual artists have similar problems and one of the activities exercised by visual arts' CMOs is public education about copyrights on visual works. This problem was also specifically mentioned by APSAV (Peru). APSAV even had to deal with a collective refusal to pay copyright from all local newspapers in 2002.¹²⁰

Recourse to the judicial system is often avoided in Latin America since the system is slow and procedures are costly. In some cases, not only time and money are at issue but also the fact that the judiciary power might be corrupt. There is thus no guarantee that justice will be achieved through litigation. Leaving corruption, time and money aside, if one launches a judiciary process, one will have to face the reality that many courts are not well equipped to deal with copyright issues. There are no specialized courts for the subject and many judges do not "believe in" copyright. This situation was mentioned for example in the case of Argentina.¹²¹

In an attempt to solve this problem, some national copyright registrars offer specialized arbitration services to their members. This is the case in Peru and Venezuela, two countries with very similar governmental control provisions – not surprisingly since they are both part of the Andean Community. Despite the fact that arbitral tribunals have been created in both countries under the supervision of the national copyright registrars, tribunal decisions are not publicly available for consultation. This publication might help enhance the modernization of those two countries' copyright systems.

Courts in Uruguay have confirmed not only the legitimacy of CMOs and their right to act on behalf of their members but also that collective management is a more efficient way to negotiate the use of copyright material.

4.3. ORGANIZATIONAL PROBLEMS

In Argentina, decree No. 1671/74 required CAPIF, AADI, SADEM and ADIVA to change their statutes, based on a previous agreement executed by these collectives with the purpose of avoiding the double collection of amounts

118. The protection of choreographies is linked to the protection of traditional knowledge, including sacred dances and dances derived from traditional sources. See Daniel Gervais, "Spiritual But Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge" (2003), 11 *Cardozo Journal of International & Comparative Law* 467.
 119. Information obtained from Ms. Patricia Aulesia at SOCEM in an interview on 8 July 2005.
 120. Information obtained from Ms. Villa Ilacencio in an interview on 7 July 2005.
 121. See *supra* note 113.

for the same uses. Although the Decree and the agreement among the collectives is more than 20 years old, lawsuits dealing with the legality of such agreements are still being pursued and the legality of the Decree is still being analyzed by the courts.¹²²

AADI and CAPIF are at the top of the list of recent decisions concerning the collective management of copyright in Argentina. The large majority of claims regard the legitimacy of AADI-CAPIF in the representation of authors. Opponents of the CMOs' activity allege that their legal representation is unconstitutional and that the regulation validating the AADI-CAPIF agreement was not enacted by the Legislative power, but by the Executive. However, while some hotels and night clubs admit that the agreement among the four collectives has been properly established and is not unconstitutional, those who do not contest the constitutionality of AADI-CAPIF's activity, maintain that the entities have legitimacy only to collect and distribute money in the representation of authors, not to initiate lawsuits to collect outstanding amounts.

In Costa Rica, some suits claim that ACAM is not entitled to collect contributions on behalf of its members.¹²³ Others pledge that ACAM does not determine for which works it is collecting contributions and invoices commercial establishments the amount it judges fair (docket No. 04-006203-0007-CO of 25 June 2004). Some lawsuits have tried to question the legitimacy of ACAM / SACAM, but thus far without success (Sentence No. 273; docket No. 00-000093-0011-CI of 12 July 2000).¹²⁴

4.4. New Technologies

New technologies are another very important and demanding challenge, not only in Latin America, but everywhere in the world. There is no specific legislation dealing with music on the internet. Therefore, some say that music can be downloaded from the internet without compensation to the copyrights' owner. Most CMOs are essentially powerless since there is no specific legal provision allowing or prohibiting the free transit of music files on the internet. SADAIC and ABRAMUS listed new technologies as one of their biggest challenges today.¹²⁵

Besides the three points mentioned above, a particular difficulty faced by Mexico and Peru is the level of formalism required by the law to deal with copyright licensing. The legal requirements contained in the Mexican Law (e.g. to have a mandate recognized by a notary) not only slows down the process of joining a CMO but may also keep authors who do not have many works to license away from CMOs. SOGEM (Mexico) mentioned excessive formalism as one of

the reasons that makes their activity harder and creates problems for authors, especially those beginning their careers that might not have the necessary means to afford notary services. APSAV (Peru) mentions the periodical audits conducted to comply with legal requirements as a costly and unnecessary measure. Considering that APSAV is administered by authors themselves there should be no need for the government to approve its accountancy since authors themselves will benefit from sound accountancy procedures.

5. CONCLUSION

Brazil and Argentina are examples of successful, privately-run CMOs. CMOs in those two countries – together with Mexico – are the oldest and strongest in the region. They are well established and their activities are generally well understood and supported. Lawsuits that reach superior courts in those countries have confirmed the importance of the role of CMOs. Collection and distribution numbers in both countries – as well as in Mexico – are available for consultation by the public and around 80 per cent of the total collected is actually distributed.¹²⁶ Brazilian and Argentinian CMOs do not require governmental assistance in the execution of their activities. Authors themselves have started CMOs and managed to organize the activity in a manner that fulfills their needs. This is also beneficial for users who obviously prefer to rely on efficient institutions to obtain licenses.

Considering the group of the three biggest and richest countries in the region, Mexico's CMOs are under a higher level of government supervision when compared to CMOs in Brazil and Argentina. This is despite the fact that Mexico is considered a regional leader and adopts a free market approach, reflected *inter alia* in its NAFTA membership. Mexico maintains that the regulations are an attempt to prove to Mexico's North-American partners the seriousness and transparency of its copyright institutions.

The global position of Latin American countries as members of the developing world may justify governmental assistance in the setting up of new collective management organizations in some countries. Looking back at our research, Peru and Venezuela are the two countries with a higher degree of governmental presence in the activities of local CMOs. They also have the lowest per capita GDP¹²⁷ among the group of countries under review. In spite of governmental aid for their start-up phase, CMOs in those two countries (in Peru mainly) complain about the lack of awareness by, and the lack of a legal structure for effective support from, the government not only in the establishment of CMOs, but in the day-to-day operations, especially when disputes with users

122. Information available online: <www.scha.gov.ar/> (last visited: 28 October 2005).

123. Sentence No. 11593, lawsuit No. 04-008357-0007-CO of 10 October 2004.

124. Information available online: <www.poder-judicial.gov.cr/> (last visited: 29 October 2005).
125. See *supra* notes 112 and 113.

126. Reference to ECAD's data.

127. Peru's per capita GDP: USD 5,600, Venezuela's: USD 5,800. Information available online: <www.cia.gov/> (last visited: 29 October 2005).

arise. Local CMOs cannot always rely on the government or on the judiciary to help.

In Uruguay and Chile, the government has the right to audit and supervise the activities of CMOs. Local CMOs consider the state control as a formal process and not as an invasion of their rights to freely develop their activities. Those countries possess stable economies and politics and this reflects not only on their legal institutions but also on their understanding of the importance of copyright.

In Costa Rica, the situation is *sui generis* compared to the group of countries under review, since it views CMOs as commercial businesses and allows CMOs to operate for profit, something which is prohibited in many Latin American countries.

From our research, for those countries where institutions and the economy are not stable, governmental guidance is not only helpful but often also a necessary ingredient of successful collective management. However, this guidance is only a small step in the consolidation of the activity in those countries. Once CMOs start their activities they need to be supported by the government – mainly through recognition of their activities by the judiciary. Ideally, CMOs should receive governmental aid until they acquire the necessary expertise to conduct their activities independently and until users and others better understand copyright. When this stage is reached, CMOs should be run privately and independently, that is, managed and administered by the rightsholders themselves. This is the scenario in place in Argentina and Brazil.

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