

Collective Management of Copyright and Related Rights

Third edition





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Foreword

I met Dr. Mihály Ficsor many years ago. I have not only an immense respect for him but also a long-standing friendship. I am very proud to be one of Dr. Ficsor's successors at WIPO in charge of copyright and creative industries.

Everybody knows the decisive role he played in the preparation, negotiation and adoption of the so-called "Internet Treaties": the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Those many years of international exposure have been enriched by Dr. Ficsor's practical experience of collective management while heading ARTISJUS, the Hungarian collective management organization (CMO), and his many assignments during his third career after retiring from WIPO.

We are honored that Dr. Ficsor accepted to author the third edition of this major publication. Dr. Ficsor has added to the first edition, published in 1990 and updated in 2002, very sound information reflecting the different systems, legislative options and best practices of CMOs worldwide.

This edition has shed the light on many recent developments that are fundamental to the development and operation of CMOs, including how CMO ecosystems are impacted by (to mention just a few...):

- online digital technologies;
- new business models, such as streaming;
- introduction of new categories of works, such as orphan or out of commerce works;
- new rights management solutions, such as extended collective management; and
- recent jurisprudence in this field.

I wish to thank Dr. Ficsor for sharing with us all his knowledge and insights. This publication provides Dr. Ficsor's views on key legal foundations underpinning collective management systems and will unquestionably serve as a rich source of information for copyright and related rights management practitioners worldwide.

Sylvie Forbin

Deputy Director General, WIPO

About the author

Between 1977 and 1985, Dr. Mihály Ficsor was Director General of the Hungarian Bureau for the Protection of Authors Rights (Artisjus), a member of the International Confederation of Societies of Authors and Composers (CISAC). From 1982 to 1985, he was Vice President of the Executive Bureau.

Dr. Ficsor is a former Director (1985–92) and Assistant Director General (1992–98) of copyright and related rights with the World Intellectual Property Organization (WIPO), during which time he played a decisive role in the preparation, negotiation and adoption in 1996 of the so-called WIPO Internet Treaties (i.e., the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (or WPPT)).

Dr. Ficsor is currently a member of the Hungarian Copyright Experts Council.

Dr. Ficsor regularly acts as a consultant to WIPO and the European Union, and he frequently speaks at copyright conferences, seminars and workshops. He is the author of numerous articles and books on a range of copyright issues – most commonly, on the protection and exercise of copyright in the online digital environment, and on the collective management of copyright – including the first two editions of this book.

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The views expressed are those of the author and are not intended to reflect the views of WIPO Member States or the WIPO Secretariat.

Preface

This is the third edition of a book published by WIPO on collective management of copyright and related rights.

The first edition emerged when, in 1989, the competent assemblies of the World Intellectual Property Organization (WIPO) submitted a request to the International Bureau of WIPO for a study to offer guidance to governments on what at that time was referred to as the “collective administration” of copyright and “neighboring” rights.

Published in 1990, that study appeared under the title *Collective Administration of Copyright and Neighboring Rights*.¹

Before its publication, the study was discussed and approved, with some minor comments, by a WIPO Group of Governmental Consultants on Collective Administration of Copyright and Neighboring Rights (in Geneva, March 19–23, 1990). It was published by WIPO first in English, and later in French² and Spanish.³ It went on to be published under license in further languages by WIPO Member States. In 2002, at WIPO’s invitation, a second edition of the book was drafted to reflect technological and business-method developments and the adoption of new international norms – in particular, the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) and the so-called WIPO Internet Treaties (namely, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT)).

In its second edition, the book’s main principles did not change significantly, but it took a new title, *Collective Management of Copyright and Related Rights*.⁴ It was again published first in English, then in French⁵ and Spanish,⁶ and later translated and published in certain other languages by Member States.” Since 2002, further technological and business-method developments have emerged, in response to which new copyright and related rights norms have been adopted around the world. When WIPO conceived of a third edition, the Organization highlighted, among other changes, that:

- the Digital Single Market Directive (DSM Directive)⁷, which sets out detailed provisions on extended collective management, has been adopted in the European Union;
- the Santiago and Barcelona Agreements, which were discussed in the second edition, are no longer applicable;
- streaming has considerably changed the copyright and collective management landscape;
- the role of collective management of orphan works and out-of-commerce works has developed further;
- mandatory and, in particular, extended collective management is an area of debate in many countries;
- the U.S. Music Modernization Act of 2018 has revolutionized the exercise of collective management;
- the E.U. Collective Rights Management Directive⁸ (CRM Directive) has been adopted; and

1 WIPO (1990). *Collective Administration of Copyright and Related Rights*, Publication No. 688 (E). Geneva: WIPO.

2 WIPO (1990). *Gestion collective du droit d’auteur et des droits voisins*, Publication No. 688 (F). Geneva: WIPO.

3 WIPO (1991). *Administración Colectiva del Derecho de Autor y los Derechos Conexos*, Publication No. 688 (S). Geneva: WIPO.

4 WIPO (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO.

5 WIPO (2002). *La gestion collective du droit d’auteur et des droits connexes*, Publication No. 855 (F). Geneva: WIPO.

6 WIPO (2002). *La gestión colectiva del derecho de autor y de derechos conexos*, Publication No. 855 (S). Geneva: WIPO.

7 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130/92, May 17, 2019.

8 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72, March 20, 2014.

- the *CISAC*⁹ and *OSA*¹⁰ judgments of the Court of Justice of the European Union (CJEU) have had acute impact on the practice of collective management organizations (CMOs) worldwide.

This third edition has changed in style and structure, to some extent. The approach is more analytic and certain issues – such as aspects of competition, national treatment or the triangle of voluntary, mandatory and extended management – are discussed in more detail. Footnotes, which were absent in the first two editions, have been included, pointing toward more detailed information and offering alternative views. Nevertheless, the objective of this third edition remains the same as that of the first two: not to deliver a monograph, written in a fully fledged academic style, but rather a handbook intended to be accessible to a wide audience – with a special focus on those questions that may emerge for governments as they prepare, adopt and apply collective management norms and regulations.

A number of new WIPO publications have facilitated the analytic discussion of questions of collective management, and certain descriptive elements covered in the first and second editions are, in the third, reserved to those publications. For example, it was only one year after publication of the second edition that the *WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO* and *Glossary of Copyright and Related Rights Terms* appeared. Readers seeking definition and description of certain details concerning the rights exercised through collective management are directed there for more guidance; likewise, they will find in Chapter 2 reference to a wide range of WIPO publications that set out the more detailed methods and technological means of rights management.

Nevertheless, and despite the fact that it is more extensive than both the second and first editions, the third edition includes no separate chapter headed “Conclusions”; rather, the findings of the various analytic chapters are set out clearly therein.

This third edition of WIPO’s *Collective Management of Copyright and Related Rights* comprises 12 chapters:

In Chapter 1 the objectives, functions and different models of collective management are explored. Looking at how the first authors’ societies were established, how a fully fledged collective management system emerged, and how the scope of collective management was broadened and diversified. An attempt is made to conceptualize “collective management” and define “collective management organizations”.

In Chapter 2 the ways in which WIPO’s activities became ever more intensive in the field of collective management of copyright are explored in response to its increasing importance – such activities extending to legislative guidance (when the governments of the Member States require it), publications, capacity building and training, and infrastructure solutions.

In Chapter 3, there is analysis of the international norms from the viewpoint of their relevance, if any, for the establishment and operation of CMOs. We discuss the role of regulation in Contracting Parties’ fulfilment of their obligations to ensure the enjoyment, due exercise and protection of certain rights of authors and beneficiaries of related rights.

Four chapters then follow that deal with the basic organizational aspects of collective management.

Chapter 4 presents the key thesis of a natural monopoly situation for the management of certain rights of certain categories of rightsholder. There is consideration of the frequent *de facto*, or even *de jure*, monopoly position of CMOs, in which cases it is not advisable to introduce competition artificially but adequate measures are needed to prevent its possible abuse.

Chapter 5 points out that the exclusive nature of rights may truly prevail only if they are exercised individually and that mandatory collective management is therefore a limitation of such rights. In

9 Judgment of the General Court (Sixth Chamber) of April 12, 2013, *International Confederation of Societies of Authors and Composers (CISAC) v European Commission*, Case T-442/08, ECLI:EU:T:2013:188.

10 Judgment of the Court (Fourth Chamber) of February 14, 2014, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, Case C-351/12, ECLI:EU:C:2014:110.

contrast, extended (or presumption-based) collective management is an enabling system that is advantageous to both rightholders and lawful users.

Chapter 6 introduces independent management entities (IMEs). The legislation governing IMEs in the European Union is reviewed and there is discussion that they have been granted some unjustified advantages in relation to CMOs. This has led to some conflicts, mainly in the traditional fields of collective management, some of which have been solved in the courts and others through cooperative agreement.

Chapter 7 tells the history of the former centrally planned economies of Central and Eastern European countries, during which period governmental or semi-governmental bodies took care of the collective management of copyright, within a heavily regulated framework of contractual rules and tariffs. There is a review of how these organizations have been transformed within new market economies into private CMOs – smoothly, in some places, and with difficulty, in others – and the kinds of problems that remain where the transition is not yet complete.

In the next two chapters, there is analysis of the activities of CMOs in detail in the light of regional norms, national legislation, professional rules and codes of conduct. In this, the chapters draw richly from WIPO's *Good Practice Toolkit for CMOs* (the Toolkit).

Chapter 8 opens with an outline of the nature, objective and structure of the Toolkit. It goes on to discuss such topics as rightholders' adherence to and withdrawal from CMOs, their membership rights, the governance and financial administration of CMOs, the distribution of revenues and relationships between CMOs.

Chapter 9 expands on the relationships between CMOs and is structured similarly to Chapter 8, covering issues such as the contractual aspects, licensing, tariffs, users' obligations and dispute settlement.

In Chapter 10, there is a review of the exclusive right of (interactive) making available to the public, which is not provided in the same way in the WCT as it is in the WPPT and the Beijing Treaty on Audiovisual Performances (BTAP). There is an exploration of the problems of interpretation that have emerged from this difference and the impact it may have on collective management of copyright. The chapter models licensing download and streaming services, paying special attention to the use of musical works, and it outlines how digital rights management systems (i.e., technological measures and electronic rights management information systems) can be used for the protection and exercise of rights in the online digital environment. Since they are particularly relevant for the transborder multi-territorial use of works in the online digital environment, there is also a review in this chapter of the private international law aspects of collective management.

The final two chapters of the book have characteristics in common in that they explore issues that go beyond the merely economic aspects of copyright and collective management of rights.

Chapter 11 spotlights the twofold role of cultural productions and services, including the part played by CMOs in the protection of cultural diversity and the rules of the deductions for cultural and social purposes.

Chapter 12 reviews the specific needs of developing and the least-developed countries, taking into account the relevant recommendations of WIPO's Development Agenda. There is analysis of the results of the various studies on the economic contribution of copyright and a look at the role of CMOs in the protection and exploitation of expressions of folklore/traditional cultural expressions. Finally, there is a review of how online digital technology is used in technical cooperation programs in the field of copyright management.

Each chapter opens with introductory remarks that add detail to the outline given here.

Raison d'être, core functions and various models of collective management

Introductory remarks

The exclusive rights of authors to use their works¹¹ and to authorize others to do so are basic elements of copyright; where recognized, they are also important for the beneficiaries of related rights. Irrespective of whether or not it is explicitly stated in a treaty¹² or national law, the exclusive right to authorize use of a work also implies the right to prohibit it. Unauthorized use of such a work is therefore an unlawful act prohibited by law – an infringement of the author's exclusive rights – against which enforcement action may be taken.

Although exclusive rights allow rightholders to prohibit use of their works, exclusive rights are not negative in nature. Their genuine purpose is to ensure that the protected works are exploited in accordance with the intentions and interests of the rightholders (in a way that duly takes into account the legitimate interests of others and the general public). It is a corollary only that the rightholders may thereby exclude others from exploiting the works (or productions of the works protected by related rights).

Rightholders may most fully enjoy and exercise their own exclusive rights if they exercise the rights individually. It is in this way that they maintain control over the exploitation of their works by others. They not only decide whether or not they authorize or prohibit the use of the works but also determine the limits and conditions of the authorized acts, including any remuneration, and they may monitor more or less closely whether or not their moral and economic rights are duly respected. Such a model of exercising exclusive rights was – and still is – predominant, for example, in the field in which copyright protection originally emerged: books and periodical publications.

When the international copyright system was first established, however, there were already certain rights – most obviously of public performance of nondramatic musical works – over which the individual exercise of rights did not seem possible, at least not effectively. Since then, waves of new technologies have successively widened the areas in which the individual exercise of rights has proven impossible, or highly impracticable. Until the advent of online digital technologies, it seemed that there were ever more cases in which individual owners of rights were unable to control the use of their works, negotiate with users and collect remuneration.

In such cases, the idea was mooted time and again that if the exclusive rights concerned could not be exercised in the traditional individual way, they should be abolished entirely, or at the very least reduced to a mere right to remuneration. But where the provision of a right is justified – in the case of copyright and related rights,¹³ as an incentive to creativity, and in recognition of creative efforts

11 Unless otherwise stated, reference in this book to “works” includes the subject matter of related rights.

12 The Berne Convention provides for an “exclusive right of authorizing” acts. (The verb “to prohibit” may be found only in Article 17 on the right of the government to prohibit certain acts and not in combination with a right of authorization to form censorship.) It is in Articles 10 and 13 of the Rome Convention, and Articles 14.2 and 14.3 (concerning the rights of producers of phonograms and broadcasting organizations) and 11 of the TRIPS Agreement (on rental rights), that the expression “authorize or prohibit” appears (while Article 7 of the Rome Convention and Article 14.1 TRIPS provide for the “possibility of preventing” certain acts). For more on all of these, see Mihály Ficsor (2003). *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, Publication No. 891 (E). Geneva: WIPO (hereinafter, Ficsor, *WIPO Guide and Glossary*), 145–149; Daniel Gervais (1998). *The TRIPS Agreement: Drafting History and Analysis*, 2nd edn. London: Sweet & Maxwell (hereinafter, Gervais, *The TRIPS Agreement*), 152–160.

13 Unless otherwise stated, reference to “copyright” in this book includes related rights.

and investments therein¹⁴ – it is not reasonable to jump to abolition as a solution to emerging difficulties in its exercise; rather, the sensible approach is to try to find a new means through which a right may still somehow be exercised.

In a number of cases (and ever more frequently), the reason why copyright cannot be exercised individually is that the works are used by a great number of users at different places and at different times. Individual rightholders, in general, do not have the necessary resources to monitor all of the uses, to negotiate with all of the users and to collect all of the remuneration due; likewise, users would have difficulty if they were to want to seek authorization from a huge number of individual rightholders, the job of identifying and locating them being a burden beyond most users' means.¹⁵

It is in such a situation that the collective management of rights emerges as an adequate alternative to restricting exclusive rights to mere rights to remuneration or abolishing them. In some rare cases, the international treaties and national laws (to be discussed more in detail below in this chapter) do provide instead for mere rights to remuneration to authors and to owners of related rights; in others, they limit the exercise of exclusive rights to compulsory or statutory licenses (the latter in effect *de facto* rights to remuneration). In most cases, collective management seems to have become the norm – a nearly inevitable way of exercising rights effectively.

Within the framework of a fully fledged collective management system, those for whom the individual exercise of their rights would be impracticable authorize a collective management organization (CMO) to monitor the use of their works, negotiate with prospective users, grant licenses against appropriate remuneration (usually on the basis of a tariff system – see Chapter 9) and, under appropriate conditions, collect the remuneration and distribute it among the rightholders. This list of activities may be regarded as an indirect definition of “collective management”. Nevertheless, as is to be discussed shortly, the collective nature of the rights management may – and frequently does – involve additional functions going beyond the collective exercise of rights per se, such as pursuing certain cultural and social purposes. It is not realistic to try to capture a precise, legally applicable definition of anything more substantive than the objectives and tasks of a CMO.

In collective management systems, rightholders may exercise their rights only indirectly; if the collective management system functions properly, the exclusivity of those rights may be preserved in relation to the users.

Although the collective management system primarily serves the interests of the rightholders, it also offers significant advantages to the users, who can access the works through a single source, or only a few sources, and – since collective management simplifies negotiations, the monitoring of uses and the collection of fees – they can generally do so at lower transaction costs than if they were dealing with each rightholder individually.

In the paragraphs above, the elements of a fully developed collective management system are outlined. In the case of statutory licenses and mere rights to remuneration, some of the functions of the system – in particular, licensing – are absent; the other functions, however, may apply. There are also certain cases in which the rightholders do not authorize a CMO to carry out all of the functions but only some of them. For example, authors of dramatic works may leave the tasks of collective bargaining and negotiating a framework agreement with the representatives of theaters to their CMO, but authors tend to conclude contracts with the theaters directly and entrust their CMOs only with subsequently monitoring performances, collecting remuneration and distributing it.

14 It is beyond the scope of this book to set out the differences between the various copyright systems (in particular, between the civil law and common law systems). For such a description, including a historical background and their legal-political justification, see Ficsor, *WIPO Guide and Glossary*, 6–12.

15 This is true, however, only if individual owners of rights – such as authors – may directly exercise their rights. It is worth noting that increasing trends toward concentration and convergence have led big companies or complex media conglomerates to establish huge repertoires as transferees – and, in certain countries, even original owners – of rights. In some ways, managing these repertoires (known as “catalogues”, “libraries”, etc.) may resemble the collective management of copyright (e.g., uniform tariffs may be used with a technique of authorization that is similar to blanket licensing, even though it covers only a limited proprietary repertoire). In this book, the management of such repertoires is not considered collective management because ownership of the rights is concentrated in the hands of single corporate rightholders (i.e., the source of authorization is not a society of many owners of rights).

Establishing the first authors' societies and the emergence of a fully fledged collective management system

The first authors' societies were born in France. The establishment of the very first one was closely linked to the legal battles of Beaumarchais,¹⁶ author of such successful operas as *Le Barbier de Séville*, *Le Mariage de Figaro* and *La Mère coupable*, against those theaters that were reluctant to recognize and respect authors' economic and moral rights. It was at his initiative that, in 1777, the Bureau de législation dramatique – later to become the Société des auteurs et compositeurs dramatiques (SACD) – was established as the first society to deal with the collective management of authors' rights. The SACD still functions to the satisfaction of its members and the cultural community, and it has extended its activities to authors' rights in audiovisual works. It is worth noting, however, that the original activity of the society – involving, as it did, “grands droits”¹⁷ (the exercise of the right of public performance of dramatic and dramatico-musical works) – was (and remains) only a partial form of collective management. It included collective bargaining with theaters and similar users to negotiate framework agreements, but it left to authors the licensing of their works individually within that framework. It then resumed responsibility at the point of monitoring the individually licensed uses of the works, collecting remuneration and distributing the remuneration among authors or transferring it to their successors-in-title.¹⁸

The SACD is an appropriate example of a basic aspect of an authors' society as the prototypical CMO – namely, that “collective management” does not mean only joint management as the mere collection and distribution of remuneration. In the case of authors' societies (and it has also become a characteristic of performers' organizations), the expression “collective management” does not mean only that the organization grants authorizations and collects remuneration jointly (i.e., they are not simply “collecting societies”) but also that the management activity they perform collectively is for, and governed by, creators who combine their forces in exercising their rights and acting as a community to serve their common interests, in the spirit of solidarity and mutual support.

The SACD expresses this on its website in a way that Beaumarchais himself could have drafted, and it holds not only for the SACD but also, *mutatis mutandis*, for any authors' society or organization of performers:

Why call on a collective management body for live performance authors? In order to guarantee authors' rights, it is preferable to turn to a body capable of applying pressure during negotiations and potential disputes, all the while avoiding bureaucracy and time-consuming data collection activities.

In addition, it is because together we are stronger, both individually and collectively. Since the SACD represents all authors, it can negotiate advantageous general payment conditions from performing arts contractors for all artists – experienced and beginner alike. Beginners benefit from the same conditions as the experienced artists they will one day become.

This is essential work – a virtuous cycle for every author and for the dynamism and diversity of the arts.¹⁹

16 As well as being a playwright, Pierre-Augustin Caron de Beaumarchais (1732–99) was variously a musician, publisher, inventor, watchmaker, financier, diplomat and arms dealer. (He was also involved in the revolutionary movements of his time.)

17 For definitions of and differences between “grand droit” (grand right) and “petit droit” (small right) uses of works (in particular, musical and dramatico-musical works), see Ficsor, *WIPO Guide and Glossary*, 291, 202:

Petits droits: French expression (frequently used also in other languages in the original French version) meaning the so-called performing rights in non-dramatic musical works, with or without words, which, in general, are managed on a collective basis. The English term “small rights” is also used in this context.

[...]

Grand droits: The French expression (frequently used also in other languages in the original French version) meaning the so-called performing rights in dramatic (usually dramatico-musical) works which, in contrast with “*petits droits*”, in general, are not managed on a collective basis (or if they are, collective management usually does not extend to all aspects of exercising rights). The English term “grand rights” is also used with the same meaning.

18 On the SACD's website, this combination of collective and individual elements is described thus:

The SACD [...] makes authors' voices and views heard in regulatory and contractual negotiations. Furthermore, it negotiates agreements to showcase contemporary artists with business alliances for live performance, theaters and amateur shows. This is especially important as, at the SACD, every author retains the fundamental right to permit or prohibit the use of their work.

See www.sacd.fr/gestion-individuelle-gestion-collective (WIPO translation).

19 *Ibid.*

More than half a century later, Honoré de Balzac, Alexandre Dumas, Victor Hugo and other French writers followed suit in the field of literature when they constituted the Société des gens de lettres (SGDL), whose general assembly met, for the first time, at the end of 1837. The SGDL was not founded with the objective of the practical management of copyright (writers tend to exercise their own rights individually through contracts concluded with their publishers) and it has not since become a real CMO; rather, for the SGDL, representing the shared interests and rights of the entire creative community was – and has remained – the core objective.²⁰

The writers who founded and operated the SGDL played a decisive role in the recognition of authors' rights – including moral rights (the protection of which is listed among the objectives of the society) – as human rights. This is one of the reasons why the SGDL is properly counted among the pioneer societies in which authors organized themselves in France between the end of the 18th century and the middle of the 19th century. While the representation of creators' shared interests and their human rights – particularly their moral rights to be recognized – may not be regarded as a necessary function of collective management, those CMOs operating in civil law jurisdictions and some others nonetheless consider a core goal.

The same group of French authors also played a decisive part in the establishment of the International Literary and Artistic Association (ALAI) in 1878, of which Victor Hugo became the first president. It was the ALAI that drafted the convention subsequently considered at three consecutive diplomatic conferences in 1884, 1885 and 1886, and adopted as the Berne Convention. Still active, the ALAI is the most widely recognized and respected international nongovernmental organization (NGO) in the field of copyright – with an increasing number of national groups, as well as annual congresses and other meetings in which it deals with topical issues of authors' rights.²¹

The SACD, for these reasons, was not yet a fully fledged CMO: it did not perform all of its management activities collectively. Nor was the SGDL even a genuine CMO. The sequence of events that led to fully developed collective management in France began in 1847 when, supported by their publisher, two composers, Paul Henrion and Victor Parizot, and a writer, Ernest Bourget, brought a lawsuit against a restaurant, Ambassadeurs, located in the Avenue des Champs-Élysées in Paris, which organized regular "café-concerts". The authors found it infuriating that they had to pay for their seats and meals in the restaurant, while nobody paid them for their works being performed by the orchestra. They decided that they would take up their seat and eat their meal but not pay for it as long as they were not paid for their own effort. They won their case: the restaurant owner was required to pay the creators fair remuneration, opening up new possibilities to the composers, lyricists and publishers of nondramatic musical works. Appropriate machinery was necessary to take advantage of those opportunities and a collective entity was founded in 1850, soon to be replaced by the Société des auteurs, compositeurs et éditeurs de musique (SACEM), still functioning with great success to this day.²²

20 On the SGDL's website, the present functions of the SGDL are summed up thus:
The SGDL is an officially approved private institution. Its mission is to ensure compliance with the moral rights of all authors working with the written word (such as writers, essayists and translators), to defend their economic interests and legal and social status, and to promote copyright. It represents 6,000 authors. The SGDL also provides a service for the physical or digital storage of works, which is a means of protecting and preserving their content and constitutes evidence of prior art where cases of illegal use or plagiarism arise. See www.sgdl.org/sgdl-accueil/la-sgdl/presentation-de-la-sgdl (WIPO translation).

21 On the ALAI's website, the objectives and activities of the organization are described as:
The International Literary and Artistic Association (ALAI) is an independent learned society dedicated to studying and discussing legal issues arising in connection with the protection of the interests of creative individuals. Copyright and performing artists' rights are today an integral part of fundamental human rights as enshrined in several international conventions, declarations and charters.
[...] ALAI promotes creativity by endeavoring to assure the protection of the moral and economic rights of creators in general, a goal that Article 27(2) of the Universal Declaration of Human Rights also affirms. ALAI does not represent or promote any individual author in particular, nor does it assist businesses or industrial groups. ALAI is a broad-based, independent organization, receptive to the views held by its numerous national groups and individual members from every corner of the globe. Its members have a wide range of backgrounds and activities, from academic scholars and practicing lawyers specializing in the field of copyright to professionals in the media sector and national and international officials.
Membership in ALAI or its national groups is open to anyone who wishes to take part in the great debate on the role of authors' and performers' rights in a constantly-evolving world, with a view to seeking balanced solutions in order to promote creativity and the protection of creators.

See www.alai.org (WIPO translation).

22 See www.sacem.fr

The ability of SACEM to operate a fully fledged collective management system was critical to the application and exploitation of the newly recognized right of public performance. Henrion, Parizot and Bourget were quite sure that their works were being performed not only at the café-concerts in the Ambassadeurs but also in other restaurants and public places in Paris – and likely not only in Paris but also in Marseille, Lyon, Lille, Nice, Reims, Toulouse and so on. They had a right, but they would not have been able to exercise it individually in more than a very few cases: trying to identify users spread across the whole country and to collect remuneration from them would have been extremely costly – if it were even possible. Several other composers and lyricists were facing the same problems, and the SACD example pointed toward a solution: a society that could manage their rights through an appropriate national network, monitoring uses, licensing users, collecting remuneration and distributing it (after deducting its costs). This was a new conception of collective management compared with that performed by SACD: it not only allowed creators to join forces as a community, obtain recognition of their creative efforts and negotiate due remuneration with potential users; it also emerged as an inevitable – the only workable – solution for the application of a right in a situation in which the use of a repertoire spanning multiple rightholders was to be authorized to multiple users.

At the end of the 19th century and in the course of the first decades of the 20th century, similar authors' organizations (so-called performing rights societies) were formed in nearly all of the countries in Europe and also in some elsewhere. Reciprocal representation agreements swiftly fueled cooperation among the CMOs, and they began to feel the need for an international body to coordinate their activities and more efficiently protect authors' rights throughout the world. It was in June 1926 that delegates from 18 societies set up the International Confederation of Societies of Authors and Composers (CISAC). Membership has widened continuously since then, adding to the musical performing rights societies at its core CMOs managing various rights in different categories of works.²³

The fundamental objectives of CISAC member societies – duly reflected in the CISAC Statutes – are both the collective management of authors' rights and protection of the interests of the creative community in general. Under Article 8 of the Statutes, an organization may be an ordinary member of the Confederation only if, among other things, it:

1. has as its aim the advancement of Creators' moral interests and the defence of the material interests of Creators (and, where relevant, other categories of rightholders); [...]
2. has at its disposal effective machinery for the collection and distribution of Royalties to Creators (and, where relevant, other categories of rightholders) and assumes full responsibility for the administration of the rights entrusted to it; [...]
3. carries out its activities for the common good of Creators (and, where relevant, other categories of rightholders) as a whole and not for any specific segment or group of Creators (and, where relevant, other categories of rightholders); [...]
4. does not administer the rights of performing artists, producers, broadcasters or any entity which exploits the rights of authors, composers, (and, where relevant, other categories of rightholders), except as a secondary activity; [...]
5. does not have the power to sell or trade in the rights administered by the organisation, or the right to sell or trade in any interest in the Royalties collected or distributed by the organisation.²⁴

These provisions of the CISAC Statutes affirm that authors' societies aim higher than only the collection and distribution of remuneration; their tasks extend to "the advancement of Creators' moral interests and the defence of the material interests of Creators". Fulfillment of this ambition is possible only if the societies have behind them a real community of creators, with clear common goals and a proper organizational structure to channel joint efforts, as well as statutes and regulatory

23 At time of writing, CISAC has 232 member societies in 120 countries and represents more than 4 million creators from all geographic areas and five artistic repertoires (music, audiovisual, drama, literature and visual arts). See www.cisac.org/ about

24 See <https://members.cisac.org/CisacPortal/initConsultDoc.do?idDoc=38474>

instruments adopted in the spirit of professional unity and solidarity to serve the objectives of the “advancement of moral interests” and the “defense of [creators’] material interests”.

Authors’ interests have certain aspects in common with the interests of the owners of related rights, but conflicts of interest may arise. This is why the CISAC Statutes prescribe that its member organizations must “not administer the rights of performing artists, producers, broadcasters or any entity which exploits the rights of authors, composers, (and, where relevant, other categories of rightholders), except as a secondary activity”.

The collective nature of the activities of author’s societies goes beyond collective management of rights in the strict sense and beyond joint actions targeting better legislative and social recognition of the legitimate interests and rights of their members. It is also usually expressed in the fulfillment of common social functions and in the promotion of creativity, thereby serving not only the interests of society members but also those of the public at large.

Some governments encourage these organizations to deliver more than a mere legal-technical mechanism of management of rights. This is especially so in countries with a civil law tradition where the copyright system is particularly creator-centric, where – in view of the close relationship between works and their creators – authors’ rights are recognized as human rights and where the promotion of creativity is the main *raison d’être* of copyright protection. In these countries, legislators also tend to make sure that the copyright system guarantees that, insofar as it is reasonable, the exercise and enjoyment of rights remain in the hands of human creators, or at least their collective organizations (rather than being transferred to corporate bodies in which creators have no real say). This is achieved by, among other things, restricting the scope of the rights that may be transferred (as opposed to only licensed), regulating copyright contracts to protect the interests of individual creators as presumed weaker parties and even granting inalienable rights to remuneration (“residual rights”²⁵) to such creators – typically exercisable only through CMOs – in those cases in which they transfer their rights or grant exclusive licenses to the exploiters of their creations.

The cultural and social functions of CMOs are particularly important in developing countries, where extra efforts are needed to promote creativity (see Chapter 11 for more detail). In general, the same may be said about net importer countries (usually smaller ones), where, by means of these specific functions, national CMOs may achieve – beyond their basic management activities on behalf of the rightholders represented – two further objectives:

- to contribute to the preservation of cultural diversity; and
- to improve public acceptance of copyright protection (which otherwise may be subject to attack or may have a negative public relations effect).

For all this to be effective, it is essential that the foreign partners of CMOs – peer CMOs, media conglomerates and rightholders in general – recognize the importance of these more complex functions of authors’ and performers’ societies and stand ready to cooperate with them. This may be more than a matter of generosity or solidarity; as we will analyze in detail in Chapter 11, partners with foresight should recognize that, through these means, they may achieve their own goals more efficiently in a globalized world and an online environment.

Broadening the scope of and diversifying collective management

The “mechanical right” – that is, the right of recording musical works – was the next right in connection with which the need for collective management emerged, although its birth was different from and not so inevitable as that of the right to public performance of musical works.

25 This expression has traditionally referred to the right to additional remuneration negotiated between producers and guilds in the United States, where authors’ and performers’ rights are transferred to the producers. After the E.U. Rental, Lending and Related Rights Directive – Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376/28, December 27, 2006 – introduced the right to an unwaivable remuneration maintained in the event of transfer of the right of rental, this right was also frequently referred to as a “residual right”. However, the U.S. “residual right” and the unwaivable right to remuneration under E.U. law do differ in various aspects: not only is the former based on collective negotiations and agreements and the latter, on statutory norms, but also, more substantially, while the former is usually applied only after a certain period during which conditions are fulfilled (such as recoupment of the value of the initial remuneration paid by the producers), the latter is applicable immediately as a separate parallel right, similar in some ways to a usufructuary right.

The management of the mechanical right (a version of the right of reproduction) diversified the collective management system. The provisions of the Berne Convention relating to the mechanical right were modified at the 1967 Stockholm diplomatic conference such that they took the form seen currently in its Article 13(1). Other than the specific provisions of the Appendix applicable only in developing countries and alongside Article 11*bis*(2) on broadcasting and retransmission rights, Article 13(1) has become one of the two articles of the Convention that permit the imposition of “conditions” on an exclusive right – interpreted as a basis for compulsory licenses (and, as will be clarified shortly, also for mandatory collective management).

The management of the mechanical right has introduced at least two new elements into the collective management system. First, while in many countries the existing societies managing the right of public performance in musical works extended their activities to the mechanical right, in other countries, rightholders set up separate organizations to manage mechanical rights in the same works in which the existing societies continued to manage the performing right. Depending on which of the two options was chosen, new needs emerged:

- in those organizations with repertoires covering several rights of different types, the need to settle the internal relationship between their management; and
- where parallel CMOs were established, the need for these to cooperate and, in certain cases, to form “coalitions”.

Second, in countries with a common law tradition, music publishers became the owners of mechanical rights either originally or as a result of the transfer of rights, and they set up organizations separate from the authors’ societies (while remaining, as regards “performing rights”, members of those societies). For the first time, CMOs were set up for legal entities (see Chapter 7); their exclusive, or nearly exclusive, task was the collection and transfer of royalties as quickly and as precisely as possible, at the lowest cost possible, and proportionate to the value and actual use of the productions involved. To the extent that they deliver them through the collective management system itself, such organizations rarely have the cultural and social functions that characterize authors’ societies. As a result, a fork appeared in the path of the collective management system: while authors’ societies have remained *collective* management organizations in both senses – that is, not only managing rights collectively but also for a collective – this is rarely true of the joint management²⁶ of rights by these organizations of legal entities.

This is neither a criticism nor value judgement, but a statement of fact – and it is similar to the differences between civil law and common law copyright systems. A market-driven and business-oriented regime does not preclude investment in or promotion of creative efforts, or that publishers and producers will not take into account the interests of authors and performers: it is in publishers’ and producers’ own genuine commercial interests to find and fuel talent. The main difference is that the extent of that relationship is set out in the collective and individual agreements between the creators and the entities, to which the creators transfer their rights. It is in this context that specific types of organization (such as guilds) have emerged to promote the interests and objectives of a creator community. The activities of these organizations do not extend to the authorization of uses and the collection of remuneration from users; they extend only to the collection of what are known as “residuals” from the legal entities to which the creators have transferred their rights – and it is these latter entities that authorize uses and collect remuneration from users.

The portfolio of rights in musical works was completed (at least for a while) when the right of broadcasting was recognized. At first, the authors did not perceive the need for collective management of such a right because there were few broadcasters and hence the authors themselves were relatively easily able to monitor use of their works in broadcasting. Broadcasters, however, needed repertoires of musical works that they could use as flexibly as possible and this – as well as, later, the proliferation of broadcasting organizations, which made things more difficult for the authors – made collective management desirable.

With this development, it became clearer than ever that the collective management of rights serves not only the interests of the rightholders but also the interests of (lawful) users. But

²⁶ In the second edition of this book, the expression “joint management” referred to such management for legal entities to differentiate it from collective management on behalf of groups of creators. This categorization has not been widely adopted. Thus this edition describes and emphasizes the differences between the two models but does not apply this categorization.

broadcasters, several of them financed by government, were powerful users – far more powerful at that time than restaurants, bars, concert organizations and so on.²⁷ While concerns had been expressed that CMOs might abuse their *de facto* or *de jure* monopoly positions, the broadcasters' community was so strong that the Berne Convention was amended to introduce a limitation of the exclusive rights of broadcasting and secondary uses of broadcast works provided for in paragraph (1) of Article 11*bis*: under paragraph (2) of the same article, governments are allowed to "determine the conditions" of their exercise (i.e., by means of compulsory licensing and mandatory collective management).

This first period of development of the collective management system also included recognition – in Article 12 of the Rome Convention (with many reservations possible under Article 16(1)(a), including to the extent that the Article has no application at all) – of a right to a single "equitable remuneration" of producers of phonograms and performers for broadcasting and communication to the public of phonograms published for commercial purposes. (The same right to a single equitable remuneration, with the same kinds of possible reservation, was later duplicated in Article 15 of the WPPT.) Because it is a mere right to remuneration, collective management of the right is the norm: the right covered the same acts as the "performing rights" of authors, and hence the well-established model (and costly machinery) of authors' societies was readily available to, and used contractually by, the organizations managing this related right.

The second period of development was a broadening of the application of the collective management system as a new wave of technological developments – new devices and media – made the mass reproduction of works possible easily and even domestically. These developments were addressed in the so-called guided development period of the international copyright system – that is, the period in the late 1970s and the 1980s during which no new norms were adopted. During this time, the competent bodies of WIPO – for a while, in joint meetings with the corresponding bodies of the United Nations Educational, Scientific and Cultural Organization (UNESCO)²⁸ – tried to offer solutions to the new issues and guidance to national governments by interpreting existing treaty provisions.

First, WIPO addressed the unreasonable prejudice caused by increasingly widespread reprographic reproduction: the recommendations adopted positioned collective management of rights as a key solution. Then, it looked at the same kind of prejudice caused by the private copying of musical and audiovisual works: the recommendations adopted centered on a right to remuneration applied as a percentage surplus on the recording equipment and materials (introduced in 1965 in the German Copyright Law), which necessarily relied on collective management. In the case of reprographic reproduction, both the publishers and the authors of "the text and image sectors"²⁹ were interested parties, and the coverage of the categories of rightholders concerned by private copying was even broader. For private copying of phonograms, it included authors, performers and producers of phonograms; for private copying of audiovisual works, authors, performers and producers of such works. Thus, CMOs jointly managing the rights of several types of rightholder became even more numerous – because the idea that each of the organizations of the various categories of rightholders could collect remuneration from the manufacturers and importers of equipment and materials separately was unreasonable.

It was in the same "guided development" period that the scope of the right of cable retransmission (at that time, counted among "sleeping rights"³⁰ in several countries) was clarified. It was made

27 Later, hotels, restaurants and cafés (known as the "HoReCa" sector) joined forces to represent common interests in negotiation with the CMOs and became equally powerful users.

28 A close relationship was established between the Berne Convention and the 1971 Paris Act of the Universal Copyright Convention (UCC), administered by UNESCO. But the relationship was a bridge over which traffic passed in only one direction. Under the Appendix Declaration to Article XVII of the UCC, if a country were party to both Conventions, only the Berne Convention would apply. Furthermore, if a country were to leave the Berne Union, its works would cease to enjoy the lower-level and shorter-term protection otherwise extended to it under the UCC. Therefore, if a country were to cross the bridge to Berne, there was no turning back.

For a while, as the international system of copyright protection continued to develop and while membership of the UCC remained relevant, it was useful for WIPO and UNESCO to hold joint copyright meetings. However, in 1989, the United States, which was a key member of the UCC, acceded to the Berne Convention, as did several Latin American countries, the Russian Federation and others in the 1990s; China acceded to the two treaties shortly thereafter. The UCC consequently quickly became irrelevant and the joint meetings, pointless.

29 This expression has been generally used to refer to the sectors concerned by widespread photocopying and interested in management of the rights recognized by reproduction right organizations (RROs).

30 An expression referring to situations in which national laws provide for certain rights, but they are not applied in practice (which is regrettably not rare).

clear that the right, in accordance with Article 11*bis*(1)(ii) of the Berne Convention, must be applied to the transmission of broadcast works by cable (wire) where it is made by an organization other than the original broadcasting organization. It also became evident that it would be impossible for a cable system – which retransmits the live programs of a number of broadcasting organizations at the same time (whereby use of a certain work may be decided only shortly before, or even during, its broadcasting) – to obtain a retransmission right from individual rightholders. Again, collective management was the only realistic choice, whether as mandatory collective management or based on compulsory licensing (both made possible by Article 11*bis*(2)).

In the European Union, the Satellite and Cable Directive³¹ prescribed mandatory collective management of cable retransmission rights. In contrast with the broadcasting right, where collective management is not normally applied to audiovisual works, the collective management of the cable retransmission right does extend to such works. Otherwise, the E.U. directives – in contrast with extended collective management, the conditions of the applicability of which are now regulated in Article 12 of the Digital Single Market Directive – do not contain generally applicable provisions on when and how mandatory collective management may or must be applied; there are only piecemeal provisions on this fundamental issue of collective management. Nevertheless, it was a step toward harmonization when the provisions on mandatory collective management of the cable retransmission right became applicable under the Satellite and Cable Directive II,³² *mutatis mutandis*, to “direct injection” systems (i.e., systems of delivering programs to cable distributors rather than to the public).

The third stage of development in the collective management system was the result of the increasingly widespread application of online digital technologies – with multiple consequences. The most fundamental effect is that for the exercise of the right of interactive making available to the public – in a way replacing, in the online environment, the traditional “performing rights” – collective management no longer seems indispensable. In principle, technological measures and electronic rights management information – combined in digital rights management (DRM) systems – support the exercise of this right both by individuals and agency-type entities competing with each other with their own proprietary repertoires. The E.U. CRM Directive – as discussed in Chapter 10 on the trans-border, multi-territorial licensing of online use of musical works – has, in fact, transformed the network of CMOs representing the entire collectivity of creators in the spirit of solidarity into a system of competition between such entities.

Online digital technology allows new forms of using works in accordance with the interests of both rightholders and users (and the general public) in which collective management may or may not play a decisive role. The E.U. Orphan Works Directive³³ refers to extended collective management only in Recital (24) of its Preamble, as a means of making the use of such works possible in accordance with copyright provisions – even though extended collective management is arguably the most appropriate way of managing rights in orphan works too. In contrast, as regards the management of the rights in the somewhat similar category known as “out-of-commerce works”,³⁴ Article 8 of the Digital Single Market Directive explicitly provides for extended collective management.

Determining the constituting features of – and the difficulty of defining – CMOs

Only a few of the emerging national laws attempted to define “collective management organization” or even “collective management” (or synonymous expressions). By the time the need for statutory regulation emerged, these concepts had become sufficiently well known and were

31 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, OJ L 248/15, October 6, 1993.

32 Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ L 130/82, May 17, 2019.

33 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, October 27, 2012.

34 The Orphan Works Directive itself inevitably also refers to this category. Recital (4) of the Preamble to the Directive reads (with emphasis added):

This Directive is without prejudice to that Memorandum of Understanding, which calls on Member States and the Commission to ensure that voluntary agreements concluded between users, rightholders and collective rights management organisations to licence *the use of out-of-commerce works* on the basis of the principles contained therein benefit from the requisite legal certainty in a national and cross-border context.

more or less taken for granted. In fact, the very terms “collective management of copyright” and “collective management organization”³⁵ captured well what was involved (most typically, societies of authors traditionally comprising composers and lyricists of musical works working in alliance with their publishers) for at least three reasons, as follows.

- (i) The meaning of “an organization” is more than two or few loosely connected persons; rather, it means a larger group who have organized into a specific structure, with specific rules, targeting a specific shared objective.³⁶
- (ii) It is clear that the objective, “management of copyright”, is a complex activity that extends far beyond the simple conclusion of contracts with users.³⁷
- (iii) The term “collective management” captures two meanings: an activity that is “done or shared by every member of a group”,³⁸ and – at least in the case of traditional CMOs – it is about the interests of a “collectivity [which] can be used as a basis of cooperation, for sharing tasks, [and] giving mutual support”.³⁹

While this conception of collective management worked well within a civil law system, it was not so well suited to a common law system driven by market forces, where the term “collective management organization” was rarely used; rather, expressions appeared such as “collecting organization”, “collecting society”, “licensing agency” or, in the United Kingdom (in the Copyright, Designs and Patents Act 1988), “licensing body”.

Section 116(2) of the 1988 Act, as originally drafted, defined “licensing body” as:

... a society or other organization which has as its main object, or one of the main objects, the negotiation or granting either as owner or prospective owner of copyright or as agent for him, of copyright license, and whose objects include the granting of licenses covering works of more than one author.

There were (and since this remains the key element in its current form, still are) certain aspects of this definition that do not fit well together. Although a “licensing body” is defined as “a society or other organization” (and hence, to that extent, the definition corresponds with the concept of collective management), it is not a good fit with the basic concept and the very *raison d'être* of *collective* management, since it suggests that such societies and organizations need do nothing more than grant licenses for the use of the works of (i.e., to represent) no more than two authors (i.e., “more than one”).⁴⁰ This follows from the definition even if the most extreme cases *in which* rights could be managed by no more than two authors (coauthors, the authors of the same collective works and the employed authors of the same employer⁴¹) are excluded. Such kinds of minimalist definition, which do not express certain decisive aspects of collective management, may not be problematic in those countries where there are well-established and effectively functioning organizations, including those operating in the United Kingdom.⁴² But the same cannot be said of those countries in which no adequate collective management system is yet set up: there, such concepts and definitions may give rise to misunderstanding, misinterpretations, abuse and worse. Indeed, this is not an abstract risk; this proved to be the case in countries transitioning from a centrally planned economy to a market economy, where governmental or semi-governmental bodies were replaced with private management organizations (see Chapter 7).

When the E.U. CRM Directive was transposed into domestic law, the United Kingdom went only so far as to add to its definition of “licensing body”, set out in what was now section 116(2)(a) of the

35 Or, sometimes, “collective administration of copyright” and “collective administration organization”.

36 See <https://dictionary.cambridge.org/dictionary/english/organization>

37 See <https://dictionary.cambridge.org/dictionary/english/management>

38 See <https://dictionary.cambridge.org/dictionary/english/collective>

39 See <https://dictionary.cambridge.org/dictionary/english/collectivity>

40 Although according to the Roman law dictum, *tres faciunt collegium*, at least three persons are needed to form an organization.

41 Section 116(2) of the Copyright, Designs and Patents Act 1988 reads as follows: “(4) References in this Chapter to licences or licensing schemes covering works of more than one author do not include licences or schemes covering only—(a) a single collective work or collective works of which the authors are the same, or (b) works made by, or by employees of or commissioned by, a single individual, firm, company or group of companies.”

42 For example, the Performing Rights Society (PRS) does not represent only “more than one” author; it directly represents more than 160,000 authors as members and, through its network of bilateral contracts with the organizations of other countries, several million rightholders: see www.prsformusic.com

1988 Act, a subsection (b), “any other organisation which is a collective management organisation as defined by regulation 2 of the Collective Management of Copyright (EU Directive) Regulations 2016 has become qualified as ‘licensing body’”. In contrast, the influence of the definition in U.K. law on the concept of collective management applied in the Directive was much more substantive (and this is why it is worth referring in such detail to the definition set out in the 1988 Act).

The most substantive – and, at the same time, the most easily identifiable – expression of that influence is found in the English-language version⁴³ of Article 3(a) of the CRM Directive, where “collective management organization” is also defined as an organization responsible for managing the rights of “more than one” rightholder:

(a) “collective management organisation” means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:

- (i) it is owned or controlled by its members;
- (ii) it is organised on a not-for-profit basis.

The Directive was an attempt to harmonize Member States’ rules on the establishment and operation of CMOs; it consequently combined elements drawn from those States with a civil law tradition centering authors and creators (the majority of Member States) with elements drawn from those States with a common law tradition centering product, market and competition (i.e., market forces).⁴⁴ When the draft Directive was published in November 2012, the United Kingdom had yet to take its decision to leave the European Union (known commonly as “Brexit”), and it had keen influence as one of the biggest E.U. economies, with a highly developed and successful copyright system. The adoption of the minimalist criterion drawn from U.K. law was, however, in accordance with the strongly pro-competition approach that characterizes the Directive.

In fact, “collective management organization” is defined in even more minimalist terms in the Directive than it is in the U.K. Copyright Act, duplicating the reference to only “more than one” rightholder set out in section 116(2) of the Act without including the corrective limitations set out in section 116(4). Thus, if (as it must be) the definition is accepted at face value, in principle (although it will rarely happen in practice) the coauthors of a single work (such as the composer and the lyricist of a particular musical work) might properly form a “collective management organization” in accordance with the Directive. While certain other elements of the definition might mitigate this risk, the difficult act of harmonizing civil law and common law approaches has diluted the genuine collective aspects of copyright management otherwise available to Member States.

Such difficulties were apparent also even in the proposal for the Directive.⁴⁵ While the expression “collective management” appeared in its title (signaling a civil law orientation), draft Article 3(a) defined not “collective management organization” but “*collecting society*” (the adjective signaling a common law orientation) as “any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement, by more than one rightholder, to manage copyright or rights related to copyright as its sole or main purpose and which is owned or controlled by its members”.

In the version of the definition eventually adopted, the phrase “collective management organization” appears instead, replacing “*collecting society*” and better indicating the *collective* character of collective management – that is, that such an organization should function “for the collective benefit of [the] rightholders” as a community with shared interests. Yet if that community can comprise no more than two rightholders, it is somewhat strange to speak about “*collective benefit*”. And the conception of a CMO is further eroded by extension of the definition to include organizations that are neither owned nor controlled by their members but rather

43 This is not true of all versions, as we will explore shortly.

44 In practice, only the United Kingdom, Cyprus, Ireland and, to a certain extent, Malta.

45 European Commission (2012). *Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market*, COM(2012) 372 final 2012/0180 (COD), November 7.

run independently of government as corporate entities.⁴⁶ As a consequence, the definition that emerges may better correspond to bodies described as “collecting organizations”, or even “licensing bodies”, than it does to genuine CMOs.

There are, however, some elements of the Directive that cannot be applied in practice to CMOs conceived of so barely. Provisions on matters such as the general assembly and the other bodies of a CMO cannot be applied without a number of members much higher than only the two suggested in the definition. Indeed, in certain versions of the Directive – in particular, those in the languages of Member States with a civil law tradition and a creator-centric copyright system – the phrase “more than one” is avoided and more realistic phrases are used, such as (in French) “plusieurs titulaires de droits” and (in Spanish) “varios titulares de derechos”, meaning “several/more/ various rightholders”.

The definition set out in the Directive refers to “management” of rights as the activity of CMOs, which is a more comprehensive term than the “negotiation and licensing” that appears in the U.K. Act and its definition of “licensing body”. But the definition remains incomplete: it is unclear what are the substantive features of collective management, and what, in fact, “management” means.

A range of national laws, legislative proposals and legal studies take aim at more substantive definitions, indicating:

- the circumstances in which it is reasonable and appropriate to establish a CMO (and conversely those in which it is not);
- the rules that CMOs must respect if they are to be recognized as such; and
- what functions CMOs are supposed to fulfill.

For example, section 2 of the Canadian Copyright Act sets out a definition that delivers a rare level of detail:

collective society means a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

(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 under this Act 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.

The majority of countries in transition from a centrally planned economy to a market economy overhauled their copyright management systems by replacing state bodies with private organizations. In some of them, the process has been relatively smooth; in others, it has been less successful (see more in detail in Chapter 7). With new organizational forms emerging, these countries sought to legislate and define them. For example, Article 1242(1) of the 1994 Civil Code of the Russian Federation (Russian Civil Code) – within its Part IV on intellectual property rights – provides as follows:

The authors, performers and manufacturers of sound recordings and other owners of copyright and allied rights, when it is difficult for them to exercise their rights individually or when the present Code permits the use of objects of copyright and allied rights without the consent of the owners of the relevant rights but with a fee being paid to them, may form

46 Not to mention inclusion in the Directive of “independent management entities”, which are not CMOs.

membership-based non-commercial organisations that have the powers granted thereto by right holders and the duty to manage the relevant rights on a collective basis (organisations managing rights on a collective basis).

For similar reasons, the 1990 Copyright Law of the People's Republic of China (Chinese Copyright Law), as amended, also includes provisions (in Article 8) to determine the concept of CMOs:

Copyright owners and owners of rights related to copyright may authorize collective administration organizations to exercise their copyright or rights related to copyright. A collective administration organization established in accordance with the law is a not-for-profit legal entity, which may, upon authorization, claim rights in its own name for the copyright owners or the owners of rights related to copyright and participate as a party in litigation, arbitration or mediation proceedings concerning copyright or rights related to copyright.

In China, the Regulations on collective management of copyright⁴⁷ add several substantive elements:

- regulation 1 states that CMOs are needed to facilitate the application of copyright for both the rightholders and the users;
- regulation 2 lists the basic functions of these organizations as being to license users, collect remuneration, distribute remuneration and enforce the rights on behalf of the rightholders represented;
- regulation 3 provides that the organizations are to manage collectively the rights of rightholders and must be registered as such; and
- regulation 4 indicates that collective management of copyright is justified where the effective individual exercise of copyright would be difficult for the rightholders, such as for the exercise of the rights of public performance, broadcasting and certain cases of rental, interactive making available to the public and reproduction.

Another approach can be found in the CISAC Statutes. The definition of CMO set out there does not deal with questions of where, for what rights and in what circumstances it is justified to establish collective management; neither does it indicate in detail what functions CMOs must fulfill. It mentions only, in point (1) of the definition set out at Article 1, that the organization is "to license, manage or otherwise represent" the rights of creators and, where relevant, other rightholders.

CISAC may not describe CMOs' functions more in detail because it takes for granted that these aspects are surely already well known to those who have to apply the Statute; instead, CISAC sets out how a CMO may be properly established and appropriately operated. A CMO should properly:

- (i) be authorized by the law of the country in which it operates and/or by the creators;
- (ii) function in a nondiscriminatory manner;
- (iii) be available to all creators in the given category;
- (iv) be ready to represent a broad range of rights; and
- (v) be owned or controlled by the creators and/or organized on a not-for-profit basis.

Three further substantive criteria are mentioned. Two of them accord with the definition set out in the E.U. CRM Directive – namely, that collective management should be the primary purpose of the organization (point 1) and work for the benefit of the rightholders (point 2).

The third criterion is a welcome departure from the unrealistic element of the English version of the Directive providing that two authors may establish a CMO. Instead, point (1) of the definition set out in Article 1 of the CISAC Statutes affirms that the organization is to function "on behalf of a *broad range* of individual Creators (and, where relevant, other categories of rightholders)" (emphasis added).

47 Regulations of December 22, 2004, on Copyright Collective Management (promulgated by Decree No. 429 of December 28, 2004, of the State Council of the People's Republic of China).

The entire definition reads as follows:

A Collective Management Organisation means any organisation that fulfils all of the following criteria:

- (1) It shall be authorised by law in countries where operating as a collective management organisation requires such authorisation and/or by way of assignment, licence or other contractual arrangement to license, manage or otherwise represent as its primary purpose, Authors' rights on behalf of a broad range of individual Creators (and, where relevant, other categories of rightholders);
- (2) It shall do so in a non-discriminatory manner for the sole benefit of the aforementioned Creators (and, where relevant, other categories of rightholders);
- (3) It shall be open to all individual Creators (and, where relevant, other categories of rightholders) according to objective, transparent and non-discriminatory criteria;
- (4) It shall represent Authors' rights across a broad range of types of exploitation, unless it has been limited by applicable law, government regulation or judicial authority to serve a specific purpose;
- (5) It shall be owned or controlled by the aforementioned Creators (and, where relevant, other categories of rightholders) unless subject to specific oversight by applicable law, government regulation or judicial authority and/or is otherwise organised on a not for profit basis.⁴⁸

This review of the various definitions demonstrates that it would be futile to try to set out in this book single short definitions of "collective management" and "collective management organization". In the present edition, the same approach is therefore followed as was taken in the first two – with some modification.

Clear concepts and definitions of these terms may emerge from understanding:

- (i) the *raison d'être* of collective management – that is, where it is necessary and even indispensable instead of individual management;
- (ii) what functions organizations operating a *fully fledged* collective management system are to fulfill and what forms of *partial* collective management exist; and
- (iii) what is meant by the *collective* nature of the activities of the organizations.

As in the previous two editions, it is necessary to stress the differences between:

- those CMOs that not only engage in the joint exercise of rights but also operate on behalf and pursue the common interests of a creator collective, in the spirit of solidarity and with general social and cultural purposes; and
- those organizations that limit their "collective management" activities to the necessary legal and technical administration of rights (typical of organizations of legal entities).⁴⁹

WIPO's *Good Practice Toolkit for CMOs* (the Toolkit) – which Chapter 8 introduces at its start, and which the WIPO Secretariat prepares and regularly upgrades on the basis of suggestions submitted by WIPO Member States and organizations with WIPO observer status – applies the same sort of approach to that set out here. In its 2021 version – the most recent at time of writing – it describes CMOs thus:

48 It is to be noted that CISAC differentiates genuine CMOs from client rights management entities (RMEs) to which CISAC offers certain management services. According to CISAC itself:

Under a new approach adopted in recent years, CISAC is now able to offer services to Rights Management Entities (RMEs). These are companies that operate a business model different from that of the traditional Collective Management Organisations (CMOs) which make up CISAC's membership. Under the new approach, RMEs can now become Clients of the Confederation and obtain access to CISAC's business tools (the CIS Tools).

See www.cisac.org/client-rmes

49 However, in contrast with the second edition, the term "joint management" is not used as a generic concept to cover the activities of these two kinds of organizations such that only the former would have been considered genuine CMOs, while the latter would have been referred to as "rights clearance" bodies. (This kind of generic term is not used because neither it nor the differentiation underpinning it have been widely adopted.)

In the third edition, the difference between these categories of organization is stressed, but the expression "collective management organization" is used for both of them.

Collective Management Organizations (CMOs) typically exist in a situation where it would be impossible or impractical for owners of copyright and related rights to manage their rights directly, and where it is to their advantage that the licensing of the rights that they own or represent be aggregated with a CMO.

The CMO's authority is typically conveyed by its Statute (if Membership-based), by voluntary mandates, by Representation Agreements with other CMOs and/or by national law. In most (but not all) cases, CMOs are organised on a not-for-profit basis and are owned or controlled by their Members.

CMOs ensure that their Members and represented Rightholders receive fair and appropriate payment for copyright-protected uses of their works and other subject matter. [...] ⁵⁰

50 Available at www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_cmtoolkit_2021.pdf

WIPO activities in the field of collective management

Introductory remarks

In the mid-1970s, WIPO and UNESCO began to recognize the growing importance of collective management of copyright, because the emerging new technologies increasingly required this form of exercising rights. The competent bodies of the two organizations were, at that time, often engaged in joint pursuits because in that period the Universal Copyright Convention (UCC) administered by UNESCO still played a significant role. The United States and the Soviet Union, as well as several Latin American countries, were party only to the UCC and not the Berne Convention; and for a while, China acceded to neither convention (eventually acceding in parallel to both). Later, as the majority of countries party to the UCC began to accede to the Berne Convention and because the Berne Convention takes precedence, the two bodies ceased to hold joint meetings and the UCC became irrelevant.⁵¹

In June 1975, the Subcommittees of the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee of the UCC met in Washington, D.C. to discuss the copyright questions raised by reprographic reproduction. They reviewed the options that a previous working group had suggested, such as contractual schemes, non-voluntary licenses and payments ("levies") on equipment, but finally they adopted only one concrete solution in their short resolution: "States where the use of processes of reprographic reproduction is widespread [...] should consider, among other measures, *encouraging the establishment of collective systems to administer the right to remuneration.*" (emphasis added)⁵²

In the subsequent decade, the development of reproduction technologies accelerated – and they extended into the domestic environment. The "home taping" (i.e., private copying) of phonograms and audiovisual works began to undermine the market for lawful productions, with unreasonable prejudice to the legitimate interests of the rightholders. In response, some countries legislated in order to reduce the prejudice at least to a reasonable level by means of a right to remuneration, to be effected by means of a percentage charge on recording equipment and/or materials, and to be collected and distributed by CMOs. WIPO and UNESCO set out this principle at the international level: the organizations' joint Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter, meeting in June 1984, stated that, for "home taping" (i.e., the private copying of phonograms and audiovisual works), "a *right to remuneration* should be recognized to be *exercised collectively by the rightholders*" (emphasis added).⁵³

At the beginning of the 1980s, the multiple impacts of computer and telecommunication technologies on the creation, use and protection of works and objects of related rights were becoming ever clearer. The WIPO/UNESCO Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works, meeting for its second session in June 1982, drew up recommendations on the rights to be granted for the storage in, and retrieval from, computer systems of works. The Committee underlined that these uses should be based upon contractual agreements concluded either on an individual basis or through a

51 For more on the route whereby the Berne Convention became the only relevant convention of the two, see Mihály Ficsor (2020). Heavy traffic on the UCC–Berne bridge, In Sam Ricketson (ed.), *World Intellectual Property Organization: The First 50 Years and Beyond*, Cheltenham: Edward Elgar, 2020, 78.

52 See *Copyright*, August 1975, 175.

53 See *Copyright*, July–August 1984, 280–282.

collective management system, and stressed that, where individual exercise of rights gets difficult, *collective management should be preferred* to non-voluntary licenses.⁵⁴

Much attention was paid to collective management in the Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable, adopted by the Subcommittees of the Executive Committee of the Berne Union, the Intergovernmental Copyright Committee of the UCC and the Intergovernmental Committee of the Rome Convention in December 1983 and subsequently approved by the Committees. The Annotated Principles confirmed that the only condition imposed on the exclusive right of retransmission of broadcast works by cable (“wire”) under Article 11*bis*(1) (ii) of the Berne Convention is that the transmission is made by an entity other than the original broadcasting organization. They emphasized that, in the event of cable retransmission of broadcast programs, the clearance of rights on a program-by-program basis with the various rightholders would be highly impracticable; thus, in such cases, *collective management was suggested as the appropriate solution*.⁵⁵

The possible need for collective management was also considered at the November 1984 session of the WIPO/UNESCO Group of Experts on Rental of Phonograms and Videograms. In its conclusions, the joint body stated that “the soliciting and granting of licenses may, in particular where the number of right holders is big, require legislative measures to facilitate the negotiations of licenses and their implementation measures *preferably resulting in collective administration* of the rights” (emphasis added).⁵⁶ Nevertheless, there was a fairly strong opposition to *mandatory* collective management in the context of the rental right (a proposal submitted as an alternative):

Representatives of film producers and several other participants said that, with regard to the special conditions of producing and marketing cinematographic works, the film industry needs control over each form of using its productions, and the rental or lending of videograms should be exempted from collective administration of the rights therein. In their view, the film industry is in a position to control the rental or lending of each videogram individually [...]. Some experts felt that the authors cannot be obliged to entrust a society with the administration of their rights [and they] expressed their concern that the system of collective administration may easily become a kind of non-voluntary licensing, in particular with regard to authors and producers who did not entrust the society giving collective authorization to represent them.⁵⁷

The Group, as reflected in the above-quoted part of its report, confirmed that exclusive rights have more complete value if they may be exercised on an individual basis by the rightholders themselves, and expressed doubts that collective management ought to be applied to this newly recognized exclusive right.

Model statutes for CMOs

Alongside these meetings exploring the various new uses emerging with the new technologies, WIPO and UNESCO shared a project that concentrated on collective management itself. The Committee of Governmental Experts on the Drafting of Model Statutes for Institutions Administering Authors’ Rights in Developing Countries met twice, in June 1980 and in October 1983, and, at its second session, the Committee adopted two model statutes for organizations managing authors’ rights: one for public or semi-public institutions;⁵⁸ another for private societies. It followed from the Committee’s terms of reference that it dealt only with the organizational aspects and legal status of CMOs; it did not analyze the concrete tasks of the operation of such organizations.⁵⁹

54 The Committee stated in its recommendations: “The introduction of non-voluntary licenses in respect of the use of works in computer systems is permissible only when licenses mentioned in the preceding paragraph [collective administration] are not practicable” See *Copyright*, September 1982, 246.

55 See *Copyright*, April 1984, 131–202, esp. 150–152 and 182.

56 See *Copyright*, January 1985, 19.

57 *Ibid.*, 18.

58 With a focus on several such organizations in certain developing countries (see Chapter 12) and countries with centrally planned economies not yet in transition (see Chapter 7).

59 See the Model Statutes in *Copyright*, December 1983, 351–354.

In the field of related rights, it was the Subcommittee of the Intergovernmental Committee of the Rome Convention which, in January–February 1979, discussed certain questions of collective management. The Subcommittee adopted a Recommendation, a subchapter of which offered “Guidelines for the establishment and operation of collective societies for Article 12 rights”,⁶⁰ referring to the right to a single equitable remuneration under Article 12 of the Rome Convention for performers and producers of phonograms for broadcasting or communication to the public of phonograms published for commercial purposes.

Intensive analysis of the issues of collective management

From 1985, WIPO’s program of work turned more keenly to the questions of collective management. As ever more rights emerged for which collective management was proving necessary, or even indispensable, the International Bureau and the competent governing bodies of the Organization recognized that this important form of exercising rights needed more detailed analysis. By extending its activities to all substantive issues of collective management, the Organization sought to achieve at least three objectives:

- (i) to determine which provisions of the treaties administered by WIPO may be relevant to collective management, and what criteria national laws and CMOs should be observing in compliance with these international norms;
- (ii) to offer legislative and practical advice to Member States seeking to establish and operate CMOs; and
- (iii) to assist developing countries and countries in transition (see Chapter 7) in “institution building” – that is, in establishing and developing their collective management systems.

In the period between October 1985 and February 1986, seven comprehensive studies were published in WIPO’s monthly review, *Copyright*, under the common title “Collective administration of authors’ rights”. In order of publication, the following articles dealt with the various issues of collective management under these titles:

- Collective administration of authors’ rights in the developing countries;⁶¹
- Development and objectives of the collective administration of authors’ rights;⁶²
- Music performing rights organizations in the United States of America: special characteristics, restraints and public attitudes;⁶³
- Collective administration: the relationship between authors’ organizations and users of works;⁶⁴
- Technical problems in collective administration of authors’ rights;⁶⁵
- The relations between authors and organizations administering their rights;⁶⁶ and
- Collective administration and competition law.⁶⁷

The series of articles was part of the preparation for the WIPO International Forum on the Collective Administration of Copyrights and Neighboring Rights, held in Geneva in May 1986. Some 160 participants attended the Forum, including government representatives, observers from intergovernmental organizations and international nongovernmental organizations (NGOs), as well as representatives and members of various national collective management organizations.

Over three days, 21 invited speakers presented papers. Among these speakers were representatives of the core international NGOs interested in the field of collective management:

- International Confederation of Societies of Authors and Composers (CISAC);
- International Federation of Musicians (FIM);
- International Federation of Actors (FIA);

60 See *Copyright*, April 1979, 108–109.

61 Salah Abada, *Copyright*, September 1985, 314–322.

62 Mihály Ficsor, *Copyright*, October 1985, 341–353.

63 John Kernochan, *Copyright*, November 1985, 389–410.

64 Michael Freegard, *Copyright*, December 1985, 443–469.

65 Ulrich Uchtenhagen, *Copyright*, January 1986, 26–34.

66 Gunnar Karnell, *Copyright*, February 1986, 45–66.

67 Jean-Loup Tournier and Claude Joubert, *Copyright*, March 1986, 96–103.

- International Federation of the Phonographic Industry (IFPI);
- International Publishers Association (IPA); and
- European Broadcasting Union (EBU).

Other speakers represented national organizations from across Africa, the Americas, Asia, Australia and the Pacific, and Europe – from both industrialized and developing countries, and from both market economies and centrally planned economies.

At the Forum's end, the participants adopted a Declaration in which they expressed, among other things, the view that "the establishment of collective administration systems should be encouraged wherever individual licensing is not practicable and as a preferable alternative to non-voluntary licenses, even where such licenses could be admitted under the Berne Convention ... and the Rome Convention". The participants welcomed the idea that "WIPO [might] continue to make governments and the concerned interested circles increasingly aware of the importance of appropriate systems of collective administration of copyright and neighboring rights and ... stimulate further international discussion in this field". They urged "WIPO [to] collect, study and make available to governments and the concerned interested circles information" on various aspects of joint management of copyright and neighboring rights, and to "continue to pay particular attention to rendering assistance in the setting up or strengthening of collective administration systems in developing countries".⁶⁸

WIPO continued to study the legal and practical aspects of collective management under its 1986–87 program collaborating with UNESCO to examine questions concerning various categories of work. A series of meetings at which committees of governmental experts discussed nine such categories fueled outcomes delivered in June–July 1988 when the Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works met in Geneva.⁶⁹ The Committee published a set of principles – accompanied by detailed comments – intended to guide governments. Some of the principles – specifically those on "home taping" (i.e., private copying), rental and "cable distribution" of audiovisual works and phonograms, performing rights in musical works, and reprographic reproduction of literary and graphic works – related also to collective management. The Committee recommended that WIPO consider these principles in its planned work on model provisions for national legislation in the field of copyright.

The draft Model Provisions prepared by the International Bureau of WIPO for the Committee of Experts on Model Provisions for Legislation in the Field of Copyright consequently contained a Chapter VIII headed "Collective administration of economic rights". While the Committee's first and second sessions in February–March 1989 and November 1989 were host to wide-ranging discussions, at the third session in July 1990, the Committee narrowed its focus to prepare a "draft Model Law on Copyright". But the Model Law – the last version of which contained fairly detailed provisions on collective management – was never adopted. By the time of its "third reading", a new important WIPO project had begun: preparation of what was first conceived of as a protocol to the Berne Convention and six years later became the WIPO Copyright Treaty (WCT), one of the two WIPO "Internet Treaties" (the other being the WIPO Performances and Phonograms Treaty (WPPT), as an extension of the original project). With new binding norms on the horizon, the Committee agreed that it would not be timely to publish the Model Law.

Publication of a book on *Collective Administration of Copyright and Neighboring Rights*

In 1990, the results of this first period of intensive investigation were summed up in a book titled *Collective Administration of Copyright and Neighboring Rights* – the terms then in use.⁷⁰ As its introduction indicated, the book corresponded in substance to a study discussed and approved in March 1990 by a WIPO Group of Governmental Consultants on Collective Administration of Copyright and Neighboring Rights, convened in accordance with the decision adopted by the governing bodies of WIPO at their September–October 1989 sessions.⁷¹

68 For a short report on the WIPO International Forum, see *Copyright*, June 1986, 196–201.

69 The Principles, along with the report of the Committee of Governmental Experts, were published in three subsequent 1988 issues of *Copyright*: October 1988, 364–398; November 1988, 445–476; and December 1988, 506–528.

70 In effect, the first edition of this book.

71 WIPO (1990). *Collective Administration of Copyright and Related Rights*, Publication No. 688 (E). Geneva: WIPO, 3–4.

The book comprised five chapters:

- Chapter 1 Introduction
- Chapter 2 Notion of collective administration and its role in the exercise of copyright and neighboring rights
- Chapter 3 Main fields and typical forms of collective administration of copyright and neighboring rights
- Chapter 4 Recent WIPO activities concerning collective administration of copyright and neighboring rights
- Chapter 5 Certain basic questions of collective administration of copyright and related rights.

At its end, the book translated the results of its analysis into 19 principles intended to guide the establishment and operation of an appropriate collective management system.

The book was actively used in WIPO's development cooperation programs, and it had significant influence on the legislative norms and administrative arrangements of not only various developing countries and countries in transition, but also some industrialized countries. For example, the Simpson Report, published in 1995 and with which the Australian Government sought to modernize its collective management system,⁷² included affirmation that the conception of collective management (at that time, "collective administration") set out in the book was an appropriate definition.⁷³

Proposals for treaty provisions on collective management during the preparation of the WIPO Internet Treaties

In a working paper submitted to the second session of the Committee of Experts working on the proposed "protocol to the Berne Convention" held in February 1992, the International Bureau of WIPO emphasized the increasing importance of collective management and suggested that the protocol include provisions on five areas in which appropriate new collective management norms might support better balanced and more transparent conditions in international copyright relations:

First, it should be provided that government intervention in the determination of fees and conditions of authorizations given by a collective administration organization is only allowed if, and to the extent that, such intervention is indispensable for prevention or elimination of *actual* abuse (particularly abuse of a *de facto* monopoly position) by a collective administration organization.

Second, it should be prescribed that the fees collected by a collective administration organization be distributed to the interested copyright owners as proportionally to the actual use of their works as possible (after deducting the actual costs of administration).

Third, it should be prohibited to use the fees collected by collective administration organizations on behalf of copyright owners without the authorization of the copyright owners concerned, or by persons or bodies representing them, for purposes other than distribution of fees to them and covering the actual costs of collective administration of the rights concerned.

Fourth, foreign copyright owners should enjoy the same treatment as copyright owners who are members of the collective administration organization and nationals of the country where the organization operates.

72 See Shane Simpson (1995), *Review of Australian Copyright Collecting Societies: A Report to the Minister for Communications and the Arts and the Minister for Justice Canberra*: Commonwealth of Australia.

73 *Ibid.*, 10, where the following suggestion appears, quoting WIPO itself:

A working definition of "collective administration" is a system of copyright administration whereby "... owners of rights authorise collective administration organisations to administer their rights, that is, to monitor the use of the works concerned, negotiate with prospective users, give them licences against appropriate fees and, under appropriate conditions, collect such fees and distribute them among the owners of rights." ["Collective Administration; Copyright and Neighbouring Rights", WIPO, Geneva 1990, para 8.] [...]

Fifth, it should be provided that national legislation may only prescribe (in an obligatory way) collective administration of those rights for which the Berne Convention allows determining the conditions of their exercise, that is, in the cases where non-voluntary licenses are allowed by the Convention (broadcasting, recording, certain reproductions, *droit de suite*), because the condition that a right can only be exercised through collective administration is clearly a condition of that right.⁷⁴

In retrospect, it is evident that these proposals were overly ambitious and optimistic about likely agreement on issues that had never yet been the topic of international treaties. Thus, the Committee was perhaps relieved when, at the end of the session, it was forced to postpone discussion of this last topic to its third session. Then, before that third session, the competent governing bodies of WIPO reduced the Committee's terms of reference to an exhaustive list of 10 issues, and collective management of copyright was not among them.⁷⁵

Nevertheless, two of the remaining issues on the agenda of the "Berne Protocol Committee" had some relationship with collective management: the possible abolition and/or "phasing out" of non-voluntary licenses for broadcasting (at least, as far as "primary broadcasting" and satellite communication were concerned) and for sound recording of musical works, under Articles 11*bis*(2) and 13(1), respectively. These proposals "survived" the preparatory work and were included in the Basic Proposal (the draft of the treaty that became the WCT), but they were not adopted at the Diplomatic Conference in December 1996.

This is not to say, however, that the WCT and the WPPT have not had influence on collective management systems. The provisions of the treaties and the agreed statements have clarified the application of existing rights, as well as the scope of permissible exceptions and limitations, and they have also supported the adaptation of certain rights to the new requirements (i.e., recognizing some new aspects of their application or adding to them new elements). The new obligations that the treaties imposed to protect technological measures and rights management information were also relevant, since they had the potential to transform the legal and technical conditions of protection, exercise and enforcement of copyright, including by means of collective management. (For more on all of this and the online digital technologies in general, see Chapter 10.)

Seville International Forum on exercise and management of rights in the digital environment

It was in view of the new technological and legal possibilities of both the individual exercise and collective management of rights that WIPO – in cooperation with the Ministry of Education and Culture of Spain, and with the assistance of the General Authors' and Publishers' Society of Spain (SGAE) – organized in May 1997 in Seville, Spain, the International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology. That some 400 participants from 50 countries took part in the Forum was indicative of the importance of issues to be covered.

The International Forum hosted four keynote presentations, by Thierry Desurmont, Ralph Oman, Charles Clark and Tarja Koskinen-Olsson together, and Santiago Schuster, and nine panel debates brought together representatives of authors, performers, publishers, producers of phonograms, producers of audiovisual works, software makers, broadcasting organizations, cable distributors and Internet service providers to explore themes titled:

- the impact of digital technology on the protection and exercise of copyright and neighboring rights;
- the role of the state concerning the exercise and management of copyright and neighboring rights;
- exercise of rights in respect of 'multimedia productions';
- technological means of protection and rights management information;
- new alternatives for centralized management: 'one-stop shops';
- 'traditional' collective management in the face of digital technology;
- overview of the present situation of collective and centralized management of rights;
- review of the principles [outlined in the 1990 WIPO study]; and
- collective management in developing countries.

⁷⁴ WIPO document BCP/CE/I/3, ch. VI.

⁷⁵ See WIPO document N/A/XIII/2, [22].

The rich material that emerged from the Seville Forum was published in book form in 1998.⁷⁶

The Seville Forum reviewed the challenges raised by the online digital environment to collective management and outlined those directions in which adequate responses should be sought (see Chapter 10 for more detail). One of the questions submitted for discussion was whether it would be necessary to replace the principles published at the end of the 1990 WIPO book. The participants concluded that no basic changes were justified; there was only a need for some amendments to take into account technological, legal and business-method developments.

Publication of the book on *Collective Management of Copyright and Related Rights*

In 1998, the conclusions of the Seville Forum (by far the biggest WIPO event on collective management to date) – as well as some other developments – were taken into account when what had been titled in 1990 *Collective Administration of Copyright and Neighboring Rights* went into its second edition, now titled *Collective Management of Copyright and Related Rights*.⁷⁷

Reflecting the broader scope of issues covered, the second edition contained six chapters:

- Chapter 1 Introduction
- Chapter 2 Rationale and functions of the two basic systems of joint exercise of rights: collective management and rights clearance
- Chapter 3 WIPO activities concerning collective management and other joint systems of exercising copyright and related rights
- Chapter 4 Main fields and typical forms of collective management, central licensing and other forms of joint exercise of rights
- Chapter 5 Collective management and other joint systems of exercising rights in the face of challenges posed by new technologies and economic developments
- Chapter 6 Certain general issues of collective management and other systems of joint exercise of copyright and related rights.

In this edition, the expression “joint systems of exercising rights” was adopted as a generic term under which two categories of organizations were differentiated: those performing collective management as real collectivities (mainly of authors and performers) and those in the activities of which only the legal and technical aspects dominate (typically organizations of legal entities).

At its end, the book expanded the concluding principles – raising the count from 19 to 26 principles.

WIPO's Copyright Management Division: ambitions, projects and growing scope of activities

In WIPO's recent programs and budgets, due attention has been paid to the growing importance of well-functioning collective management systems both for rightholders and for legitimate users, and to the increasing role of collective management in new business methods exploiting the potentials of online digital technologies. This is reflected in ambitious objectives and projects, widened access to the necessary resources and also in the organizational structure. Within the four divisions of WIPO's Copyright and Creative Industries Sector, the Copyright Management Division⁷⁸ is, among other things, “responsible for the provision of support and technical assistance to Collective Management Organizations (CMOs) and national copyright offices around the world”,⁷⁹

76 WIPO (1996). *WIPO International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology*, WIPO publication No. 756(E). Geneva; WIPO.

77 Mihály Ficsor (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO.

78 The other three divisions are the Copyright Law Division, the Copyright Development Division, and the Information and Digital Outreach Division. For WIPO's and the Sector's organizational structure, see www.wipo.int/about-wipo/en/activities_by_unit

79 The Division's other activities include:

1. Providing staffing for the secretariat of the Accessible Books Consortium (ABC) – an alliance of WIPO, organizations that serve or represent persons who are blind, visually impaired or otherwise print disabled and rightholders.
2. Undertaking and publishing studies on the economic contribution of copyright-based industries to national economies.

See www.wipo.int/about-wipo/en/activities_by_unit/index.jsp?id=34

tasked with “providing training and technical assistance to Member States, national copyright offices and CMOs on a wide variety of copyright issues, (including on specialized computer software, WIPO Connect) for the effective collective management of copyright and related rights”.

In its 2020–21 program and budget, WIPO dedicated focus to the collective management of copyright. The Director General’s foreword to the document spotlights that work:

With the main-streaming of development that has been achieved across the Organization, a rich menu of services now exists, and will be further developed, for developing, least developed and transition countries to enable greater participation on the part of these countries in innovation and in the creative industries. These services include IT systems and platforms for IP Offices and *collective management organizations, technology and innovation support centers (TISCs), legislative and institutional advice, human capacity building* through the WIPO Academy, global partnerships, such as WIPO Re:Search and the Accessible Books Consortium (ABC) (emphasis added).⁸⁰

Program 3 is titled “Copyright and related rights”, and here WIPO promises to “Support Member States to *strengthen institutional and human resource capacity of Copyright Offices and Collective Management Organizations (CMOs)* in order to facilitate the effective use of the copyright system for social, cultural and economic development, and optimize the engagement of all parties in international fora” (emphasis added).⁸¹

The Copyright Management Division has since intensified and diversified its activities in implementing the program, in particular in three areas:

- (i) publishing training materials and general information booklets, offering detailed analysis of the aspects of collective management of rights specific to various creative sectors;
- (ii) preparing and making available a rich collection of national provisions and professional rules as a unique source of best practice; and
- (iii) offering legislative and practical advice for, and institution building in, developing countries and countries in transition between centrally planned and market economies.

Rich resources for capacity building and training

Within WIPO, training programs – conferences, seminars, workshops – are generally organized at the demand of the Member States concerned. A wide range of WIPO officials and invited experts are invited to present, among them the representatives of the international CMO federations – in particular, CISAC, the International Federation of Reproduction Rights Organisations (IFRRO), the Societies’ Council for the Collective Management of Performers’ Rights (SCAPR) and IFPI. The WIPO Academy offers intensive training programs on collective management (including as distance learning⁸²) and the WIPO for Creators initiative is also addressing the activities of CMOs.⁸³

The WIPO Copyright Management Division has established a rich and growing collection of publications on collective management, which are freely available online and may be efficiently used for training, public information and other purposes in the Member States. Some of them are of a general nature, while others deal with the issues specific to the various creative sectors.

WIPO has also made available a complete set of modular “Educational Material on Collective Management of Copyright and Related Rights”,⁸⁴ comprising six topics:

80 Assemblies of the Member States of WIPO (2019). *Proposed Program and Budget for the 2020/21 Biennium*, Document A/59/8, September 12, 2019, 6. Available at www.wipo.int/edocs/mdocs/govbody/en/a_59/a_59_8.pdf

81 *Ibid.*, 34.

82 See www.wipo.int/academy/en/courses/distance_learning/

83 See www.wipo.int/wipoforcreators/en/index.html and WIPO (2020), WIPO and music rights awareness foundation to collaborate in favor of creators. Press release, August 10. Available www.wipo.int/pressroom/en/articles/2020/article_0016.html

84 Authored by Tarja Koskinen-Olsson and Nicolas Lowe and published in 2014.

- general aspects of collective management;⁸⁵
- management of copyright and related rights in the field of music;⁸⁶
- management of copyright and related rights in the audiovisual field;⁸⁷
- management of rights in print and publishing;⁸⁸
- management of rights for visual arts and phonography;⁸⁹ and
- management of rights in dramatic works.⁹⁰

The set is supplemented by a booklet entitled *Collective Management as a Business Strategy for Creators: An Introduction to the Economics of Collective Management of Copyright and Related Rights*.⁹¹

Among the publications freely available on the WIPO website are also older titles, among them the second edition of this book, as well as:

*The Setting-up of New Copyright Societies*⁹²

*Copyright Collective Management in Music*⁹³

*Collective Management in Reprography*⁹⁴

From Artist to Audience – How Creators and Consumers Benefit from Copyright and Related Rights and the System of Collective Management of Copyright.⁹⁵

Since the exercise of rights to remuneration for private copying and reprographic reproduction is hardly possible without collective management, the following two studies may also be considered part of WIPO's series of collective management publications:

*International Survey on Private Copying Law & Practice 2016*⁹⁶

International Survey on Text and Image Copyright Levies.⁹⁷

WIPO's Good Practice Toolkit for CMOs

At time of writing, WIPO's richest source of both legislative and practical guidance in the collective management arena is its *Good Practice Toolkit for CMOs* (the Toolkit). As its introduction sets out, its purpose is "to compile examples of legislations, regulations and codes of conduct in the area of collective management of copyright and related rights from around the world and to distil them into examples of good practice". Member States and other stakeholders "may select tools from The Toolkit to choose an appropriate approach in view of their country's particular circumstances, and decide on their own infrastructure for collective management", if they wish.

A non-normative document, the Toolkit was first published in 2018 as "a working document, based on the input received from WIPO Member States and other stakeholders throughout the consultation process 2017–18, with the aim to update and improve it on a regular basis".⁹⁸

85 See www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_1.pdf

86 See www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_2.pdf

87 See www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_3.pdf

88 See www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_4.pdf

89 See www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_5.pdf

90 See www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_6.pdf

91 Richard Watt (2016). *Collective Management as a Business Strategy for Creators: An Introduction to the Economics of Collective Management of Copyright and Related Rights*. Geneva: WIPO. Available at www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2016_3.pdf

92 Ulrich Uchtenhagen (2005). *The Setting-up of New Copyright Societies: Some experiences and reflexions*. Geneva: WIPO. Available at www.wipo.int/publications/en/details.jsp?id=135

93 Ulrich Uchtenhagen (2005). *Copyright Collective Management in Music*. Geneva: WIPO. Available at www.wipo.int/publications/en/details.jsp?id=362&plang=EN

94 Tarja Koskinen-Olsson (2005). *Collective Management in Reprography*. Geneva: WIPO. Available at www.wipo.int/edocs/pubdocs/en/copyright/924/wipo_pub_924.pdf

95 Tarja Koskinen-Olsson (n.d.). *From Artist to Audience: How Creators and Consumers Benefit from Copyright and Related Rights and the System of Collective Management of Copyright*, Publication No. 922(E). Geneva: CISAC/IFRRO/WIPO. Available at www.wipo.int/edocs/pubdocs/en/copyright/922/wipo_pub_922.pdf

96 Hester Wijminga, Wouter Klomp, Marije van der Jagt and Joost Poort (2017). *International Survey on Private Copying Law & Practice 2016*. Geneva: WIPO. Available at www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2017.pdf

97 WIPO/IFRRO (2017). *International Survey on Text and Image Copyright Levies*. Geneva: IFRRO/WIPO. Available at www.wipo.int/edocs/pubdocs/en/wipo_pub_1042_2017.pdf

98 See www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_cmotoolkit.pdf

Accordingly, it was always intended to be a “work in progress” – a publication to be revised and updated regularly – as its 2021 revision attests.⁹⁹

More than 120 pages offer insight into a broad scope of issues, and its Appendix 2 links to the statutes and regulations of 31 countries¹⁰⁰ and three regionally applicable normative acts,¹⁰¹ as well as six organizational codes of conduct.¹⁰² (See Chapters 8 and 9 for more detail on the Toolkit.)

To offer some idea of the broad range of topics included in The Toolkit, it suffices to list its chapters and primary subheadings:

1. Providing information about the CMO and its operations (the role of the CMO and its primary functions; information for the general public)
2. Membership: information, adherence and withdrawal (before joining a CMO as a member; acceptance of members; nondiscrimination of rightholders; scope of CMOs’ rights management mandate; termination of mandate)
3. Members’ rights to fair treatment; their position in the CMO (members’ rights to fair treatment; members’ rights in representative bodies)
4. Particular issues concerning the CMO–member relationship (financial and administrative information to members; notification of changes in the CMO Statute and other pertinent rules; CMO’s contact information)
5. Governance (general meeting; internal supervision; avoidance of conflicts of interest)
6. Financial administration, distribution of revenue and deductions (split accounts; annual report; distribution policies; revenue deductions [such as social, cultural, educational])
7. Relationship between CMOs
8. Relationship between CMO and user/licensee (CMO’s information to users/licensee; principles governing licensing of users/licensees; rules for setting of tariffs; obligations of users/licensees)
9. Processing of members’ and users/licensees’ data (explanation; examples; good practice tools)
10. Importance of IT infrastructure (explanation; examples; good practice tools)
11. Development of staff skills and awareness (explanation; examples; good practice tools)
12. Complaints and dispute resolution procedures (explanation; examples; good practice tools)
13. Supervision and monitoring of CMOs (explanation; examples; good practice tools).

The structured way in which these issues are covered makes the Toolkit a useful source of information and guidance both for the governments of the Member States and for the interested stakeholders.

Collective management infrastructure solutions

In recent decades, WIPO’s development cooperation programs have been particularly active in developing advice for governments on the legislative and administrative aspects of collective management, in helping them to establish new CMOs and further develop the existing ones, and in training the officials of state copyright administrations who supervise CMOs and the staffs of CMOs.

At time of writing, WIPO’s 2020–21 program and budget made special provision for the establishment and improvement of collective management systems in developing countries and countries in transition from centrally planned to market economies. These are goals reflected both in the Organization’s overall development cooperation program and in tasks specific to the Copyright and Creative Industries Sector. Accordingly, there is inevitably cross-remit collaboration with WIPO’s other (regional and sectoral) units.¹⁰³

99 See www.wipo.int/publications/en/details.jsp?id=4561

100 Albania, Belgium, Bosnia and Herzegovina, Brazil, Canada, Chile, China, Colombia, Côte d’Ivoire, Dominican Republic, Ecuador, France, Germany, Guatemala, Italy, Japan, Malawi, Mexico, Nigeria, North Macedonia, Pakistan, Paraguay, Peru, Republic of Korea, Senegal, Spain, Switzerland, Uganda, United States, Uruguay and Venezuela.

101 Andean Community, European Union and Organisation Africaine de la Propriété Intellectuelle (OAPI).

102 Of the Australian CMOs, the British Copyright Council (BCC), CISAC, IFPI, IFRRO and SCAPR.

103 Including the Regional Bureaus for Africa, Asia and the Pacific, and Latin America and the Caribbean; the Least Developed Countries Division; the Development Agenda Coordination Division; the Department for Transition and Developed Countries (TDC); the WIPO Academy; the Arbitration and Mediation Center; the Traditional Knowledge Division; the Global Infrastructure Sector; the Division of AI Policy; the Building Respect for IP Division; and the Publications Division.

As in other fields of intellectual property, copyright development cooperation activities (delivered “on demand”, and adapted to the conditions and requirements of, those countries that require such support) include legislative advice, training, awareness-raising and institution building (i.e., establishing and improving the institutions through which the collective management system is delivered).

This also means providing technical assistance where appropriate, such as through WIPO Connect (succeeding and replacing the previous WIPOCOS project), an IT solution that includes local and central (shared) modules developed and made available by WIPO for collective management operations. The WIPO website describes the objectives of WIPO Connect thus:

CMOs establish and maintain networks to support accurate collection and distribution of royalties. A key concern for CMOs is the correct management of the vast amounts of data and information that they collect about their members, their works and other creative contributions.

Documentation is thus vital for a smooth functioning of CMOs at the national, regional, and the international level. CMOs need to collect information about right holders and works, such as identifiers, names and pseudonyms, titles, shares, sub-publishing and licensing agreements. This information allows CMOs to collect royalties and distribute them to right holders.

WIPO Connect provides an efficient, well-suited, and customizable solution, aimed at facilitating CMOs’ day-to-day operations and their cooperation with CMOs from other countries.¹⁰⁴

WIPO Connect works on two levels: WIPO Connect *Local* and WIPO Connect *Shared*.

- WIPO Connect *Local* is a web application used for day-to-day operations and it is either installed on a local server or hosted in the “cloud”. It is suitable for the:
 - registration of rightholders;
 - management of documentation: works, performances and sound recordings;
 - management of licensing agreements;
 - identification and matching of works that have been used;
 - providing usage reports and/or data capture; and
 - distribution reports providing the amount of royalties to be distributed to right holders based on usage, documentation and local parameters.
- WIPO Connect *Shared* is a fully cloud-based solution. It synchronizes WIPO Connect *Local* implementations, and it exchanges data with industry-based data sources and servers for the following purposes:
 - synchronization in the cloud of WIPO Connect *Local* implementations;
 - submission of documentation to industry databases and retrieving information for synchronization;
 - facilitating and automatizing the assignment of industry identifiers; and
 - dissemination of local repertoires to foreign CMOs.

Some countries have already begun to use WIPO Connect, with CMOs collecting and distributing royalties thanks to the new tool not only in relation to musical rights, which was its first field of application, but also to other rights, including reprographic reproduction rights.

In addition, the various international NGOs – in particular, CISAC, IFRRO, SACPR, IFPI and the Association of International Collective Management of Audiovisual Works (AGICOA) – participate in various ways in activities centering developing countries and countries in transition, both on an ad hoc basis and through special cooperation agreements concluded with WIPO. On July 2020, for example, the Director Generals of WIPO and CISAC signed such an agreement concerning repertoire data management, with a particular benefit for CMOs representing creators in

104 See at www.wipo.int/global_ip/en/activities/wipo_connect/

developing countries.¹⁰⁵ Its aim was to allow CMOs to manage their repertoires and share them with CMOs in other countries using CISAC's CIS-Net international repertoire database (see Chapter 10). Under the agreement, CISAC-member CMOs using WIPO Connect will have access to an enhanced solution to facilitate their participation in CISAC's international information network.

This is an agreement specifically designed to improve the international reach of CMOs in developing countries, and to boost the earnings of creators and publishers whose rights are managed by those CMOs.

Another agreement, signed earlier in 2020, focused on the exchange of metadata between WIPO and Swiss authors' society Suisse Auteurs (SUISA), a CISAC member that has traditionally played an active role in supporting developing countries establishing appropriate collective management system. Under the WIPO-SUISA agreement, WIPO Connect user societies obtain access to the global system for identifying authors, composers and publishers (the IPI system), managed by SUISA on behalf of CISAC.

By means of these two agreements, WIPO Connect users will be able to share their domestic repertoires through the international information exchange systems operated by CISAC.

Finally, although WIPO for Creators is a broad initiative aiming to do more than only promote efficient collective management, it is very much relevant for the operation of CMOs. It is the program of a Consortium established by agreement signed in August 2020 between Francis Gurry, then Director General of WIPO, and – on behalf of the Music Rights Awareness Foundation (MRAF) – its cofounders: ABBA star Björn Ulvaeus, songwriter and producer Niclas Molinder (chair) and Max Martin, songwriter, producer and singer. The Consortium is open to members and sponsors from both the public and the private sectors.

The purpose of WIPO for Creators is to educate and raise awareness about the rights of creators, so that they may be properly compensated and credited when their works are used. This initiative is particularly significant because the creative content marketplace has become increasingly complex and data-driven; therefore, it has become more important for creators to understand the crucial role of data management if they are to effectively exercise their intellectual property rights.¹⁰⁶

105 See WIPO (2020). WIPO and CISAC announce new repertoire data agreement to support collective management organizations. Press release, July 30. Available at www.wipo.int/pressroom/en/articles/2020/article_0015.html

106 See WIPO (2020). WIPO and Music Rights Awareness Foundation to collaborate in favor of creators. Press release, August 10. Available at www.wipo.int/pressroom/en/articles/2020/article_0016.html

Collective management and the international treaties on copyright and related rights, and the role of governments

Introductory remarks

As discussed in the last chapter, one of the reasons why WIPO began to pay more attention to the collective management of copyright in the 1980s is that it had become increasingly relevant to the international treaties administered by WIPO. This had made it necessary to address the questions of what obligations the Member States had under the treaties in connection with the establishment and operation of CMOs.

There is no reference in the international treaties on copyright and related rights to collective management. Nevertheless, concerning the rights of broadcasting and secondary uses of broadcast works as well as the “mechanical right” in musical works, in adopting the provisions of Articles 11*bis*(2) and 13(1) of the Berne Convention (which allow the application of compulsory licensing and mandatory collective management), the diplomatic conferences took into account the collective management of those rights. Furthermore, while the legislative history of Article 17 of the Convention on the right of governments “to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right” evidences agreement on the right of governments to adopt measures defending against CMOs’ possible abuse of their dominant position (see Chapter 4).

It is also worth remembering the types of provisions on collective management that were proposed for inclusion in the draft treaty that became the WCT (see Chapter 2). Although they were summarily excluded from its scope, these provisions aimed to regulate certain issues of establishing and operating of CMOs which seemed to be relevant from the viewpoint of treaty obligations. The questions proposed were as follows.

- (i) In what respects, and to what extent, may legislative, administrative and/or judicial intervention into the exercise of the rights provided in the treaties be justified?¹⁰⁷
- (ii) In which cases it is in accordance with the international treaties to make the collective management of rights mandatory?¹⁰⁸

¹⁰⁷ See WIPO document BCP/CE/I/3, first proposal:

It should be provided that government intervention in the determination of fees and conditions of authorizations given by a collective administration organization is only allowed if, and to the extent that, such intervention is indispensable for prevention or elimination of actual abuse (particularly abuse of a de facto monopoly position) by a collective administration organization.

¹⁰⁸ See *ibid.*, fifth proposal:

It should be provided that national legislation may only prescribe (in an obligatory way) collective administration of those rights for which the Berne Convention allows determining the conditions of their exercise, that is, in the cases where non-voluntary licenses are allowed by the Convention (broadcasting, recording, certain reproductions, droit de suite), because the condition that a right can only be exercised through collective administration is clearly a condition of that right.

- (iii) What provisions are needed to guarantee that the exercise of rights through collective management (in particular, the distribution of the remuneration collected) is compliant with the relevant treaty provisions?¹⁰⁹
- (iv) How should the obligation to grant national treatment to the nationals of other Contracting Parties to the international treaties be guaranteed in the case of the collective management of rights?¹¹⁰

These issues encompass basic aspects of the collective management system that will be explored in the chapters to come – issues of voluntary, mandatory or extended collective management, competition issues, the requirements of good governance and so on. This chapter will focus on how the provisions of the international treaties apply in general to collective management and how Contracting Parties should account for this in their legislation.

General obligations to undertake measures for the application, and to give effect to the provisions, of the treaties on copyright and related rights

Article 36 of the Berne Convention provides:

- (1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.
- (2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.

Article 26 of the Rome Convention contains almost identical provisions. In fact, Article 26(1) is almost verbatim, while Article 26(2) is identical in effect:

- 1. Each Contracting State undertakes to adopt, in accordance with its Constitution, the measures necessary to ensure the application of this Convention.
- 2. At the time of deposit of its instrument of ratification, acceptance or accession, each State must be in a position under its domestic law to give effect to the terms of this Convention.

Of the two paragraphs in each of the treaties, the first lays down the basic obligation of a country party to the Convention. The requirement under the second paragraph would have followed from that basic obligation – to ensure the application of the Convention – even were it not stated separately: adopting “the measures necessary to ensure the application of this Convention”, as provided for in the first paragraph, is hardly possible if a country is *not* “in a position under its domestic law to give effect to the terms of this Convention”, as set out in the second paragraph. In other words, it is clear that a country party to the Convention may fulfill its obligation “to ensure the application of [the] Convention” only if it is “in a position under its domestic law to give effect to the terms of this Convention” both at the time of the ratification of or accession to the Convention and after it, as long as the Convention remains in force for the country. In both cases, the obligation – to “ensure the application of the Convention” and that it is “in a position ... to give effect to [its] terms” – corresponds to the Latin maxim *pacta sunt servanda* (“agreements must be kept”).

In Article 14(1) WCT, Article 23(1) WPPT and Article 20(1) of the 2012 Beijing Treaty on Audiovisual Performances (BTAP), only the general obligation to ensure the application of the treaties is set out (verbatim across the three treaties), and the obligation differs from Article 36(1) of the Berne Convention¹¹¹ and Article 26(2) of the Rome Convention only in that reference to “legal system” is substituted for reference to “constitution”:

¹⁰⁹ See *ibid.*, second and third proposals:

It should be prescribed that the fees collected by a collective administration organization be distributed to the interested copyright owners as proportionally to the actual use of their works as possible (after deducting the actual costs of administration); [...] it should be prohibited to use the fees collected by collective administration organizations on behalf of copyright owners without the authorization of the copyright owners concerned, or by persons or bodies representing them, for purposes other than distribution of fees to them and covering the actual costs of collective administration of the rights concerned.

¹¹⁰ See *ibid.*, fourth proposal: “Foreign copyright owners should enjoy the same treatment as copyright owners who are members of the collective administration organization and nationals of the country where the organization operates.”

¹¹¹ It is to be noted that Article 36 is not among the provisions of the Berne Convention (Articles 1–21 and the Appendix) with which, under Article 1(4) WCT, the Contracting Parties of the Treaty must comply.

- (1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

Paragraph (2) of the same Articles of the three treaties – also verbatim – imposes the obligation to apply appropriate measures against infringements of rights:

- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

This provision is a version, *mutatis mutandis*, of the first sentence of Article 41.1 of the TRIPS Agreement on general obligations to enforce intellectual property rights, including copyright and related rights.¹¹² And Article 1.1 of the Agreement contains provisions that correspond to those of the Berne and Rome Conventions: “Members [of the World Trade Organization (WTO)] shall give effect to the provisions of the Agreement [...] Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.” Then the Agreement sets out detailed rules on the procedures, remedies and sanctions to be applied to enforce intellectual property rights that, in general, are missing in the treaties administered by WIPO. (Likewise an efficient dispute settlement mechanism, which is applicable where the obligations under the Agreement are not fulfilled.)

Provisions on the enforcement of rights and conflict resolution in the event that treaty obligations are violated are relevant to collective management. But the question of whether or not it may be said that a country duly “ensures the application” of a treaty by “giving effect to its terms” – that is, whether or not it applies the treaty in accordance with the terms of its provisions – is a more complex issue.

There are certain rights that may be exercised efficiently only through collective management. Thus, there seem to be good reasons to submit that, to fulfill its obligation to “ensure the application” of (i.e., to “give effect” to) the provisions on those rights, a country should adopt adequate legal regulation to facilitate the establishment and due operation of the necessary collective management system. This requires from governments, on the one hand, to be proactive where its contribution is needed and, on the other, to refrain from any unnecessary intervention that might create undesirable obstacles.

These considerations apply differently depending on whether or not there is already an existing collective management system in place in a country and hence it is necessary only to support its adaptation – including its extension, where needed – to technological, business-method and social developments. A proactive approach is particularly important in supporting certain developing countries and countries in transition (see Chapters 7 and 12), and it is in such countries that the assistance offered by WIPO and the international federations of CMOs is especially important (see Chapter 2). It goes without saying that any assistance, whether through WIPO or directly by the international federations, is to be supplied only on demand: it is for the governments concerned to recognize the value of and request such assistance.

Suggested “dos” and “don’ts”

The levels of governmental regulation and administrative intervention are not necessarily supposed to be the same across all rights. It follows from the nature of an exclusive right that, in the absence of an applicable exception or limitation, its owners – and *only* the owners – should be able to decide whether or not they authorize or prohibit any use of their works; and if they authorize the use, it should be they who decide to what extent, under what conditions and against what payment (if any). In such a case (again, in the absence of applicable exceptions or limitations),

¹¹² For the reasons why this provision has been included in the WIPO treaties and its significance, see the commentary on Article 14(2) WCT in Ficsor, *WIPO Guide and Glossary*, 222–224. It is to be noted that Article 36 is not among the provisions of the Berne Convention (Articles 1–21 and the Appendix, with the exception of the rights conferred under Article 6bis and the rights derived therefrom) with which, by virtue of Article 9.1 of the Agreement, the Members of the WTO must comply.

no governmental intervention is justified. The exclusive nature of the rights is such that their owners, in general, should be free to join a CMO or not.

When such a right is managed collectively, its exclusivity must be taken into account. When a CMO is in a *de facto* or *de jure* monopoly position, it may be necessary to take steps to mitigate the risk that it might abuse that position, but it is not justified to limit the exclusive rights by intervening automatically in the CMO's tariff system or licensing conditions without evidence of such abuse or that the risk is high. Indeed, in many cases, market forces and the supply/demand dichotomy may take care of appropriate arrangements.

In the case of compulsory licenses, the Berne Convention foresees the intervention of an administrative authority. It is to be noted, however, that a compulsory license is not a *statutory* license (i.e., where a national law itself allows the performance of acts covered by a right against remuneration) or a right originally provided as a mere right to remuneration. Articles 11*bis*(2) and 13(1) on such licenses¹¹³ make it clear that the competent authority is supposed to fix the "equitable remuneration" only in "the absence of agreement", which presupposes prior negotiations between the CMOs and the users seeking to establish a tariff system and licensing conditions.

As regards mere rights to remuneration¹¹⁴ and non-voluntary licenses,¹¹⁵ more intensive regulation and intervention by administrative bodies may be justified. However, in the application of such rights too, negotiations between the CMOs and the users should play their proper part, because these negotiations are the most suitable way of establishing a level of remuneration that reflects the real value of the use of works and other protected productions.

In the case of those rights that *are* properly managed collectively, if it is accepted that governments should provide a favorable legislative framework for – and be proactive in encouraging – the establishment of the necessary CMOs, it may be recognized that such organizations should be truly capable of fulfilling the objective they are supposed to serve – namely, "giving effects to" the provisions on the rights concerned. Thus, the governments should guarantee that no CMO faces unreasonable legal obstacles; rather, it should receive all of the support necessary to its effective activity. This means that, among other things, although the freedom of association of rightholders should be ensured, where CMOs need to act as natural monopolies for the purposes of effectively managing rights, they should not be subjected to artificial constraints on competition. Indeed, in certain cases where the efficient exercise of the rights requires it (and the international norms allow it), mandatory collective management may be prescribed, or the effect of the licenses granted by voluntarily established CMOs be extended (with appropriate conditions and guarantees), to encompass those rightholders who have not joined the CMOs. (For the details of these models of collective management and the means of protection against possible abuses of a CMO's monopoly position, see Chapter 5.)

Of course, it is not sufficient if governments ensure only the necessary legal framework for efficient application of – that is, for the "giving effect" to – those rights for the exercise of which collective management is necessary; adequate legislative provisions and administrative measures are also essential, guaranteeing that the CMOs and the staff of CMOs act in the interests of the rightholders they represent, in accordance with the requirements of effective, efficient and transparent rights management.

At the same time, any unnecessary and poorly informed overregulation and intervention would endanger the effective operation of a CMO and hence jeopardize a country's capacity to meet its treaty obligations to "giv[e] effect to" the rights to be granted. For example, a statutory provision fixing the costs of management at a *uniform* level – too high for certain rights, but too low for others – may unreasonably undermine the organization's financial position and may prejudice the rightholders' legitimate interests (see Chapter 8).

113 It is true that the Appendix to the Berne Convention also provides for translation and reprint compulsory licenses applicable in developing countries, but those are rarely connected to collective management.

114 See, e.g., the extremely detailed regulation of the remuneration to be paid set out in the E.U. Resale Right Directive: 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, OJ L 272/32, October 13, 2001.

115 See, e.g., the provisions of Articles 11*bis*(2) and 13(1) of the Berne Convention under which, in the absence of agreement, a competent authority is to fix the equitable remuneration in the case of the compulsory licenses foreseen in those provisions for the rights of broadcasting and certain acts of secondary uses of broadcast works, and for the right of reproduction applied for recording musical works, respectively.

These considerations point toward governmental registration, accreditation or authorization as a way of ensuring that only organizations that fulfill their obligations can engage in collective management. As a corollary, a supervisory system should guarantee that CMOs, once appropriately established, continue to function appropriately. However (and as it is stressed in Chapter 8), in the event of some irregularity, it is not a reasonable and proportionate solution to leap immediately to the toughest sanctions (such as suspension of the operation, or withdrawal of the accreditation of a CMO), because such measures inevitably punish also the rightholders. It is unfair that rightholders should suffer the impact of irregularities for which they are not responsible. Proportionality – and, wherever possible, patience and cooperation – seems to be the right approach, especially in the case of newly established CMOs, which usually face teething problems.

Mandatory, presumption-based and extended collective management

In prescribing *mandatory* collective management, a government imposes a limitation on exclusive rights. An exclusive right means that the rightholder – and only the rightholder – can decide individually whether or not they authorize (or prohibit) the use of their works, and under what conditions and against what sort of remuneration; in a collective management system, this is rarely the case.

In general, the fact that rightholders are represented by a CMO means that their works are subject to the general licensing scheme of the organization. If a user meets conditions set by the CMO, the use of the works will be licensed and, as a rule, the generally applicable standard licensing conditions and tariffs will be applied. The rightholder will then receive remuneration in accordance with the CMO's distribution rules. If the rightholders accede to a CMO, they accept these consequences and transfer the relevant elements of their exclusive rights to the organization. In such a case, although the collective elements of the management will limit the exclusivity of their rights, the rightholders accept it voluntarily; they agree to exercise their rights through the CMO. In contrast, if the law prescribes mandatory collective management of an exclusive right, it is a statutory limitation, and the questions are: whether or not – as is true of any limitation – it is permissible under the international treaties; and if it is, in which cases and under what conditions, subject to the three-step test (see Chapter 5).

Recently, the scope of rights for which mandatory collective management is prescribed has broadened to include not only those cases in which the international norms foresee or allow the application of compulsory licenses or mere rights to remuneration, but also – to the extent that those norms allow it – exclusive rights. The issues of mandatory collective management are covered in Chapter 5.

Extended collective management – like the older *presumption-based* systems¹¹⁶ – refers to a form whereby a CMO may also act on behalf of rightholders who have *not* joined it and hence who have not accepted the general conditions of the organization. The important difference between mandatory collective management and these two models is that rightholders may leave an extended collective management system or may rebut the presumption of authorization in the case of a presumption-based system. This form of collective management, which first emerged in the Nordic countries, has recently become more widespread. Much depends on questions of to which rights and in which way, with which guarantees, it is applied whether or not it is in accordance with the international treaties. These questions are also discussed in Chapter 5.

Collective management and the obligation to grant national treatment

In the Berne Convention, the basic provision obliging countries to grant national treatment to the nationals of other countries within the Berne Union is set out in Article 5(1):

¹¹⁶ The extended collective management and presumption-based systems are described in the next chapter. Here, it is sufficient to indicate briefly that, in the case of extended collective management, the law extends to nonmembers the effect of the license granted by a CMO to the users on behalf of its members, allowing nonmembers to “opt out”; under a presumption-based system, as its name indicates, the effect of the license is applicable to all the rightholders in the given category until the contrary is proven.

Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

The Convention allows certain limited, exhaustively determined, exceptions to this principle,¹¹⁷ but these exceptions do not apply to issues of collective management.

It is another matter entirely that protection of the resale right – one of the rights that may be managed collectively (both voluntarily and by mandate) – is provided for on an *optional* basis under Article 14*ter* of the Convention. Should that option be granted, reciprocity may be applied instead of national treatment.¹¹⁸

Under Article 2(1) of the Rome Convention, “national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed” – that is, the treatment that a state grants to its own nationals. Article 2(2) adds that this national treatment is “subject to the protection specifically guaranteed, and the limitations specifically provided for, in the Convention”. This means that national treatment is defined like in Article 5(1) of the Berne Convention: the same treatment must be granted to nationals of other Contracting States as is offered to the nationals of the State where protection is claimed, but the formers’ treatment must correspond with at least the minimum level of protection prescribed in the Convention (determined by the rights to be granted and the limitations allowed).

The General Report of the 1961 Rome Diplomatic Conference confirms that the delegations did indeed mean this kind of national treatment in accordance with what the text of Article 2 suggests.¹¹⁹ However, owing to the “pioneer” nature of the Convention,¹²⁰ it was inevitable that Berne-type national treatment would create tensions between Contracting States with different levels of protection.¹²¹ This became an overwhelming problem during the TRIPS negotiations when participants sought to adopt provisions on the protection of related rights both for the Rome Contracting States and for the many other countries that had not joined the Convention.

In respect of copyright, both the TRIPS Agreement¹²² and the WCT¹²³ prescribe an obligation to comply with the provisions of the Berne Convention (in the former case, with an exception relating to moral rights). In contrast, as regards related rights, both the TRIPS Agreement and the WPPT have given up the Berne-type national treatment model and adopted instead – albeit under the title of “national treatment” – provisions that may instead be characterized as material reciprocity.

117 For more on those exceptions, see Ficsor, *WIPO Guide and Glossary*, 40–41.

118 For definitions of “national treatment” and “reciprocity”, see Ficsor, *WIPO Guide and Glossary*, 297, 306.

119 The General Report of the Rome Diplomatic Conference confirms beyond any possible doubts the understanding of the delegations in this way:

Simply stated, national treatment is the treatment that a State grants under its domestic law to domestic performances, phonograms, and broadcasts [...] [T]he Convention also contains a provision making national treatment subject to the protection specifically guaranteed by the Convention. This refers to the so-called minimum protection provided particularly in Articles 7, 10, 12 and 13, which the Contracting States undertake to grant subject to permitted reservations and exceptions even if they do not grant it to domestic performances, phonograms, or broadcasts. This idea is expressed in paragraph 2 of Article 2, which also provides that national treatment shall be subject to the limitations specifically provided for in the Convention. [...] Czechoslovakia proposed [...] that a State which granted rights other than the minima required by the Convention should not be bound to grant them to nationals of other States which did not grant such rights to nationals of the first State. This was not accepted by the Conference.

See ILO, UNESCO, BIRPI (1968). *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 10 to 26 October 1961*. Publication No. 326 (E). Geneva – Paris: ILO, UNESCO, BIRPI, 39.

120 The Rome Convention was “pioneer” in the sense that it tried to harmonize the protection of related rights at a stage when there was no such convergence between national laws as concerning copyright.

121 The tension had already emerged in the course of the preparatory work and at the 1961 Diplomatic Conference, and it concerned such basic questions as whether or not it should be a minimum obligation to grant performers and producers of phonograms a right to remuneration for broadcasting and communication to the public of phonograms. Although Article 12 provides for a right to a single equitable remuneration, several possible reservations (“declarations”) are allowed under Article 16(1)(a), including – under item (iv) – the possibility of applying reciprocity (rather than national treatment) as a condition of granting the same right to the nationals of other Contracting States.

122 By reference in Article 9.1, as well as directly in Article 3 of the TRIPS Agreement.

123 By reference in Article 1(4) of the WCT.

Although the first sentence of Article 3.1 of the TRIPS Agreement provides that “Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection [...] of intellectual property”, the second sentence adds, “In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement.” In other words, for the beneficiaries of related rights, there is no obligation to extend to non-nationals the same treatment as is accorded to the nationals; any protection that goes beyond the obligatory minimum can be denied to the nationals of other Members, or instead subject only to reciprocity.¹²⁴

In the WPPT, the absence of real national treatment is expressed more directly. Article 4(1) simply provides that the obligation extends only to the minimum protection prescribed in the Treaty; the Contracting Parties are not obligated to grant to the nationals of other Contracting Parties any protection beyond this minimum that they may offer to their own nationals:

- (1) Each Contracting Party shall accord to nationals of other Contracting Parties [...] the treatment it accords to its own nationals with regard [only] to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

Article 4(1) of the BTAP contains the same provision almost verbatim, the only difference being a reference to the right to remuneration provided for in Article 11 of the Treaty.

For the purpose of discussing the role of national treatment in the collective management of copyright and related rights, it seems to be sufficient to set down as a fact that there is such a difference between national treatment as provided for under the Rome Convention, on the one hand, and what is called “national treatment” in the TRIPS Agreement, the WPPT and the BTAP, on the other. It seems inevitable to accept that this has become a legal-political reality now that not only has the protection of related rights been given “teeth” (TRIPS provisions strengthen the enforcement mechanisms and extend the efficient dispute settlement mechanism to these rights too), but also the WPPT and the BTAP have updated the protection of performers and producers of phonograms. It is beyond the scope of this book to analyze what effect, if any, this transformation might have on the application of the seriously outdated Rome Convention itself.¹²⁵

We can, however, explore the issue of national treatment concerning the rights exercised through collective management at two levels:

- (i) at the level of whether or not those rights are also granted to the nationals of other countries party to the same international treaties; and
- (ii) at the level of the operation of the collective management systems.

In this chapter, we focus attention on the second of these.

Principle (r) set out at the end of what can be considered the first edition of this book read as follows:

- (r) Foreign rights owners represented by a collective management organization should enjoy, in all respects (such as the monitoring of uses, the collection of remuneration, the deduction of costs and, especially, the distribution of remunerations), the same treatment as those rights owners who are members of the organization and nationals of the country concerned.¹²⁶

124 For a description of the TRIPS negotiations on the question of national treatment concerning related rights, see Gervais, *The TRIPS Agreement*, 84–89; Jörg Reinbothe and Silke von Lewinski (2002). *The WIPO Treaties 1996: The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty – Commentary and Legal Analysis*. London, Butterworth Lexis Nexis (hereinafter: Reinbothe and von Lewinski, *The WIPO Treaties 1996*), 298.

125 For insight into the arguments for a “retroactive” interpretation according to which the Rome Convention foresaw “national treatment” as the TRIPS Agreement, see Reinbothe and von Lewinski, *The WIPO Treaties 1996*, 297–298. For doubts about the validity of such interpretation, see Ficsor, *WIPO Guide and Glossary*, 126–128 and 140–141. For more detail, see Jørgen Blomqvist (2014). *Primer on International Copyright and Related Rights*. Cheltenham: Edward Elgar, 70–75. (Blomqvist does, however, point out persuasively that such “retroactive” interpretation is not in accordance with the Vienna Convention on the Law of Treaties (VCLT) and concludes his analysis by suggesting that, nevertheless, the transformation of the concept of national treatment for related rights may be accepted “in terms of ‘realpolitik’”: *ibid.*, 73.)

126 WIPO (1990). *Collective Administration of Copyright and Related Rights*, Publication No. 688 (E). Geneva: WIPO, 91–92.

In the second edition, this principle was reproduced nearly verbatim as principle (25), the only difference being that the generic term “joint management organization” was used rather than the term “collective management organization”.¹²⁷

It is hardly necessary to elaborate on why this principle should be respected and applied if a country is to be said to have fulfilled its obligations to grant national treatment. In the context of collective management, this means meeting two requirements (in addition to the basic requirement that a country should provide the same rights, under the same conditions, and with the same possible exceptions and limitations to the nationals of other Contracting Parties as it does to its own):

- (i) the statutory regulation of collective management should not contain any provision that might be in conflict with national treatment in those cases in which its limitation is not allowed; and
- (ii) the governments – when they meet their obligations in connection with the establishment, operation and supervision of CMOs – should ensure that both the internal rules and the activities of the CMOs are in accordance with the obligation to grant national treatment.

These principles should be applied to all relevant aspects of the operation of CMOs: monitoring uses, collecting remuneration, deducting costs and distributing remuneration.

“Monitoring uses” and “collection of remuneration” are closely linked – in particular, in those cases in which the data on actual uses cannot be extended to all users for technical reasons or because of weighty cost-benefit considerations (in the sense that doing so would create disproportionately high costs). In such a case, much depends on which users are selected as subjects for monitoring and thus the extent to which the data collected on actual uses will be representative – in contrast with several other users from whom the remuneration is collected but in the absence of actual data on the uses of works. It will be readily apparent that if (a) remuneration is collected equally from all users of works in the given category (such as from all public places where music is used or from television organizations), but (b) use samples are only or mainly collected from users who use largely the local repertoire (as opposed to those who use popular foreign works from whom no, or very limited, use data are obtained), and (c) the distribution is made for all the users on the basis of the limited sample data, it may result in distortion – to the detriment of the nationals of other countries. One of the reasons why a conflict arose between AGICOA and Filmjus, the Hungarian CMO managing the rights of both audiovisual creators and producers, was this very issue: the CMO used the programs of a sample of television channels for distribution of the remuneration for cable retransmission, but the proportion of national productions was much higher in that sample than in the programs of several other popular commercial television channels not included.¹²⁸

It need hardly be said that distortions emerge to the detriment of the nationals of other Contracting Parties if CMOs unilaterally burden them with certain charges when collecting remuneration in the absence of an appropriate reason. However, more serious system-level distortions might arise at the point of distribution. The obligation to grant national treatment may be fulfilled only if the remuneration due to the nationals of other countries for the use of their works is distributed on the same basis as is that due to nationals. This is discussed more in detail in Chapter 8; here, it is sufficient to refer to:

- (i) the obligation of “diligent search” necessary for accurate distribution (which applies equally in either case);
- (ii) the need to apply the category of “undistributable amounts” instead of the category of “unclaimed amounts”; and
- (iii) the need to obtain consent from the rightholders concerned, or the bodies representing them, to any deductions from the remuneration collected for the use of their works for cultural, social and educational purposes.

In other words, it is not acceptable for CMOs to wait for the nationals of other countries to *claim* their remuneration and, in the absence of such claims, distribute it to domestic rightholders as “unclaimed amounts”; it is acceptable only to transfer remuneration to and hold the funds in an

¹²⁷ See Mihály Ficsor (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 165.

¹²⁸ After informal mediations and negotiations, the conflict ended with an agreement, one of the conditions of which was that Filmjus had to transform its monitoring and data collection system to better reflect the extent and value of the use of audiovisual works by the various television channels.

“undistributable amounts” account, on condition that appropriate measures have been taken (“diligent search”) to identify and locate rightholders, irrespective of whether they are national or non-national owners of rights.

Further, no deductions – other than those covering the costs of management – are justified without prior authorization by the rightholders concerned. In the case of non-nationals, such authorization will usually be sought by the CMOs managing the rightholders interests in their own countries.

Structural issues of collective management: monopoly and competition, mono- and multi-repertoires, cooperation and coalitions

Introductory remarks

This chapter begins by discussing how many CMOs may ideally manage a certain right. In particular whether it is justified not only to recognize a *de facto* monopoly position of a single CMO in a given country, but also provide in the law that only one organization may be authorized to manage a certain category of rights of a certain category of rightholders, thereby establishing a monopoly *de jure*. In close connection with this, there is a review of what competition rules may be applied to prevent such a CMO abusing its dominant position.

Another structural aspect of a collective management system considered is what solution is more appropriate from the perspective of rightholders and users: is it better to have nationally only a few CMOs, all of which manage a variety of rights – perhaps even a variety of categories of rightholder, or multiple CMOs, each one of which manages a distinct category of right for a distinct category of rightholder?

Also discussed are the difficulties that may emerge should a bigger CMO seek to manage the multiple rights of various groups of rightholders: how can it guarantee the proper treatment of the various groups; and how can parallel organizations cooperate effectively, perhaps by establishing coalitions to reduce costs, increase efficiency and generally better pursue their common interests? In this context, the issues specific to management and the right of performers and producers of phonograms to a single equitable remuneration – as regulated under Articles 12 and 16(1)(a) of the Rome Convention, and Articles 4(2) and 15 WPPT – are analyzed separately.

CMOs as natural monopolies

Although, in some countries, there are now statutory provisions under which only one organization may be authorized/registered/accredited to manage a given category of right, the system for collective management of “performing rights” in musical works by societies of authors, composers and music publishers – the original instance of collective management – developed as a monopoly without legislative or administrative intervention. Following the lead of SACEM in France (see Chapter 1), similar societies were established as single organizations to manage musical performing rights also in other countries:

- in 1882, Italy, the SIAE;
- in 1889, Spain, the SGAE;
- in 1903, Germany, the AFMA (which may be regarded the predecessor to the current powerful GEMA);
- in 1907, Hungary, the MARS (predecessor to the present Artisjus);
- in 1913, Austria, the AKM;
- in 1914, the United Kingdom, the PRS (now called “PRS for Music”);

- in 1923, Switzerland, the SUIA;
- in 1926, Australia, the APRA;
- in 1929, Uruguay, the AGADU;
- in 1930, Argentina, the SADAIC;
- in 1939, Japan, the JASRAC – and so on.

In 1926, CISAC was established as an international confederation of these societies.¹²⁹ By means of bilateral contracts among the national societies, granting “blanket license” – allowing a CMO to be a “one-stop shop” for the representation and licensing of a global repertoire of musical works – was becoming ever more possible.

The societies of authors, composers and music publishers were born as natural monopolies – even if they were not, at that time, explicitly acknowledged as such. The nature of the rights, and the interests of both the rightholders and the users, straightforwardly justified their *de facto* monopoly position in their respective countries.

The Organisation for Economic Co-operation and Development (OECD) defines “natural monopoly” thus:

A natural monopoly exists in a particular market if *a single [organization] can serve that market at lower cost than any combination of two or more [organizations]*.

Natural monopoly *arises out of* the properties of productive technology, often in association with *market demand, and not from the activities of governments or rivals* (see monopoly).

Generally speaking, natural monopolies are characterized by steeply declining long-run average and marginal-cost curves such that *there is room for only one [organization] to fully exploit available economies of scale and supply the market [...]*.

In essence natural monopolies exist *because of economies of scale and economies of scope* which are significant relative to market demand ... *Because productive efficiency requires that only one [organization] exist, natural monopolies are typically subject to government regulation.* Regulations may include price, quality, and/or entry conditions (emphasis added).¹³⁰

This seems to be the generally accepted concept in economics, as two other sources demonstrate:

In the case of natural monopolies, *trying to increase competition by encouraging new entrants into the market creates a potential loss of efficiency.* The *efficiency loss to society* would exist if the new entrant had to duplicate all the fixed factors – that is, the infrastructure.

*It may be more efficient to allow only one [organization] to supply to the market because allowing competition would mean a wasteful duplication of resources.*¹³¹

Natural monopoly: a situation in which *one [organization] is able to supply the whole market for a product or service more cheaply than two or more [organizations] could* (emphasis added to both quotations).¹³²

In these passages, substitution of the word “organization” for the original word “firm” allows the definition to accommodate the concept of “natural monopolies” in the field of collective management.

It is easy to see what circumstances justify the establishment and operation of *de facto* or *de jure* monopoly for those CMOs managing certain rights such as the right of public performance in musical works.¹³³ If there were more than one CMO managing the same right, two or more parallel managements, buildings, equipment, monitoring networks, staffs and so on would be needed,

129 Eighteen societies were the founding members of CISAC. At the time of writing, CISAC’s membership extended to 228 authors’ societies in 120 countries across all geographic regions and covering artistic repertoires including music, audiovisual creations, drama, literature and visual arts: see www.cisac.org/about

130 See at <https://stats.oecd.org/glossary/detail.asp?ID=3267>

131 See www.economicsonline.co.uk/business_economics/natural_monopolies.html

132 See <https://dictionary.cambridge.org/dictionary/english/natural-monopoly>

133 At least as far as *petits droits* are concerned (see Ficsor, *WIPO Guide and Glossary*, 302).

with inevitable impact on the costs involved in administering the system. Maintaining only one CMO in a country guarantees higher efficiency, less costs and more revenues to distribute.

If there were more organizations to manage the same right, the administrative costs of lawful users would also increase, since they have to obtain the necessary repertoire from different sources, negotiate with different CMOs, fulfill their obligation to provide information on actual use of works, and so on. At the same time, those users which seek to pay as little as possible or to avoid paying entirely would find it easier were parallel CMOs to manage the same rights: the users could falsely tell each that they are using only, or largely, the other's repertoires. The CMOs may protect themselves against such misinformation by increasing monitoring activity – but this again would lead to higher operational costs and hence to a decrease in distributable remuneration.

As discussed in the next chapter, the *de facto* or *de jure* monopoly status of a CMO managing a certain right in a given country tends also to facilitate the application of mandatory and extended collective management. Furthermore, as it is pointed out in Chapter 11, monopolistic collective management is more effective to the protection of cultural diversity than competition between CMOs with their own repertoires. Where only one national CMO manages a given right, that CMO may also function as a community of creators, within which attention and resources are devoted to the promotion of domestic creativity, and the community acts in solidarity with creators who are in need.

"Natural monopoly" is, however, not a legal category but a concept developed in economic science and it does or does not exist objectively depending on the circumstances of a given situation. The core question in any instance is therefore whether national legislation recognizes and adequately reflects the monopolies, or it tries to promote (directly or indirectly) competition even where the support of natural monopoly would be justified. At the same time, it should be apparent that extending the scope of CMOs as *de facto* or *de jure* monopolies beyond those cases in which there are objective reasons for their existence may create unjustified limitations of the rights concerned. As technology and business methods evolve, so too do the conditions under which rights are exercised, and this necessarily influences the scope of rights for which "one-stop shop" licensing is appropriate and those for which it is not.

Collective management and competition: an overview

The natural monopoly position of a CMO is usually rooted in the exclusive nature of the rights it manages. Indeed, the holders of an "exclusive right" might themselves be said to be in a monopolistic position, because it is they – and they alone – who have authority to decide who might use (or not use) the works and under what conditions (including what sort of remuneration). Yet it would be incongruent to allege that rightholders "abuse" this position when they do not authorize the use of their works, or authorize it only under certain conditions and in return for specific remuneration.

The personal and professional circumstances of authors can vary widely, and so too can the ways in which they wish to exercise their exclusive rights. Some authors who create their works as self-expression may not care too keenly about the potential economic benefits they might derive from the use of their works by others. They may be even ready to offer the use of their works freely. The position of professional authors – that is, those who wish to support themselves financially from the counter value of the use of their works – is necessarily different: they want to exploit their works and earn an income. To do so, they have to respect the general rules of demand and supply in the cultural and information markets. If they impose unreasonable conditions and set unrealistic prices, potential users may decide against their works, using the works of other authors instead (and rarely is "supply" not rich). Corporate rightholders – irrespective of whether they are transferees or original owners of rights – are even more constrained by the market rules of demand and supply.

The CMOs also have to adapt their licensing activities to meet the requirements of the market. If the fees they charge for use of their repertoires are too high, some users may decide to avoid them and such CMOs, ironically, will likely secure little distributable remuneration for the rightholders they represent. However, few users will be easily able to avoid using the repertoire of a CMO in a *de facto* or *de jure* monopoly position; the supply-demand dichotomy applies differently to these users compared with the users of individual works. If a user prefers not to accept the conditions and the fee determined by the monopoly CMO, they will have to abandon the activity for which they had planned to use its repertoire (or they may pursue it illegally and risk infringement proceedings).

It is this that leads some users to accuse CMOs of abusing their dominant position in the marketplace. Whether or not such complaints are justified, the following questions emerge, which are explored in what follows.

- (i) In what conditions may (or should) there be competition between CMOs?
- (ii) Is it justified to apply competition rules to the collective management of exclusive rights in view of the fact that the rightholders have exclusive power to decide how they exercise them?
- (iii) Might the *de facto* or *de jure* monopoly position of CMOs be desirable, or should CMOs be encouraged to compete?
- (iv) Is the conclusion of bilateral and multilateral representation agreements between CMOs (i.e., agreements to manage each other's repertoires) an anti-competitive (concerted) practice?
- (v) What legislative and administrative guarantees are needed to address the possible abuse of CMOs' monopoly position?

How may CMOs compete with each other?

Although it can be a mistake to conceive of the repertoire of a CMO as a "product", two basic criteria may be cautiously taken into account when considering the ways in which CMOs might compete with one another:

- the "product" itself (i.e., the quality and size of the repertoire); and
- its "price" (i.e., the remuneration to be paid).

While the quality and size of its repertoire will play a large part in how attractive a CMO is to a rightholder, price is commonly decisive. The price – the costs to the rightholder, as deductions from the remuneration distributed to them, and the costs to the user, as a tariff on use – is one way in which CMOs can compete for the rightholders and users to whom they offer services. Tariffs are among the most conspicuous of competitive criterion – and they are the area in which disputes most frequently emerge.

A CMO might certainly obtain a more advantageous position in the marketplace for its own repertoire to the detriment of other comparable repertoires if it decreases its tariffs. The other organizations may respond by themselves decreasing their own tariffs, seeking to regain their former position or to obtain a more dominant market position. In the short term, the "cheaper" CMO may become more attractive to certain users – but this "race to the bottom" will diminish the expected return to rightholders. It will devalue the authors' creations and the CMOs' repertoires, and the creative community will suffer.

In principle, a CMO could offer lower tariffs and still distribute the same remuneration to the rightholders if it were to decrease its costs. However, this is not easy – not least because lowering costs may mean decreasing the quality of the CMO's service. Moreover – and perhaps more importantly – as discussed above, where there is a natural monopoly situation, introducing competition will necessarily increase its costs.

The negative consequences of increased competition hold true too among lawful users: unless they choose to use a very narrow repertoire, they will find themselves paying fees to multiple competing CMOs, and hence the financial and administrative burdens accumulate. It is for this reason that, during preparatory work on the E.U. CRM Directive, broadcasting organizations insisted on Article 32, providing for derogation from the provisions of Title III of the Directive (see Chapter 10), and that the European Broadcasting Union (EBU) was on the side of authors' societies in the *CISAC* case, which is analyzed below in this chapter.

The size of the repertoires may also determine whether a CMO can achieve a competitive market position. Big repertoires allow decreasing the average level of administrative expenses since they are shared among a greater number of works and rightholders. Indeed, this is one of the reasons why the CMOs of smaller countries with smaller repertoires can find themselves at a disadvantage should they be constrained to compete, in their own countries, with bigger foreign organizations. This may endanger cultural diversity, as it is discussed in Chapter 11, and thus any government predicting such a negative impact will justifiably apply proportional measures to protect its country's cultural legacy.

“Competition” for rightholders is a commendable goal if the CMOs try to increase the size of their repertoires through managing the rights with which they are entrusted both adequately and cost-effectively. In the case of a natural monopoly situation, the most cost-effective organization is that which can deliver a *de facto* global repertoire; the higher the number of CMOs competing with one another, the less cost-effective the system becomes.

Applicability of competition rules to the collective management of exclusive rights

Where copyright and related rights are exercised individually, there are rarely conflicts with competition rules.¹³⁴ Those few that arise generally relate to the field of industrial property rights, where the dysfunctional exploitation of rights to suppress competition may have significant impact in the market for economically important utilitarian products. As far as copyright is concerned, this sort of dysfunctionality tends to emerge only *outside* the traditional cultural markets, such as in the market for computer programs.¹³⁵

Since CMOs are frequently in a *de facto* or *de jure* monopoly position, two questions arise in relation to competition rules:

- (i) whether or not the very emergence of such a position – especially where it is based on agreements between several organizations – is in accordance with such rules; and
- (ii) what kinds of legislative norms and administrative measures may be needed to eliminate or prevent a CMO’s abuse of such a position.

As already discussed, there are cases in which the efficient collective management of certain rights hinges on natural monopolies; in those cases, it might be asked whether or not the application of antitrust norms can be justified at all. The answer seems to be that, while it is difficult to oppose what is emerging naturally, this does not mean that CMOs have free rein to *abuse* their dominant position.¹³⁶

There are certain national laws that exclude the application competition norms to collective management. This is typical in the laws of those newly independent countries that used to be republics within the former Soviet Union. For example, Article 1244 of the Civil Code of the Russian Federation prescribes first that the rights to which it relates may be managed only by accredited CMOs and then, in Article 1244(2), that “[n]o limitations provided for by the antimonopoly legislation shall apply to the activity of an accredited organization”. However, this only has the effect of excluding the application of provisions on concerted practices and not that there is no defense against a CMO’s possible abuse of its monopoly position. That protection is guaranteed by government decrees determining the criteria of tariffs such that they reflect the value of the actual use of the CMOs’ repertoires, as a result of negotiations between CMOs and representative organizations of users, subject to supervision by a competent authority (the Ministry of Culture) with the possibility of challenging the licensing conditions at alternative dispute settlement forums and ultimately also in court.

Such provisions may also be found in other parts of the world. For example, Article 4 of Law No. 45 of 2007 of Panama provides as follows:

Exclusions. [The following] shall not be considered monopolistic practices [...]
[...]

¹³⁴ This is certainly true of the mainstream categories of literary and artistic works (novels, poems, musical works, audiovisual works, works of art, etc.). However, if a work is of a functional nature (e.g., a computer program) and it has a significant share in the given market, the application of certain competition rules may become necessary.

¹³⁵ See, e.g., the provisions of Article 6 of the E.U. Computer Programs Directive: Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111/16, May 5, 2009. The article deals with the “decompilation” of programs (i.e., the requirement that competitor software developers not create interoperable programs) as a way of protecting against copyright abuses.

¹³⁶ A study published by the Max Planck Institute in December 2013, *Copyright, Competition and Development*, offers a broad overview of how the relationship between copyright and competition is regulated, based on analysis of competition and copyright laws of several countries. As the study shows, although it is recognized that the usual exercise of copyright (i.e., in accordance with the nature and legal-political objectives of the rights concerned) does not raise competition problems, certain potential conflicts may nonetheless emerge. See www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/02_copyright_competition/report_copyright-competition-development_december-2013.pdf

2. The exercise of intellectual property rights recognized by the law to their owners provided, during a determined time, to the owners of copyright and related rights for the exercise of their rights and granted to inventors for the use of their inventions.

The Working Group that discussed and approved the analysis and guidance serving as the basis of the 1990 edition of this book agreed on certain principles that suggested a nuanced approach to these questions. Set out in its concluding chapter as principles (m) and (n), the advice was this:

- (m) Government supervision of, and interference in, the establishment and operation of tariffs and other licensing conditions applied by collective management organizations that are in a *de facto* monopoly position *vis-à-vis* users, is only justified if, and to the extent that, such supervision or interference is indispensable for preventing abuse of such a monopoly position.
- (n) A certain level of tariffs (for example, a higher level than in other countries) should not be regarded in itself as a sufficient basis for presumption of abuse. In that respect, it should be taken into account that the tariffs should correspond to the exclusive nature of rights and should represent an appropriate remuneration to owners of rights which, in certain countries, may be ensured in a much fuller way than in others, and the actual value of the repertoire and service offered by collective management organizations should also be considered (as a result of that, it may be found that the higher tariffs are not too high, but the lower fees are too low). When evaluating tariffs, the economic and social conditions of the country concerned should also be taken into consideration.¹³⁷

In its second edition, the book reproduced these principles nearly verbatim, as principles (18) and (19) – substituting the term “joint management” for “collective management” and adding, in principle (19), reference to *de jure* monopolies.¹³⁸

International copyright norms related to competition aspects of collective management

While the title and text of Article 17 of the Berne Convention offer no indication of its relevance to competition in collective management, the records of the relevant diplomatic conferences show otherwise. The Article reads:

The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

This provision has been part of the Berne Convention since its inception in 1886 and has remained unaltered. It has always been understood as a provision authorizing censorship under certain circumstances, such as for the protection of basic human rights, public morals or public security.

None of the three activities mentioned in the provision – circulation, presentation and exhibition of works – are mentioned in this way in the other provisions of the Convention, although “presentation” may be understood as implicating non-copy-related rights (i.e., of public performance, broadcasting, communication to the public) and “circulation” may be regarded as a synonym of “distribution”, while “exhibition” – although not among the rights provided for under Convention – may be covered, in certain countries, by the right of public display or public exposition.

Despite the objective of the article being interpreted as allowing the countries of the Union to exercise censorship in the public circulation, presentation and exhibition of works, the text could have been misinterpreted as also allowing governments to “permit” such uses instead of the

¹³⁷ WIPO (1990). *Collective Administration of Copyright and Related Rights*, Publication No. 688 (E). Geneva: WIPO, 89–90.

¹³⁸ See Mihály Ficsor (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 162.

authors of the works. For this reason, Main Committee I of the 1967 Stockholm revision conference adopted a sort of “agreed statement”,¹³⁹ seeking to clarify the meaning of the Article:

This Article referred mainly to censorship: the censor had the power to control a work which it was intended to make available to the public with the consent of the author and, on the basis of that control, either to “permit” or to “prohibit” dissemination of the work. According to the fundamental principle of the Berne Union, countries of the Union should not be permitted to introduce any kind of compulsory license on the basis of Article 17. In no case where the consent of the author was necessary for the dissemination of the work, according to the rules of the Convention, would it be possible for countries to permit dissemination without the consent of the author.¹⁴⁰

Although the agreed statement specifically aims at preventing misinterpretation of Article 17, it is equally useful to confirm what may be derived *a contrario*: that, in the absence of provisions on exceptions and limitations, the exclusive rights provided in the Convention may not be limited. This has – at least indirect, if not necessarily direct – relevance to issues of competition in collective management.

In a subsequent paragraph, however, Main Committee I made another statement about its interpretation of Article 17, which reads as follows:

The Committee accepted, without opposition, the proposal of its [chair] that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that *the countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies*. Whereupon, the proposals of Australia and the United Kingdom relating to abuse of monopoly were withdrawn (emphasis added).¹⁴¹

This was adopted – if not specifically characterized – as another agreed statement, putting an end to a recurring debate that was started at the 1928 Rome diplomatic conference and continued through the 1948 Brussels diplomatic conference. At those conferences, when several delegations highlighted the possibility that CMOs might abuse their *de facto* monopoly position in the management of performing rights, vague references had been made to the general freedom of the countries of the Union to regulate this issue domestically.

At the 1967 Stockholm revision conference, the U.K. and Australian delegations sought to settle this issue by means of an express provision in the Convention. The United Kingdom presented a concrete proposal. It suggested that a new paragraph be inserted into Article 17 to read: “Each country of the Union is free to enact such legislation as is necessary to prevent or deal with any abuse, by persons or organizations exercising one or more of the rights in a substantial number of different copyright works, of the monopoly position they enjoy.”¹⁴² This proposal received certain support, but also opposition, and hence the above-quoted statement adopted instead.

But Article 17 is not the only provision of the Berne Convention that has been adopted in order to prevent any possible attempts of CMOs to abuse of their dominant position. Article 11*bis*(2) provides that:

- (2) It shall be a *matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the paragraph 1*^[143] *may be exercised*, but these conditions shall apply only in the countries where they have been prescribed.

139 In the sense in which such sources of interpretation are mentioned in Article 31(2)(a) of the VCLT:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
[...]

140 *Records of the Intellectual Property Conference of Stockholm (1967)*. WIPO, 1971, 1174–1175, para. 262.

141 *Ibid.*, 1175, para. 263.

142 *Ibid.*, 704, document S/171.

143 Paragraph (1) of the article obliges the countries of the Union to grant exclusive rights of broadcasting and certain subsequent uses of broadcast works, including their retransmission by cable (“wire”).

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 (emphasis added).

At the 1928 Rome revision conference, where a new Article 11*bis*(1) was agreed to recognize the author's right to authorize the communication of their works to the public by broadcasting, this second paragraph was also added. One of its objectives was to guarantee broadcasters (many of which were state radios) easy access to the works necessary to their delivery of public services;¹⁴⁴ another reason stressed equally by various delegations was that, without the possibility of limitation to the exclusive right of broadcasting, the "performing rights" CMOs emerging as *de facto* monopolies might abuse their dominant position.¹⁴⁵

Article 13(1) of the Convention contains a similar provision:

- (1) 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 (emphasis added).

Article 13(2) of the 1908 Berlin Act of the Berne Convention was the origin of this provision. It was at that time that both the phonographic industry and the musical rights CMOs began to broaden their activities intensively. While the right of recording of musical works is recognized in Article 13(1) of the Act,¹⁴⁶ Article 13(2) allowed – as is now allowed under the 1971 Paris Act – the imposition of conditions on the exercise of the right for competition reasons. This was in part an attempt to stop the bigger phonogram producers from achieving a monopolistic position and in part (at the request of the producers) as protection *against CMOs' possible abuse of their dominant position*.¹⁴⁷

Article 8.2 of the TRIPS Agreement includes the following provision, which – in principle – is applicable to all branches of intellectual property rights and hence also to copyright: "*Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology*" (emphasis added). But the provision has little distinctive impact on the status of exclusive rights, whether exercised individually or collectively, since their application must be "consistent with the provisions of the Agreement", including those provisions of the Berne Convention that are applicable by virtue of Article 9.1 of the Agreement.

Competition and national laws recognizing CMOs as natural monopolies

As discussed above, CMOs have emerged as monopolies naturally. Rightholders banded together in a single national CMO because it was the most effective way of exercising certain rights and

144 As the general report put it:

[T]he adopted text represents a compromise between two opposing tendencies that of completely assimilating the radio broadcasting right to the author's other exclusive rights [...] and that of considering the matter subject to intervention on the part of the public authorities in order to protect the cultural and social interests linked to this specific new form popular dissemination of intellectual works, particularly musical ones.

(BIRPI (1929). *Records of the Conference of the International Union for the Protection of Literary and Artistic Works Convened in Rome. May 7 to June 2 1928*. Geneva: BIRPI, translation in Arpad Bogsch (1986), *1886 – Berne Convention Centenary – 1986*, Publication No. 877 (E), Geneva: WIPO 174.)

145 See *ibid.*, 256–258, for interventions by the delegates of Australia, New Zealand, the Netherlands and various Nordic countries.

146 Article 13(1) of the Berlin Act was still broader: it covered not only the right of recording of musical works on phonograms (so-called mechanical reproduction – an expression referring to the period when real mechanical versions were played on barrel organs in the street) but also the right of public performance. Article 13(2) contained a provision allowing reservations to, and the imposition of conditions on, the application of those rights.

147 For a detailed description of the adoption and subsequent modifications of the provisions of Article 13 – from the 1908 Berlin Act to the 1967 Stockholm/1971 Paris Twin Act – see Sam Ricketson (1986). *The Berne Convention for the Protection of Literary and Artistic Works, 1886–1986*. The Hague: Kluwer, 513–521 (hereinafter: Ricketson, *The Berne Convention*).

because it was also beneficial for lawful users. Had parallel organizations been set up, it would have been disadvantageous to all stakeholders.

The study published as the first edition of this book in 1990 reflected this recognition in its concluding principle (f):

As a rule, there should be only one organization for the same category of rights for the same category of rights owners in each country. The existence of two or more organizations in the same field may diminish or even eliminate the advantages of joint management of rights.¹⁴⁸

The second edition repeats this as principle (11), the only change being the substitution of the word “Usually” for the first three of the original: “As a rule”.¹⁴⁹

There are some countries in which this principle is enshrined in statute, either specifically for the management of certain categories of rights or as a more general rule. This was the case of copyright laws in the Czech Republic and Hungary in 2008, when the European Commission launched infringement proceedings against the two countries to eliminate the “monopoly of collecting societies’ activities”. In its reasoned opinions, the Commission found the Czech and Hungarian governments to be in breach of E.U. law: according to the Commission, authorizing only one CMO to manage a certain right of a certain category of rightholders was an obstacle to the freedom of establishment and the freedom to provide services, and thus an infringement of Article 16 of the Services Directive.¹⁵⁰ (The article provides that a Member State must grant to entities established in other Member States “free access to and free exercise of a service activity within its [own] territory”.) This implied the idea that multiple CMOs of other Member States might collect remuneration for use of their own competing repertoires in a given State – responsible for applying the rights in accordance with its treaty obligations – and its government would have no influence over them.

The Commission also expressed its opinion that dismantling the system of national CMOs “may prove to be beneficial for rights management”, because “cross-border management facilitates distribution to a wider public, which benefits distributors and consumers, as well as rights holders”.¹⁵¹

These reasoned opinions did not seem to follow the guidance of the then European Court of Justice (ECJ) in *Tournier* adopted nine years earlier.¹⁵² In that case, various competition issues were raised (regarding both concerted practice and abuse of dominant position), but of central concern was the natural monopoly situation of French musical performing rights society SACEM (of which Jean-Loup Tournier was Director General at the time) and the blanket licenses it offered on the basis of a tariff system.

The plaintiff – a discothèque operator – claimed that its venues were using only or largely music of Anglo-American origin and that SACEM had not taken this into account when calculating the license fees owed (based on a fixed rate of 8.25 percent of the venue’s turnover, including sales tax). The plaintiff argued that the fee was too high calculated in a way that it allowed a venue to access the whole of SACEM’s repertoire, and the society had refused to grant a lower fee in return for access to only that part of its repertoire in which a given venue was interested. The plaintiff highlighted the fact that its venues could not deal directly with the CMOs in the United Kingdom or the United States, to access only those repertoires in which it was interested, because the latter were bound to refuse such direct access in accordance with their reciprocal representation agreements with SACEM.¹⁵³

148 WIPO (1990). *Collective Administration of Copyright and Related Rights*, Publication No. 688 (E). Geneva: WIPO, 88.

149 See Mihály Ficsor (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 160.

150 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/35, December 27, 2006.

151 See European Commission (2008). *Monopoly of collecting societies’ activities: infringement proceedings against the Czech Republic and Hungary*, press release of the European Commission, November 27. Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_08_1786

152 Judgment of the Court of July 13, 1989, *Ministère public v. Jean-Louis Tournier*, Case C-395/87, ECLI:EU:C:1989:319.

153 *Ibid.*, [5].

In other words, the plaintiff opposed SACEM's practice of issuing blanket licenses on the basis of its position as a natural monopoly and "one-stop shop". The *method* of calculating the tariff due as a percentage of turnover of the discothèques which could not function without the use of music seemed to be reasonable and ensured due proportionality. The *level* of the percentage, however, was another issue, given competition rules intended to inhibit a CMO's abuse of its dominant position.

However, the plaintiff's conception of the blanket licensing system seems to have been rooted in misunderstanding (or ignorance). The tariffs applied for blanket licenses are not calculated on the basis of the assumption that the users will use *the entire repertoire* of a CMO (which, in the case of musical performing rights societies bound by reciprocal representation agreements, means practically the entire relevant global repertoire), but on the basis that they will use *some works from that repertoire*, to some extent, in a certain way and for a certain purpose. SACEM had fixed the percentage due based on these general criteria and not specifically according to distinctions among the rightholders whose works were used. The function of music and the intensity of the use of musical works – which determined their value to the discothèques – did not change whether French, Italian, English or American works were performed.

In fact, the discothèques were hoping that they might be permitted to seek authorization for the use of the same works for the same purpose at a lower fee from sources other than SACEM. Those advocating competition might support such a goal, since this is the way in which competition works as a consequence of the rules of demand and supply. They might go on to suggest that, as a consequence, CMOs would have to compete with their own repertoires and would be constrained to operate more efficiently, to guarantee as attractive supply to the would-be users as possible. But, such a theory of competition between CMOs ignores the impact on the rightholders represented by the various CMOs. The assumption that it would be beneficial for these stakeholders too does not hold in all, or even the majority of, cases. While it may be justified for certain uses of certain works (particularly the widespread online uses of musical works, for which rightholders might benefit from stronger competition among their CMOs, with negative effect on only the smallest of repertoires), it is certainly not in situations in which natural monopolies are recognized.

In accordance with this, the Court ruled that a national CMO may refuse to grant music users access to only a part of its repertoire (in this case, access to only its Anglo-American repertoire) and not the whole, because doing so would increase "the costs of managing contracts and monitoring the use of protected musical works".¹⁵⁴ The Court also ruled that it is not in conflict with competition rules if a CMO does not offer direct access to its repertoire in another Member State, but rather concludes a reciprocal representation agreement with a peer organization there, to avoid the costs of setting up its own management and monitoring system in that foreign territory.¹⁵⁵ In doing so, the Court amplified the reasons why natural monopolies are typically accepted in the collective management of copyright. (In its *Lucazeau* judgment handed down the same day, the Court applied the same reasoning to another case concerning SACEM's issue of blanket licenses.¹⁵⁶)

The Czech Republic and Hungary reacted in different ways of the Commission's claims about the breach of E.U. law. The Czech Republic took its case to the CJEU, seeking to protect its national law, while Hungary gave in and changed its law.

In *OSA*, the CJEU rejected the Commission's position about the applicability of the Services Directive¹⁵⁷ and *de facto* recognized the existence of natural monopoly situations – where the interests of the various stakeholders, and the public in general, justify that only one CMO be authorized to manage a given right. In its judgment published on February 27, 2016¹⁵⁸ – one day after adoption of the CRM Directive – the Court stated that:

¹⁵⁴ *Ibid.*, point (3) of the Court's summary.

¹⁵⁵ *Ibid.*, [24].

¹⁵⁶ See Judgment of the Court of July 13, 1989, *François Lucazeau and others v. Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, C-110/88, ECLI:EU:C:1989:326.

¹⁵⁷ After all, according to Article 17(11), Article 16 of the Services Directive does not apply to any kinds of service-type activities concerning copyright and related rights.

¹⁵⁸ Judgment of the Court (Fourth Chamber) of February 14, 2016, *OSA – Ochraný svaz autorský pro práva k dílům hudebním o.s. v. Léčebné lázně Mariánské Lázně a.s.*, Case C-351/12, ECLI:EU:C:2016:110.

Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Articles 56 TFEU and 102 TFEU must be interpreted as *not precluding national legislation*, such as that at issue in the main proceedings, *which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single copyright collecting society ...* (emphasis added)¹⁵⁹

Article 98(6)(c) of the Czech Copyright Law was the object of the dispute. It provided that only one organization was to be authorized to manage a given right. Although the CJEU did not use the expression “natural monopoly”, its reasoning corresponded to the criteria by which not only a *de facto* but also a *de jure* monopoly is acceptable. The Court held that the statutory provision on CMO monopoly in the given case (the public performance of musical works) was “suitable for protecting intellectual property rights, *since it is liable to allow the effective management of those rights and an effective supervision of their respect in that territory*” (emphasis added).¹⁶⁰

The Court’s findings seemed to remain valid even after the entry in force of the CRM Directive. The Court stated that, *for the effective exercise of the right concerned* (the right of communication to the public of musical works), the provision on *de jure* monopoly *was necessary*. The directive adopted one day before the judgment may have included some provisions that might be interpreted as obligating Member States to allow in their territory the operation of parallel CMOs (even foreign CMOs), but to prescribe multiple representation in a natural monopoly situation like that considered in *OSA* would be to insist that the exercise of the rights concerned should be rendered less effective.

The original draft of the CRM Directive was based on an idea (rejected later by the CJEU in *OSA*) that the freedom of providing services under the Services Directive should be applicable to CMOs. In the course of the preparatory work of the Directive, this idea was overturned. Nevertheless, those who opposed it seemed to overlook Article 37(2), which remains in the Directive. Not only does it allow a CMO established in a Member State to operate in any other Member State, but also the government in the latter has no competence over the foreign CMO and hence cannot guarantee that its operations are lawful under the State’s national provisions. In this situation, the only thing that the government may do is to turn to the authority of the country in which the foreign CMO has been established and request that it take appropriate action within *its* competence – and the only thing the government making the request can expect under the Directive is that the authority of that other country will “provide a reasoned reply within three months.”

If a Member State is to fulfill its obligation to “ensure the application of” and “give effect to the provisions”¹⁶¹ of the international treaties to which it is party, two options seem to be available should a foreign CMO take advantage of Article 37(2) of the CRM Directive.

- (i) It is quite evident that, if the activities are in conflict with certain provisions of the Directive and violate substantive national norms (particularly if they amount to infringements), the authorities not only are allowed to apply the measures foreseen in the national law but also may be *obliged* to do so.
- (ii) If, by introducing “competition” in a case where the recognition of natural monopoly is justified, the operation of a foreign CMO endangers the effective exercise of a right to be protected under the EU law and the international treaties and, as a result, it creates legal uncertainty, increases costs to the interested stakeholders and decreases remuneration for the rightholders, the country concerned – as the CJEU clarified in *OSA* – cannot be required to stand idly by while the effective functioning of its copyright and collective management system is harmed.

While the Czech Republic appealed the Commission’s opinion, Hungary chose instead to modify Article 86(2) of its 1999 Copyright Law (similar to Article 86(2) of the Czech Copyright Law) by Act CLXXIII of 2011 and to allow, in principle, the establishment in its territory more than one CMO to manage the same right – but it put a safeguard in place: under Article 91(4) of the Copyright Law, the authorization of another CMO remained impossible in the case of mandatory and

¹⁵⁹ *Ibid.*, summary of the findings of the judgment.

¹⁶⁰ *Ibid.*, [72].

¹⁶¹ As required by the provisions of Article 36 of the Berne Convention.

extended collective management (see Chapter 5). In these instances (i.e., those in which there was, in practice, a natural monopoly situation), it was clear that competition would endanger the operability and efficiency of the collective management system.

The Hungarian government based its new regulation on the same considerations as what the CJEU set out in its *OSA* judgment *four years later*. The new Hungarian provisions entered into force on January 1, 2012, long before the CJEU's judgment in *OSA* – and even before the 2013 judgments of the General Court in *CISAC*¹⁶² and specifically in *Artisjus*¹⁶³ (a similar case initiated by the European Commission).

When the CRM Directive was implemented in Hungary – in a new Collective Management Act (Act XCIII of 2016), which replaced Chapter XII of the Copyright Law on collective management – both the freedom of association of rightholders and the principle that the effective operability of the collective management system must be preserved were confirmed. Under Articles 32 and 33 of the 2016 Act, a CMO that fulfills the general conditions does not need any authorization beyond registration at the Hungarian Intellectual Property Office (HIPO) if it does not wish to be recognized and registered as a “representative CMO” (and unless it is seeking to perform mandatory and extended collective management). Thus, such CMOs may manage in parallel the same category of rights of different groups of the same category of rightholders. However, by virtue of Article 35 of the Act, where mandatory or extended collective management applies, authorization to manage the same right of the same category of rightholders will be granted to more than one CMO, or a new CMO in addition to that already functioning, only if such authorization does not endanger the operation and efficiency of the collective management system.

Where two or more CMOs ask for such authorization and they fulfill the conditions under Article 34, then – by virtue of Article 89 of the 2016 Act – they must agree between or among themselves which of them grants licenses on the basis of extended collective management or collects remuneration in the framework of mandatory collective management on behalf of those rightholders who are not represented among the organizations' repertoires. Such CMOs, by virtue of Article 90 of the Act, must also reach agreement on jointly applicable tariffs and on which of them will collect remuneration on behalf of the other(s). If they are unable to reach agreement on either or both of these issues, the HIPO will appoint that CMO which better meets the conditions of authorization under Article 34 and a new CMO may be authorized at the same time as the former one withdraws only if it better satisfies those conditions.

Conditions to be fulfilled in a natural monopoly situation, the impact of uncontrolled competition and the management of rights in the absence of a natural monopoly

As discussed above, in a natural monopoly situation, it is not advisable to increase the number of CMOs to manage the same right, since their parallel operation tends to decrease their efficiency, increase their costs, and introduces legal uncertainty. However, where the conditions of natural monopoly do not exist, several organizations may be established to manage the same right – at least in principle, even if in practice the issues of decreased efficiency and legal certainty remain. Should parallel organizations proliferate beyond a certain point, in accordance with the Hegelian principle that quantitative changes eventually have qualitative effect, the question emerges whether the system remains collective management or is rather a network of competing agencies representing different repertoires. (See Chapter 10 for more on the way in which the online digital environment has conspicuously dismantled natural monopoly conditions for the use of musical works, enabling even individuals to control the trans-border uses of their works.)

At this point, it should be recalled that there are two main forms of anticompetitive behavior to which an organization can fall prey: concerted practice to artificially eliminate competition (i.e., unjustified monopoly or oligopoly); and abuse of a dominant market position, irrespective of how that position has emerged. The first – the unacceptable elimination of competition – is discussed in the next section, but noting here too that the existence of a natural monopoly situation is a

162 Judgment of the General Court (Sixth Chamber) of April 12, 2013, *International Confederation of Societies of Authors and Composers (CISAC) v. European Commission*, T-442/08, ECLI:EU:T:2013:188.

163 Judgment of the General Court (Sixth Chamber) of April 12, 2013, *Artisjus Magyar Szerzői Jogvédő Iroda Egyesület v. European Commission*, T-411/08, ECLI:EU:T:2013:172.

strong indication that an organization will not be found in breach of antitrust rules. The second potential behavior is not only relevant but critical to the operation of CMOs – particularly those in *de facto* or *de jure* monopoly positions, which are dominant by definition, both in the marketplace and in their relationships with both the users of their repertoires and the rightholders whose rights they manage.

There are some countries in which several CMOs have been established and are operating even in fields in which, in most other countries, CMOs are in a *de facto* or *de jure* monopoly position. This may include the most typically – traditionally – natural monopoly situation: management of the right of public performance of musical works. Whether or not such systems function appropriately depends largely on context. Examples of systems in the United States, Brazil and Ukraine will illustrate the potential differences.

In the United States, as in the overwhelming majority of other countries, the original – first – society set up centered on “musical performing rights”. Established in 1914 to manage the right of public performance in musical works, the operations of the American Society of Composers, Authors and Publishers (ASCAP) were similar to those of its contemporaries in Europe, with which ASCAP concluded reciprocal representation agreements, and it became a member of CISAC.

This situation changed in 1930, when ASCAP lost its complete monopoly position, because another – at that time small – society was formed under the name Society of European Stage Authors and Composers (SESAC) (which, in 1940, when it began representing not only European authors, changed its full name merely to “SESAC”, and even more in 1939 when another big one – Broadcast Music Inc. (BMI) – was set up for the management of musical performing rights.

While, at the beginning, there were still significant conflicts between these organizations – in fact, BMI was born as an outcome of disputes between ASCAP and the National Association of Broadcasters (NAB) about ASCAP’s licensing practices and membership policy¹⁶⁴ – later, in view of their common interests, the three CMOs went on to function well as a network for the management of musical performing rights (and all the three became members of CISAC). (For the management of mechanical rights in the United States, see Chapter 10 in connection with the review of the Music Modernization Act of 2018.)

While this specially developed system of a small number of CMOs managing the same rights functions satisfactorily in the huge market of United States, it may not be the case in other countries; each country is well advised to consider carefully its own conditions, requirement and traditions.

Brazil, for example, demonstrates how increasing numbers of competing CMOs may endanger the operation of the collective management system and the protection of the rights concerned. To make the system work for both rightholders and users, a central umbrella organization – Escritório Central de Arrecadação e Distribuição (ECAD) – was set up to act as a “one-stop shop” for users, to collect remuneration from them, and (after deducting its costs) to distribute remuneration proportionately to its partner¹⁶⁵ and associated¹⁶⁶ organizations.¹⁶⁷

In Ukraine, for a while, the collective management system was ineffective – to the frustration of the international copyright community. It was the consequence of some ill-advised choices made during the country’s transition from centrally controlled to market economy (see Chapter 7) for the transformation of a state system into a private one, apparently based on a regrettable misunderstanding of the role of competition in collective management.

Originally, the Ukrainian Association of Copyright and Related Rights (UACRR), a state institution, was established to manage musical performing rights in the newly independent Ukraine. It concluded reciprocal representation agreements with foreign societies, the repertoires of which

164 ASCAP increased its tariff for broadcasters from 3 percent to 5 percent of revenue and it did not duly take into account the actual part of music within the programs of the various broadcasters. ASCAP also applied a closed membership policy that allowed BMI to recruit members from among those composers and lyricists to whom ASCAP had not granted entry.

165 In alphabetical order: AMAR, BRAMUS, SBACEM, SICAM, SOCINPRO and UBC.

166 ABRAC, ANACIM, ASSIM and SADEMBR.

167 The various complaints made about ECAD’s operation and the measures taken as a consequence are beyond the scope of the chapter.

were widely used in the country, and it became a recognized member of CISAC. In time, however, groups with nebulous membership (sometimes rightholders; sometimes not) began to seek – and obtain – authorization as CMOs from the Ukrainian intellectual property office based on a bald conception of competition law. In the absence of appropriate controls (i.e., checks that these would-be CMOs were able to function adequately), confusion abounded in a field in which a natural monopoly would have been justified. Some 20 so-called CMOs – several of them rogue entities with no appropriate repertoires, aggressively collecting but not duly distributing remuneration – undermined the activities of the well-established CMO, the UACRR, which had by far the biggest repertoire (both domestic and international), and disrupted the system of copyright protection in an important field.

The Ukrainian Government understood that these developments had gone in the wrong direction and, in parallel with the transformation of the IP administration, it made steps to remedy the situation. It sought and received support in overhauling its collective management system not only from the governments of those countries whose musical repertoires were mainly concerned but also from the international NGOs (CISAC, SCAPR and IFPI) interested in the management of musical rights, as well as from IFRRO, representing rights in text and images, and particularly from WIPO, which the Ukrainian government asked to play an active role in mediating new legislative norms. The complex and context-specific solution has been to recognize a natural monopoly for the management of those rights mostly concerned, and to apply for those rights extended and, where appropriate, mandatory collective management. (For some details of these changes, see Chapter 5.)

Prohibition of concerted practices and collective management

That the effective collective management of certain rights requires the existence and recognition of natural monopolies is particularly true of the management of musical “performing rights” (which, in a broader sense, mean not only public performance but also broadcasting, rebroadcasting, retransmission by cable – and now, in an even broader sense, also non-interactive streaming). The natural monopolies enjoyed *de facto* or *de jure* by musical performing rights societies (which can grant blanket licenses to users as “one-stop shops”) were secured by means of two steps:

- (i) the rightholders of the various countries set up their societies; and
- (ii) these peer societies concluded reciprocal representation agreements, making it possible for each to offer an effectively global repertoire to its users.

The emergence of such a monopoly position drew the attention of competition authorities (usually as a response to complaints by users who were reluctant partners to these CMOs). Their focus was, for example in the United States, the repertoires of the societies (and the establishment of common licensing and distribution rules) and, for example in the European Union, the network of reciprocal representation agreements.

In the United States, it is the Sherman Antitrust Act of 1890 that sets out the basic legal principles and provisions on competition. In general terms, it prohibits both concerted practices, including anticompetitive agreements and any attempts to monopolize a given market, as well as any abuse of a dominant position.

As mentioned above, three CMOs – first, ASCAP; then, SESAC; then, BMI – were established in the United States as musical performing rights organizations (PROs). Initially, however, ASCAP and BMI were in *de facto* dominant position vis-à-vis music users (and hence critics called them a “duopoly”). Time and again, ASCAP faced charges of the sort set out in a 1948 competition law case:

Almost every part of the ASCAP structure, almost all of ASCAP’s activities in licensing [...] involve a violation of the anti-trust laws. 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. [...] ¹⁶⁸

¹⁶⁸ *Alden-Rochelle, Inc. v. AMERICAN SOC. OF C., A. AND P.*, 80 F. Supp. 888, 893 (S.D.N.Y. 1948) of July 19, 1948.

The judgments went so far as to deny – at least indirectly – the right of authors and other rightholders to establish CMOs for anti-trust reasons (and thus their freedom of association): a position that, had it been adopted into U.S. law in general, would have endangered the exploitation of the rights concerned.

No such extreme step was taken, however, even if the Department of Justice (DoJ) seemed to be tempted to go so far. In 1934, the DoJ launched a lawsuit against ASCAP alleging violation of the Sherman Act. At first, it accused ASCAP of concerted practices/anticompetitive agreements *among its members* (and the management), and it asked that ASCAP be abolished.¹⁶⁹ Later, the DoJ downgraded its demands and, in 1941, a “consent decree” was adopted to determine certain conditions that ASCAP would have to fulfill if it were to be allowed to continue to operate. ASCAP’s consent decree was later modified more than once – for the last time, in 2001. A consent decree was also adopted to determine the conditions of BMI’s operation, last amended in 1994.

In large part, the consent decrees prescribed measures aiming to prevent ASCAP and BMI from abusing their position of dominance vis-à-vis both members and users. Nevertheless, the decrees also prescribed some measures that aimed to weaken the organizations’ monopoly position, such as the requirement that they offer per-program licenses as alternatives to blanket licenses and allow the members of the societies to license users in parallel.

In 2014, the DoJ launched consultations for further modification of the consent decrees – reflecting the pace of technological and business-model change since 2001 and 1994 (their last versions), and the decrees’ decreasing relevance. Yet the objective of the review stopped short of any real modernization, focusing instead on an idea that did not promise a more competitive environment; rather, it offered a “solution” that would limit contractual freedom (and the freedom of association) of joint authors of works, disrupt the CMOs’ well-established licensing practices and introduce incongruence with U.S. law on joint authorship.

The DoJ’s idea was that ASCAP and BMI should grant only “100 percent licenses” for the use of coauthored works. It would mean that if the composer of a musical work were a member of ASCAP and the lyricist, a member of BMI or a CMO in another country, and if either were to grant a license for the use of the work, it would be valid for the entire work, regardless of whether or not the other were happy to authorize such use.

The international copyright community – following this debate closely because the repertoires of ASCAP and BMI included the works of foreign authors and other rightholders on the basis of reciprocal representation agreements – was surprised. Not only is it rarely the case elsewhere that more than one organization manages musical performing rights (at least the “traditional” ones), and hence it is relatively rare that composers and lyricists are members of different CMOs, but also because copyright law, in general, provides that a coauthor cannot unilaterally authorize the use of the joint work (i.e., without the consent of their coauthor(s)).¹⁷⁰ This is true, for example, of the copyright laws of China, France, Germany, Japan, the Russian Federation, Spain and several Latin American countries,¹⁷¹ and it seems also to apply under the copyright laws of the countries that follow the common law tradition, which (for example, Australia, New Zealand, Singapore or the United Kingdom) usually provide that the status of coauthors corresponds to the status of individual authors as regards the ownership and application of copyright.¹⁷² It is also true in international law: the idea of disregarding the exclusive rights of coauthors to decide whether or not they authorize certain acts is inconsistent with the Berne Convention. Other than Article 7bis

169 For detailed descriptions of the process of determining consent decrees, their subsequent versions and contents, see Glynn Lunney (2016). “Copyright collectives and collecting societies: the United States experience” in Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights – Third Edition. Alphen aan den Rijn*: Wolters Kluwer, 238–243.

170 It is another matter that the coauthors are generally supposed to exercise their rights to agree or not agree in good faith, and certain laws provide that a court is to decide in the event of disagreement.

171 See Article 14 of the Copyright Law of China; Article L-113-3 of the French Intellectual Property Code; section 8(2) of the German Copyright Law; Article 65(2)–(3) of the Japanese Copyright Law; Article 1258 of Pt IV of the Russian Civil Code; Article 7(2) of the Spanish Intellectual Property Code. See also Article 23 of the Copyright Law of Brazil; Article 18 of the Copyright Law of Colombia; Article 23 of the Copyright Law of Chile; Article 112 of the Organic Code on the Social Economy of Knowledge, Creativity and Innovation of Ecuador; and Articles 80 and 81 of the Copyright Law of Mexico. Under the copyright law of some other Latin American countries, each coauthor may authorize the use of their own contribution to the works of co-authorship provided that they do not prejudice the exploitation of the rights of the other coauthor(s): see Article 4 of the Copyright Law of Panama; Article 14 of the Copyright Law of Peru.

172 See sections 78–79 of the Australian Copyright Act; section 6(3) of the Copyright Act of New Zealand; sections 75–76 of the Copyright Act of Singapore; and section 10(3) of the Copyright, Designs and Patents Act of the United Kingdom.

on the term of protection, the Convention includes no specific provisions on co-authorship – and certainly no provision allowing one coauthor to unilaterally transform the exclusive right of their colleague into a mere right to remuneration.

Various copyright experts and organizations also petitioned against prescriptive “100 percent licenses”, arguing that such an obligation would position ASCAP and BMI in breach of U.S. copyright law. Paul Goldstein – a leading copyright expert – explained this particularly clearly, pointing toward the definition of “joint work” in section 101 of the U.S. Copyright Act (“A ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”) and arguing that this may be understood as a default rule whereby the exclusive right of coauthors is indivisible and must be exercised jointly.

In spite of this, the U.S. courts have taken the opposite stance – a position that corresponds to the idea of “100 percent licensing” – holding that *any* of the coauthors may authorize the use of a joint work; they are duty bound only to share the resulting remuneration with the other(s). It is, however, *a default rule applicable only in the absence of an agreement to the contrary* and such agreement is commonplace.¹⁷³

The U.S. Copyright Office has summed up in a persuasive opinion the reasons why requiring “100 percent licensing” of ASCAP and BMI would be in conflict with domestic law, the country’s international obligations and with the very objective of copyright constitutionally established:

In sum, an interpretation of the consent decrees that would require 100-percent licensing or removal of a work from the ASCAP or BMI repertoire would appear to be fraught with legal and logistical problems, and might well result in a sharp decrease in repertoire available through these PROs’ blanket licenses. It would seemingly punish copyright owners who have chosen to exercise their rights under the Copyright Act to manage their separate copyright interests through the PRO of their choice. And, at the very least, it seems inevitable that it would be extremely disruptive to the blanket licensing practices of ASCAP and BMI, upon which large segments of the music community – including songwriters, publishers and licensees – currently rely.¹⁷⁴

In spite of these apparently well-founded arguments, the DOJ decided, in August 2016, that the consent decrees *must* be interpreted and applied so as to require ASCAP and BMI to grant “100 percent licenses” – although there was hope that this might not be the last word.

In 2019, the DOJ launched a new round of public consultation, including questions that suggested not only the possible elimination from the decrees of the most controversial conditions but even their termination or phasing out (with a “sunset clause”).¹⁷⁵ Yet on January 15, 2021, the DOJ decided to maintain a system – now 80 years old – that critics argue no longer corresponds with new technology and business methods, and is therefore more disadvantageous to rightholders than ever.¹⁷⁶

173 Paul Goldstein pointed out this in his submission to the Department of Justice on November 18, 2015 :

Courts deciding disputes between joint work co-owners generally look for analogies to the rules governing real property tenancies in common. As a consequence, courts hold that each joint work co-owner owns an undivided fractional interest in the copyrighted work that gives it standing to sue for copyright infringement without joining the other co-owners; that entitles the co-owner, in the event of suit, to recover a complete, rather than a divided, damage award, subject only to a duty to account to the non-joining co-owners; and that empowers the co-owner to (non-exclusively) license others to exploit the entire copyrighted work, again subject to a duty to account to co-owners for their share of the profits earned.

The Copyright Act allows co-owners complete freedom to alter any or all of these default rules. So, for example, co-owners may agree that their undivided interests will be allocated other than according to the principle of equality; that one co-owner may transfer an exclusive (rather than nonexclusive) license to exploit the co-owned work to a licensee; and that no co-owner may grant even a nonexclusive license to exploit the co-owned work without the assent of all co-owners (emphasis added).

174 See www.copyright.gov/policy/pro-licensing.pdf

175 See www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019

176 See ASCAP (2021). *An Open Letter from ASCAP CEO Elizabeth Matthews and BMI President and CEO Mike O'Neill in Response to the DOJ Closing Statement on the ASCAP and BMI Consent Decrees*. January 15. Available at www.ascap.com/press/2021/01/01-15-ascap-bmi-consent-decrees. See also Malcolm Owen (2021). *DOJ keeps 80-year-old music licensing rules affecting Apple Music intact*. January 16. Available at <https://appleinsider.com/cdn.ampproject.org/c/s/appleinsider.com/articles/21/01/16/doj-keeps-80-year-old-music-licensing-rules-affecting-apple-music-intact/amp/>; and Jem Aswad (2021). *Justice Department leaves music industry consent decrees unchanged*. *Variety*. January 15. Available at <https://variety.com/2021/music/news/justice-department-music-consent-decrees-unchanged-1234886620/>

It is to be noted, however, that the objective of the consent decree system is to serve as defense against alleged concerted practices. There is another mechanism to prevent the PROs' possible abuse of a *de facto* monopoly (or rather duopoly) position; namely the "rate court" system updated by the Music Modernization Act.

In the United States, the content decrees originally were adopted on the basis of the assumption that the very establishment of authors' societies and the jointly licencing of their repertoires may qualify as concerted practices. In the European Union, such an extreme opinion has not emerged, only the CMOs' network of reciprocal representation agreements has raised the regulators' suspicion about concerted practices. This led in 2008 to the *CISAC* case brought by the European Commission for alleged concerted practice among E.U. CMOs.¹⁷⁷

The *CISAC* case originated in two complaints by commercial users.

- In 2000, RTL Group filed a complaint against GEMA, the German authors' society, for its refusal to grant a license for broadcasting rights covered by its repertoire (including the works of foreign authors represented on the basis of reciprocal representation agreements) beyond Germany also to the entire territory of the European Union.
- In 2003, Music Choice (a digital content provider) filed a complaint alleging that the *CISAC* Model Contract for reciprocal representation agreements¹⁷⁸ did not allow *CISAC*'s member societies to grant multi-territorial licenses.

At the end of January 2006, the European Commission addressed a statement of objections to *CISAC* and the CMOs. In March 2007, *CISAC* and its member societies offered several commitments to the Commission, but the Commission did not find them satisfactory and, in July 2008, it published a decision in which it held that 24 *CISAC* member societies had engaged in concerted practices by reaching agreement on the territorial scope of their activities, making it impossible for organizations to compete with one another in granting multi-territorial, multi-repertoire licenses for the exploitation of rights.¹⁷⁹ The decision related mainly to rights in musical works and solely to their exploitation via Internet, satellite and cable retransmission. *CISAC* and its member societies appealed against the decision, and in April 2013 the General Court of the CJEU found in their favor, holding that the Commission had not succeeded in proving concerted practice.¹⁸⁰

In the meantime, as a result of the "sunset" of the Santiago agreements¹⁸¹ (see Chapter 10) and the relevant provisions of the Satellite and Cable Directive,¹⁸² trans-border multi-territorial licensing had become possible and, to that extent, the dispute had been settled indirectly.¹⁸³ Thus, the Court had to deal mainly with the more "traditional" aspects of musical performing rights, in which field CMOs had been established and operated on a territorial basis without cross-border licenses, in accordance with objectively existing natural monopoly situations. Demands for change consequently seemed to ignore the old maxim, "if it ain't broke, don't fix it", threatening to introduce troubles into a settled space. It proved eloquently that a system of national CMOs, operating as "one-stop shops" able to grant blanket licenses for the use of not only their own repertoires but also relevant foreign repertoires is to the general benefit of all interested stakeholders, including lawful users, that the EBU (the representative organization of one of the most important categories of music users in the European Union) intervened in the case to support *CISAC* and its member societies.

177 The basic competition rules may be found in Articles 101 and 102 of the TFEU (ex Articles 81 and 82 of the TEC). There are essentially two kinds of prohibited behavior: (i) concerted practices – i.e., agreements to restrict competition – under Article 101 of the TFEU (ex Article 81 of the TEC); (ii) abuse of dominant positions – under Article 102 of the TFEU (ex Article 82 of the TEC). The Commission is empowered by the Treaty to apply these rules and enjoys a number of investigative powers to that end. It may also impose fines on entities that violate these EU rules.

178 It is to be noted that, since 2005, *CISAC* has not promoted or updated the Model Contract – for competition reasons. At a maximum, it may be referred to, in certain respects, in the course of bilateral negotiations between societies.

179 See Commission Decision of July 16, 2008, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. C(2008) 3435 final, Case COMP/C2/38.698 – *CISAC*. Available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf

180 T-442/08, *CISAC*.

181 That is, agreements adopted at the 2000 Santiago de Chile congress of *CISAC* by five societies: BMI (United States), BUMA (Netherlands), GEMA (Germany), PRS for Music (United Kingdom) and SACEM (France).

182 See Article 1 of the Directive.

183 See *CISAC*, [109]–[119].

It can be demonstrated by quoting from the Court's judgment the arguments put forward by CISAC and the EBU, why the Commission's intervention was not justified, since "the parallel conduct can be explained by reasons other than the existence of concertation":¹⁸⁴

The applicant [CISAC], supported by EBU, claims that *the national territorial limitations are the result of individual, carefully considered and rational decisions on a practical and economic level, given the specific conditions of the market, and not the result of a concerted practice*.¹⁸⁵

The applicant's arguments relating to the existence of explanations – other than the existence of concertation – for the parallel behaviour of collecting societies are centred on *the need for a local presence to monitor effectively the exploitations of copyright and the need to ensure that the amount of royalties received by the authors does not diminish*.^[186] The applicant also refers to the importance of national territorial limitations *for maintaining the existence of national "one-stop shops" from which users may obtain licences in respect of the worldwide repertoire. That last argument is developed by EBU*.¹⁸⁷

The applicant and EBU submit that the collecting societies considered it was in the interest of their members, and therefore rational, to provide for territorial limitations in their RRAs, since *those limitations were a means of ensuring the effectiveness of the fight against the unauthorised use of musical works* (emphasis added).¹⁸⁸

Agreeing with these weighty considerations, the Court annulled the relevant parts of the Commission's decision:

On the basis of the foregoing, it must be found that the Commission has not proved to a sufficient legal standard the existence of a concerted practice relating to the national territorial limitations, since it has neither demonstrated that the collecting societies acted in concert in that respect, nor provided evidence rendering implausible one of the applicant's explanations for the collecting societies' parallel conduct.¹⁸⁹

That same day, a parallel case reached its conclusion in the General Court. Artisjus, the Hungarian CISAC member society, had appealed against a Commission decision finding concerted practice for the same reasons. The Court delivered a judgment consistent with its ruling in CISAC and with almost identical reasoning.¹⁹⁰

One organization or separate organizations to manage different rights? Cooperation and "coalitions" between CMOs

The description of the main types of collective management of copyright in Chapter 1 may suggest that the establishment and operation of one organization in a given country is the most effective model. When an organization focuses across a range of rights, or manages only one category of rights but for the benefit of different categories of rightholders, it can be more cost-effective than parallel organizations (representing necessarily smaller repertoires). It uses the same apparatus for different rights – and by avoiding the necessarily duplicative costs of parallel organizations representing smaller repertoires, rightholders generally benefit from higher rates of remuneration and users, fewer administrative burdens and costs.

The majority of the strongest and oldest collective management organizations – the musical "performing rights" organizations (PROs) – represent the rights not only of authors but also of music publishers. In general, this is also true of the reprographic reproduction rights organizations (RROs). Publishers are admitted as members of such organizations and they can play a decisive role in the organizations' governing bodies.

184 *Ibid.*, [87].

185 *Ibid.*, [134].

186 In a way agreeing with that argument, the Court referred to the judgments in *Tournier* and *Lucazeau*: CISAC, para, 136.

187 *Ibid.*, [135].

188 *Ibid.*, [140].

189 *Ibid.*, [182].

190 See T-411/08, *Artisjus*, [157].

There is traditionally an alliance between composers and lyricists, on the one hand, and music publishers, on the other. As mentioned in Chapter 1, when Henrion, Parizot and Bourget launched their lawsuit against restaurant *Ambassadeurs* in 1847, they did so with the full support of their publisher, Jules Colombier. In fact, without him, their likelihood of success would have been meager. Publishers were both managers and patrons of their composers and lyricists, and the interests of all three were in harmony. It was therefore reasonable that they would join forces and exercise their rights within the framework of the same societies.

It should not be forgotten, however, that publishers are also businesses: they cannot neglect their profit margin and market forces. There is an increasing trend toward the merging of music publishers with producers of phonograms in huge media conglomerates. This increases the risk of conflicts of interest between publishers and authors – for example, when negotiating contract terms, or fixing authors' and publishers' shares in the CMO's distribution rules, but also in some broader aspects of collective management, such as deductions for cultural and social purposes.

In the case of authors' societies, however, it has long been only infrequently the case that publishers would be admitted as ordinary members; now, it is rare – even though it is not necessarily contrary to the interests of authors, even when publishers are allowed to play an active role in the CMO's governing bodies. There are certain ways as a result of which authors and publishers may work together harmoniously and efficiently in the collective management of their rights. Such conclusions may be drawn from the example of the management of musical “performing rights”.¹⁹¹

The advantages of authors and their publishers working together to manage rights have also been confirmed by the experience of RROs. RROs are distinguished by their establishment as special kinds of “coalitions”. The tasks of such “coalition” organizations (such as monitoring uses, collecting remuneration) may be appropriately fulfilled by only one organization, frequently according to a clearing house model, while the distribution of remuneration is usually performed by the members of the coalition, such as societies of authors (writers, authors of works of art, journalists, etc.) and publisher organizations often grouped by field (e.g., fiction, nonfiction, scientific, technical and medical, or STEM, subjects) or by medium (e.g., newspaper and other periodicals).

Coalition-type forms of collective management dominate in the case of certain rights, such as the so-called Article 12 rights,¹⁹² the rights of simultaneous and unchanged cable retransmission of broadcast programs, and the right to remuneration for “private copying”. Several national laws prescribe such joint management (frequently combined with mandatory or extended collective management) and determine default rules concerning the distribution between the various categories of rightholders of the remuneration collected.

The specific case of coalition-type CMOs managing the right of performers and producers of phonograms to a *single* equitable remuneration provided for in Article 15 of the WPPT (and Article 12 of the Rome Convention) is analyzed in the next section. There are, however, “coalitions” of CMOs also where the rights managed are not as inseparable as the right to a single equitable remuneration, but where the management of different rights is combined in a way that, although the rights are related

191 It should be evident that the close connection between music publishers and producers of phonograms – which inevitably has an impact on the activities of CMOs – corresponds to objective developments in the music industry; while, at the time of the emergence of the network of musical “performing rights” societies, the publication and distribution of sheet music were indispensable to the widespread use of musical works, with the appearance and breathtaking development of the phonographic industry, the latter took over this role step by step – in particular, as regards popular music, which is commercially by far the most important source of revenues also for the performing rights CMOs.

192 The expression “Article 12 rights” is a reference to the right of performers and producers of phonograms to a single equitable remuneration for broadcasting or communication to the public of phonograms published for commercial purposes under Article 12 of the Rome Convention. Article 15 WPPT contains similar provisions, although differently structured. As is discussed in the next section, however, an unexpected CJEU judgment has introduced uncertainty about the application of this right in the European Union and made the work of the CMOs managing the right more difficult.

Reservations to the Article 12 rights are possible under Article 16 of the Rome Convention. Several European countries have taken this route, but while they could have gone so far as to completely reject the application of the right, the majority chose the least restrictive option available – Article 16(1)(a)(iv) – and have declared only that they will not unilaterally grant the right to nationals of other countries that have similarly lodged a reservation excluding application of the right. This was frequently coupled with another reservation under Article 16(1)(a)(iii), excluding application of the right in respect of phonograms when the producers are not nationals of a Contracting State: see the declarations of Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Italy, the Netherlands and Spain, available at https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=17

In contrast, neither the European Union nor the E.U. Member States have made any such reservations under Article 15(3) of the WPPT, to the application of the right under Article 15(1): see the list of Contracting Parties and their reservations (notifications), available at https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=20

The reason is obvious: Article 4(2) WPPT itself provides that there is no obligation to extend national treatment to the nationals of other Contracting Parties that have themselves reserved that right (see the next section).

to different kinds of uses, they concern the same category of works, and, consequently, more or less the same categories of rightholders. This is the case, for example, as regards “performing rights” and “mechanical rights” in musical works, which are managed sometimes by separate organizations (SACEM and SDRM in France, PRS for Music and MCPS in the United Kingdom, BUMA and STEMRA in the Netherlands, etc.) but quite frequently by the same organization (GEMA in Germany, SGAE in Spain, SIAE in Italy, etc.). The management of different rights of the same category of rightholders by the same CMO or a closely knit group of CMOs not only makes the exercise of the rights more cost-effective but also facilitates adaptation of the collective management system to the demands of technological and business-method developments.

There is no “one size fits all” answer to the question of which solution is better: whether to set up separate organizations to manage different rights or to entrust them all to one organization. It is certainly easier to avoid the interests of certain rightholders being subordinate to the interests of others if each group of rightholders forms a separate organization. And the existence of parallel organizations does not exclude coordinated actions wherever two (or more) groups have joint interests that may be asserted more successfully if they join forces.

Both kinds of CMO structure – several parallel CMOs with mono-repertoires and a few CMOs with multi-repertoires – may function appropriately; their context is key. Much will depend on the size of the markets, on the extent to which the various categories of rightholders are organized and on the traditions within the countries involved. Indeed, to illustrate this, we can take a quick look at the collective management systems of the two key markets within the European Union – two that have diametrically opposite CMO structures, yet both of which operate adequately.

In Germany, the lion’s share of the collective management system is shared among six CMOs:

- GEMA, the oldest and most important, manages musical performing and mechanical rights;¹⁹³
- VG WORT, an RRO, manages text-based rights;
- VG Bild-Kunst, another RRO, manages image-based rights;
- GVL manages the rights of performers;
- IFPI Germany (BVMI) manages the rights producers of phonograms; and
- AGICOA manages cable retransmission rights.

In addition, there are some smaller CMOs, representing separate repertoires in a similar way to agencies, which mainly exercise certain secondary rights in film and television productions.

In contrast, in France, the CMO structure is much more diversified. On the website of the Ministry of Culture, no less than 25 CMOs listed which manage different rights of different categories of rightholders.¹⁹⁴

There are weighty arguments in favor of concentrating collective management in bigger organizations representing various categories of rights, including that comprehensive organizations may have a stronger position and better chances of success when negotiating with users and collecting remuneration. While it is true that, in such organizations, the resolution of possible internal conflicts demands care and tact, there are effective methods to tackle this potential problem and guarantee reconciliation.

¹⁹³ GEMA is now also a key member of the SOLAR (formerly CELAS) online platform: see Chapter 10.

¹⁹⁴ The 25 CMOs are listed under four titles:

Societies of authors and publishers: Société des auteurs dans les arts graphiques et plastiques (ADAGP), Centre français d’exploitation du droit de copie (CFC), Société des auteurs des arts visuels et de l’image fixe (SAIF), Société des auteurs et compositeurs dramatiques (SACD), Société civile des auteurs multimédia (SCAM), Société française des intérêts des auteurs de l’écrit (SOFIA), Société civile des éditeurs de langue française (SCELFF), Société des auteurs compositeurs et éditeurs de musique (SACEM), Société pour l’administration du droit de reproduction mécanique des auteurs, compositeurs et éditeurs (SDRM), Société des auteurs et éditeurs de musique (SEAM), Guichet commun gérant les droits des auteurs dans le multimédia (SESAM), Société des auteurs de jeux (SAJE), Société des arts visuels associés (AVA). *Societies of performers:* Société civile pour l’administration des droits des artistes et musiciens interprètes (ADAMI), Société de perception et de distribution des droits des artistes-interprètes (SPEDIDAM), Société des artistes interprètes (SAI). *Societies of producers:* Agence Nationale de Gestion des Œuvres Audiovisuelles (ANGOA), Société civile des producteurs phonographiques (SCPP), Société civile des producteurs de phonogrammes en France (SPPF), Société civile des producteurs associés (SCPA), Société des producteurs de cinéma et de télévision (PROCIREP). *Joint societies of different categories:* Société pour la perception de la rémunération équitable (SPRE), Copie-France, société pour la perception de la rémunération de la copie privée sonore et audiovisuelle, Société civile des auteurs, réalisateurs et producteurs (ARP), SORIMAGE. (See <https://www.culture.gouv.fr/Thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Liens-utiles/Organismes-de-gestion-collective>).

The question of which of the outlined solutions might be the best fit in any specific case may only be decided country by country and case by case. Much depends on such criteria as the size of the country, its population and its cultural industry, or the level of its overall economic development. For example, governments in developing countries – particularly the least-developed countries (LDCs) – which are in less advanced stages of building a copyright infrastructure and have neither the financial resources nor expertise to build multiple institutions, a centralized organization may be a more appropriate model.¹⁹⁵

Of course, it would be ill-advised to establish a CMO in which conflicts of interest are likely among the various rights of a wide range of categories of rightholders. Where, for practical reasons, such organizations come into being, governments must take special care to defend the interests of those rightholders – commonly, authors and performers – whose rights are managed alongside those of more powerful partners.

It is not unusual for CMOs to use the services of other CMOs (even those that represent other categories of rightholders) for certain purposes, such as the collection of remuneration or for “back office” services. Musical “performing rights” societies of authors had already established effective licensing, monitoring and enforcement networks by the time other categories of rightholder (especially performers and producers of phonograms) were granted public-performance-type rights of communication to the public. There were consequently cost benefits to these latter organizations if they concluded contracts with, and outsourced the collection of remuneration to, the authors’ societies. Such contract-based, combined (copyright/related rights) “one-stop shop” arrangements can also have buy-in benefits, raising awareness and boosting the credibility of the collective management of musical rights. In this way, the representatives of two or three categories of rightholder need not negotiate and license uses and collect remuneration for the use of musical works and performances recorded in phonograms and the phonograms themselves separately: an exercise complicated by the fact that these three different rights – of authors, of performers and of producers of phonograms – are commonly indistinguishable to users and the general public. In the combined system, the users pay what appears to them to be a single remuneration for the use of “music” in general, and it is up to the owners of related rights to agree on the amount (percentage) added to the society’s tariffs that is to be collected and transferred to them (after reasonable deductions of costs).

Managing the right of performers and producers of phonograms to a single equitable remuneration

In the case of a coalition in which no separate organization is to manage the rights of different categories of rightholders, but one CMO among them is appointed under national law to collect remuneration for the rightholders represented by another CMO (or for the rightholders represented by various CMOs), special guarantees are needed to prevent the appointed CMO from abusing its position to the detriment of the legitimate interests of other rightholders. The application of this principle seems to be particularly important where, under national law, the single equitable remuneration of performers and producers of phonograms provided for in Article 12 of the Rome Convention and Article 15 WPPT is to be collected by the CMO of one of two categories of rightholders (which then is to transfer the corresponding share to the CMO representing the other category).

In countries following a common law tradition, the CMO representing producers is usually the one authorized to collect the single equitable remuneration. This was a plausible solution when the right was introduced for performers, because producers of phonograms (in those legal systems, usually called “sound recordings”) had already been enjoying “copyright” for a while. In a way, it is understandable why the producers may have been initially hesitant to embrace a “newcomer” right where previously only they had held the right to collect remuneration. It is unfortunate, however, that this resistance has continued to have negative effect both on performers’ enjoyment of their right to a share from the single equitable remuneration and on the exercise of the right, usually through their CMOs.

¹⁹⁵ Many African countries have adopted such a model (Algeria, Burkina Faso, Côte d’Ivoire, Kenya, Senegal, etc.). Nevertheless, their copyright laws generally allow for separate societies to manage different rights of different categories of rightholders: see, e.g., Senegal, by virtue of Article 112 of Law No. 2008–09 of 2008; Côte d’Ivoire, under Articles 112 and 113 of Law No. 2016/555 of 2016. There are already different CMOs in operation in Cameroon, in accordance with Article 75 of Law No. 2000/11 of 2000. However, in general, only the CMOs managing authors’ musical rights operate truly effectively in these countries in terms of the collection and distribution of remuneration.

One example illustrating this effect spectacularly is a case brought before the CJEU by a performers' society and a producers' society. The case, *RAAP v. PPI*,¹⁹⁶ was followed keenly by the community of performing artists, and it demonstrates well the issues that can affect the management of rights in "coalitions" of CMOs both generally and specifically, in the case of this joint right of performers and producers of phonograms.

In 2020, the CJEU has adopted the following rulings:

1. *Article 8(2) of Directive 2006/115/EC [...] on rental right and lending right and on certain rights related to copyright in the field of intellectual property must, in the light of Article 4(1) and Article 15(1) of the [WPPT], be interpreted as precluding a Member State from excluding, when it transposes into its legislation the words "relevant performers" which are contained in Article 8(2) of the directive and designate the performers entitled to a part of the single equitable remuneration referred to therein, performers who are nationals of States outside the European Economic Area (EEA), with the sole exception of those who are domiciled or resident in the EEA and those whose contribution to the phonogram was made in the EEA.*
2. *Article 15(3) of the [WPPT] and Article 8(2) of Directive 2006/115 must, as EU law currently stands, be interpreted as meaning that reservations notified by third States under Article 15(3) of the [WPPT] that have the effect of limiting on their territories the right to a single equitable remuneration laid down in Article 15(1) thereof do not lead in the European Union to limitations of the right provided for in Article 8(2) of Directive 2006/115, in respect of nationals of those third States, but such limitations may be introduced by the EU legislature, provided that they comply with the requirements of Article 52(1) of the Charter of Fundamental Rights of the European Union. Article 8(2) of Directive 2006/115 therefore precludes a Member State from limiting the right to a single equitable remuneration in respect of performers and phonogram producers who are nationals of those third States.*
3. *Article 8(2) of Directive 2006/115 must be interpreted as precluding the right to a single equitable remuneration for which it provides from being limited in such a way that only the producer of the phonogram concerned receives remuneration, and does not share it with the performer who has contributed to that phonogram (emphasis added).¹⁹⁷*

There are two aspects to these rulings in *RAAP*. In points 1 and 3, the Court states what appears to be obvious under E.U. law and the WPPT – namely, that the Member States are obliged under Article 8(2) of the Rental, Lending and Related Rights Directive¹⁹⁸ to require in law that, where the producers collect the remuneration, they must share it with the performers (point 3) and that the single equitable remuneration must be granted also to performers who are nationals of States outside the European Economic Area (EEA), in accordance with the relevant international treaties (point 1). In contrast, what is stated in point 2 is far from obvious: it means no less than that the Court would impose a new unilateral international obligation on Member States that does follow from the WPPT (or the Rome Convention). The application of the obligation would not only impose new financial burdens to the Member States but also would lead to a drying out of the sources used by several E.U. Member States to fund the promotion of creativity and the protection of cultural diversity. Points 1 and 3 of the rulings are reviewed under this title, while point 2 is only partly here and partly in Chapter 11, in the context of CMOs' and governments' cultural and social activities.

In point 3 of its rulings, the CJEU appears to answer a question that is, in fact, *acte clair* (i.e., so clearly set out in E.U. law that it needs not be the subject of referral): "Is it permissible in any circumstances to confine the right to equitable remuneration to the producers of a sound recording, i.e., to deny the right to the performers whose performances have been fixed in that

¹⁹⁶ *Recorded Artists Actors Performers Ltd (RAAP) v. Phonographic Performance (Ireland) Ltd (PPI), Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, Case C-265/19, ECLI:EU:C:2020:677.

¹⁹⁷ Judgment of the Court (Grand Chamber) of September 8, 2020 (request for a preliminary ruling from the High Court (Ireland)), *Recorded Artists Actors Performers Ltd v. Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General*, Case C-265/19, OJ C 378/11, November 11, 2020. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62019CA0265&rid=1>. The preliminary questions to which the CJEU has responded in this way has been submitted by the Irish High Court as ruled in its judgment of January 11, 2019 ([2018] the High Court 2016 Bo 6897P (hereinafter: judgement of the referring court).

¹⁹⁸ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376/28, December 17, 2006.

sound recording?” There is good reason to consider this *acte clair* because Article 8(2) of the Directive provides in this way:

Member States shall provide *a right* in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, *and to ensure that this remuneration is shared between the relevant performers and phonogram producers*. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them (emphasis added).

The Irish court’s question was even more surprising because two sections of the country’s own Copyright and Related Rights Act, 2000 (CRRA) provides – at least in respect of Irish nationals and nationals of countries within the EEA – for an equitable remuneration to be paid by the producers to the performers for the acts mentioned above:

A performer has a right to equitable remuneration from the owner of the copyright in a sound recording where the sound recording of the whole or any substantial part of a qualifying performance which has been made available to the public for commercial purposes is—

- (a) *played in public, or*
- (b) *included in a broadcast or cable programme service.*¹⁹⁹

“qualifying country” means—

- (a) Ireland,
- (b) another Member State of the [European Economic Area (EEA)], or
- (c) to the extent that an order under section 289 so provides, a country designated under that section;

[...] (emphasis added)²⁰⁰

The text in Article 8(2) of the Directive, “to ensure that this remuneration is shared between the [...] performers and phonogram producers”, does not leave room for any contrary interpretation; thus, the CJEU has given the obvious response in point 3 of its rulings:

Article 8(2) of Directive 2006/115 must be interpreted as precluding the right to a single equitable remuneration for which it provides from being limited in such a way that only the producer of the phonogram concerned receives remuneration, and does not share it with the performer who has contributed to that phonogram.

Point 1 seems to be a response to the second preliminary question of the Irish court:

Does a Member State have discretion to prescribe criteria for determining which performers qualify as “relevant performers” under Article 8 of the directive? In particular, *can a Member State restrict the right to share in equitable remuneration to circumstances where either (i) the performance takes place in [an EEA] country, or (ii) the performers are domiciles or residents of an EEA country?* (emphasis added)

Article 8(2) is to be regarded as implementing Article 15(1) WPPT on the right of the performers and producers of phonograms to a single equitable remuneration, which the Contracting Parties (including the European Union and its Member States) are obliged, by virtue of Article 4(1) of the Treaty on national treatment, to extend to performers and producers who are nationals of other Contracting Parties. The only exceptions are where a Contracting Party has made a reservation under Article 15(3) of the Treaty to exclude or limit the application of the right (and neither the European Union nor any Member State has done so), or where another Contracting Party has done so and therefore, as provided in Article 4(2), no Contracting Party is obliged to extend the right unilaterally. Thus, this preliminary question may also be considered an *acte clair* and, in its point 1, the CJEU has responded accordingly.

199 Section 208(1) of the CRRA.

200 Section 287 of the CRRA. Until the lawsuit, no such country had been so designated per item (c).

Before turning to the more problematic point 2 of the rulings, it is necessary to outline the reasons why – despite the issues appearing to be *acte clair* and its own thorough analysis – the Irish court felt it necessary to submit these preliminary questions. It is also worth noting that there remain issues in the conflicts between RAAP and PPI that were not been addressed in RAAP – partly because the Irish court submitted no appropriate preliminary questions to the CJEU, and partly because they were addressed in a parallel lawsuit between RAAP and PPI.²⁰¹ Since these issues relate to significant aspects of collective management, it is apt to explore them too.

The basic problem facing the Irish High Court was the asymmetric status of the two categories of beneficiaries of the single equitable remuneration under the CRRA. By virtue of section 17(2)(b) of the Act, “sound recordings” (i.e., phonograms) are protected by “copyright”, which, in accordance with section 17(1), “is a property right whereby, subject to this Act, the owner of the copyright in any work may undertake or authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright”, while section 38(1) of the Act requires users to make payment the producers, as copyright owners, for the acts covered under Article 15(1) WPPT. There is no reference here to the single equitable remuneration nature of the payments that would be also due to performers. Under section 208(1), however, performers have a right to equitable remuneration – but there is no mention here either about the *single* nature of the equitable remuneration to be paid *by the users* to performers and producers jointly; on the contrary, performers may claim the remuneration only *from the producers*.

It follows from this asymmetric regulation – although the CJEU ignored the issue in RAAP – that the CRRA was not congruent with Article 8(2) of the Directive and Article 15(1) and (2) WPPT. This was true in two key regards:

- (i) no *single* equitable remuneration is provided but *two separate rights* – a stronger right to the producers, who are to collect remuneration from the users, and a subordinate right of performers to claim remuneration from the producers; and
- (ii) while under Article 8(2) of the Directive and the first sentence of Article 15(2) WPPT, the single equitable remuneration of the producers *and the performers* is due *from the users*, under the CRRA, performers’ right to an equitable remuneration may be claimed only *from the producers*.

It should be noted that the source of the apparent conflicts with the Directive and the WPPT is not the different legal characterization of the right of the producers as copyright but that the principle of the “*relative freedom of legal characterization*” was disregarded.²⁰² PPI applied a practice that reflected its belief that producers are the only real owners of the right to a payment from the

201 See *Recorded Artists Actors Performers Ltd v. Phonographic Performance (Ireland) Ltd* [2018] IEHC 2, [2019] IEHC 3; *Recorded Artists Actors Performers Ltd v. Phonographic Performance (Ireland) Ltd* [2020] IECA 82.

202 See Chapter 10 for more on the principle, as presented in Ficsor, *WIPO Guide and Glossary*. It is submitted that this principle applies equally not only to the legal characterization of acts covered by copyright and related rights and the exceptions to and limitations of the rights but also to the legal characterization of the subject matter of rights.

“Phonogram” is defined in Article 2(b) WPPT: “(b) ‘phonogram’ means the fixation of the sounds of a performance or other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.” The Rental, Lending and Related Rights Directive does not contain any such definition. At the time of its adoption in 1991, the definition set out in Article 3(b) of the Rome Convention was simpler but largely the same as that set out in the WPPT: “(b) ‘phonogram’ means any exclusively aural fixation of sounds of a performance or of other sounds.” Although the European Union is not party to the Rome Convention, it is a Contracting Party to the WPPT; thus, it is hardly questionable that the definition under Article 2(b) of the WPPT is applicable in the European Union and in its Member States.

In section 2(1) of the CRRA, “sound recording” is defined thus: “‘sound recording’ means a fixation of sounds, or of the representations thereof, from which the sounds are capable of being reproduced, regardless of the medium on which the recording is made, or the method by which the sounds are reproduced.” One element is therefore missing, suggesting the definition might be incongruent with the Rome Convention and WPPT – namely, it is not clear that it is an exclusively *aural* fixation. But this does not seem to be a substantive issue: if any doubt were to be raised, it could be easily settled through appropriate interpretation.

Having clarified this, it may be said that the CRRA definition corresponds, in essence, to the definition set out in Article 2(b) of the WPPT. It is about the same subject matter of intellectual property rights. Indeed, “sound recording” is an English translation of the Greek “phonogram” (*phono* = “sound” + *gram* = “writing, recording”). Therefore, there can be no doubt that the Irish law provisions on “sound recordings” would have to be in accordance with the provisions on the protection of “phonograms” under E.U. law and the relevant international norms. The characterization of sound recordings/phonograms as subject matter of copyright rather than related rights would not in itself create a conflict with the international and E.U. norms. Nor should there be a conflict with international norms if additional rights were to be granted to the producers of phonograms; likewise not under E.U. law, if a country were to grant the same extra rights to the nationals of other E.U. Member States.

What is problematic, however, is that the different legal characterization must not result in the denial or inappropriate limitation of a right to be granted under E.U. law – yet, in Ireland, the different characterization of the rights of producers of phonograms as “copyright” in contrast with the related rights of performers embodied in phonograms seems to result in conflicts that inhibit the ability of performers to exercise the rights of those whom they represent.

users and that they had to make payment to performers only for *the contributions to the producers' productions* – the sound recordings – protected by “copyright”.

To understand how serious problems have emerged as a consequence of a less-than-lukewarm attitude to performers' rights, it is necessary to review the status of RAAP and PPI under Irish law. According to section 281 CRRA, three different types of CMO (“licensing bodies”) may be registered with the Controller of Intellectual Property:

- (i) a body that has the right “to act [...] until the contrary is proved [...] on behalf of the classes of rightsowners for whom it claims representation rights” (emphasis added);
- (ii) a body that has the right to act “on behalf of the rightsowners who have assigned rights to it”; or
- (iii) a body that has the right to act “exclusively licensed to act”.

Both RAAP and PPI had been registered as CMOs (“licensing bodies”) in the first category: RAAP as the only CMO registered to claim remuneration for the class of performers; PPI, the only CMO registered to claim remuneration for the class of producers. In other words, each of them was authorized to manage the rights of the category of rightholders for which it had been registered in a presumption-based system (see Chapter 5) but not for the rights of the other category of rightholders. In the case of RAAP, its registration – effective during the legal proceeding – as a “licensing body for performers' rights”, authorized it to operate a presumption-based collective management system, applied to the representation of the following “classes of rightholders”:

- 1) Musicians
 - a) Featured Artists including Bands & Solo Artists;
 - b) Non-Featured Artists (session musicians);
 - c) Orchestras and Orchestra members;
- 2) Performers – Singers, Choirs, Comedians;
- 3) Actors²⁰³

This list clearly included the classes of performers whose performances are embodied in phonograms published for commercial purposes and used for broadcasting and communication to the public.

It follows from this that, since PPI was not registered to manage the rights of performers, it was not authorized to perform any management activities in respect of rights other than to collect the single equitable remuneration and to transfer to the performers their due share.

Consequently, it was not PPI but RAAP (the CMO representing performers) that was to fulfill all other management activities, which were to include:

- (i) distributing and paying the corresponding amounts of share of the single equitable remuneration transferred by the PPI to its members and to the performers otherwise represented by it on the basis of the presumption of representation under Section 280(7) of the CRRA;
- (ii) transferring the corresponding amounts of remuneration due to the performers represented by foreign CMOs as agreed upon in the reciprocal representation agreements concluded with those CMOs;
- (iii) deducting amounts for cultural and social purposes, if any, in accordance with the decisions of the competent bodies of RAAP and with the reciprocal representation agreements concluded with foreign CMOs;
- (iv) performing “diligent search” to identify and locate performers to whom remuneration is due;
- (v) applying the policy established, and the decisions made, by the competent governing bodies of the organization on the use of non-distributable amounts of remuneration;
- (vi) clarifying – on the basis of the available databases and a “diligent search” that may be needed – whether or not certain amounts correspond to the use of performances that do not enjoy protection (in other words, that are in the public domain) for some reason; such as because (a) their term of protection has expired; or (b) their performers are nationals of a country who – in the absence of treaty relationship – do not enjoy protection; or (c) although their performers are nationals of a country that is party to the WPPT, for the relevant acts, by

203 Order No. P/21/03/0004/.

virtue of Article 2(4) of the Treaty, they do not enjoy protection (there is no obligation to pay remuneration to them) because their country has made a reservation to the application of the right in respect of such acts;

- (vii) taking care of the use of the amounts corresponding to the use of performances mentioned in the preceding point not covered by any treaty obligations and, thus, outside the contours of intellectual property rights, in accordance with the national laws that are competent to provide about their purposes, such as using the amounts for cultural and social purposes and the promotion and recognition of creative activities of performers.

PPI did not recognize RAAP's authorization to carry out these collective management activities for performers in accordance with the CRM Directive as a CMO authorized to operate a presumption-based system. It took over, step by step, the various competences, reducing RAAP's role in effect to nothing more than paying out to its members the remuneration already distributed by PPI.²⁰⁴ Several conflicts thus emerged from these practices that were not necessarily dealt with in the case brought before the CJEU. There was another case between RAAP and PPI where a number of conflicts were addressed.

In that other lawsuit, first, the Irish High Court²⁰⁵ and then the Court of Appeal,²⁰⁶ in general, approved, and even encouraged, PPI's practices with only one exception – namely, that, while the High Court had found that PPI could also complete the distribution of the equitable remuneration to all of the performers, irrespective of whether or not they were represented by RAAP (and would transfer to RAAP the distributed amounts with which it was to pay the amounts due to the performers), the Court of Appeal at least returned to RAAP the right to distribute to the performers who had explicitly trusted it with management of their rights the equitable remuneration due.²⁰⁷

In view of the analysis above, the legal situation may be summarized as follows.

First, under section 281 CRRA, there are three alternative forms – clearly separated by the conjunctive “or” – in which the Controller may register a CMO (“licensing body”):

- (i) as a body that has the right to act “until the contrary is proved ... on behalf of the classes of rightsowners for whom it claims representation rights”; *or*
- (ii) as a body that has the right to act “on behalf of the rightsowners who have assigned rights to it”; *or*
- (iii) as a body that has the right to act “exclusively licensed to act”.

Second, RAAP has *not* been registered in the second alternative form as a body to act only “on behalf of the rightsowners who have assigned rights to it” (i.e., there is no such limitation in RAAP's registration) nor has RAAP been registered either in the third alternative form as a body to act

204 The erosion of the competence of the RAAP by PPI was taking place as follows:

- Originally, there was an agreement between the two CMOs under which PPI was to transfer to RAAP 50 percent of the equitable remuneration (after the deduction of costs) for distribution among the latter's members. However, PPI hypothesized that, while it had the right to collect remuneration for the use of phonograms published for commercial purposes, it was obligated to transfer to RAAP only the share for the use of “qualified performances” and entitled to keep the rest (which then it considered to be transferable to the producers of “qualified sound recording” as copyright owners).
- In 2016, PPI outsourced the collection of its non-broadcasting revenues to IMRO (the Irish musical performing rights CMO). Although the arrangement covered collecting on behalf of performers as well as producers and although RAAP bore 50 percent of the costs of the arrangement, PPI refused to give RAAP sight of the agreement on grounds of “commercial sensitivity”.
- Later, PPI adopted and applied an interpretation of the agreement according to which it required proof from RAAP that it had a “mandate” to manage the rights of performers even in respect of “qualified performances” (i.e., PPI refused to apply section 281 of the CRRA under which a CMO registered for the management of rights on behalf of a class of rightsowners – in the given case, RAAP, for the management of any performers – has the right, until the contrary is proved, to act on behalf of *any* rightsowner in the given class).
- PPI also outsourced the calculation of the performers' share of the remuneration to PPL, a U.K. CMO managing both producers' and performers' rights. Again, PPI refused to give RAAP sight of the agreement or even information on the ways in which it impinged on the management of rights for those performers of whom RAAP was the certified representative in Ireland.
- PPI went on to reject the very right of RAAP to manage the rights of performers for whom it was registered representative. Instead, PPI began to manage performers' rights in nearly all relevant aspects of collective management, including individual distribution of the remuneration due to them, reducing the role of RAAP to post box and pay desk. PPI calculated, with PPL's assistance, the amounts to be distributed to individual performers who were members of RAAP for “qualified performances” and it transferred the amounts to RAAP to do nothing more than distribute them to its members.

205 High Court order [2019] No. 10801 P. [2019] IEHC, para. 86. (hereinafter: High Court in RAAP v. PPI).

206 Judgement of the Court of Appeal of April 3, 2020 (Court of Appeal 2019/22fi) [2020] IECA (hereinafter: Court of Appeal in RAAP b. PPI).

207 See *ibid.*, paras 59–60.

only to the extent that it is “exclusively licensed to it” (i.e., there is no such limitation in RAAP’s registration). Instead, RAAP has been registered in the first form to represent the following “classes of rightholders”, set out explicitly in RAPP’s registration:

- 1) Musicians
 - a) Featured Artists including Bands & Solo Artists;
 - b) Non-Featured Artists (session musicians);
 - c) Orchestras and Orchestra members;
- 2) Performers – Singers, Choirs, Comedians;
- 3) Actors²⁰⁸

This cannot mean anything else but rightholders whose performances are embodied in phonograms (“sound recordings”) published for commercial purposes.

Third, under section 281, a CMO (“licensing body”) registered in this form rather than in the second or third forms may (be authorized to) act – that is, may (be authorized to) carry out all of the relevant activities involved in managing rights – “until the contrary is proved ... on behalf of the classes of rightholders for whom it claims representation rights”.

Fourth, PPI – and indeed any organization other than RAAP – has not been registered to manage performers’ rights: neither in the first alternative form, so as to manage the rights of any class of performers; nor in the second alternative form, to manage the rights of any performer who has assigned their right; nor in the form whereby it might manage the rights of any performer who has exclusively licensed it to do so. PPI has no authority other than that to collect the remuneration – the nature of which must be, as far as possible (and it is quite clearly possible), interpreted as a single equitable remuneration to be shared with performers in accordance with Article 8(2) of the Rental, Lending and Related Rights Directive – and to transfer it to RAAP, which has the right to carry out the remaining collective management tasks.²⁰⁹

In view of this clear legal situation, it would have been reasonable, had any question been asked in court about the collective management activities for which RAAP has been registered and authorized, to answer thus:

The registration of a licensing body confers a presumptive right to act, until the contrary is proved, on behalf of all performers within the registered classes without any requirement for assignment or licensing. Applying this to the acts of the case, RAAP is entitled to collect the equitable remuneration not only on behalf of those individual performers who have actually assigned the right, but also on behalf of all rightholders for whom it is presumed to act, until the contrary is proved.

Yet the High Court adopted the following rulings – and the Court of Appeal agreed (with the exception of the condition set by the High Court according to which the representation ought to be based on assignment)²¹⁰ :

In summary, registration as a licensing body does not confer a presumptive right to act on behalf of all performers within the registered classes without any requirement for assignment or licensing. Applying this to the facts of the case, RAAP is only entitled to collect the equitable remuneration on behalf of those individual performers who have actually assigned the right to do so to it pursuant to the provisions of section 208(2).²¹¹

The arguments of the Court of Appeal may be summed up – and analyzed – as follows.

First, it was the Court’s view that the rebuttable presumption under the CRRA according to which a CMO may also act on behalf of a class of rightholders who have not individually

²⁰⁸ Order No. P/21/03/0004/.

²⁰⁹ These include the tasks involved should “the contrary” be “proved”, such that the task of any CMO to operate either a presumption-based or an extended collective management system is now regulated in Article 12 of the Digital Single Market Directive.

²¹⁰ The Court of Appeal disagreed that assignment was necessary; it found that only some form of contractual arrangement is sufficient: see *Court of Appeal in RAAP v. PPI*, para 57.

²¹¹ *High Court in RAAP v. PPI*, para 62.

assigned their rights or otherwise licensed the CMO is in conflict with the CRM Directive. Therefore, any interpretation of section 281 of the CRRA such that a CMO registered for the management of certain classes of rightholder (e.g., RAAP, for the relevant classes of performers) may act, until the contrary is proved, on behalf of the classes of rightsowners for whom it claims representation rights would be in conflict with E.U. law, within which framework Ireland is bound to interpret its national law. The Court of Appeal founded this argument, with reference to the provisions set out in the CRM Directive (especially Articles 4(7) and (8) and 5(2) and (4)),²¹² on the freedom of rightholders to choose which CMO they authorize to manage their rights and to what extent, if at all, and the requirement that a CMO may act only as licensed by individual rightholders. The Court stated that it was “satisfied that the mandatory collective management of rights, the presumption of authorisation of a CMOs or the exclusive collective management of rights through one licensed CMO is inconsistent with the provisions of s.280 of the Act of 2000^[213] and of the Directives”.²¹⁴

This “satisfaction” is obviously unjustified. Recital (12) of the Directive – quoted elsewhere by the Court itself²¹⁵ – makes it clear that “[t]his Directive [...] *does not interfere with arrangements concerning the management of rights in the Member States* such as [...] extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organisations” (emphasis added).

Second, according to the Court, if section 281 were to be interpreted in such a way that a CMO may be registered to act, until the contrary is proved, on behalf of the classes of rightholders for which it has been registered (like RAAP, on behalf of the relevant classes of performers), the second part of section 281 would be superfluous.²¹⁶ It is difficult to understand what the Court meant by this argument and it is quite evident that it is not valid since it is in conflict with the basic rules of logic. This is so, because it is not the case that where, in a legal norm, it is provided that *either* alternative A *or* alternative B *or* alternative C may be applied, and it is found that alternative A is to be applied in a given case, the rest of the provision becomes “superfluous”; rather, it is simply that the other two alternatives are not applied in that case. On the basis of the principles of interpretation of legal texts, it would be unreasonable to hold that, if three alternatives are offered and one is chosen, it should be applied along with *the other alternatives* (because, according to such an opinion, if not all the alternatives were used in a given case, the provision providing for them would be “superfluous”).

Third, the Court held that, in section 281, the proviso “until the contrary is proved” does not refer to the authorization of a CMO (such as RAAP) to act on behalf of the classes of rightsowners represented according to the registration until it is proven that it has no such right to represent those classes but rather to the validity of the authorization (i.e., to the

212 Which was transposed largely verbatim into the Irish law by means of the European Union (Collective Rights Management) (Directive 2014/267EU) Regulations 2016, SI 156/2016.

213 The Court quotes, in particular, section 280(5)–(7) of the CRRA in para. 19. However, in these provisions, there is nothing that might be relevant to the question of applicability of a presumption-based system. Subsection (5) reads as follows: “The Controller shall register an applicant or renew a registration where the Controller is satisfied that (a) the applicant comes within the definition of a licensing body specified in section 265, and (b) the applicant has provided such information and satisfied such conditions as may be prescribed by the Minister for the purposes of registration.”

Subsection (6) sets out what information must be presented: the name and address of the applicant, the names of the members of the board, a copy of the memorandum and articles of association, etc., and (among other things) “the class of rightsowners represented or proposed to be represented by the applicant”.

Subsection (7) is about the format in which the information should be presented. In indicating the class of rightsowner the applicant represents, or proposes to represent, there is no obligation for the Controller to choose the first form of registration under section 281; it is only one of the three possible alternatives mentioned there. The provision is not indicative of the *applicability or non-applicability of presumption-based systems under the CRM Directive*.

214 *Court of Appeal in RAAP v. PPI*, [43].

215 *Ibid.*, [24].

216 See *ibid.*, [49]:

[I]f the entitlement to act arose from the fact of registration in respect of a particular class of rights and it extended, as a result, to all performers coming within the class (absent those who opted out of such representation), the second part of s.281 would be superfluous, as assignment of rights or exclusive licensing of rights would be unnecessary in order to authorise the CMO to manage the rights of the right-holders.

validity of the registration).²¹⁷ It is submitted here not only that no such thing follows from the text of section 281, which is about CMOs acting on behalf of the classes indicated in the certificate and not about the validity of a certificate – but also that such an argument is self-defeating. A situation in which a certificate no longer applies for a class of rightholders may emerge only where the certificate is modified or expires. However, the Court proposes another possibility: that a CMO might not actually claim the right to represent the class of rightholders as mentioned in the certificate. Certainly, this was not the situation for RAAP, which did wish to manage the rights of performers in accordance with its certificate, but if such a situation were to emerge, it would have nothing to do with the general applicability of a presumption-based system. Again, in such a case, the certificate (and the underlining registration) would have to be modified or withdrawn.

In light of all of this, RAAP – on the basis of section 281 of the CRRA and in accordance with the CRM Directive, Recital (12) of which is now confirmed by the provisions of the Digital Single Market Directive²¹⁸ – is authorized to manage the right to the single equitable remuneration of the relevant classes of performers set out its registration and certificate. With due respect, the Court is mistaken when it alleges that the certificate and registration of RAAP means only that it might “hold itself out as available to represent the proposed classes, but this does not dispense with the necessity for those individual performers to request representation and to grant the requisite assignments, or exclusive licences, to authorise the licensing body to act on their behalf”.²¹⁹ By this, the Court meant to suggest that RAAP was registered and certified according to the second or third alternatives mentioned in section 281, and hence that it was authorized to act only on behalf of those individual rightholders who had assigned – or exclusively licensed – their rights to it, respectively. In reality, however, RAAP had been licensed and certified to act on behalf of the relevant classes of performers; thus, in accordance with section 281, it has authorization to act on behalf of all such performers until the contrary is proved.

It is respectfully suggested that the reason why the Court reached these conclusions is that it too lightly found – in clear conflict with Recital (12) of the CRM Directive – that a presumption-based collective management system is in conflict with the Directive. It is discussed in the next chapter in which cases and for what reasons it is justified to apply presumption-based (or extended or mandatory) collective management systems. One of these is to avoid the consequence that would inevitably occur if the Court’s “only to hold itself out” theory were to be applied – namely, that, in the absence of collective management, some performers would lose their chance to exploit their rights, or that, if they still would like to exercise their rights individually, they would have to reach agreement about their share with a CMO representing producers (that would have no registration to manage the performers’ rights and to represent the parties in the negotiations, in which producers’ interests would conflict with those of the performers). The Court recognized that such a situation would be to the detriment of the effective exercise of the rights of such performers,²²⁰ but it alleged that it unavoidably followed from the Court’s obligation to interpret the provisions of the CRRA in accordance with E.U. law, under which – in the Court’s surprising view – a presumption-based system cannot be applied.²²¹ As it is pointed out above, this does not follow from the CRRA – in fact, precisely the opposite follows from section 281, in due accordance with Recital (12) of the CRM Directive as confirmed by the provisions of Article 12 of the Digital Single Market Directive.

A separate comment should be made about the effect of this case on the amounts of the remuneration collected for foreign performers. PPI introduced a practice whereby, in those cases in which foreign performers did not enjoy the right to remuneration, it transferred the relevant

217 See *ibid.*, [52]:

The phrase “until the contrary is proved” in s.281, to my mind, deals with a situation where there may be a discrepancy between the certificate granted and the actual authorisation of the licensing body; the licensing body may cease to satisfy the requirements set out in s.280(6), or may have ceased to act in respect of certain classes of rights in respect of which it was registered, or where individual performers have withdrawn their authorisation of the CMO to act on their behalf.

218 See Recitals (33), (44) and (46) and Article 12(1)(b) of the Directive.

219 *Court of Appeal in RAAP v. PPT*, para.37.

220 See *ibid.*, paras 55 and 77.

221 See *ibid.*, para. 55, where the Court of Appeal remarks:

[W]hether this leaves such right-holders with inadequate protection is not a matter which can alter the proper construction of the legislation”. Also see para. 70 where it states as follows: “It may be that the legislative regime is ineffective in practice adequately to protect the rights of performers who do not actively manage their rights, either individually or by authorising a CMO to manage their rights. That is a matter upon which I make no observation. But, that cannot alter the proper construction of the statute as enacted, and in light of existing EU law.

amounts to the producers of the phonograms concerned. PPI justified this – on the basis of what seemed to be a correct legal analysis²²² – arguing that while Article 4(2) of the WPPT relieved Ireland of the obligation to transfer to U.S. producers the remuneration that it had collected for activities in respect of U.S. works (because the United States has made reservations concerning those activities), neither was there an obstacle under Article 15(1) of the WPPT to it choosing to do so unilaterally in the absence of international obligations. Since PPI had no authorization (registration) to manage performers' rights, however, it was RAAP that was supposed to make arrangements for the amounts corresponding to the use of the performances of performers who, in the absence of international obligations, did not enjoy the right.

The CJEU did not agree with PPI's justification of its action. In response to the preliminary questions submitted by the Irish court, in point 2 of its ruling, it stated that:

Article 15(3) of the [WPPT] and Article 8(2) of Directive 2006/115 must, as EU law currently stands, *be interpreted as meaning that reservations notified by third States under Article 15(3) of the [WPPT] that have the effect of limiting on their territories the right to a single equitable remuneration laid down in Article 15(1) thereof do not lead in the European Union to limitations of the right provided for in Article 8(2) of Directive 2006/115, in respect of nationals of those third States, but such limitations may be introduced by the EU legislature, provided that they comply with the requirements of Article 52(1) of the Charter of Fundamental Rights of the European Union. Article 8(2) of Directive 2006/115 therefore precludes a Member State from limiting the right to a single equitable remuneration in respect of performers and phonogram producers who are nationals of those third States.* (emphasis added)

The ruling implies that Article 4(2) cannot be used directly as a basis to exclude the application of the right to a single equitable remuneration provided for in Article 8(2) of the Rental, Lending and Related Rights Directive. According to the Court, the right is granted to any performers and producers without any limitations on nationality and irrespective of whether or not their Contracting Parties have made reservations – and even irrespective of whether or not their home countries are Contracting Parties to the WPPT at all. According to this point of the rulings, the application of Article 4(2) of the WPPT would mean a limitation of this right for which, however, – since it were a limitation – an explicit provision would be needed, in accordance with the requirements of Article 52(1) of the Charter of Fundamental Rights of the European Union. But this ruling might readily be challenged, on the following grounds.

First, Article 4(2) of the WPPT reads as follows: “*The obligation* provided for in paragraph (1) [to grant national treatment, inter alia, with regard to Article 15 on the right to a single equitable remuneration] *does not apply* to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty” (emphasis added). In other words, the European Union and its Member States have *no obligation* at all to provide for the right: if *there is no right granted and no beneficiary, there is no right to limit*; it is meaningless to speak about the limitation of any right in such a case. The same is true in the absence of a Treaty relationship: the acts performed in these cases are outside the contour of the protection of intellectual property rights.

Second, therefore, since the limitation of non-existent rights of non-existent beneficiaries is not conceptually possible, the applicability of Article 52(1) of the Charter – on the question of limitations of intellectual property rights – cannot emerge. Otherwise, it would also be doubtful that any concrete right and claim might be derived from Article 17(2) of the Charter, according to which intellectual property rights are protected, and the same seems to be true concerning concrete limitations. It is not the Charter but the specific E.U. norms – in accordance with the relevant international treaties – that determine what “intellectual property rights” are provided and what limitations, under what conditions, may be applied.

222 See para. 101 of the judgment of the referring court:

... PPI argue that—as a consequence of the USA having entered its reservation under Article 15(3)—there was no obligation at all to provide any reciprocal rights to US producers or performers. The fact that the Irish State was relieved of its obligation under Article 4 of the WPPT in respect of US domiciles and residents did not, however, preclude the Irish State from providing copyright protection on a voluntary basis. Thus, whereas there was no obligation under the WPPT to do so, Ireland was entitled to lay down eligibility criteria in such a way that US producers might qualify to be paid equitable remuneration in certain circumstances.

Third, there are two methods applied in national laws to extend protection to nationals of foreign countries. One is the system that is usually applied in common law countries, where the extension takes place *through separate orders or decrees*. This is not frequent in the European Union, but Ireland – as a common-law country – happens to apply it.²²³ The other method is the inclusion of a general provision in national laws that, in addition to the rights provided for nationals (and the nationals of the EEA Member States), the rights are granted also to the nationals of countries in accordance with the obligations under the international treaties binding the Member States concerned.²²⁴ This is the method that the overwhelming majority of E.U. Member States apply. These provisions have been applied without any problem to determine what is protected and what is not. The question, if it has been raised at all, has been solved satisfactorily through these provisions at domestic level – in some of the Member States, even before the establishment of the European Union. If it has now become an issue in Ireland, it is not because it is not settled at the E.U. level but because the CRRA does not provide the right to the single equitable remuneration in accordance with Article 8(2) of the Directive and because Ireland apparently has not applied either of the two above-mentioned methods of extending the right to foreign performers in accordance with its obligations under the WPPT.

Fourth, granting national treatment in respect of the uses of the performances of foreign nationals in accordance with Article 4(1) of the WPPT is an obligation within the European Union – but this obligation does *not* extend to the cases mentioned in Article 4(2). It is not realistic to presume that, when the competent organs of the European Union decided to ratify and implement the Treaty, they intended either not to apply the obligation to grant national treatment at all or to extend it to cases in which there is no such obligation. In any cases in which national treatment – with or without limitations – is to apply, it has always been considered obvious that the rights of foreigners were to apply in accordance with the obligations under the international treaties and within their limits.

Fifth, it seems that the reason why, in general, there are no provisions about this issue in the E.U. legislation is exactly the above-mentioned obviousness of the answer to any question that may emerge. This was certainly the reason why the CJEU, in *SENA*,²²⁵ did not include in its judgment the analysis and statements set out in the opinion of Advocate General (AG) Antonio Tizzano, who pointed out that national treatment provided in the international treaties binds the European Union and it binds the Member States. Although the case concerned the application of Article 8(2) of the Rental, Lending and Related Rights Directive in its original version,²²⁶ before the implementation of the WPPT in the European Union, the analysis and statements made in view of treaties applicable at that time – the TRIPS Agreement and the Rome Convention – were of a general nature about the question of national treatment obligations.²²⁷ This is such a key point of the extent of protection that, if the CJEU had disagreed with AG Tizzano, it certainly would have clarified its reasoning in the judgment; it did not, and hence may be concluded that the Court found the AG's analysis and statements well founded and even evident.

223 In sections 287(c) and 289 of the CRRA, this is foreseen in respect of performers' rights, but no such order had been adopted before the judgment in *RAAP*.

224 See, e.g., Article 97(2) of the Copyright Law of Austria; Article L 511-11 of the Intellectual Property Code of France; Section 125(5) of the Copyright Law of Germany; Article 90(4) of the Copyright Law of Poland; Article 200(3) of the Intellectual Property Code of Spain.

225 Judgment of the Court (Sixth Chamber) of February 6, 2003, *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)*, Case C-245/00, ECLI:EU:C:2003:68.

226 Directive 92/160/EEC.

227 See Opinion of Advocate General Tizzano delivered on September 26, 2002, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*, Case C-245/00, ECLI:EU:C:2002:543, paras 43–25:

[T]he scope of the prohibition of discrimination on grounds of nationality in this area extends beyond the terms of Article 12 EC alone. In fact, as far as related rights are concerned, that prohibition encompasses a range of operators who, although citizens of third countries and therefore not protected under Article 12 EC, enjoy the protection provided by the World Trade Organisation TRIPS Agreement and the Rome Convention. The TRIPS Agreement binds the Community and all its Member States; it is also common ground that, notwithstanding the debate on its direct applicability, the rules on national treatment which it contains are an integral part of the law with which the Court must ensure compliance, in accordance with Article 220 EC. The effect of the reference in Article 1(3) of the TRIPS Agreement is to incorporate within it Articles 2, 4 and 5 of the Rome Convention, which require the application of the principle of national treatment to a broad category of operators and situations that have no defined link with the Community, be it membership or establishment, and are not therefore, in principle, protected under Article 12 EC. Consequently, it is as a result of those provisions of TRIPS and the Rome Convention, as well as the provisions of Article 12 EC, that the freedom of action of the Member States in applying the Directive, and particularly Article 8(2) thereof, is limited.

Sixth, it would not be apt to assume that the European Union and its Member States were uncertain whether the WPPT provisions on the obligation of national treatment and its limitation in Article 4(2) are incorporated into E.U. law, because the delegations to the then European Community and its Member States had insisted during the treaty negotiations on the adoption of Article 4(2), which corresponded to a consistently represented community policy relieving Member States of unilateral legal and financial burdens.

Seventh, it is a basic principle of the CJEU – stated in a number of judgments²²⁸ – that the interpretation of E.U. norms should be in accordance, as far as possible, with the provisions of the international treaties binding the European Union and its Member States. It is respectfully submitted that there was no good reason why the CJEU did not apply this principle in the interpretation of Article 8(2) of the Rental, Lending and Related Rights Directive and introduced instead a burdensome new obligation for the European Union and its Member States that does not follow from the treaty to which they are party.

Eighth, where foreign nationals do not enjoy a right – not because an exception to, or limitation of, an otherwise existing right is applied but because no such right is granted in absence of international obligations – the use of the subject matter is free of charge. In other words, it is part of the public domain. In such a case, one cannot speak about any term of protection of the subject matter – here, the phonograms published for commercial purposes. This is made clear in Article 7(2) of the Terms Directive,²²⁹ which provides (concerning the terms of protection of the related rights under Article 3) that, “without prejudice to the international obligations of the Member States, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 3”. This is in full harmony with Article 4(2) of the WPPT and it follows from the Directive – in the same way as it does from the provision of the Treaty – that there is no obligation under Article 8(2) of the Rental, Lending and Related Rights Directive to grant the right to the nationals of other Contracting Parties to the extent that they have made reservations and do not provide the right. In other words, to the extent that reservations apply, the term of protection is zero; there is no protection that might be “limited”.

If point 2 of the *RAAP* rulings were to be applied as stated by the CJEU, an unexpected financial burden would emerge for the Member States that they had been rightly persuaded did not exist and did not follow from their international obligations. If the Court’s logic were recognized, the same burden would emerge in the application of other rights provided in E.U. law in respect of which it is not stated – because it has been rightly considered obvious – that they apply to foreign nationals only in accordance with the international treaties within the limits of the obligations under the treaties. For example, the rights provided for in the Information Society Directive²³⁰ implementing the WCT and the WPPT would become applicable to all foreigners irrespective of whether or not there is an obligation to apply national treatment or of any treaty relationship at all with the countries of which they are nationals.

The CJEU did not deal directly with the date on which the newly recognized obligation introduced in *RAAP* would become applicable; in principle, therefore, it might be understood that point 2 of the preliminary rulings applies retroactively (*ex tunc*), since the judgments of the Court clarifying an existing legal situation generally apply in that way. But this would create grave financial problems to the Member States, likely leading to volumes of lawsuits seeking remuneration for all acts covered by Article 8(2) of the Rental, Lending and Related Rights Directive performed since its entry into force at the beginning of 1993. However, established case law handed down by the then European Court of Justice as early as 1976, in the *Sabena* case,²³¹ suggests that *ex nunc* application (i.e., application only from time of the adoption of a judgment) may still be justified if two conditions

228 See, e.g., Judgment of the Court of April 30, 1974, *R. & V. Haegeman v. Belgian State*, Case 181/73, ECLI:EU:C:1974:41, [5]; Judgment of the Court (Second Chamber) of April 11, 2013, *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab; HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, joined cases C-335/11 and C-337/11, ECLI:EU:C:2013:222, [2]-[30] – to which the CJEU refers in *RAAP*, [62].

229 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372/12, December 27, 2006.

230 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125/15, May 5, 2001.

231 Judgment of the Court of April 8, 1976, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, Case 43–75, ECLI:EU:C:1976:56.

are met: first, that the judgment is unexpected to the extent that there was no earlier indication that the issue might emerge or that it would be settled with a new obligation; and, second, that claims arising from the retroactive (*ex tunc*) application of the newly applicable obligation would impose on Member States a sudden and disproportional financial burden.²³² For point 2 of the *RAAP* rulings, both of these conditions are undoubtedly met, but it is not clarified in the judgement.

As regards the need to escape a newly introduced obligation that appears incongruent with the international obligations of the European Union and its consistently applied policy concerning national treatment and its desirable limitations in matters of copyright and related rights, the CJEU itself has offered a possible solution – namely, to state in the Directive that Article 8(2) is applicable to the nationals of Contracting Parties other than the EEA Member States only in accordance with the obligations of the European Union and its Member States under the international treaties binding them (which would correspond to existing provisions in the national laws of most Member States). Such clarification may be unnecessary, but its absence might have *a contrario* implications regarding the application of the rights provided in other directives – such as the Information Society Directive. It should be seen, that the various problems created by the CJEU’s unexpected rulings include the serious negative impact that it would have were it to be applied and erase the significant sources of funding for important cultural objectives. This is discussed more closely in Chapter 11, along with the broader questions of whether or not the application of the “no collection without distribution” principle is necessarily justified, and how and for what purposes the amounts collected for acts not covered by international obligations might be used.

232 The relevant paragraphs of the judgment (*ibid.*) read as follows:

- 69 The governments of Ireland and the United Kingdom have drawn the Court’s attention to the possible economic consequences of attributing direct effect to the provisions of Article 119, on the ground that such a decision might, in many branches of economic life, result in the introduction of claims dating back to the time at which such effect came into existence.
- 70 In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy.
[...]
- 73 The fact that, in spite of the warnings given, the Commission did not initiate proceedings under Article 169 against the Member States concerned on grounds of failure to fulfil an obligation was likely to consolidate the incorrect impression as to the effects of Article 119.
- 74 In these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past.
- 75 Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment.

Voluntary, presumption-based, extended and mandatory collective management

Introductory remarks

This chapter reviews a number of basic structural forms of collective management – namely, voluntary, mandatory, presumption-based and extended collective management. Of these systems, voluntary collective management is outlined first, because it is the simplest one and it does not raise any question of compliance with the international treaties. After this, the issues of mandatory collective management are explored, since it is in connection with this form of management that there seem to be some directly applicable international norms. Finally, the presumption-based and extended collective management systems are analyzed – taking into account that they have to be compared with both the voluntary and the mandatory forms of collective management. Their analysis, as in the case of mandatory collective management, starts with the requirements under the international treaties, and it is followed by the presentation of national systems how they fulfill those requirements. Extended collective management was born in Europe and it is mainly there that it applied ever more widely. It is, however, also where certain doubts have emerged whether it is in accordance with the international norms. The last sections of the chapter describe how those doubts were raised in – and in connection with – a judgment of the CJEU (adopted when extended collective management was to be applied to the exercise of rights in out-of-commerce works); how they were eliminated in the course of the preparatory work of the Digital Single Market Directive, and how all this led later to a general regulation in the Directive determining in detail what requirements must be fulfilled to guarantee the compatibility of an extended collective management system with the international and E.U. norms. Before this, however, it is necessary to examine what “individual” exercise means as a basic alternative to collective management.

“Individual exercise” vs. non-collective management of rights?

When WIPO documents or legal literature²³³ (or even national laws²³⁴) provide that collective management of copyright and related rights is justified where “individual exercise” of rights is impossible or impracticable, the term “individual exercise” should not be considered to be equal to the exercise of rights by *individual* authors or owners of related rights (or the coauthors of individual works) *personally*. It should rather be understood to mean, in practice, any method other than collective management, whereby rightholders may make their own decisions about the exercise of their rights (whether they authorize or prohibit use of their works, and if they authorize it, under what conditions) rather than transferring this function to become part of the collective system of a CMO. This also includes exercise of the rights through representatives.

233 Such a principle may be found in WIPO (1990). *Collective Administration of Copyright and Related Rights*, Publication No. 688 (E). Geneva: WIPO, 87 (principle (a)), and in Mihály Ficsor (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 157 (principle (1)).

234 Such provisions may be found in the copyright laws of several newly independent countries formed from previous member republics of the Soviet Union. For example, article 63(1) of the Armenian Copyright Law provides as follows:

(1) For the provision of administration of economic rights of holders of copyright and related rights, where the exercise of economic rights in personal order is practically difficult or impossible, non-commercial, non-profit organizations for collective administration of economic rights (hereinafter referred to as “organization”) shall be established.

It is important to keep this concept of “individual exercise” in mind in those cases in which mandatory, presumption-based or extended collective management is applicable, but it is relevant too to the regulation of the key aspects of collective management. National laws establish the conditions that entities seeking to be recognized as CMOs must fulfill; their operations should align with specific rules provided for in the legislation, including certain competition rules. The recognition, registration or accreditation as a CMO offers an entity advantages, including that it may offer blanket licenses with tariffs equally applicable to any users of its repertoires, rather than individual licenses, and – in the case of mandatory, presumption-based and extended collective management – that it may also represent rightholders, under certain conditions, who are not its members. The obligations of users (e.g., as regards information about the use of works) may also be less extensive vis-à-vis entities other than CMOs proper than vis-à-vis CMOs.

In fact, even the very nature and conception of “licensing” change qualitatively if a CMO is recognized as such and its tariffs applicable to any uses covered therein are approved (and even published) in accordance with the law.

A so-called license granted by a CMO truly includes the typical elements of a license (fees to be paid for, and the other conditions of, the use of the work or other protected subject matter), but it is not of the same nature as an individual license offered by a rightholder, because the latter only creates obligations if a user accepts the offer.

CMO tariffs duly established by law, approved by a copyright board or other competent authority or, in case of disputes, confirmed by arbitration, mediation or by court, are obligating all the category of users covered by the tariffs. The law itself and/or the common provisions added to the tariffs normally clarify that it is an obligation of the users:

- (i) to inform the CMO before the commencement of the use;
- (ii) to pay the fee established in the tariffs (without which the use of the works is not authorized and, if it still takes place, the users become liable for infringement of copyright);
- (iii) to offer information about the nature, extent and other aspects of the use that are relevant from the viewpoint of the tariffs;
- (iv) to grant information about the repertoire used;
- (v) to allow the CMO to control all aspects of the use on the basis of relevant documents and also on the spot of the use.

Such a tariff system is not the same as, but it is similar to, wrap-on or click-on licensing in the sense that the performance of the acts concerned trigger the application of the “license” and the non-fulfilment of the conditions is a violation of the agreement and infringement of copyright.

In the common provisions added to the tariffs, or in the law itself, frequently consequences are prescribed for the case where the users perform an act covered by the tariffs without fulfilling the conditions set therein (they do not inform the CMO about the commencement of the use, do not pay the fees, etc.). In such a case, the tariffs rules or the law itself may (and, to make the system, should) not only provide that the users must pay the fee, but also that they must pay more than what is fixed in the tariffs; normally the double of the fee. Such doubling of the payment is not a criminal or administrative sanction and not a punitive damage either; it is a sort of contractual penalty or a lump sum damage (a kind of statutory damage) to cover the extra costs of the CMO emerging in connection with the infringing behaviour of the users.

This has been confirmed, for example, by the CJEU in its judgement in the *Stowarzyszenie 'Oławska Telewizja Kablowa' v Stowarzyszenie Filmowców Polskich* case²³⁵ in this way:

Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as *not precluding national legislation*, such as that at issue in the main proceedings, *under which the holder of an intellectual property right that has been infringed may demand* from the person who has infringed that right either compensation for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, or, without him having

²³⁵ Judgment of the Court of April 8, 1976, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, Case 43-75, ECLI:EU:C:1976:56. Judgment of the Court (Fifth Chamber) of 25 January 2017 *Stowarzyszenie 'Oławska Telewizja Kablowa' v Oławska w Stowarzyszenie Filmowców Polskich w Warszawie*, Case C-367/15, ECLI:EU:C:2017:36.

to prove the actual loss, *payment of a sum corresponding to twice the appropriate fee* which would have been due if permission had been given for the work concerned to be used (emphasis added).²³⁶

From the viewpoint of the question of what is collective management (and licensing) and what is not, the category of “independent management entities” (IMEs) introduced in the E.U. CRM Directive is quite specific. Article 3(b) of Directives defines such entities in the following way:

- (b) “independent management entity” means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is:
 - (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and
 - (ii) organised on a for-profit basis.

Such IMEs are therefore *not* CMOs. Therefore, since the Directive regulates collective management, it is even doubtful whether it is the right place to include provisions on non-CMO entities that engage in “independent” rather than collective management. Recital (15) of the Directive points toward the answer:

- (15) Rightholders should be free to entrust the management of their rights to independent management entities. Such independent management entities are commercial entities which differ from collective management organisations, inter alia, because they are not owned or controlled by rightholders. However, *to the extent* that such independent management entities *carry out the same activities as collective management organisations*, they should be obliged to provide certain information to the rightholders they represent, collective management organisations, users and the public (emphasis added).

The status of IMEs, both in general and specifically in the context competition they create against CMOs “to the extent that [they] carry out the same activities as collective management organisations”, is the subject of the next chapter.

The next recital confirms that the licensing of a repertoire owned by a legal entity such as a publisher or a producer directly rather than through a CMO is also “individual exercise”:

- (16) Audiovisual producers, record producers and broadcasters license their own rights, in certain cases alongside rights that have been transferred to them by, for instance, performers, on the basis of individually negotiated agreements, and act in their own interest. Book, music or newspaper publishers license rights that have been transferred to them on the basis of individually negotiated agreements and act in their own interest. Therefore audiovisual producers, record producers, broadcasters and publishers should not be regarded as “independent management entities”. Furthermore, authors’ and performers’ managers and agents acting as intermediaries and representing right holders in their relations with collective management organisations should not be regarded as “independent management entities” since they do not manage rights in the sense of setting tariffs, granting licences or collecting money from users.

In spite of this clarification, the appearance and recognition of IMEs in the Directive have blurred the boundaries between collective management and the individual exercise of rights. This is also discussed in the next chapter.

236 Judgment of the Court (Fifth Chamber) of 25 January 2017 *Stowarzyszenie “Oławska Telewizja Kablowa” v Oławie v Stowarzyszenie Filmowców Polskich w Warszawie*, Case C-367/15, ECLI:EU:C:2017:36.

Voluntary collective management

In the triangle of voluntary, mandatory and extended (or presumption-based) collective management, it is the easiest task to present voluntary collective management. It follows from the freedom of association itself that rightholders may establish a society or other organization within which they join their forces to exercise their rights. This basic principle is duly expressed in Article 5 of the E.U. CRM Directive – in particular, in the following paragraphs:

2. Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder. Unless the collective management organisation has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject-matter, provided that their management falls within the scope of its activity.
[...]
4. Rightholders shall have the right to terminate the authorisation to manage rights, categories of rights or types of works and other subject-matter granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice, as determined pursuant to paragraph 2, for the territories of their choice, upon serving reasonable notice not exceeding six months. The collective management organisation may decide that such termination or withdrawal is to take effect only at the end of the financial year.
[...]
7. In cases where a rightholder authorises a collective management organisation to manage his rights, he shall give consent specifically for each right or category of rights or type of works and other subject-matter which he authorises the collective management organisation to manage. Any such consent shall be evidenced in documentary form.

Nevertheless, there are two further questions to be considered. First, whether rightholders may establish a CMO freely – that is, without seeking authorization, registration or accreditation from a competent authority. As it can be seen in Chapter 1, the answer may be “no”. To fulfill its obligations under the international treaties and to guarantee adequate exercise of the rights of the interested rightholders, a government should make sure that only organizations properly suited to the lawful management of copyright are permitted to function in its territory.

The second question is whether there may be any exception to the general principle that rightholders should be free to join a CMO – namely, whether it may be justified to *prescribe* collective management of their rights even when they have *not* joined an organization. This issue – that is, the question of applicability of mandatory and extended (or presumption-based) collective management – is discussed below in this chapter.

Limited scope of exclusive rights for which mandatory collective management may be applied under the international treaties

Before analyzing the relevant provisions of the international treaties on copyright and related rights to identify when and under what conditions mandatory collective management may be permitted, it is worth us asking the following questions.

- Is it *determining or imposing a condition* if somebody might do something, but the law sets out that they are allowed to do so only in a certain way?
- Is it *determining or imposing a condition* if somebody owns something, but the law sets out that they may use it only in a certain way?
- Is it *determining or imposing a condition* if somebody is granted a right, but the law sets out that they may exercise it only through a certain system?

It seems self-evident that the answer, in all three instances, is “yes”.

The clarification of these questions is necessary because the Berne Convention provides – in Articles 11*bis* (2) and 13(1) – that “it is a matter for legislation in the countries of the Union to determine/impose the conditions” under which certain exclusive rights may be exercised.²³⁷

Article 11*bis* (2) provides:

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 paragraph*^[238] *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 (emphasis added).

Article 13(1) provides in a similar way:

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 (emphasis added).

These provisions are regarded as the legal basis for the application of *compulsory licenses*. This is *deduced* from the way in which the minimum requirement for such conditions is prescribed – namely, that determining or imposing conditions must not, under any circumstances, prejudice the right to an equitable remuneration. This does not mean, however, that non-voluntary licenses are the only possible “conditions” applicable under these provisions; *other conditions* for the exercise of the exclusive rights concerned *may also be applied*.

It seems to be clear that mandatory collective management of rights is a *condition*, since it means that:

- although the rightsholders might authorize the acts in question, it is set out that *they can do so only in a certain way*;
- although they own exclusive rights, it is set out that *they can exploit those rights only in a certain manner*; and
- although they are granted such rights, it is set out that *they can exercise those rights only through a certain system* (i.e., through collective management).

The freedom to “determine/impose conditions” is exhaustively provided for in the Convention. It may therefore be deduced *a contrario* that, in general, the mandatory collective management of *exclusive rights* is applicable only in these cases. The right of reproduction is an exception in this respect, because Article 9(2) of the Convention allows the application of limitations (and mandatory collective management is also a limitation) if the cumulative conditions of the three-step test provided in it are fulfilled.

This analysis has been made about the legal situation under the Berne Convention. However, the question of applicability of mandatory collective management also emerges concerning the TRIPS Agreement and the WCT which not only incorporate these Berne provisions by reference,²³⁹ but they also provide for further rights – or at least adapt or clarify the application of the rights already

²³⁷ See also Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT, which incorporate these Berne provisions by reference.

²³⁸ Article 11*bis*(1) reads:

Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

- (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.

²³⁹ See Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT.

provided. Furthermore, the question equally arises regarding the relevant provisions of the WPPT and the BTAP. The following provisions of these treaties should be taken into account:

- Both the TRIPS Agreement and the WCT provide for an exclusive right of rental authors –at least for computer programs (which is of little relevance in terms of collective management) and audiovisual works (with certain grandfathering limitations).²⁴⁰
- The WCT adds provisions on the exclusive right of distribution²⁴¹ (allowing its exhaustion beyond the first sale of copies), on a generally applicable exclusive right of communication to the public (going beyond the scope of the right of communication to the public under the Berne Convention for certain categories of works), and the exclusive right of interactive making available to the public.²⁴²
- The WPPT and the BTAP also provide for certain exclusive rights, such as the rights of reproduction,²⁴³ distribution²⁴⁴ (in the same way as the WCT), rental (at least of phonograms)²⁴⁵ and – as a stand-alone right – interactive making available to the public.²⁴⁶

In these treaties, there are no provisions similar to Article 11*bis*(2) and 13(1) of the Berne Convention allowing both compulsory licenses and mandatory collective management to be applied as *conditions* of the exercise of the exclusive rights concerned. However, this does not mean that, for these rights, no such limitations may be applied at all. Since mandatory collective management is a limitation of the exclusive rights, it may be applied as such only (but it may be) if the cumulative conditions of the three-step test – the application of which has been extended to the above-mentioned exclusive rights under Article 13 TRIPS, Article 10(2) WCT, Article 16 WPPT and Article 13 BTAP – are fulfilled.

In the same way as Article 9(2) of the Berne Convention concerning the exclusive right of reproduction, these provisions allow the application of exceptions to and limitations of the exclusive rights provided for by them only:

- in a certain special case; *and*
- provided that it does not conflict with a normal exploitation of the work/performance/phonogram; *and*
- further provided that it does not conflict with a normal exploitation of the legitimate interests of the rightholders.²⁴⁷

While the three-step test, under Article 9(2) the Berne Convention, allows for the inclusion of exceptions or limitations not specifically permitted under the Convention only in relation to the exclusive right of reproduction, the other treaties provide that the test may be applied to allow for exceptions to, or limitations of, *all* Berne-plus exclusive rights.²⁴⁸ Thus, mandatory collective management may also be applied as a limitation of the exercise of the exclusive rights in circumstances in which the three cumulative conditions of the test are fulfilled.

Article 12(3) of the BTAP also allows its Contracting Parties to provide for an unwaivable right to equitable remuneration in the event that audiovisual performers transfer their rights. We will look more closely at this later in the chapter.

240 See Article 11 of the TRIPS Agreement and Article 7 of the WCT.

241 See Article 6 of the WCT.

242 See Article 8 of the WCT.

243 See Articles 7 and 11 of the WPPT and Article 7 of the BTAP.

244 See Articles 8 and 12 of the WPPT and Article 8 of the BTAP.

245 See Articles 9 and 13 of the WPPT and Article 9 of the BTAP.

246 See Articles 10 and 14 of the WPPT and Article 10 of the BTAP.

247 For interpretation of the test and its three conditions, see Ficsor, *WIPO Guide and Glossary*, 56–60.

248 It is to be noted that Article 13 of the TRIPS Agreement and Article 10(1) of the WCT are also applicable to all rights to be protected under those treaties, i.e., also to the exclusive rights provided by the Berne Convention are to be complied under Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT. This does not mean that new exceptions to, or limitations of, rights other than the right of reproduction might be introduced under the articles, but it does mean that the exceptions and limitations specifically permitted under the Berne Convention may be applied only if, in addition to the specific conditions provided in the relevant provisions of the Convention, they also correspond to the three-step test (in those cases, to the second and third conditions).

Mandatory collective management of the rights of broadcasting and cable retransmission (with “ancillary services” and “direct injection”)

Under Article 11*bis*(2) of the Berne Convention, the countries of the Berne Union (as well as WTO members applying the TRIPS Agreement and the WCT Contracting Parties) are allowed to “determine the conditions” for the exercise of the rights of broadcasting and secondary transmissions – including, in particular, cable retransmission of broadcast works – and hence also to prescribe mandatory collective management.

In the case of broadcasting, however, mandatory collective management of rights in certain categories of works – such as audiovisual works – would conflict with a normal exploitation of the works and unreasonably prejudice the legitimate interests of rightholders. Therefore, under Article 13 TRIPS and Article 10(1) WCT, such a limitation – which would conflict with the second and third conditions of the three-step test – is impermissible.²⁴⁹

In accordance with this, those national laws that do provide for compulsory license and/or mandatory collective management of the right of broadcasting usually exclude audiovisual works from the scope of that provision, and apply it only to non-dramatic musical works. This is expressly stated, for example, in the laws of Croatia, Hungary and Poland.

The exclusive right of cable retransmission is another matter. In the stage of the retransmission of broadcast programs by the cable networks, it would be practically impossible to obtain authorization from the rightholders separately for this simultaneous secondary use. Therefore, for cable retransmission, compulsory licensing or mandatory collective management is necessary for the effective exercise of rights in the works retransmitted (and, in this case, also the rights in audiovisual works).

In terms of the interests of rightholders, mandatory collective management is more advantageous than compulsory licensing. It is in light of this that the Satellite and Cable Directive requires Member States of the European Union to prescribe mandatory collective management for the exercise of cable retransmission rights. Article 9(1) of the Directive provides as follows: “Member States *shall* ensure that the right of owners of copyright and 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 means whereby all such rights may be concentrated within the repertoire of only one CMO (or more than one organization from among which the rightholders may choose only one).²⁵⁰ Accordingly, the copyright laws of the E.U. Member States prescribe mandatory collective management for cable retransmission rights (and so too do those of Bosnia Herzegovina, North Macedonia, Montenegro, the Republic of Moldova and Serbia, for example).

It is noteworthy that Article 10 of the Satellite and Cable Directive provides for an exception to mandatory collective management of cable retransmission rights – namely, the rights of broadcasting organizations.²⁵¹ This confirms one of the basic principles of collective management according to which collective management is justified only where – because of the number of

249 In fact, at certain diplomatic conferences to revise the Berne Convention, proposals were submitted unsuccessfully to exclude the applicability of Article 11*bis*(2) to audiovisual works (for such reasons in practice, although without reference to the three-step test): see Ficsor, *WIPO Guide and Glossary*, 78–79.

250 Article 9(2) and (3) of the Satellite and Cable Directive provides:

2. Where a rightholder 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 rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and a collecting society which is deemed to be mandated to manage his rights as the rightholders 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 rightholder 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.

251 Article 10 of the Satellite and Cable Directive provides:

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.

owners of rights, the number of users or other circumstances of use – the individual exercise of rights is impossible, or at least highly impracticable. There are fewer broadcasting organizations than there are authors and the owners of related rights, and hence broadcasting organizations are generally able to manage their rights individually.

Article 1 of the Satellite and Cable Directive II states that it:

... lays down rules that aim to enhance cross-border access to a greater number of television and radio programmes, by facilitating the clearance of rights for the provision of online services that are ancillary to the broadcast of certain types of television and radio programmes, and for the retransmission of television and radio programmes, and it also lays down rules for the transmission of television and radio programmes through the process of direct injection.

The concept of “ancillary services” is defined in Article 2(1)–(3) of the Directive, but the definition and the other provisions²⁵² are so complex that it is better just to summarize the key elements of the regulation.²⁵³

The European Commission has concisely summed up the provisions on “ancillary services”:

Retransmission services aggregate TV and radio channels into packages. They are increasingly provided using technologies *other than cable* (for example IPTV), but the current rules facilitating rights’ clearance for operators of those services are limited to retransmissions by cable. The operators of retransmission services using other technologies (for example, satellite, IPTV, digital terrestrial, mobile network, internet) cannot benefit from these rules facilitating rights’ clearance. [...]

By extending *the system of mandatory collective management*, which is currently applicable to cable retransmissions only [...] allows retransmission operators to clear the necessary rights in a simpler manner – they need to clear the relevant rights with broadcasters whose channels they retransmit and with collective management organisations, i.e. organisations that represent a multitude of right holders and not with several individual right holders on a one-to-one basis (e.g. a music composer or an audiovisual performer).^[254] At the same time this system ensures that the rights of all concerned rightholders are covered. [...]

The rules on mandatory collective management do not apply to rights in retransmissions that are held by broadcasters. In such cases broadcasters licence the rights to operators of retransmission services directly, as is already the case for cable retransmissions under the Satellite and Cable Directive (emphasis added).²⁵⁵

“Direct injection” is defined in Article 2(4) of the Directive as meaning “a technical process by which a broadcasting organisation transmits its programme-carrying signals to an organisation other than a broadcasting organisation, in such a way that the programme-carrying signals are not accessible to the public during that transmission”.

The Directive clarifies that, when broadcasters transmit their program-carrying signals by direct injection exclusively to distributors and the latter transmit these to the public, *an act of communication to the public takes place, in which both the broadcaster and the distributors participate*,

252 Articles 3–7 of the Satellite and Cable Directive II.

253 It is to be noted that these are basically online digital services; thus, they might have been discussed in Chapter 10 on the impact of online digital technology on collective management. They are included here on the basis that the provisions of the Satellite and Cable Directive on “traditional” cable retransmissions have been extended to them.

254 It is to be noted that these provisions do not apply to all programs. As the European Commission points out (*ibid.*):

The country of origin principle will apply to all radio programmes, and to certain TV programmes – to news and current affairs programmes and programmes that are fully-financed own productions of the broadcasting organisations.

The country of origin principle will therefore not apply to TV productions acquired from third parties or commissioned by the broadcasting organisations from independent producers. Television broadcasts of sport events are also excluded.

The Commission also confirms that the principle “does not apply to video-on-demand (VOD) services” either (see Article 3 of the Directive).

255 European Commission (2019). *Questions and answers: Directive on television and radio programs*, March 28, 2019. Available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1889

and for which they need to obtain authorization from the rightholders.²⁵⁶ In other words, when a cable network transmits the program to the public, the provisions of the Satellite and Cable Directives – including those on mandatory collective management – may apply.

The provisions of the Satellite and Cable Directive II have put an end to legal debates about the status of “direct injection” – especially in Belgium, where the question was whether “direct injection” might be regarded as one or two acts of communication to the public, along with the cable retransmission of the “injected” programs, and hence who should be responsible for seeking authorization of, and paying remuneration to, the rightholders: the “injecting” broadcaster or the cable distributor. In *SBS Belgium v. SABAM*,²⁵⁷ the CJEU ruled that direct injection is one act of communication to the public and that it should be attributed to the distributors, unless the latter’s intervention is only a technical means used by the broadcaster. While both confirm that a single act is involved, the Court diverged from the Directive, which provides that both the broadcaster and the distributor are participating in performance of that act, and thus that they must both obtain the necessary authorizations from, and pay remuneration to, the rightholders.

Mandatory collective management of “mechanical rights” in musical works

As quoted above, under Article 13(1) of the Berne Convention, the countries of the Berne Union (and therefore also the Members of the WTO obligated to comply with the TRIPS Agreement and the Contracting Parties of the WCT) may:

... impose 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.

This means that compulsory licenses or mandatory collective management are possible under the conditions mentioned in this provision.

With the adoption of the Music Modernization Act of 2018 in the United States, the application of “mechanical rights” has become the focus of attention. The U.S. Copyright Act had already provided for compulsory license for “mechanical rights” before; the 2018 Act extended the scope of the application of the compulsory license to *online* “mechanical rights”, which, under the WCT, qualifies as the distribution-type form of the exclusive right of (interactive) making available to the public. The impact of online digital technology on collective management. is reviewed and analyzed in Chapter 10.

Theories about the general applicability of mandatory collective management of exclusive rights

Silke von Lewinski has outlined a possible interpretation of Articles 11*bis*(2) and 13(1) of the Berne Convention according to which the prescription of mandatory collective management of rights may not be regarded as determination/imposition of a condition of the exercise thereof and that, in accordance with this, such a provision is not a limitation of the exclusive rights concerned. She has argued as follows:

Such provisions *have been introduced with a view to allow member countries to establish compulsory licenses in favor of broadcasting organizations and record companies* respectively. Historically, in both cases, the potential users, namely broadcasting organizations and record companies, were afraid of being hindered by the right owners from obtaining the necessary broadcasting and recording licenses, in particular where they were represented by collecting societies. They claimed unimpeded access for the purposes of their uses.^[258] Consequently, these provisions allow in particular the replacement of the exclusive right

²⁵⁶ Article 8 of the Satellite and Cable Directive II.

²⁵⁷ Judgment of the Court (Ninth Chamber) of November 19, 2015, *SBS Belgium NV v. Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*, Case C-325/14, ECLI:EU:C:2015:764.

²⁵⁸ Footnote 14 in the text, citing Ricketson, *The Berne Convention*, nn. 9.48 and 9.41ff.

by a right to equitable remuneration. *Although the mandatory collective administration may be covered by the wording of Art. 11bis(2) BC, a "condition under which the right ... may be exercised", it becomes clear from the purpose of the above-mentioned provisions that the Berne Convention thereby addresses only restrictions of the exclusive rights in favor of the users* (broadcasting organizations, record producers). As the historical background of Art. 11bis(2) BC reveals, the potential conflict was seen between collecting societies (as the representatives of authors) and broadcasting organizations rather than between authors and collecting societies. Indeed, the relationship between the author on the one hand and the user on the other hand is not at stake in the cases of mandatory collective administration ...

As the kinds of exceptions and limitations addressed in the Berne Convention relate only to certain interests of the public at large and specific interests of particular groups of users, *it is well possible that the mandatory collective administration of the exclusive rights in question is beyond the concern of the Berne Convention and is not considered at all as a restriction to the minimum rights* (emphasis added).²⁵⁹

While Von Lewinski's description of the origins of the provisions is accurate, it still does not follow from it that determining/imposing conditions of exercising the exclusive rights under Articles 11bis(2) and 13(1) of the Berne Convention only means compulsory licensing and not also the limitation of the rights by prescribing the condition that they may be exercised only through collective management (where it does not depend whether the rightholders authorize or prohibit the use of their works; the use takes place in accordance with the collectively adopted rules of a CMO that they have to accept).

This may be confirmed also by virtue of Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT) concerning the rules of interpretation of treaty provisions.²⁶⁰

Under Article 31.1 of the VCLT, a treaty should be interpreted in good faith in accordance with the *ordinary meaning* of the terms used in the *given context* and in light of *the object and purpose* of the treaty. It is difficult to argue that the *ordinary meaning* of the terms "determination" or "imposition" of conditions of the exclusive rights concerned is limited to compulsory licensing, and that it does not equally apply to other possible conditions, such as the prescription that the rights may only be exercised through collective management (about which it might hardly be alleged that it is not a condition). The *given context* mentioned in Article 31.1 of the VCLT is the regulation of how the rights concerned may be exercised. And the *object and purpose* of the Berne Convention – also referred to in this VCLT provision – are set out clearly in its Preamble as being "to protect, in as effective and uniform manner as possible, the rights of authors in their literary and artistic works" – all of which confirms, rather than challenges, that a limitation of the rights is involved which is justified by the need to balance – as in the case of other limitations – between the legitimate interests of authors and users of the works.

259 Silke von Lewinski (2000). Mandatory collective administration of economic rights: a case study on its compatibility with the international and EC copyright law. *UNESCO e-Copyright Bulletin*, January–March, 2000, 5–6.

260 Articles 31 and 32 of the VCLT read as follows:

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

In a way, von Lewinski acknowledges this when she states that “mandatory collective administration *may* be covered by the wording of Art. 11*bis*(2) BC (sic!), a ‘condition under which the right [...] may be exercised’ ” (emphasis added). Thus, it seems, she does not base her possible interpretation on Article 31.1 of the VCLT and the general rule of interpretation but rather on Article 32, which sets out possible supplementary means of interpretation.

But it is submitted that it is not necessary and justified to apply Article 32 of the VCLT in this case, and also that, even if it were applied, and therefore the “preparatory work” of the Berne Convention were taken into account, it would confirm the above-outlined meaning of the terms used in Articles 11*bis*(1) and 13(1) of the Berne Convention. There is no ambiguity or obscurity about the term “determining/imposing conditions under which the right ... may be exercised” nor does it leave to any manifestly absurd or unreasonable result, for which recourse would be needed to the preparatory work of the Convention. If still such a recourse were made, it would confirm that the term “conditions”, included in Articles 11*bis*(2) and 13(1), is to be interpreted in accordance with its ordinary meaning – namely, as meaning conditions in general rather than only specific conditions only favoring certain users.

It is true that Sam Ricketson, in reviewing the preparatory work, refers in his book on the Berne Convention to broadcasters’ wish for unimpeded access to protected works as a basis for the proposals to introduce compulsory licenses.²⁶¹ However, his analysis continues as follows:

These issues were extensively debated at the Rome Conference where the recognition of the broadcasting right was first proposed. Many delegations favoured restrictions on the exercise of this right, in particular Norway, Australia and NZ. However, *the nature of the suggested restrictions varied considerably: from the imposition of a straightforward compulsory licence to limited exceptions for particular uses and more general controls over abuses of the new right, particularly by collecting societies. By contrast, some delegations, led by the French, were opposed to any restrictions at all*, arguing that in this new area the Convention should uphold the cause of authors’ rights by protecting the new right in absolute terms. *These conflicting proposals were drafted by a special sub-committee which sought to effect a compromise. The latter was essentially based on a French amendment which avoided any reference to the recognition of a conventional compulsory licence, but proposed reserving to national legislation the power to regulate the conditions under which the broadcasting right could be exercised*, subject to three conditions:

- 1 the effect of such restrictions were to be confined to the country which imposed them;
- 2 they were not to affect the author’s moral rights; and
- 3 they should not prejudice the author’s right to an equitable remuneration, fixed by the competent authority.

Although some states would have preferred the formulation of a more generous exception which explicitly recognised the overriding interest of the public, *the sub-committee’s text was finally adopted by the general commission and duly became Article 11*bis*(2) of the Rome Act*. In this regard, it is worth noting the view of the sub-committee that a “country should only avail itself of the possibility of making limitations to copyright, in the case of broadcasting, where the necessity for them had been established by the experience of that country” (emphasis added).²⁶²

Ricketson’s description of the preparatory work of Article 11*bis*(2) of the Berne Convention confirms that the term “conditions” means not only the kinds of condition applicable in accordance with broadcasters’ desires but also *any* kinds of condition, including a condition under which the right concerned may be exercised only through collective management. There is nothing in the text or the preparatory work of Article 11*bis*(2) to suggest otherwise.

Any characterization of the determination or imposition of mandatory collective management for the exercise of rights such that it concerns only the relationship between authors and their CMOs would not be well-founded nor would it correspond to the context of Articles 11*bis*(2) and 11(3) of the Berne Convention. The issue these provisions cover is not what relationship exists between the

²⁶¹ Ricketson, *The Berne Convention*, 522.

²⁶² *Ibid.*, 522–523 (footnotes omitted; emphasis added).

authors and their representative CMO but rather a question that arises *before* the authors become members of a CMO at all: whether or not their exclusive right may be limited by a condition that they cannot exercise it according to their own free wishes but only through a CMO.

Von Lewinski has deduced from the alternative interpretation outlined by her – according to which the term “conditions” is restricted in favor of broadcasters and hence does not cover mandatory collective management – that such kind of provision is not a limitation of the exclusive right. On that basis, she has argued that mandatory collective management may be prescribed also in those cases in which neither the Berne Convention nor another copyright or related rights treaty makes provision allowing the determination/limitation of the exercise of an exclusive right.

In fact, it may be stated that:

- (i) the “conditions” mentioned in Article 11bis(2) – and equally in Article 13(1) – mean *any* conditions of exercising the exclusive right, including the condition that it may be exercised only by a CMO;
- (ii) such a condition necessarily limits the exclusive right of authors, since they are no longer in an exclusive position to decide individually when and under what conditions they authorize the use of their own works; and
- (iii) since such a limitation is allowed only in an exhaustively determined range of exclusive rights, it follows *a contrario* that it cannot be imposed on the exercise of other exclusive rights (unless circumstances fulfill the three-step test).

Christoph Geiger also expressed the view that mandatory collective management is not a limitation of exclusive rights and that there is nothing in the international treaties to restrict national competence in this respect. His arguments, were partly different from what Silke von Lewinski had presented. In view of the complexity of his arguments, it is necessary to quote them in detail in their original context, before responding to them.

The first set of arguments seems to suggest that mandatory collective management is not a limitation of exclusive rights because it only concerns the exercise – and not the existence – of the rights.

It must be underlined at the outset that *none of the [...] treaties expressly settle the question of mandatory collective management. As we have seen they only state that any restriction to the exclusive right must be compatible with the three-step test.* Moreover international conventions set the conditions for the implementation of non-voluntary licenses. Certain provisions are designed to allow Member countries to set up non-voluntary licenses for the benefit of certain groups of users, notably broadcasting organizations. These conditions are stated in *Article 11bis of the Berne Convention*, to which the TRIPS Agreement (Article 9.1) and the WIPO Copyright Treaty (Article 1(4)) refer. *The idea is therefore to replace the exclusive right by a right to fair remuneration.* Once again we are faced with a restriction to the exclusive right since the use is allowed by law.²⁶³

Hence *the real question is to determine whether to subject the exclusive right to mandatory collective management is incompatible with international law, for it constitutes a restriction to the exclusive right, a limitation or an exception to the right of the author.* It is not fitting to revisit terminology issues, as there are numerous scholarly interpretations of the terms “limitation” or “exception”. [...] *One thing is certain however: a limitation or exception affects the existence of the exclusive right, because the author loses control of the use in question. [...].*

263 Footnote 52 in the quoted text:

See however M. Ficsor, La gestion collective du droit d’auteur et des droits voisins à la croisée des chemins: doit-elle rester volontaire, peut-elle être « étendue » ou rendue obligatoire? e-Copyright Bulletin, October–December 2003, 4, according to whom mandatory collective management would also be included under these provisions since it constitutes a restriction to the exclusive right. See also in this sense Sirinelli, Logiques de concurrence et droit d’auteur, Contribution to the seminar Peer-to-Peer: droit d’auteur et droit de la concurrence, reproduced in : RLDC Apr./ June 2007, n° 11, 185, who believes, relying on a study led by M. Ficsor for WIPO (M. Ficsor, Collective Management of Copyright and Related Rights, Report prepared by WIPO, 1989, 327 seq., spec. n° 261 of the Report), that collective management can only be imposed in cases where non-voluntary licenses can be implemented. An analysis of the history of Article 11bis al. 2 of the Berne Convention seems to indicate however that this Article only deals with the restrictions to exclusive rights for the benefit of users (non-voluntary license). Since mandatory collective management does not deal with the relationship between authors and users, it would thus not fall under this Article (see in this sense S. v. Lewinski, La gestion collective obligatoire des droits exclusifs et sa compatibilité avec le droit international et le droit communautaire du droit d’auteur: e-Copyright Bulletin, Jan.–Mar. 2004, 5).

When remuneration is provided, one speaks of “statutory license,” even if this term may be misleading. Indeed, the term “license” seems to imply that the use enters the perimeter of the right, but that authorization is not from the author, but from the law. However, it is not the case since the use is located outside the field of exclusiveness. In our opinion it would thus be more appropriate to speak of an “exception with remuneration”, or even a “right to remuneration.” Yet mandatory collective management does not deal with the existence of an exclusive right, which remains intact and is not questioned. It only intends to solve the question of the exercise of rights, of modalities of implementation: the exclusive right can only be exercised through the collective management society. It is in fact clearly the substance of Community case law, which specifies that collective management deals only with the exercise of rights and not with their existence (emphasis added).²⁶⁴

As it can be seen, the author does not differentiate between limitation and exception; he just states that both affect the existence of exclusive rights. His other thesis is that, by virtue of Article 11bis(2), the exclusive rights of broadcasting and secondary uses of broadcast works are replaced by a right to remuneration, and, therefore, a “statutory license” is involved in the case of which the users do not need authorization, they only must pay remuneration. In his view, mandatory collective management is not a limitation or exception because it only concerns the exercise of the rights. Then, he describes in the following way how exclusive rights and rights to remuneration are managed by CMOs but he does not truly differentiate between voluntary and mandatory collective management:

Collecting societies carry out these exclusive rights on behalf of authors, according to, most of the time, their mandate. The author, by joining a collecting society, may (theoretically) have an influence on the modalities of exercise of his right, since by becoming a member he will be able to participate in the determination of the licensing fees. Sometimes he will even be able to designate the society of his choice. Besides, collecting societies do not always need to grant licenses. Indeed if it is true that, in some countries, they have a legal obligation to do so (like in Germany) it is not always the case (namely in Switzerland and France). Absent such an obligation to enter into a contract, the society could in principle refuse to grant authorization if the conditions are deemed unsatisfactory,²⁶⁵ even if in practice this will rarely be the case (especially to avoid infringing competition law).

The author duly characterizes the difference between two cases of mandatory collective management: on the one hand, where a mere right to remuneration is managed and, on the other hand, where the condition is prescribed in the law that an exclusive right may only be exercised through collective management.

There is a very important theoretical nuance to be made with the remuneration rights (or statutory licenses) which are most of the time also collected by collecting societies, since in that case the collecting society is only used to collect a remuneration right (i.e. a claim), the distribution conditions of which are often determined by law. In the case of mandatory collective management, it is the exclusive right that is enforced, which gives the collecting society greater bargaining power.

Comparison with French law offers an additional clue. Indeed, in France there are two cases of mandatory collective management. The first one is the management of the reprographic reproduction right (Article L. 122-10 of the Intellectual Property Code (hereinafter CPI)) and the second is cable retransmission right management of a broadcast work (Article L. 132-20-1 CPI for copyright; Article L. 217-2 CPI for performers, phonogram and videogram

²⁶⁴ Footnote 55 in the text quoted:

European Commission Decision of October 8, 2002, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA (European Economic Area) Agreement COMP/C2/38.014 – IFPI “Simulcast”, Official Journal of the European Communities (OJ) L 107/58, dated April 30, 2003, 58, point n°66. See also more recently in the framework of the mandatory collective management set up by art. 9 (2) of Council Directive 93/83/EEC of September 27, 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission., CJCE, June 1 2006, *Uradex SCRL c/ Union Professionnelle de la Radio et de la Télé-distribution (RTD) et Sté Intercommunale pour la Diffusion de la Télévision (Brutele)*, case C-169/05, where the Court of Justice reaffirms that the Directive has, for legal certainty and simplification of procedures, implemented a mandatory collective management of the exclusive right of cable retransmission. For a commentary see F. Pollaud-Dulian, *RTDcom*, July/Sept. 2006, 603.

²⁶⁵ Footnote 56 in the text quoted: “See in this sense F. Siirainen, *Le caractère exclusif du droit d’auteur à l’épreuve de la gestion collective*, Thesis, Nice, 1999, 441. According to this author, this would link mandatory collective management closer to the exclusive right than to the non-voluntary license.”

producers). In the first case, Article L. 122-10, CPI states the principle that the publication of a work implies granting the right to a certified collecting society. Yet French doctrine is unanimous to argue that it is not at all a case of “statutory license,” since only the modalities of the exercise of the exclusive right are settled.²⁶⁶ In addition, it must be underlined that some Community directives sometimes authorize, or even impose, mandatory collective management. It is the case of Directive of 27 September 1993 for cable retransmission,²⁶⁷ but also of Directive of 19 November 1992, which allows mandatory collective management of the rental and lending right,²⁶⁸ as well as Directive of 27 September 2001 for the *droit de suite*.²⁶⁹ Compliance of these solutions with international law has never been questioned.²⁷⁰

The following comments are apt in response to the arguments quoted above.

First, in the first paragraph quoted above, it is stated that “none of the [...] treaties expressly settle the question of mandatory collective management”, adding subsequently that “[c]ertain provisions are designed to allow Member countries to set up non-voluntary licenses”. Both statements seem to be correct. However, as discussed above, it would also be accurate to state that none of the treaties expressly settle the question of compulsory licenses (since the treaty provisions make express reference to neither mandatory collective management nor compulsory licenses). It would equally be correct to add that certain provisions are designed to allow countries party to the treaties to prescribe mandatory collective management. This is so since the provisions of the treaties concerned – specifically, Articles 11*bis*(2) and 13(1) of the Berne Convention, which are also applicable by reference under the TRIPS Agreement and the WCT – use only the expression “determining/imposing conditions for the exercise” of the exclusive rights concerned (in a way that such conditions must not be prejudicial to the moral rights of authors nor their right to an equitable remuneration). As also discussed above, both the application of compulsory licenses and the prescription of mandatory collective management are limitations of the exclusive rights concerned, in the form of conditions for the exercise of those rights, and – if duly applied – both must prejudice neither moral rights nor the right to equitable remuneration.

Second, at the end of the first paragraph quoted above, a footnote refers to differing views on the interpretation of Article 11*bis*(2) of the Berne Convention. Among other things, the footnote includes the following statement: “This Article only deals with the restrictions to exclusive rights *for the benefit of users* (non-voluntary license). *Since mandatory collective management does not deal with the relationship between authors and users, it would thus not fall under this article*” (emphasis added). This corresponds to von Lewinski’s argument discussed above and it may be responded to similarly – that is, by arguing that the preparatory work of the provision contradicts this thesis: “conditions”, as appears in Article 11*bis*(2), means *any* conditions and not only *certain* conditions (namely, not only those that benefit specific users). Mandatory collective management truly does not concern the relationship between authors and users, since the authors are not in the position to exercise their rights in relation with users; only the CMO may do so. However, *when an exclusive right is granted, it is granted exactly in respect of the relationship between authors and users*. It is on the basis of such a right that an author is in the exclusive position to decide whether they authorize or prohibit the use of their work and, if they authorize it, under what conditions. Where the law imposes a condition such that an author cannot exercise this exclusive right

266 Footnote 57 in the text quoted: “P.-Y. Gautier, *Propriété littéraire et artistique*, 5e éd., Paris, PUF, 2004, n° 195; A. et H.-J. Lucas, *Traité de la propriété littéraire et artistique*, 3rd ed., Paris, Litec, 2006, 562, note 43; F. Pollaud-Dulian, *Le droit d’auteur*, Paris, Economica, 2005, n° 746 seq. and n° 1644.”

267 Footnote 58 in the text quoted: “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, JOCE L 248 of 6 Oct. 1993, p. 15; article 9.1, entitled ‘Exercise of the cable retransmission right’: ‘Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.’”

268 Footnote 59 in the text quoted: “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, JOCE L 248 of 6 Oct. 1993, 15; Article 9.1, entitled “Exercise of the cable retransmission right”: “Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.”

269 Footnote 60 in the text quoted: “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, JOCE L 272 of October 13, 2001, 32; Article 6.2: ‘Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.’”

270 Christoph Geiger (2007). The role of the three-step test in the adaptation of copyright law to the information society. *UNESCO Copyright e-Bulletin*, January–March, 9–11.

but only a CMO according to its internal rules, *this relationship between the author and users ceases to exist*. The essence of the limitation of the exclusive right consists exactly in this transformation of the relationship: the authors lose the authority to decide who uses their works and how, they must accept that only the CMO has that authority (subject to its uniform conditions and tariffs – in the *prior* setting of which the members of the organization participate collectively). In other words, the *existence* of mandatory collective management means that the authors do not have – but only their CMO has – direct relationship with the users.

Third, in the third paragraph quoted above, it is submitted that: “[M]andatory collective management does not deal with the existence of an exclusive right, which remains intact and is not questioned. It only intends to solve the question of the exercise of rights, of modalities of implementation: the exclusive right can only be exercised through the collective management society.” It is true that mandatory collective management concerns “the question of the exercise of rights” and its “modalities”, how rights may be exercised. This accords with the conception of mandatory collective management presented above as a condition (determining a single possibility) imposed on the exercise of the exclusive rights concerned. The allegation that the exclusive rights of authors as rightholders remain “intact” under this condition does not correspond to the actual legal situation. If an exclusive right remained “intact”, those for whom it is granted would retain the ability to decide individually whether they authorize or prohibit the use of their works; and where mandatory collective management is imposed, individual rightholders can make no such decisions. Their exclusive right cannot be said to be “intact” because their ability to make such decisions is transferred by the law to a CMO, which is usually obliged to grant a license to *any* user who meets the conditions of its uniformly applicable tariff system.

Fourth, at the end of the third paragraph quoted above, this statement may be found: “It is in fact clearly the substance of Community case law, which specifies that collective management deals only with the exercise of rights and not with their existence.” It is submitted that the E.U. case law to which the author points does not concern the interpretation of Articles 11*bis*(2) and 13(1) of the Berne Convention; rather, it maps the existence and exercise of rights from an antitrust perspective, and it concerns the relationship between CMOs and users. The question of whether or not the exclusive rights of authors and other owners of rights may be limited by prescribing the condition that the rights is allowed to be exercised only through a CMO is an entirely different matter.

Finally, in the fifth paragraph quoted above, certain cases of mandatory collective management under French law and E.U. law are described, followed by this statement: “Compliance of these solutions with international law has never been questioned.” It is true that (at time of writing) nobody has brought such a question before the courts simply because, in the cases mentioned in that paragraph, the international norms have provided for mandatory collective management either of the specific rights in question (i.e., mere rights to remuneration) or because the Berne Convention allows conditions to be determined for, or imposed on, the exercise of the exclusive rights concerned – that is, because mandatory collective management may be applied exceptionally. But this also means, *a contrario*, that where the international treaties do not provide for this kind of exceptional possibility, it would be a conflict to apply such a limitation – in cases other than where, under the three-step test, it might still be applicable to the right of reproduction in accordance with Article 9(2) of the Berne Convention, and to the rights not provided by the Berne Convention but provided in the TRIPS Agreement (the right of rental) and in the WCT, the WPPT and the BTAP (in addition to the right of rental especially the right of interactive making available to the public), in accordance with the relevant provisions on the test.

Mandatory collective management as a normal way of exercising rights to remuneration

Under the preceding titles, the applicability of mandatory collective management of *exclusive rights* has been analysed. It has been found that it is a limitation of those rights, since the rightholders cannot decide individually whether they authorize or prohibit the use of their works. In the case of a mere right to remuneration, the rightholders’ position is limited by their very nature of the

rights; there is no need for their authorization. Therefore, it is submitted that mandatory collective management is not a limitation – and is permitted as a normal way of exercising rights – where:

- a right *ab ovo* is not provided as an exclusive right of authorization but rather as a mere right to remuneration (as in the case of the resale right (*droit de suite*) under Article 14*ter* of the Berne Convention or the right of performers and producers of phonograms to an equitable remuneration for broadcasting and communication to the public of phonograms published for commercial purposes under Article 12 of the Rome Convention and Article 15 of the WPPT;
- the restriction of an exclusive right to a mere right to remuneration is allowed (as under Article 9(2) concerning the right of reproduction in accordance with the three-step test); and
- a “residual right” – as a right to remuneration – “survives” the transfer of certain exclusive rights, such as under Article 5 of the Rental, Lending and Related Rights Directive concerning the exclusive rental right of authors and performers.²⁷¹

These cases are reviewed under the following titles of the chapter.

Mandatory collective management of rights to remuneration provided for as such in the international treaties

The Berne Convention provides authors one right as with a right to remuneration – rather than with an exclusive right; namely, the resale right (*droit de suite*). Article 14*ter*(1) of the Convention provides that:

- (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

Article 14*ter*(2) and (3) clarify that the right is optional:

- (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.
- (3) The procedure for collection and the amounts shall be matters for determination by national legislation.

As pointed out above, since authors do not have an exclusive right but only a right to collect remuneration, it is not a limitation of that right if its application is subject to mandatory collective management. While the E.U. Resale Right Directive²⁷² – which requires Member States to provide for a resale right and determines the tariffs and other aspects of its application – does not prescribe mandatory collective management for the collection and distribution of the remuneration due for the resale right, it *allows* Member States to impose such a system. Article 6(2) of the Directive reads as follows: “Member States *may* provide for compulsory or optional collective management of the royalty provided for under Article 1” (emphasis added).

The word “may” indicates clearly that *permission* is involved – that the drafters of the Directive found it necessary to distinguish this right such that Member States are allowed to subject rightholders to its mandatory collective management. This means that there is an *a contrario* implication.

As mentioned above, Article 12 of the Rome Convention and Article 15 of the WPPT provide for a “single equitable remuneration” for performers and producers of phonograms. Article 15(1) and (2) of the WPPT set out thus:

²⁷¹ By definition, such a “residual right” allows the rightholder to exercise the exclusive right concerned, since the residual can be quantified only after the right has been transferred.

²⁷² 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, OJ L 272/32, October 13, 2001.

- (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes^[273] for broadcasting or for any communication to the public.
- (2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

Under paragraph (3) of the Article (as also under Article 16.1(a) of the Rome Convention), however, a government may lodge reservations such that they apply the right to single equitable remuneration only to certain uses or in some way other than that provided for under the Article – or even that they will not apply it at all.

Collective management is the normal and usual way of exercising the right to a single equitable remuneration, either through joint organizations of performers and producers or through an organization representing one of the two categories (e.g., a CMO of producers), which transfers the share to the other (in that case, to performers). The exercise of the right to remuneration may be – and frequently is, especially in Europe – subject to mandatory collective management. But, for the phonographic industry, the role of broadcasting and communication to the public of phonograms – in parallel with the decline of the relevance of the distribution of tangible copies – has changed significantly. Broadcasting and communication to the public are no longer “secondary uses” as they once were. Therefore, phonogram producers pay even closer attention to the effective exercise of these rights, which also means that they commonly oppose mandatory collective management and favor instead extended – and even voluntary – collective management; in particular, in those countries where they are of the view that they are given few guarantees that their rights will be managed appropriately.²⁷⁴

Mandatory collective management of rights to remuneration when authors and performers transfer their rights to producers

The negotiations underpinning, and the substance of, Article 12 of the BTAP on the transfer of audiovisual performers’ rights illustrate where the recognition of such a remuneration right may be justified. The diplomatic conference convened in Geneva in 2000 was unable to adopt a treaty on the rights of audiovisual performers because no consensus was reached on such an article; it was only in 2012, when the diplomatic conference was “resumed” in Beijing, that a finely tuned compromise was reached and the BTAP was finally adopted.

Article 12(1) and (3) of the BTAP²⁷⁵ read as follows:

- (1) A Contracting Party *may provide* in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty *shall be owned or exercised by or transferred to the producer* of such audiovisual fixation *subject to any contract to the contrary* between the performer and the producer of the audiovisual fixation as determined by the national law.
[...]
- (3) *Independent of the transfer of exclusive rights* described above, *national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration* for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11 (emphasis added).

273 Article 15(4) includes the following clarification:

For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

274 For example, in Ukraine, the exercise of the right to single equitable remuneration was subject to mandatory collective management. When the law was revised and a new Law on collective management proposed, performers were in favor of maintaining the status quo; at the insistence of the phonographic industry (represented by IFPI), the system has been changed instead to extended collective management.

275 Article 12(2) of the BTAP covers only the possibility of requiring written contract.

These provisions reflect the differing legal status of performers in the various legal systems after the transfer of their rights. In some of them, performers have no statutory right but only a possible claim to supplementary remuneration (so-called “residuals”) on the basis of “individual, collective and other agreements”; in others, they have a statutory right to claim such remuneration.

The “residuals” are not based on a genuine “related right” granted in law but on a contractual claim. Nevertheless – and especially when covered by collective agreements – performers obtain their remuneration through bodies that collect the “residual” remuneration and distribute it to them, such as the well-known (voluntary) system of “guilds” in the United States. In contrast, in Europe, there are CMOs that collect from the users, rather than from the producers, the remuneration due to audiovisual performers after they have transferred their exclusive rights.

In the European Union, Article 5 of the Rental, Lending and Related Rights Directive provides that an unwaivable right to an equitable remuneration remains in place when authors and performers transfer their exclusive right of rental concerning copies of phonograms and audiovisual works to the producers. Under Article 5(4), “Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed” – that is, that they may choose to prescribe mandatory collective management of these rights – and several E.U. Member States have done so. (But as it is mentioned in the last section, the significance of the right of rental – which applies only to tangible copies – has dramatically decreased as online distribution channels have come to the fore.)

It is worth noting too that the Directive provides, in principle, for an exclusive right of public lending (not covered by the international treaties), which – by virtue of Article 6 of the Directive – may be derogated to a right to remuneration for at least authors. The majority of E.U. Member States have limited it in that way and prescribed its mandatory collective management.

Mandatory collective management of the right to remuneration for private copying

With the advent of ever more perfect and efficient reproduction technologies, it became evident that the widespread domestic reproduction of sound recordings for private purposes might seriously prejudice the legitimate interests of authors, performers and producers of phonograms. Similar – although less evident and hence more frequently disputed – prejudices have been identified in respect of the domestic reproduction of audiovisual works for private purposes. Technological developments have also made possible the private copying of text- and image-based works, and this has likewise led to unreasonable prejudice of the legitimate interests of the authors and publishers of such works.

Article 9(1) of the Berne Convention provides for an exclusive right of reproduction (of any kind), unless an exception or limitation applies. For a while, reproduction for private purposes was a general exception to the right, because the techniques available for such reproduction did not conflict with the normal exploitation of the works concerned nor did they unreasonably prejudice the legitimate interests of the rightholders. As new technologies facilitated the making of perfect copies for private purposes in a domestic environment, this changed: the conflict with the legitimate interest of rightholders became obvious. The massive scale on which such copying was possible, combined with privacy rights, mean that prohibiting the act was untenable: not only would such prohibition be difficult to enforce at the domestic level, but also it was impracticable (if not impossible) to monitor and license such use, and to collect due remuneration.

There was, however, a possibility of reducing the prejudice caused to rightholders’ prejudice to a reasonable level through a system that was suitable to do rightholders, at least, a “rough justice”: in the form of modest percentage added to the price of the recording equipment and materials used to reproduce the works, collected by CMOs from the manufacturers, or importers (and any distributors),²⁷⁶ and distributed to rightholders of the works or other protected productions assumed to be the subject matter of the use.

276 This shared responsibility was rooted in joint and several liability.

It is submitted – and when the competent WIPO bodies dealt with this issue, they reached the same conclusion²⁷⁷ – that if unreasonable prejudice might be mitigated with such a system, Article 9(2) of the Berne Convention on the three-step test seems to require a government to make use of it (since the third condition of the test is that an exception to, or limitation of, the right of reproduction may be applied only if it does not unreasonably prejudice rightholders). The application of this right to remuneration²⁷⁸ is not an exception to the right of reproduction (because an exception means that the right is not applicable at all) but a limitation of the right (allowing its continued application in a limited form). The remuneration gathered in exercise of this right must at least reduce the prejudice to a level that is not unreasonable (even if it cannot eliminate it entirely).

Germany was the first country to introduce – in 1965 – such a right to remuneration. The second, Austria, followed suit in 1980, and the third, Hungary, in 1982; since then, ever more countries have taken similar steps. The volume of this book does not allow reviewing all the various aspects of the system whereby countries manage the right to remuneration for private copying. But it seems worthwhile referring to the study on private copying published by WIPO together with the Dutch CMO Stichting de Thuiscope under the title of “International Survey of Private Copy: Law & Practice 2016” and the more recent “Private Copying Global Study 2020” published by CISAC in November 2020 which is an updated combination of the WIPO/Stichting de Thuiscope survey and a previous CISAC study;²⁷⁹ it offers a comprehensive overview of the existing systems around the world and facilitates evidence-based decision-making for the application of a right to remuneration for private copying.

In the context of this chapter, the point worthy of emphasis is that collective management is indispensable to exercise of the right to remuneration for private copying. When national laws recognize such a right, they do provide for collective management and, in the overwhelming majority of cases, mandatory collective management. It is an obvious solution: since a mere right to remuneration is involved, it is apt to make collective management a condition of rightholders’ enjoyment of the right; it is likewise the most effective way in which manufacturers, importers and distributors of reproduction equipment and/or recording material can pay the remuneration due.

Mandatory, extended and voluntary collective management of reprographic reproduction rights

Before turning to extended collective management, it seems appropriate to discuss the collective management of reprographic reproduction rights in text- and image-based works – for two reasons:

- (i) because mandatory collective management is commonplace in the exercise of these rights (although there are also voluntary and extended management systems); and
- (ii) because, in many cases, solutions similar to those applied for private copying are applied for reprographic reproduction – namely, a right to remuneration “levied” on the equipment used for such reproduction.

As discussed in Chapter 1, reprography was the first major new technology after the 1971 Paris revision of the Berne Convention to raise serious copyright problems and for the solution of which the exercise of rights through collective management was found to be the best possible way.

The circumstances of reprography were, however, different from those of the copying of phonograms and audiovisual works. Most obviously, while “private copying” (that is, the

277 See Mihály Ficsor (2002). *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation*. New York: Oxford University Press (hereinafter: Ficsor, *The Law of Copyright and the Internet*), 310–313.

278 The term “levy” is avoided consistently in this book because it is highly misleading. Understood as a sort of tax, it does not correspond to the actual legal status of what is the exercise of a holder’s right to remuneration for the use of their works in this way.

279 See Hester Wijminga, Wouter Klomp, Marije van der Jagt and Joost Poort (2017). *International Survey of Private Copy: Law & Practice 2016*. Geneva: WIPO. Available at www.wipo.int/publications/en/details.jsp?id=4183&plang=EN; Hester Wijminga et al. (2020). *Private Copying Global Study 2020*. Neuilly-sur-Seine/Hoofddorp: BIEM/CISAC/Stichting de Thuiscope. Available at www.cisac.org/services/reports-and-research/private-copying-global-study; CISAC (2020). New Private Copying Global Study shows potential for better remuneration of rightholders. Press release, November 23. Available at www.cisac.org/Newsroom/news-releases/new-private-copying-global-study-shows-potential-better-remuneration. CISAC’s new study offers a comprehensive overview of the systems existing around the world and is intended to facilitate evidence-based decision-making in relation to remuneration for private copying.

reproduction of phonograms and audiovisual works at home for private purposes) quickly became a global phenomenon, for a long time relatively few people had unlimited access to photocopying machines – until printers, attached to home computing systems, became widespread. Less obviously, it is important to distinguish the purposes of reprographic reproduction, in general, from those of “private copying”. While “private copying” concerns mainly works of entertainment, reprography is typically used for the copying of material necessary for education, research and library services (as well as in private and corporate office environments) – and this means that special public interest considerations emerge.

As it is stressed above concerning private copying, the most decisive aspect of the legal context of reprography is the right of reproduction as an exclusive right under Article 9(1) of the Berne Convention (and, by reference, under the TRIPS Agreement and the WCT) that cannot be restricted except where this corresponds to the three-step test under Article 9(2). It has never been in doubt that reprographic reproduction (photocopying, etc.) is a form of reproduction; therefore, the question is not what rights authors should enjoy in respect of reprographic reproduction of their works but rather in which limited cases exceptions or limitations may be allowed. The answer is the same in this context as it is for private copying: only those exceptions and limitations may be allowed that fulfill the cumulative conditions of the three-step test.

The conflict between the widespread photocopying of text- and image-based works and authors’ and publishers’ interests (the latter as transferees or licensees) became clearer much more quickly than did that for private copying of phonograms and audiovisual works and performers or producers.

Indeed, it was as early as in 1965 that detailed provisions were in the German Copyright Act on the right of reproduction, and on the exceptions and limitations thereto. The legislators had taken into account a 1955 decision in which the Federal Court of Justice (Bundesgerichtshof (BGH)) considered a case concerning an industrial firm’s reproduction of scientific journal articles, with the intention of sharing them among its employees. The Court found that this activity served the commercial objectives of the firm and, therefore, it was not a free use. As a consequence of this decision, the Federation of German Industry (Bundesverband der deutschen Industrie) and the Association of the German Book Trade (Börsenverein des deutschen Buchhandels) concluded a contract setting out the terms under which firms could photocopy from periodicals for their internal use.

The German CMOs went on to conclude a series of licensing agreements, such as one with the Ministries of Culture of the provinces (Länder) agreeing to reprographic reproduction in schools in return for an annual lump-sum payment. To distribute that remuneration appropriately, the Ministry required that selected schools complete surveys of the works used. VG WORT also started collecting substantial amounts under agreements concerning copying for commercial purposes.

The governments of other countries also soon began to recognize the need for a legislative response to the unreasonable prejudice caused by ever more widespread reprographic reproduction. In the first half of the 1970s, the courts of the United States were commonly still rejecting claims for remuneration, but in the course of the preparatory work of what was adopted as the new U.S. Copyright Act in 1976, a more thorough analysis of the impact of photocopying took place. The Senate Judiciary Committee recommended, in its 1975 report, that “representatives of authors, book and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines”, and that, for “library photocopying practices not authorized by this legislation, ... workable clearance and licensing procedures be developed”.²⁸⁰

In 1978, the Copyright Clearance Center (CCC) was established, in accordance with this recommendation, as a voluntary CMO. It developed its licensing system gradually to take two basic forms:

- a blanket license in return for a fee, set by the CCC, to cover the organization’s repertoire (i.e., the works of those rightholders who joined the Center); and
- per-copy licenses, for which the rightholders concerned set the fee.

280 See Senate Judiciary Committee (1975), *Copyright Law Revision*. Report No. 94–473 of the 94th Congress, First Session, November 20, 1975. Available at www.copyright.gov/history/law/clrev_94-473.pdf

Growing attention to the issues of photocopying in the United States in that period also played a role in bringing the joint session of the Subcommittee of the Executive Committee of the Berne Convention on reprographic reproductions and the Subcommittee on reprography of the UNESCO Universal Copyright Convention to Washington, D.C., in June 1995.²⁸¹ One of the key points of the resolution adopted at the session was that: "In those States where the use of reprographic reproduction is widespread, such States could consider, among other measures encouraging the establishment of collective systems to exercise and administer the right to remuneration."²⁸²

Waves of technological development since that time have resulted not only in ever more widespread reprographic reproduction but also in its increasing speed and improving quality. Reprographic reproduction rights have thus been recognized in many countries and are usually exercised through collective management – in many cases, in its mandatory or extended forms. The active awareness-building and cooperation programs of WIPO and IFRRO have played a decisive role in the establishment and operation of these systems. The membership of IFRRO now extends globally is evidence of the spectacular progress made in this field: at the time of writing, there were more than 150 member organizations spanning more than 85 countries.²⁸³

The right of remuneration for reprographic reproduction is generally recognized jointly for authors and publishers of the works covered, because both suffer prejudice if widespread reprographic reproduction is not duly remunerated: publishers, as transferees of rights or licensees, because it unreasonably prejudice their legitimate interests to exploit the rights they have obtained from the authors; and authors because, on the basis of their publishing contracts, they usually have the right to share in the income generated by the exploitation of the works published. The share is sometimes based on a contractual arrangement, but in a number of countries copyright laws contain provisions to regulate this.

In 2015, however, the CJEU in the *Reprobel*,²⁸⁴ case adopted a judgment that did not seem to recognize the publishers' ownership status. The Court held that:

Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29^[285] preclude national legislation, such as that at issue in the main proceedings, which authorises the Member State in question to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, those publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived.²⁸⁶

The judgment created some temporary problems in the application of the, until that time, well-functioning systems of the E.U. Member States, which tried to avoid the negative impact of the judgment by adopting new provisions to maintain the publishers' share in new forms. Finally Article 16 of the Digital Single Market Directive, solved the problem; it provides as follows:

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right.

281 See *Copyright*, August 1975, 159–175. Note that the United States was, at this time, a party to the UCC but not to Berne.

282 *Ibid.*, 175.

283 See IFRRO (undated): What is IFRRO. Available at <https://ifrrro.org/page/what-is-ifrrro/>

284 Judgment of the Court (Fourth Chamber) of November 12, 2015, *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, Case C-572/13, ECLI:EU:C:2015:750, point 2 of the summary of the rulings.

285 The provisions read as follows:

Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right-holders receive fair compensation;
- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor 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.

286 *Reprobel*, point 2 of the summary of the rulings.

Recitals (60) and (61) of the Directive stress the reasons why – contrary to *Reprobel* – statutory provisions on the sharing of the remuneration are justified:

- (60) Publishers [...] often operate on the basis of the transfer of authors' rights by means of contractual agreements or statutory provisions. In that context, publishers make an investment with a view to the exploitation of the works contained in their publications and can in some instances be deprived of revenues where such works are used under exceptions or limitations such as those for private copying and reprography, including the corresponding existing national schemes for reprography. In order to take account of this situation and to improve legal certainty for all parties concerned, this Directive allows Member States that have existing schemes for the sharing of compensation between authors and publishers to maintain them [...].
- (61) [...] All Member States should be allowed but not obliged to provide that, where authors have transferred or licensed their rights to a publisher or otherwise contribute with their works to a publication, and there are systems in place to compensate for the harm caused to them by an exception or limitation, including through collective management organisations that jointly represent authors and publishers, publishers are entitled to a share of such compensation.

There is wide variation among the national systems concerning reprographic reproduction rights and their collective management, including the legal basis of their application. Mandatory collective management is the most frequent form; in a few cases, statutory licenses are applied,²⁸⁷ but the systems are most commonly based on a percentage payment "levied" on reproducing equipment and more rarely payable by operators.²⁸⁸ There are also several countries with voluntary collective management systems in place for the rights²⁸⁹ and some that apply extended collective management (see next section).²⁹⁰ In many cases, the system may more properly be categorized as a combination of these different forms.

The Dutch system is a good example of the advantages that mandatory collective management can offer in exercising reprographic reproduction rights (as well as of a single CMO in a natural monopoly situation). The Netherlands adopted its first provisions on reprography between 1972 and 1974, but they did not touch on limitation of the right of reproduction; rather, as a general rule, reproduction of a few copies for private use was free of charge. The Copyright Act was even more generous towards government offices, libraries, educational institutions and other institutions representing public interests, which were allowed to make more than a few copies for their own internal use. Commercial organizations and institutions, meanwhile, were also allowed to make more than a few copies – "as many copies as are reasonably necessary" – in return for an equitable remuneration (although libraries were allowed to make single copies of articles for users and for interlibrary loans with no such obligation).

At first, collecting society Foundation Reprorecht – set up to represent authors and publishers, and to collect photocopying fees – had difficulties in fulfilling its task because it had no special status in law and hence the copiers refused to deal with the society. It was only the government's payment of nominal sums to the society that sustained it. Even a royal decree failed to break the deadlock: delivered on August 23, 1985, the decree provided that remuneration for reprographic reproduction must be paid to a collecting society, to be appointed by the Minister of Justice, with the exclusion of any other society and even of the owners of rights themselves. It was only when, on February 19, 1986, the minister duly appointed Reprorecht as the exclusive collecting society that the system became workable.

Finally, it should be mentioned that certain countries have a specific regulatory framework for collective management in the context of reprographic reproduction for educational purposes. In some case, such copying is free of charge – except where the educational institutions know, or should know, that a license agreement is available for such copying (a so-called license override)

287 For example, in Australia, the Netherlands, Singapore and Switzerland.

288 This is the case, e.g., in Austria, Belgium, Bulgaria, the Czech Republic, Ecuador, France, Germany, Greece, Hungary, Italy, Lithuania, Nigeria, Peru, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

289 See, e.g., Argentina, Brazil, Canada, Chile, Colombia, Ireland, Jamaica, Japan, Kenya, New Zealand, South Africa, Trinidad and Tobago, United Kingdom, United States and Uruguay.

290 In addition to the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), for example, also in Malawi and the Russian Federation.

and that a CMO has made such a license available. This is the case, for example, in the United Kingdom, where it was first introduced, and also in other common-law jurisdictions, such as Barbados, Ghana, Ireland, Jamaica, Kenya, and Trinidad and Tobago.²⁹¹ Article 5(2) of the E.U. Digital Single Market Directive confirms the applicability of such a “license override” system:

2. Notwithstanding Article 7(1), Member States may provide that the exception or limitation adopted pursuant to paragraph 1 does not apply or does not apply as regards specific uses or types of works or other subject matter, such as material that is primarily intended for the educational market or sheet music, to the extent that suitable licences authorising the acts referred to in paragraph 1 of this Article and covering the needs and specificities of educational establishments are easily available on the market.

Extended (and presumption-based) collective management from the viewpoint of the international treaties

One of the most important advantages of a fully developed collective management systems is that CMOs may grant blanket licenses for the use of the quasi entire global repertoire of works under copyright or objects of related rights within a given category. However, while the system of reciprocal representation agreements is well developed (especially in the case of musical “performing rights”), that repertoire can never be fully “global”, since there are in some countries no appropriate partner organizations with which a CMO can conclude reciprocal representation agreements, or because there are some rightholders who do not trust a CMO with the exercise of their rights.

There are two basic legal techniques to make blanket licensing possible. The first is the *presumption-based* system, which usually involves three elements.

First, until the contrary is proven, it is presumed that the license granted by the CMO covers all works in the given category for which the right concerned applies (i.e., either statute or case law provides that the CMO can authorize, in this way, the use of works not covered by its repertoire).

Second, the CMO guarantees that individual rightholders will not claim remuneration from the users to whom blanket licenses are granted and that, if they try to do so, the CMO will settle their claims – and it will also indemnify users against any prejudice and expense that results from such claims.

Third, the CMO also guarantees that it will not treat owners of rights who have not delegated their rights to it less favorably than it does those authors who have done so.

Since a presumption may be rebutted, it cannot be said that such a system is in conflict with the provisions on exclusive rights. Nevertheless, it is increasingly frequent that presumption-based systems are replaced by extended collective management schemes.²⁹²

This other legal technique – extended collective management – in view of its well-regulated nature, with due guarantees to those rightholders who have not joined a CMO, seems to be more advantageous for the holders of exclusive rights. The essence of such a system is that if a CMO is authorized to manage a certain right with a sufficiently representative repertoire in the given field, the effect of the licenses granted by the CMO is extended by law to the rights of those rightholders who have not entrusted the organization with the management of their rights.

291 For a description of this system, see Olav Stokkmo (2019). *The Role of Collective Licensing*. Geneva: IPA. Available at www.internationalpublishers.org/images/aa-content/ipa-reports/Licensing_practices_2019-20/Olav_Stokkmo_-_The_Role_of_Collective_Licensing.pdf

292 In fact, even in those copyright laws in which, in principle, the concept of presumption appears, it is rather a specific form of extended collective management system. For example, article 157(5) of the Croatian Copyright Law provides:

It shall be presumed that the collective management organization [...] has powers of attorney for collective management of rights for which it is authorised for all domestic and foreign holders of such rights, except for that rightholder who has notified the collective management organisation explicitly in writing not to manage his rights (emphasis added).

In addition to the obvious basic criterion that only a CMO that is well established and functions in accordance with the requirements of good governance may be allowed to operate such a system, there are five basic conditions to be fulfilled so that extended collective management do not have the effect of eroding an exclusive right.²⁹³

First, there should be a situation where the effective exercise of the right concerned is impossible, or at least impracticable, without collective management and hence it can be presumed that non-mandating rightholders are also ready to make use of this form of exercising the right. For example, this is clearly the case as regards the management of the right of public performance in musical works.

Second, the concept of “extension” should be applicable in the sense that there is a sufficiently representative CMO²⁹⁴ such that the effect of the licenses it grants may simply be extended to those rightholders who have not yet joined the organization – even though joining the CMO is the only way in which they can effectively benefit from their rights.

Third (especially in the case of exclusive rights), special provisions should be made to protect the interests of those rightsowners who have not joined the organization and who do not wish to participate in the collective management system. Those rightholders should be free to choose between either claiming remuneration or “opting out” (i.e., declaring that they do not want the organization to represent them). In the latter case, they are supposed to take care of the exercise of their rights individually. The procedure for “opting out” should be simple and effective. Rightsowners should be granted a reasonable deadline by which to notify the CMO, so that it may exclude their works from its repertoire, by means of a declaration applying to all of their present and future works. The opt-out should not be subject to burdensome conditions that make it membership a *de facto* formality.²⁹⁵ It is also a requirement that rightholders who have not explicitly (directly or indirectly, through reciprocal representation agreements) authorized the CMO to manage their rights be adequately informed about how and when they may opt out.²⁹⁶

Fourth (and as is true of collective management more generally), it is particularly important in the case of extended (as well as mandatory) collective management that due efforts – a kind of “diligent search” – should be made to identify and/or to locate any unknown and/or non-locatable rightholders.

Fifth, those rightholders who have not explicitly authorized the CMO to manage their rights should enjoy equal treatment to that of those who have done so.

If these conditions are met, not only is an extended collective management system in accordance with the international treaties, but also its enabling nature becomes evident.

The status of “orphan works” is a good example to show the enabling effect of extended collective management.

Article 2 of the E.U. Orphan Works Directive defines an “orphan work” as a work (or a phonogram) in the case of which none of the rightholders can be identified, or even if one is (or more are) identified, none can be located despite a diligent search carried out in accordance with Article 3.²⁹⁷

293 It should be self-evident that the regulation of extended collective management should align with the international treaties on copyright and related rights, unless it covers only the exercise of rights of nationals of the Contracting Party for protection over which only domestic law is said to hold sway: see Article 5(1) and (3) of the Berne Convention; Article 3(1) of the WPPT; Article 3(1) of the BTAP.

294 The test of whether or not a CMO is “sufficiently representative” is threefold: (i) the CMO should represent a substantial number of the rightholders concerned; (ii) this should be true of both domestic and foreign rightholders; and (iii) where one organization has to be chosen from among two or more candidate organizations, that which the most closely corresponds to the other two conditions should be selected. See, e.g., more on the Hungarian regulation on “representative organizations” later in the chapter.

295 As discussed later in this chapter, in its *Soulier and Doke* judgment, the CJEU found that the French government had introduced just such an “opt-out” system into extended collective management to facilitate the licensing the use of out-of-commerce works.

296 As also discussed later in the chapter, it is *Soulier and Doke* that drew attention to the requirement, which is particularly important where a previously unknown new extended collective management system is introduced.

297 That diligent search is made ever easier by the growing database systems shared among CMOs.

Where extended collective management is in place, rights are exercised even on behalf of non-member rightholders; this means that remuneration will be collected also for those rightholders who have not yet been identified and/or located. A CMO may go on to qualify the work as “orphan” – and consider the amount due to these unknown and/or non-locatable rightholders “non-distributable” – only if their genuinely diligent search has been unsuccessful. In other words, the CMOs cannot oblige rightholders to “claim” what is due to them but must instead work to identify and locate them, and transfer to them the remuneration due if such searches are successful.

Recital (24) of the Directive recognizes the role of collective management and, in particular extended collective management, in this respect:

This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation.

Where these requirements are not fulfilled, the extended collective management system may start to approach mandatory collective management and can conflict with the international treaties, as was emphasized in the second edition of this book:

The essence of such a system is that, if there is an organization that is authorized to manage a certain right by a large number of owners of rights, and thus it is sufficiently representative in the given field, the effect of such joint management is extended by the law also to the rights of those owners of rights who have not entrusted the organization with the management of their rights. In an extended joint management system, there should be provisions for the protection of the interests of those owners of rights who are not members of a joint management organization. They should have the possibility of “opting out” (that is, declaring – with a reasonable deadline – that they do not want to be represented by the organization) and/or claiming individual remuneration. Unless such possibilities exist and may be applied in practice without any unreasonable difficulties, an extended joint management system is to be regarded a form of obligatory joint management, and, thus, point (4) above is applicable to it.²⁹⁸

Point (4), to which reference is made in this point, states that mandatory collective management is a limitation of exclusive rights to which the provisions of the treaties on limitations of copyright and related rights apply.²⁹⁹ However, in the case of extended collective management, another issue might emerge if the “opt-out” system is not sufficiently accessible. Since formality-free protection is a basic principle of the international treaties on copyright and related rights, it is worth considering this issue first and dealing only then with the question of whether or not extended collective management may result in a limitation of rights.

There are some who argue that opting out is, in a way, a condition of exercising a right,³⁰⁰ and that it may therefore conflict with the prohibition of formalities under international treaties as conditions of enjoyment and exercise copyright and related rights.³⁰¹ This may well be true if opt-out provisions do not correspond to the requirements outlined above, and as it is discussed below how the CJEU did find in a case that certain specific aspects of the French legislation on extended collective management was not in accordance with the principle of formality-free protection.³⁰²

298 Mihály Ficsor (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 161, point (14).

299 Reference is made only to limitations, since the rights concerned are recognized and exercised (although through a CMO) – i.e., there is no exception to the applicability of the right. (On the concepts of – and differences between – exceptions to a right and a limitation of an exclusive right, see Ficsor, *WIPO Guide and Glossary*, 286–287.)

300 “In order to prohibit the use of the work, the rightholder must ‘opt out’ of the ECL and therefore the exercise of copyright as an exclusive right can be said to be subject to a formal prerequisite. It is not quite clear whether such a formal prerequisite required by law is prohibited by Article 5 of the Berne Convention”; Thomas Riis and Jens Schovsbo (2010). Extended collective licenses and the nordic experience: it’s a hybrid but is it a Volvo or a lemon? *Columbia Journal of Law & the Arts*, 33(4), 13. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230

301 See Article 5(2) of the Berne Convention, Article 20 WPPT and Article 17 BTAP.

302 As discussed below, these were the lack of due information available to nonmembers of a CMO and the burdensome need to prove that there is no print license in force.

Nevertheless, the dominant academic opinion is that the need for opting out in order to exclude a repertoire from the extended effect of the licenses granted by a CMO is not a formality to be fulfilled as a condition of enjoyment and exercise of copyright and related rights; at least, certainly not where the system is in accordance with five criteria outlined above.³⁰³

From this perspective, the first criterion – that effective exercise of the right concerned should be impossible, or at least highly impracticable, in the absence of collective management – is of key importance. It is what founds the presumption that rightholders not represented by a CMO tacitly consent to the organization exercising their rights – for they cannot usually exploit their rights in any other way. Jane Ginsburg, who is also of the view that opting out needed to exclude repertoires from extended collective management is not a formality, points out that there is a parallel between this and the presumptions of transfer of rights in the case of which the need for a rebuttal, rightly enough, is not considered a formality either.³⁰⁴ However, she stresses that a scheme avoids formality implications only if it also fulfills the other requirements of an appropriate extended collective management scheme.³⁰⁵ With reference to *Soulier and Doko*, Ginsburg spotlights the requirement to make adequate information available to rightholders who have not explicitly authorized the CMO to manage their rights and the Court's judgment that burdensome conditions, such as those prescribed in the French legislation cited in the case, may have the effect of formalities.³⁰⁶ It seems to follow from this *a contrario* that, in the absence of such defective elements, the question of formalities ought not to arise. Indeed, the CJEU has agreed, since it follows from *Rebrobel* that, where the duly presumable tacit consent of non-member rightholders combines with an adequate "opt-out" system, the issue of formalities does not arise.

As regards the other question indicated above – whether or not an extended collective management may involve a limitation of rights – it is necessary to point out the difference between mandatory and extended forms of collective management. Those who are of the view that extended collective management may have the effect of a limitation do not necessarily take into account the basic difference between the two systems; namely that, in case of mandatory collective management – in contrast with extended collective management – the rightholders cannot "opt out". Thus, mandatory collective management, as clarified in this chapter above, is beyond any

303 See, e.g., Mihály Ficsor (2016). Collective rights management from the viewpoint of international treaties with special attention to the EU *acquis*. In Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights – Third Edition*. Alphen aan den Rijn: Wolters Kluwer, 75–77 (hereinafter: Ficsor in Gervais); Daniel Gervais (2016). Collective management of copyright: theory and practice in the digital age. In Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights – Third Edition*. Alphen aan den Rijn: Wolters Kluwer, ("ERS ['extended repertoire system', used as a synonym for extended collective management] is not a prohibited formality under Berne. 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."); Stef Van Gompel (2011). *Formalities in copyright law. an analysis of their history, rationales and possible future*. Alphen aan den Rijn: Wolters Kluwer, 209 ("The question [is] whether the 'opt-out' procedure complies with the prohibition on formalities. It seems that it does. The possibility to 'opt-out' from the ECL scheme does not affect the 'enjoyment' or the 'exercise' of copyright. The right is exercised in any event either collectively as statutory default rule or individually if the author 'opts out.'"); Séverine Dusollier and Caroline Colin (2011). Peer-to-peer file sharing and copyright: what could be the role of collective management? *Columbia Journal of Law & the Arts*, 34(4), 862 ("Extended collective licensing does not prevent the exercise of an author's copyright, but rather enables it. Therefore, opting out is not so much a restoration of an author's right to exercise her ownership, but rather is a choice to exercise that right in a different way."); Desmond Oriakhogba (2019). Collective management of copyright in Nigeria: should it remain voluntary, may it be mandatory or extended? *Nigerian Institute of Advanced Legal Studies (NIALS) Journal of Intellectual Property*, 23. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3498393 ("The opt-out option expressly provided for under extended collective management makes it unique compared to the mandatory model. The opt-out option also insulates the extended model from negatively impacting the right to property, freedom of association, the no formality rule, the three-step test and copyright exclusivity.")

304 See Jane Ginsburg (2017). Extended collective licenses in international treaty perspective: issues and statutory implementation. *Columbia Public Law Research Paper No. 14-564*, November 12, 4. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997 ("National rules providing for presumptions of transfer and establishing mechanisms to rebut those presumptions should similarly fall outside art. 5(2). Because the ECL extension effect operates like a presumption of transfer of rights to the CMO, and the opt-out provides the means for authors to withhold their rights from the CMO, that is, to rebut the presumption of transfer, an appropriately designed opt-out should fit comfortably within the declaratory measures that member states may impose respecting transfers of ownership, without running afoul of the prohibition on formalities.")

305 Ginsburg points out (*ibid.*): "It does not, however, follow, that an opt-out system never imposes a 'formality.' [...] The permissibility of the opt-out may also turn on ensuring that the author is in fact informed of the presumption of transfer, understands the consequences of exercising her right to opt-out, and is able effectively to exercise that right without incurring unreasonable burdens."

306 See *ibid.*, 6–7.

doubt a limitation where it is applied to the exercise of an exclusive right.³⁰⁷ In contrast, it follows from the analysis above that, in the case of extended collective management, where it may be presumed that the non-member rightholders tacitly agree to the management of their rights by a CMO and where such a presumption may be effectively rebutted by an “opt-out”,³⁰⁸ there is no limitation of the right.³⁰⁹ Johan Axhamn comes to the same conclusions, after thoroughly analyzing the differences between the two forms of collective management:

[W]hereas provisions on mandatory collective management must probably be regarded as limitations to exclusive rights, this is not the case for provisions on ECL [extended collective license]. This important feature makes the ECL model substantially different from mandatory collective licensing and thus more appealing as a policy alternative to pure exceptions and limitations (which are subject to the three-step test).³¹⁰

This view is in accordance with the last sentence of point (14) of the concluding chapter of the second edition of this book quoted above since it affirms that if the “opt-out” system does not fulfill the requirements of an adequate extended collective management scheme, it may have an effect similar to limitation of exclusive rights by mandatory collective management; thus, it is applicable only if it corresponds to all cumulative conditions of the three-step test. Jane Ginsburg, in her article mentioned above, offers a thorough analysis how the three-step test may be applied for mandatory collective management and for those schemes which, although, in principle, they are referred to as extended collective management, for the reasons mentioned above, turn to be a de facto limitation of the rights concerned with effects similar to mandatory collective management.³¹¹

Regrettably, the concept of extended collective management may be misunderstood, misinterpreted and abused. In Chapter 7, on the collective management systems of countries “in transition” from centrally planned economies to market economies, certain typical cases are mentioned where such problems have emerged – as well as how they have been resolved. It is also presented how certain other “transition” problems (concerning the uncontrolled proliferation of CMOs to manage musical rights) have been settled through a duly regulated extended collective management model.

National laws on extended collective management before the adoption of the E.U. Digital Single Market Directive

Extended collective management is frequently referred to as the Nordic extended collective licensing (ECL). This is certainly true as an origin story, as Tarja Koskinen and Vigdís Sigurdardóttir described briefly the birth and development of this system:

307 See, e.g., Alain Strowel (2011). The European “extended collective licensing” model, *Columbia Journal of Law & the Arts*, 34(4), 668 (“With an ECL [extended collective license], exclusive rights are preserved, which indicates at first sight that an ECL should not be equated with an exception to copyright. However, at the same time, the author cannot exercise her rights; only the CMO can. The author cannot individually negotiate and the outsiders are affected in the absence of any express mandate. So, an ECL works in practice as an exception.”). In Ficsor in Gervais, 74–75, added to this the following:

Strowel’s description of extended collective management seems to correspond rather to mandatory collective management. This is so since he states that “the author cannot exercise her rights; only the CMO can” which, in this way, is only applies for mandatory collective management. Extended collective management is an enabling system; it is based on the presumption of the legislators that the given right may only be exercised normally and efficiently through a CMO. It is an indispensable element of such a system that rightholders must be able to opt out (in a way, rebutting the legislators’ presumption in their case). Due to this, in regard of a real “ECL”, it is not the case that “the author cannot exercise her rights”; she can if she wants.

308 It should be evident that, where – for the exploitation of the given right – it is either essential or highly advisable to use the services of a CMO, rightholders will rarely wish to “opt out”.

309 See also “Why extended collective management does not result in an exception or limitation”, in *Ficsor in Gervais*, 74–75.

310 Johan Axhamn (2013). Exceptions, limitations and collective management of rights as vehicles for access to information. In Dana Beldiman (ed.) *Access to Information and Knowledge*. Cheltenham: Edward Elgar, 184.

311 Jane Ginsburg puts it this way: “In the absence of those procedural safeguards [namely, that the author is informed of the presumption of transfer, understands the consequences of exercising her right to opt out and is able effectively to exercise that right without incurring unreasonable burdens], extension of the license to an author who has not affirmatively consented to the CMO’s representation should be treated like a limitation on the author’s exercise of her rights whose consistency with international norms requires examination under the three-step test.” See Jane Ginsburg (2017). Extended collective licenses in international treaty perspective: issues and statutory implementation. *Columbia Public Law Research Paper No. 14-564*, November 12, 4. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997. Later in the article, Ginsburg analyzes how the three-step test should be applied for the limitations created by mandatory and inadequate “extended” collective management: *ibid.*, 7–8.

Nordic legislators have paid much attention to easy access and legal security of users. A particular legal technique called “extended collective license” (ECL) was introduced in the 1960s. This legislative support mechanism is based on exclusive rights of right holders and voluntary collective licensing with the aim of offering fully covering licenses to users who obtain a license. The first application area was primary broadcasting of musical and literary works in the 1960s, to be followed by reprography and re-transmission of broadcasts in the 1970s and 1980s.

In conjunction with the national implementations of the EU Copyright Directive [the Information Society Directive (Directive 2001/29/EC)], the Nordic countries added new ECL provisions to address digital uses, in particular in educational establishments, libraries, archives and museums. Since 2008, there has been a general possibility to conclude agreements with the support of an ECL in Denmark. Such a provision was introduced also in Sweden in 2013.³¹²

In the meantime, also other countries have introduced extended collective management. In Hungary, for example, where at least as many rights are managed in this way as in the Nordic countries. It seems to be worthwhile presenting the Hungarian regulation as an example to show what kinds of provisions had been found necessary to guarantee due accordance of such a system with the international treaties and E.U. norms:

- The expression “extended collective management” is not defined separately in Article 3 on definitions of the Collective Management Act of 2016,³¹³ with which Hungary implemented the E.U. CRM Directive. The provisions on extended collective management are contained in Articles 17 and 18 of the Act, which determine its basic aspects. The regulation is quite complex, because the relevant norms may be found in various provisions of the Copyright Law and the Collective Management Act: the Copyright Law determines which rights are to be exercised through mandatory and extended collective management; the detailed rules are included in the Collective Management Act. The Act does, however, define (in its Article 3), the terms it uses synonymously with “extended collective management” and “collective management organization” – namely, “prescribed collective management” and “representative collective management organization”.
- Under Article 3(3) of the Collective Management Act, “a case where prescribed collective management applies” is “that kind of use [of works or objects of related right] in connection with which, on the basis of the Copyright Law, the rightholders may only exercise their rights through a CMO as long as a notice opposing collective management made in accordance with Article 18(1) enters into force”. The expression “prescribed collective management” might be misunderstood as suggesting that rightholders may only exercise their rights through collective management (which would mean mandatory collective management). But this is not the case: rightholders may opt out of the system in accordance with Article 18(1) of the Copyright Law. In fact, “prescribed” collective management is nothing more than extended collective management as provided for in the Copyright Law in those cases in which collective management is a standard way of exercising rights (practically, in a natural monopoly situation).
- In addition to the possibility of an “opt-out” from the system, it is also generally recognized that extended collective management may be regarded as being in accordance with the provisions on exclusive rights of authorization only if it is applied where collective management is *necessary* to exercise the rights concerned and where the CMO is sufficiently *representative both domestically and internationally* (and, if there are two or more potential CMOs, *the most representative*).
- These further conditions in respect of “prescribed collective management” are determined in the following way.
 - Under Article 5(1) of the Collective Management Act, not only mandatory collective management but also prescribed collective management may be performed only by “representative collective management organizations”.
 - Furthermore, Article 34(2) provides as follows: “In cases other than those where mandatory or extended collective management applies, authorization to perform collective management as a representative CMO may only be granted if the rightholders cannot exercise their

312 Tarja Koskinen and Vigdís Sigurdardóttir (2016). Collective management in the Nordic countries, in Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights – Third Edition*, Alphen aan den Rijn: Wolters Kluwer, 244.

313 See Chapter 4.

rights efficiently on an individual basis.” This provision confirms that “prescribed collective management” is a specific form of extended collective management for which two of the three conditions (opt-out and broad representation) must be met, while the third (that effective individual exercise of the rights would be impossible or highly impracticable) is set out in those provisions of the Copyright Law that determine exclusively which rights may be exercised through “prescribed collective management”.³¹⁴

- Under Article 3(10) of the Collective Management Act, a “representative collective management organization” is “a collective management organization which, in regard to the right under copyright or related rights managed by it, corresponds to the requirements determined in Article 34 and which for the said right has received authorization to function as a representative collective management”. This is evidently not a substantive definition, since it refers only to Article 34 where the conditions to be fulfilled are truly determined.
- Finally, Article 17 of the Collective Management Act includes provisions on extension of the validity of licenses granted by representative CMOs to the owners of rights not covered by their repertoire and on the obligations of such CMOs in regard to such owners of rights, while Article 18 sets out the requirements of “opt-out” notices (which should cover all works or objects of related rights of the rightholders concerned and be made in writing with full probative effect and they enter into force on the first day after the end of a given financial year).

As it is indicated in the title of this section, this regulatory framework did not yet include provisions implementing the provisions of the Digital Single Market Directive on extended collective management, which are described and analyzed below.

Provisions in EU directives on extended collective management adopted before the Digital Single Market Directive

Although it is the Digital Single Market Directive which now sets out detailed norms on extended collective management, certain provisions were already in force in other directives adopted before.

The first such provisions were adopted in the original Satellite and Cable Directive. Article 2 stated 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) added that “Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement” (i.e., it must not be subject to a non-voluntary licensing system). Then Article 3(2) went on to outline what may be regarded as an extended collective management system:

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 rightholders 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
- the *unrepresented rightholder 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).

As the “may” language indicates, these provisions permitted Member States to introduce an extended collective licensing system, reflecting the position that:

- authorization is needed and such a system cannot be applied in respect of any exclusive right; and
- where such a system is applied, there are certain conditions to be taken into account.

³¹⁴ The Copyright Law provides for such “prescribed collective management” in the following cases: public performance of musical works (other than dramatico-musical works) and literary works (other than scientific, technical and medical works and longer non-fiction works) (Article 25(1) and (3)); satellite broadcasting of musical works (other than dramatico-musical works) and literary works (other than scientific, technical and medical works and longer non-fiction works) (Article 27(2)); communication to the public in a way other than broadcasting of (non-dramatic) musical works and literary works (other than scientific, technical and medical works and longer non-fiction works), including (interactive) making available to the public provided in Article 26(8) of the Copyright Law (Article 27(3)); making available performances (in an interactive manner) to the public, as provided in Article 73(1)(e) of the Copyright Act (Article 74(2)).

Article 3(3) and (4) of the Directive confirmed this, since they reflect recognition that extended collective management is justified only where it is indispensable or highly necessary and where the rightholders do not intend to – or cannot – exercise their exclusive rights individually. Article 3(3) identified a category of works for which this is not the case: “Paragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography”.

Other directives that mentioned extended collective management before the Digital Single Market Directive entered into force confirmed only its applicability, without providing for its regulation. Article 24 of the Orphan Works Directive was mentioned earlier in the chapter, but before it the Information Society Directive and after it, the CRM Directive also included such clarification. Recital (18) of the Information Society Directive simply stated, “This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses”, while Recital (12) of the CRM Directive was more complex:

(12) *This Directive, while applying to all collective management organisations, with the exception of Title III, which applies only to collective management organisations managing authors’ rights in musical works for online use on a multi-territorial basis, does not interfere with arrangements concerning the management of rights in the Member States such as individual management, the extended effect of an agreement between a representative collective management organisation and a user, i.e. extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organisations (emphasis added).*

It was surprising that the CRM Directive included very detailed provisions on several aspects of the structure and operation of CMOs and yet there were no substantive norms on extended collective management (or mandatory and presumption-based systems) other than one – namely, an implied requirement that the CMOs operating such systems should be “representative”.

This lacuna in E.U. law – at least as far as extended collective management is concerned – has been eliminated with the introduction of the Digital Single Market Directive (which, among other things, determines in more details the requirement of representativeness).

Soulier and Doke: regulating the extended collective management of out-of-commerce works

In 2012, the French legislature passed a new law which demonstrated the enabling potential of extended collective management to serve efficiently the interests of rightholders, users and the general public.

Law No. 2012-287 on the digital exploitation of out-of-print 20th-century books added, to Title III of Book One of the first part of the French Intellectual Property Code, a Chapter IV entitled “Special provisions relating to the digital exploitation of out-of-print books”, comprising Articles L. 134-1 to L. 134-9 of the Code. (Some of those articles were subsequently amended or repealed by Law No. 2015-195.) The new legislation introduced an extended collective management that contained the following key elements.

- “Out-of-print book” was defined as a book published in France before January 1, 2001, which was no longer commercially distributed by a publisher and was not currently published in a print or digital format.
- A public database indexing out-of-print books was to be created and made openly available through an online, public communication service.
- When a book had been registered in the database for more than six months, the right to authorize its reproduction and performance in digital format were to be exercised by a CMO approved for that purpose by the minister responsible for culture.
- The authors or the publishers of out-of-print books were able to oppose the CMO’s exercise of their rights by means of a notification submitted no later than six months after a book had been registered in the database.
- If, upon expiration of that term, the author or publisher had not given notice of opposition, the CMO was to offer to the publisher that held the right to reproduce that book in print its

authorization to reproduce an out-of-print book in digital format. The authorization was to be issued on an exclusive basis for a 10-year period, which was tacitly renewable.

- The authors of out-of-print books were able to decide at any time to withdraw, from the collecting society referred to in Article L. 134–3, the right to authorize the reproduction and performance of books in digital format if they provided evidence that they alone held the rights laid down in that article.
- The author and the publisher that held the right of reproduction in print of an out-of-print book were able, at any time, to jointly notify the CMO of a decision to withdraw the organization's right to authorize the reproduction and performance of that book in digital format.
- Publicity measures were provided, which had to include an information campaign initiated by the minister responsible for culture, in conjunction with the CMO and the professional organizations in the book sector. The campaign had to include presentation of the framework for an online public communication service, an online mailing operation, the publication of flyers in the national press and the distribution of banners on news websites.

Two authors, Marc Soulier and Sara Doke, initiated proceedings before the Conseil d'État, seeking to annul the Law. The Conseil turned with a preliminary question to the CJEU.

The CJEU arrived at the following judgment:

Article 2(a) and Article 3(1) of Directive 2001/29/EC [Information Society Directive] ... must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of "out-of-print" books, namely, books published in France before 1 January 2001 which are no longer commercially distributed by a publisher and are not currently published in print or in digital form, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that that legislation lays down.³¹⁵

It should be noted that the Court did not rule that extended collective management in general, or for the purpose of facilitating the use of out-of-commerce works in particular, would not be in accordance with the E.U. (and the international) norms, but only that it would be the case if it were to be exercised in accordance with the conditions set out in the French legislation.

According to the judgment, there were two reasons why the conditions laid down in the French legislation were in conflict with E.U. law.

- Although the Court recognized the argument that if the rightholders did not "opt out", they might be presumed to have implicitly authorized the CMO to license the use of their out-of-commerce works,³¹⁶ it held that, for this to be true, they would have had to be duly informed about this possibility – and the French legislation guaranteed no such notice.³¹⁷
- Although an appropriate "opt-out" system does not automatically qualify as a formality to the exercise of their exclusive rights, under the French legislation the authors could "opt out" only if they were able to prove that are the only rightholders and that there is no other print right in force (usually as a license granted to publishers), which would have been so difficult a condition to fulfill that it, in view of the Court, might function as a formality.³¹⁸

In the Digital Single Market Directive, the European Parliament and Council have maintained the essential elements of the French system but added (in Article 10) the necessary publicity measures whereby rightholders are made aware that they can "opt out". By this, the first reason for which the Court found the French law incompatible with the E.U. law has been eliminated.

The second feature of the French legislation that the Court found in conflict with E.U. law has also been resolved, since there is, in the Directive, no condition requiring that, to "opt out" of extended

³¹⁵ Judgment of the Court (Third Chamber) of November 16, 2016, *Marc Soulier and Sara Doke v. Premier ministre and Ministre de la Culture et de la Communication*, Case C-301/15, ECLI:EU:C:2016:878, para. 28.

³¹⁶ See *ibid.*, [35] and [42].

³¹⁷ See *ibid.*, [39]–[40], [43].

³¹⁸ See *ibid.*, [49]–[51].

collective management of their rights in out-of-commerce works,³¹⁹ rightholders must prove their exclusive ownership of the rights involved. Article 8(4) of the Directive prescribes simply that:

Member States shall provide that all rightholders may, at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism [...] either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.

General regulation of the requirements of extended collective management

The clarification of the requirements of the extended collective management for the use of out-of-commerce works offered the occasion to codify in general these requirements. It has taken place in Article 12 of the Digital Single Market Directive:

1. Member States may provide [...] subject to the safeguards provided for in this Article, that where a collective management organization [...] in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter:
 - (a) such an agreement can be extended to apply to the rights of rightholders who have not authorised that collective management organisation to represent them by way of assignment, licence or any other contractual arrangement; or
 - (b) with respect to such an agreement, the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.
2. Member States shall ensure that the licensing mechanism referred to in paragraph 1 is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned, and shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders.
3. For the purposes of paragraph 1, Member States shall provide for the following safeguards:
 - (a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights which are the subject of the licence, for the relevant Member State;
 - (b) all rightholders are guaranteed equal treatment, including in relation to the terms of the licence;
 - (c) rightholders who have not authorised the organisation granting the licence may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism established in accordance with this Article; and
 - (d) appropriate publicity measures are taken, starting from a reasonable period before the works or other subject matter are used under the licence, to inform rightholders about the ability of the collective management organisation to license works or other subject matter, about the licensing taking place in accordance with this Article and about the options available to rightholders as referred to in point (c). Publicity measures shall be effective without the need to inform each rightholder individually.

Subparagraph (d) is important when applying extended collective management – in particular, in those cases to which it is newly introduced, such as the use of out-of-commerce works. It has determined the scope of information requirements of “opt-out” is bound and, thus, it guarantees that fulfillment of these requirements do not conflict with the objective of such a system.

³¹⁹ Article 8 defined an out-of-commerce work as “a work or other subject matter is to be deemed to be out of commerce when it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public”.

Recital (41) of the Digital Single Market Directive underlines the need for flexibility in this respect:

[A]ppropriate publicity measures might need to be taken on a case-by-case basis in order to increase the awareness in that regard of the rightholders concerned, for example through the use of additional channels of communication to reach a wider public. *The necessity, the nature and the geographic scope of the additional publicity measures should depend on the characteristics of the relevant out-of-commerce works or other subject matter, the terms of the licences or the type of use under the exception or limitation, and the existing practices in Member States. Publicity measures should be effective without the need to inform each rightholder individually* (emphasis added).

It is submitted that the more completely the other requirements of an appropriate extended collective management system are fulfilled, the less relevant the role of publicity may become. First of all, if such a system is applied only “where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned” (as provided in Article 12(1) of the Directive), the need for “opt-out” does not truly emerge. The individual exercise of the right would be, by definition, so impracticable and onerous that any such opt-out would be unlikely.

Second, if the CMO fulfills the requirements of both Article 12 of the Digital Single Market Directive and the provisions on good governance set out in the CRM Directive, it guarantees that non-members enjoy equal treatment, that due efforts are taken (a “diligent search”) to identify and locate unknown and/or non-locatable rightholders, and that the remuneration due to the known and located rightholders are transferred to them. What kind of “publicity” could be more adequate than the transfer of the remuneration along with standardly attached note drawing attention to the (unappealing, and from the viewpoint of the genuine interests of the rightholders, undesirable) possibility of “opting out”?

The application of extended collective management may also act as a “wake-up call” for certain “sleeping rights” – that is, those that are granted in principle under the international treaties and E.U. law but which are not truly exploited because their individual exercise is impracticable. When, in 2016, France adopted a law providing for the extended collective management of authors’ rights in photographic and artistic works otherwise impracticably managed in the context of online, the country pointed clearly toward the enabling environment that an adequately established system can engender.

Law No. 2016-925 of July 7, 2016, relating to freedom of creation, architecture and heritage, has introduced into the French Intellectual Property Code a new Chapter VI, entitled “Provisions applicable to research and referencing of plastic, graphic or photographic works of art” (Articles L. 136-1 to L. 136-4). It sits within Title III of the Code, on the exploitation of rights. The 2016 amendment foresees the application of mandatory collective management of a right to remuneration for any “automated online image referencing services”³²⁰ in relation to plastic, graphic or photographic works of art. But although the amendment has been adopted unanimously, it is not applied yet in practice, because the Conseil d’État has not yet issued a decree bringing it fully into force.

It seems that it will be through extended collective management that this right will become at last applicable. It may be that the Conseil d’État anticipates an issue arising because (as discussed earlier in this chapter) mandatory collective management is a limitation if it is applied to exclusive rights (such as, in this case, the rights of reproduction and making available to the public).³²¹ The

³²⁰ The term “service automatisé de référencement d’images” is determined in Article L. 136-1 as “tout service de communication au public en ligne dans le cadre duquel sont reproduites et mises à la disposition du public, à des fins d’indexation et de référencement des œuvres d’art plastiques, graphiques ou photographiques collectées de manière automatisée à partir de services de communication au public en ligne [WIPO translation]”.

³²¹ The right of (interactive) making available to the public is covered under the French Code by a broad right of communication to the public, as provided for in Article 8 WCT and Article 3(1) of the Information Society Directive.

reason for the hesitation does not seem to be that such a limitation would not be applicable under the Berne Convention and the WCT,³²² but rather that no such limitation is foreseen yet in E.U. law.

With the adoption of Article 12 of the Digital Single Market Directive, the rights landscape has changed yet again, and with that change have come ideas such as applying the right to remuneration, through extended collective management, to the new uses defined in Law No. 2016-925. Indeed, another draft law was already before the French Senate at time of writing,³²³ the main provisions of which were as follows:

Art. L. 136-2. – En ce qu'ils accomplissent un acte de reproduction ou un acte de communication au public d'œuvres mentionnées à l'Article L. 136-1, les services automatisés de référencement d'images sont soumis à l'autorisation de l'auteur ou de ses ayants droit.

La rémunération due au titre de ces actes de reproduction et de communication au public est assise sur les recettes et revenus de toute nature issus directement et indirectement du service automatisé de référencement d'images. [...]

L'autorisation d'exploitation et les rémunérations auxquelles elle donne lieu peuvent être gérées par un ou plusieurs organismes de gestion collective régis par le titre II du livre III du présent code.

Lorsqu'il conclut un accord de licence pour l'exploitation d'œuvres, conformément aux mandats donnés par ses membres, un organisme de gestion collective peut, en ce qui concerne l'utilisation sur son territoire et sous réserve des garanties prévues au présent chapitre, étendre, par l'effet d'une licence collective étendue, le contenu de cet accord pour qu'il s'applique aux titulaires de droits non membres de cet organisme.

Art. L. 136-3. – L'extension de l'accord conclu par l'organisme de gestion collective pour ses membres emporte représentation, pour les œuvres du même type, des titulaires de droits non membres de l'organisme de gestion collective agréé ayant conclu l'accord.

L'extension est subordonnée:

- 1 au fait pour l'organisme concerné d'avoir été agréé pour cette fonction par le ministre en charge de la culture;
- 2 à la mise en œuvre de mesures de publicité appropriées, dans un délai raisonnable précédant l'utilisation sous licence des œuvres, destinées à informer les titulaires de droits quant à la capacité de l'organisme de gestion collective à octroyer des licences pour des œuvres, quant à l'octroi de licences conformément au présent chapitre et quant aux possibilités offertes à ces titulaires de droits inclus dans le champ de l'accord par l'extension de manifester leur volonté de ne pas être concernés par pareil accord;
- 3 à l'absence de manifestation contraire de volonté de la part des titulaires de droits concernés mais non désireux de bénéficier de l'accord conclu.

³²² In fact, there might be a reasonable chance for such limitation of the rights involved. Limitations are allowed under Article 10 WCT both for the right of reproduction under Article 9(2) of the Berne Convention (applicable also under Article 1(4) of the WCT) and for the right of making available to the public (covered by the broad right of communication to the public in accordance with Article 8 of the WCT). For this, the cumulative conditions of the three-step test prescribed in those treaty provisions must be fulfilled. There seem to be well-founded reasons why the provisions of the LCAP might pass all three steps. The acts are determined specifically and narrowly enough to be considered a special case; thus, there would be no problem with the first condition. The provisions may even more straightforwardly meet the second and third conditions because, in the circumstances, a mandatory collective management system would eliminate, or at least reduce to a reasonable level, unreasonable prejudice to the legitimate interest of rightholders. Nevertheless, it remains true that E.U. law does not yet foresee such a limitation through mandatory collective management might be reasonable.

³²³ Available at www.senat.fr/encommission/2020-2021/523/Amdt_COM-31.html. The draft ends: "L'amendement reprend, pour ce faire, les propositions du Conseil supérieur de la propriété littéraire et artistique émises dans le cadre de la Mission de novembre 2019 sur les services automatisés de référencement d'images [WIPO translation]". See also the report containing the proposals on the amendments: Pierre Sirinelli and Sarah Dormont (2019). *Mission Services automatisés de référencement d'images – Rapport et proposition de modification législative*. Available at www.culture.gouv.fr/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-services-automatisees-de-referencement-d-images-sur-Internet

Art. L. 136-4. – Un ou plusieurs organismes de gestion collective peuvent être agréés par le ministre chargé de la culture pour octroyer des licences collectives étendues au titre des actes d'exploitation visés aux articles précédents.[...]

Art. L. 136-5. – Tout organisme de gestion collective ayant conclu un accord ayant fait l'objet d'une extension est tenu d'assurer une égalité de traitement à l'ensemble des titulaires de droits représentés.

Les règles de répartition sont établies de manière à garantir aux titulaires de droits représentés une rémunération appropriée, tenant compte de l'importance de l'utilisation de leurs œuvres dans le cadre du service.

Le fournisseur du service est tenu de communiquer à l'organisme de gestion collective l'ensemble des informations pertinentes relatives à l'exploitation des œuvres permettant d'assurer la juste répartition des revenus entre les titulaires de droits.

Les mesures de publicité sont prises par l'organisme agréé. Elles sont effectives sans qu'il soit nécessaire d'informer chaque titulaire de droits individuellement. [...]

The provisions of the draft law – which is a kind of an adapted version of Law No. 2016-925 – are quoted quite fully to support comparison with the provisions of Article 12 of the Digital Single Market Directive. It can be seen quite easily that the draft law would secure compliance of the French provisions not only with the international treaties but also with E.U. law. Through such a duly regulated extended collective management system, the right to remuneration originally provided in Law No. 2016-925 could be woken up at last – which, in turn, might effectively advertise the potential benefits of extended collective management.

Independent management entities

Introductory remarks

The CRM Directive introduced – as an alternative to CMOs – the category of “independent management entities” (IMEs). While some entities (mainly in Europe and in the United States) had already been conducting activities that corresponded to the definition subsequently included in the Directive, it was only after adoption of the Directive that IMEs began to proliferate.

Such entities have since been born in other continents, some as branches of other wider networks and others as stand-alone entities, among them:

- Unison – one of the rights management entity (RME) “clients” of CISAC, as mentioned later in the chapter – which has formed an alliance with ONErpm³²⁴ to establish a pan-African licensing and information network;³²⁵
- AudioValley (of which Jamendo mentioned later in relation to a French court case, is one branch) and MediaDonuts,³²⁶ which have established joint IME activities in India and South-East Asia;³²⁷
- NexTone (another of CISAC’s RME “clients”) in Japan; and
- RevMusic in Colombia, which has its own closed repertoire of musical works and sound recordings.³²⁸

In this chapter, however, mainly the E.U. regulation of IMEs and its application are reviewed – not only because it has served as a model and a catalyst also elsewhere, but also because the preparation, transposition and implementation of the CRM Directive have been forums for intensive debate about the status of IMEs and their relationship with CMOs.

In this chapter:

- it is assessed what is the position of IMEs among the various forms of rights management;
- certain contradictions having emerged with the appearance of these entities to perform collective management yet not CMOs are pointed out;
- it is described how the provisions on IMEs were added into the draft CRM Directive as a sort of afterthought;
- it is analyzed how big unjustified competitive advantage is granted to IMEs over CMOs under the Directive;
- the typical forms of IMEs are outlined;

324 ONErpm (ONE Revolution People’s Music) is a digital distribution service with broad international reach, based in the United States, with offices in seven U.S. cities and Mexico, as well as (at time of writing) Argentina, Brazil, Chile, Colombia and Peru, plus Nigeria, Russia, Spain, Turkey and the United Kingdom: see <https://onerpm.com/>

325 See Murray Stassen (2020). IME Africa ONErpm partners with Unison for pan-European and pan-African collection. *Music Business Worldwide*, November 4. Available at www.musicbusinessworldwide.com/onerpm-partners-with-unison-for-pan-european-and-pan-african-collection/

326 MediaDonuts is an online marketing and advertisement company with (at time of writing) offices in 11 countries in Europe, the Middle East and Africa, the Asia-Pacific region and the United States, with headquarters in Belgium and Singapore: see <https://mediadonuts.com/about-us/>

327 See Jean-Noël Legalland (2020), AudioValley: partenariat avec MediaDonuts. *Boursier.com*, December 15. Available at www.boursier.com/actions/actualites/news/audiovalley-partenariat-avec-mediadonuts-838126.html

328 The company licenses its repertoire for all kinds of uses, ranging from concerts through background (“in-store”) and online uses, and for synchronization with audiovisual works and videogames. It uses blockchain technology (at which we look later in the chapter) and promises distribution of the remuneration collected within 15 days of use. See <https://revmusic.co>

- certain legal disputes in which CMOs and IMEs got in conflict are reviewed;
- the potentials of blockchain technology offered to IMEs and CMOs are discussed; and
- it is shown how some IMEs seek to cooperate with CMOs within the framework of CISAC, as RME “clients”.

“Independent management entities”, CMOs and “joint management organizations”

As quoted already in Chapter 5, the definition of IME in Article 3(b) of the CRM Directive reads as follows:

- (b) “independent management entity” means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is:
 - (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and
 - (ii) organised on a for-profit basis[.]

Under Article 3(a) of the Directive,³²⁹ “collective management organizations” of three types emerge:

- (i) organizations owned or controlled by their members and organized on a not-for-profit basis (the general trend in Europe);
- (ii) organizations owned or controlled by their members but organized on a for-profit basis; and
- (iii) organizations not owned or controlled by their members but organized on a not-for-profit basis.

The definition of “independent management entities” thus corresponds to a fourth alternative:

- (iv) organizations not owned or controlled by their members and organized on a for-profit basis.

In all other respects, the definitions of CMOs and IMES are practically the same. Thus, this parallel definition positions IMEs clearly in context with CMOs – even though (as discussed below) some language versions of the Directive published in the Official Journal of the European Union did not cite the for-profit criterion.

The three alternatives provided for CMOs can be seen to comprise different categories of the generic term “joint management organization”, as defined in paragraph (3) of the concluding chapter in the second edition of this book:

- (3) There are significant differences between *collective management proper and other systems of joint exercise of rights*. The term “collective management” refers to those forms of joint exercise of rights where there are certain true “collective” elements in the system (for example, in respect of tariffs, licensing conditions and distribution rules), there is a real collective behind it, the management is carried out on behalf of such a collective, and *the organization also serves certain collective objectives beyond the tasks of mere rights management (this is mainly typical in the case of management of the rights of authors and performers)*. The other basic system of joint exercise of rights is mere “rights clearance” which, in its fully fledged form, is without any collective elements; what is involved is simply offering a single source for users to obtain authorization and pay for it; the remuneration may be – and quite frequently is – individualized, and instead of a real “distribution”, *the remuneration, after the deduction of the management costs, is simply transferred to each owner of rights on behalf of whom it has been collected* (this system is mainly typical in the case of rights owned by *legal entities*). (The expression “joint exercise” or “joint management” is a *generic term covering both collective*

³²⁹ Already quoted in full in Chapter 2, the definition is repeated here for comparison:

- (a) “collective management organisation” means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:
 - (i) it is owned or controlled by its members;
 - (ii) it is organized on a not-for-profit basis; [...]

*management and rights clearance, but also extending to some other specific systems that may not fit easily into either of these two basic categories, such as the alliances or “coalitions” of different kinds of organizations, “one-stop shops”, or the combination of state collecting bodies with private organizations taking care of the remaining management tasks.) (emphasis added)*³³⁰

In this third edition, the term “joint management organization” is not used, although the differences between the three categories of “collective management organizations” under the CRM Directive are pointed out. The terminology of the Directive is applied even though the “rights clearance” systems of rights-holding legal entities (e.g., music publishers and record producers) – which are without the collective characteristics of genuine *collective* management organizations – are similar to the category of IMEs in one significant aspect. Namely that they also pursue profit goals (but, contrary to IMEs, they are normally owned and controlled by the rightholders. It is necessary to emphasize this because, in legal literature, IMEs are sometimes improperly considered to fall in the category of “rights clearance” within the generic term “joint management organizations” used in the second edition.³³¹

Contradictions – and unjustified competitive advantages – that emerge when entities other than CMOs carry out the same activities

No real explanation is offered of why the category of IMEs has been recognized and regulated in the CRM Directive. In addition to Article 2(4), which simply lists the provisions on CMOs that are also applicable to IMEs, it is only Recital (15) in which IMEs are mentioned at all.³³² It reads:

(15) *Rightholders should be free to entrust the management of their rights to independent management entities. Such independent management entities are commercial entities which differ from collective management organisations, inter alia, because they are not owned or controlled by rightholders. However, to the extent that such independent management entities carry out the same activities as collective management organisations, they should be obliged to provide certain information to the rightholders they represent, collective management organisations, users and the public (emphasis added).*

As Gábor Faludi points out, allowing for-profit commercial entities to “carry out the same activities as collective management organisations” without granting the creators any control whatsoever does not seem to be in accordance with the declared objectives of the Directive.³³³ He recalls that, under Recitals (8) and (9) of the Directive, the aim is to harmonize the requirements applicable to CMOs, to ensure “a high standard of governance, financial management, transparency and reporting”, and it is clarified that a Member State may diverge from these harmonized requirements only to the extent that it may impose more stringent standards. He points out the contradictions as follows:

In other words, one of the main objectives of the [Directive] is to offer broader protection, guarantees and right to control to rightholders represented by CMOs. Such broader protection and guarantees are not provided in the management activities of IMEs managing creators’ and performing artists’ rights. Such IMEs usually operate on the legal basis of assignment and buy-out of the economic rights exercised by [them] without any further rightholders’ control save for the eventual accounting if the remuneration of the creator/performing artist is set as a recurrent royalty. In the case of a final, irreversible and full

330 See Mihály Ficsor (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 157–158.

331 See, e.g., Zhiqin Wu (2018). A legal framework for global joint copyright management in musical works: based on Rawls’s theory of justice. Ph.D. thesis, Lancaster University, 18. Available at <https://eprints.lancs.ac.uk/id/eprint/124827/1/2018ZhiqinWuPhD.pdf> (hereinafter: Wu, A legal framework) (“Ficsor states that IME is one of the two basic systems of the joint exercise of rights. He suggests that the only or nearly exclusive task of IMEs is the collection and transfer of royalties as quickly, precisely, cheaply and as much in proportion with the value and actual use of the productions involved as possible.”)

332 Non-substantively, they also appear in Article 41, which establishes an expert group to examine the impact of the transposition of the Directive.

333 Gábor Faludi (2018). The transposition of the Collective Management Directive (2016/26/EU) in Hungary. *Medien und Recht*, 2018, 27–37 (hereinafter: Faludi, The transposition of the Directive).

assignment of economic rights one cannot speak any longer of the management of other rightholders' rights.³³⁴

There is no clarification in the Directive why IMEs, as organizations that are *not* CMOs, may carry out not only rights management in general but also "*the same* activities as collective management organizations" (emphasis added) nor of why, in spite of this, IMEs are subject not to *the same* requirements but to only a small fraction of them.

No clarification is offered either why rightholders "should be free" to choose IMEs that enjoy big competitive privileges and how this might be reconciled with what is stated in Recital (3):

Article 167 of the Treaty on the Functioning of the European Union (TFEU) *requires the Union to take cultural diversity into account in its action* and 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. *Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services* for the benefit of their rightholders and the public (emphasis added).

The preferred status and multiple competitive advantages of IMEs are surely incongruent with the recital – according to which:

Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.

The replacement of CMOs with profit-oriented entities – or the undermining of their position – may seriously weaken the protection of cultural diversity, the chances of smaller repertoires to access the copy, and the role of CMOs in promoting creativity – irrespective of how much the importance of all these aspects are stressed in the recital.

This contradiction becomes even more conspicuous if the findings of the impact assessment study prepared by the staff of the European Commission ahead of the Directive's adoption are taken into account from the viewpoint of smaller CMOs and cultural diversity. Although the document deals specifically with the impact of parallel licensing of online uses of musical works by CMOs, its findings can be equally applied to parallel licensing of IMEs in competition with CMOs (and, indeed, not only as regards online licensing but also in respect "traditional" off-line uses). The Commission's study foresaw grave negative impacts of for-profit licensing on smaller repertoires and cultural diversity:

Parallel licensing would have a negative impact on cultural diversity. Most creators (i.e. smaller rightholders) would receive lower royalties. Moreover, the direct licensing of popular repertoire risks undermining the solidarity function hitherto played by aggregating popular and less popular repertoire into one "blanket" licence. *The commercial opportunities for the repertoire held by smaller collecting societies might be undermined.* The disappearance of this less "main stream" repertoire (e.g. niche or local repertoire) *would be detrimental to cultural diversity in Europe* (emphasis added).³³⁵

It is perhaps too soon after implementation of the Directive, at time of writing, to draw conclusions, but first experiences seem to indicate that the fears of the risks posed by IMEs to the established collective management system – in particular, in the smaller cultural markets – are proving well-founded. As "collateral damage", there may be a risk too that the social-political justification and public acceptance of copyright will be weakened: the emergence of IMEs may be regarded as a

³³⁴ *Ibid.*, 31–32.

³³⁵ European Commission (2012). *Commission Staff Working Document: Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market*. SWD(2012) 204 final, July 7, 170, point 24.6.6. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0204&from=EN>

further step in the transformation of copyright into a sort of new branch of industrial property rights: a branch involving rights owned by legal entities, protected and managed by legal entities, for the profit of legal entities – from which they may (or may not) pay to the creators employed by them or from whom they have purchased the rights.

The emphasis of “further” above is a reference both to the European Parliament’s strong criticism of the Commission’s 2005 Recommendation (discussed in detail in Chapter 10) in its 2007 Resolution, in which the Parliament too found that the provisions of the Recommendation endangered the CMOs of smaller Member States, managing smaller repertoires and promoting at-risk cultural diversity. It is also a reference to the opinions of various academics who have expressed the view that the Directive has not truly fixed either of the problems created by Recommendations.

A team of copyright researchers of the Max Planck Institute analyzed the draft Directive particularly thoroughly.³³⁶ They highlighted those aspects of the Recommendation that in their view privileged large, rights-holding legal entities to the detriment of smaller CMOs, acting on behalf of creators in Member States with smaller cultural markets, and endangered the cultural diversity of those nations, and they found that the proposed Directive (in which, at that time, the category of “independent management entities” did yet not even appear) had not truly fixed those problems.

A selection of findings from the team’s detailed opinion is illustrative:

When the Commission recommended rightholders to withdraw their rights, this only had an effect on the powerful major companies, who saw a chance to renegotiate the terms of collective administration of their rights with individual collecting societies. [...] *The Recommendation can be criticised for exclusively benefiting large rightholders such as the major publishing companies. The Commission Proposal will not change this by making the rules of the Recommendation binding.*³³⁷

*The Recommendation of 2005 has inappropriately favoured the interests of the major publishing companies, since only the e companies had sufficient market power to withdraw their rights from the existing system and to negotiate better terms for multi-territorial licensing with single collecting societies. Hence, strengthening the position of “rightholders” as such may well only benefit the economically most powerful rightholders in the market.*³³⁸

Since rightholders from smaller countries with music that is less popular in the international market may have difficulties getting direct access to passport entities, and therefore have to rely on indirect access through smaller collecting societies without a passport, the Proposal may still create disadvantages for such rightholders and, thereby, produce a negative impact on cultural diversity.³³⁹

Forcing collecting societies to compete among each other for their respective repertoires collides with fundamental ideas of collective rights management. *Competing for an attractive repertoire and managing a copyright catalogue is the core business of publishers and record companies, not of collecting societies* (emphasis added).³⁴⁰

Inclusion of IMEs in the CRM Directive as a kind of afterthought – and the resulting incomprehension

As mentioned above, when the CRM Directive was first proposed, it included no provisions on IMEs, and hence it was understandable that academics and researchers did not offer commentary on the category. It was introduced into the Directive suddenly and, it seems, without due preparation and alarm-warning, in an under-the-radar manner and, thus, insufficient attention was paid to its

336 Josef Drexler, Sylvie Nérissson, Felix Trumpke and Reto M. Hilty (2013). Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372. *Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 13-04*, February 5, Available at https://pure.mpg.de/pubman/faces/ViewItemOverviewPage.jsp?itemId=item_1720095

337 *Ibid.*, 9, [12].

338 *Ibid.*, 14, [17].

339 *Ibid.*, 28, [54].

340 *Ibid.*, 32, [64].

foreseeable impact – even to its very meaning – in the shadow of other issues at the forefront of negotiations, such as the regulation of multi-territorial licensing of rights in musical works for online uses. This may be why the new category was, for a long time, met with perplexity: not only in those countries in which both the collective management system and technologies were less advanced but also in those Member States in which duly established CMOs functioned; and not only among policymakers or the general public but also among copyright and collective management experts. Julien Baupain, a French copyright expert and the lawyer of a CMO, has expressed eloquently the surprise he and his colleagues felt when confronted by the unexpected new category:

In the maritime world, the acronym ‘UFO’ refers to an ‘unidentified floating object’ [...] Like a UFO, independent management organizations suddenly appeared in the world of collective management, which until now had only ever known one identified form of organization: collective management organizations.³⁴¹

The inclusion of the new category without thorough preparation and without due attention to it by the representatives and experts of the Member States were manifested in the uncertainty about the very criteria of the concept and definition of IMEs. Recital (15) of the Directive cites only a single distinguishing: “Such independent management entities are commercial entities which *differ* from collective management organisations, inter alia, *because they are not owned or controlled by rightholders* (emphasis added).”

Since there are *two* elements in the definition of IMEs in Article 3(b) of the Directive that differentiate it from the definition of CMOs, it is not easy to understand why the recital mentions only one (“inter alia” implying that there may be others) and not the other according to which IMEs are “organized on a for-profit basis” (even if the term “commercial entities” may be regarded as hinting vaguely to this). This combines with another oddity to amplify the uncertainty: in some versions of the Directive (the Romanian and the Spanish), as published in the Official Journal of the European Union, IMEs were not “organized on a for-profit basis” (per Article 3(b)(ii)) but “organized on a not-for-profit basis”.³⁴² At time of writing, the discrepancy remains in situ online on the EUR-Lex website – although a separate document has been issued, explaining that the criterion should be understood as “organized on a for-profit basis” also in those versions.³⁴³

Although many experts received the landing of IMEs in the Directive as they would the sighting of a UFO, there were a few who followed the various stages of the rhapsodic preparatory work of the CRM Directive who might have glimpsed the phenomenon on the horizon. Its outline was visible in the Gallo report for the European Parliament Committee on Legal Affairs,³⁴⁴ prepared in the context of the first reading of the draft Directive, in which also the opinions of the various committees of the Parliament were taken into account.

There was no provision yet on IMEs in the draft Directive as published by the Commission, but one of the recitals referred to “service providers” and “agents”. At the end of what is now Recital (5) of the Directive adopted but was then draft Recital (4), alluding to the problems certain CMOs face (a lack of transparency, inefficiency, etc.), the following text appeared: “*These difficulties do not arise in the functioning of independent rights management service providers who act as agents for rightholders for the management of their rights on a commercial basis and in which rightholders do not exercise membership rights*” (emphasis added). Reporting for the European Parliament Committee on Legal Affairs, Gallo challenged the implication that these “independent rights management service providers” may be superior to CMOs³⁴⁵ and proposed (successfully) that the assertion be deleted.

In its impact assessment study, the staff of the European Commission referred several times (in the context of online licensing of the use of musical works) to “direct licensing” by commercial entities as an alternative that may be applied in parallel with licensing by CMOs. Since it was clear that this

341 Julien Baupain (2017). Retour sur la directive européenne “gestion collective” et sa transposition en France, *Les cahiers de propriété intellectuelle*, 476 (hereinafter: Baupain, Retour sur la directive).

342 In Romanian, “nu are scop lucrativ”; in Spanish, “carezca de ánimo de lucro”.

343 See Document No. 5084/16 of the Council of the European Union containing the corrigendum.

344 Marielle Gallo (2013). *Report on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market* (COM(2012)0372 – C7-0183/2012 – 2012/0180(COD)). Prepared for the European Parliament Committee on Legal Affairs, October 4. Available at www.europarl.europa.eu/doceo/document/A-7-2013-0281_EN.html

345 *Ibid.*, Amendment 4.

would position such entities in direct competition with CMOs, Gallo proposed a new provision, which became, with some minor changes, Article 2(4) as adopted:

Articles 10, 11(1), 12, 16, 19 and 20 of Title II and Articles 35(1) and 37 of Title IV shall apply to entities that manage on a commercial basis within the Union, as their sole or main purpose, copyright or rights related to copyright on behalf of more than one rightholder.

Although the Gallo report itself did not contain a definition of such entities, the opinions of European Parliament Committees referred to in the report did so. The amendment quoted above originated in the opinion of the Committee on Culture and Education, as an introduction to the reasons why it recommended that application of certain provisions of the Directive be extended to what it referred to in its opinion as “independent commercial operators” (later defined as IMEs). As the Committee explained: “[C]ommercial operators, which are authorised by way of contractual arrangements to manage copyright or rights related to copyright on behalf of rightholders, although not in the scope of this Directive, *should be submitted to some transparency requirements*” (emphasis added).³⁴⁶

Although the opinion mentioned only the transparency requirements proposed under the Directive, the scope of the provisions the Committee proposed should be applied to such “independent commercial operators” was broader than those alluded to in Gallo’s draft paragraph – and far broader than those set out in Article 2(4) of the Directive as adopted. The Committee proposed that:

Title I, Articles 10, 11(1), 12, 15, 16, 18, 19 and 20 of Title II, Title III and Articles 34, 35, 37 and 38 of Title IV shall also apply to *independent commercial operators*, to legal persons and any entity *that exercise the same function as a collective management organisation* based inside or outside the Union, *who act as agents* for rightholders for the management of their rights *and operate in the Union on a commercial basis* (emphasis added).³⁴⁷

The Committee on Industry, Research and Energy – which used the term “independent rights management service providers” in its report – included a similarly broad scope of provisions on CMOs to be applied also to such entities.³⁴⁸ The Committee on International Trade, meanwhile, offered a new definition, suggesting that “commercial operator” should mean “any entity which is authorised by way of any contractual arrangement to manage copyright or rights related to copyright on behalf of rightholders on a commercial basis”.³⁴⁹ The Committee noted that its proposal was consistent with the opinion of the Committee on Culture and Education, and it added the following justification: “*In order to establish a level playing field within the framework of rights management, publishers and record companies – who also manage rightholders rights – should be subject to a minimum set of transparency rules*” (emphasis added).³⁵⁰

Yet these proposals to extend the provisions on CMOs to IMEs were self-contradictory. The Committee on International Trade seemed to accept that the IMEs (referred to in the proposed amendments as “independent commercial operators” and “independent rights management service providers”) would “manage rights” and even “exercise the same function as a collective management organization” as CMOs – that is, that they would be in direct competition with the CMOs. The Committee rightly stated that regulation of the relationship between IMEs and CMOs was supposed to guarantee a level playing field for CMOs, but it proposed no draft text to deliver this goal.

Likewise, the other two committees quoted above expanded the scope of requirements that IMEs must fulfill – suggesting that they be subject to controls broader than only “some transparency

³⁴⁶ *Ibid.*, ninth unnumbered paragraph of the introduction to (“justification of”) the opinion of the Committee on Culture and Education.

³⁴⁷ *Ibid.*, Amendment 36 in the opinion of the Committee on Culture and Education.

³⁴⁸ The proposed text read as follows:

Title I, Articles 10, 11(1), 12, 15, 16, 18, 19 and 20 of Title II, Title III and Articles 34, 35, 37 and 38 of Title IV shall also apply to independent rights management service providers established inside or outside the Union who act as agents for rightholders for the management of their rights and operate in the Union on a commercial basis.

Ibid., Amendment 18 of the opinion of the Committee on Industry, Research and Energy.

³⁴⁹ *Ibid.*, Amendment 16 of the opinion of the Committee on International Trade.

³⁵⁰ *Ibid.*

requirements” or “a minimum set of transparency rules” – but they fell short of the objective of the regulation itself: a playing field is not leveled by the application of certain transparency rules only. With IMEs already operative at the time of the preparation of the Directive, regulation was necessary in principle, but the way in which it took place not only did not produce equal market conditions for CMOs, but it made it far harder for them to compete effectively with IMEs than it had been before the adoption of the Directive. Why this has happened is discussed next.

Provisions granting IMEs competitive advantage over CMOs

Although the various above-mentioned committees of the European Parliament referred only to certain transparency requirements, they did propose a number of provisions going beyond such requirements that might have allowed CMOs to compete with IMEs. Nevertheless, the provisions set out in Article 2(4) of the CRM Directive are even more strictly limited to transparency requirements than even Gallo had suggested.

Article 2(4) lists the provisions of the Directive that shall have effect for IMEs: “Article 16(1), Articles 18 and 20, points (a), (b), (c), (e), (f) and (g) of Article 21(1) and Articles 36 and 42 apply to all independent management entities established in the Union.” They may be summarized as follows (in the quotations, emphasis added where appropriate).

- *Article 16(1)*: A CMO (thus, also an IME) must “conduct negotiations [with users] for the licensing of rights in good faith”, and they and users “shall provide each other with all necessary information”.
- *Article 18*: A CMO (thus, also an IME) *must make available* “not less than once a year, to each rightholder to whom it has attributed rights revenue or made payments in the period to which the information relates, *at least the following information*”: (a) any necessary contact details; (b) “the rights revenue attributed to the rightholder”; (c) the amounts paid to the rightholder “per category of rights managed and per type of use”; (d) “the period during which the use took place”, unless there are objective reasons why the CMO (and hence the IME) should not share such information; and (e) and (f) deductions made. Where the CMO (and hence the IME) has as members entities responsible for distribution of the “rights revenue”, this information must be provided to such entities.
- *Article 20*: A CMO (thus, also an IME), “*in response to a duly justified request*”, *must make available* to any CMO (or IME) with which it has concluded a representation agreement, to any rightholder and to any user *the following information*: (a) the works or other subject matter it represents, the rights it manages (directly or under representation agreements) and the territories it covers; or (b) where the scope of activity of the CMO (or IME), such works or other subject matter cannot be duly determined, at least “the types of works or of other subject-matter it represents, the rights it manages and the territories covered”.
- *Article 21(1)*: A CMO (thus, also an IME) *must make public* at least *the following information*: (a) its statute; (b) (if not in the statute) its membership terms and terms of withdrawal of authorization; (c) its standard licensing contracts and standard applicable tariffs; (d) (by reference to Article 10) details of the persons responsible for its management; (e) its general distribution policy of amounts due to rightholders; (f) its general policy on management fees; (g) its general policy on deductions, other than in respect of management fees, and “including deductions for the purposes of social, cultural and educational services”.
- *Article 36*: Member States *must have procedures* enabling members of a CMO (thus, also of an IME), rightholders, users, CMOs (or IMEs) and other interested parties *to notify the competent authorities “of activities or circumstances which, in their opinion, constitute a breach of the provisions of national law adopted pursuant to the requirements laid down in this Directive”* (i.e., whistleblowing procedures) *The competent authorities must have the power “to impose appropriate sanctions or to take appropriate measures”* where the provisions of national law have not been complied with, which must be “effective, proportionate and dissuasive”.
- *Article 42*: The *processing of personal data* carried out within the framework of the Directive must be subject to Directive 95/46/EC (on the protection of personal data).³⁵¹

³⁵¹ The reference to Directive 95/46/EC should be understood as reference to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), because Article 94(1) and (2) of the Regulation provide that “Directive 95/46/EC is repealed with effect from 25 May 2018” and that “References to the repealed Directive shall be construed as references to this Regulation.”

As can be seen, the overwhelming majority of the obligations imposed under the Directive are only to make information available. Consequently, the provisions on complaints, and the possible sanctions and procedures to be applied by the competent authorities foreseen in Article 42 also relate only to these requirements. It is only the obligation to “conduct negotiations for the licensing of rights in good faith” under Article 16(1) that may be regarded as going beyond information-oriented provisions (although the reason for its inclusion may be just that Article 16(1) itself prescribes information requirements, i.e., to “provide [...] all necessary information”).

The uneven playing field that disadvantages CMOs is made even more conspicuous in those provisions that apply to CMOs and not to IMEs. It is worthwhile starting with Article 16 of the Directive the application of paragraph (1) of which is extended to IMEs, but the rest of the provisions of the Article apply only to CMOs. Determination of the licensing terms – in particular, as regards the remuneration to be paid – is at the heart of competition between two entities sharing the same field, as those drafting the Directive conceived of CMOs and IMEs. As a consequence, it is difficult to understand why they chose not to extend to IMEs the more demanding concrete requirements prescribed in the rest of Article 16, such as that:

- a CMO must base its licensing terms on *objective and nondiscriminatory criteria* (paragraph (2)), while an IME is bound only to negotiate in good faith;
- *the rightholders a CMO represents must receive appropriate remuneration* for the use of their rights (paragraph (2)), while have no such requirement binding an IME, the objective of which is to increase its management’s profit as much as possible, and the question of how much it shares with the rightholders represented is just a matter of business calculation;
- *the tariffs a CMO sets must be reasonable in relation to*, among other things, *the economic value* in the specific trade of the use of the rights, taking into account the nature and scope of the use of the work and other subject matter, as well as the economic value of the service provided by the CMO (paragraph (2)), while IMEs are free in principle to apply tariffs far higher than the nature, scope and economic value of their repertoires should justify, yet still at a level lower than a CMO with a broad and valuable repertoire as much as it still may ensure the IME’s competitive advantage to the detriment of CMOs; and
- if a user so requests, the CMO *must offer a license* without undue delay or else give a reasoned statement why not (paragraph (3)), while an IME is bound by neither requirement.

In analyzing one single article, it has been already demonstrated how significant – and unwarranted – a competitive advantage is granted to IMEs under the Directive. The limited volume of the book does not allow similarly detailed review of all the relevant provisions of the Directive; therefore, only the following competition privileges of IMEs are highlighted.

- Contrary to CMOs, IMEs are not obligated to accept as members rightholders who fulfill the membership requirements (see Article 6(2)) and to manage the rights of any rightholder within the scope of their activities (Article 5(2)); rather, they are allowed to “cherry pick” only certain rights and certain rightholders from whom they may expect profit – and they leave the rest to the CMOs, which do have such obligations.
- Contrary to CMOs, IMEs are allowed to enjoy as stable repertoire as they wish and can secure these contractually, since they are not bound by the provisions of Article 5(3) and (4) of the Directive on the freedom of rightholders to withdraw their rights and repertoires.
- Contrary to CMOs, IMEs are not bound by any rules on terms of membership, on establishment and operation of governing bodies, on control mechanisms, on conflicts of interest and on complaint procedures (see Articles 6–10); rather, they are free to focus wholly on competition and profit making.
- Contrary to CMOs, IMEs are not bound by rules on the use of “rights revenues”, investment, deductions and distribution (see Articles 11–15); rather, they may use all their income to secure a stronger competitive position and to maximize profit.
- Although the declared objective of Article 2(4) of the Directive is to extend transparency requirements to IMEs, only Article 20 and certain provisions of Article 21 are applied in the case of IMEs. Contrary to CMOs, IMEs are not burdened by the other transparency obligations under Chapter V of the Directive – particularly the preparation of annual reports in accordance with Article 22 and the Annex – which means not only that they are free to function in a less transparent way but also that they are free to dedicate elsewhere the funds and resources that preparing such reports demands.

- Title III of the Directive, on the multi-territorial licensing of online rights in musical works does not apply to IMEs; only CMOs must respect its requirements.
- Further, IMEs are free of the requirements set out under Articles 33 on complaints procedures, 34 on alternative dispute resolution procedures and 35 on dispute resolution. This means that, contrary to the obligations of CMOs, IMEs are not subject to such control mechanisms.

In view of these contradictions, it is hardly a surprise that commentators point out the grave consequences of an asymmetric playing field to the detriment of CMOs:

Introducing independent management organizations could destabilize the rights management market in Europe, since it could distort competition between the various categories of organization operating on the market. [...]

Firstly, at the national level, although independent management organizations are subject to a reinforced regime and requirements in France, the fact remains that significantly more requirements are imposed on their competitors, collective management organizations. [...]

How can healthy competition [...] between organizations with different statuses and constraints be contemplated?³⁵²

Currently, CMOs and IMEs are competing with each other in an *unfair music licensing market*, since *IMEs' licensing activities are less restricted* by copyright laws. This is jeopardising CMOs' performances further (emphasis added).³⁵³

PMOs [an abbreviation of "for-profit, joint rights management organizations", which the author uses as a synonym for IMEs] could [...] also directly compete with traditional CMOs. [IMEs] *have* two important *advantages that have little to do with their relative efficiency*: first, without rights holder control [IMEs] have greater prospects to exploit market power on the rights holder side; second, so far [IMEs] seem *less restricted by statutory regulation* (emphasis added).³⁵⁴

By including provisions on IMEs and prescribing to them only certain information requirements, the CRM Directive not only constrains CMOs and disadvantages them in the so-called marketplace³⁵⁵ of "collective rights management", but it has also granted IMEs a kind of accredited status and incentives to proliferate.

Two assumptions seem to have served as justification for the promotion of competition between for-profit IMEs and CMOs – namely, that:

- a *de facto* or *de jure* monopoly of CMOs is bad, while competition is good; and
- CMOs do not function efficiently, while profit-driven IMEs do.

The activities³⁵⁶ of and the statements³⁵⁷ made by the European Commission seem to reflect this position; in contrast, the European Parliament and the CJEU have represented a more nuanced and, in certain aspects, contrary position. This was quite clear in draft Recital (4) of the proposed Directive to which reference was made earlier. In its entirety, the draft recital read as follows:

There are *significant differences* in the national rules governing the functioning of collecting societies, in particular as regards their *transparency and accountability* towards

352 Beaupain, Retour sur la directive, 489–490.

353 Wu, A legal framework, 77.

354 Cristian Handke (2016). Joint copyrights management by collecting societies and online platforms: an economic analysis. March 11, 28. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616442

355 The expression "so-called market" refers to the fact that, although from the viewpoint of the for-profit IMEs, it is truly just another commercial market to invest on the basis of business calculations, for CMOs, as organizations of authors and performers, it is rather a matter of the protection of the creators' rights as human rights in the spirit of solidarity and serving the promotion of national creativity and cultural diversity.

356 See, e.g., the Commission's 2005 Recommendation (strongly criticized by the 2007 Resolution by the European Parliament), the Commission's decisions in *CISAC* and *OSA* (judged ill founded by the CJEU) and the Commission's position on the applicability of the Services Directive (rejected by both the European Parliament and CJEU).

357 The most famous – and frequently quoted – statement was made by Neelie Kroes, Commissioner for digital issues, in May 2012 at a conference in Brussels sponsored by Bertelsmann, Vivendi and NBC Universal: "If I have enemies – and I assure you it is a long list – on that list are collecting societies, and I can't care less. They are monopolists." See, e.g., Kevin O'Brien, (2012). Fees that could spoil the party in Berlin. *New York Times*, September 23. Available at www.nytimes.com/2012/09/24/business/media/fees-that-could-spoil-berlin-party.html

their members and rightholders. Beyond the *difficulties* non-domestic rightholders face when exercising their rights and the *too often poor financial management* of the revenues collected, *problems* with the functioning of collecting societies lead to *inefficiencies* in the exploitation of copyright and related rights across the internal market to the detriment of the members of collecting societies, rightholders and users alike. *These difficulties do not arise in the functioning of independent rights management service providers who act as agents for rightholders for the management of their rights on a commercial basis and in which rightholders do not exercise membership rights* (emphasis added).

As mentioned above, the European Parliament Committee on Legal Affairs, in the Gallo report proposed that the last sentence alleging superiority of IMEs over CMOs be deleted. Perhaps IMEs worked efficiently and, in some cases, that success may have been attributable in part to their management teams – but in larger part it derived from simplicity of their newly built repertoires, easier to manage because of their limited scope, and because the system put CMOs at a disadvantage. As originally drafted, the recital did not only express preference of the Commission for competition but also reflected a somber pessimism about the future of CMOs – and in doing so it amplified the bias against them and elevation of IMEs already taking root in the collective management system on the basis of such poorly funded assumptions.

Different types of IME and their fields of operation

In the online digital environment, direct licensing even by individual rightholders has become possible and, by the time of the adoption of the CRM Directive (and as a result of the 2005 Commission Recommendation), pan-European platforms for the trans-border online licensing of the use of musical works had already been established. In theory, then, the newly established IMEs could also engage in direct online licensing of the use of their generally small, fragmented repertoires – but emerging giants Netflix, Apple Music and Deezer, among others, were disinterested in these small players and eager to obtain authorization for the use of musical works in bulk repertoires. Thus, several IMEs turned their attention instead to rights concerning “traditional” “off-line” uses, including the right of public performance of musical works, an area in which natural monopolies had emerged as the most advantageous way of exercising the right both for rightholders and for lawful users. When IMEs began to manage performing rights, the objective economic law of natural monopolies prevailed: a new actor appears in the market, efficiency decreases, per-product or per-service costs increase and – at an overall level – revenues decrease. The effect was asymmetrical: while IME start-ups lost nothing, the CMOs had to suffer all the negative consequences.

In spite of their relatively short history, several significant differences have appeared among IMEs, including their strategy, business model, size, economic result, impact on CMOs, and so on. Next some of their most typical forms are described briefly.

Some new IMEs have concentrated on offering, for use as background music, closed repertoires of authors of whom they require an “opt-out” from the collective management system. The business method of such IMEs is built on matching the minimal quality requirements of certain users such as hotels, department stores, restaurants and bars, some of which may need music only for atmosphere, on the one hand, with those authors and performers, on the other hand, who are prepared to abdicate responsibility to their peers, leave the collective management system and include their productions in the IME’s repertoire. For some such authors and performers, this may have appeared to be the only way in which they can access remuneration for their own efforts (either as an upfront lump sum for assignment to the IME of their rights and/or as some modest recurring payment), because their works would otherwise be overlooked in favor of creators who are members of, or are represented by, CMOs.

This type of user mentioned above will often choose a repertoire not due to its high quality or popularity but only because it costs less than another. This is a key element of some IMEs’ business model: their tariffs are lower than those of a CMO; they advertise this advantage as a main attraction, and they tout it as a positive outcome of the competition constrained on the community of creators represented by their CMOs.

The IMEs’ methods of competition with the CMOs are sometimes more sophisticated, but frequently it consists in simply taking the tariff systems of the local CMOs and fixing their tariffs at a somewhat lower level. Due to their heavily advantageous position in the “competition” created by the regulation of the CM Directive, these IMEs may appear “efficient” and “successful” also

with such lower dumping tariffs in a “course to the bottom” initiated by them. Their privileged competition advantage is further accentuated by the fact that it is in an order of magnitude easier to efficiently manage a smaller, freshly created, closed repertoire than practically the world repertoire of the CMOs representing the entire community of creators (minus the erosion created by such “competition” with IMEs), including those whom they must try to identify and locate.

The volume of the loss of the creative community depends on how much a CMO may take it as granted that the allegedly fool-proof closed systems – frequently based on cloud technology – for the use of IME repertoires truly function as claimed. Certain monitoring activity of the CMOs appears to be inevitable which, in certain cases, may be costly. One thing seems to be sure; namely that, if the IME’s pro-profit systems proliferated, the resulting fragmentation of the management of rights would lead to a qualitatively new situation, where the governments, no matter what kind of external norms dictated the permission of uncontrolled “competition”, not only might but also would have to act to prevent or eliminate the confusion that may undermine the due operation of the collective management system.

Legal disputes concerning the status and activities of IMEs

At the outset of this section, it is worthwhile defining the concept of “royalty-free” licensing – a term that can sometimes confuse users, since “royalty-free” music is *not* music free of charge. The best way to define seems to be quoting a description offered by an IME (with original emphasis, except in the last sentence, to which emphasis is added):

In the simplest terms possible, royalty-free music is *music that you pay for once and that you don’t have to pay royalties for to use*. There is a lot of confusion surrounding royalty-free, namely because of that word “free” [...] [R]oyalty-free enables a single upfront payment to be made to the artist, which can be much better for other [than certain traditional] projects, especially smaller ones. [...]

Royalty-free music is *NOT free*. As previously mentioned, the term free applies to the fact you won’t need to pay royalties after you license a song. Now, that said, royalty-free music does come with a cost. Many places charge significant licensing fees to use it for a single production. *[W]e charge you a monthly subscription that gives you FULL access to the entire catalog.*³⁵⁸

Confusion can similarly arise over whether an IME is genuinely managing the rights of others rather than the rights owned by itself³⁵⁹ or is engaging in activities that are similar to – perhaps, in certain aspects, the same as – those of music publishers.³⁶⁰

In this section, it is explored what kinds of conflicts the IME business model have raised in relation to the status of, and the rights managed by, the CMOs. These issues have led to legal disputes, especially over “royalty-free” systems, for example in France, where such a case reached the Cour de cassation (the country’s highest court).

358 See Fabian Midby (2020). What is royalty-free music? *Epidemic Sound blog*, May 7. Available at www.epidemicsound.com/blog/what-is-royalty-free-music/

359 See Gábor Faludi’s remark: “In the case of a final, irreversible and full assignment of economic rights one cannot speak any longer of the management of other rightholders’ right”: Faludi, *The transposition of the Directive*, 32.

360 See, e.g., Shakespeare Music, an IME, on the conditions under which it will include music in the repertoire it makes available to the public:

I am artist/composer/songwriter. How I can become a part of Shakespeare Music?

It is really easy. *Contact us and send us link (mp3 samples) where we can listen you music. Our chief music designer will listen to them and if it is compatible with our music policy we will contact you making an offer to be a part of Shakespeare Music. If you like our offer we will sign the contract and add your music tracks to our music data base. When our clients will use your tracks it will be calculating regarding the price the client is paying. After all two times a year, according to the factual use of works, Shakespeare Music distributes collected monies for their rights holders (emphasis added).*

Shakespeare Music (undated). FAQ. Available at www.shakespearemusic.com/faq/

In the *AudioValley v. SACEM (MusicMatic)* case,³⁶¹ the Court affirmed the judgments of the two lower courts when it summarized a “royalty-free” license thus:

A company that broadcasts in its stores phonograms posted on an online platform by performers, who choose to participate in the platform’s commercial program for sound transmission in the premises of subscribing professionals, is carrying out, independently of the means or technical process used, direct communication in a public place of phonograms published for commercial purposes and is, in application of Article L. 214-1 of the Intellectual Property Code, required to pay fair remuneration.³⁶²

AudioValley is a Belgian group of companies that engaged in various different business activities concerning music. The case concerned the business method of one of its companies, Jamendo, registered in Luxembourg as an IME. The summary quoted above is only one part the Court’s judgment; legal qualification of “royalty-free” systems was a relatively easy question because, irrespective of how the IMEs advertise their services, they are quite obviously *not free of charge*. In addition, however, the Court had to deal with two other questions – namely, about application of the right to a single equitable remuneration of performers and producers of phonograms for communication to the public (including acts similar to public performance) and for the broadcasting of phonograms published for commercial purposes. The right is provided in Article L. 214 of the French Intellectual Property Code, in accordance with Article 12 of the Rome Convention, Article 15 WPPT, and Article 8(2) of the Rental, Lending and Related Rights Directive. Under Article L. 214-5 of the Code (and as in many other European countries), the right may be exercised only through collective management (i.e., in the form of mandatory collective management).

SACEM, the French authors’ society, was the defendant in the case. It had collected, on a contractual basis, the single equitable remuneration for SPREE, an umbrella organization gathering the CMOs managing the rights of performers (ADAMI and SPEDIDAM) and the rights of producers of phonograms (SCPP and SPPF).

AudioValley claimed that the phonograms that Jamendo made available to the user (a company operating more than 100 stores in France, specializing in the sale of carpets and interior décor for home) to be performed as background music had not been published for commercial purposes and hence that the right to a single equitable remuneration was not applicable. AudioValley further claimed that, even if it had been applicable, the prescription of mandatory collective management for those who did not intend to join a CMO – such as the performers and producers of the phonograms represented by Jamendo – is inconsistent with EU law. AudioValley proposed that, if the Court did not find that this was obviously the case (i.e., if it did not consider this to be *acte clair*), it should turn to the CJEU with preliminary questions.

The Cour de cassation found the case to be *acte clair* – but not for the reason the plaintiff had suggested; rather, it was clear to the Court that the provision of the French Code was in accordance with the EU law when it prescribed mandatory collective management for the exercise of the right to a single equitable remuneration, because:

- (i) where not an exclusive right but a mere right to remuneration is involved, mandatory collective management is not a limitation of the right but an enabling system;
- (ii) Recital (12) of the CRM Directive makes it clear that Member States are free to apply mandatory collective management (if doing so, as in the given case, is not an inappropriate limitation of rights); and
- (iii) it follows from the very concept of the *mandatory* nature of management of rights that the rightholders need not accept – and cannot reject – it.

It was also *acte clair* that the phonograms made available by Jamendo qualified as phonograms published for commercial purposes. In this respect, there was another twist in Jamendo’s business methods similar to its “royalty-free” system. The musical works that were allegedly made available

³⁶¹ Judgment of the French Cour de cassation of December 11, 2019, *AudioValley, société anonyme (formerly MusicMatic) v. Société des auteurs compositeurs et éditeurs de musique (SACEM), et al.*, Case No. 18–21.211, ECLI:FR:CCASS:2019:C101021. Available at <https://www.courdecassation.fr/decision/5fca60790686c047f7bdb8fd> For detailed analysis of the case, see Oleksandre Bulayenko (2020), *MusicMatic: the French Supreme Court’s decision on Creative Commons Plus (CC+) commercial licensing and mandatory collective management of the right to remuneration for communication to the public of commercial phonograms*. *IIC – International Review of Intellectual Property and Competition Law*, 2020, 51(5), 2668–679.

³⁶² See *MusicMatic*, Summary (WIPO translation).

for non-commercial purposes were, in fact, were made available for commercial purposes: although, in principle, the phonograms were included in Jamendo's database through a non-commercial Creative Commons license (CC BY-NC-ND 3.0), which, however, was "combined" with a Creative Commons Plus (CC+) commercial license, as a result of which the purpose of the publishing of the phonograms became commercial.

The impact of the existence and recognition of IMEs on the collective management system differs depending on whether online licensing of musical works or "traditional" performing rights licensing is involved. In the online environment, parallel licensing by platforms such as SOLAR or Armonia by CMOs, by IMEs and even by individual rightholders is a reality, and as discussed above and will be seen in more detail in Chapter 10, national legislatures take this into account. While IMEs may play a role in that market, the online giants prefer the licenses they may obtain from online platforms for the use of their huge repertoires. In the field of "traditional" performing rights, the impact is much more complex.

As regards mandatory collective management, the findings of the French Court in the above-mentioned case, seem to be correct and applicable in general – that is, not only for the management of the right to a single equitable remuneration of performers and producers of phonograms for broadcasting and communication to the public of phonograms published for commercial purposes, as in the case itself, but also, for example, for the cable retransmission rights for the exercise of which, in the European Union, mandatory collective management is prescribed.

In the case of extended collective management systems, the situation depends on the number and the size of IMEs in a given country. Where there are few IMEs and those IMEs are small, the situation may still be managed within an "opt-out" framework, with one possible exception – namely, that CMOs may reasonably be required to publish on their websites a list of those individual rightholders who have opted out and of the works thus *not* covered by the extending effect. The situation is different when IMEs initiate "opting out" in an attempt to build their own repertoires. In the latter case, it seems more appropriate to require the IMEs to publish and maintain a list of the rightholders and works that *are* covered by their repertoires, to which the CMO concerned may then refer.

As IMEs multiply and grow in size, a qualitatively new situation may emerge that might require legislative and administrative interventions in those fields in which the recognition of natural monopolies would be appropriate to the interests of both rightholders and lawful users. This relates both to *de facto* and – as discussed below, even more acutely – to *de jure* CMO monopolies.

Until the adoption of the CRM Directive, Italian CMO SIAE, the society of authors and publishers, had enjoyed a *de jure* monopoly position. The transposition of the Directive into national law initially allowed SIAE to maintain that position. Later, its *de jure* monopoly was eliminated and competition among CMOs – but not IMEs – was permitted. Soundreef, one of the oldest and biggest IMEs in Europe, alleged that the Italian law was inconsistent with the E.U. norms and it brought its case before the courts.

As mentioned, originally Decree No. 35 of March 15, 2017, had transposed the CRM Directive in such a way that it maintained the *de jure* monopoly position of SIAE, as provided in Article 180 of the Italian Copyright Law. This, in the cases covered by the OSA judgment of the CJEU (see Chapter 4) would have been in accordance with the E.U. law, but it was not limited to those cases only. The new provision included in the Italian law corresponded, practically verbatim, to the provision of the first sentence of Article 5(2) of the Directive prescribing complete freedom of association of rightholders, but it differed in two aspects – at once both more and less liberal:

- the new provision seemed to be more liberal than Article 5(2) because while the article foresees complete freedom of association concerning only CMOs,³⁶³ the Decree extended this principle to IMEs (despite that Article 2(4) of the Directive itself has not so extended the application of Article 5); and

³⁶³ Article 5(2) of the Directive provides as follows:

Rightholders shall have the right to authorise a *collective management organisation* of their choice to manage the rights, categories of rights or types of works and other subjectmatter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the *collective management organisation* or the rightholder (emphasis added).

- the new provision was less liberal because it left the application of Article 180³⁶⁴ of the Copyright Law (on SIAE's *de jure* monopoly) intact.

It did not take long for the European Commission to warn Italy that Article 180 of its Copyright Law was in conflict with the CRM Directive. As a consequence, by means of Decree No. 148 of October 16, 2017 (later to become Law 172 of December 4, 2017), Italy modified Article 180 of its Copyright Law such that the possibility of managing the rights mentioned in the article are reserved not only for SIAE, but for SIAE *and* other CMOs foreseen in Decree No. 35.

It was the latter new provision that led to the lawsuit between SIAE and Soundreef, a big UK-based IME (which has since obtained "client" RME status with CISAC). Soundreef claimed that limiting the freedom to manage the rights mentioned in the modified Article 180 to SIAE and CMOs – and not extending it to the IMEs – was in conflict with the CRM Directive. SIAE responded that, under OSA, it is in accordance with the E.U. law to provide for a *de jure* monopoly of a national CMO for the rights concerned (in particular, the right of public performance), and it argued that the protection of cultural diversity also justifies such a provision. Both of SIAE's reasons seemed to be valid – and while the plaintiff challenged the applicability of OSA as concerning a legal situation that had since been modified by the CRM Directive, its argument was not well-founded because, as discussed in Chapter 4, the analysis on which the Court based its judgment in OSA remained equally applicable after the entry into force of the Directive as it had been before it. This is so because the CJEU has found that, for an efficient exercise of the right concerned in the case (the right of public performance of musical works), a national provision on *de jure* monopoly of a CMO is necessary. Moreover, the Directive does not declare that such a situation does not exist *de facto* anymore or that it would be justified to constrain Member States not to apply those provisions that are necessary to ensure the genuinely efficient exercise of rights of all rightholders concerned.

The Tribunal of Rome nonetheless decided to submit the following preliminary question to the CJEU:

Must Directive 2014/26/EU be interpreted as precluding national legislation that reserves access to the copyright intermediation market, or in any event the granting of licences to users, solely to entities which can be classified, according to the definition in that directive, as collective management organisations, to the exclusion of those which can be classified as independent management entities incorporated in that Member State or in other Member States?³⁶⁵

The preliminary question was registered at the CJEU as Case C-781/18. But on April 10, 2018, the parties reached a peaceful settlement, withdrew their claims and terminated the lawsuit. The Tribunal of Rome informed the CJEU about this in December 2018; by its order of July 16, 2019, the Court deleted the case from its registry.

The basis of the settlement was that Soundreef had found a solution to circumvent the new provision: it had reached an agreement with what was, at that time, quite a small Italian CMO, LEA (*Liberi Editori Autori*), for management of its repertoire in Italy. LEA's status as a CMO was in accordance with the modified provision of Article 180 of the Italian Copyright Law. The settlement between SIAE and Soundreef also included the following elements.

- SIAE acknowledged the legitimacy of LEA to receive remuneration on behalf of Soundreef and its direct members.
- SIAE acknowledged that Italian users would have to obtain a supplementary license from LEA (on behalf of Soundreef) if they were to use the repertoire of LEA.
- For public performance of musical works through recordings or on the basis of broadcast programs, SIAE would collect remuneration on behalf of LEA/Soundreef (for which purpose SIAE

³⁶⁴ Article 180 reads as follows (with emphasis added):

The right to act as an intermediary in any manner whether by direct or indirect intervention, mediation, agency or representation, or by assignment of the exercise of the rights of performance, recitation, broadcasting, including communication to the public by satellite, and mechanical and cinematographic reproduction of protected works, shall belong exclusively to the S.I.A.E. It shall pursue the following activities:

1. the granting of licenses and authorizations for the exploitation utilization of protected works, for the account of and in the interests of the rightholders;
2. the collection of the revenues arising from the licenses and authorizations;
3. the distribution of that revenue among the rightholders (emphasis added).

³⁶⁵ Order of the Tribunal of Rome of November 23, 2018, available at www.pojaghi.com/wp-content/uploads/2018/12/Ordinanza-SIAE-Soundreef.pdf

would not be changing its tariffs, but agreed to transfer proportional remuneration to LEA/Soundreef).

- In contrast, for live performance of musical works, from July 1, 2018, a complex system would apply under which if only the SIAE or only the LEA/Soundreef repertoire were used, only the license of the relevant organization would be needed, and where the repertoires of both organizations were used, both organizations' licenses would be necessary, but in which case SIAE would collect the remuneration for both itself and LEA/Soundreef (and transfer to the latter the proportional part). In the latter case, however, the system was complicated by the requirement that the users should inform the organizations about the musical works to be used in the programs at least two days before their performance (a requirement on which LEA insisted and which users have not received well³⁶⁶).

Thus, the parties have recognized the decisive instance in which natural monopoly is justified in the case of the management of musical performing rights – namely, when there should be a “one-stop shop” with a common tariff and licensing system for the users.

Blockchain technology used by IMEs – and also by CMOs

Blockchain has been heralded as a killer technology and a fundamental game changer through which IMEs may replace CMOs. Before discussing whether or not this is a realistic assessment, it is necessary to describe briefly – although not the complex technical aspects but at least – the basic functions and the impact of this technology.

A blockchain is a chain of records – so-called blocks – linked together by cryptography in such a way that the data included within it becomes resistant to modification. The information included in a block cannot be altered retroactively without changing all subsequent blocks. A blockchain may be also characterized as an online decentralized database (“distributed ledger”) with no central authority, controlled by the subjects of the database themselves as a collectivity, to whom it is readily available and who may fully trust it. Furthermore, by design, it reflects the information recorded in it in real time. It seems to be so robustly reliable, self-protecting and automated that, as soon as it is properly established, it needs no specific monitoring and oversight; it functions as “truth”, so that the data contained in it may be accepted as proof even in legal procedures.

The appeal of blockchains to rightholders is entwined with the possibility of licensing the use of works – of which the real-time status of ownership of rights is recorded – through “smart contracts”. A “smart contract” is much more than a traditional contract to which the parties may refer as a proof of their agreement on the subject matter of the license, the rights granted, the scope of the license, and so on. All this is precisely and safely recorded, but a smart contract can *self-execute*: when a use takes place, the blockchain can – on the basis of the real-time information recorded within it and with no further intervention – automatically calculate the remuneration due to the rightholders and immediately transfer it to them. Due to the automatic low-cost operation of the system it is suitable to manage “micro payments” due for online uses, which can cumulatively be significant sums.

This seems to be a perfect management system for rightholders, and not only IMEs but also some well-known, successful artists are already applying it, the latter more or less individually. It seems that this new technology might also facilitate solving certain problems of orphan works and of the “black box” amounts due to unidentifiable and/or un-locatable rightholders. There are, however, limits in this respect.

To start with, blockchain may offer a solution to problems of orphan works and “black box” amounts only if, in the first blocks to be “chained” together with other data, the ownership of those rights are properly clarified; no smart contract may be so smart as to transfer remuneration

366 Users point out that, in many cases, it is unrealistic to expect them to supply a precise program ahead of their performance; so much depends on the circumstances of a performance and, in particular, the demands of the audience. See, e.g., Anon (2019). *Il guazzabuglio dei diritti a la questione LEA* [The confusion/mess of rights and the LEA question]. *SILBFIPE*, August 9. Available at www.silb.it/il-guazzabuglio-dei-diritti-e-la-questione-lea/. The short article outlines the issues that users report: that frequently identification of the holders of rights in any given work and thus the repertoire to which it belongs is difficult – sometimes even impossible – such that it should rather be a matter for the CMOs. Should a CMO take responsibility, however, that one CMO would have to collect the remuneration, then would distribute it, such that the CMO would then be doing the work of identifying and locating, for this purpose, the rightholders.

to a rightholder whose data are not correctly recorded. The reliability and the effective use of a blockchain depend on the accuracy of the “provenance data”. Where more than a closed repertoire is involved, the CMOs remain in possession of the great majority of data and hence in the best position to checking its authenticity – and making “diligent search” where needed – on the basis of their databases and their own metadata systems.

Blockchain could function as a general solution for the management of copyright only if there were a reliable global database guaranteeing that the first data links in the chains of data blocks are always correct. However, as discussed in Chapter 10 – and as the commentators contend – a Global Repertoire Database (GRD) remains a utopia for the time being:

One of the biggest problems in the industry right now is that there’s no verified global registry of music creatives and their works.

The essential thing in this kind of technology is that *it will work if there is just ONE universal IP register; I mean, if there are two, three, or more the primary purpose of blockchain will be nothing*.³⁶⁷

Despite the enormous strides in digital technologies, *this copyright utopia hasn’t been possible to date*. No-one has been able to create a single database which all participants can trust to manage their content rights and automate payments on a timely and accurate basis (emphasis added).³⁶⁸

As new blocks are added, conflicting data may appear in the chain. There are some attempts in progress seeking to solve such conflicts, but they do not seem satisfactory yet at time of writing. In contrast, the CMOs have their own well-established complaint settlement procedures.

It is also a relevant factor that rightholders – in particular, authors and performers – often need advice and assistance if they want to make use of blockchain technology, and for that they may turn to their CMOs. It is also true that there are high costs to establishing and operating blockchains – costs that are not only financial but may be even environmental:

[T]he difficulty in creating a single block is immense. It (currently) takes the collective efforts of many thousands of miners [i.e., servers running the systems] testing 1.6-million-million hashes per second to discover one “block” every 10 minutes; they’re working at a speed that’s equivalent to 130-billion “average” desktop computers working in parallel. These mining computers are real devices, taking up real physical space, and they collectively consume gigawatts of real power.³⁶⁹

It is worthwhile quoting Daniel Gervais who, at a symposium on blockchain and copyright, warned against jumping to conclusions about the role of blockchain technology and its impact on CMOs:

Since we are still at a “proof of concept” stage, it is too early to assess the viability of blockchain applications for online music licensing or the creation of a global rights database. It will be necessary to let the market mature, standardize licensing information, establish a functioning and scalable payment infrastructure, define dispute settlement rules, secure respect for privacy and personal data of users, deal with issues on the fairness of payments to artists, define the role of CMOs in this field, etc.³⁷⁰

367 Giancarlo Jorge Giraldo Agurto (2020), Does blockchain change the music industry in a digital era? A perspective from copyrights and how it could equitably distribute the royalties and how it can enhance the protection of the rightholders. *LLM thesis, Upsala University*, 48. Available at www.diva-portal.org/smash/get/diva2:1441754/FULLTEXT01.pdf

368 Dany Gilbert and Tony Tobin (2020), *Blockchain: Hype or Major Disruptor? A Copyright Lawyers’ Guide*. July 17, 4. Available at https://cdn.brandfolder.io/3RTTK3BV/as/pqrec0-810d3k-59zwoo/Blockchain_Hype_or_Major_Disruptor_A_Copyright_Lawyers_Guide.pdf

369 Nikolai Hampton (2016), Understanding the blockchain hype: why much of it is nothing more than snake oil and spin. *Computerworld*, September 5. Available at www2.computerworld.com.au/article/606253/understanding-blockchain-hype-why-much-it-nothing-more-than-snake-oil-spin/

370 Quoted in João Pedro Quintais, Lars Groeneveld and Balázs Bodó (2017), Blockchain Copyright Symposium: summary report. *Kluwer Copyright blog*, August 3. Available at <http://copyrightblog.kluweriplaw.com/2017/08/03/blockchain-copyright-symposium-summary-report/>

It is also an important aspect to which Vincent Salvadé, Deputy CEO of the Swiss authors' society SUISA, has pointed out; namely that the question of relationship between CMOs and IMEs cannot be reduced just to the question of what kind of technology is applied:

Collective management of rights is, after all, more than just pure technology. It is based on an important value: a joint defence of creative work. Authors will always need an organisation which supports them, which negotiates contracts for them (including smart contracts) and campaign for fair transaction conditions (even if they have been certified by the blockchain).

But hold on a minute: *This statement does not allow us to rest on our laurels.* It's the duty of collective management organisations to be interested in the Blockchain, to understand it and to try and use it for the utmost advantage of authors and publishers (emphasis added).³⁷¹

Certainly, CMOs do not rest on their laurels. After all, it is not a right question to ask which is better: IMEs with blockchain or CMOs without blockchain? On the one hand, CMOs may also use it and, on the other hand, not all IMEs use it. As early as in 2017, three authors' societies with huge repertoires – SACEM, ASCAP and PRS for Music – decided to join forces to make use of blockchain. They announced that their data and technology teams were “working with IBM, leveraging the open source blockchain technology from the Linux Foundation, Hyperledger Fabric, to match, aggregate and qualify existing links between ISRCs and ISWCs to confirm correct ownership information and conflicts”,³⁷² and the CEOs of the three societies made statements that reflected high hopes:

Jean-Noël Tronc, SACEM: “[W]e aim to develop new blockchain-based technologies that will tackle a long-standing issue with music industry metadata – a problem that has grown more acute as online music rights distribution has become increasingly decentralized with the rise in digital channels. By developing this blockchain technology [...] we will unlock value to the benefit of music creators worldwide.”

Elizabeth Matthews, ASCAP: “Blockchain has become well-known for its use in payments systems because of its ability to capture real-time data and transaction updates that can be shared with multiple parties, and in the process, dramatically improve operations by reducing costs.”

Robert Ashcroft, PRS for Music: “Blockchain and distributed ledger technologies are opening up a world of new opportunities for all industries to address long-standing challenges. The digital market requires real-time reporting on behalf of multiple stakeholders across the world. If blockchain can help us achieve this, it will unlock opportunities for developers of new digital applications, increase accuracy of royalty payments and release value for rightsholders.”³⁷³

Other CMOs, such as SOCAN,³⁷⁴ Access Copyright,³⁷⁵ COPIBEC³⁷⁶ and JASRAC,³⁷⁷ also have blockchain programs.

371 Vincent Salvadé (2017), Blockchain: an ending or future for collective management organisations? SUISA blog, November 24. Available at <https://blog.suisa.ch/en/blockchain-an-ending-or-future-for-collective-management-organisations/>

372 Anon (2017), ASCAP, PRS and SACEM join forces for blockchain copyright system. *Music Business Worldwide*, April 9. Available at www.musicbusinessworldwide.com/ascap-prs-sacem-join-forces-blockchain-copyright-system/

373 *Ibid.*

374 See Stuart Dredge (2017), Dot Blockchain partners with SOCAN, Songtrust and more. *MusicAlly*, February 2. Available at <https://musically.com/2017/02/02/dot-blockchain-partners-with-socan-songtrust-and-more/>

375 See Robert Gilbert (2019), Unlocking blockchain's potential for creators and rightsholders. *Access©*, July 25. Available at www.accesscopyright.ca/media/announcements/unlocking-blockchains-potential-for-creators-and-rightsholders/

376 See at Copibec (2019), Copyright management: Copibec adopts blockchain technology. Press release, February 26. Available at www.copibec.ca/en/nouvelle/218/copyright-management-copibec-adopts-blockchain-technology

377 See Anon (2020), Japan's JASRAC to trial blockchain technology for music copyright management. *TokenPost*, February 5. Available at <https://tokenpost.com/japans-jasrac-to-trial-blockchain-technology-for-music-copyright-management-5019>

IMEs as RME “clients” of CISAC

There are quite important differences between the various IMEs in terms of their financial capacity, the size of their repertoires and the scope of their activities (e.g., to what extent they concentrate on licensing online uses and “traditional” uses – in particular, performing rights). Among the repertoires of some are high-quality authors and performers; unlike smaller IMEs concentrating on background music licensing, these giants emerge as real competitors to CMOs. It makes their relationship with CMOs unusual in that they both are competitors and must cooperate technically. Some CMO members of CISAC have even concluded representation agreements with certain IMEs.

These developments have gone so far that CISAC has introduced a category of “clients” under which it treats IMEs as rights management entities (RMEs).

Those IMEs that seek RME status must supply the CISAC Secretariat with certain documents and information in support of their application. They may qualify if they:

- (i) have at least one representation agreement with a full CISAC member;
- (ii) comply with all relevant and applicable laws and regulations in the countries in which they operate;
- (iii) sign and abide by CISAC’s “Client RMEs Terms and Conditions” and the “Common Information System (CIS) Tools User” contract; and
- (iv) comply with specific CISAC binding resolutions.

If CISAC accepts the IME as a client, it will attach to that status a disclaimer – namely, that this may not be considered a qualitative evaluation of these entities’ operations.

While CMOs are ordinary members of CISAC (and may also become members of the CISAC governance bodies and committees) and have to pay both subscription fees and the CIS Tools fees, the client RMEs’ relationship with CISAC is limited to technical cooperation. They can choose to access CIS Tools in return for payment of fees, and they may have “observer” status at technical and regional committees – but only to the extent of those aspects that are relevant to CIS Tools.³⁷⁸

At the time of writing, CISAC had granted client status to six RMEs: Soundreef (United Kingdom), Unison (Spain), NexTone (Japan) and Hexacorp (United States), as well as two former CISAC members that have changed their status to client RMEs, MCPS (United Kingdom) and CMRRA (Canada).

The requests of some other entities for client RMEs status were under consideration.

378 See CISAC (undated). Client rights management entities (RMEs). Available at www.cisac.org/client-rmes

Collective management in countries in transition from a centrally planned economy to a market economy

Introductory remarks

The terms “countries in transition” or “transition countries”, were a shortened version of what Article 65.3 of the TRIPS Agreement referred to as any Member of the World Trade Organization (WTO) “which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations”.

During the period in which their economies were centrally planned – combined with so-called democratic centralism, in which the emphasis was on *centralism* – the ideological, political, economic and social systems of these countries necessarily determined how copyright and related rights (where they existed at all) were provided, how they were applied, and (where the exercise of the rights required collective management) how CMOs were established and operated. It has been three decades since these countries began their transition toward market economy (and pluralist democracy). Previous important differences between them have diminished over time, but the details of each country’s transition have been different. For some of the former “transition countries”, a centrally planned economy is a thing of the past; for others, the transformation may not yet be complete and certain typical problems may persist. These latter countries and the specific features of their copyright and collective management regimes demand separate analysis.

There has been and remains some overlap between developing countries and “transition” countries which referred to themselves as “socialist countries” and were called in the industrialized countries as “communist regimes”. This chapter does not deal with such countries as China, Mongolia, Vietnam or Cuba, but only with 28 former or present “transition countries” in Central and Eastern Europe, the Baltic, Caucasus and Balkans regions, and Central Asia.³⁷⁹ The 28 countries are known collectively as the “Central and Eastern European (CEE) countries”, even though this term may not precisely reflect their geographical location.

In general, the categorization of national copyright laws is based on whether they follow a civil law or common law tradition. But the copyright laws of the CEE countries at the time of their centrally planned period were so specific that, while they may have narrowly compared more closely with the civil law than the common law system, they did not easily fit into either category. Thus, in this chapter, first, the shared and differing characteristics of the “transition countries” are analyzed. Then the specific aspects of their collective management systems existing at the outset of their political and economic transition are outlined, and it is reviewed how they have been transformed in the course of their “transition”.

379 The countries are: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Montenegro, North Macedonia, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. Additionally, the German Democratic Republic became part of Germany and adopted its legal, social and economic systems.

Like developing country Members, by virtue of Article 65.3(1) and (2) of the TRIPS Agreement, the “transition country” Members of the WTO were granted a grace period of five years in which to fulfill their obligations under the Agreement. One might assume therefore that these countries had more or less fully transitioned by 2000 – five years after the Agreement entered into force. It is, however, doubtful that these countries completed their transition satisfactorily within such a short time. Certainly, there remained significant differences among the countries by that date.

Eleven of the countries characterized as “in transition” in the middle of the 1990s went on to accede to the European Union.³⁸⁰ As a consequence, they have had to transpose the E.U. norms on copyright, related rights, electronic commerce, data protection, competition, and so on into their national legislation. They have also benefited from a number of pre-accession and post-accession programs, and they now participate in the various E.U. governing bodies. Thus, there might be good reason to consider that, for these countries, the “transition” is complete. Nevertheless, still there are certain features common to these countries’ copyright laws – not regulated directly by the international and E.U. norms – that seem to have remained from their former legal system. This is even more so in those CEE countries that have not acceded to the Union. Indeed, in several CEE countries, users remain more hostile towards copyright than are users in Western Europe, perceiving it as an unnecessary economic hurdle. Consumers that were used to commonly owned property and to have only limited private property are eager to embrace opportunities to acquire works free of charge.

There are other CEE countries – such as those that are Members of, or in negotiation to accede to, the WTO and/or to the E.U. – that have also made substantial progress from centrally planned to market economies. Several of them may therefore have good reason not to continue to categorize themselves as “countries in transition”, while in some others the effects of transition on their copyright system have not yet been fully realized.

WIPO has paid special attention to the transformation of copyright legislation and institutional systems that necessarily partner political and economic developments in a country’s transition process. In the early 1990s, the Organization hosted several regional and national meetings, seminars and workshops in the CEE countries. In 1993, the WIPO Secretariat prepared a study summarizing those tasks that are most important during a transition process,³⁸¹ and it presented its findings at a Seminar for Central European Countries on the Adaptation of the Copyright and Neighboring Rights Systems to the Conditions and Requirements of Market Economy, held in Prague in September (known as the “Prague CEE Copyright Summit”).

The study set out those tasks as, among other things:

- (i) in parallel with modernizing the laws on copyright and neighboring rights and adapting them to the requirements of the existing conventions and to the newly emerging international standards, those elements of the laws which followed from the centrally-planned, collectivist system should be eliminated;
- (ii) appropriate provisions should be adopted for the protection of neighboring rights (which, in the overwhelming majority of these countries were not yet recognized);
- (iii) the over-regulation of copyright and neighboring rights contracts should be eliminated;
- (iv) *governmental and semi-governmental CMOs should be transformed into private organizations, but in a way that the functionality of the collective management system may be seamlessly maintained;* and
- (v) the system of enforcement of rights should be made much more efficient, and its proper application should be guaranteed (emphasis added).³⁸²

In this chapter, the specific features of the collective management system of the CEE countries are discussed in the following order.

380 The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia joined the European Union in 2004; Bulgaria and Romania, in 2007; Croatia, in 2013.

381 WIPO (1993), Typical Features of Copyright in Transition: Review of the Transition Process – Guidance for Its Completion Where It May Still Be Needed, v.1. Document WIPO/CNR/PRG/93/Inf.3.

382 *Ibid.*, 19.

First, a general characterization of the copyright laws of these countries is outlined, with special attention to what follows from the specific features for collective management.

Second, the following organizational aspects are described:

- (i) how the mainly governmental or semi-governmental bodies have been transformed into private organizations;
- (ii) what rules govern the establishment of CMOs;
- (iii) in which cases collective management is supposed to be voluntary or mandatory;
- (iv) under what conditions collective management may take the form of extended collective management; and
- (v) what kinds of CMOs (for which rights) exist or are absent from the system.

Third, the operational features of collective management systems are reviewed.

Typical features of the copyright laws of the CEE countries

The Berne Convention comprises fairly comprehensive regulation on the rights to be protected, possible limitations or exceptions to those rights and other basic aspects of copyright protection. In Central and Eastern Europe and the West Balkans, the majority of “transition countries” – or their predecessors – were already party to the Convention by the time they began that transition, and at the time of writing, all were party to the Berne Union (with Turkmenistan the last to accede, in 2016). The Soviet Union had not been party to the Berne Convention; the majority of the newly independent States formed from former Soviet Republics acceded to the Paris Act during the 1990s. Nevertheless, the Soviet Union was party to the Universal Copyright Convention (UCC), administered by UNESCO, which was a bridge to Berne Union membership.³⁸³ At the frequent joint sessions of the Executive Committee of the Berne Union and the Intergovernmental Committee of the UCC and their joint Subcommittees, as well as at the meetings of WIPO–UNESCO committees of experts and working groups held in the 1970s and 1980s, there was some converging interpretation of the two Conventions’ provisions on the basic aspects of copyright (works to be protected, rights to be granted, possible exceptions and limitations, answers to the challenges raised by new technologies, etc.).

Therefore it might be asked what room remained for the copyright laws of CEE countries to include special features? The answer is that, even where these countries duly implemented the international standards in their national legislation, there were three areas where specific features might – and as a rule did – appear in their national laws:

- (i) where the Convention left room for interpretation;
- (ii) where the Convention left the regulation of certain detail to national law; and
- (iii) where a given aspect of copyright protection was outside the scope of the Convention.

It was most typically the third category in which the distinctive features of copyright law in the CEE “countries in transition” could be found – namely, in:

- (i) the way governmental copyright administration was organized;
- (ii) the provisions on original ownership of rights (e.g., of works created by employed authors);
- (iii) as a rule, the non-transferability of economic rights;
- (iv) particularly detailed rules on copyright contracts; and
- (v) specific regulation of the establishment and operation of CMOs – a topic directly relevant to this chapter.

The situation was also different when it came to compliance with the international treaties on related rights. In 1990 – a year often regarded as the beginning of fundamental political, economic and legal change in these countries – there were 35 countries party to the Rome Convention but only one in the CEE region: Czechoslovakia. A negative attitude toward related rights seemed to stem from a specific feature of as the “socialist copyright laws” in the pre-transition period – namely it special sort of “author-centrism”. This was manifested in the regulation of original ownership of

³⁸³ Because the minimum obligations under the UCC were determined more flexibly than under the Berne Convention: see Ficsor, *WIPO Guide and Glossary*, 12.

rights, the contractual system and the copyright status of works created by employed authors. Original ownership of copyright was granted consistently to authors and not to employers, producers or publishers; not only moral rights but also economic rights were, in general, inalienable; it was possible to grant licenses to use works, but the rights themselves were non-transferable. It was this specific “author-centrism” that also manifested in neglecting related rights – first of all the rights of producers, but, along with them also the rights of performers.

Looking back, this attitude centering the author may seem to be strange in view of the economic and social structures common to these countries. Some typical elements of copyright law (detailed rules on contracts or broad exceptions “in the interest of the socialist society”) appeared to be in harmony with heavily regulated, collectivist economic and social relations. However, it may not be easily understood why would “socialist” countries the civil law model for their copyright law in respect of the questions of original ownership and the transferability of rights rather than the common law model? Why were individual creators and employees recognized as the original owners of rights rather than their state-owned employers? And why were those individuals not permitted to assign copyright? Why the system included these apparently unnecessary “complications” with “individualistic”, private rights when the economic rights could have been owned by the “community”? Why was it that not the state-owned publishers and producers of films and phonograms became original owners of rights?

Answering these questions demands a substantive analysis of how the Soviet-type “socialist copyright system” (many elements of which were later adopted in the “people’s democracies” of the CEE region) came into being, as well as how it functioned and developed. It is also necessary to understand the way in which CMOs were established and functioning in these countries.

The following features may serve as some explanation of these apparent contradictions:

- (i) the anti-capitalism of the system;
- (ii) the eagerness to prove that Soviet-type socialism was the “superior” economic model;³⁸⁴
- (iii) the regime’s dogmatic tendencies; but also
- (iv) a sincere persuasion among copyright experts in these countries that an author-centric system is justified.

In Russia, before the 1917 October Revolution, publishers were the only important group of users of works. By virtue of the law in force at that time, as a rule, they owned the rights in the works they published. The “revolutionary” regime declared that those contracts were invalid, and it confiscated the rights of publishers and “gave them back” to the authors. In parallel, the term of protection was first reduced and later gradually increased again. After World War II, the so-called people’s democracies applied similar measures (although they did not reduce the term of protection).

Copyright could have been simply nationalized, as was true of other property rights and, in several “socialist” countries, also of industrial property rights. Authors’ rights escaped the fate of those other rights apparently because “socialist” ideologues were eager to boast of the superior treatment that Soviet-type socialism extended in recognizing the rights of creators. When the principles of the “socialist legal system” were laid down, a romantic notion of the “author-genius” was broadly accepted, particularly in Europe. The Soviet ideologues wanted to prove that the regime, in accordance with this concept, fully respected and promoted the creativity of authors.

Two specific features of “socialist” copyright laws followed from this. These features were determined as basic principles of “socialist legal theory” and quickly became dogma.

First, since the romantic notion of author-genius played a decisive role in the recognition of authors’ rights, the author’s personality was the focus of the system. Granting “individualistic” exclusive rights to authors followed from the belief in an intrinsic relationship between author and work. As a result, “socialist copyright laws” were based, in general, on a fairly strict monistic theory that presented authors’ moral and economic rights as inseparable. Within this unity, moral rights were quite generously regulated, while economic rights were strongly limited, with the objective of guaranteeing that they were in accordance with the “interests of the society”.

384 The ideologues and leaders kept repeating prophecies that, within a short time, the Soviet-type “socialist” system would develop far beyond the capacity of the “rotting” capitalist system.

Second, it also followed from this approach that the “commodity” nature of copyright was emphatically rejected as a typical feature of “capitalist” copyright laws. The recognition of exclusive economic rights was inseparably linked to what was characterized as the distinctive personality of authors’ creativity. Thus, as a rule, authors – and not, for example, employers, producers and publishers – were recognized as the original owners of copyright; authors’ rights had to be inalienable, and even the validity of licenses granted to users had to be limited in term and in other aspects.

The centering of the author in the “socialist” copyright laws did offer certain advantages under centrally planned economic conditions. Authors’ rights were limited in various respects, and many conditions – among them several of an ideological and political nature – were prescribed for their exercise; however, to a certain extent, they still formed an island of privacy, tolerated “individualism” and private property (although intellectual property, in general, was not characterized as *property*; in order to avoid the blasphemy of using this term, the expression “the law of intellectual creations” was used instead of the well-known expression “the law of intellectual property”). The alternative – granting original ownership to producers, publishers and employers and/or at least allowing the assignment of copyright to them, would have been led to indirectly collectivization of authors’ rights. Therefore, this aspect of “socialist copyright laws” was beneficial from the viewpoint of authors as intellectual creators.

It is another matter that, in that period, the authors did not enjoy real freedom of expression – certainly not as regards political and ideological issues. They had to respect certain taboos and apply self-censorship – and, at maximum, just to send cautious critical messages ‘hidden among the lines’ – in order to avoid repercussions.

When the period of “transition” began, the rigidity of copyright laws of the CEE countries began was incrementally – but, in a few, suddenly – eliminated, although their author-centric underpinnings have rarely disappeared:

- the contractual system has been liberalized;
- the dogma of inalienability of economic rights has been eliminated, or its application has been limited to open the door to more flexible exploitation of copyright under emerging market-economy conditions;
- the status of works created by employed authors has been modernized; and
- related rights have been recognized.³⁸⁵

The specific author-centric natures of the copyright laws of the CEE countries also has impact on their collective management systems. This was evident in features such as that:

- CMOs were regarded not as mere collecting agencies but as communities of creators;
- there was special emphasis on the principle of solidarity among them; and
- CMOs were considered important institutions for the promotion of national creativity and cultural diversity.

These features of the collective management system, in the majority of the CEE countries, continued prevailing in the “transition” period, although the previously applied principle that only authors were supposed to play a role in the governing bodies of the CMOs was relaxed step by step, in particular in relation to music.

The countries covered by this chapter – the 28 countries in transition or post transition – have joined the mainstream as regards the recognition of copyright and related rights and participation in the international system of protection and enforcement of these rights (and this extended also to the trade-related aspects of these rights). Does this mean that now the protection and enforcement of copyright and related rights are in order in these countries? It is obvious, that the accession to and implementation of the international treaties, and even the transposition into national legislation of

³⁸⁵ In this regard, it is interesting to note that, under Article 1240.1 of Part IV of the Russian Civil Code (which replaced its separate laws on intellectual property rights from January 1, 2008), audiovisual works and multimedia products are regarded as “complex objects”, and the rights of authors and performers are transferred (and not only licensed) to the producer (“the person who has organized the creation of the complex object”), unless otherwise provided for in contract. The result is that producers become the owners of all of the rights (although, under Article 1263.3, the composers and lyricists of musical works created for audiovisual works retained a right to remuneration).

the E.U. directives, is not a sufficient guarantee for this. This is the case also as regards some of the CEEs countries covered by this chapter.

Collective management in the CEE countries in their pre-transition period

In the centrally planned economies in the majority of the CEE countries, the functions of state copyright administrations and the collective management of authors' rights were combined in a single structure. Governmental agencies (such as the VAAP in the Soviet Union, with a Moscow center and units in the member republics) semi-governmental organizations with more or less autonomy (such as Artisjus in Hungary and JUSAUTOR in Bulgaria) or, in principle, private societies but subject to government influence and control included (such as OSA and DILIA in the Czech, and SOZA and LITA in the Slovak, parts of Czechoslovakia). Only the Polish ZAIKS and the Yugoslav SOKOJ functioned as relatively independent authors' societies.

It had a strong influence on the collective management systems of CEE countries that, in the Soviet Union, the predecessor organization of VAPP – the UOVAP – was established to deal with authors' rights in published works. The CMOs usually also acted as literary and theatrical agencies (with state monopoly and frequently also performing *de facto* censorship), in addition to performing traditional collective management activities. In fact, agency activity seemed to be the main role of the VAAP: it was the key organizer of the Moscow Book Fairs held for the first time in 1975 and then regularly thereafter. In some of the CEE countries, separate organizations fulfilled these agency functions, alongside their management of rights in literary works: in the Czech part of Czechoslovakia, the DILIA; in the Slovak part, the LITA; and in Romania, the Fondul Litteral was a key participant in cooperation among "socialist copyright organizations". In accordance with this strong publishing orientation, where the organizations were not independent state bodies (as the VAAP had been in the Soviet Union), they were subject to oversight by the ministries of culture (where, in general, the deputy ministers in charge of publishing were responsible for the supervision of authors' societies).

Transformation of the collective management system in the "transition" period

When, in March 1990, the WIPO Group of Governmental Consultants considered and approved the study published as the first edition of this book, the CEE countries were at the start of their political and economic transformation. It was natural that the study and the WIPO Group should deal with their specific collective management systems – in particular, with the functioning of governmental or semi-governmental CMOs, and in combination with the CMOs of developing countries (see Chapter 12).

In doing so, the WIPO Group approved a principle included as paragraph (g) in the book's concluding chapter:

- (g) Whether public or private organizations are more appropriate for the collective management of copyright and neighboring rights [...] depends on the political, economic and legal conditions and traditions of the countries concerned. In general, private organizations are preferable. The conditions of certain countries (e.g., of those developing countries which are at the stage of establishing their copyright infrastructure) may, however, make the setting up of public organizations desirable in order to safeguard rightholders' interests. In the case of such public organizations, appropriate organizational forms and guarantees are needed in order that the rights owners concerned may participate in the direction of the management of their rights.³⁸⁶

In the 2002 edition of the book, the principle reappeared as principle (12), with only minor changes (using the terms "joint management" and "related rights" instead of "collective management" and "neighboring rights").³⁸⁷

In the course of transition from centrally planned to market economies, state and semi-state institutions began to become real private societies. In certain CEE countries, this was accompanied by some hesitation: in the Russian Federation, for example, the VAAP was transformed into RAIS, then RAIS was transformed for a short while into GAASP (still semi-governmental), before being

³⁸⁶ See WIPO (1990). *Collective Administration of Copyright and Related Rights*, Publication No. 688 (E). Geneva: WIPO, 88.

³⁸⁷ See Mihály Ficsor (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 161.

superseded by the Russian Authors' Society (RAO) – a fully private organization. In other countries, the organizational change was less gradual; in some cases, it was so sudden that it created a transitional vacuum (i.e., the governmental or semi-governmental structure no longer operational but private organizations not yet established). It was also sometimes the case that multiple private societies were established to manage the same rights in parallel – something said to be dictated by the principle of freedom of association but which, in practice, led only to confusion and a barrier to the effective exercise of the rights concerned. The situation in Ukraine – as mentioned in Chapter 4 – was particularly untenable: at one point, some 20 organizations managed musical performing and mechanical rights, several of them rogue entities.

At time of writing, there remain some countries covered by this chapter – especially in the Central Asian and Caucasus regions – in which the transformation from governmental or semi-governmental organizations to private societies is not yet complete.

In contrast, there were some in which the transformation has been seamless. This was the case, for example, in Hungary, where the formerly semi-governmental CMO Artisjus continued its activities as a private society without any major transitional problems. It was the result not only of a reasonable grace period for CMOs seeking to meet all the requirements to re-establish as private societies but also of helpful provisions in the new legislation: strict conditions were prescribed for the registration of a private CMO (conditions that, in practice, only the existing CMOs were able to fulfill) and only one organization was permitted to register for the collective management of a given category of rights of a given category of rightholders.

The political, economic and social changes in the CEE region were also coupled with the division of existing States into distinct independent countries. This added no complication in the “velvet” division of Czechoslovakia into the Czech Republic and Slovakia: as mentioned already there were separate Czech and Slovak CMOs already in place during the “socialist” period. In contrast, the establishment and operation of duly functioning CMOs in the former Yugoslav republics was far from smooth. In Serbia, where SOKOJ had centered its activities when responsible for the former Yugoslavia, and in the economically more developed Croatia and Slovenia, these issues were resolved fairly quickly; in some of the other newly independent countries, at time of writing, there remain significant efforts yet to be made if the countries' collective management systems are to be truly effective.

Such differences are even more pronounced among the independent states born of former Soviet republics. In the Russian Federation, RAO inherited the staff, equipment, machinery, experience and relations of the VAAP, which facilitated a relatively easy transition. In Armenia, Georgia and the Republic of Moldova, private CMOs administering both copyright and related rights were created, integrating the personnel of the small VAAP regional branches – but they faced, from their inception, a range of challenges to the enforcement of those rights they were entrusted with managing. And in the Baltic countries, collective management took a different path, resulting in multi-repertoire CMOs operating successfully (in the authors' rights field) within the specific legal and economic environment of the European Union.³⁸⁸

CMOs in a *de jure* or *de facto* monopoly position, and specific competition questions in the CEE countries

During the period of centrally planned economies in the CEE countries, the political and economic structure was such that the idea of establishing competing organizations to manage the same category of rights of the same category of rightholders would have been anathema.

At the beginning of the “transition” period, some CEE policymakers sought to introduce market and competition conditions too quickly and completely, including in the field of collective management.³⁸⁹ This, in general, led to chaos and paralyzed the exercise of the rights concerned (and the above-mentioned untenable situation that emerged in Ukraine under the slogan of “free competition”).

³⁸⁸ It should be noted that the three Baltic authors' societies – AKKA/LAA (Latvia), LATGA-A (Lithuania) and EAU (Estonia) – have benefited from the experience of their Nordic counterparts through cooperation with CMOs in Sweden (STIM), Norway (TONO), Denmark (KODA) and Finland (TEOSTO).

³⁸⁹ It is worthwhile noting that this mainly happened in those countries where there had not previously been well-established and more-or-less adequately functioning CMOs. The explanation for this trend might be that, where there had been such CMOs, there was also sufficient experience available that did justify the preservation of the organizations' *de jure* or *de facto* monopoly position.

The territories and populations of the majority of the CEE countries are relatively small (practically only Poland, the Russian Federation, Ukraine and some of the five Central Asian “stans” may be regarded as exceptions). Furthermore, there are several small countries that have only small language markets (with a flourishing cultural diversity inseparably connected to those different languages). For these reasons, it was particularly true that allowing parallel CMOs to manage the same rights would be harmful. The main argument wielded against a plurality of CMOs, in the specific context of these CEE countries, was the danger of unfair competition between the CMOs resulting in a “race to the bottom” and ever-decreasing rates of royalty payment by users. In spite of which, there were two smaller CEE countries – the Czech Republic and Hungary – in connection with which it was questioned whether a legislative provision for a *de jure* monopoly position was in accordance with the community law (see Chapter 4 for more about this).

Mandatory and extended collective management in the CEE countries

The questions of mandatory collective management and extended collective management are discussed in detail in Chapter 5. In view of the overregulated and fully controlled nature of centrally planned economies, one may think that – in at least some of the CEE countries – mandatory collective management might be prescribed even in cases in which this might conflict with the provisions of the international treaties. In fact, this is true of only a few such countries: those in which the “transition” from centrally planned to market economy is not yet complete. In general, the copyright laws of the CEE countries prescribe mandatory collective management only where it is permissible under the international treaties (and, for E.U. Member States, E.U. norms) – that is, concerning mere rights to remuneration and where the international treaties allow the prescription of such “conditions” for the application of exclusive rights. Nevertheless, there does seem to be a general trend toward mandatory collective management in the CEE countries compared with the other European countries.

Those CEE countries that are Member States of the European Union, in accordance with Article 11*bis*(2) of the Berne Convention and with Article 5(1) of the E.U. Satellite and Cable Directive, provide for the mandatory collective management of cable retransmission rights; other countries hoping to join the Union or to obtain another specific status include the same provisions in their national law.³⁹⁰ Like many other countries, the CEE countries also provide in law for the mandatory collective management of the right to equitable remuneration for private copying for personal purposes.³⁹¹ In some, mandatory collective management is also applied to the right to remuneration for reprographic reproduction (although in several cases this is limited to private reproduction).³⁹² There are several CEE laws prescribing mandatory collective management of the right to remuneration for resale right³⁹³ and it is typically true of the lending right, where it is provided (as it usually is in E.U. Member States).

A lot of CEE countries provide for the mandatory collective management of the right of performers and producers of phonograms to a single equitable remuneration for broadcasting and communication to the public of phonograms published for commercial purposes (provided for in Article 12 of the Rome Convention and Article 15 WPPT).³⁹⁴ And yet it may come as a surprise that only a few CEE countries have made use of opportunity to provide for mandatory collective management under the two provisions of the Berne Convention (Article 11*bis*(2) and Article 13(1)) that allow determination of such a condition of the exclusive rights concerned (along with compulsory licenses).

390 Such as in the copyright laws of Bosnia Herzegovina (Art. 4(2)(c)), North Macedonia (Art. 131(c)), Montenegro (Art. 155(1)), Republic of Moldova (art. 11(5)) and Serbia (art. 29(2)).

391 See the copyright laws of Bosnia Herzegovina (Art. 4(2)(b)), Croatia (Art. 156(1)), the Czech Republic (Arts 25(5) and 96(1)), Estonia (Art. 27(5)), Georgia (Art. 21(5)), Hungary (Art. 20(1)), Latvia (Arts 34(5) and 63(5)), Lithuania (Art. 65(3)), Montenegro (Art. 155(1)(3)), North Macedonia (Art. 47(2)), Poland (Art. 21(5)), Republic of Moldova (Art. 26(1)), Russian Federation (Civil Code Art. 1245(2)), Romania (Art. 107¹(1)), Serbia (Art. 39(2)), Slovakia (Arts 24(6) and 78(3)(b)), Slovenia (Art. 147(1)(4)) and Ukraine (Art. 42(5)).

392 See the copyright laws of the Czech Republic (Arts 25(5) and 96(1)), Estonia (Art. 27¹(4)), Hungary (Art. 21(8)), Latvia (Arts 35(3) and 63(5)), Lithuania (Art. 65(3)) and Romania (Art. 20¹(7)).

393 See the copyright laws of Armenia (Art. 27), the Czech Republic (Arts 24(2) and 96(1)), Estonia (Arts 15(2) and 76(3)), Latvia (Arts 17(5) and 63(5)), Republic of Moldova (Art. 20(4)), Slovenia (Art. 141(1)) and Ukraine (Art. 27).

394 See the copyright laws of Armenia (Art. 54(3)), Croatia (Art. 156(2)), the Czech Republic (Art. 96(1)), Georgia (Art. 52(2)), Hungary (Art. 7(9)), Kazakhstan (Art. 39(2)), Kyrgyzstan (Art. 36(2)), Latvia (Art. 63(5)), Romania (Art. 123¹(1)), Russian Federation (Civil Code Art. 1326(2)), Serbia (Arts 117(2) and 127(2)) and Slovakia (Art. 78(3)(d)).

Article 11*bis*(2) also allows mandatory collective management of the right of broadcasting and rebroadcasting in addition to that of the right of cable retransmission, and Article 13(1) makes this possible for the “mechanical right” in musical works. It is to be noted that, where mandatory collective management is still applied for broadcasting, it does not extend to those categories of works – especially audiovisual works – where such limitation of the exclusive right of broadcasting would be in conflict with the three-step test provided under Article 13 of the TRIPS Agreement and Article 10 of the WCT. The copyright laws of Croatia (Article 156(1)), Hungary (Article 27(1)) and Poland (Article 21(1)) provide for the mandatory collective management of the right of broadcasting, but all of them only concerning musical works and some limited types of shorter literary work; while the laws of Estonia (Article 76(2)6 and (3)) and Hungary (Article 19(1)) provide for the same in relation to mechanical rights.

The application of poorly drafted extended collective management schemes in some CEE countries created problems because it was possible to misuse them – and some rogue organizations commonly did so. This was the case, for example, in the Russian Federation where the Copyright Law of 1993 (in force until superseded by Part IV of the Civil Code) provided for an extended effect of the licenses granted by voluntarily established CMOs but did not contain the guarantees that are indispensable if such systems are to be in accordance with the international norms. Article 1244 of the Civil Code has solved this problem by introducing an accreditation system to guarantee that only those CMOs authorized to operate an extended collective management system are able to do so. Paragraph (1) of the Article contains an exhaustive list of rights for the management of which such accreditation may be granted. Under paragraph (2), such accreditation may be granted to only one CMO for each category of rights, including:

- (i) the exclusive rights of public performance, broadcasting, rebroadcasting and cable retransmission of musical works;
- (ii) the same rights concerning musical works embodied in audiovisual works;
- (iii) the resale right;
- (iv) the right to remuneration for private copying;
- (v) the right to a single equitable remuneration of performers for broadcasting and communication to the public of phonograms published for commercial purposes; and
- (vi) the right to a single equitable remuneration of producers of phonograms for broadcasting and communication to the public of phonograms published for commercial purposes.

Paragraph (3) provides that the accreditation also extends to the management of the rights of those rightholders who have not joined such CMOs; under paragraph (4), they may “opt out” from the collective management systems. Articles 1245(2) and 1326(2) of the Civil Code do, however, make collective management of the right to remuneration for private copying and the right to equitable remuneration of performers and producers of phonograms, respectively, mandatory.

The copyright laws of Bosnia Herzegovina, Croatia, Hungary, the Republic of Moldova and Ukraine also provide for systems of extended collective management. They provide in their national copyright or collective management laws for the possibility of “opting out” from the extended collective management system,³⁹⁵ and they include conditions for the registration or accreditation if a CMO is to perform extended collective management appropriately.

Thus, it is evident that mandatory, and particularly, extended collective management schemes are widely used in the CEE countries, reflecting the slow ripening of copyright protection and awareness in this European sub-region. It seems that such “one-stop shop” licensing solutions

³⁹⁵ See the copyright laws of Bosnia and Herzegovina (Article 18(1)); Croatia (Article 159(2)); Hungary (Article 18); Republic of Moldova (Article 48(12)). Note that the Croatian Copyright Act is listed as also providing for an extended collective management system. Article 159 of the Act provides:

159.—(1) The collective administration of rights referred to in Article 156 of this Act, with respect to the same category of right holders can be entrusted by the Office to one collective society only, and that to a society to which the most right holders have given their powers of attorney for the administration of their rights, and which has the most contracts on mutual representations with foreign collective societies, all in accordance with the professional criteria referred to in Article 169, paragraph (2) of this Act.

(2) It shall be presumed that the society referred to in paragraph (1) of this Article has powers of attorney of all domestic and foreign right holders of a respective category, unless a right holder has explicitly notified the society, in a written form, not to administer his rights.

Although Article 159(2) uses the language of “presumption”, the actual effect of the provisions corresponds to that of an extended collective management system; the notification of the society by the rightholder not to administer their rights mentioned at the end is, in fact, an “opt-out” notice.

may be useful in countries that lack solid (private) copyright traditions and where the majority of users would not voluntarily obey their copyright obligations, or where they can barely distinguish between copyright and related rights; at the same time, rightholders have little experience of defending their rights and few financial resources with which to do so.

Problems specific to CEE CMOs attempting to enforce the rights they represent

In several CEE countries, the core concern is not that no appropriate CMOs have yet been established to exercise those rights that are most – or even only – effectively managed collectively, but that the efforts of CMOs to enforce the rights they managed have not yet been successful. There seem to be three basic problems in this respect.

The first is that, in many CEE countries, users – such as broadcasters, as well as commercial and entertainment establishments (in general, state- or community-owned) – were not accustomed to the “burden” of copyright obligations, and hence after the political changes it was difficult (and, in some countries, it still is) to make them abide by the law.

The second problem relates to a negative collateral effect of the fundamental political changes that took place at the end of the 1980s and at the beginning of the 1990s. The above-mentioned WIPO study presented in 1993 at the Prague CEE Copyright Summit referred to it as “the diminishing law-abiding discipline” in “the euphoria of regained freedom”.³⁹⁶ Centrally planned economies overregulated and closely controlled all aspects of political, economic and social activities; in the new political atmosphere, people were contemptuous not only of the unnecessary rules but also of many justified legislative provisions. As the WIPO study put it:

The collective administration organizations, which in the past were either state authorities or at least had the State’s full support and which had to deal usually with state-owned user entities, may now find themselves in a much weaker position as private bodies faced with many new private entrepreneurs who are frequently reluctant to cooperate with the collective management organizations and to pay royalties to them.³⁹⁷

This has led to a third problem to which the study referred as follows:

In the laws of socialist countries, as a rule, there were no truly efficient legal devices available against piracy, and, actually, the need for such means was not even perceived. All activities were controlled, and, in most of those countries, it was quite unthinkable to establish a private company in the ideologically so important cultural industry. The tight State control, of course, did not allow piratical activities either. After the dramatic political and economic changes, the absence of appropriate means of enforcement became suddenly obvious.

Since then, certain steps have been taken in some of these countries to strengthen the means of enforcement; for example, tougher penal sanctions have been introduced. An efficient enforcement system, however, must contain a number of further elements – such as conservatory (preliminary) measures along with appropriate procedural rules, customs measures, etc. – and also the active participation of law enforcement bodies of the State (police, etc.). In this respect, there is still much to be done in these countries.³⁹⁸

This last problem still lingers in some CEE countries. Much is yet to be done to inspire enforcement authorities to fight copyright infringements and to raise awareness among those authorities and the judiciary of certain copyright principles and provisions.

³⁹⁶ WIPO (1993), *Typical Features of Copyright in Countries in Transition: Review of the Transition Process – Guidance for Its Completion Where It May Still Be Needed*, 7–18.

³⁹⁷ *Ibid.*, 17.

³⁹⁸ *Ibid.*, 18.

In some of the countries covered by this chapter some may feel that Vaclav Havel was right when he wrote in 1975 in his famous letter to Gustav Husak, then First Secretary of the Czechoslovak Communist Party: "I am very much afraid that the devastating social consequences will for many years survive the system which – following its political objectives – has triggered them."³⁹⁹

399 Quoted by Dr. Arpad Boggsch, then Director General of WIPO, in his opening speech at the Seminar for Central European Countries on the Adaptation of the Copyright and Neighboring Rights System to the Conditions and Requirements of Market Economy and Pluralist Democracy (Prague, September 6–8, 1993): see *ibid.* 2.

Proper functioning of CMOs – from the perspective of rightholders and partner organizations

Introductory remarks

In the preceding chapters, the basic structural and organizational issues of collective management have been analyzed, including: the appropriate number of CMOs to manage any given right; monopoly and competition; CMOs with mono- and multi-repertoires; cooperation and coalitions; voluntary, mandatory and extended collective management; government and semi-governmental CMOs and their transformation to private organizations, etc. In this chapter and the next, those general principles and rules are reviewed that should be applied for the proper functioning of all kinds of CMO.

In this chapter, the focus of attention is the operation of CMOs from the points of view of rightholders (both members and others whom the CMO represents) and the partner organizations (both those gathered in “coalition” and those that have arrived at cooperation agreements). It will be discussed in particular how national legislators and the competent authorities may guarantee that only those entities that are suitable to carry out collective management efficiently and transparently, with due governance of the rights they represent, are permitted to operate as CMOs, and ensure the proper functioning of those CMOs by means of internal control and accountability mechanisms, as well as supervision.

An extremely rich source is available for such a review – namely, WIPO’s *Good Practice Toolkit for CMOs* (the Toolkit),⁴⁰⁰ prepared by the WIPO Secretariat and freely available on WIPO’s website. The Toolkit being available not only in its original English version but also in Arabic, Chinese, French, Portuguese, Russian and Spanish makes it all the more valuable a source of information.

Two aspects of the document are worthy of special emphasis, as follows.

- The Toolkit is a working document, which means that while its subject matter is well organized and has stable elements, it will be updated regularly.⁴⁰¹
- The Toolkit clearly states at its very start that it “should not be perceived as being normative in any way”.⁴⁰²

In its Introduction, the Toolkit underlines this:

The purpose of this WIPO Good Practice Toolkit for CMOs (The Toolkit) is to compile examples of legislation, regulation and codes of conduct in the area of collective management of copyright and related rights from around the world and to distil them into examples of good practice.

400 Available at www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_cmotoolkit_2021.pdf (hereinafter, The Toolkit).

401 First published in 2018, the Toolkit is already in its second version. It is this 2021 version – available on WIPO’s website at the time of writing – that is used and quoted in this chapter. WIPO anticipates that it will update the Toolkit every two years.

402 The Toolkit, 6.

If they wish, Member States and other stakeholders may select tools from The Toolkit to choose an appropriate approach in view of their country's particular circumstances, and decide on their own infrastructure for collective management.

This guide is not intended to prejudice in any way the operation of exceptions and limitations to copyright as they may exist in national law.

[...]

The Toolkit is a working document, based on the input received from WIPO Member States and other stakeholders throughout the consultation process 2017–18, with the aim to update and improve it on a regular basis; the current version reflects the submissions received in 2021 and contains updated information as of the date of its publication. Member [S]tates and other stakeholders may use relevant parts of the document to help them design an approach suitable for their particular context.⁴⁰³

To facilitate its use, the Toolkit groups the information it captures on each of the various issues within a structurally consistent framework:

- a short "Explanation" outlines why the issue is worthy of attention in principle;
- "Examples of good practice in codes, regulation or legislation" follow, showing how the issue is addressed in practice; and
- "Good practice tools" then gathers a menu of optional tools for Member States and other stakeholders may tailor to meet their own needs.

In its Appendix 2, the 2021 version of the Toolkit lists the following specific sources of information, including links where that information is available online:

- the national laws and regulations of 31 countries (Albania, Belgium, Bosnia and Herzegovina, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Dominican Republic, Ecuador, France, Germany, Guatemala, Italy, Japan, Malawi, Mexico, Nigeria, North Macedonia, Pakistan, Paraguay, Peru, Republic of Korea, Senegal, Spain, Switzerland, Uganda, United States, Uruguay and Venezuela);
- three regionally applicable normative acts (Decision No. 351 on the Common Regime on Copyright and Neighboring Rights of the Andean Community, under the Cartagena Agreement; the CRM Directive of the European Union; the Bangui Agreement of the Organisation Africaine de la Propriété Intellectuelle, (OAPI)); and
- six organizational codes of conduct (of the Australian CMOs, the British Copyright Council, CISAC, IFPI, IFRRO and SCAPR).

Its Appendix 1 is in effect a list of abbreviations commonplace among CMOs in three key areas of operation – namely, international identifiers, exchange formats and protocols, and industry IT standards.

The Toolkit presents the rich information under the following 13 main headings:

1. Providing information about the CMO and its operations
2. Membership: information, adherence and withdrawal
3. Members' rights to fair treatment; their position in the CMO
4. Particular issues concerning the CMO–Member relationship
5. Governance
6. Financial administration, distribution of revenue and deductions
7. Relationship between CMOs
8. Relationship between CMO and User/Licensee
9. Processing of Members' and Users/Licensees' data
10. Importance of IT infrastructure
11. Development of staff skills and awareness
12. Complaints and dispute resolution procedures
13. Supervision and monitoring of CMOs.

⁴⁰³ *Ibid.*

The issues listed under headings 1–7 and 9–13 correspond to the subject matter of this chapter, while the complex relationship between CMOs and users or licensees covered under heading 8 is the subject matter of the next. The scope of the Toolkit is such – containing references to, and quotations from, a great number of the sources listed in its Appendix 2 – that it is unnecessary to duplicate that content here. Therefore, only the most important materials are reviewed, supplementing them with commentary where appropriate.

Providing information about the CMO and its operations

The first issue covered under subheading 1.1 of the Toolkit is “[t]he role of the CMO and its primary functions”, which have been already discussed in detail in Chapter 1. It is under subheading 1.2 that the Toolkit deals with “Information for the general public”. In the explanation, it is pointed out as follows:

In order to ensure a relationship of mutual trust, it is important for all stakeholders in the value chain to have easy access to accurate information about CMOs, as well as to how they are organized. The provision of certain basic information about a CMO’s operations is usually an essential step towards the creation of a more positive perception of CMOs amongst the general public. Day-to-day operations of a CMO must remain transparent to establish and bolster trust among all stakeholders.⁴⁰⁴

This is indeed one of the most important issues to emphasize, such information having at least three purposes – namely:

- raising awareness of the objectives and principles at the heart of a CMO’s operation;
- offering a guarantee of transparency and accountability; and
- engaging interested stakeholders (in particular, rightholders and users).

Examples given under this subheading of the scope of information made available either directly to the general public by online means or through the competent authorities include the national norms of Belgium, Brazil, Colombia, Canada, Guatemala, Ecuador, Nigeria, Peru, Republic of Korea and Venezuela, as well as the regional norms of the Andean Community Decision, the European Union and OAPI, and the CISAC and SCAPR codes of conduct.

The Toolkit goes on to list, in its “good practice tool” 9, the following areas in which a CMO should make information available (online, where possible):

- (a) its Statute, membership terms and rules on termination of membership;
- (b) its tariff structure;
- (c) its distribution policy;
- (d) its deductions policy and amounts (both for management costs and for social, cultural or educational purposes);
- (e) its policy for the use of non-distributable amounts;
- (f) its annual accounts and its annual report;
- (g) its complaint and dispute resolution procedures;
- (h) a list of its directors and the most important members of its management;
- (i) the total amount of remuneration paid and other benefits provided to those persons; and
- (j) whenever feasible, all details of the rights revenue for which it is responsible.⁴⁰⁵

There are extensive differences among the regional/community and national rules in terms of the level of detail required. The requirements that are prescribed in the E.U.’s CRM Directive seem to be the most detailed: CMOs are required to make a lot of information permanently

404 The Toolkit, 17.

405 The Toolkit, 23–24.

and publicly available on their websites, and to keep that information regularly updated.⁴⁰⁶ In addition, CMOs must prepare “annual transparency reports”, the contents of which are defined in detail.⁴⁰⁷ Although the Brazilian Law on Copyright and Neighboring Rights (Law No. 9.610 of February 19, 1998) also provides for publication of a broad range of information, it does so less comprehensively.⁴⁰⁸ In its Decision No. 351, the Andean Community prescribes even less detail on the information obligations,⁴⁰⁹ and section 70(11) of the Canadian Copyright Act 1985 puts it at its simplest: “A collective society referred to in section 70.1 must answer within a reasonable time all reasonable requests from the public for information about its repertoire of works, performer’s performances, sound recordings or communication signals.”

Although short, this Canadian provision draws attention to an important principle concerning information requests and obligations: they should be *reasonable*. Demanding information of a CMO too frequently and at too granular a level imposes administrative and financial burdens, and may siphon energy and time away from the proper fulfillment of its management tasks.

Membership: information adherence and withdrawal

Introducing subheading 2.1, “Before joining a CMO as a Member”, the Toolkit explains:

In order to ensure transparency towards Rightholders and Users, a CMO should provide a Rightholder with the necessary information about its membership requirements, the nature of its Representation Agreement, Management Fees, other possible deductions, membership withdrawal conditions, the governance structure, and any opportunities to participate in the decision-making processes.⁴¹⁰

It is in the interests of both the rightholders and the CMO that prospective members are properly informed before joining the organization. Not only does this support rightholders in understanding how to exercise their rights appropriately, once they are members, but also the risk of certain disputes and complaints arising is diminished. The Toolkit quotes the provisions of several national laws and the European Union (i.e., the CRM Directive), as well as institutional codes of conduct, to illustrate the broad scope of information in this regard the CMO is to make available.

Subheading 2.2 of the Toolkit bears the title “Acceptance of Members”, under which “good practice tools” 11–15, set out, after explanation of the issue and examples (namely, the national laws of Belgium, Colombia, Ecuador and Mexico, the CRM Directive and various institutional codes of conduct), the following requirements:

11. Membership criteria should be included in a CMO’s Statute or its membership terms.
12. A CMO should accept a Rightholder as a Member if he/she fulfil the membership criteria.

406 Article 21(1) of the Directive provides that a CMO must make available at least the following information:

- (a) its statute;
- (b) its membership terms and the conditions of termination of authorisation to manage rights, if these are not included in the statute;
- (c) standard licensing contracts and standard applicable tariffs, including discounts;
- (d) the list of the persons [who manage the activities of the CMO];
- (e) its general policy on distribution of the amounts due to rightholders;
- (f) its general policy on management fees;
- (g) its general policy on deductions ... from rights revenue ... for the purposes of social, cultural and educational services;
- (h) a list of the representation agreements it has entered into, and the names of [CMOs] with which these representation agreements have been concluded;
- (i) the general policy on the use of non-distributable amounts;
- (j) the complaint handling and dispute resolution procedures available in accordance with Articles 34, 35 and 36.

407 See Article 22 of and the Annex to the Directive.

408 Under article 98(i) and (ii), CMOs must make public, through their own electronic means: (i) the calculation formulas and collection criteria, differentiating, among other information, types of user, time and place, and the criteria for the distribution of the collected amounts, including playlists and other usage records of the works and phonograms provided by users, except for the values distributed to the individual owners; and (ii) their bylaws, their collection and distribution rules, the minutes of their deliberative meetings, the lists of works and right holders they represent and the amount collected and distributed and credits collected and undistributed, their origin and the reason for their retention.

409 Under paragraph 45(h) and (i) of the Decision, CMOs “must undertake to publish at least annually, in a medium with wide national circulation, their balance sheets and accounts, and also the general tariffs for the use of the rights that they represent” and “must circulate to their members complete and detailed periodical information on all those of their activities of the society that may have a bearing on the exercise of the rights of the said members”.

410 The Toolkit, 24.

13. Rightholders should be free to grant their rights to one or more CMOs on condition that they do not grant the same rights within the same territory and for the same period of time to more than one CMO. This is without prejudice to the Rightholders' freedom to grant to CMOs non-exclusive mandates or licenses, and retain the right to license uses individually.
14. Membership criteria should be objective, transparent and non-discriminatory.
15. A CMO may only refuse a request for membership on the basis of objectively justifiable criteria, according to the provisions of its Statute or membership terms. Grounds for refusal should be provided to the applicant in writing within a reasonable period of time.⁴¹¹

It may be evident that there are implications in these requirements for competition among CMOs, which; under subheading 2.3, "Non-discrimination of Rightholders", these implications are exposed quite explicitly.

There seems to be complete harmony among the various applicable copyright and competition laws, community norms and codes of conduct of rightholders' federations about these requirements. The Toolkit quotes the following examples of national and community norms:

Belgium:

"(...) the administration shall be carried out in a reasonable and non-discriminatory manner."
Belgian Code of Economic Law, Book XI, Title 5

Brazil:

"Associations [CMOs] shall treat their associates in an equitable manner, and unequal treatment shall be prohibited."
Article 98(5), Law on Copyright and Neighboring Rights

Colombia:

"Foreign members whose rights are administered by a society ... shall be given the same treatment as members who are nationals of the country or have their usual residence there and are members of the collective administration society or are represented by it."
Article 14(6), Law no. 44 of 1993

Dominican Republic:

"Collecting Societies shall guarantee in its bylaws and operation, the following:
[...]
c) A system of collection, distribution and monitoring of royalties that is effective and transparent and treats all right holders equally, whether Dominican nationals or foreigners."
Article 162(iv), Law no. 65-00 on Copyright

Guatemala:

"Foreign members whose rights are administered by a collective management society either direct or under agreements with similar foreign societies shall enjoy the same treatment as the members who are nationals or who have their residence within the country. Collective management societies shall always be obliged to agree to the administration of their members' rights".
Article 118, Law on Copyright and Related Rights
"The distribution of royalties accruing to foreigners shall take place on the same conditions as have been laid down for the distribution of the royalties accruing to Guatemalans".
Article 123, Law on Copyright and Related Rights

Republic of Korea:

"No business entity shall perform any of the following acts that are likely to hinder fair trade, or require its affiliates or other business entities to do such acts:
1. Unfairly refusing a transaction or discriminating against a certain transaction partner."
Article 23(1), Monopoly Regulation and Fair Trade Act

European Union:

"[...] a collective management organization should not, when providing its management services, discriminate directly or indirectly between rightholders on the basis of their nationality, place of residence or place of establishment."

*Recital 18, EU Directive 2014/26/EU*⁴¹²

The following extracts from the various codes of conduct are added:

CISAC:

"Each Member shall at all times refrain from discriminating between Creators and, where relevant, publishers or between legally unjustifiable or which cannot be objectively Sister Societies in any manner which is legally unjustifiable, or which cannot be objectively justified."

CISAC Professional Rules (music)

IFPI:

"Each MLC is to accept as members and/or provide services to all sound recording rightholders on non-discriminatory basis and according to principles of equal treatment, [unless the MLC has objectively justified reasons to refuse its services or differentiation is absolutely necessary and based on justified and objective criteria (for example, where an applicant/member is proven to be engaging in piracy or other illegal practices) or where an applicant/member manages rights in sound recordings that are of a type that does not fall within the MLC's scope of activity (such as, for example, library music or jingles)]."

IFPI Code of Conduct for Music Industry MLCs

IFRRO:

"[CMOs] maintain fair, equitable, impartial, honest, and non-discriminatory relationships with rightholders, users and other parties."

IFRRO Code of Conduct

SCAPR:

"Distribution of remuneration to all performers shall be based on the principle of equal treatment."

Article 8, SCAPR Code of Conduct

"Based on the principle of equal treatment, PMOs shall identify all protected right owners involved, both national and foreign."

*Article 12, SCAPR Code of Conduct*⁴¹³

Equal treatment does not mean the requirement of treating all rightholders in the same way when one rightholder is different from another on the basis of some objective criteria. The emphasis is on treatment that is free from discrimination.

For example, in Article 8(9) of the CRM Directive on the voting rights in the general assemblies of CMOs reflects this as follows:

All members of the collective management organisation shall have the right to participate in, and the right to vote at, the general assembly of members. However, Member States may allow for restrictions on the right of the members of the collective management organisation to participate in, and to exercise voting rights at, the general assembly of members, on the basis of one or both of the following criteria:

- (a) duration of membership;
- (b) amounts received or due to a member,

provided that such criteria are determined and applied in a manner that is fair and proportionate.

Subheading 2.4 of the Toolkit, "Scope of CMOs' rights management mandate", covers different issues, but it basically asserts a rightholder's freedom of association of rightholders – that is,

⁴¹² The Toolkit, 32–33.

⁴¹³ The Toolkit, 33–34.

their freedom to join any CMO for the management of the rights they want to entrust to that organization, without being constrained to entrust more.

Subheading 2.5 affirms this principle from the opposite end of the relationship – namely, “Termination of [the] mandate”. The only constraint on their freedom is that, when a rightholder terminates their membership, the CMO may require a reasonable notice period, so that it can reflect the change(s) in its repertoire.

Like many other issues covered in this chapter, the E.U. CRM Directive appears to provide the most detail Article 5 of the Directive reads as follows:

[...]

2. Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder. Unless the collective management organisation has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject-matter, provided that their management falls within the scope of its activity.

3. Rightholders shall have the right to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose.

4. Rightholders shall have the *right to terminate the authorisation* to manage rights, categories of rights or types of works and other subject-matter granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice, as determined pursuant to paragraph 2, for the territories of their choice, upon serving reasonable notice not exceeding six months. The collective management organisation *may decide that such termination or withdrawal is to take effect only at the end of the financial year*.

5. If there are amounts due to a rightholder for acts of exploitation which occurred before the termination of the authorisation or the withdrawal of rights took effect, or under a licence granted before such termination or withdrawal took effect, the rightholder shall retain his rights under Articles 12, 13, 18, 20, 28 and 33.

6. *A collective management organisation shall not restrict the exercise of rights provided for under paragraphs 4 and 5 by requiring, as a condition for the exercise of those rights, that the management of rights or categories of rights or types of works and other subject-matter which are subject to the termination or the withdrawal be entrusted to another collective management organisation.*

7. In cases where a *rightholder* authorises a collective management organisation to manage his rights, he *shall give consent specifically for each right or category of rights or type of works* and other subject-matter which he authorises the collective management organisation to manage. Any such consent shall be evidenced in documentary form.

[...]

The broad – nearly unlimited – freedom of rightholders to authorize any CMO to manage any right in any way, with no limits and, in principle, with no possibility of a CMO to establish certain conditions in this respect, may undermine the stability and the efficiency of the organization's collective management activities. Therefore, it seems that it is justified to interpret these restrictions – like others – in a reasonable way that mitigates those risks.

These provisions of the Directive may be understood and interpreted in such a way that, among other things, they serve as a safeguard, protecting rightholders against a CMO's possible abuse of its *de facto* or *de jure* monopoly position. While these rules, in general, may generally be reasonably

applied in countries such as the E.U. Member States, where there are well-established collective management systems, they are not a good fit for certain developing countries (see Chapter 12) and countries “in transition” (see Chapter 7) where concentrated effort is necessary to establish CMOs, sometimes from scratch. In those circumstances, it is better to facilitate the building up of a stable repertoire of a workable size that is in general not an easy task, rather than to allow – or even encourage – fragmentation.

It is noteworthy that paragraphs (6) and (7) of Article 5 of the Directive appear to codify the European Commission’s competition decisions in the *GEMA*⁴¹⁴ and *Daft Punk* cases.⁴¹⁵

Members’ rights to fair treatment; their position in the CMO

In its subheading 3.1, the Toolkit emphasizes the principle of “Members’ rights to fair treatment” on the basis of general legal provisions and rules set out in codes of conduct, while subheading 3.2 – on “Members’ rights in representative bodies” – covers those issues that, in the European Union has been regulated in the most complex way in Articles 6(3), 8(9) and 10 of the CRM Directive:

Article 6

[...]

3. The statute of a CMO shall provide for appropriate and effective mechanisms for the participation of its members in the collective management organisation’s decision-making process. The representation of the different categories of members in the decision-making process shall be fair and balanced.

Article 8

[...]

9. All members of the CMO shall have the right to participate and vote at the general assembly of members. However, Member States may allow for restrictions on the right of the members of the collective management organisation to participate in and to exercise voting rights at the general assembly of members, on the basis of one or both of the following criteria:

- (a) duration of membership;
- (b) amounts received or due to a member in relation to the specified financial period;

provided that such criteria are determined and applied in a manner that is fair and proportionate.

10. Every member of a collective management organisation shall have the right to appoint any other person or entity as a proxy holder to participate in and vote at the general assembly of members in his name, provided that such appointment does not result in a conflict of interest which might occur, for example, where the appointing member and the proxy holder belong to different categories of rightholders within the collective management organization. ...

Particular issues concerning the CMO – member relationship

As its heading 4 indicates, this section of the Toolkit covers various issues concerning the CMO – member relationship.

Under subheading 4.1, the Toolkit outlines the requirement to provide “Financial and administrative information to Members”, with reference to the national laws of Belgium, Brazil, Ecuador,

⁴¹⁴ In *GEMA I* (Decision 72/268/CEE of the European Commission, July 6, 1972, available at <https://eur-lex.europa.eu/legal-content/HU/ALL/?uri=CELEX:31972D0268>) and *GEMA II* (Decision 82/204/EEC of the European Commission, December 4, 1981, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31982D0204>), the European Commission obligated GEMA to abandon the practice according to which the rightholders had been allowed to join the organization only if they allowed it to manage *all* their rights in musical works. The Commission also determined a number of specific categories of rights from among which the rightholders were to be able to choose freely based on whether or not they trusted GEMA with the management thereof.

⁴¹⁵ Brought by the authors of the musical works played by the popular group Daft Punk, the *Daft Punk* case resulted in SACEM being instructed to allow rightholders to terminate the management of their rights concerning online digital uses without obliging them to join another CMO to manage those rights. See European Commission (2002). *Affaire COMP/C2/37.219 Banghalter & Homem Christo v SACEM*, August 12. Available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/37219/37219_11_3.pdf

Guatemala, Italy, Paraguay, the Republic of Korea and Venezuela, the norms of the Andean Community and the European Union, and the CISAC and SCAPR codes of conduct. The explanation under the subheading sums up the main requirements thus:

Given the role of CMOs in ensuring timely and efficient Distribution of remuneration to its Rightholders, a CMO is expected to provide its Members with information about its financial results in an accurate, transparent and timely manner. This information should include, without being limited to, its:

- gross Rights Revenue broken down between the main collection sectors;
- operating Expenses broken down between the main collection sectors;
- the social and cultural deductions it has made; and
- the amount of Distributions made.

The statements which a CMO provides to each Rightholder should allow such Rightholder to verify the sources of the amounts due in respect of each of [their] works.⁴¹⁶

Subheading 4.2 requires the CMO to notify its members of any changes to its statute or other pertinent rules, and subheading 4.3 emphasizes the CMO's responsibility to make available and keep up to date its contact information.

Governance

Under subheadings 5.1, "General meeting", 5.2, "Internal supervision", and 5.3, "Avoidance of conflicts of interests", the Toolkit sets out those rules relating to the internal organizational structure and control mechanisms of a CMO that secure its members' ability to influence the operation of the CMO, as well as transparency and accountability.

In relation to general meetings, the Toolkit mentions various national rules and several provisions of the CRM Directive, but – as the explanation of subheading 5.1 notes – examples applicable to CMOs can also be found in standard clauses of a range of laws regulating the governance of companies or civil associations. For the purposes of this chapter, principles 34–37 outlined under the title "Good practice tools" seem to be sufficient as summary:

34. A CMO should convene a General Meeting of its Members or of their elected representatives at least once a year.
35. The General Meeting should approve any amendments to the Statute and to the membership terms.
36. The General Meeting:
 - (a) approves the general policies on the Distribution of collected monies; deductions for social, cultural or educational purposes; and the use of non-distributable monies and investments;
 - (b) approves the Annual Report and is to be presented with an auditors' report that comes with that Annual Report;
 - (c) appoints and dismisses members of the board, and approves their remuneration and other benefits, pension awards, severance packages and other awards;
 - (d) decides on its general investment policies. The information about the type of investment, the investment policy, and the policy's results should be included in the Annual Report;
 - (e) appoints one or two independent external auditors;
 - (f) approves clear and objective rules governing the functioning and proceedings of General Meetings; and
 - (g) approves the suspension of membership of Members, when appropriate.
37. The Statute of a CMO may delegate some of the above-mentioned powers of the General Meeting to the board, in compliance with applicable rules in national legislation, if any.⁴¹⁷

⁴¹⁶ The Toolkit, 45.

⁴¹⁷ The Toolkit, 54–55.

Likewise, “good practice tools” 38–40, which neatly capture the content of subheading 5.2 on internal supervision:

38. A CMO’s Statute should ensure a fair and balanced representation of its different categories of members on the board, in compliance with applicable rules in national legislation.
39. The requirements, established in the Statute to apply to become a member of the board shall be clear, objective and not arbitrary.
40. The General Meeting may elect board members for their commercial, legal and other relevant experience, subject to any limitations provided by law.⁴¹⁸

Under subheading 5.3 of the Toolkit, those provisions are reviewed that serve the prevention of corruption through the elimination of possible conflicts of interests.

In the national laws of several countries, particularly detailed provisions offer guarantees to prevent corruption by the CMOs’ managements. Colombia is one such country, Articles 47 and 48 of its Law No. 44 of 1993 providing that:

47. The Manager, Secretary and Treasurer of a society shall be subject to the following disqualifying factors and incompatibilities in addition to those laid down in the statutes:
 - (a) being the manager, secretary or treasurer, or a member of the governing board, of a society other than those provided for in this Law;
 - (b) being a relation, to the fourth degree of blood relationship, the second of relationship by marriage or the first of civil relationship, or the spouse or permanent companion, of members of the Governing Board or Supervisory Committee or the Manager, Secretary, Treasurer or Controller of the society;
 - (c) being the artistic director, manager, owner, a member, the representative or attorney or an officer of bodies indebted to the society or in dispute with it;
 - (d) being a relation, to the fourth degree of blood relationship, the second of relationship by marriage or the first of civil relationship, or the spouse or permanent companion, of officers of the National Copyright Directorate;
 - (e) occupying a managerial post in any association or collegial grouping of the same nature.
48. The Manager may not engage in contractual dealings with his or her spouse or permanent companion or with his or her relations to the fourth degree of blood relationship, the second of relationship by marriage or the first of civil relationship.⁴¹⁹

The Colombian Law includes similar detailed rules on the factors disqualifying members of the governing board (article 44 of the 1993 Act) and of the controller (article 48). These are exceptionally strict rules; nevertheless, applied appropriately, they may not only prevent corruption but also protect CMOs against unfounded allegations.

The E.U. CRM Directive, in this respect, does not prescribe such detailed and strict disqualifying criteria. Article 10(2) of the Directive (summarized in the Toolkit but quoted here in the original) concentrates on transparency, bringing the status and interests of the members of the management into focus:

2. Member States shall ensure that collective management organisations put in place and apply procedures to avoid conflicts of interest, and where such conflicts cannot be avoided, to identify, manage, monitor and disclose actual or potential conflicts of interest in such a way as to prevent them from adversely affecting the collective interests of the rightholders whom the organisation represents.

The procedures ... shall include an annual individual statement ... to the general assembly of members, containing the following information:

⁴¹⁸ The Toolkit, 59–60.

⁴¹⁹ Quoted in the Toolkit, 62.

- (a) any interests in the collective management organisation;
- (b) any remuneration received in the preceding financial year from the collective management organisation, including in the form of pension schemes, benefits in kind and other types of benefits;
- (c) any amounts received in the preceding financial year as a rightholder from the collective management organisation;
- (d) a declaration concerning any actual or potential conflict between any personal interests and those of the collective management organisation or between any obligations owed to the collective management organisation and any duty owed to any other natural or legal person.

Financial administration, distribution of revenue and deductions

Almost 20 pages of content follow heading 6 in the 2021 version of the Toolkit, making this one of the issues most extensively covered. Under the four subheadings – subheadings 6.1, “Split accounts”, 6.2, “Annual report”, 6.3, “Distribution policies”, and 6.4, “Revenue deductions (such as social, cultural, educational)”, the Toolkit gathers examples from a wide range of national laws (those of Belgium, Bosnia and Herzegovina, Brazil, Chile, China, Colombia, Ecuador, Ethiopia, Guatemala, Italy, Malawi, Peru, Mexico, North Macedonia, Senegal and Switzerland), supranational norms (of the Andean Community and the European Union) and codes of conduct (of the Australian CMOs, CISAC, IFPI, IFRRO and SCAPR).

In light of these materials and because there is some overlap with other chapters in this book on, for example, social and cultural deductions (see Chapter 11), it will suffice to gather and quote here principles 43–56 set out under the title of “Good practice tools” concerning these subheadings:

- 43. A CMO should manage and keep separate the Rights Revenue and any income derived from the investment of its own assets, the income derived from its management services or the income derived from any other activities.
- 44. A CMO should not be allowed, unless specifically authorized by the General Meeting or its Statute, or provided by law, to use Rights Revenue and any income from the investment of Rights Revenue for any purposes other than Distributions to Rightholders or, if so decided by the General Meeting, social, cultural, educational, or cost reduction.
- 45. In respect of each financial year, a CMO should distribute or make available an Annual Report to its membership well in advance of its General Meeting.
- 46. The Annual Report should contain:
 - (a) a financial statement, which should include a balance-sheet or a statement of assets and liabilities as well as an income and expenditure account for the financial year;
 - (b) a report of the CMO's activities in that financial year;
 - (c) a statement of Rights Revenue broken down per category of rights managed and per type of use including the total amount of Rights Revenue collected, but not yet attributed to Rightholders, and the total amount of Rights Revenue attributed but not yet distributed to Rightholders;
 - (d) a breakdown of the Operating Expenses;
 - (e) a breakdown of the deductions for the purposes of social, cultural and educational services in the financial year and an explanation of the use of those amounts, with a breakdown per social, cultural and educational expenditure;
 - (f) information on the total amount of remuneration paid, and other benefits granted to, the persons who manage the business of the CMO and the board members in the financial year;
 - (g) a general statement setting out, in respect of the transactions between a CMO and each partner CMO with which it has a Representation Agreement, the:
 - (i) name of such partner CMOs, and the dates of the relevant contracts;
 - (ii) total amount paid in the financial year to the partner CMOs;
 - (iii) total Management Fees and other specified deductions; and
 - (iv) total amount received from the partner CMOs.

47. The financial records of a CMO should be inspected annually by at least one external auditor appointed by the General Meeting.
48. A CMO should maintain and publish a Distribution policy, as approved by the General Meeting, that sets out:
 - (a) the basis for calculating entitlements to receive payments from Rights Revenue collected. In establishing such basis, a CMO should take into account, as far as possible, the actual use and manner of use of works or other subject matter. If not practicable, a statistically valid sample approximating actual use of the works or categories of works can be used;
 - (b) the manner and frequency of Distributions to Members and Rightholders; and
 - (c) the amounts that will be deducted from the Rights Revenue before Distribution on the basis of Operating Expenses and deduction policies as determined by the General Meeting, the Statute or the law.
49. A CMO should regularly, diligently and accurately distribute and pay amounts due to the Rightholders it represents, be it through membership, mandate – voluntary or statutory – or through Representation Agreements with other CMOs, in accordance with its general policy on Distributions and the agreements it has signed with other CMOs.
50. A CMO should carry out such Distributions and payments no later than 12 months after the end of the financial year in which the Rights Revenue was collected, unless objective reasons, for instance insufficient reporting by Users/Licensees, prevents it from meeting this deadline.
51. A CMO should clearly state its policy relating to undistributed monies.
52. The General Meeting should decide on the rules on deductions from Rights Revenue.
53. The amounts deducted from the Rights Revenue for the purposes of social, cultural and educational purposes in the financial year and an explanation of the use of those amounts should be included in the annual report.
54. A CMO should strive to ensure that funds for social, cultural and educational purposes are only deducted from the Rights Revenue with the agreement of the Rightholders represented.
55. A CMO should ensure that its Operating Expenses are transparent and properly documented.
56. A CMO should ensure that each Rightholder it represents – whether directly through a membership contract or through a Representation Agreement will be entitled to apply for its social, cultural or educational services provided deductions were made on Rights Revenue attributed and distributed to such Rightholder.⁴²⁰

In addition, three provisions concerning the costs of the management are worth reproducing here (with emphasis added):

North Macedonia:

"Article 16(6)- The organization may use funds from the collected fees in the amount specified in the statute or in the contract for the establishment, but *not more than 15%.*"

Article 16, Law on Copyright and Related Rights

Senegal:

"Management costs. – Management costs deducted by the collective management society shall be compatible with generally recognized good governance practices and shall, to the extent possible, be *proportional to the actual cost of managing* the rights in the work, performance, phonogram or videogram."

420 The Toolkit, 65–66, 72, 77–78, 83.

European Union:

"3. Management fees shall not exceed the *justified and documented costs* incurred by the collective management organisation in managing copyright and related rights."

[Article 12(3)], EU Directive 2014/26/EU⁴²¹

It should be highlighted, however, that there are big differences between the costs of managing the various rights. For some, for example, a 15 percent level might exceed of actual costs of efficient management; for others (such as musical performing rights), a 15 percent level may be extremely difficult to achieve – perhaps even impossible – such that the CMO's financial situation may become untenable and its operation be endangered. The approach applied by the Senegalese Copyright Act and the E.U. Directive seems apt: they allow the deduction of the "justified and documented costs" "proportional to the actual cost of managing" the given rights.

Relationship between CMOs

Considered without subheadings, heading 7, "Relationship between CMOs", gathers examples from the national laws of China, Colombia, Germany, Guatemala, Italy, Nigeria and Peru, as well as the community norms of the European Union, and the CISAC, IFRRRO and SCAPR codes of conduct. In general, these provisions commonly stress that reciprocal representation agreements should be based on the principles of non-discrimination among members and other rightholders represented by the parties to the agreement, and of mutual transparency and accountability.

The Toolkit explains the issue concisely:

CMOs cooperate across borders on the basis of Representation Agreements. A fundamental requirement of such a Representation Agreement is that a CMO treats the Members of an overseas CMO on a non-discriminatory basis. CMOs should provide each other with all information which may be of assistance in executing it.⁴²²

Of the national laws cited as example, China offers the most detailed provisions on reciprocal representation agreements, including a comprehensive definition:

China:

"The term "reciprocal representation agreement" in the preceding paragraph means an agreement in which a Chinese copyright collective administration organization and a like overseas organization mutually authorize the other party to carry out activities of copyright collective administration in the country or region to which the other party belongs.

A copy of reciprocal representation agreements concluded between a Chinese copyright collective administration organization and a like overseas organization shall be submitted to the copyright administration department of the State Council for the record and be published by such department."

Article 22, *Regulations on Copyright Collective Administration*⁴²³

The Nigerian CMO Regulation and Decision of the Andean Community include specific ethical provision concerning competition between various CMOs, which seem aimed at maintaining legal certainty in the spirit of solidarity and cooperation between the societies of creators rather than compete in neglecting each other's interests, which could put all parties at a disadvantage:

Nigeria:

"(1) The following conduct or practices by Collective Management Organization shall be deemed to be unethical: (...)

(e) inducing a user who is in the process of negotiating for a license with another society or right owner to refrain from completing the licensing process; [...]"

421 The Toolkit, 80–81.

422 The Toolkit, 83.

423 The Toolkit, 84.

*Article 18(1), CMO Regulations, 2007*⁴²⁴

Andean Community:

The license [by owners of rights in affiliating to CMO] shall be granted subject to compliance with the following requirements:

(k) they [CMOs] must undertake not to admit members of other collective administration societies of the same type, whether national or foreign, that have not first expressly renounced such membership;

Article 45(k), Decision no. 351,

The E.U. CRM Directives stress the principle of non-discrimination:

European Union:

"Rights managed under representation agreements:

Member States shall ensure that a collective management organisation does not discriminate against any rightholder whose rights it manages under a representation agreement, in particular with respect to applicable tariffs, management fees, and the conditions for the collection of the rights revenue and distribution of amounts due to rightholders."

*Article 14, EU Directive 2014/26/EU*⁴²⁵

Processing of members' and users' data, importance of IT infrastructure, and development of staff skills and awareness

The first two of the issues dealt with under headings 9–11 are rarely addressed in legal norms. Heading 10, "Importance of IT infrastructure", is entirely new to the 2021 version of the Toolkit and it is from a new source, the United States, that the Toolkit takes its only example of national law, quoting extensively from the U.S. Code of Federal Regulations. Examples of the last of the issues – that is, the substance of heading 11, "Development of staff skills and awareness", continue to be found only in the CMO federations' codes of conduct.

It consequently seems sufficient to summarize these issues here by quoting the Toolkit's own explanations:

Members and Users/Licensees provide CMOs with personal and sometimes confidential or commercially sensitive information. A CMO should treat such personal or sensitive data carefully, and always in compliance with the applicable rules on the protection of privacy, personal data, and trade secrets. The applicable rules on data protection vary from country to country, but it is good practice to ensure that personal data is only kept and used for the purpose for which it was originally collected and that consent is sought for any further processing of data. If it is necessary to transfer personal data about a Member abroad, a CMO should point out to the Member, when obtaining his/her consent, that some foreign countries might have weaker data protection laws, or no data protection laws at all.⁴²⁶

A CMO should utilize a proper functional data model, which caters for the needs to document, identify, collect, allocate and distribute the Rights Revenue represented by the CMO in the respective territory and in relation to other territories the CMO cooperates with, taking into account applicable transparency rules.

The IT infrastructure should implement carefully the business processes of documentation, collection, allocation and Distribution. A CMO should look at existing solutions, prior to developing a customized system.

Distribution is facilitated through existing international identifiers (EIDR, IPI, IPN, ISAN, ISBN, ISNI, ISRC, ISSN, ISWC, VRDB-ID, etc.), exchange formats and protocols (CRD, CWR,

⁴²⁴ The Toolkit, 85.

⁴²⁵ The Toolkit, 86.

⁴²⁶ The Toolkit, 104.

DDEX, SDEG, etc.) and dedicated industry IT standards (AV Index, Cis-Net, IDA, IPD, IPI System, VRDB, etc.). (See also Appendix 1.)⁴²⁷

In order to ensure the provision of high-quality services, a CMO should encourage the on-going development of its staff's skills and knowledge through, for example, training programs. A CMO should take reasonable steps to ensure that its employees and agents are aware of, and at all times comply with the applicable code of conduct, regulation or legislation.⁴²⁸

It is noteworthy that explanation of the new IT issue has demanded a new three-page Appendix 1 to expand on the many abbreviations that form the majority of its last sentence.

Complaints and dispute resolution procedures

Under heading 12, the Toolkit offers examples from the national laws of Brazil, Ecuador, Japan, Pakistan, the United States⁴²⁹ and Venezuela, as well as the European Union. The majority of these provisions concern disputes between CMOs and users – in particular, about licensing conditions and tariffs – and hence they are discussed in the next chapter, where the services of the WIPO's Arbitration and Mediation Center are also reviewed, which may be used for the same kinds of dispute.

The national laws of Brazil and Venezuela do also provide for the resolution of disputes among rightholders, and between them and the CMOs:

Brazil:

"CMOs must establish rules to find expeditious and efficient solutions for cases on conflicts regarding directory information that result in retention of distribution of values to owners of works, interpretations or phonograms."

Article 15(3), Decree no. 9.574, of November 22, 2018

Venezuela:

"To ensure the exercise of administrative and other functions pertaining to registration, surveillance and inspection as provided for in this Law, the National Directorate for Copyright has been created under the Ministry that has given jurisdiction over these matters, by virtue of the law organizing the Central Administration.

That Directorate shall: (...)

(6) Act as arbitrator, when requested by the interested parties, in conflicts arising between right holders; between CMOs; and between CMOs or right-holders and users of works, products or productions protected by this Law."

*Article 130, Copyright Act 1993*⁴³⁰

In the European Union, where the CJEU has also dealt with certain conflicts between CMOs and rightholders,⁴³¹ Articles 33, 35 of the CRM Directive include provisions on dispute resolution, as quoted in the Toolkit :

Article 33

1. Member States shall ensure that collective management organisations make available to their members, and to collective management organisations on whose behalf they manage rights under a representation agreement, effective and timely procedures for dealing with complaints, particularly in relation to authorisation to manage rights and termination or withdrawal of rights, membership terms, the collection of amounts due to rightholders, deductions and distributions.

⁴²⁷ The Toolkit, 105–06.

⁴²⁸ The Toolkit, 112.

⁴²⁹ The U.S. example summarizes what is known as the "willing buyer, willing seller test", provided for under sections 114 and 115 of the U.S. Copyright Act: "In the U.S., the regular rate setting procedures for certain compulsory licenses use a willing buyer, willing seller standard when setting the rate." See the Toolkit, 115. See also Chapter 10, in which we discuss this in connection with the Music Modernization Act of 2018.

⁴³⁰ The Toolkit, 113, 115.

⁴³¹ See, e.g., the competition decisions of the European Commission in the *GEMA* and *Daft Punk* cases.

2. Collective management organisations shall respond in writing to complaints by members or by collective management organisations on whose behalf they manage rights under a representation agreement. Where the collective management organisation rejects a complaint, it shall give reasons.

Article 34

1. Member States may provide that disputes between collective management organisations, members of collective management organisations, rightholders or users regarding the provisions of national law adopted pursuant to the requirements of this Directive can be submitted to a rapid, independent and impartial alternative dispute resolution procedure.

[...]

Article 35

[...]

2. Articles 33 and 34 [...] shall be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.

Supervision and monitoring of CMOs

The last issue the Toolkit covers, under heading 13, gathers examples including provisions in the national laws of Brazil, Ecuador, Germany, and the Republic of Korea, as well as Articles 9 and 36 of the E.U. CRM Directive, across which the level of detail is varied. The provisions are reviewed in order of that level, from the simplest to the most complex.

These provisions are mainly of a procedural nature in that even the more complex of them does not indicate in detail the fulfillment of what requirements governments should be specifically monitoring. It is discussed elsewhere in this book that proper regulation of the conditions an organization must fulfill if it is to function as a CMO is a basic safeguard, guaranteeing the appropriate establishment and operation of a collective management system – which, in turn, is indispensable to the due application of those rights that can only reasonably, or best, be exercised by means of collective management. As pointed out, the competent authority should authorize the operation to only those organizations as CMOs that fulfill all the conditions determined in law, and it seems logical that the same competent authority should supervise the CMOs to ensure that they comply with those conditions.

Such supervision must, however, necessarily be nuanced – and particularly nuanced in applying legal consequences when irregularities are uncovered. The primary objective of any such consequence should be improvement of the CMOs' operation, in the interests of the rightholders they represent. Serious sanctions – such as the suspension of CMOs or withdrawal of their authorization – are justified only where other measures have not had effect. Even then, such sanctions should target the management responsible and not have negative effect on the rightholders the CMO represents. Preferred measures will therefore be those that support the continued operation of the CMO; withdrawing a CMO's authorization should be a measure of last resort.

The Brazilian provision refers to the qualifications needed for any entity to commence operation as a non-governmental organization (NGO) and these criteria can be extrapolated to the supervision of CMOs:

Brazil:

"The exercise of the collection activity referred to in art. 98 will depend on previous qualification in a Federal Public Administration body, as set forth in regulations, whose administrative process will observe (...)"

*Article 98-A, Law on Copyright and Neighboring Rights*⁴³²

The Republic of Korea has legislated mainly for procedural rules and information requirements:

Republic of Korea:

"The Minister of Culture, Sports and Tourism may demand a copyright trust service provider to submit a necessary report on the duties of the copyright trust service. In order to promote the protection of rights and interests of authors and the convenient use of works, the Minister of Culture, Sports and Tourism may issue necessary orders concerning copyright trust service."

Article 108(1)(2), Copyright Act

"A copyright trust service provider shall, each year, report the business result of the preceding year and the business plan of the relevant year as stipulated by Ordinance of the Ministry of Culture, Sports and Tourism."

Article 52(1), Enforcement Decree of the Copyright Act

"A copyright trust service provider shall prepare following matters as of the end of each month and make a report to the Minister of Culture, Sports and Tourism by the 10th of the following month: List of works, etc. under management of a copyright trust service provider; Information on the right to works; Contact information of a copyright trust service provider."

*Article 52(3), Enforcement Decree of the Copyright Act*⁴³³

In the E.U. CRM Directive, Article 9 provides a framework within which Member States must ensure that CMOs are properly equipped for supervision:

1. Member States shall ensure that each collective management organisation has in place a supervisory function for continuously monitoring the activities and the performance of the duties of the persons who manage the business of the organisation.
2. There shall be fair and balanced representation of the different categories of members of the collective management organisation in the body exercising the supervisory function.
3. Each person exercising the supervisory function shall make an annual individual statement on conflicts of interest, containing the information referred to in the second subparagraph of Article 10(2), to the general assembly of members.
4. The body exercising the supervisory function shall meet regularly and shall have at least the following powers:
 - (a) to exercise the powers delegated to it by the general assembly of members ... ;
 - (b) to monitor the activities and the performance of the duties of the persons [who manage the organization], including the implementation of the decisions of the general assembly of members and, in particular, of the general policies [of a CMO].
5. The body exercising the supervisory function shall report on the exercise of its powers to the general assembly of members at least once a year.

In Article 36, the Directive focuses on compliance:

1. Member States shall ensure that compliance by collective management organisations established in their territory with the provisions of national law adopted pursuant to the requirements laid down in this Directive is monitored by competent authorities designated for that purpose.
2. Member States shall ensure that procedures exist, enabling members of a collective management organisation, rightholders, users, collective management organisations and other interested parties to notify the competent authorities designated for that purpose of activities or circumstances which, in their opinion, constitute a breach of the provisions of national law adopted pursuant to the requirements laid down in this Directive.
3. Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures where the provisions of national law adopted in implementation of this Directive have not

been complied with. Those sanctions and measures shall be effective, proportionate and dissuasive.

To the extent that the Directive provides a framework within which Member States must adopt concrete provisions on the supervision of CMOs and determine which authorities are to act as competent authorities, the inclusion of the German regulation in the Toolkit as example illustrates application of the Directive, also duly taken into account the principle of proportionality.

The measures so provided for aim to avoid endangering the continued functioning of a CMO, and hence any sanctions in the event of a breach of rules ought to be directed to the representatives of the CMO rather than the CMO as such (in which case they would indirectly be a sanction of the rightholders whose rights the CMO represents):

Germany:

[...]

"Powers of the supervisory authority

- (1) The supervisory authority may take all necessary measures to ensure that the collecting society properly fulfils the obligations incumbent upon it under this Act.
- (2) The supervisory authority may forbid a collecting society from continuing its business operations if the collecting society
 1. acts without authorization or
 2. repeatedly contravenes one of the obligations incumbent upon it under this Act, despite a warning from the supervisory authority.
- (3) The supervisory authority may require the collecting society to provide information at any time regarding all matters concerning the management and to produce the books and other business documents.
- (4) The supervisory authority shall be entitled to participate, through entitled persons, in the general assembly of members as well as in the meetings of the supervisory board, of the management board, of the supervisory body, of the representation of delegates (section 20) and of all the committees of these bodies. The collecting society shall inform the supervisory body in good time of the dates of the meetings referred to in the first sentence.
- (5) Where there is reason to believe that a person authorized by law or under the statute to represent the collecting society does not possess the reliability needed in the exercise of his activity, the supervisory authority shall set the collecting society a deadline for his dismissal. The supervisory authority may prohibit him from continuing his activity until the expiry of this deadline if this is necessary to prevent serious adverse effects.
- (6) Where there are indications that an organization requires authorization in accordance with section 77, the supervisory authority may require the information and documents needed to examine the obligation to obtain authorization."

*Section 85, German Collecting Societies Act, 2017*³⁴

The provisions of the Ecuadorian law are the most detailed of all the examples to which the Toolkit refers. For reasons of space, only the most important of those provisions are quoted, but even they are quite voluminous:

Ecuador:

"The competent national authority for intellectual property matters may, *proprio motu* or at the request of an interested party, conduct inspection and monitoring visits to verify the proper functioning of collective management organizations and to conduct summary proceedings or investigations in cases of infringement of the regulations governing them. In any event, the competent national authority [...] may conduct inquiries and investigations and intervene with regard to a collective management organization if it fails to comply with the applicable regulations. [...]

[...] For this purpose, the competent national intellectual property authority shall appoint one of its officials or another person who is technically qualified to perform the task as controller. [...] In cases identified by the competent national intellectual property authority, intervention may be ordered as a measure to ensure compliance with the penalties imposed on the collective management organization for infringements of the regulations governing intellectual property rights, and until such time as they are remedied."

Article 258, Organic Code on the Social Economy of Knowledge, Creativity and Innovation

"If the collective management organization fails to comply with the provisions of this Code, the respective regulation or its Statutes [...] and does not remedy the non-compliance within the term established by the competent national authority, *the authority may impose any of the sanctions laid down in this article, having regard to the seriousness of the infringement or the recidivism.*

Sanctions shall be imposed *taking into account* the following criteria: *the seriousness* of the non-compliance *and failure to follow the rules* set out in this Code, together with other applicable rules, and whether the violation was single or repeated. [...]

The sanctions are as follows:

1. written reprimand;
2. fine;
3. suspension of the operating permit for a period of up to six months; and
4. cancellation of the operating permit.

When a collective management organization is sanctioned, *it shall inform its members of the scope of the sanction* and the competent national authority for intellectual property matters shall publicize the sanction as stipulated by the relevant regulation. [...]

Where the infringements are the result of willful misconduct or gross negligence on the part of the Director General, managers, members of the Board of Directors or Monitoring Committee, *the collective management organization shall take further action against the officials for damages by way of a fine under this Article."*

Article 259, Organic Code on the Social Economy of Knowledge, Creativity and Innovation

[...]

"Where the suspension of the operating permit is decreed, *the collective management organization shall retain its legal personality solely for the purpose of remedying the breach.* If the company does not remedy the breach within six months after the suspension has been decreed, the competent national authority for intellectual property rights shall definitively cancel the company's authorization to operate. The collective management organization shall then be liquidated and the corresponding sums shall be distributed immediately to all members, in equal parts (emphasis added).

*Article 261, Organic Code on the Social Economy of Knowledge, Creativity and Innovation*⁴³⁵

While not included in the 2021 version of the Toolkit, it is worth looking at two other examples from in Africa.

In those African countries in which there are governmental or semi-governmental organizations ("Bureaus", such as the BBDA in Burkina Faso or BUTDRA in Chad), the copyright laws generally do not provide for a specific supervision mechanism to control the activities of CMOs; rather, they indicate that CMOs function under the supervision of the competent ministry, which is usually the Ministry of Culture. In contrast, where the national laws foresee the possibility of establishing private societies to manage the different categories of rights, the national laws include more or less detailed provisions in this respect.

For example, in Cameroon, Article 22(3)–(7) of Decree No. 2001/956/PM of November 1, 2001, implementing Law No. 2000/11 of December 19, 2000, on Copyright and Neighboring Rights, provides as follows:

435 The Toolkit, 118–20.

3. Where an organization infringes its own basic texts or the laws or regulations in force, the Ministry of Culture shall order it to rectify the situation within one month.
4. The Minister of Culture may suspend approval [authorizing the organization to operate as a CMO] where, at the end of the period referred to in paragraph 3 above, no action has been taken to comply with the order in question.
5. Suspension may not exceed thirty (30) days.
6. Approval may be withdrawn only in the event of a repeat offense.
7. Approval shall be refused, granted, suspended or withdrawn by a substantiated decision of the Minister of Culture. The interested party shall be notified of all decisions.

In Senegal, under Article 124 of Law No. 2008-09 of 2008 on Copyright and Related Rights, a special committee takes care of the supervision of CMOs:

1. A standing committee shall be established to oversee collective management societies, consisting of five members appointed by decree for a term of five years:
 - (a) a judge in the Court of Audit, who shall be chairman, appointed by the First President of the Court of Audit;
 - (b) a Councilor of State, appointed by the President of the Council of State;
 - (c) a judge of the Court of Cassation, appointed by the First President of the Court of Cassation;
 - (d) a member of the General Inspectorate of Finances, appointed by the Minister of Finance;
 - (e) a representative appointed by the Minister of Culture.
2. The committee may seek the assistance of experts appointed by its chairman. It shall audit the accounts and the management of the collective management societies. To that end, the directors of those societies shall be required to assist the committee, communicate any documents to it and respond to any request for information necessary for the performance of its tasks. For operations involving information technology, the right of communication shall imply access to software and data, as well as the right to request the transcription thereof by any suitable processing method in documents directly usable for auditing purposes. The committee may carry out its audit on the basis of documents or on site.
3. Failure by any director of a collective management society to respond to information requests made by the committee, the obstruction in any way of the committee's performance of its tasks or the intentional communication to it of inaccurate information shall be punishable by a prison term of six months to one year and a fine of one million CFA francs.
4. The committee shall submit an annual report to the President of the Republic, the National Assembly, the Government and the general assemblies of the collective management societies.
5. The organization and operation of the committee, and the procedures applicable before it, shall be determined by decree.
6. In addition, the collective management society shall communicate its annual statement of accounts to the Minister of Culture and shall bring to his attention, at least two months before consideration by the general assembly, any draft amendment to its statutes or to the rules for collection and distribution of royalties. It shall address to the Minister of Culture, at the Minister's request, any document relating to the collection and distribution of royalties and copies of agreements concluded with third parties. The Ministry of Culture may gather, from documents or on site, the information referred to in the present Article.

Relationship between CMOs and users

Introductory remarks

The introductory remarks to the preceding chapter presented the main features of WIPO's *Good Practice Toolkit for CMOs* (the Toolkit), prepared by the WIPO Secretariat. Here, it is therefore enough to recall its two aspects emphasized there – namely, that it is a working document, which means that it is to be updated regularly (it is in its second version at time of editing⁴³⁶), and that it “should not be perceived as being normative in any way”.⁴³⁷ While it gathers examples of national and supranational law and regulation, as well as the codes of conduct published by various federations of CMOs, the Toolkit itself aims only to inform and guide Member States, CMOs and other stakeholders engaged in building legislative, regulatory, governance and licensing frameworks.

The Toolkit arranges the rich information it makes available under 13 headings, 12 of which have been reviewed in the preceding chapter, spanning those issues that generally relate to the proper functioning of CMOs and their relationship with rightholders and partner organizations. In this chapter, the issues covered by heading 8, “Relationship between CMO and User/Licensee” are explored separately because they cover a wide range of matters, including the licensing of users, the principles and basic practices involved in establishing tariffs, dispute settlement mechanisms, the obligations of users and the status of CMOs concerning the enforcement of those rights they represent.

This part of the Toolkit is divided into three subheadings: subheading 8.1, “CMO’s information to Users/Licensees”, subheading 8.2, “Principles governing licensing of Users/Licensees”, and subheading 8.3, “Rules for setting of tariffs”. In this chapter, the approach is not the same as in the preceding one. While the materials included under each of the three subheadings are referred to and quoted – and the first subheading is covered as such – the rest of the issues are dealt with in somewhat different structure:

- the principles of and criteria involved in determining licensing conditions – in particular, tariffs – are discussed more broadly;
- then the procedural rules and systems (i.e., of negotiation, approval and dispute settlement) are reviewed; and
- finally, it is analyzed what obligations users have and what consequences they face if they do not fulfill their obligations (or, from another perspective, what impact of the approval and publication of the tariff may have in this respect).

⁴³⁶ Updates are based on suggestions submitted by WIPO Member States and observers to the SCCR. First published in 2018, that version remained current when the manuscript of this book was submitted; shortly afterwards, in January 2021, Director General Daren Tang sent out a circular inviting Member States and observers to contribute to a new update. By the time of editing, in 2022, WIPO had published the second version of the Toolkit and this book was substantively revised to reflect the resulting changes.

⁴³⁷ The Toolkit, 6.

CMO's information to users/licensees

In its explanation (see Chapter 8) of subheading 8.1, the Toolkit outlines the reasons why a CMO must make adequate information available to users and licensees: "With a view to enabling all potential Users/Licensees to take an informed decision about the benefits of an appropriate license, a CMO should make available to Users/Licensees information which explains the key aspects of its licensing policies."⁴³⁸ It may be added that the tariffs established on the basis of the application of the licensing policies should also be accessible and made available to the potential users/licensees. This, in the online digital environment, means that a CMO should be publishing its tariff on its website for all to see. As mentioned below, these tariffs are also frequently published in official gazettes.

The Toolkit gathers, under this subheading, examples of the national laws of Brazil, China, Ecuador, Nigeria, the Republic of Korea and Uruguay, of the law of the European Union, and of the codes of conduct of the Australian CMOs, the BCC and the SCAPR. Then under the title of "Good practice tools", the following principle is distilled:

63. A CMO should provide a User/Licensee (where possible electronically) with relevant background information regarding licenses and licensing schemes, where appropriate. Such information should include:

- (a) the legal authority under which the CMO is established, an explanation of the rights administered by the CMO, and the categories of Rightholders on whose behalf the CMO acts;
- (b) if practicable, a list of the works and corollary rights in its Repertoire available to Licensees;
- (c) a summary of relevant tariffs;
- (d) a description of the license term and conditions and invoicing procedures;
- (e) details of how a Licensee can cancel a license, any notice provisions which may apply, and any periods during which the right to cancel may subsist.⁴³⁹

This principle describes the basic elements of the information necessary, and it also duly stresses the need to take into account what is possible and practicable in the given cases.

For example, as regards information about the CMOs' repertoires, the *Ecuadorian* law to which the Toolkit refers provides that:

Ecuador:

"CMOs shall have an updated and *publicly accessible* database with clear and precise information on the works, performances, broadcasts or phonograms whose copyright or related rights manage, as well as the names of their members and national and foreign represented persons, indicating:

- (1) each individual work, performance, broadcast or phonogram that they represent with respect to each rightholder;
- (2) the tariffs for each type of use and user category;
- (3) the reported uses for each work;
- (4) the methodology applied to the distribution."

*Article 250, Organic Code on the Social Economy of Knowledge, Creativity and Innovation*⁴⁴⁰

The obligation to maintain a *publicly accessible* database with detailed information on each work – as provided, for example, in the Ecuadorian law – is highly demanding. As complete and as up-to-date a database as possible is essential to the distribution of remuneration collected – but making such information publicly accessible may be necessary only for voluntary collective management without extended effect and in the absence of a presumption-based system (see Chapter 5). This is especially so when CMOs operating in a given territory are in competition with one another. Where mandatory or extended collective management is applied, it may be unrealistic to expect a CMO to maintain a database covering all possible works covered by its licenses and to make it publicly

⁴³⁸ The Toolkit, 88.

⁴³⁹ The Toolkit, 91.

⁴⁴⁰ The Toolkit, 89 (emphasis added).

accessible. These forms of collective management do not facilitate the compilation and publication of a complete list, because generally all the works of all rightholders are covered with respect to the given right – including even those that, at the moment of licensing, are not and cannot yet be identified. This is different from the situation in which rightholders “opt out” from (i.e., leave) the extended collective management system to exercise their rights individually. In such a case, the publication of a “negative list” – that is, a list of those rightholders who have opted out and, if practicable, of their works – may be required.

It seems to be justified to adapt the obligation to make publicly accessible the list of works covered by a CMO’s repertoire to the actual need of the users who are to be sufficiently informed, when the use of the works is licensed to them. For example, the *Brazilian* law quoted in the Toolkit differentiates between the need for a database and the availability requirements:

Brazil:

“Associations [CMOs] shall maintain a centralized register of all contracts, declarations or documents of any nature that prove authorship and ownership of works and phonograms, as well as individual participations in each work and in each phonogram, preventing the falsification of data and fraud and promoting the disambiguation of similar titles of works.”

“The information mentioned in § 6 is of public interest and access to it shall be made available by electronic means to any interested party, free of charge, and the Ministry of Culture shall also be granted continued and integral access to such information.”

*Article 98(6) and (7), Law on Copyright and Neighboring Rights*⁴⁴¹

These provisions suggest that while “permanent and integral access” is to be granted to the Ministry of Culture, apparently for supervisory purposes, this is not true of all stakeholders (in particular, would-be users). It is also noteworthy that the CMO may tailor the level of information it makes available according to the justified information interests of the “interested parties”.

The law of the Republic of Korea provides for proportional repertoire requirements. It does not automatically obligate CMOs to make available and publicly accessible all possible data concerning their repertoire; instead, they may choose to do so only on request. It also allows the CMOs to assess whether the request is justified and how much information is necessary:

Republic of Korea:

“Where a user requests in writing, the copyright trust service provider shall supply the information under his/her management necessary for concluding exploitation contract of works, etc., which is prescribed by Presidential Decree, within a considerable period of time in writing, unless there are justifiable causes to the contrary.

1. List of works, etc.;
2. Period of trust agreement with the holder of author’s economic right of the relevant work, etc.;
3. Conditions for exploitation, such as royalties and standard contract.”

*Article 106(2), Copyright Act and Article 51, Enforcement Decree of the Copyright Act*⁴⁴²

The European Union also applies the principle of proportionality in its CRM Directive, which outlines the information CMOs must make available about their repertoire. Article 20 provides (emphasis added):

... Member States shall ensure that, *in response to a duly justified request* [i.e., not automatically], a collective management organisation makes *at least the following information available by electronic means* and without undue delay to any collective management organisation on whose behalf it manages rights under a representation agreement or to any rightholder or *to any user*:

- (a) *the works or other subject-matter it represents, the rights it manages, directly or under representation agreements, and the territories covered; or*

⁴⁴¹ The Toolkit, 89.

⁴⁴² The Toolkit, 89–90a.

- (b) *where, due to the scope of activity of the collective management organisation, such works or other subject-matter cannot be determined, the types of works or of other subject-matter it represents, the rights it manages and the territories covered.*

For multi-territorial licenses of online uses of musical works, the Directive foresees competition among licensing platforms with separate repertoires (see Chapter 9). For this reason, such platforms are supposed to define the precise scope of their repertoires and only Article 20(a) may apply. Nevertheless, Article 25 repeats the point in relation to licenses, adding the following at Article 25(2): “The collective management organisation may take reasonable measures, where necessary, to protect the accuracy and integrity of the data, to control their reuse and to protect commercially sensitive information.” Although this provision does not appear in Article 20, it would seem justified to apply it in that context too.

The need to make available to would-be users as complete a repertoire database as possible has been a driving force behind adoption of the Music Modernization Act of 2018 in the United States and attempts (as yet unsuccessful) to establish a Global Repertoire Database (GRD), which we discuss in the next chapter.

As regards the tariffs applied by CMOs, it is in general recognized that prospective users might reasonably expect that they will be duly informed what remuneration they might pay for what uses and under what conditions.

The provisions of the Ecuadorian and Korean laws cited already obligate CMOs to make available the tariffs they apply – namely:

- in Ecuadorian law, “the tariffs for each type of use and user category”;⁴⁴³ and
- in Korean law, the “[c]onditions for exploitation, such as royalties and standard contracts”.⁴⁴⁴

The Nigerian law provides similarly:

Nigeria:

“Where a Collective Management Organization seeks any change in the tariff rates for any category of users, it shall inform such users through a medium that could be accessed publicly by them.”

*Article 8(4), CMO Regulations, 2007*⁴⁴⁵

The Australian CMOs include the following rule in their code of conduct:

Australian CMOs:

“Each Collecting Society will:

make available to Licensees and potential Licensees information about the licences or licence schemes offered by the Collecting Society, including the terms and conditions applying to them, and about the manner in which the Collecting Society collects remuneration and/or licence fees for the use of copyright material [...]”

*Australian Collecting Societies Code of Conduct*⁴⁴⁶

The British Copyright Council (BCC) has determined more specific requirements:

BCC:

“[A CMO should]

- Explain the rights administered by the CMO
- Identify the rightsholders on whose behalf the CMO acts
- Explain the basis for the authority to act (e.g. membership agreements, etc.)
- Summarize licensing schemes, terms and conditions and tariffs, etc.:

⁴⁴³ The Toolkit, 89.

⁴⁴⁴ The Toolkit, 90.

⁴⁴⁵ The Toolkit, 89.

⁴⁴⁶ The Toolkit, 90.

- explain where more details can be found so as to provide a full picture of the whole agreement into which a licensee may be entering including information on any relevant related licensing scheme(s) or licences operated by other CMOs or right holders.
- where applicable, clarify how these have been negotiated (e.g. with a relevant trade association)
- explain how and when terms and conditions are reviewed
- explain if licences grant any powers to the CMO to visit the licensee's premises for compliance purposes, and if so, how these powers may be exercised."

*BCC Principles of Good Practice for Collective Management Organizations*⁴⁴⁷

In the online digital environment, "due availability" of tariffs undoubtedly means availability on a CMO's website.

Principles and criteria of licensing conditions and tariff setting

The national laws, community norms and codes of conduct from which the Toolkit draws its examples provide for both the basic principles and the criteria – at various levels of detail – applicable in practice when licensing users and setting tariffs.

There are two generally applicable principles, both of which are rooted in competition considerations and which aim to ensure equal treatment among users who meet the CMO's licensing conditions. The first of these is the prohibition of discrimination between users and the obligation to apply objective criteria, which are linked and presuppose one another, as the E.U. CRM Directive makes clear in Article 16(2) (emphasis added): "Licensing terms shall be based on *objective and nondiscriminatory* criteria. [...]"

The Brazilian law clarifies that the principle of nondiscrimination should be applied only among users who share characteristics: "The collection shall have as principles the efficiency and fairness, and shall make *no discrimination* between users of the *same characteristics*."⁴⁴⁸

The law of Uruguay does not use the language of "discrimination" or "nondiscrimination", but the meaning of its provision is to that effect: "Obligations of Collecting Societies: [...] set fair and *equitable tariffs* that determine the required remuneration for use of their repertoire, *whether for national or foreign rightholders, whether resident or not in the Republic*."⁴⁴⁹

In the United States, the consent decrees (see Chapter 4) also determine nondiscrimination in licensing as a key requirement:

[The CMO] is hereby *enjoined and restrained from*:
[...]

- (C) *Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated; [...]*⁴⁵⁰

The codes of conduct of rightholders' federations referred to in the Toolkit emphasize the same principle, including that nondiscrimination means equal treatment between users with equivalent status (in particular, whether or not they are lawful users):

Australian CMOs:

"Each [CMO] will treat [users] fairly, honestly, impartially, courteously, and in accordance with its Constitution and any license agreement."

Australian Collecting Societies Code of Conduct

⁴⁴⁷ The Toolkit, 90–91.

⁴⁴⁸ Article 6 of Decree No. 8.468, of June 22, 2015 (emphasis added).

⁴⁴⁹ Article 21 of the Law on Copyright No. 17.616 (emphasis added).

⁴⁵⁰ Amended final judgment of March 14, 1950, *United States of America v. ASCAP et al.*, Civil Action No. 13-95 (S.D.N.Y.), point IV (emphasis added).

CISAC:

"Each Member shall:

- a. grant licenses on the basis of objective criteria and, when applicable, meet the requirements to operate as set by the national legislation, provided that a Member shall not be obliged to grant licenses to users who have previously failed to comply with such Musical Society's licensing terms and conditions; and
- b. not unjustifiably discriminate between users."

CISAC Professional Rules

IFPI:

"With a view to increasing efficiency and reducing costs MLCs should examine opportunities for cooperation with other CMOs representing complementary rights, e.g., with respect to the licensing of rights in sound recordings and musical works for the public performance of recorded music."

*IFPI Code of Conduct for Music Industry MLCs*⁴⁵¹

The requirement that tariff conditions should be objective means not only that there should be no subjective distinction in their application to users who share characteristics but also that the conditions themselves must be based on specific, objective criteria. The national laws, community norms and codes of conduct likewise prescribe some general substantive criteria that CMOs must meet when defining their licensing conditions and tariffs, such as that they should be:

- "appropriate as to the category of the work and the manner of the use thereof" (Bosnia and Herzegovina, Article 23 of the Collective Management Law);⁴⁵²
- based on "the principles of *isonomy, efficiency and transparency*" (Brazil, Article 98 of the Copyright Law);⁴⁵³ and
- "reasonable, equitable and proportional rates" (Ecuador, Article 251 of the Organic Code on the Social Economy of Knowledge, Creativity and Innovation);⁴⁵⁴

There are national laws, community norms and codes of conduct, as well as court and competition authority decisions, that determine more specifically what it means for tariffs to be "appropriate", "reasonable", "proportionate", among other things. Some of these definitions are quantitative; others, qualitative or substantive.⁴⁵⁵

For a while, some countries and communities applied a 10 percent rule of thumb – that is, they required the remuneration for the use of works to be around 10 percent of the income derived from (or, in certain cases, the costs of) their management. Switzerland was unusual in codifying this, article 60(2) of its 1992 Copyright Law providing that

[A]s a general rule, the compensation shall amount to a maximum of 10 percent of the revenue from use, or of the costs incurred by such use, in the case of copyright and a maximum of 3 percent in the case of neighboring rights; the compensation shall be established to ensure that rational management provides right holders with fair remuneration.

Fixing remuneration in this way – 10 percent for all kinds of uses in case of copyright and just 3 percent in case of related rights – seemed to be too rigid also in 1992 (although it was spelled out only "as a general rule" and thus there was room for some flexibility taking into account the truly substantive criterion that "the compensation shall be established in order to ensure that rational management provides right holders with fair remuneration").

However, since this provision was enacted, galloping technological developments and a swathe of new business methods have emerged for which a uniform percentage-based licensing criterion is

451 The Toolkit, 93–94.

452 The Toolkit, 95 (emphasis added).

453 *Ibid.* (emphasis added).

454 The Toolkit, 93 (emphasis added).

455 For a thorough review of statutory and case law, as well as best practices concerning licensing and tariffs, see Romana Matanovac Vučković (2016). "Remunerations for authors and other creators in collective management of copyright and related rights". *Zbornik Pravnog Fakulteta u Zagrebu*, February, 35–60.

no longer a good fit. In a stable analogue environment (relating to authors' fees for book publishing or for vinyl phonograms that include a standard number of recorded songs), this sort of rule of thumb might have been reasonably applicable; in the new environment, more flexibility is needed. It consequently seems all the more appropriate to emphasize not the general percentage-based rule but rather the fairness of remuneration.

As regards the quantitative aspects of licensing and setting tariffs, the CJEU has tended toward comparative methods. The Court has based several judgments on such methods when asked whether or not a certain CMO's tariff might be too high and a sign that it might be abusing its *de facto* or *de jure* monopoly position. In *Tournier*⁴⁵⁶ and *Lucazeau*⁴⁵⁷ – judgments adopted on the same day in 1989 – the Court introduced the “appreciably higher than” criterion. The ruling was verbatim the same across the two judgments:

Article 86 of the Treaty [now Article 102 TFEU]⁴⁵⁸ must be interpreted as meaning that a national copyright-management society holding a dominant position in a substantial part of the Common Market imposes unfair trading conditions where the royalties which it charges to discotheques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.⁴⁵⁹

The Court also applied the “appreciably higher than” criterion in *OSA*,⁴⁶⁰ but it added an “economic value” criterion, which is of a substantive rather than of a quantitative-comparative nature:

Article 102 TFEU must be interpreted as meaning that the imposition by that copyright collecting society of fees for its services which are appreciably higher than those charged in other Member States (a comparison of the fee levels having been made on a consistent basis) or the imposition of a price which is excessive in relation to the economic value of the service provided are indicative of an abuse of a dominant position.⁴⁶¹

The Court's judgment in *OSA* came only one day after the European Union published the CRM Directive. It is consequently reasonable to presume that Article 16(2) of the Directive had some impact on this part of the ruling. Among other things, the second sentence of the second unnumbered paragraph within Article 16(2) may be read such that: “[t]ariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, [...]the economic value of the service provided by the collective management organization.” It is another matter that – as discussed below – the really substantive criterion may be found in the first part of the same sentence (emphasis added):

Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organization.

456 Judgment of the Court of July 13, 1989, *Ministère public v Jean-Louis Tournier*, Case 395/87, ECLI:EU:C:1989:319.

457 Judgment of the Court of July 13, 1989, *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, joined cases 110/88, 241/88 and 242/88, ECLI:EU:C:1989:326.

458 Article 102 TFEU reads as follows:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) *directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) *limiting production, markets or technical development to the prejudice of consumers;*
- (c) *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (d) *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts (emphasis added).*

459 *Tournier*, [46]; *Lucazeau*, [33] (emphasis added).

460 Judgment of the Court (Fourth Chamber) of February 27, 2014, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, Case C-351/12, ECLI:EU:C:2014:110.

461 *Ibid.*, [92] (emphasis added).

It is pertinent too that this criterion relies for balance on the first sentence of that same unnumbered second paragraph within Article 16(2), according to which the rightholders “shall receive appropriate remuneration for the use of their rights”.

In terms of the quantitative aspects of licensing, there are some more nuanced versions of the comparative method. For example, among other things, the Collective Management Law of Bosnia and Herzegovina provides that:

Bosnia and Herzegovina:

“[...]”

(3) When determining an appropriate tariff, the following shall be taken into account, in particular:

[...]

- f) *comparability of the proposed tariff with the tariffs of similar collective organizations in other neighboring states and the states which may be compared with Bosnia and Herzegovina according to the relevant criteria, and in particular with respect to GDP per capita and purchasing power.”*

*Article 23(3), Law on Collective Management, Bosnia and Herzegovina, 2010*⁴⁶²

In *AKKA – LAA*,⁴⁶³ the CJEU outlined the same sort of criterion:

... for the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of point (a) of the second paragraph of Article 102 TFEU, *it is appropriate to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the PPP [purchasing power parity] index*, provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments.⁴⁶⁴

In general, the criterion of “purchasing power parity” (PPP) seems to be a more objective basis for comparison than the tariffs of neighboring countries. In the case of Bosnia and Herzegovina, the latter may not differ too much from the PPP index, because the country is surrounded by other countries that used to be Yugoslav republics and their standards of living may have developed similarly since independence. For the three Baltic countries, the outcome of a comparison among only them may be similar, but the same is not true if comparison were to be with neighboring Nordic countries or the neighboring Russian Federation and Belarus. In those latter instances, it certainly seems advisable to take account instead of the PPP index.

The criteria relating to neighboring countries and PPP are quantitative. They offer no guidance on the substantive conditions of licensing and tariff setting. There are, however, certain provisions among national laws, community norms and codes of conduct that do offer such guidance, including Article 16(2) of the CRM Directive the second unnumbered paragraph of which was quoted above already:

Rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organization.

⁴⁶² The Toolkit, 95 (emphasis added).

⁴⁶³ Judgment of the Court (Second Chamber) of September 14, 2017, *Autortiesību un komunikēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v. Konkurences padome*, Case C-177/16, ECLI:EU:C:2017:689.

⁴⁶⁴ *Ibid.*, [51] (emphasis added). The Court also indicated, at [61], certain more detailed criteria for the application of the “appreciably higher than” test:

... the difference between the rates compared must be regarded as appreciable if that difference is significant and persistent. Such a difference is indicative of abuse of a dominant position and it is for the copyright management organisation holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses or the remuneration of rightholders.

The basic principle is that rightholders must receive *appropriate remuneration* for the use of their rights. The Directive then clarifies that appropriateness presupposes, among other things, remuneration that corresponds to *the economic value* of the exclusive rights and the rights to remuneration *in trade* – that is, their market value – in the context of the *nature and scope of the use* of works and other subject matter protected. The paragraph adds that the “economic value of the [CMO’s] service” should also be taken into account, but this may not be an independent criterion in that context; rather, it means the legal integrity and the quality of the CMO’s repertoire as “served” to users.

The Brazilian Copyright Law provides a criterion somewhat similar to the “economic value of the use” under Article 16(2) of the CRM Directive:

Brazil:

[...]

“The collection will always be proportional to the degree of use of the works and phonograms by the users, considering the importance of the public execution in the exercise of its activities, and the particularities of each segment, as provided in the regulation of this Law.”

*Article 98(2)-(4), Law on Copyright and Neighboring Rights*⁴⁶⁵

The codes of conducts of the rightholders’ federations equally stress both the economic value of the rights in the protected materials and their benefits to the users:

Australian CMOs:

[...]

“In setting or negotiating license fees, a CMO may have regard to the following matters:

- *the value of the copyright material;*
- *the purpose for which, and the context in which, the copyright material is used;*
- *the manner or kind of use of the Copyright Material; [...].”*

Australian Collecting Societies Code of Conduct

IFPI:

“Each MLC is to establish tariffs that are transparent and based on objective criteria and that fairly reflect both *the value of rightholders’ rights in trade* and *the benefits to users* of the MLC’s service.”

*IFPI Code of Conduct for Music Industry MLCs*⁴⁶⁶

These general criteria demand that two basic aspects be taken into account: the nature and value of the rights in the protected materials, and the value of the use for (i.e., the benefits to) the users. This presupposes a market context in which conditions are stable without legislative, administrative and/or judicial intervention. Such intervention may be a consequence of the fact that CMOs are traditionally in a *de facto* or *de jure* monopoly position, which may distort the balance of supply and demand (see Chapter 3).

The basic principles presented in the first edition of this book, approved by the Group of Governmental Consultants in 1990 and repeated with some unsubstantial wording changes in the second edition in 2002, continue to be valid:

- (m) Government supervision of, and interference in, the establishment and operation of tariffs and other licensing conditions applied by collective management organizations which are in a *de facto* or *de jure* monopoly position *vis-à-vis* users, is only justified if, and to the extent that, such supervision or interference is indispensable for preventing abuse of such a monopoly position.
- (n) A certain level of tariffs (for example, a higher level than in other countries) should not be regarded in itself as a sufficient basis for presumption of abuse. In that respect, it should be taken into account that the tariffs should correspond to the exclusive nature

465 The Toolkit, 95–96.

466 The Toolkit, 98–99 (emphasis added).

of rights and should represent an appropriate remuneration to owners of rights which, in certain countries, may be ensured in a much fuller way than in others, and the actual value of the repertoire and service offered by a collective should also be considered (and, as a result of all that, it may be that it is not that the higher tariffs are too high but the lower fees are rather too low). When evaluating tariffs, the economic and social conditions of the country concerned should also be taken into consideration.⁴⁶⁷

It is worth emphasizing that – as in Article 16(2) of the CRM Directive, for example – these basic principles and criteria are applicable for both “exclusive rights and rights to remuneration”. This certainly spans the many variations of these rights: it includes the limitation of exclusive rights to compulsory licenses and mandatory collective management; and, in the case of the rights to remuneration, both those that are originally provided as such (e.g., the “single” equitable remuneration of performers and producers of phonograms for broadcasting and communication to the public of phonograms published for commercial purposes) and those that are limitations (to a mere right to remuneration) of exclusive rights (e.g., the right to remuneration for private copying).

In the light of all of this, and particularly in the case of exclusive rights, the “willing buyer, willing seller” test surfaces (with government intervention where justified to prevent CMOs’ abusing their dominant position). This evidently also applies to compulsory licenses as a form of limitation of exclusive rights (others than those foreseen for developing countries in the Appendix to the Berne Convention): it is explicitly provided for under the U.S. Music Modernization Act of 2018, for example, with respect to the compulsory license of mechanical rights for interactive online streaming of musical works (see Chapter 10). In the case of mere rights to remuneration, the “willing buyer, willing seller” test may not be applicable in the same way, because users do not have to “buy” the right to use the works but rather only pay for it. For such rights, the concept of *equitable* (fair) remuneration is supposed to guarantee that the remuneration – through the CMOs’ tariffs – express the economic value of the rights to both the rightholders and the users.

The correspondence of the tariff system with these principles depends on the nature of the rights and the ways in which works might be used. Accordingly, the national laws with which the Toolkit illustrates the principles prescribe some detailed criteria that CMOs must take into account when setting their tariffs.

In Article 23(3)(a)–(e) of the Collective Management Law of Bosnia and Herzegovina – subparagraph (f) of which have already been quoted in relation to the quantitative criteria relevant to neighboring countries and PPP – several substantive criteria appear:

Bosnia and Herzegovina:

“[...]”

(3) When determining an appropriate tariff, the following shall be taken into account, in particular:

- a) total gross income derived from the use of a work or, if it is impossible, total gross costs related to such use;
- b) importance of the use of works for the activity of a user;
- c) ratio between protected and non-protected works used;
- d) ratio between the rights managed collectively and individually;
- e) particular complexity of the collective management of rights due to certain use of the works; [...]”

*Article 23(3), Law on Collective Management, Bosnia and Herzegovina, 2010*⁴⁶⁸

⁴⁶⁷ WIPO (1990). *Collective Administration of Copyright and Related Rights*, Publication No. 688 (E). Geneva: WIPO, 89–90. In the second edition, the two principles appeared in the concluding chapter as principles (18) and (19): see WIPO (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 162. Principle (18) was almost identical to principle (m), the only exception being substitution of the expression “joint management” for “collective management”. Principle (19) differed from principle (n) only to the extent that it had been shortened:

(19) A certain level of tariffs (for example, a higher level than in other countries) should not be regarded in itself as a sufficient basis for presumption of abuse. In that respect, it should be taken into account that the tariffs should correspond to the exclusive nature of rights and should represent an appropriate remuneration to owners of rights which, in certain countries, may be ensured in a much fuller way than in others, and the actual value of the repertoire and service offered by a joint management organization, as well as the economic and social conditions of the country concerned should also be taken into account.

⁴⁶⁸ The Toolkit, 95.

The Brazilian law is less detailed but it also refers to certain substantive criteria:

Brazil:

[...]

"The collection will always be proportional to the degree of use of the works and phonograms by the users, considering the importance of the public execution in the exercise of its activities, and the particularities of each segment, as provided in the regulation of this Law."

*Article 98(4), Law on Copyright and Neighboring Rights*⁴⁶⁹

Section 66.501 of the 1985 Copyright Act of Canada determines the criteria the Copyright Board is to apply in a similar way to the U.S. "willing buyer, willing seller" test, but the Canadian criteria are to be applied also in accordance with public interest considerations:

66.501. The Board shall fix royalty and levy rates and any related terms and conditions under this Act that are fair and equitable, in consideration of

- (a) *what would have been agreed upon between a willing buyer and a willing seller* acting in a competitive market with all relevant information, at arm's length and free of external constraints;
- (b) *the public interest*;
- (c) any regulation made under subsection 66.91(1);^[470] and
- (d) any other criterion that the Board considers appropriate.

Section 39 of the German Collective Management Law likewise not only provides some general criteria for the setting of tariffs but also requires the CMO to take specific public interests into account:

Germany:

[...]

"Setting of tariffs

- (1) As a general rule, the tariffs shall be calculated *on the basis of the pecuniary benefits derived on account of the exploitation*. The tariffs may also be calculated *on another basis* if there are sufficient indications which can be secured at economically justifiable expense *for the benefits from the exploitation*.
- (2) When setting the tariffs, *reasonable consideration shall be given to the share which the use of the work represents of the total utilisation* and to the economic value of the services provided by the collecting society.
- (3) The collecting society is to *pay reasonable consideration* when setting the tariffs and collecting the remuneration *to the religious, cultural and social concerns of the users*, including the concerns of the youth services.
- (4) The collecting society shall inform the users concerned of the criteria used for the setting of the tariffs."

*Section 39, German Collecting Societies Act, 2017*⁴⁷¹

Section 39(2) of the German Act appears to be the application in domestic law of the ruling adopted by the CJEU in the *Kanal 5* case,⁴⁷² in which the Court found as follows:

Article 82 EC [provision on the prohibition of abuse of dominant position; at present in the TFEU, Article 102] must be interpreted as meaning that *a copyright management organisation with a dominant position on a substantial part of the common market does not abuse that position where*, with respect to remuneration paid for the television broadcast of musical works protected by copyright, *it applies to commercial television*

⁴⁶⁹ The Toolkit, 95–96.

⁴⁷⁰ Section 66.91(1) of the Act reads: "The Governor in Council may make regulations issuing policy directions to the Board and establishing general criteria to be applied by the Board or to which the Board must have regard [...] in establishing fair and equitable royalties to be paid pursuant to this Act."

⁴⁷¹ The Toolkit, 96 (emphasis added).

⁴⁷² Judgment of the Court (Fourth Chamber) of December 11, 2008, *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättare Internationella Musikbyrå (STIM) upa*, Case C-52/07, ECLI:EU:C:2008:703.

*channels a remuneration model according to which the amount of the royalties corresponds partly to the revenue of those channels, provided that that part is proportionate overall to the quantity of musical works protected by copyright actually broadcast or likely to be broadcast, unless another method enables the use of those works and the audience to be identified more precisely without however resulting in a disproportionate increase in the costs incurred for the management of contracts and the supervision of the use of those works.*⁴⁷³

It is worth reviewing the application in Hungary of the *Kanal 5* ruling, by authors' society Artisjus, as an example illustrating that broadcasters tend to be in favor of simpler and flexible blanket licensing systems, rather than calculating the actual shares of protected works in their programs.

Before *Kanal 5*, Artisjus applied the following uniform tariffs without taking into account the musical part of the programs of broadcasting organizations:

- 1 percent of budgetary subsidy;⁴⁷⁴
- 2 percent of subscription fees; and
- 4 percent of advertising and sponsorship income.

After *Kanal 5*, the society introduced *pro rata temporis* tariffs:

- up to 15 percent of the musical part of the programs:
 - 1 percent of budgetary subsidy;
 - 1.5 percent of subscription fees; and
 - 2 percent of advertising and sponsorship income;
- up to 50 percent of the musical part of the programs:
 - 1 percent of budgetary subsidy;
 - 2 percent of subscription fees; and
 - 4 percent of advertising and sponsorship income;⁴⁷⁵
- up to 75 percent of the musical part of the programs:
 - 1 percent of budgetary subsidy;
 - 3 percent of subscription fees; and
 - 6 percent of advertising and sponsorship income;
- above 75 percent of the musical part of the programs:
 - 1 percent of budgetary subsidy;
 - 4 percent of subscription fees; and
 - 8 percent of advertising and sponsorship income.⁴⁷⁶

Artisjus offered broadcasting organizations a choice between the pre-*Kanal 5* and post-*Kanal 5* tariffs, and many have chosen the original simpler system.

⁴⁷³ *Ibid.*, [49], point 1 (emphasis added).

⁴⁷⁴ The general application of a percentage-based tariff for budgetary public subsidy (for public-service broadcasting organizations) is to cover the costs of the building, the technical equipment, electricity, the operation and the salary of the staff; hence it is justified to use only 1 percent for the remuneration of the composers, authors and music publishers for the use of musical works.

⁴⁷⁵ That is, the pre-*Kanal 5* percentages.

⁴⁷⁶ Note that a minimum tariff applies even if a broadcaster does not have such incomes. This reflects the fact that the right of broadcasting is applicable for broadcasting and not for obtaining income from broadcasting.

Specific rules are applicable to the right to remuneration for private copying (and this is the right to remuneration most widely recognized in Europe).⁴⁷⁷ Article 5(2)(b) and (5) of the Information Society Directive provides for such a right to remuneration ("fair compensation"):

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

[...]

- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor 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;

[...]

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

The latter provision illustrates that, in fact, the legal basis of the right to remuneration for private copying corresponds to what was found during the "guided development" period of copyright at the international level by the competent bodies of WIPO (see Chapter 1) – namely, that it is a limitation of the exclusive right of reproduction provided in Article 9(1) of the Berne Convention, applied in accordance with the three-step test under Article 9(2). At that time, the WIPO bodies found that:

- widespread private copying had led to unreasonable prejudice to the legitimate interests of the rightholders;
- it is possible to eliminate – or at least to reduce to a reasonable level – that prejudice by including a payment for that purpose in the price of the equipment and/or recording materials used for such copying; and
- since such an option is available, it is apt to make use of it.⁴⁷⁸

The CJEU have based several judgments on this interpretation of the provisions on the right to remuneration (i.e., the right to "fair compensation" in the form of remuneration). Two judgments are particularly worthy of mention as directly addressing questions of tariff setting.

⁴⁷⁷ The scope and actual application of the right to remuneration is quite varied at an international level. A broader substantive review is beyond the scope of this book. Such reviews are available in Stichting de Thuiscopie/WIPO (2017). *International Survey of Private Copying: Law and Practice 2016*. Available at www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2017.pdf; CISAC/BIEM/Stichting de Thuiscopie (2020). *Private Copying Global Study*. Available at www.cisac.org/Newsroom/news-releases/new-private-copying-global-study-shows-potential-better-remuneration

As the 2020 study demonstrates, it is in Europe that the right to remuneration for private copying is by far the most widely recognized. The CJEU has adopted several judgments on various aspects of the regulation and application of such a right. In Europe, the right is recognized and applied in such a way that collection and distribution take place across the following countries: Austria, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lichtenstein, Lithuania, Republic of Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland and Ukraine. There are also legislative provisions on such a right that are not yet applied in practice in Belarus, Bulgaria, Cyprus, Estonia, Luxembourg, Malta, Montenegro and North Macedonia.

Among the other continents, a right to remuneration is provided for and applied in practice (to varying extents) in several African countries: Algeria, Botswana, Burkina Faso, Cabo Verde, Ghana, Kenya, Malawi and Morocco. In the following countries, such provision is not yet partnered with collection and distribution: Angola, Benin, Burundi, Cameroon, Chad, Democratic People's Republic of Congo, Côte d'Ivoire, Djibouti, Gabon, Madagascar, Mali, Mauritania, Mozambique, Niger, Nigeria, São Tomé and Príncipe, and Senegal. In Asia, the right to remuneration is applied and partnered with collection and remuneration only in Israel and Japan, while it is legally recognized but not applied yet in practice in Azerbaijan, Kazakhstan, Kyrgyzstan, Turkey, Turkmenistan and Uzbekistan. The right to remuneration for private copying is currently least well recognized in the Americas, where Canada, Paraguay, Peru and the United States make provision for it in national law and put that law into practice, and only the Dominican Republic has in place a legal framework not yet put into practice.

⁴⁷⁸ See Ficsor, *The Law of Copyright and the Internet*, 310–317, for more on the finding of the competent WIPO bodies.

In *Padawan*,⁴⁷⁹ the CJEU ruled, among other things, that:

Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the “fair balance” between the persons concerned means that fair compensation *must be calculated on the basis of the criterion of the harm caused to authors* of protected works by the introduction of the private copying exception. *It is consistent with the requirements of that “fair balance” to provide that persons who have digital reproduction equipment, devices and media and who on that basis, in law or in fact, make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation, inasmuch as they are able to pass on to private users the actual burden of financing it.*⁴⁸⁰

Accordingly, in Europe, CMOs setting private copying tariffs are generally required to present evidence (e.g., research studies) of the existence and size of the prejudice (or “harm”, as the judgment puts it) to the legitimate interests of the rightholders.

In *EGEDA*,⁴⁸¹ the Court analyzed a more basic issue – namely, the legal nature of what is frequently referred to (and also frequently misunderstood and misinterpreted) as a private copying “levy”. “Levy” tends to be understood as a fiscal instrument similar to a tax; it might therefore be presumed that the payment made during purchase of materials or equipment should be applied in the same way, and have the same effect, as “other” tax-type levies. In fact, that payment is neither levy nor tax but it is due for the right of reproduction under copyright – in a limited special form.

In *EGEDA*, the CJEU faced a case in which a government had applied the fiscal – rather than copyright – concept of the right to remuneration for private copying. The CJEU ruled as follows:

... Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as *precluding a scheme for fair compensation for private copying which, like the one at issue in the main proceedings, is financed from the General State Budget* in such a way that it is *not possible to ensure that the cost of that compensation is borne by the users of private copies.*⁴⁸²

This also means that, in accordance with E.U. case law too, the right to remuneration (i.e., “fair compensation” in the form of remuneration) provided for in Article 5(2)(b) of the Information Society Directive should be applied in such a way that it eliminates – or at least reduces to a reasonable level – the unreasonable prejudice (“harm”) caused by widespread private copying.

Negotiations and establishment of tariffs; dispute settlement systems

As forms of authorizing uses, licensing and tariff setting do not necessarily demand the same of CMOs. Sometimes, CMOs may conclude individual licensing contracts with certain users; but in the case of blanket licenses, they will more usually establish tariffs that are applicable to all users who perform acts covered by the rights concerned.

While national rules for the procedures whereby CMOs may adopt and apply tariffs differ, they have some common elements.

- Fair and good faith negotiations must generally take place between the CMOs and representatives of the users.
- The number of specific issues involved is such that, in some countries, special boards, councils, arbitration tribunals or mediation bodies may be the first forums in the event of a dispute,

479 Judgment of the Court (Third Chamber) of October 21, 2010, *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, Case C-467/08, ECLI:EU:C:2010:620.

480 *Ibid.*, [50] (emphasis added).

481 Judgment of the Court (Fourth Chamber) of June 9, 2016, *Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) and Others v Administración del Estado and Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (AMETIC)*, Case C-470/14, ECLI:EU:C:2016:418.

482 *Ibid.*, [42] (emphasis added).

and the parties may turn to the courts only if such alternative dispute resolution (ADR) procedures fail.

- In other countries, the parties may turn to the court not only after the exhaustion of ADR options but also, at least in certain circumstances, directly.
- When tariffs are agreed or approved, and any disputes have been settled, they are applicable to any users in the given category.
- Tariffs must be made publicly available, which means at least publishing them online, on the CMOs' websites, and may also mean publishing them in official gazettes.

Under heading 12, "Complaints and dispute resolution procedures", the Toolkit quotes examples of relevant provisions from the national laws of Brazil, Ecuador, Japan, Pakistan, the United States and Venezuela, as well as from the European Union, and it also draws attention to the services of the WIPO Arbitration and Mediation Center, which Member States may use to settle disputes over collective management:

WIPO Arbitration and Mediation Center:

The WIPO Arbitration and Mediation Center (WIPO Center) (<http://www.wipo.int/amc/en/>) provides alternative dispute resolution (ADR) advice and case administration services to help parties resolve disputes arising in the area of collective management outside the courts.

In this regard, the WIPO Center collaborates with copyright authorities in the promotion of the use of ADR for copyright disputes (<http://www.wipo.int/amc/en/center/specific-sectors/ipoffices/>).

The WIPO Center also collaborates with relevant stakeholders and organizations, including the Association of International Collective Management of Audiovisual Works (AGICOA) and the Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) to provide adapted mediation and arbitration procedures for disputes involving CMOs and their members (<http://www.wipo.int/amc/en/center/specific-sectors/collecting-societies/>).⁴⁸³

Obligations of users; their status in the application of tariffs

A tariff is the key element of an inclusive agreement concluded between – or at least accepted explicitly or implicitly (where there was no opposition even though opposition was possible) by – the representatives of the users. In the case of compulsory licenses, a competent authority – or a semi-judicial or judicial body, such as the "rate court" in the United States – may (and, in the case of statutory licenses, generally will) determine the tariffs. Either way, the consequence is that a tariff, once established and published, is an open license applicable equally to any users in the given category, who may perform the acts covered by the tariffs provided that they pay promptly the remuneration fixed in the tariffs and act in accordance with any other applicable conditions.

Some national laws expressly provide for this;⁴⁸⁴ in other countries, it is implicit within the concept and regulation of inclusive agreements and the setting of tariffs.

The tariff system is based on a presumption that users will report their uses and pay the remuneration due; this presumption allows costs to be lower than if CMOs were to monitor uses intensively, initiate infringement procedures, be faced with delays in the collection of the fees, etc. It is self-evident that when a hotel or a restaurant, for example, uses the repertoire of a musical "performing rights organization" without paying the applicable tariff, it infringes copyright; should a CMO need to enforce a right against such a user, its costs will necessarily increase. It is therefore

⁴⁸³ The Toolkit, 116–17.

⁴⁸⁴ For example, section 73.3. of the Canadian Copyright Act 1985 provides as follows:

No proceedings may be brought against a person for the infringement of a right with respect to an act referred to in section 3, 15, 18 or 21 if

- (a) the person has paid or offered to pay the royalties set out in an approved tariff that apply with respect to that act;
- (b) in the case where section 73.2 applies with respect to that act, the person has paid or offered to pay the royalties referred to in paragraph 73.2(b); or
- (c) in the case where no tariff has been approved with respect to that act and section 73.2 does not apply with respect to it, the person has offered to pay the royalties that are included in a proposed tariff and that will apply to that act once the tariff is approved.

justified that the CMOs include in the rules accompanying their tariffs a stipulation that a user so identified will be required to pay a higher amount, such as double the fee to be paid by a lawful and cooperative user.

The applicability of a higher tariff for non-cooperative infringer users came before the CJEU in *SFP*.⁴⁸⁵ The CMO, which managed copyright in audiovisual works, launched a lawsuit against OTK, a cable network. The case had been appealed to the Polish Supreme Court, which had to interpret and apply, among other things, Article 79(1) of the Polish Law on Copyright and Related Rights, which included, at that time, the following provision (emphasis added):

A rightholder whose economic rights of copyright have been infringed may request the person who infringed those rights to:

[...]

(3) remedy the loss caused:

- (a) on the basis of general principles, or
- (b) by *payment of a sum of money corresponding to twice, or, in the event of a culpable infringement, three times, the amount of the appropriate fee which would have been due* at the time it was sought if the rightholder had given permission for the work to be used; [...]

The Supreme Court submitted the following preliminary questions to the CJEU:

*Is Article 13 of Directive 2004/48 [the Enforcement Directive] to be interpreted as meaning that the rightholder whose economic rights of copyright have been infringed may seek redress for the damage which it has incurred on the basis of general principles, or, without having to prove loss and the causal relationship between the event which infringed its rights and the loss, may seek payment of a sum of money corresponding to twice the amount of the appropriate fee, or, in the event of a culpable infringement, three times the amount of the appropriate fee, whereas Article 13 of Directive 2004/48 states that it is a judicial authority which must decide on damages by taking into account the factors listed in Article 13(1)(a), and only as an alternative in certain cases may set the damages as a lump sum, taking into consideration the elements listed in Article 13(1)(b) of that directive? Is the award, made at the request of a party, of damages as a predetermined lump sum corresponding to twice or three times the amount of the appropriate fee permissible pursuant to Article 13 of the directive, regard being had to the fact that recital 26 thereof states that it is not the aim of the directive to introduce punitive damages?*⁴⁸⁶

The CJEU ruled that:

... Article 13 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as *not precluding national legislation*, such as that at issue in the main proceedings, *under which the holder of an intellectual property right that has been infringed may demand from the person who has infringed that right either compensation for the damage that he has suffered, taking account of all the appropriate aspects of the particular case, or, without him having to prove the actual loss, payment of a sum corresponding to twice the appropriate fee which would have been due if permission had been given for the work concerned to be used.*⁴⁸⁷

The Court did not deal with the possibility of applying three times the tariff in the event of infringement because, between submission of the question to the CJEU and its judgment, Poland had modified its Copyright Law after a decision of the Polish Constitutional Court held that the provision in question – requiring payment, in the event of “culpable infringement”, of an amount three times the usual fee – was partially unconstitutional.⁴⁸⁸

⁴⁸⁵ Judgment of the Court (Fifth Chamber) of January 25, 2017, *Stowarzyszenie “Oławska Telewizja Kablowa” w Oławie v Stowarzyszenie Filmowców Polskich w Warszawie*, Case C-367/15, ECLI:EU:C:2017:36.

⁴⁸⁶ Quoted *ibid.*, [17] (emphasis added).

⁴⁸⁷ *Ibid.*, [33] (emphasis added).

⁴⁸⁸ Reported *ibid.*, [19].

The CJEU found an infringer's obligation to pay instead double the fee applicable to lawful users to be in accordance with the Enforcement Directive for three reasons, two of which would have been applicable had the payment been qualified as punitive damages. First, that such a consequence would go beyond the minimum obligations set out in the Directive is allowed;⁴⁸⁹ second, the Polish Supreme Court's interpretation of "causal relationship" would have been "irreconcilable with the very idea of setting damages as a lump sum".⁴⁹⁰ However, the third and decisive reason was that the CJEU did not consider it proven that a punitive damage was involved:

[I]t is not evident that the provision applicable in the main proceedings entails an obligation to pay such damages. [...] Thus, it should be pointed out that, where an intellectual property right has been infringed, mere payment of the hypothetical royalty is not capable of guaranteeing compensation in respect of all the loss actually suffered, *given that payment of that royalty would not, in itself, ensure reimbursement of any costs* – referred to in recital 26 of Directive 2004/48 – *that are linked to researching and identifying possible acts of infringement [...] or payment of interest on the sums due.*⁴⁹¹

Users also have other obligations under the licenses granted by CMOs and, in particular, under the conditions accompanying the tariffs, including that they must provide information to the CMOs on the works they use. Not only may this be necessary to application of a given tariff and the collection of remuneration, but also it is necessary for the due distribution of the remuneration collected. Sometimes, this obligation is stipulated only as a condition accompanying the tariffs, but there are also national laws that prescribe it. For example, Article 27 of the Chinese Collective Management Regulation – quoted in the Toolkit under subheading 8.1, "CMO's information to Users/Licensees" – provides as follows:

China:

"A user shall, when paying licensing fees to a copyright collective administration organization, *provide with that organization the information on specific use*, such as the titles of the used works, sound or video recordings, etc., the names or titles of the right owners, as well as the manner, amount and time of the use; except otherwise stipulated in the licensing contract.

Where the information provided by the user involves his trade secrets, the copyright collective administration organization shall have the obligation to maintain secrecy."

*Article 27, Regulations on Copyright Collective Administration*⁴⁹²

The E.U. CRM Directive includes in Article 17 the following provision that Member States must transpose into their national law (emphasis added):

Member States shall adopt provisions to ensure that *users provide a collective management organisation*, within an agreed or pre-established time and in an agreed or pre-established format, *with such relevant information* at their disposal *on the use of the rights* represented by the collective management organisation *as is necessary for the collection of rights revenue and for the distribution and payment of amounts due to rightholders*. When deciding on the format for the provision of such information, collective management organisations and users shall take into account, as far as possible, voluntary industry standards.

It follows that, in the event that users do not fulfill this information obligation, appropriate consequences are likely, such as a proportional increase of a user's fees or their loss of certain privileges that lawful, cooperative users may enjoy. It should be self-evident that CMOs ought not to base their calculation of the remuneration to be collected *exclusively* on the information that users supply to them. Their licensing conditions usually define the CMOs' right to control – and, where appropriate, audit – the actual use of works, and this right is generally recognized nationally in statute and/or in case law.⁴⁹³

489 *Ibid.*, [23].

490 *Ibid.*, [32].

491 *Ibid.*, [29]–[30] (emphasis added).

492 The Toolkit, 89.

493 See, e.g., David Oxenford (2021). "Copyright Royalty Board Announces SoundExchange Audits of Royalty Payments for Webcasters (Including Broadcast Simulcasts) and Other Digital Music Services". *Broadcast Law Blog*, January 8. Available at www.broadcastlawblog.com/2021/01/articles/copyright-royalty-board-announces-soundexchange-audits-of-royalty-payments-for-webcasters-including-broadcast-simulcasts-and-other-digital-music-services/

Collective management in the online digital environment

Introductory remarks

The conditions of creation, production and exploitation of works and productions protected by related rights – and with them, the requirements for the protection, exercise and enforcement of copyright and related rights – have gone through spectacular changes during the last few decades. This is due in part to the advent of new technologies – in particular, online digital technologies – and in part to the concentration and globalization of economies and trade. A review of these developments, and the way in which new norms such as the so-called WIPO Internet Treaties of 1996 (i.e., the WCT and the WPPT) and implementation of those norms at the national level have taken the developments into account, is indispensable to any analysis of the problems facing CMOs managing copyright in the online digital environment.

Under the various titles of this chapter, first, it is recalled what assessment was made at the 1997 Seville Forum – held shortly after adoption of the WCT and WPPT – about the impact of online digital technologies on the exercise of copyright. Then it is described how the “umbrella solution” emerged for adapting copyright to the use of works on the Internet, in the form of an exclusive right to authorize interactive making available to the public, and how it has sometimes been misinterpreted. In the following sections t, first, it is discussed to what sorts of interpretation problems the adoption of a “half-open umbrella solution” in the WCT have led from the viewpoint of collective management; second the trends in the European Union toward fragmentation and then partial integration again and those in the United States toward integration are analyzed; third, the CMOs’ digital identification and information systems are outlined; fourth the attempts to establish comprehensive repertoire databases are reviewed; and, finally, the private international law aspects of collective management are dealt with.

Assessing the impact of online digital technologies on the exercise and collective management of copyright at the 1997 Seville Forum

What will be more appropriate and more typical in the digital, networked environment: the individual exercise of rights, their collective management or some other form of joint exercise? This question was the focus of attention at WIPO’s Seville International Forum (see Chapter 2). By its date, in May 1997, WIPO had adopted its Internet Treaties and was gathering signatories to the two.⁴⁹⁴

The participants in the Seville Forum were faced with pessimistic prophecies about the chances of collective management to survive. It was said that – with the assistance of direct rights management (DRM) systems (i.e., the combination of technological protection measures, such as encryption systems, and electronic rights management information, such as digital identifiers) – the Internet would make possible the individual exercise of those rights (such as the right of communication to the public) that had traditionally been exercised effectively only collectively.

Gathering written and oral contributions from many leading experts, the International Forum was able not only to identify the challenges the online digital environment posed to collective

management, to which adequate responses were indeed necessary, but also to rebut the gloomy forecasts. Its key findings, and those of the 1998 and 1999 sessions of the WIPO Advisory Committee on Management of Copyright and Related Rights (established at the Forum's recommendation⁴⁹⁵), may be summarized as follows.

First, the role of collective management will not necessarily decrease in the online digital era – on the contrary, it may well increase – because new business methods were likely to emerge and collective management may be an appropriate solution to the licensing of these.

Second, since they may exercise their rights directly on the Internet by means of DRM systems, rightholders would indeed have greater freedom to choose between the individual exercise and collective management of their rights. This does not mean, however, that it will always be in their interest to choose the former. The reasons why, in fields such as the exercise of “performing rights”, collective management is the best solution in the analogue world remain true in the digital environment. While some exceptionally well-known and popular authors and performers may be able to effectively exercise their rights individually, there is evidence that – at least in the case of traditional forms of collective management – solidarity within the community of creators has benefits, and going their own way can have negative consequences not only for that community but also for the rightholder choosing to do so.

Third, new forms of exercising rights are emerging that combine individual and collective elements, with promising implications of exercising rights; and, in certain cases, this will offer further options to rightholders for the management of their rights.

Fourth, online digital technologies both pose serious challenges and offer promising opportunities for traditional CMOs (such as musical performing rights societies with collective licensing conditions, tariff systems and distribution rules). On the one hand, the prospect of individual licensing may undermine the monopolistic position of such organizations in those fields in which collective management was the only feasible option; on the other hand, the same technologies that challenge the established system can support its improvement, helping CMOs to operate more efficiently and more effectively attract both rightholders and users. As a result, traditional collective management organizations may – indeed, should – become more efficient and stronger.

Fifth, the phenomenon of multimedia – both offline productions and combinations of different categories of work and objects of related rights in the global digital network – fuels a need among CMOs for coalitions, so that they can offer users “one-stop shops” (i.e., single points of contact for all necessary authorization), or to participate in even more general cooperation. Individual owners of rights may extend their licensing information to these coalitions or grant the coalitions authority to approve uses on their behalf. This does not mean that, in such a “coalition”, all of the various licensing sources become homogenous; “traditional” authors’ societies may preserve their autonomy.

Debating the legal characterization of acts of interactive making available to the public; the “umbrella solution” and its application in Article 8 of the WCT

The analysis of collective management in the online digital environment demands a review of the debates leading to the adoption of the provisions of the WIPO “Internet Treaties” on the exclusive rights to authorize acts of interactive online making available works to the public based on the “umbrella solution” – along with the problems to which the “half-opened umbrella” way of the application of the solution in Article 8 of the WCT have led.

During the preparatory work of the WCT and the WPPT, there was broad agreement among the experts and government delegations that the inclusion of works in and their transmission through,

495 The Advisory Committee held two sessions: one on December 14 and 15, 1998, and the second on December 8 and 9, 1999. See WIPO documents ACMC/1/INF, ACMC/1/1, ACMC/1/2 and ACMC/2/1. Its tasks were then taken over by the Standing Committee on Copyright and Related Rights.

the Internet should be subject to an exclusive right of authorization. There was also a desire to apply existing norms to this new way of using works (since established practices and long-term contractual relations were based on these norms).

However, when the existing rights were reviewed, it became evident that digital interactive transmissions blurred the boundaries between the two traditional groups of rights, copy-related rights and non-copy-related rights.⁴⁹⁶ in two ways. First, commercial dissemination of protected material in interactive networks may take place with DRM support allowing access and use only if members of the public fulfill certain conditions. In such a case, the actual use – depending on what the DRM system allows under what conditions – is not necessarily determined at the moment of the making available of a work and by only the person or legal entity who or which carry out the act of making available. The members of the public may decide when and from where they access the work made available; and it is also they who may choose to defer the use by downloading a less temporary copy or to use it directly, by studying online through a database, by watching moving images online or by listening to music streamed online.

Second, hybrid forms of uses emerge from the online making available of works and their subsequent transmissions, and these uses cannot always be neatly defined as involving copy-related or non-copy-related rights: when a user downloads a copy, the download is also obtained through a transmission of electronic impulses; and, when protected materials are streamed, it also goes along with the appearance of temporary copies.

Therefore, it was no surprise that the various governments, when trying to determine which existing right(s) might be applied to cover the acts of interactive making available of works to the public, did not necessarily find themselves on the same side of the copy-related rights and non-copy-related rights border. Two major trends emerged – one, trying to base the solution on the right of distribution; the other, preferring some general communication to the public right. It was not merely on some theoretical basis that governments were wrestling with this in the abstract: their positions were informed by the existing national laws (i.e., which rights, for whom and to what extent were granted), established practices, application of those laws and the specific national interests involved.

Faced with two basic options – application of the right of distribution or application of the right of communication to the public (with a further option of somehow combining these) – the international copyright community quickly recognized this would be no simple decision from which the further consequences would reveal themselves automatically.

Delegations to the Committees responsible for the preparatory work of what later became the WCT and the WPPT were unable to agree how to legally characterize the acts of online making available of works; thus, the work stalled. Seeking to break the deadlock, the WIPO Secretariat offered a compromise – referred to as an “umbrella solution” – to the negotiating countries:

- (i) the act of interactive making available to the public should be neutrally described as such (e.g., as making available a work to the public by wire or by wireless means, for access by members of the public), free of any specific legal characterization;
- (ii) that description should not be technology-specific, but it should clearly express the interactive nature of digital transmissions in a way that a work is considered to be made available to the public when the members of the public may access it at a time and at a place of their own choosing;
- (iii) national legislators should have reasonable freedom in characterizing the exclusive right – that is, in choosing the right(s) to be applied in law; and
- (iv) the gaps in coverage of the relevant rights under the Berne Convention – the right of communication to the public and the right of distribution – should be eliminated.

⁴⁹⁶ *Copy-related rights* (in addition to the basic right of reproduction) means the right of distribution, the right of rental or the right of public lending (where recognized) to cover acts whereby copies are made available to the public. These copies are typically for “deferred” use, since members of the public will engage in the act of making available and the perception (i.e., studying, watching, listening to) of the signs, images and sounds in which a work is expressed or a sound recording (i.e., the actual “use”) at different times. *Non-copy-related rights* (e.g., the right of public performance, the right of broadcasting, the right of communication to the public by wire) covers those acts through which works or objects of related rights are made available for the person’s direct – i.e., not “deferred” – use (i.e., perceiving, studying, watching, listening to).

A group of industrialized countries, known as the “Stockholm Group”, agreed among themselves that they accept this “umbrella solution” proposed by the WIPO Secretariat and that the delegation of the European Community would present it with the support of all the Group. Consultation meetings organized by WIPO in the three major regions of developing countries shared the solution more widely, and it was finally adopted by consensus at the 1996 Diplomatic Conference in Article 8 of the WCT and Articles 10 and 14 of the WPPT (as well as, later, Article 10 of the BTAP), expressed as:

exclusive right of authorizing [...] the making available to the public of [...] works (performances fixed in phonograms, phonograms, performances fixed in audiovisual fixations), by wire or wireless means,⁴⁹⁷ in such a way that the members of the public may access them from a place and at a time individually chosen by them.

Had the Stockholm Group proposed only this expression of the original “umbrella solution”, there would now be fewer issues of interpretation concerning the exclusive right of making available to the public. However, the proposal submitted by the European Community on behalf of the Group for what later became Article 8 of the WCT opened the “umbrella” only halfway: it applied the solution quite specifically.

Because those countries that preferred the right of communication to the public as a general option were in the majority, the right of communication to the public was first extended to all categories of works and then it was “clarified” that it also covers the acts of interactive making available to the public:

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 14(1)(ii) and 14*bis*(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.*⁴⁹⁸

As a second step, however, the U.S. delegation (as it had been agreed upon at the informal consultations before) proposed an alternative way of implementing Article 8 in a statement that no negotiating delegation (including those comprising the Stockholm Group) opposed.

The United States was in favor of characterizing the acts of making available to the public as acts of distribution, but without the effect of exhaustion of the right when applied. The statement it brought before Main Committee I suggested that the Contracting Parties should be free to implement the obligation to grant an exclusive right to authorize acts of making available to the public by applying a right other than the right of communication to the public, or a combination of different rights, as long as all acts of interactive making available to the public were fully covered by an exclusive right (with appropriate exceptions).⁴⁹⁹ By the “other” right, of course, the U.S. delegation meant mainly the right of distribution.

The statement is valid not only because no delegation opposed it, but also – and more importantly – because it is reflected well-established practice among Berne Union countries when applying the rights granted by the Berne Convention. That Berne countries may characterize a right differently in national law from its characterization under the Convention has never been challenged. For example, in some countries, the concept and right of public performance covers not only those acts that the Berne Convention defines as public performance of works but also the right of broadcasting and the right of communication to the public, which are separate rights under the Berne Convention. In other countries, the right of communication to the public is a general right covering all three categories of the rights mentioned. In yet other countries, it is the right of broadcasting that includes communication to the public by wire. (It is important to underline, however, that a country’s freedom to characterize variously in law the acts to be covered by the

497 The words “by wire or wireless means” appear earlier in the text of the proposal as part of the provision on a broadly construed right of communication to the public.

498 Article 8 of the WCT (emphasis added).

499 See WIPO (1999). *Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions*, Geneva 1996, Vol. I. Geneva: WIPO, 675, para. 301. Available at www.wipo.int/edocs/pubdocs/en/wipo_pub_348_vol_i.pdf (hereinafter, Records of the 1996 Diplomatic Conference).

rights provided in the treaties is limited by its obligation to grant a minimum level of protection in respect of those rights.⁵⁰⁰)

The “umbrella solution” recognized the gaps in the Berne Convention among even these differing legal characterizations, as boundaries blurred between copy-related rights and non-copy-related rights, and hybrid acts emerged from the digital interactive making available of works. As regards the right of distribution, the WCT eliminated those gaps. 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, an exclusive right of distribution. In the agreed statement added to Articles 6 and 7 (on the rights of distribution and rental) – namely, that, “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 deny the applicability of the right of distribution for digital, interactive transmissions within the “umbrella solution” framework. The principle of *relative* freedom to characterize variously in law the acts and rights provided in the treaties does, however, have an effect. Since exhaustion of the exercise of the right of distribution applies, under Article 6 of the WCT, only to *tangible* copies, the effect of that exhaustion cannot be extended to acts of interactive making available of digital – that is, *intangible* – copies under Article 8. Consequently, no online digital exhaustion is allowed under the WIPO Internet Treaties.

Theories according to which, for an act of making available a work to the public to take place, the making available of the work to the public is not sufficient

The expression “making *available* to the public” (emphasis added) appearing in Article 8 of the WCT, Articles 10 and 14 of the WPPT, and Article 10 of the BTAP may hardly be interpreted – in accordance with Articles 31 and 32 of the VCLT⁵⁰¹ – in any way other than that, as soon as a work is uploaded to the Internet and thus *becomes available* to members of the public, who may access it from a place and at a time of their own choosing, *the act of making available to the public takes place*.

Since the text of the treaty provisions is clear in this regard, there is no need to confirm it with reference to the “preparatory work”.⁵⁰² Nevertheless, the documents of the 1996 Diplomatic Conference make it clear that there *was* consensus among the delegations about this meaning of “making available to the public”.

When the delegation of the European Community proposed to the preparatory committees before the Diplomatic Conference a text that – with only minor differences – was substantively the same as Article 8 of the WCT; it clarified that:

500 Ficsor, *WIPO Guide and Glossary*, 294 (emphasis added), defines “the principle of *relative* freedom of legal characterization of acts and rights” in this way:

1. It is a broadly applied practice in national legislation to use terms other than those appearing in the *international norms on copyright and related rights* concerning certain acts covered by such rights, and consequently by the rights themselves; that is, to characterize the acts and rights concerned in a way different from the way they are characterized legally in the said international norms. For example, several countries grant a “*right of public performance*” in a way that it covers more or less all *non-copy-related rights* (in particular, also the *right of broadcasting* and the *right of communication to the public by cable (wire)*, which, in the *Berne Convention* are construed as separate rights), or it is also frequent in national laws that a broader *right of broadcasting* is provided which also covers the *right of communication to the public by cable (wire)*, a separate right under the *Berne Convention*.
2. Such a practice is accepted and regarded as legitimate, provided that the level of protection granted by the legislation of the given country, in spite of the differing legal characterization of the acts and rights concerned, corresponds to the minimum level of protection prescribed by the relevant *international norms on copyright and related rights* (such as in respect of the nature of the rights – whether *exclusive rights of authorization* or a mere right to *remuneration* – or the scope of *exceptions* to and *limitations* on them). For example, if the concept of broadcasting is extended also to *communication to the public* and even to (interactive) *making available to the public*, this does not authorize the legislators of the country concerned to extend the *limitations* allowed in Article 11bis (2) of the *Berne Convention* (non-voluntary licenses or obligatory collective management) beyond the scope of the *right of broadcasting* determined in the *Berne Convention* (in its Article 11bis(1) [...]).

501 See Articles 31 and 32 of the VCLT – especially Article 31(1) under which “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (emphasis added).

502 In the sense it is provided for in Article 32 of the VCLT (emphasis added):

- Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:*
- (a) *leaves the meaning ambiguous or obscure; or*
 - (b) *leads to a result which is manifestly absurd or unreasonable.*

[U]nder the proposal, for the completion of the act of communication to the public, *it would not be required that an actual transmission takes place*; for this, the mere making available of works to the public (for example, the uploading of a work to a bulletin board) for subsequent transmission would be sufficient.⁵⁰³

More importantly, the notes added to Article 10 in the Basic Proposal – what became Article 8 of the WCT with the same text – also stated this clearly: “The relevant act is the making available of the work by providing access to it. *What counts is the initial act of making the work available.*”⁵⁰⁴ This is so in the same way as is the case for the exclusive right of distribution, which – under Article 6 of the WCT and Articles 8 and 12 of the WPPT – applies for “making *available* to the public” of copies (emphasis added). The act of distribution takes place as soon as copies are made available; it is not a further condition that the members of the public buy the copies – even if they usually do so, of course.

However, the following question may be – and sometimes is – asked: if an act of making available to the public takes place by uploading and thus by rendering a work or object of related rights accessible, how may the subsequent interactive transmissions in which the actual use by the public consists be taken into account?

The answer to this question follows directly from the dialectics of interactivity. The act is making a work available to access for use by the members of the public. The actual access by the members of the public consists in the *realization* of the potential to access. The final classification of the act thus realized depends on two things: for what kind of use(s) the work is made available; and for what kind of use(s) the members of the public have actually accessed the work so made available.

In terms of the concept of making available to the public, practically the same applies as does to the concept of publication, which is a specific, qualified form of the distribution of copies. Under Article 3(3) of the Berne Convention, a work is published if “the *availability* of [...] copies has been such as to satisfy the reasonable requirement of the public” (emphasis added). In this case too, the *availability* of copies is sufficient, as Sam Ricketson and Jane Ginsburg point out on the basis of an analysis of the treaty text and its “preparatory work”:

*The wording of the definition indicates that it is the availability of copies that constitutes publication. Thus, if there is no public demand for copies, this should be irrelevant – the copies are available to meet any demand that may reasonably be expected to exist, and the author’s Berne coverage should not be prejudiced by the fact that there is none at all. [...] [The status of “published work” should not be denied the work, simply because no one chooses to buy the book.]*⁵⁰⁵

Jörg Reinbothe and Silke von Lewinski – who were among the most active negotiators at the 1996 Diplomatic Conference on behalf of the then European Community – deal with this question in the following way:

[T]he act of “*making available*” to the public for access *covers the offering of works for access and extends to the entire transmission to the user*, if such transmission takes place. Accordingly, *the mere establishment of a server which may be accessed individually by members of the public and at their choice regarding time and place constitutes the act of making available* under Article 8 WCT [(sic!)]. *If a work is actually accessed, the whole act of communication is covered by the exclusive right*, including the offering of the work in a server and its entire transmission up to the terminal from which the member of the public gets access to the work. This interpretation is confirmed by the wording: *availability of the works is only accomplished when the work has been transmitted* to the member of the public so that he or she may access it from his or her terminal.⁵⁰⁶

503 WIPO document BPC/CE/VII/4-INR/CE/VI/4, 4 (emphasis added).

504 Records of the 1996 WIPO Diplomatic Conference, 204 (emphasis added).

505 Sam Ricketson and Jane Ginsburg (2006). *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*. Oxford: Oxford University Press, 266 (emphasis added).

506 Reinbothe and von Lewinski, *The WIPO Treaties 1996*, 108 (emphasis added, particularly to the words “only accomplished” to stress the similarity with the acts of distribution accomplished only by the actual purchase of copies – i.e., not by the distributor but by the buyer).

The author of the present book has also characterized elsewhere the two elements of the concept (making available and its accomplishment by interactive transmission) in this way:

[U]nder Article 8 of the WCT and Article 3(1) of the Information Society Directive, *the act of "communication to the public" in the form of "making available" is completed by merely making a work available for on-demand transmission*. If then the work is actually transmitted in that way, it does not mean that two acts are carried out: "making available" and "communication to the public".⁵⁰⁷ The entire act thus carried out will be regarded as communication to the public. Of course, it is not irrelevant from the point of view of legal consequences whether or not on-demand transmissions for which the work is made available are actually carried out and how many times, in which way and with what consequences. It is very relevant, for example, for the calculation of damages.⁵⁰⁸

Despite the clear meaning of Article 8 of the WCT and Articles 10 and 14 of the WPPT (as well as of Article 10 of the BTAP) – further confirmed by the "preparatory work" of the provisions – such that no interpretation might be well founded other than that an act of interactive making *available* to the public in practice takes place when a work is made *available* to the public for access in principle, some commentators have argued otherwise – namely, that the work must also actually be accessed and be transmitted.

A group of academics, writing as the "European Copyright Society", presented such a theory in an opinion in connection with the CJEU case *Svensson*.⁵⁰⁹ The main issue brought before the Court was not specifically this, but the copyright status of hyperlinks. They said that "hyperlinking in general should be regarded as an activity that is not covered by the right to communicate the work to the public embodied in Article 3 of Directive 2001/29", arguing that "[h]yperlinks *are not communications because establishing a hyperlink does not amount to 'transmission' of a work, and such transmission is a prerequisite for 'communication'.*"⁵¹⁰

That group of academics referred to Article 3(1) of the Information Society Directive, where – in language that is almost identical to that of Article 8 of the WCT – this right is provided for truly as a special case of a broad right of "communication" to the public. However, they ignored that Article 3(2), which provides for *the same right* in the subject matters of related rights makes no reference to communication (or transmission). It is in this context that they referred to Article 8 of the WCT (but not also to Articles 10 and 14 of the WPPT, in which – with, *mutatis mutandis*, the same language – the right of making available to the public is provided for as a stand-alone right):

The Basic Proposal for the Treaty [the WCT] which contained a draft Article 10, in similar terms [as the finally adopted Article 8], was accompanied by an explanatory commentary. Paragraphs [10.15]–[10.16] confirm the equation of "communication" with "transmission":

"[10.15] As communication always involves transmission, the term 'transmission' could have been chosen as the key term to describe the relevant act. The term 'communication' has been maintained, however, because it is a term used in all relevant Articles of the Berne Convention in its English text. It deserves to be mentioned that in the French text the expression 'la transmission publique' has been used in Article 11 and 11ter, and the expression 'la transmission par fil au public' has been used in Article 14 while 'communication to the public' and 'communication to the public by wire' are the English expressions. In Article 11bis of the French text of the Convention, the corresponding expression is 'la communication publique'.

[10.16] It seems clear that, at the treaty level, the term 'communication' can be used as a bridging term to ensure the international interoperability and mutual recognition of

507 "Communication to the public" in the sense that it covers not only interactive streaming but also transmissions for downloading (i.e., certain acts taking the form of making available copies and, in that sense, similar to acts of distribution but still qualifying as acts of making available to the public, because – as the agreed statement concerning Article 6 of the WCT clarifies – the right of distribution applies only to making available to the public of tangible copies).

508 Ficsor, *The Law of Copyright and the Internet*, 496–499 (emphasis added).

509 Judgment of the Court (Fourth Chamber), February 13, 2014, *Nils Svensson and Others v Retriever Sverige AB*, Case C-466/12, ECLI:EU:C:2014:76.

510 European Copyright Society (undated). Opinion on the reference to the CJEU in Case C-466/12 *Svensson*, para. 6 (emphasis added). Available at <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>

exclusive rights that have been or *will be provided in national legislations using either the term 'transmission' or the term 'communication.'* The former refers to a technical transfer while the latter implies, in addition to the technical transfer, that something is communicated. For the purposes of the proposed Treaty, this slight difference between the terms is irrelevant. What is transferred or communicated is the work."⁵¹¹

These academics disregarded the principle of *relative* freedom of legal characterization in national laws of the acts and rights under the international treaties. The emphasis is on the adjective "relative"; in characterizing an act or right in its national law differently from its characterization under the treaties, a country cannot change its nature (e.g., providing for a compulsory license rather than an exclusive right) or reduce the scope of its application as provided in the treaty. In spite of this, this group of authors expressed the view that the act of making available of a work for access by the members of the public does not take place yet when the work is made available for access by the members of the public from a place and a time individually chosen by them, but only when the members of the public do access it and, thus, its actual "communication" (transmission) also takes place.

They did not take into account that, in the same Basic Proposal from which they quoted notes to Article 10 of the WCT (eventually adopted as Article 8), it is made clear in an unmistakable manner that: "The relevant act is the making available of the work by providing access to it. *What counts is the initial act of making the work available.*"⁵¹²

The Executive Committee of the International Literary and Artistic Association (ALAI) – which numbers also several prominent European academics among its members – rebutted the theory of the so-called European Copyright Society thus:

The exclusive right of "making available" under the WCT and the implementing EU legislation covers the *offering* to the public of a work for individualized streaming or downloading; in addition, where it takes place, the actual transmission of a work to members of the public also is covered, both irrespective of the technical means used for making available. [...] ⁵¹³

The CJEU in *Svensson* itself also rejected the theory and found that:

As is apparent from Article 3(1) of Directive 2001/29 [the Information Society Directive], for there to be an "act of communication", *it is sufficient, in particular, that a work is made available to a public* in such a way that the persons forming that public may access it, *irrespective of whether they avail themselves of that opportunity.*⁵¹⁴

In the United States, the misconception of making available and the existing provisions of the U.S. Copyright Act have also created problems. In 2016, the U.S. Copyright Office organized consultations on the status of implementation of the right of making available to the public. The opinion Jane Ginsburg presented within the consultation framework described the existing situation in this way:

The WCT "making available" right applies to the offering to the public of on-demand access to a work in the form of a stream or of a download. *Compliance with the WCT requires a member state to cover both kinds of access (streaming and downloading), and to cover not only actual transmissions of streams and downloads, but also the offering to communicate the work as a stream or a download.* [...]

The "umbrella solution" adopted at the 1996 Diplomatic Conference that yielded the WCT allows member states to implement the art. 8 making available right through a variety of means, including, for example, an all-embracing "making available" right, or a combination of a public performance right covering streams and a digital distribution right covering

511 *Ibid.*, para. 21, quoting Records of the 1996 Diplomatic Conference, 206 (emphasis added).

512 Records of the 1996 Diplomatic Conference, 204, para. 10.10 (emphasis added).

513 ALAI (undated). *Report and Opinion on the Making Available and Communication to the Public in the Internet Environment: Focus on Linking Techniques on the Internet*, 1 (emphasis original). Available at www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf

514 *Svensson*, [19] (emphasis added).

downloads. *Whatever the means chosen, however, the member state must ensure that its law covers the offering to the public of on-demand access to a work both as a stream and as a download. [...]*

The U.S. implementation has assigned the offering and communication of digital streams to the public performance right, and downloads to the reproduction and distribution rights. Although case law and statutory authority clearly establish that the US distribution right embraces delivery of digital copies, decisions interpreting the scope of the distribution right differ regarding the essential question of coverage of *offers* to download. A majority of courts addressing that question have so far held that the right requires actual delivery of the download: a mere offering of the work to the public for downloading does not suffice. In addition, recent case law has called into question the scope of the public performance right in on-demand communications based on individualized storage copies. [...]

Unless courts consistently interpret the 106(3) distribution right to cover offers of digital downloads, and the 106(4)(5)(6) public performance and display rights to cover all kinds of on-demand offers of content for streaming access, the U.S. will not be in compliance with its international obligations. If courts persist in their current crabbed interpretations, Congress may need to step in. If Congress does legislate in this area, it would be preferable to provide for a true “making available right”, echoing WCT art. 8, rather than the piecemeal solution that currently pertains. The “umbrella solution” was devised to enable the U.S. to adhere to the WIPO Copyright Treaties without amending the statute, but judicial interpretation to date has ripped the umbrella’s canopy from its spokes, leaving exclusive rights forlornly drenched by the torrent of uncompensated new uses and business models.⁵¹⁵

The U.S. Copyright Office drew similar conclusions, yet managed to sound more optimistic:

[T]he Copyright Office concludes that the exclusive rights of copyright owners set forth under 17 U.S.C. § 106 collectively meet and adequately provide the substance of the making available right.

Consistent with the plain language of the Treaties, which defines the making available right in terms of whether members of the public “*may access*” a copyrighted work, U.S. law should be read to include the offer of public access, including through on-demand services, without regard to whether a copy has been disseminated or received. Doing so is also consistent with the judicial opinions of foreign jurisdictions on this point.

Within the particular context of downloads, U.S. law provides the making available right through the exclusive right of distribution under Section 106(3). While some courts have failed to find distribution in the absence of evidence of completed transfers, and therefore declined to recognize claims based solely on making copies available to the public for download, the Copyright Office concludes that the appropriate reading of Section 106(3) in the context of making available claims is that it covers offers of access.⁵¹⁶

As discussed below in the chapter, the U.S. Music Modernization Act of 2018 has brought about some improvement in the situation created by case law (although it has raised some other – more easily resolvable – issues of interpretation).

In the context of this book, what is important is that, where the right of making available to the public is exercised through collective management (in a country that fulfills its obligations under the WIPO Treaties) – irrespective of how it is characterized in the given national law – it is already applicable when a work is made available to the public. However, the legal characterization of the exclusive right of making available to the public is far from irrelevant to the status of the various CMOs and the rightholders represented by them, as it will be seen next.

⁵¹⁵ Comments of Professor Jane C. Ginsburg – Study on the Right of Making Available Docket No. 2014–2, April 7, 2014. Available at www.copyright.gov/docs/making_available/comments/docket2014_2/Jane_Ginsburg.pdf

⁵¹⁶ U.S. Copyright Office (2016). *The Making Available Right in the United States: A Report of the Register of Copyrights*. February, 4. Available at www.copyright.gov/docs/making_available/

Impact of legal characterization on collective management of the right of making available to the public

The provisions on the right of making available to the public have been included in the WCT and the WPPT – with some minor wording differences – as the European Community proposed them. It was therefore understandable that the Information Society Directive, with which the two treaties were implemented in Community (now European Union) law, provisions appear that, in substance, are the same as in Article 8 of the WCT and Articles 10 and 14 of the WPPT (with the exception that the right of making available to the public extends also to other related rights provided in E.U. law).

Article 3 of the Information Society Directive provides:

1. Member States shall provide authors with the exclusive right to authorise or prohibit 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 them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - (a) for performers, of fixations of their performances;
 - (b) for phonogram producers, of their phonograms;
 - (c) for the producers of the first fixations of films, of the original and copies of their films;
 - (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite. [...]

Since the text is substantively the same as what was proposed by the then European Community and adopted as Article 8 of the WCT and Articles 10 and 14 of the WPPT, it is to be expected that the same considerations should apply to its interpretation. The act of making available to the public is completed as soon as a work or object of related rights is uploaded in a way that it becomes accessible to the members of the public from a place and at a time of their own choosing – regardless of whether the interactive use thus made possible allows only perception and/or also the downloading of copies.

The national laws of the Member States correspond to these concepts. This is true even where exceptionally (e.g., in France) the national law was not fundamentally modified to implement the right of making available to the public, but rather an existing right was deemed suitable to absorb the broadly construed right of communication to the public, including the right of (interactive) making available of works (e.g., in France, the broadly interpreted “droit de représentation”, or representation right). It is true too where a Member State (in this case, a former Member State) has partnered a special term – namely, “electronic transmission” – with the phrase “communication to the public” and a full description of an act of interactive making available to the public, as the United Kingdom provides in section 20(2)(b) of its Copyright, Designs and Patent Act 1988 (emphasis added):

- (2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include—
 - (a) the broadcasting of the work;
 - (b) the *making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.*

The courts have successfully applied section 20(2)(b) in practice not only to streaming but also to downloading.⁵¹⁷

⁵¹⁷ See, e.g., *Twentieth Century Fox Film Corporation and ors v. Newzbin Ltd* [2010] EWHC 608 (Ch); *Twentieth Century Fox Film Corporation and ors v. Newzbin Ltd* [2010] EWHC 608 (Ch) (*Newbin No. 2*).

Where the same organization manages both performing rights and “mechanical” rights or two organizations do so in close alliance, it is not difficult to take into account the hybrid nature of the acts of interactive making available to the public. As already discussed above, the hybrid nature of such acts mean that, although an act of mere streaming (that does not result in downloading relatively permanent copies) is truly similar to the acts of broadcasting or communication to the public in the offline context, it still entails the appearance of temporary copies both in the progress of the transmission and at the end-user’s computer – not to mention the original upload, which involves the making of a more permanent copy on the server. The hybrid nature of the acts of interactive making available works to the public is also manifested in the case of downloading services, because the copy on the end-user’s computer is made through transmission (and, in that aspect, in a way similar to the acts of broadcasting or communication to the public), and hence it may be characterized as distribution through reproduction through transmission.

The notes added at the 1996 Diplomatic Conference to Article 10 of the Basic Proposal for the treaty (later adapted as Article 8 of the WCT) referred to the term “transmission” as a kind of synonym for “communication”, and foresaw that the exclusive right under the provision “[would] be provided in national legislation using *either* the term ‘*transmission*’ or the term ‘*communication*’”.⁵¹⁸ The notes pointed out that the French text of the Berne Convention⁵¹⁹ even uses alternatively the words “transmission” (in Articles 11(1)(ii), 11^{ter}(1)(ii) and 14(1)(ii)) and “communication” (in Article 11^{bis}) in those cases in which, in all corresponding provisions of the English version, only the word “communication” appears.⁵²⁰ The note characterizes the relationship of the two terms in this way: “The former refers to a technical transfer while the latter implies, in addition to the technical transfer, that something is communicated. *For the purposes of the proposed Treaty, this slight difference between the terms is irrelevant.*”⁵²¹

The characterization that the two terms are synonyms between which any minor difference is to be dismissed and hence that their effect will be identical irrespective of which is used in national laws has been proven overly optimistic – and this has been manifested in contradictions emerging in the laws of the various Contracting Parties.

Neither “transmission” nor “communication” alone is a well-chosen generic expression capable of covering the act of interactive making available to the public in the second part of the Article 8 of the WCT (described in the same way in Articles 10 and 14 of the WPPT as a stand-alone right, where the language is truly in accordance with the “umbrella solution”). In Article 8 of the WCT, the expression “making available to the public” is used, which has *a well-known neutral meaning* whether it is a copy-related act (i.e., distribution or, in the online digital context, downloading, which is a kind of “distribution through reproduction through transmission”) or a non-copy-related act (e.g., public performance, broadcasting, communication to the public or, in the online digital context, streaming) – noting that the very offer of a work to be accessed for any such acts is sufficient for the right to apply. *That neutral meaning is well-known because it is the same as that where the Berne Convention uses this expression* (“making available to the public”) – namely, in Articles 7(2) and (3) and 10(1).⁵²²

The term “transmission” may have been suitable if it were duly read together with the text on the right of interactive making available to the public, in view of the fact that both streaming and downloading take place through interactive transmissions. “Communication” could have passed as a similarly neutral term only if it could have been easily understood as *telecommunication*; in that case, it might have been sufficiently broad to also cover technical transmissions in the course of which members of the public do not directly perceive the transmitted works. In the first part of

518 Records of the 1996 WIPO Diplomatic Conference, 204, para. 10.10 (emphasis added).

519 Which, under Article 37(1)(c) of the Berne Convention, is decisive for interpretation of Convention provisions.

520 Records of the 1996 WIPO Diplomatic Conference, 206, para. 10.15.

521 *Ibid.*, para. 10.16 (emphasis added).

522 Ficsor, *WIPO Guide and Glossary*, 48–49, describes this neutral meaning of Article 7(2) where it is first used in the Convention:

It is to be noted that the concept of “making available to the public” is broader than the concept of “publication” as defined in Article 3(3) of the Convention. In addition to making available a work to the public through distribution of copies (which takes place in the case of “publication”), it also extends to such acts as public performance, broadcasting and communication to the public by wire; that is, to “making available” works without reproduction and distribution of copies. Also, it goes without saying that it equally covers interactive making available of works as provided for in Article 8 of the WCT (in the case of which, as discussed below in the commentary to that Article, the elements of copy-related and non-copy-related aspects of uses of works may be more complex).

Article 8 of the WCT, however, the concept of “communication” appears exclusively in connection with (non-interactive) acts where the communication is made directly for perception by members of the public. Interpreting Article 8 correctly has consequently become dependent on whether or not all the sources provided for under Articles 31 and 32 of the VCLT – namely, sources such as the context of the provision to be interpreted (Article 31.1), and “the preparatory work of the treaty and the circumstances of its conclusion” (Article 32). If the interpretation takes place as provided in Article 31.1 – “in good faith in accordance with the ordinary meaning of the terms of the treaty in their context” – it may hardly be understood otherwise than that the same expression (“making available to the public”) in two treaties adopted by the same diplomatic conference cannot be understood to have different meanings. Nor is it appropriate, for all these reasons, to interpret the simple phrase “communication to the public” in Article 8 of the WCT as suitable to express the complex meaning of the act and right of (interactive) making available to the public.

In spite of this, there are certain substantive differences in the ways in which the right of making available to the public has been interpreted and applied.

Some countries have taken into account the hybrid nature of interactive making available to the public stressed in the course of the preparatory work. Four examples will demonstrate the ways in which CMOs in those jurisdictions are reflecting that, in their rules irrespective of whether or not the acts take the form of streaming or downloading (although such difference is reflected in the distribution rules).

In France, the distribution rules of SACEM (for “performing rights”) and SDRM (for “mechanical rights”) are as follows.

- *Downloading*: 10 percent for communication to the public right (droit de représentation publique, or DEP) – 90 percent for mechanical rights (droit de reproduction mécanique, or DRM)
- *Streaming for payment* (Deezer, Apple Music, Spotify Premium, Netflix ...): 25 percent DEP – 75 percent DRM
- *Streaming – advertisement-based free* (Spotify Basic, YouTube ...): 50 percent DEP – 50 percent DRM.⁵²³

In the United Kingdom, the PRS for Music (for “performing rights”) and MCPS (for “mechanical rights”) apply the following rules:

- *Downloading*: 25 percent communication to the public right – 75 percent mechanical right
- *Streaming*: 50 percent communication to the public right – 50 percent mechanical right.⁵²⁴

In Germany, GEMA manages both “performing” and “mechanical” rights, and set out its distribution rules thus:

- *Downloading*: 33.33 percent communication to the public rights – 66.67 percent mechanical right
- *Streaming*: 67.67 percent communication to the public rights – 33.33 percent mechanical right.⁵²⁵

Likewise Hungarian CMO Artisjus:

- *Downloading*: 25 percent communication to the public rights – 75 percent mechanical right
- *Streaming*: 75 percent communication to the public rights – 25 percent mechanical right.⁵²⁶

Both France and the United Kingdom have implemented the rights by using in their national laws certain neutral terms. The national laws of Germany and Hungary use the language of Article 8 of the WCT.

523 SACEM (2020). *Règles de Répartition – Édition 2020*. Available at https://createurs-editeurs.sacem.fr/actuimg/fr/live/v4/Createurs-Editeurs/Actualites/2021/2nd_semestre_2021/Regles_repartition_2020.pdf

524 PRS for Music (2022). *Online royalties*. Available at www.prsformusic.com/royalties/online-royalties

525 GEMA (2017). *GEMA Distribution Plan*. Available at www.gema.de/fileadmin/user_upload/Gema/geschaeftsberichte/Verteilungsplan_2017_auf_Englisch.pdf

526 Artisjus (2021–21). *Felosztási Szabályzat*. Available at www.artisjus.hu/wp-content/uploads/2020/06/FelosztasiSzabalyzat_2020.pdf

There are also examples where countries have *not* interpreted the term “making available to the public of works [or productions protected by related rights], by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them” as such. Instead of this, attention has been paid only to its inclusion in provisions on a broad right of communication to the public. Those countries have not taken into account the note to the draft Article 10 of the WCT (adopted later as Article 8) in the Basic Proposal, a decisive document of the “preparatory work” to which Article 32 of the VCLT refers as supplementary source of interpretation – according to which the word “communication” should be interpreted as a synonym of the neutral term “transmission”, apt to cover both communication-type (streaming) and distribution-type (downloading) interactive uses.

It has been already seen above that while the U.S. Congress found that the existing exclusive rights provided in several sections of the Copyright Act – the right of distribution (section 106(3)), along with the rights of reproduction (section 106(1)) and public performance and display (sections 106(4) and (6) and 106(5)) – jointly formed an adequate basis for the application of the right of interactive making available, the courts have been reluctant to apply those existing rights consistently to acts of interactive making available to the public. It has proved to be a problem that the language describing interactive making available of works, performances and phonograms to the public that appears in Article 8 of the WCT and Articles 10 and 14 of the WPPT is not present exactly in the U.S. Copyright Act. Although it was seen above in the chapter that the U.S. Copyright Office has proved persuasively that, in case of correct implementation of the relevant provisions, it must have been found that the mere making available of (i.e., offering access to) works and phonograms (“phonorecords”) is enough to comprise the act, the courts tend to consider otherwise. According to them, the concept of distribution requires *actual* transfer of property of copies and the concept of public performance requires *actual* transmission of works and phonograms to the public to be perceived (i.e., the downloading of works and phonograms in compressed files precludes the possibility of perceiving the work in the course of the transmission and hence, “by definition”, it excludes the application of the rights of public performance and public display).⁵²⁷

It is to be noted, however, that – as it is discussed in the chapter below – the hybrid nature of acts of interactive making available to the public has been nonetheless recognized in the United States through legislative provisions concerning streaming in the Music Modernization Act of 2018 (although no symmetric recognition has been made concerning the hybrid nature of downloading). However, it has turned out that linking the right of interactive making available to the public to the right of communication to the public may occasionally have an undesirable effect on interpretation even where the second part of Article 8 of the WCT is reproduced almost verbatim in national law. The implementation in Canada of the right of interactive making available to the public is an example.

When Canada implemented the provisions of the two WIPO Internet Treaties in its Copyright Modernization Act of 2012, it included the following provision as subsection 2.4(1.1):

For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

This text may be regarded to be in accordance with Article 8 of the WCT if the term “telecommunication” is understood to correspond to the words “by wire or by wireless means” in the Treaty, which seems to be the case. Either way, in accordance with Article 8 of the WCT, the text has made it clear that the newly recognized right is applicable when a work is made available (offered) to the members of the public, such that they might access it interactively. It is another matter entirely that it did not correspond to Articles 10 and 14 of the WPPT, which – concerning the rights of performers and producers of phonograms – provides for an exclusive right of interactive making available to the public without any reference whatsoever to “communication to the public”. This was not relevant in the given case, however, in which the applicability of the tariffs of authors’ society SOCAN for interactive making available was at issue.

⁵²⁷ In *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014), the U.S. Supreme Court has at least clarified that individualized transmission is included within the rights of public performance and public display.

The tariffs had to be approved first by the Canadian Copyright Board, which – in a well-documented decision – interpreted them in accordance with the provision recognizing the right of interactive making available to the public of authors. It is worth quoting the Board’s summary of a decision that it based on thorough analysis of both the new provision in the Canadian Act and Article 8 of the WCT, which the provision applied:

[12] As will be made clear from the reasons that follow, subsection 2.4(1.1) of the *Act* deems the act of placing a work or other subject-matter on a server of a telecommunication network in a way that a request from a member of the public triggers the transmission of that work or subject matter, including in the form of a stream or download, whether or not such a request ever takes place, to be a communication to the public by telecommunication.

[13] A more limited interpretation of subsection 2.4(1.1) of the *Act*, which would make this provision applicable only when a work is made available for streaming, would not comply with Canada’s international obligations. The fundamental reason for the enactment of subsection 2.4(1.1) by Parliament was for Canada to comply with Article 8 of the WCT.

[14] The interpretation of subsection 2.4(1.1) of the *Act* that it applies to the making available of both streams and downloads is consistent with Canada’s obligations under Article 8 of the WCT and Articles 10 and 14 of the WPPT. It is also consistent with the technological neutrality interpretation principle.⁵²⁸

The Federal Court of Appeal rejected the Board’s interpretation⁵²⁹ – even *though, in this essential aspect*, the Board was correct.⁵³⁰ In doing so, the Court cited the judgment of the Supreme Court of Canada in the *ESA v. SOCAN case*⁵³¹ handed down less than a month after the adoption of the Copyright Modernization Act,⁵³² but a long time before the Act entered into force.⁵³³ In other words, the Court of Appeal based its decision on *the law existing before the right of interactive making available to the public became applicable in Canada* – finding that, by means of the downloading of a work through an online digital transmission, no act of communication to the public took place.

In its own *ESA v. SOCAN* judgment, the Federal Court of Appeal found that – because section 2.4(1.1) of the Copyright Modernization Act uses the term “communication to the public” – the same criteria apply to the acts of interactive making available to the public of works as applied to the act of communication to the public before the entry into force of the Copyright Modernization Act. In so finding, it made *two statements in clear conflict with both the new section 2.4 (1.1) of the Canadian Act and Article 8 of the WCT* – namely, that:

- section 2.4 (1.1) *does not apply to on-demand downloading* (because it is not an act of communication to the public); and
- even more importantly, to effect an act of making available of a work for interactive access, *it is not sufficient to make a work available* for interactive accessible in the way described in section 2.4(1.1) – it is also necessary that the members of the public *actually access* the work so made available.

528 Decision of the Copyright Board of August 25, 2017, *Communication to the public by telecommunication*, Decision No. CB-CDA 2017-085, [12]–[14] (hereinafter, Board Decision).

529 See *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100.

530 Emphasis is added to the words “in this essential aspect” because the Board said *obiter* that this may be misleading. It announced that it did not want to revisit the “transmission component” of the communication to the public right: see Board Decision, points 15 and 130–136. This may be understood as the Board (incorrectly) suggesting that the introduction of section 2.4(1.1) did not modify the concept of the right of communication to the public. This is unlikely to have been the Board’s intention because it would not follow from its analysis. Certainly, it would not follow from the provisions of the Copyright Modernization Act 2012, which modified the Copyright Act to implement the WCT and the WPPT in such a way that it covers, under the broad concept of “communication to the public”, all kinds of acts of interactive making available to the public irrespective of whether or not they are realized through streaming or downloading. (See earlier in this chapter for more on this hybrid nature of the acts of interactive making available to the public.)

531 *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34.

532 The Act was adopted on June 26, 2012, while the judgment was dated July 10, 2012.

533 The Act entered into force on November 7, 2012.

The Court went even so far as to expressly state that “[s]ubsection 2.4(1.1) does not create a new exclusive right”.⁵³⁴

The Court of Appeal stressed that, as a judicial body, it had to apply the actual text of the new Act; it argued that *if the government and the legislators had intended to recognize a new right*⁵³⁵ that would be applicable in the case of mere making available works to members of the public for interactive access at a time and from a place individually chosen by them, *the legislators should have done so*. According to the Court, *the legislators had included no such provision in section 2.4(1.1)*.

It is obvious that this is *not* the case. Section 2.4(1.1) specifically provides for “making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public”. The new law (*lex posterior*) clearly *did* provide for a right that was different from the previous law (*lex anterior*) on which the Supreme Court had based its decision *before* that new law’s entry into force. It was different and new because it did not consist in a mere traditional (non-interactive) transmission of a work to the public for their reception (i.e., push technology) but in making available a work online for interactive access (i.e., pull technology). It was also different and new because it reflected the hybrid nature of the acts covered: when a member of the public accesses the work, the very nature of the technology (including the use of digital rights management) is such that it might take the form of either streaming (similar in practice to communication to the public, in that it allows perception of the work without the making of anything more than fleeting copies), or downloading both temporary and more permanent copies transmitted in compressed files (similar to distribution without making the work perceptible to the members of the public during the transmission). There ought to have been no obstacle to the Court interpreting the new right as provided for in the new law, and applying it as required by the principle of effectiveness⁵³⁶ and the provisions of Articles 31 and 32 of the VCLT.⁵³⁷ The Court did not do so despite that the Canadian Government had proposed, and the Canadian Parliament had adopted, a new section 2.1(1.1) that fulfilled Canada’s obligations under the WCT, and the Canadian Copyright Board had properly interpreted it as such.⁵³⁸

Fortunately, it is rare that the idea of the Stockholm Group of including in what became Article 8 of the WCT a provision on interactive making available to the public – in partnership with that part which provides for non-interactive acts of communication to the public – result in such erroneous judicial interpretation that wrongly regards the right of interactive making available to the public as if it were a right of non-interactive “communication to the public”.⁵³⁹

534 *Ibid.*, [96].

535 The Court of Appeal quoted, at [55], the Canadian Government’s statement when it presented the Act (emphasis added):

The WIPO Copyright Treaty and the Performances and Phonograms Treaty, collectively known as *the WIPO Internet treaties*, establish new rights and protections for authors, performers and producers. Canada signed the treaties in 1997. The proposed Bill will implement the associated rights and protections to pave the way for a future decision on ratification. All copyright owners will now have a “making available right,” which is an exclusive right to control the release of copyrighted material on the Internet.

536 The principle that provisions of a law, in general, and rights and obligations thereunder should be effective rather than not, is expressed in the maxim *ut res magis valeat quam pereat* (“it is better for a thing to have effect than to be made void”).

537 Canada is party to the VCLT, and thus its institutions must take into that Treaty’s provisions on the interpretation in Articles 31 and 32. The judgment of the Court of Appeal certainly would have been different had it taken into account the object and purpose of the terms describing interactive making available to the public in the context of Article 8 of the WCT binding Canada as required by Article 31.1 of the VCLT. It would have been sufficient in terms of Article 32 of the VCLT had the Court allowed room for doubt that interactive making available of a work to the public is the same as non-interactive communication. Had it done so, the Court might have recognized that the Government, the Parliament and the Copyright Board were right.

538 In fact, it cannot be said that the Court of Appeal has not interpreted appropriately the text “making available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public”, because *it has not interpreted it at all*. It stated only that the Board ought have recognized that an act under section 2.4(1.1) is “communication to the public” and should have followed the Supreme Court’s interpretation in *ESA v SOCAN* (see *ibid.* [47]). In contrast, to support its interpretation of the acts of interactive making available to the public, the Canadian Board offered thorough analysis, as required by the VCLT and in accordance with the country’s obligations under the WCT. In some ways, the Court of Appeal seems to have condemned the Board for a kind of contempt of court because it applied the provisions of the new law rather than an outdated Supreme Court judgment based on *lex posterior* that did not provide for a right of interactive making available to the public. There is an emotional tenor to the Court of Appeal’s argument that is unusual in a judicial decision of this type: the Board’s attempt to apply the new law instead of the Supreme Court case, based on the old law, was a “fundamental defect” resulting “in a fatal loss of confidence in the Board’s interpretation”; and the Board “skewed its analysis”, offering “nothing in support” of its interpretation (a remark that is particularly surprising given the thorough and well-founded analysis evident in the Board’s decision) (*ibid.*, [49] and [50]).

539 The situation in the United States is different since, in contrast with the Canadian Copyright Act, the U.S. Copyright Act does not include a specific text corresponding to the “umbrella solution”.

When they characterize in their national laws the right provided in the second part of Article 8 of the WCT, countries are bound only to ensure that they properly reflect the nature and scope of the right – that is, they must ensure that they provide for an exclusive right of making available works to the public, by wire or wireless means, in a way that members of the public may access them from a place and at a time individually chosen by them. There has therefore been no obstacle to providing for it as a stand-alone right not only for performers and producers of phonograms, as is the case under Articles 10 and 14 of the WPPT, but also for authors, in accordance with the original “umbrella solution”. In fact, this seems to be the best way of avoiding unnecessary issues of interpretation and CMOs struggling to apply the right. This option has been chosen, for example, in the copyright laws of Montenegro⁵⁴⁰ and Ukraine.⁵⁴¹ The provisions in Article 23(1) of the Japanese Copyright Law on the exclusive right of authors, and in Articles 92-2 (1), 96-2, 99-2(1) and 100-4 of the Law on the exclusive rights of owners of related rights, which authorize the making available of their works and subject matter of protection, respectively, for transmission (“making transmittable” in an interactive manner, rather than transmitting) have the same effect.

Licensing copyright in the online digital environment – from integration to fragmentation and back to partial integration: the European experience

For a long time, CMOs generally worked as national organizations and granted licenses for the use of their repertoires (national and international) within only their own territories (with some well-known exceptions, such as NBC, the joint mechanical rights organization of the Nordic countries).

The first significant changes to this were brought about when direct broadcasting satellites began to transmit programs across the territories of several countries. Irrespective of the academic debates that have raged about the various variants of “emission theory” and “communication theory” it was inarguable that, in such cases, communication to the public (broadcasting being communication *to the public* by wireless means) begins only in the country of emission and is completed only in those countries that comprise the satellite’s “footprint”. It is in these latter countries *where the public may be found to which the communication is made* (i.e., to whom the program is made available for reception, actual reception not being a condition for the completion of an act of broadcasting).

CISAC took this into account in its so-called Sydney Principles, included as an addendum to its Model Contract of Reciprocal Representation between Public Performance Rights Societies, which addendum the CISAC Administrative Council adopted in session at Sydney in 1987.⁵⁴²

Principle 1 of the Sydney addendum stated that “[t]he responsibility for granting the necessary licenses to broadcast programmes is always that of the Society of the originating country”.

Principle 2 provided that, in relation to the CISAC Model Contract, a distinction should be made between situations in which:

- the broadcasts transmitted by direct broadcasting satellite lead to only marginal overspill in relation to the territory of the originating country, in which case – and by analogy with the situation that had also prevailed in respect of certain terrestrial broadcasts – the existing Model Contract could apply without any particular problem; and
- the broadcasts transmitted by direct broadcasting satellites are communicated to a footprint covering several countries, in which case the Model Contract needed to be supplemented by an addendum to be chosen from among three “formulae”.

The three alternative formulae included in the Sydney addendum were as follows.

⁵⁴⁰ Article 31 of its 2011 Copyright Act of Montenegro provides for a stand-alone exclusive right of making available to the public, separate from the right of communication to the public: “The author enjoys the exclusive right to authorize or prohibit that his work is made available to the public by wire or wireless means in such a way that members of the public may access it from a place and at a time chosen by them.”

⁵⁴¹ Article 15(1) of 1994 Copyright Law of Ukraine, as updated in 2001, on an author’s exclusive rights of authorization, lists the right of making available to the public as a stand-alone right, separate from the non-interactive communication rights: “... making available of his works to the public in a way that the members of the public may access them from any place and at any time at their discretion.”

⁵⁴² CISAC Administrative Council (1987), *Addendum Concerning Direct Broadcasting Satellite (DBS)*; not published; included in the in CISAC’s archive.

1. The “Contract’s direct application formula”:

With regard to direct broadcasting by satellite, the contracting Societies agree that the rights conferred by virtue of Article 1 of this Contract are not limited to the territories of operation but are valid for all countries within the footprint of the satellite of which the transmissions are effected from the territory/ies in which a contracting Society operates.

2. The “prior agreement” formula:

With regard to direct broadcasting by satellite, the contracting Societies agree that the rights conferred by virtue of Article 1 of this Contract are not limited to the territories of operation but are valid for all countries within the footprint of the satellite of which the transmissions are effected from the territories in which a contracting Society operates, *subject to having acquired the other contracting Society’s agreement beforehand* as to the conditions under which the authorizations required for such transmissions may be delivered, insofar as the territories in which it operates are situated within the satellite’s footprint.

3. The “prior consultation” formula:

With regard to direct broadcasting by satellite, the contracting Societies agree that the rights conferred by virtue of Article 1 of this Contract are not limited to the territories of operation but are valid for all countries within the footprint of the satellite of which the transmissions are effected from the territories in which a contracting Society operates, *subject to having consulted the other contracting Society beforehand* as to the conditions under which the authorizations required for such transmissions may be delivered, insofar as the territories in which it operates are situated within the satellite’s footprint.

The Sydney addendum also provided that, in the case of the second and third formulae, the prior agreement or prior consultation necessarily had to concern:

- tariffs (“it is desirable to come to a harmonization of tariffs so as to avoid outrageous imbalances; such harmonization should be established at a level which will secure, in any event, a just remuneration for authors”);
- owners of subrights, such as subpublishers (“the conditions for a possible participation of the subright owners should be determined pursuant to terms to be settled by bilateral agreement between the Societies concerned”); and
- deduction for social and/or cultural purposes (“the conditions under which this deduction could be effected and, in conformity with the confederal Rule, within the limit of an effective maximum of 10 percent applied to the net distributable income, should also be determined according to terms to be settled by bilateral agreement between the Societies concerned”).

The Sydney addendum reflected two – equally important, but not easily to reconcile – objectives of performing rights societies: first, to offer a reasonable and workable licensing system to users; and second, to duly take into account the interests of, and the rights represented by, all the interested societies not only in the spirit of solidarity but also with a focus on their efficient operation. When the societies confronted the Internet phenomenon, whereby works transmitted online might be made available to a worldwide population, they recognized that if they wanted to achieve the same objectives – and they did, since they were the very *raison d’être* of collective management – they needed to agree upon an even more complex system that could handle the likely need for global licenses.

Their first idea was rooted in the Sydney addendum and was to leave licensing to the society of the country in which the content provider is located and from which the transmission originates. The societies soon saw, however, that such a licensing system for Internet transmissions might lead to a proliferation of unauthorized uses and fuel disrespect for copyright, and the five societies with the biggest repertoires decided to collaborate on a new licensing model.

Since the five societies comprising CISAC – BMI (United States), BUMA (Netherlands), GEMA (Germany), PRS for Music (United Kingdom) and SACEM (France) – adopted the new licensing model (legally, an “amendment” of the existing contracts based on the CISAC Model Contract)

at their 2000 Congress in Santiago de Chile, agreements concluded according to this model are known as “Santiago agreements”. The practical and legal problems involved in these agreements were such that they were regarded as experimental and implemented on a trial basis, with review (and possible renewal) due at the end of 2001.

The model Santiago agreement included several definitions that have generally remained valid, such as of “content provider”, “service provider”, “website”, “webcasting/streaming” or “online exploitation”. The definition of “on-demand” uses (corresponding to the concept and right of making available to the public) is worthy of special mention because it both corresponded to the hybrid nature of such acts and took into account the content providers’ business methods:

music on-demand online:

- a) downloading (with or without the facility of listening during the downloading) of musical works on demand against payment,
- b) downloading (with or without the facility of listening during the downloading) of musical works on demand without payment,
- c) listening of musical works on demand without downloading against payment,
- d) listening of musical works on demand without downloading and without payment;

The model agreement determined the society authorized to grant a global license in the following way:

- (i) where (a) the content provider uses the relevant country-code top level domain name (for example, “.fr” if the contracting society is SACEM, “.de” if the contracting society is GEMA, etc.), or, in the case of the US, the “.com” or “.net” generic top level domain name, and, (b) the primary language used at the site of the content provider is the primary language of the country indicated by the national identifier, then, the license shall be granted by the society operating in that country;
- (ii) in all other cases, the license shall be granted to the content provider by the society of the country among those mentioned in item (i) above where the content provider is incorporated;
- (iii) notwithstanding anything to the contrary set forth in items (i) and (ii) above, where the economic residence of the content provider is in a country among those mentioned in item (i) above and is different from the country set forth in items (i) and (ii) above, the society of that country may license the content provider;
- (iv) however, where the content provider is situated in a country without proper copyright legislation and/or without proper procedures for the management of copyright in place, the parties must consult and agree on the most appropriate actions to take in the relevant circumstances, including the grant of any appropriate license to any party involved in the process of online exploitation.

The model agreement declared too that “[t]he parties will continue to examine the rules set out above with the object of trying to ensure that systems and procedures result in authors, composers and publishers/sub-publishers being paid their royalties in the most timely manner appropriate”.

In principle, the Santiago model based its solutions to issues of online licensing on the traditional management of authors’ rights in musical works: it provided that all of the CMOs involved were to fulfill the usual legal, technological and accounting requirements. Its success would have depended on whether or not the participating CMOs could meet these requirements in practice – and it risked unprepared CMOs granting licenses for the use of other CMOs’ repertoires (in effect, a world repertoire).

The model got off to a promising start: more CMOs joined the system and concluded Santiago agreements. Nonetheless, its success was short-lived – not because it failed to deliver the expected results, but because the European Commission intervened, seeing the agreement as problematic in competition terms and as a barrier to its planned transformation of national markets into a single European market. (While they are not considered further in this book for reasons of space, it is worth noting that BIEM had worked out a similar model agreement for

mechanical rights – the Barcelona agreement⁵⁴³ – and IFPI, a simulcasting agreement.⁵⁴⁴ These two met the same fate for the same reason: because the European Commission intervened, requiring that the models be abandoned or transformed.⁵⁴⁵)

On April 17, 2001, European CMOs BUMA, GEMA and SACEM notified the European Commission of a number of so-called Santiago agreements; the other CMOs in the European Union and European Economic Area (EEA) went on to join the notification, with the exception of the Portuguese CMO SPA.

On the basis of third-party comments, the Commission issued to the notifying CMOs a “Statement of Objections” on April 29, 2004, in which it cited competition and internal market objections and expressed particularly strong opposition to a so-called customer allocation clause. The clause was a key element of the model agreements which would have allowed to the CMOs that were most closely connected with the users to apply easy and legally safe “one-stop shop” licensing, and would have also guaranteed an equal chance for CMOs irrespective of whether they had bigger or smaller repertoires. When the agreements’ original term expired on December 31, 2004, the CMOs based in the European Union and European Economic Area (EEA) did not renew them. (The same was true, in parallel, of the Barcelona Agreements on mechanical rights.)

As a result of the Commission’s intervention and dismantling of this promising licensing system, a vacuum emerged. To fill it, the Commission issued on October 18, 2005, a Recommendation on the collective cross-border management of copyright and related rights for legitimate online music services.⁵⁴⁶ Its declared objective was to introduce, into the online trans-border licensing of the use of musical works in the European Union, competition among the different CMOs managing the same rights in parallel in any of the Member States. The idea seemed to be that, although at the beginning there might have been too many CMOs to license content providers, competition would lead to concentration of the repertoires in the hands of a small number of licensing platforms (with a situation similar to the system in the United States as an intended outcome).

The Commission intended to achieve this fundamental transformation of the collective management system through these kinds of provision:

3. Right-holders 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 right-holder. [...]
5. With respect to the licensing of online rights the relationship between right-holders and collective rights managers, whether based on contract or statutory membership rules, should, at least, be governed by the following:
 - (a) right-holders should be able to *determine the online rights* to be entrusted for collective management;
 - (b) right-holders should be able to *determine the territorial scope* of the mandate of the collective rights managers;
 - (c) right-holders should, 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

543 See Notification of cooperation agreements (Case No. COMP/C-2/38.377 – BIEM Barcelona Agreements), OJ C 132/18 of June 4, 2002.

544 See Commission Decision of October 8, 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 – IFPI “Simulcasting”), OJ L 107/58 of April 30, 2003.

545 For more on the Barcelona and IFPI simulcasting agreements, the European Commission’s decisions and the settlement of the cases, see Lucie Guibault and Stef van Gompel (2016). Collective management in the European Union. In Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, 3rd edn. Alphen aan den Rijn: Wolters Kluwer, 159–162.

546 Commission Recommendation 2005/737/EC of May 18, 2005, on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276/54, October 21, 2005. Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32005H0737> (hereinafter, Commission Recommendation).

the Member State of residence or the nationality of either the collective rights manager or the right-holder;

- (d) *where a right-holder 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.*⁵⁴⁷

In accordance with these rules, the major music publishers began to withdraw their repertoires from national CMOs and the bigger European CMOs began to establish pan-European licensing platforms. Several such platforms emerged – some overlapping – including:

- CELAS – in which music publisher EMI allied with national CMOs PRS for Music/MCPC (United Kingdom) and GEMA (Germany);
- PAECOL – in which music publisher Sony/ATV allied with German CMO GEMA; and
- Armonia – in which Universal Music Publishing International allied with national CMOs SACEM and SDRM (France), SIAE (Italy) and SGAE (Spain).

Further mergers took place later: CELAS and PAECOL joined forces as SOLAR, and the new alliance also established the International Copyright Enterprise (ICE), within which other CMOs cooperated to offer joint online licensing.

However, the national CMOs also survived. Thus, if a lawful online user of musical works were to want to obtain a license with the same kind of broad coverage the Santiago (and Barcelona) agreements had made available, they would now have to gather licenses from a great number of sources (ranging from the pan-European platforms to the smaller national CMOs). The vast majority of internationally relevant musical works was available from the bigger competing platforms, and content providers therefore cared less for the smaller repertoires of smaller countries with smaller cultural markets – with unwelcome consequences for the CMOs of those countries. As their repertoires shrank, their cost levels soared – if they were concerned with maintaining the quality of their activities.

The European Commission recognized that the reasons why a natural monopoly was justified among musical performing rights organizations in a traditional analogue environment were diminished – or even disappeared – in an online digital environment that made parallel licensing (with DRM support) possible even by individual rightholders. In its Recommendation, it had proposed abrupt solutions without properly considering the foreseeable consequences (largely because there was urgent need to replace the Santiago/Barcelona models eliminated by the Commission's intervention).

The sudden structural changes to the collective management system wrought by the Recommendation were so controversial that, in 2007, the European Parliament weighed in on the new model: the views it set out in its Resolution were not favorable.⁵⁴⁸ Among its criticisms were issues of the “constitutional” distribution of power and procedural matters,⁵⁴⁹ but the Parliament directed its main concerns at the Commission's too one-sided focus on only competition, and its ignorance of the foreseeable negative consequences for the national cultures of smaller countries and the protection of cultural diversity.

⁵⁴⁷ *Ibid.*, points 3 and 5 (emphasis added).

⁵⁴⁸ European Parliament Resolution 2005/737/EC of March 13, 2007 on the Commission Recommendation of October 18, 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 301E/64, December 13, 2007. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007IP0064>

⁵⁴⁹ See *ibid.*, Recitals A and C:

A. whereas the Commission failed to undertake a broad and thorough consultation process with interested parties and with Parliament before adopting the Recommendation; [...] all categories of right-holders must be consulted on any future regulatory activities in this area so as to ensure a fair and balanced representation of interests, [...]

C. whereas it is unacceptable that a “soft law” approach was chosen without prior consultation and without the formal involvement of Parliament and the Council, thereby circumventing the democratic process, especially as the initiative taken has already influenced decisions in the market to the potential detriment of competition and cultural diversity, [...]

The following were the main points the European Parliament made in its lengthy Resolution:

From Recital H:

... music is not a commodity and collective rights managers are mainly non-profit-making organisations ...

Recital I:

... national CRMs should continue to play an important role in providing support for the promotion of new and minority right-holders, cultural diversity, creativity and local repertoires, which presupposes that national CRMs should retain the right to charge cultural deductions

Recital L:

... there is concern about the potentially negative effects of some provisions of the Recommendation on local repertoires and on cultural diversity given the potential risk of favouring a concentration of rights in the bigger CRMs, [...] the impact of any initiative for the introduction of competition between rights managers in attracting the most profitable right-holders must be examined and weighed against the adverse effects of such an approach on smaller right-holders, small and medium-sized CRMs and cultural diversity

Recital O:

... the system of reciprocal representation agreements should be maintained, as it enables all commercial and individual users without discrimination to have equal access to the world repertoire, ensures better protection for the right-holders, guarantees real cultural diversity and stimulates fair competition in the internal market

Operational point 1:

[The European Parliament] Invites the Commission [...] to present as soon as possible – after consulting closely with interested parties – a proposal for a flexible framework directive to be adopted by Parliament and the Council in co-decision with a view to regulating the collective management of copyright and related rights as regards cross-border online music services, while taking account of the specificity of the digital era and safeguarding European cultural diversity, small stakeholders and local repertoires, on the basis of the principle of equal treatment

Operation point 6:

[The European Parliament] Stresses that the proposed directive should [...]:

- *[...]*
- *provide for democratic, transparent and accountable governance in CRMs, inter alia by establishing minimum standards for organisational structures, transparency, representation, copyright distribution rules, accounting and legal remedies,*
- *ensure comprehensive transparency in CRMs, particularly as regards the calculation base for tariffs, administrative costs and supply structure and, where necessary to that end, lay down rules for the regulation and supervision of CRMs,*
- *promote creativity and cultural diversity,*
- *[...]*
- *avoid downward pressure on royalty levels by ensuring that users are licensed on the basis of the tariff applicable in the country where the consumption of the copyrighted work (the so-called “country of destination”) will take place, and help to achieve an appropriate level of royalties for the right-holders,*
- *preserve CRMs’ cultural and social role while ensuring that they administer right-holder funds and provide services to rights users and right-holders in such a way as to ensure as far as possible that they are protected,*

- [...]
- *avoid the over-centralisation of market powers and repertoires* by ensuring that exclusive mandates may not be granted to a single or a very few CRMs by major right-holders, thereby guaranteeing that the global repertoire remains available to all CRMs for the granting of licences to users,
- [...]

Operational point 7:

[The European Parliament] Considers, furthermore, that in order to ensure the full and complete functioning of the system of reciprocity to the benefit of all right-holders, *it is crucial to prohibit any form of exclusive mandate between major right-holders and CRMs for the direct collection of royalties in all Member States, as this would lead to the rapid extinction of national CRMs and undermine the position of minority repertoires and cultural diversity in Europe.*⁵⁵⁰

Although the European Parliament urged the Commission “to present as soon as possible – after consulting closely with interested parties – a proposal for a flexible framework directive”, for which it also outlined a number of criteria, that task turned out to be far from easy. The draft Directive was published only five years later, in 2012, and the CRM Directive (Directive 2014/26/EU) was adopted only in 2014.

Although it took time to properly prepare it, the Directive is a high-quality instrument. It consists of five titles, as follows.

Title I contains “General Provisions”, including definitions.

Title II offers detailed provisions on the proper functioning of the “Collective Management Organisations”, including provisions on:

- the rights of rightholders and their relationship with CMOs;
- the basic governing bodies, and the rules guaranteeing accountability and transparency in the management and activities of CMOs;
- the distribution of and deductions from the remuneration collected;
- the licensing of uses and the basic principles involved in setting tariffs;
- relationships among CMOs by means of reciprocal representation agreements; and
- the obligation to disclose information and reporting requirements.

Title III contains the provisions on “Multi-Territorial Licensing of Online Rights in Musical Works by Collective Management Organisations”.

Title IV is headed “Enforcement Measures”, but it does not include such measures in the same way as the TRIPS Agreement does in its Part III on “Enforcement of Intellectual Property Rights” (civil and administrative and remedies, criminal procedures and sanctions, etc.). Only the provisions of Article 36 of the Directive – which requires the Member States to supervise CMOs’ operations and to apply appropriate sanctions, or take other measures, where a CMO does not comply with the rules prescribed in law – correspond to the concept of “enforcement”; otherwise, the Title deals with complaint and dispute settlement procedures, cooperation between Member States and the tasks of the Commission.

Title V includes the usual “Reporting and Final Provisions”, such as on the deadline for transposition of the Directive (namely, April 10, 2016). Among other things, it also provides, in Article 40, that the Commission is to have assessed the application of the Directive and submitted to the European Parliament and to the Council a report by April 10, 2021.

It should be self-evident that the general provisions of the CRM Directive on the operation of CMOs also apply to the multi-territorial licensing of online rights in musical works. Title III of the Directive includes provisions on the specific requirements CMOs must fulfill in granting such licenses, the essence of which is that they must carry out electronically and online the majority of activities,

⁵⁵⁰ *Ibid.* (emphasis added).

including processing multi-territorial licenses (Article 24), offering accurate information on the repertoire (Articles 25 and 26), reporting and invoicing (Article 27), and making accurate and timely payment to rightholders (Article 28). Only CMOs capable of fulfilling these more demanding requirements are supposed to grant multi-territorial online licenses.

Article 31 explains the consequences for those CMOs that are *not* capable of doing so (emphasis added):

Member States shall ensure that *where a collective management organisation does not grant or offer to grant multi-territorial licences* for online rights in musical works or does not allow another collective management organisation to represent those rights for such purpose by 10 April 2017 [that is, within one year from the deadline for the transposition of the Directive], *rightholders* who have authorised that collective management organisation to represent their online rights in musical works *can withdraw from that collective management organisation* the online rights in musical works for the purposes of multi-territorial licensing in respect of all territories *without having to withdraw the online rights in musical works for the purposes of mono-territorial licensing, so as to grant multi-territorial licences* for their online rights in musical works themselves or through any other party they authorise or *through any collective management organisation* complying with the provisions of this Title.

This provision also seems to have the role in avoiding overly fragmented online licenses. It combines with the so-called tag-on obligation prescribed in Article 30 whereby those CMOs capable of granting such licenses may represent other organizations that are unable to fulfill the more demanding requirements of Title III of the Directive. Article 30(1)–(6) sets out the rules that apply to this “tag-on” system (emphasis added):

1. Member States shall ensure that where a collective management organisation which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own repertoire requests another collective management organisation to enter into a representation agreement to represent those rights, *the requested collective management organisation is required to agree to such a request if it is already granting or offering to grant multi-territorial licences* for the same category of online rights in musical works in the repertoire of one or more other collective management organisations.

[...]

3. ... the requested collective management organisation *shall manage the represented repertoire* of the requesting collective management organisation *on the same conditions* as those which it applies to the management of its own repertoire.
4. The requested collective management organisation *shall include* the represented repertoire of the requesting collective management organisation *in all offers* it addresses to online service providers.
5. *The management fee for the service* provided by the requested collective management organisation to the requesting organisation *shall not exceed the costs reasonably incurred* by the requested collective management organization.
6. The requesting CMO also have certain obligations: “The requesting collective management organisation *shall make available to the requested collective management organisation information* relating to its own music repertoire *required* for the provision of multi-territorial licences for online rights in musical works. *Where information is insufficient* or provided in a form that does not allow the requested collective management organisation to meet the requirements of this Title, *the requested collective management organisation shall be entitled to charge for the costs reasonably incurred* in meeting such requirements or to exclude those works for which information is insufficient or cannot be used.

It is to be noted, however, that those CMOs which are not yet capable of fulfilling the requirements prescribed in Title III may nevertheless grant online licenses by “outsourcing” the activities that they cannot fulfill in the way as prescribed in the Directive – that is, by making use of the “back

office” capacities of those CMOs that do have such capacity. There are some smaller European CMOs that have joined the pan-European platforms on such a basis.

Article 32 contains provisions on derogation from the more demanding requirements under Title III for the online music rights required for radio and television programs, including simulcasting and “catch-up” transmissions.

For the purpose of assessing the impact of application of the Directive, Article 40 contains the following provision (emphasis added):

By 10 April 2021, the Commission shall assess the application of this Directive and submit to the European Parliament and to the Council a report on the application of this Directive. That report shall include an assessment of the impact of this Directive on the development of cross-border services, on cultural diversity, on the relations between collective management organisations and users and on the operation in the Union of collective management organisations established outside the Union, and, if necessary, on the need for a review. The Commission’s report shall be accompanied, if appropriate, by a legislative proposal.

At the time of writing, the Commission had not yet submitted such a report.

Licensing copyright in the online digital environment – from fragmentation to integration: the U.S. experience

In Europe, repertoire-based fragmentation has occurred as a result of the 2005 Commission Recommendation and Title III of the 2014 CRM Directive. In the United States, similar repertoire-based competition has been moderately common between musical performing rights CMOs. With the adoption of the Music Modernization Act of 2018 (MMA),⁵⁵¹ however, things are changing: significant integration is taking place among the organizations involved in the online licensing of musical rights – in particular, mechanical rights.

The MMA is undoubtedly one of the most important reforms of the U.S. copyright system since the adoption of the Copyright Act in 1976; and, it is *the* most important in relation to copyright in musical works. The Act comprises three Titles:

- Title I – Musical Works Modernization Act (MWMA)
- Title II – Classics Protection and Access Act
- Title III – Allocation for Music Producers Act (AMP).

For the purposes of this chapter, the provisions under Title I are especially relevant.⁵⁵²

The key element of the MWMA – indeed, of the MMA in general – is the introduction of a new “blanket license”, based on compulsory licensing, for the management of mechanical rights of musical works for online digital delivery of copies. A new CMO, the Mechanical Licensing Collective (MLC), has been set up to operate the system. Part of a lengthy Act, the MWMA is extensive in itself, comprising more than 21,000 words.

The U.S. Copyright Office describes the MWMA as follows:

Musical Works Modernization Act

[The Musical Works Modernization Act] replaces the existing song-by-song compulsory licensing structure for making and distributing musical works with a blanket licensing system

⁵⁵¹ Formally, the Orrin G. Hatch–Bob Goodlatte Music Modernization Act.

⁵⁵² Title II – Classics Protection and Access extends the remedies available for copyright infringement to owners of sound recordings fixed before February 15, 1972 (i.e., when the recordings are used without authorization). Sound recordings fixed before February 15, 1972, had previously been governed only a state level; now, they are brought under federal law. Title III – Allocation for Music Producers, meanwhile, codifies the longstanding practice of using “letters of direction” to secure direct payment of a portion of statutory sound recording digital performance royalties to sound engineers and other studio professionals for their contributions to recording music.

for digital music providers to make and distribute digital phonorecord deliveries (e.g., permanent downloads, limited downloads, or interactive streams).

Mechanical Licensing Collective

The legislation *establishes a “mechanical licensing collective” (“MLC”) to administer the blanket license, and a “digital licensee coordinator” (“DLC”) to coordinate the activities of the licensees and designate a representative to serve as a non-voting member on the board of the MLC. The MLC will receive notices and reports from digital music providers, collect and distribute royalties, and identify musical works and their owners for payment.* The MLC will establish and maintain a *publicly accessible database* containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works and the sound recordings in which the musical works are embodied. In cases where the MLC is not able to match musical works to copyright owners, the MLC is *authorized to distribute the unclaimed royalties to copyright owners identified in the MLC records, based on the relative market shares of such copyright owners as reflected in reports of usage provided by digital music providers for the periods in question.*

The operational costs of the MLC will be paid for by digital music providers through voluntary contributions and an administrative assessment set by the Copyright Royalty Judges. [...]

Rate Standard

The *new rate-setting standard applied by the Copyright Royalty Judges* will be a market-based *willing buyer / willing seller standard*, replacing the policy-oriented 801(b)(1) rate-setting standard.

PRO Rate Court Proceedings

The section 114(i) provision that prohibits PRO [performing rights organization] rate courts from considering licensing fees paid for digital performances of sound recordings in its rate-setting proceedings for the public performance of musical works is partially repealed. [...] Additionally, the legislation changes how judges in the Southern District of New York are assigned to the rate court proceedings set forth in the consent decrees for ASCAP and BMI, by assigning each new rate dispute on a rotating basis instead of all disputes being handled by the same judge.⁵⁵³

There is no reference in this description to the international treaties binding the United States – in particular, none to Article 8 of the WCT on the right of interactive making available to the public. Nor may such reference be found in the Act in itself or in House and Senate reports on the Act. This absence is worth noting not only because the acts to which the compulsory license applies are clearly covered by the second part of Article 8 of the WCT on the right of interactive making available literary and artistic (and hence also musical) works to the public but also because – as it was seen above in the chapter – it was the U.S. delegation which, at the 1996 Diplomatic Conference, before the adoption of the two WIPO Internet Treaties made the clarification – in accordance with the agreement reached at the informal consultation, and hence with no opposition from, other delegations to the Conference – that the right of (interactive) making available to the public provided in the second part of Article 8 of the WCT may be implemented by rights other than the right of communication to the public.

Furthermore, both the U.S. Administration and Congress declared at the time of the adoption of the Digital Millennium Copyright Act (DMCA) in 1998 that, in the United States, this right would be implemented by combining the existing exclusive rights of reproduction, public performance and display (equivalent to communication to the public) and the rights of distribution.

Both interactive downloading and interactive streaming of musical works embodied in phonograms (phonorecords) are covered under the compulsory license provided for in the MWMA – with the caveat that, in the United States, interactive streaming implicates both performing and mechanical rights, and therefore needs licenses from both the newly established MLC and

⁵⁵³ See www.copyright.gov/music-modernization/115/ (emphasis added).

the performing rights organizations, or from relevant copyright owners themselves. The first question that emerges in this connection is *how and why interactive streaming without downloading copies may be regarded as an act of reproduction (and the related act of distribution of copies)*. A relatively straightforward answer may be given to this by referring to Article 5(1) and (5) of the E.U. Information Society Directive, in which it is recognized that the concept of reproduction cannot to be reduced to permanent reproduction. If an act is reproduction (i.e., a sufficiently stable status such that the work may be perceived, no matter how temporarily, or may be used as a basis for further transfer), it is covered by the right of reproduction, although certain exceptions or limitations may be applied to it subject to the three-step test under in Article 5(5).

Article 5(1) of the Directive prescribes an obligatory exception (free use) for such temporary copies as follows (emphasis added):

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
 - (a) *a transmission in a network* between third parties by an intermediary, or
 - (b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

The provisions of the U.S. law, under which streaming is characterized as an act of reproduction (and the related act of distribution) seem to be based on the same recognition as on which Article 5(1)(a) of the Directive is based. It follows from the WCT (and the Berne Convention with which the Contracting Parties must comply) that, if an act is reproduction, irrespective of how long the emerging copy exists, in principle, the right of reproduction applies. At the same time, it might hardly be denied that a temporary act of reproduction that takes place in the course of interactive streaming is an integral and essential technological part of the transmission; the only question is whether or not it has any independent economic significance. It seems that, at least, in certain cases it does not. This is why it is provided in the Directive that, where all the criteria of Article 5(1) are fulfilled, an obligatory exception applies for temporary/transient reproductions. However, surely no conflict can emerge with the WCT or any other copyright treaty if a national law, such as the U.S. Copyright Act, does not provide for such a specific exception⁵⁵⁴ (but, as it is the case in the MWMA, it provides for a limitation of the exclusive right in the form of a compulsory license). Due to the hybrid nature of the acts of interactive making available to the public, the MWMA has acknowledged the need to create a blanket license for the right of reproduction (and distribution) in the context of streaming. In that way, it eliminates the problem created by some courts that (as discussed above in this chapter) are reluctant to apply the right to authorize such acts by combining existing exclusive rights in the way both the Administration and Congress foresaw they should. (It is another matter that legal symmetry might have been established by clearly recognizing too the hybrid nature of the acts of interactive downloading – at least where a user might also listen to or otherwise perceive the works in the course of transmissions for downloading.)

The legal basis on which compulsory licensing is applied to acts of interactive downloading requires closer analysis. The compulsory license applicable under the MWMA (based on section 115 of the U.S. Copyright Act) is characterized as a mechanical right license; it is therefore supposed to be based on Article 13 of the Berne Convention. Article 13(1) (emphasis added) allows the imposition of:

... 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.*

⁵⁵⁴ The adjective “specific” refers to the U.S. fair use system which allows the application of exceptions also without specific statutory provisions on the basis of certain factors codified in section 107 of the Copyright Act.

In the case of downloading, it is not an act of recording of a musical work that takes place but an act of copying of the work as recorded.⁵⁵⁵ Yet even if the compulsory licensing system might not be found to be in perfect accordance with Article 13 of the Berne Convention, this reason alone would not be decisive from the viewpoint of compliance with the Convention in general. In this case, the generic provisions on the right of reproduction would apply, including Article 9(2) of the Berne Convention on the three-step test for the application of exceptions to and limitations of the exclusive right of reproduction – and there is good reason to expect that the compulsory license would pass the three cumulative steps of the test.

From this perspective, then, it is positive that the MWMA maintains the possibility of negotiating and concluding voluntary licensing agreements – even though it follows from the applicability of a compulsory license that, in the absence of an agreement, such a license will be granted. (It is a further positive that the “willing buyer, willing seller” test is now fully applicable to the setting of rates, such that it safeguards against a conflict with a normal exploitation of the musical works concerned and any unreasonable prejudice to the legitimate interests of the rightholders.)

It is worth noting that the compulsory licensing for interactive downloading and streaming (the latter involving temporary copies) does *not* influence the application of the exclusive “performing rights” in musical works under section 106(4) of the Copyright Act (usually managed by PROs – i.e., CMOs managing performing rights) or the application of the exclusive rights of reproduction, distribution and digital public performance of producers of sound recordings under section 106(1), (3) and (6) of the Act. In fact, the MWMA may improve the position of PROs and the authors represented by them through benefitting from the updating of the rate-setting procedures and conditions.

Indeed, the compulsory licensing system and the MLC’s operation as a CMO promise benefits to all stakeholders. Digital service providers (DSPs) are now able to secure a blanket compulsory mechanical license rather than required to clear each work individually and risk liability if they fail to clear correctly just one of the millions of works they use. A broad, publicly available database will advance legal security, and extension of coverage should be such that the MLC can identify and locate otherwise unidentifiable and/or nonlocatable rightholders, so that they may properly be paid royalties. Where efforts to identify and/or locate the proper rightholder are unsuccessful, the MLC will hold the royalties for at least three years, then distribute them among the identifiable and locatable rightholders.

“The answer to the machine in the machine”: CMOs and digital rights management

In the concluding chapter of the second edition of this book, point (6) offered the following observation about the impacts of digital technology on the collective management of copyright:

Digital technology and the Internet both pose serious challenges and offer new promising opportunities for “traditional” collective management organizations (such as “performing rights” societies with “collectivized” licensing conditions, tariff systems and distribution rules). On the one hand, the new possibilities for individual licensing and the new alternative options of joint exercise of rights, in principle, may question their monopoly also in those fields where their system used to be the only possible or feasible option, but, on the other hand, on the basis of the technology that may create such problems for them, they can make their operation more efficient and more attractive both for owners of rights and for users. As a result of these various effects, “traditional” collective management organizations may become strengthened, with a better and more efficient management system, in this period of development.⁵⁵⁶

⁵⁵⁵ It may also be considered relevant that the reproduction in the end user’s electronic storage is the result of an act of interactive making available to the public. The question may therefore be raised whether or not Article 8 of the WCT also provides for a limitation of the exclusive right of authorization. If so, the limitation may still be permitted on the basis of the three-step test prescribed in Article 10(2). Since it is an enabling solution, beneficial for all of the interested stakeholders, it is hardly likely that serious doubts will emerge about its accordance with the three cumulative criteria of the test and hence with the WCT.

⁵⁵⁶ See WIPO (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 159.

This echoes Charles Clark's frequently quoted saying that "the answer to the machine is in the machine" – that is, that the problems digital technology poses for copyright holders may be solved by means of the same technology (in particular, digital rights management).⁵⁵⁷

The negotiating parties preparing the two WIPO Internet Treaties – the WCT and the WPPT – agreed that it would not be enough to provide appropriate rights for the online use of works; the application of technological protection measures and rights management information was also required, and would need legal protection when applied. This has led to the adoption of Articles 11 and 12 of the WCT and Articles 18 and 19 of the WPPT.

The CMOs recognized quite early the potential for digital rights management in the exercise of rights in an online digital environment. They foresaw that it would facilitate not only more efficient authorization (or prohibition) and monitoring of the use of the works but also the more precise and quicker distribution of the remuneration collected. In 1994 – even before the WIPO Internet Treaties were adopted – CISAC launched its Common Information System (CIS) project, the objectives of which it outlined as:

To administer rights across digital superhighways, societies must share information about musical works and other types of creations by implementing systems to enable their unique identification and to establish the current owner of the rights. [...] CIS is a plan for standardizing and communicating data in an efficient and integrated way. It is designed to replace the many duplicate sets of data managed independently by royalty collection societies and publishers or producers or broadcasters with their individual and unrelated numbering schemes. To become efficient and integrated, all parties need to be able to identify the same work by a single unique identification number no matter where in the digital world it is exploited.⁵⁵⁸

On the basis of a five-year development plan, CISAC made spectacular progress on the project, and it was a key item on the agenda of the CISAC Congress held in Santiago de Chile in 2000 (the same event at which the Santiago agreements came into being). In April 2001, CISAC organized a "CIS Information Day" in Nice, France, to which it invited representatives of its partners, users and the general public. The reports presented at the event showed that CIS was nearing full operation, and that CISAC and its member societies would soon become truly efficient intermediaries in the online digital environment. This was true in respect of both of the basic pillars of the CIS project: a network of databases and standard identifiers of works and interested parties.

The International Organization for Standardization (ISO) had adopted the International Standard Musical Works Code (ISWC) as a worldwide identifier of musical works (a dumb number with access to information on the titles, authors and composers of musical works). Some other identification standards – such as the International Standard Audiovisual Number (ISAN), a joint project between CISAC, AGICOA and FIAPF, and the International Standard for Textual Works (ISTC) – were close to completion. Progress had been made in establishing another CIS subsystem: the Interested Parties Information (IPI) system, which was to replace the Composers, Authors and Editors (CAE) file system.

In addition, the ISO recognized other identification number standards, such as the International Standard Recording Code (ISRC) identifying musical recordings, developed and managed by IFPI, and several standards common within the publishing industry, such as the International Standard Book Number (ISBN) – the oldest and best known such identifier – and the International Standard Serial Number (ISSN), as well as newer ones – namely, the Publisher Item Identifier (PII), the Serial Item and Contribution Identifier (SICI), and the Book Item and Component Identifier (BICI), developed to identify any part of a publication.

Using the momentum generated by the CIS project at the Santiago Congress, five big societies – SACEM (France), GEMA (Germany), SGAE (Spain), SIAE (Italy) and BMI (United States) – established a "FastTrack" alliance: a system in which the five societies' existing computing resources and

557 Charles Clark (2005). *"The Answer to the Machine is in the Machine" and Other Collected Writings*. Jon Bing and Thomas Dreier (eds). Oslo: Norwegian Center for Computers and Law.

558 Quoted in WIPO (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO, 101–102.

databases were connected in a decentralized, but harmonized, way. The FastTrack project had three aims:

- (i) to establish a global documentation and distribution network, constructed from the databases of the partner societies and the already-existing centralized or regional sources, offering a wide-ranging facility for the electronic exchange of information for the purposes of revenue distribution;
- (ii) to develop an online work registration portal; and
- (iii) to work out an online licensing system.

Membership of FastTrack was open to those other societies that could contribute to these ambitious objectives. At time of writing, FastTrack had added eight further members to its original five.⁵⁵⁹

For a while, CIS-Net (as the key element of CISAC's Common Information Network) and FastTrack developed in parallel – albeit with some overlap because of mutual membership. In 2004, however, CISAC and FastTrack agreed to implement CIS-Net using FastTrack's software, systems and data protocols; that implementation took place in 2005.

CIS-Net is a network of databases built upon the CIS Standards. Each database constitutes a node within the overall network, of which there are three types:

- local nodes, maintained by individual member societies of CISAC;
- regional nodes, developed by regional groups of member societies (e.g., LatinNet, DIVA or Mis@Asia); and
- the WID Center, the CISAC database of musical works for performing and mechanical rights.

The network can be accessed online, and the CMOs use it both for licensing the use of musical works and for distributing the remuneration collected.⁵⁶⁰

FastTrack, through which CIS-Net now functions, is an international transactional platform for the exchange of music and audiovisual authorship, ownership and agreements information. At the time of writing, it served more than 120 CMOs administering copyright in more than 100 countries, with a combined database of more than 30 million single works.⁵⁶¹

FastTrack supports CMOs' use of the CIS-Net platform in multiple ways and it claims that its benefits have been many. The amounts of royalties received in error are said to have been reduced, and the accuracy with which works and interested parties are identified has increased. The number of inquiries among societies using CIS-Net to resolve differences in copyright data sourced from different territories is also said to have been reduced, as has the number of payment queries.⁵⁶²

FastTrack aims to continuously refine and expand its capabilities as a global transactional platform. An example is its Audio-Visual Index (AVI), a tool that has provided societies with immediate benefits including expedited, automatic processing of cue-sheet data and more accurate distribution of royalties on audiovisual performances.

At the time of writing, the Common Information System comprised the following main standards and tools.

International Standard Musical Work Code (ISWC) – ISO 15707:2001 The ISWC identifies musical works by title, composer, author and arranger. Although it does not include information on the productions in which the works are used (e.g., publications, recordings and broadcasts), there are other standard codes for this purpose – in particular, *the International Standard Recording Code (ISRC)* – ISO 3901:2019 – for phonograms. The ISWC data that the various registration

559 Namely, AKM (Austria), ASCAP (United States), BUMA-STEMRA (Netherlands), PRS for Music (United Kingdom), SABAM (Belgium), SOCAN (Canada), SUIZA (Switzerland) and UBC (Brazil).

560 CIS-Net has global coverage. At the time of writing, it spanned 25 nodes of three types and the repertoires of 112 societies, including 94.4 million musical works with more than 52 million ISWCs. See www.cisac.org/services/information-services/cis-net

561 See FastTrack (undated). Our mission. Available at www.fasttrackdcn.net/our-missions/

562 See FastTrack (undated). Benefits. Available at www.fasttrackdcn.net/benefits/

agencies produce is incorporated in the ISWC System: a central database – built as an extension of the CIS-Net network – with a public portal through which members of the public can access ISWC metadata.

International Standard Audiovisual Number (ISAN) – ISO 15706:2002 The ISAN identifies an audiovisual work and remains the same regardless of:

- the various formats in which it might be embodied and used (audiovisual recording, DVD, etc.);
- the language of the version; and
- the various titles a work may be known by in the given markets.

The IBAN also facilitates accurate and fast identification of audiovisual works, as well as automated processing of broadcast usage reports and monitoring of Internet usages. Because of its stability, the ISAN system may play a key role not only in collective management but also in fighting piracy.

International Documentation on Audiovisual Works (IDA) The IDA is an online international database containing information on audiovisual works, including their language and other versions, adaptations and formats. Information for each work registered in IDA includes the original title, title versions, the year and country of protection, the names of the production company, authors and other rightholders, the ISAN, the Interested Party Information (IPI) code and also an IDA code. CISAC member societies use the IDA to identify audiovisual works, their authors and other rightholders, to exchange information between themselves and for distribution purposes.

Also of relevance to this discussion is DDEX (registered as Digital Data Exchange, LLC): a not-for-profit, membership organization that was formed in 2006 to create standards applicable along the digital music value chain. The first DDEX members were CMOs, media companies, rightholders, DSPs and technical intermediaries from across the digital music industry who recognized that they needed to adopt common standards of information (i.e., metadata about works, tracks and products (including ownership and sales information)).⁵⁶³

At the time of writing, there were eight types of standard, all of which DDEX makes available to anyone who acquires a free DDEX implementation license. The standards themselves are all freely available online, partnered with detailed information about the principles underpinning them and instructions on how to put them into practice.

Repertoire databases of musical works for online uses

The Common Information System serves as a basis for establishment of repertoire databases, but the example of the system set up under the MWMA in the United States – one of the key elements of which is a publicly available repertoire database of musical works – is also worth reviewing. The more so because as the report of the House of Representatives reflects it, in the course of the preparatory work toward the database, the failure of an ambitious and costly E.U. project – the Global Repertoire Database (GRD) – was also noted as a valuable lesson.⁵⁶⁴

Here, first the provisions of the MWMA on the database to be established and administered by the MLC will be outlined, and reference will be made to that part of the House Report where the reasons of the collapse of the GRD project are mentioned. Then, the main features of the GRD project is analyzed in a little more detail to show why its failure was inevitable. Finally, it is mentioned what other – and more reasonable – options for a shared database may be available.

The main elements of the MWMA included in the Copyright Act as new subsection 115(d)(3)(E) on the MLC database may be outlined as follows.

⁵⁶³ See DDEX (undated). About us. Available at <https://ddex.net/about-ddex/>. Among its members and associated members may be found authors' societies (APRA, ASCAP, BMI, BUMA-STEMRA, GEMA, PRS for Music, SABAM, SACD, SACEM, SESAC, SGAE, SOCAN, SUISA), CMOs of producers of phonograms and performers (Gramex – Finland; GVL – Germany; PPL – United Kingdom; SPPF and SCPP – France; SoundExchange Inc. – United States), alliances of CMOs (AGEDI – Spain), music publishers (Universal, Sony Music, Warner/Chappell), an online licensing platform (Armonia Online), independent management entities (Kobalt, NexTone) and major online users (Amazon, Apple, Deezer, Facebook, Netflix, Google, Pandora, Spotify, Tencent).

⁵⁶⁴ House Rept. 115-651, Music Modernization Act. 115th Congress (2017–2018), 2nd Session, August 25, 2018. Available at www.congress.gov/115/crpt/hrpt651/CRPT-115hrpt651.pdf

- The MLC must establish, maintain and update a database containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the owners of rights in such works (and shares of such works) and the sound recordings in which the musical works are embodied.
- With respect to musical works (and the shares of such works) that have been matched to copyright owners, the musical works database shall include, to the extent reasonably available to the MLC:
 - the title of the musical work;
 - the owners of copyright in the work (or the share of the work);
 - the ownership percentage;
 - contact information for the owner of the copyright;
 - the ISMW code for the work; and
 - identifying information for sound recordings in which the musical work is embodied, including the name of the sound recording, the featured artist, the owner of right of the sound recording, the producer, the ISRC code and other information commonly used to help associate sound recordings with musical works.
- With respect to unmatched musical works (and shares of such works), the database must include – to the extent reasonably available:
 - the title of the work;
 - the ownership percentage for which an owner has not been identified;
 - if a copyright owner has been identified but not located, the identity of such owner and the ownership percentage; and
 - identifying information for sound recordings in which the work is embodied, including the ISRC code and other information commonly used to help associate sound recordings with musical works.
- The musical work copyright owner listed in the musical works database is obliged to engage in commercially reasonable efforts to deliver to the MLC information regarding the names of the sound recordings in which their musical works (or shares of those works) are embodied, to the extent practicable.
- The database must be made available to members of the public in a searchable, online format, free of charge. In addition, the MLC must make any such database available in a bulk, machine-readable format, through a widely available software application, and it must make it available to all of the interested stakeholder entities listed in the Act, as well as to the U.S. Copyright Office, free of charge (as well as to others against payment of a reasonable fee).

The Report of the House Judiciary Committee reflected on the failure of the GRD and its implications for the MLC database project:

There have been several attempts to create a unified music database, most notably the 2008 Global Repertoire Database project that brought together numerous music industry participants in an attempt to solve the music industry's data problem. Despite hopes that this effort would succeed where others had failed, *this project too ended without success due to cost and data ownership issues. Music metadata has more often been seen as a competitive advantage for the party that controls the database, rather than as a resource for building an industry on.*⁵⁶⁵

The GRD project was launched in 2008 originally within the European Commission by Commissioner Neelie Kroes (in charge of competition). In April 2010, a Working Group chaired by Kroes issued a Request for Information (RfI); in July 2010, the Group sent detailed Requests for Proposals (RfPs) to a great number of stakeholders. At the time of the RfPs' publication, the Working Group comprised representatives of Amazon, EMI Music Publishing, iTunes, Nokia, PRS for Music, SACEM, STIM and Universal Music Publishing.

The RfPs emphasized that, although the project had its start with the European Commission, the scope of the GRD was to be global, because the administrative issues of licensing of musical works

⁵⁶⁵ *Ibid.*, 8 (emphasis added).

are common throughout the world. It was also indicated that although the global database would cover only musical repertoires at first, it would later – with the same objectives and based on the same criteria – be extended to audiovisual productions and then to other sectors.

According to the RfPs, the various existing databases – those of CMOs, publishers and others – would be merged in the GRD as a single authoritative global database available to interested stakeholders, but rightholders would also be able to add data to it directly.

Detailed requirements outlined the data to be included in the GRD. All of the existing standard identification codes were to be used, with cross-references. A separate organization was to be set up, with a separate staff with a specific technical background. The RfPs sought proposals on how to finance the likely high costs; one such idea put forward was that the GRD would make several existing databases obsolete, and the amounts used for their maintenance and operation could be transferred to the GRD. The roadmap presented in the RfPs was too optimistic: it anticipated that the system would be finalized, in its basic form, by the end of that same year (i.e., 2010).

Such optimism turned out to be unjustified, even though further organizations such as CISAC, the International Confederation of Music Publishers (ICMP) and Google were included in the Working Group. It was mooted that the International Copyright Enterprise (ICE) could be used to support management of the GRD, and Deloitte was commissioned to prepare a detailed – and thus very costly – feasibility study in consultation with all direct and indirect stakeholders and with governmental and legislative bodies.

To cut a long story short: in 2014, the project was declared a failure, after sunk costs (i.e., accumulated debt) of more than USD 12 million, and it was abandoned. Certain technical problems and issues of data quality had emerged, and the foreseeably high costs of establishing and operating the system had frightened away stakeholders. Moreover, some highly controversial questions concerning the control and governance of the database had been raised.

One of the most decisive reasons – if not the most decisive – why the project failed was that participating CMOs began to withdraw from, and stopped financing, it. It had become clear to them that if a GRD were to be established as proposed, music publishers and users might begin to engage in licensing activities directly. Not only were CMOs wary of the effect on their continued relevance, but also their members were unhappy that management activities might migrate away from the societies – within which they had influence, and within which their interests and expectations as creators were centered – and instead be hosted within a global enterprise with only an economic, competition and market focus.

This has been a lesson for legislators in the United States as they began to build their MLC database. Realistic criteria define both the ways in which the MLC might use the database to manage rights duly controlled by the rightholders and the extent of data required to be included within it.

The idea of setting up a broad database to serve as an information tool usefully facilitating lawful uses and more efficient rights management has not been abandoned even in Europe, but it has become clear that the type of centralized database foreseen in the GRD project would be ill-advised. It seems that only a decentralized database might have a realistic chance of success. Professor Norbert Gronau (Potsdam University) prepared a proposal along these lines for the German Ministry of Justice, the title of which is in itself telling.⁵⁶⁶ Among the slides in his “Conception of a European, decentralised copyright platform for music” is one in which Gronau concisely sums up the reasons why a decentralized approach is the sensible option:

Why a decentral approach makes sense

- Failure of previous centralized Approaches
 - A comprehensive database is needed but centralized approaches have been unsuccessful
- Existing Power Relations

⁵⁶⁶ Norbert Gronau (undated). Conception of a European, decentralised copyright platform for music. Available at <https://lswi.de/assets/images/presse/zentrum/Copyright-Conference.pdf>

- Controversy about who would have control over the data and who would manage the catalogue would be circumvented
- Power relations would no longer hinder participation in a common platform
- Platform Purpose
- No provided data shall be saved on a central server
- Sole platform purpose: Data exchange and data quality improvement.⁵⁶⁷

A promising new project in the European Union may also be an appropriate framework within which such a platform might be established. The abstract of a feasibility study for the establishment of a European Music Observatory, published in November 2020, notes that:

The lack of data in the music sector has been discussed for several years. Robust and meaningful comparative data collected at a regular basis are essential when it comes to assessing the need for interventions at the EU level to address gaps in the market and enhance the efficiencies and global competitiveness of the sector. The fragmented, scarce and poorly-harmonised nature of the data collection landscape in the field of music has led to calls from within the sector supporting the creation of a European Music Observatory that can act as a centralised music data and an intelligence hub at European level. This study investigates the possible development of a future full-scale establishment of a data collection organisation, a European Music Observatory, as a core strategic resource to drive relevance and value for future policy actions in the music portfolio and across the sector. Specifically, the study analyses different options for the set-up and operation of an Observatory, taking into account the specific characteristics and requirements of the European music sector.⁵⁶⁸

Private international aspects of collective management

No issues of private international law were discussed in the first and second editions of this book; only the requirements of national treatment were mentioned with any relevance to private international law, since it concerns the status of rightholders who are the nationals of Contracting Parties other than that in which protection is sought. This third edition covers the issues of national treatment in more detail than did the previous editions, but a more general analysis of private international law implications was always intended to be outside its scope.

Nevertheless, on December 15, 2020 – two days before the author’s submission to WIPO of the manuscript of this book – an online conference of the International Law Association (ILA) adopted the Kyoto Guidelines on Intellectual Property and Private International Law, prepared by a group of academic experts in the field. Although the Guidelines were published in February 2021⁵⁶⁹ during the preparatory work of the book’s publishing, their role in collective management justifies their late addition.

The 35 Kyoto Guidelines are divided in four sections:

- General Provisions (Guidelines 1–2)
- Jurisdiction (Guidelines 3–18)
- Applicable Law (Guidelines 19–31)
- Recognition and Enforcement of Judgments (Guidelines 32–35).

The members of the Committee that prepared the Guidelines supplemented them with commentary. The issues of collective management of copyright are covered by Guideline 27, “Collective Rights Management in the Field of Copyright and Related Rights”, on which Josef Drexler has made comments.⁵⁷⁰

⁵⁶⁷ *Ibid.*, 8.

⁵⁶⁸ Directorate-General for Education, Youth, Sport and Culture of the European Commission/KEA European Affairs/Panteia (2020). *Feasibility Study for the Establishment of a European Music Observatory*. Luxembourg: European Union, 8. Available at <https://op.europa.eu/en/publication-detail/-/publication/a756542a-249d-11eb-9d7e-01aa75ed71a1/language-en>

⁵⁶⁹ See *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (JIPITEC), Special issue containing the Kyoto Guidelines, 12(1), February 2021. Available at www.jipitec.eu/issues/jipitec-12-1-2021

⁵⁷⁰ *Ibid.*, 60–68.

One of Drexl's first comments stresses that the Guidelines are unprecedented: "Neither national law nor international law specifically provide conflict rules relating to collective rights management. When legislatures adopt sector-specific rules on collective rights management, they typically remain silent on issues of private international law."⁵⁷¹

He adds: "Contrary to the past, private international law is quickly gaining relevance with regard to collective rights management. Especially in the field of online use of music, multi-territorial licensing has emerged as a new tool used by CMOs."⁵⁷²

Guideline 27 reads as follows:

1. The law of the State where a collective rights management organization has its actual seat of administration shall govern
 - a) the requirements for the specific corporate structure of collective rights management organizations;
 - b) the rights, conditions and principles concerning the relationship of the right holder, as well as of another collective rights management organization representing right holders, vis-à-vis a collective rights management organization, such as
 - (i) the right and conditions for becoming a member of this organization;
 - (ii) the right and conditions for entrusting rights to this organization;
 - (iii) the rights and conditions for withdrawing the management of rights from this organization;
 - (iv) the requirements regarding the calculation and distribution of the organization's revenue to the right holders and other collective rights management organizations representing right holders; and
 - (v) the rights and conditions on access to alternative dispute resolution to be offered by the collective rights management organization; and
 - c) in absence of a choice of law by the parties, the contract under which the right holder entrusts rights to this organization.
2. The law of the State for which protection is sought shall govern
 - a) the presumption that a collective rights management organization is empowered to seek protection for certain works or subject-matter of related rights;
 - b) mandatory collective rights management;
 - c) the power of an individual collective rights management organization to grant licenses or collect statutory remuneration without prior consent of the right holder; [...]
 - e) the issue of whether and under which conditions a collective rights management organization has to license rights to users; and
 - f) the requirements regarding the calculation of the royalty rates and statutory remuneration.
3. The law of the forum shall govern legal standing of a collective right management organization before a court.
4. This guideline applies without prejudice to the applicable competition law rules.⁵⁷³

These provisions may not come as a surprise. It seems logical to apply in Guideline 27.1 the law of the State of the seat of the organization for organizational aspects and for the relationship between members and the organization, because many of these aspects are regulated – at least in part – in the national laws on associations of the State of the seat. The same is true of the law of the State, in Guideline 27.2, where protection is claimed (*lex loci protectionis*) concerning the issues relevant for the level of protection and the exercise of the rights concerned.

⁵⁷¹ *Ibid.*, 61, para. 68.

⁵⁷² *Ibid.*, para. 69.

⁵⁷³ *Ibid.*, 60.

It is noteworthy that Guideline 27.2(a) and (b) clearly refer to presumption-based and mandatory collective management, respectively. According to the comments,⁵⁷⁴ Guideline 27.2(c) probably is intended to cover extended collective management. It is appropriate to apply the law of the State where protection is claimed for extended collective management in the same way as it applies for mandatory management and presumption-based collective management, but what is described in Guideline 27.2(c) is *not* that kind of extended collective management which is discussed in Chapter 5. The language used here – “the power of an individual collective rights management organization to grant licenses or collect statutory remuneration without prior consent of the right holder” – seems to better correspond to mandatory collective management; there is no reference to those conditions that must be fulfilled to distinguish the one from the other – including, at a minimum, the possibility of opting out.

As Josef Drexler's commentary emphasizes, Guideline 27 is only a first attempt to outline general private international law principles in the field of collective management. Two complex realms of legal regulation are involved; further discussions and amendments are inevitable if the many legal and practical implications of both are to be taken into account. Nevertheless, it is high time to draw attention to the question of how the general principles of private international law may be applied – or how they may have to be adapted – to increasingly trans-border collective management. This is a discussion that will undoubtedly continue to unfold long after publication of this book.

574 *Ibid.*, 66, para. 95.

Cultural and social aspects of collective management

Introductory remarks

In this chapter, the aspects of collective management that go beyond the usual legal, technical and economic aspects are reviewed. There are two basic conceptions at play in copyright that are also used in the field of collective management: one that centers product, market and competition (more typical of the common law systems); another that centers the promotion and recognition of human creativity, the close relationship between creators and their creations, and the cultural and social dimensions (more characteristic of the civil law systems).

The extent to which cultural and social considerations may prevail in the activities of CMOs depends largely on whether they are only “collecting” entities – that is, functioning only to collect and distribute remuneration, efficiently but mechanically – or real collectives that also pay attention to promoting creativity and protecting cultural diversity in their countries, as well as to supporting creative people with specific needs (such as young talent and disabled creators). Such cultural and social activities are more typical of authors’ and performers’ organizations. Publishers and producers may also play such roles, but usually not through their CMOs; rather, they invest in finding and nurturing talent as part of their business activities and their contractual relationship with creators, because this is their interest. Such activity is, however, outside the scope of this book. No mention is made in the chapter about the cultural and social roles of ICEs either, because usually they do not play such specific roles. As discussed in Chapter 6, IMEs – as for-profit entities – may make payments to their rightholders as contractual partners but they do not manage rights for the entire creative community of a country or burden themselves with cultural and social services.

Although the cultural and social activities of CMOs are explored in general in the chapter, special attention is devoted to the role that they play in the protection and promotion of cultural diversity – in accordance with the relevant international instruments and E.U. norms.

Dual nature of cultural productions and services: international instruments on the protection and promotion of cultural diversity

Two international instruments deal with the issues specific to the dual nature of cultural goods and services: the UNESCO Universal Declaration on Cultural Diversity, adopted in 2001;⁵⁷⁵ and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.⁵⁷⁶ The two instruments have different legal status, but their objective is the same.

The Preamble to the Convention makes clear that it is based on the principles laid down in the Declaration.⁵⁷⁷ The Convention, however, has a more direct impact, because, as a treaty, it obliges

⁵⁷⁵ See http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁵⁷⁶ See http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁵⁷⁷ The relevant of the Preamble to the Convention reads as follows: “Referring to the provisions of the international instruments adopted by UNESCO relating to cultural diversity and the exercise of cultural rights, and in particular the Universal Declaration on Cultural Diversity of 2001.”

the contracting parties to comply with its provisions. At the time of writing, 150 countries and the European Union were party to the Convention.⁵⁷⁸

The status of the Declaration, meanwhile, is similar to that of the Universal Declaration of Human Rights. It is not directly binding, but – as a primary international articulation of fundamental principles recognized by the international community – it serves as a general basis for, and may have influence on, any subsequent regulation of the issues covered.

The Declaration stresses the dual nature of cultural activities, productions and services. Article 8, titled “Cultural goods and services: commodities of a unique kind”, requires that “particular attention must be paid to the diversity of the supply of creative works, to due recognition of the rights of authors and artists and to the specificity of *cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods*” (emphasis added). Accordingly, Article 9 stresses that “[i]t is for each State, with due regard to its international obligations, to define its cultural policy and to implement it through the means it considers fit, whether by operational support or appropriate regulations” (emphasis added).

The UNESCO Convention, in which these principles have been transformed into binding norms, further emphasizes the importance of preserving national culture in adopting norms and measures – in the way each State “considers fit” – for the protection of cultural diversity as a key vector of national identity. Articles 5(1) and 6(1) of the Convention make this particularly clear:

The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, *reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions ...*

Within the framework of its cultural policies and measures as defined in Article 4.6^[579] and taking into account its own particular circumstances and needs, *each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory* (emphasis added).

Basic provisions in E.U. law concerning the protection of cultural diversity

Article 167 of the Treaty on the Functioning of the European Union (TFEU) adheres to the principles and provisions of the UNESCO Convention by which the Union and its Member States are bound. The Article provides in paragraphs (1) and (4) that:

1. The Union shall 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. [...]
4. The Union *shall take cultural aspects* into account in its action under other provisions of the Treaties, in particular *in order to respect and to promote the diversity of its cultures* (emphasis added).

Article 167(4) deserves special focus. It requires all E.U. bodies to take cultural aspects into account – that is, to respect and promote the diversity of cultures of the Member States – whenever they apply “other provisions” of the TFEU. In this context, “other provisions of the TFEU” means not *some* of the other provisions but *all* other provisions. Therefore, it appears to be clear that even where the E.U. bodies have exclusive or shared competence (in areas such as competition and the internal market) they must take into account cultural aspects. This obligation obviously applies also to the regulation of the collective management of copyright.

⁵⁷⁸ See https://en.unesco.org/creativity/countries?member_parties=1

⁵⁷⁹ The definition reads as follows:

Cultural policies and measures refer to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.

These provisions of the TFEU have been duly reflected in what is known as the “EU Cultural Agenda”:

The originality and success of the European Union is in its ability to respect Member States’ varied and intertwined history, languages and cultures [...]. Through this unity in diversity, *respect for cultural and linguistic diversity and promotion of a common cultural heritage lies at the very heart of the European project. This is more than ever indispensable in a globalizing world.*

[...] In this respect, the entry into force of the UNESCO Convention on the protection and promotion of the diversity of cultural expressions on 18 March 2007 is to be seen as a fundamental step, to which the EU has greatly contributed.

Europe’s cultural richness and diversity is closely linked to its role and influence in the world. The European Union is not just an economic process or a trading power, it is already widely – and accurately – perceived as an unprecedented and successful social and cultural project. (emphasis added) [...] ⁵⁸⁰

Joint application of the basic provisions of the TFEU, the CRM Directive and the UNESCO Convention for the protection of cultural diversity

Recital (3) of the Preamble to the CRM Directive affirms the key importance of CMOs’ activities to national culture, creativity and cultural diversity:

Collective management organizations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.

This is to be interpreted and applied in light of the relevant provisions of the UNESCO Convention binding the European Union and its Member States. Under Article 6 of the Convention, headed “Rights of parties at the national level”:

1. Within the framework of its cultural policies and measures [...] taking into account its own particular circumstances and needs, each Party [i.e., any E.U. Member State] may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.
2. Such measures may include the following:
[...]
(b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services [...] including provisions relating to the language used for such activities, goods and services;
[...].

Article 7(2) of the UNESCO Convention draws attention to the role of domestic organizations of creators – among which CMOs are prominent – in the protection of cultural diversity: “Parties shall also endeavour to recognize the important contribution of artists, others involved in the creative process, *cultural communities, and organizations* that support their work, *and their central role in nurturing the diversity of cultural expressions* (emphasis added).”

In a way, this underlines that copyright and related rights should function as “advertised” – that is, to promote creativity – and not only in relation to creativity in certain parts of the world but to creativity in each country (even those that are small, with only limited economic capacity). Binding the Member States and the European Union in general, this provision sets out that Member States not only have the right to apply policies and take measures to strengthen the position of their own CMOs, so that they may fulfill more efficiently the role of protecting cultural diversity and promoting creativity *in their own country*, but also are obligated to take their best efforts (to “endeavour”) to do so.

⁵⁸⁰ European Commission (2007). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world*. COM/2007/0242 final, May 10, 2–3. Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0242:FIN:EN:PDF>

Adolf Dietz also stresses the key role of CMOs in the promotion of creativity and the protection of cultural diversity in their countries:

[T]he cultural mission of collecting societies is embodied in their role in efficiently organising collective administration of the relevant rights and the impartial and rapid as possible distribution of the revenues they have generated [...]. But, this important and indeed original role only represents half of the story. *To appreciate the full cultural purpose of collecting societies we must take account of the territorial aspects of what they do.* The societies do not operate as it were in a neutral area – nationally, regionally (i.e., European) or internationally – but *their primary responsibility is for the creative people of “their” country or of “their” linguistic culture.*

*This is especially true for societies from the smaller countries with a cultural minority position within the European context, administering “the smallest and less popular repertoires” in the outside world. Based on their statutes and sometimes also under strict legal obligation, these societies have a specific cultural mandate to fulfil reaching far beyond the usual remit of collective management (emphasis added).*⁵⁸¹

With the prescription of the obligation to protect cultural diversity in the TFEU, the European Union fulfills its obligation under the UNESCO Convention. It recognizes its Member States’ “sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions”.⁵⁸² Together with statements made in the CRM Directive on the cultural role of CMOs and the flexible approach offered in that Directive, the Member States have broad freedom to implement the Directive in ways that correspond to *their* CMOs’ specific cultural mandate to support *their* creative communities, *their* culture and *their* cultural diversity.

Thus, a Member State may apply “measures aimed at protecting and promoting the diversity of cultural expressions within its territory”⁵⁸³ in the field of collective management. These may take the form, for example, of a Member State prescribing certain conditions that any CMO established in its territory must meet if it is to be authorized to operate and of guaranteeing an appropriate role for the national repertoire (such as through requirements that it be representative). This may be particularly justified when a CMO is to perform extended or mandatory collective management. As discussed in Chapter 8, deductions from payments to cover the costs of cultural and social purposes may not be prescribed in general, but a country may make appropriate provisions to encourage the application of such deductions in support of its cultural policy. Furthermore, in the case of certain statutory rights to remuneration (i.e., those offering “rough justice”, such as the right to remuneration for private copying), it may also be justified to use a certain percentage of the remuneration (without endangering the equitable right to remuneration of the rightholders concerned) for the promotion of national creativity.⁵⁸⁴

Recital (44) of the Preamble to the Directive expresses optimism that certain measures foreseen in Part III on the trans-border licensing of online uses of musical works will enhance cultural diversity. This optimism is not shared by everybody. It is true that the Directive provides for measures to mitigate the risks – created by the 2005 Recommendation (see Chapter 10) – that cultural diversity will be diluted, but as it will be seen next some commentators have expressed that those measures may not be enough.⁵⁸⁵

581 Adolf Dietz (2014). The European Commission’s Proposal for a Directive on collecting societies and cultural diversity: a missed opportunity. *International Journal of Music Business Research*. 3(1), 15 (footnotes omitted) (hereinafter, Dietz, “The European Commission’s Proposal”).

582 Article 2.2 (and also Article 5.1) of the UNESCO Convention.

583 Article 6(1) of the UNESCO Convention.

584 See, e.g., Judgment of the Court (Second Chamber) of July 11, 2013, *Amazon v. Austro-Mechana*, C-521/11, ECLI:EU:C:2013:515, [3]:

Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that the right to fair compensation under that provision or the private copying levy intended to finance that compensation cannot be excluded by reason of the fact that half of the funds received by way of such compensation or levy is paid, not directly to those entitled to such compensation, but to social and cultural institutions set up for the benefit of those entitled, provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory, which it is for the national court to verify.

585 In addition to Dietz, “The European Commission’s Proposal”, see, e.g., Reto M. Hilty and Sylvie Nérison (2013). Collective management and digitization: the European experience. In Ruth Towse and Cristian Handke (eds.), *Handbook of the Digital Creative Economy*. Cheltenham: Edward Elgar, 228–230.

Rejection of the application of the Services Directive to collective management and the protection of cultural diversity

From the viewpoint of the protection of cultural diversity of the Member States, it is important that the E.U. Services Directive has been found not to apply in the context of collective management.

Recital (3) of the Preamble to the Proposal for a CRM Directive⁵⁸⁶ made the following statements:

When established in the Union, collecting societies – as service providers – must comply with the national requirements pursuant to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market^[587] which seeks to create a legal framework for ensuring the freedom of establishment and the free movement of services between the Member States. This implies that collecting societies should be free to provide their services across borders, to represent rightholders resident or established in other Member States or grant licences to users resident or established in other Member States.

Although the majority of the provisions of the original proposal – in particular in Title II (the key provisions of which are reviewed in Chapter 8) – may be regarded as codifying the settled case law of the CJEU, the second sentence of this recital was out of step with the Court's rulings. It did not correspond with the nuanced findings in *Tournier* and *Lucazeau* (see Chapter 4), according to which “services across borders, to represent rightholders resident or established in other Member States or grant licenses to users resident or established in other Member States”⁵⁸⁸ were *not* justified and would have endangered effective application of rights concerned (as the Court later confirmed it in *OSA* – just one day after the Directive was adopted). However, it was more decisive that the European Parliament rejected the proposals that application of the Services Directive be extended to collective management, whereby “competition” would have been promoted not only for the online licensing of music but also for *any* rights appropriately managed collectively.

The European Parliament's position has been consequential in rejecting the idea of introducing the same type of competition into the collective management of rights in works and productions protected by related rights as applies in utility services, such as telecommunication, waste management or cleaning, repair and maintenance services. The position of the Parliament has been based on the recognition that CMOs mainly or exclusively manage rights in productions that are highly relevant to national cultures, cultural diversity and cultural policy of the Member States and that to introduce competition into these arenas risked undermining Article 167(4) of the TFEU whereby all activities of the E.U. bodies must be structured so as “to respect and to promote the diversity of [...] cultures”.⁵⁸⁹

The European Parliament stuck to these basic TFEU provisions when it expressed strong opposition to those aspects of the 2005 Recommendation that, in its view, endangered national cultures and cultural diversity (see Chapter 10). In its 2007 Resolution, the Parliament emphasized its:

... concern about the potentially negative effects of some provisions of the Recommendation on local repertoires and on cultural diversity given the potential risk of favouring a concentration of rights in the bigger CRMs,^[590] and [that] the impact of any initiative for the introduction of competition between rights managers in attracting the most profitable rightholders must be examined and weighed against the adverse effects of such an approach on smaller rightholders, small and medium-sized CRMs and cultural diversity.⁵⁹¹

586 Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012)372 final. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52012PC0372>

587 Note 18 in the text quoted reads “OJ L 376, 27.12.2006, 36”.

588 See Recital (3) of the Preamble to the Proposal for a Directive.

589 It is also relevant that this concerns cultural policies in respect of which the Member States enjoy broad autonomy (under Articles 4–6 TFEU – especially Article 6(c) concerning cultural policy, over which the European Union does not have exclusive competence nor even shared competence; the European Union has only a supportive role to play “to carry out actions to support, coordinate or supplement the actions of the Member States”).

590 The European Parliament used the expressions “collective rights management” and “collective right managers” as synonyms for collective management and CMOs; the abbreviation “CRMs”, in the given context, meant CMOs.

591 European Parliament resolution of March 13, 2007 on the Commission Recommendation 2005/737/EC of October 18, 2005 on collective cross-border management of copyright and related rights for legitimate online music services. OJ C 301E/64, December 13, 2007, para. L.

The Parliament also stressed that the E.U. rules on collective management should be “in compliance with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions”.⁵⁹²

In accordance with its consistent position on the protection of Member States’ national cultures and cultural diversity across Europe, the Parliament opposed any reference to the applicability of the Services Directive in the course of negotiations on subsequent versions of the draft CRM Directive. As a result, the above-quoted Recital (3) was removed from the text. It would have been in conflict with the Parliament’s position because the freedom of one or more foreign CMOs to manage the same category of rights in parallel with domestic CMOs of a given Member State in the traditional fields of collective management – that is, in fields other than the trans-border licensing of online use of musical works – would put the effective operation of collective management systems at risk, because they would be in conflict with their very objectives and *raison d’être*.

However, the Commission accepted the position of the European Parliament that no reference should be made to the Services Directive understanding that it was therefore not applicable. Subsequently, during the debate held at the European Parliament on February 4, 2014, Commissioner Barnier stated that the CRM Directive was to be considered “neutral” in relation to the Services Directive and that the scope of the application of the latter would remain the same.⁵⁹³ His statement suggested that, in spite of the removal of the reference to the Services Directive, it was still an open question to be decided later whether or not it would be applicable to CMOs. However, the CJEU, as discussed in Chapter 4, one day after the adoption of the CRM Directive made it clear in *OSA* that the Services Directive is not applicable to CMOs. The Court’s findings are valid not only for the pre-Directive legal situation, as was the case in *OSA*, but also after the entry into force of the Directive; since they consisted in recognizing that, for effective application of certain rights, a national CMO may necessarily be not only a *de facto* but also a *de jure* monopoly (which means that to constrain a country to introduce “competition” to manage such rights would be to constrain it to substitute an inadequate regime for its existing optimal system).

There were, however, certain provisions close to the end of the extensive CRM Directive to which the European Parliament and those Member States that opposed application of the Services Directive did not pay attention and which seem still to reflect the rejected idea. The provisions in Article 37(2) of the CRM Directive may be regarded as to have such an effect:

- (2) *Where a competent authority considers that a collective management organisation established in another Member State but acting within its territory may not be complying with the provisions of the national law of the Member State in which that collective management organisation is established which have been adopted pursuant to the requirements laid down in this Directive, it may transmit all relevant information to the competent authority of the Member State in which the collective management organization is established, accompanied where appropriate by a request to that authority that it take appropriate action within its competence. The requested competent authority shall provide a reasoned reply within three months.*⁵⁹⁴

This provision suggests that it is possible for a CMO established in one Member State to provide “services” in another and that the government of the first Member State may do only one thing about it – namely, complain to the Member State in which that CMO is established. In this way, these provisions seem to be in conflict with the decisions to reject the applicability of the Services Directive, both by the European Parliament and by the CJEU in *OSA*.

⁵⁹² *Ibid.*, para. Y.

⁵⁹³ See the minutes of the debate, available at www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20140204&secondRef=ITEM-003&language=EN&ring=A7-2013-0281. Barnier’s statement in the original French was recorded as follows (author’s own translation): “I mean that the directive you are going to adopt is neutral – I emphasize – with regard to the directive on services. The scope of the latter directive will therefore not change.”

⁵⁹⁴ Emphasis added to show that, if these provisions were applicable not only for licensing of online trans-border use of musical works (for which a special regime is provided in Title III of the Directive) but for collective management in general, the Member States would not be in a position to decide what organizations they allow to carry out collective management activities in their territories. Thus, they would be constrained to tolerate also that a possible uncontrollable appearance of a bigger number of CMOs in their cultural markets might undermine the effective management of certain rights; neither would they be allowed to supervise CMOs operating without their authorization and to apply their statutory provisions where foreign CMOs violate them.

Nevertheless, the conflict can be resolved through adequate interpretation of Article 37(2) in the context of the Directive. The principle of *effectiveness* applicable in the interpretation of legal provisions would not allow a finding according to which Article 37(2) is not applicable because the need for its deletion – that would have followed from the rejection of the applicability of the Services Directive – has been overlooked. It is, however, possible to apply it without getting in contradiction with the rejection of the application of the Services Directive by the European Parliament and the CJEU. This is so because there are valid reasons to argue that it may apply for trans-border licensing of online use of musical works, as provided for under Title III of the Directive (because the reasons for the legal monopoly mentioned in the *OSA* judgment do not necessarily exist in this specific context), but it is not applicable in other cases (where there is a need for a *de facto* and even *de jure* monopoly of the CMOs as in the case dealt with in *OSA*).

Since the application of the Services Directive has been rejected and the CJEU has clarified in *OSA* that the freedom of providing services may be limited under certain conditions (practically as regards offline uses), it is possible for a Member State not only to subject a CMO seeking to operate in its territory to approval requirements (i.e., accreditation or registration by a competent national authority), but even to provide in such cases that only one CMO may be approved. (As stressed above, this is not applicable to CMOs seeking to grant multi-territorial licensing under Title III of the Directive, although it may be justified to prescribe at least some notification obligation for such CMOs too: see Chapter 10.)

Even where a national law does not prescribe that the operation of only one CMO may be approved in cases like those identified in *OSA* and where, in principle, the operation of CMOs established in other Member States is allowed outside the field of trans-border licensing of online use of musical works, it should be possible for a Member State to extend the approval (accreditation/registration) procedure and the requirements thereof – as well as the supervision of collective management activities – to those CMOs. This is necessary to level the playing field for all CMOs managing rights in the territory of a given Member State. For the same reasons, it is also reasonable to extend the application of provisions on the establishment of tariffs to be used in a Member State's territory. Appropriate *ex ante* and *ex post* controls over the adequate operation of CMOs (the activities of which are indispensable to the exercise of certain rights) are necessary as a guarantee that the given Member State will fulfill its treaty obligations.

Use of remuneration collected for cultural and social purposes

It goes without saying that CMOs may deduct the costs of management before distributing and transferring the amounts due to the rightholders in accordance with their distribution rules. But the use of the remuneration for any other purposes may be possible only with the permission of the rightholders. Such permissions may be granted in different ways: individually, case by case (rarely); as a condition of CMO membership (fairly frequently); by bodies representing rightholders (frequently); or by means of reciprocal representation agreements between CMOs (commonly).

In general, such additional deductions are made for cultural or social purposes. Percentage deductions for such purposes are quite typical in the case of “traditional” CMOs, such as musical performing rights societies. “Cultural purposes” mean activities promoting national creativity (such as prizes, competitions, fellowships, etc.), while “social purposes” serve health insurance or pension funds. Of course, rightholders are themselves free to dispose directly of their remuneration as they wish, but any such disposal through a CMO should be based on rightholders’ free and informed decisions, and exercised either directly or through their CMO’s competent bodies (the latter most commonly when a relationship with a foreign organization is implicated). In this respect, the legal maxim *nemo plus iuris transferre potest quam ipse habet* (“no one may transfer more rights than they themselves have”) applies. This means, for example, that the assembly of a CMO comprising rightholders who are nationals of the country concerned is not entitled to exercise its “generosity” by using the remuneration of *foreign* rightholders for its own national cultural and/or social purposes without seeking their authorization directly or through the CMOs representing them.

As a rule, when rightholder join, or are otherwise represented by, a CMO, they agree to such deductions as part of the membership package. It is therefore not easy to evidence the free and informed decisions of individual rightholders in general – and of foreign rightholders in particular,

in whose name their CMO's agree to such deductions. In view of this, that percentage of deductions should be reasonably low; otherwise, doubts might emerge about its legality.⁵⁹⁵

There are, however, some special cases in this regard. For example, somewhat different considerations apply to the right of performers and producers of phonograms to a single equitable remuneration under Article 12 of the Rome Convention and Article 15 of the WPPT – in particular as regards the share due to performers. One of the recognized purposes of this right is to counterbalance the lost employment opportunities that performers suffer as a result of the widespread uses of performances included in phonograms. For this reason, in applying these rights, cultural and social considerations may be more decisive than they are in the case of copyright and other related rights in general. This also means that it may be reasonable to deduct a higher percentage of the sums collected in the exercise of this right for the promotion of creativity and for social purposes.

In Chapter 4, in the section on the collective management of the right of performers and producers of phonograms to a single equitable remuneration, it is discussed in detail how the CJEU in *RAAP* believed it apt to introduce the obligation of the Member States – although, by virtue of Article 4(2) of the WPPT they are not obligated – that their CMOs collect and transfer the single equitable remuneration unilaterally also in favor of nationals of those other Contracting Parties that have made reservations under Article 15(3) to the application of the right provided for in Article 15(1) of the Treaty. One of the negative consequences of this newly introduced obligation would be that several Member States would be deprived of a source of funds that they have legitimately used for cultural purposes, with serious negative effects for the promotion of creativity and the social situation of performers.

As discussed in Chapter 4, the introduction of such a new obligation for the Member States is not justified, and it would be helpful if the Rental, Lending and Related Rights Directive were to be amended to clarify that it does not apply. In that event, the question will emerge whether it is justified to collect remuneration at all where there is no beneficiary of the right under the WPPT.

This issue was discussed intensively at the 2000 Diplomatic Conference on the rights of audiovisual performers. Although not involving the rights of performers under the WPPT, the position of the then European Community and the Member States on this issue – also applicable to the holders of rights to performances embodied in phonograms – became quite clear. Before the closure of the Conference and recognizing that the debate had not been fully settled, the chair of Main Committee I made the following statement, intended to be adopted as an agreed statement in accordance with Article 31.2(a) of the VCLT:

[D]uring the work of Main Committee I, a proposal was made to include in the Treaty a provision stating that no Contracting Party should allow collection of remuneration in respect of performances of nationals of another Contracting Party, unless distribution of such remuneration is made to those nationals. Such rules have not been taken to the text of the Treaty. It is understood that there is no legal basis for collection of remuneration in a Contracting Party in respect of nationals of another Contracting Party for rights that it does not accord to those nationals. Collections in such circumstances would be inappropriate and without legal authority. Therefore, all those from whom such remuneration is claimed should have legal remedies against the payment. Where remuneration is collected, on the basis of proper mandates, in a Contracting Party for rights that it accords to the nationals of another Contracting Party, but not distributed to them, those nationals should have legal means to ensure that they receive the remuneration collected on their behalf.⁵⁹⁶

595 The 10 percent upper limit on deductions is a traditional part of the CISAC Model Contract for reciprocal representation agreements between performing rights CMOs that, for antitrust reasons, is not really applied in practice anymore. The Model Provisions had codified best practices of contractual relations between many CMOs, the smooth and correct cooperation of which is a basic precondition to the adequate management of copyright. As well as determining an acceptable maximum level, the 10 percent rule drew attention to such deductions as desirable for the promotion of creativity and as a matter of solidarity among creators.

596 See WIPO (2002). *Diplomatic Conference on the Protection of Audiovisual Performances, Geneva, December 7 to 20, 2000: Summary Minutes (Main Committee I)*. Document IAVP/DC/37, 59, paras. 423–424. Available at www.wipo.int/edocs/mdocs/copyright/en/iavp_dc/iavp_dc_37.pdf

It is to be noted that two different cases were covered in this would-be agreed statement:

- in the first four sentences, the case in which – as under Article 4(2) of the WPPT – there is no right in view of which, and no beneficiary for whom, collection would be justified; and
- in the last sentence, that in which there is a proper mandate to collect remuneration.

The case debated at the Conference was the former.

After the closure of the session, the delegation of the European Community made the following declaration:

The European Community and its member States have taken note of the declaration of the Chairman of Main Committee I regarding Article 4.

In reaction to this, the European Community and its member States submit the following declaration for inclusion in the proceedings of the Conference:

“The declaration made by the Chairman of Main Committee I in relation to Article 4 is of a unilateral nature and in no way implies a commitment for the members of Main Committee I or for the future Contracting Parties to the Treaty.”⁵⁹⁷

This declaration reflects the position in the European Union that it is appropriate to collect remuneration for the holders of such related rights even where it is not distributed because there is no right to be applied and no beneficiary – a position in relation to which three points can be made.

First, in principle, amounts corresponding to the acts of communication to the public and broadcasting may be transferred to the foreign nationals concerned even if such an obligation does not follow under Article 4(2) of the WPPT. If a country were to do so, however, it would be a unilateral gesture; but such gestures normally are linked to reciprocity (which would demand further analysis of E.U. law and possibly new legislative norms).

Second, it is understandable why commercial users and consumers would support the “no collection without distribution” principle – with emphasis on *no collection* – because they may consider such payments to be an unjustified economic burden. It follows from this that the laws of Member States may (and some of them do) exclude the collection of fees for those foreign rightholders who do not enjoy the benefits of Article 15(1) and obligate the CMOs to adapt their tariff systems accordingly.

Third, nevertheless, in certain countries, not only the non-distributable amounts (i.e., those due to rightholders who cannot be identified and/or located) but also the not-for-distribution amounts (i.e., those collected despite no obligation to grant national treatment or to apply reciprocal agreement and hence transfer remuneration) are used for cultural purposes. In several E.U. Member States, the single equitable remuneration is collected irrespective of whether the amounts are distributable, non-distributable or not-for-distribution. The non-distributable amounts are to be used in accordance with relevant provisions of the CRM Directive⁵⁹⁸ (frequently and largely for cultural purposes). In contrast, the collection of not-for-distribution amounts is rather similar to – indeed, can even be regarded as a kind of – *domain public payant* not covered by genuine copyright and related rights norms. Such amounts usually – as in the given cases – serve the purposes of cultural policy, including the fulfillment of the obligation to protect cultural diversity within the European Union, in accordance with the relevant provisions of the TFEU and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (binding on the European Union and its Member States). This does not mean, however, that such amounts are supposed to be used exclusively for the promotion of creativity and the protection of cultural diversity in the country in which they are collected. One of their purposes may be used for cooperation programs, aiming to promote due recognition of performers’ rights, and to establish the infrastructure and organizations with which to manage those rights, in the developing world.

597 WIPO (2000). *Diplomatic Conference on the Protection of Audiovisual Performances, Geneva, December 7 to 20, 2000: Declaration concerning Article 4*. Document IAVP/DC/39. Available at www.wipo.int/edocs/mdocs/copyright/en/iavp_dc/iavp_dc_39.doc

598 Articles 8(5)(b) and (e), 13(4) and (6), and 21(1)(i) of, and Recital (2)(c)(vii) of the Preamble to, the Directive.

As regards deductions for cultural and social purposes from remuneration due to rightholders, different considerations apply to national and foreign rightholders. Under the international treaties – the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO “Internet Treaties” – there is no obstacle to deductions from amounts due to *national* rightholders. While this is inelegant, these kinds of provision may also fix a level of protection lower than the international norms require. Such provisions, however, are not applicable in respect of *foreign* owners of rights, since, for their protection, at least the minimum level prescribed by the relevant international norms applies.

There are two specific categories of remuneration over which governments have broader freedom to prescribe use for cultural purposes. The first is a horizontal category that may concern various rights – namely, the amounts of non-distributable remuneration collected. The second category relates to certain rights to remuneration, such as the right to remuneration for private copying, in the case of which the percentage deducted for cultural and social purposes may be higher than standard,⁵⁹⁹ provided that the remaining part is sufficient to eliminate – or at least decrease to a reasonable level – the unreasonable prejudice to the legitimate interests of rightholders caused by widespread private copying.

Recently, some performing rights societies have tried to eliminate from their reciprocal representation agreements provisions allowing for – or at least drastically reduce the level of – deductions for cultural and/or social purposes. Although there is no legal obstacle to reduction below the traditionally acceptable 10 percent level and although it is legitimate for CMOs to seek to distribute to rightholders remuneration at levels as high, and with deductions as low, as possible, it should be apparent that any sums set aside for cultural and/or social purposes generate returns in the form of better awareness and public acceptance of copyright in those countries where such amounts are left to such purposes. Grants for the promotion of creativity, prizes for the recognition of outstanding creative achievements and/or financial support to young talent or to authors in need can boost the visibility of copyright systems delivering on their objectives. As a consequence, the creative communities of the countries in receipt of these deductions will stand more firmly behind the CMOs and the entire copyright system. With a creative community ready to fight for its own interests and rights, it will become easier to obtain the support of governments and to create the necessary legal and practical conditions to protect the rights of all rightholders effectively – both nationals and foreigners.

⁵⁹⁹ See, e.g., Judgment of the Court (Second Chamber) of July 11, 2013, *Amazon v. Austro-Mechana*, C-521/11, ECLI:EU:C:2013:515, where the CJEU found that even 50 percent of the private copying remuneration may be used for cultural and social purposes.

Collective management in developing countries and LDCs

Introductory remarks

This chapter includes six sections. First, there is a review of the provisions in the Berne Convention and the TRIPS Agreement which aim to ensure preferential treatment for developing countries and least-developed countries (LDCs). This includes where those provisions seem to have failed to achieve this objective and how CMOs – in particular reprographic reproduction organizations (RROs) – may facilitate access to knowledge by the institutions and the general public of these countries where the international norms are not suitable anymore to do so.

Second, the results of the number of studies prepared on the economic contribution of copyright on the basis of the standard methodologies worked out and published by WIPO are analyzed from the viewpoint of developing countries.

Third, the existing and emerging standards for the protection and exploitations of expressions of folklore/traditional cultural expressions are reviewed, with special attention to those provisions of the 1982 Model Provisions, the regional agreements and national laws that foresee active roles of CMOs.

Fourth, those principles of the 2007 WIPO Development Agenda are outlined that may be relevant to the collective management systems of developing countries.

Fifth, the kinds of special aspects that should be taken into account in developing countries in respect of deductions for cultural and social purposes are discussed.

Finally, there is a description of how developing countries have recognized the potential that regional cooperation may offer them, in particular how online digital technology with its trans-border applicability has accelerated such cooperation for the common benefits of the countries of the various regions.

Preferential treatment, access to knowledge and collective management

The international copyright and related rights treaties (namely the Berne Convention and the TRIPS Agreement) include certain specific norms on the status of developing countries and least developed countries (LDCs), respectively.

The Appendix of the Berne Convention⁶⁰⁰ provides for a preferential compulsory licensing system for developing countries. By virtue of Articles II(1) and III(1) of the Appendix, translation and the reprint licenses, respectively, are to be granted by the competent authorities of those developing countries that, in accordance with Article I(2), have valid declarations to notify that they make use of one of or both faculties allowing such compulsory licenses.

600 With which the WTO Members by virtue of the TRIPS Agreement and the Contracting Parties of the WTO also must comply (see Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT).

Since the compulsory licenses are to be granted by the competent *authorities*, this system is not directly relevant for the activities of CMOs. Nevertheless, there are some aspects of the Appendix that are worth mentioning.

First, the provisions of the Appendix are not very generous to developing countries and the procedures are too complicated, and this does not make it attractive (so much so that, at the time of writing, only eight developing countries had valid declarations, although previously there were 29).⁶⁰¹

Second, the provisions of Article III on reprint licenses have become largely out of date as a consequence of technological developments. Under Article III(3), even if all the several conditions of the applicability of compulsory licenses are fulfilled, *five years* are to elapse from the first publication of the particular edition of the work before a license would be granted. It is true that, this period, in the case of “works of the natural and physical technology, including mathematics, and of technology” is shorter – *three years* – but for “works of fiction, poetry, drama, and music” and “art books” it is longer: *seven years*. These periods were quite long even in 1971, at the time of the adoption of Appendix, and with the possibility of easy copying allowed first by reprography (photocopying) and then digitally, they have become too long to offer any real advantages.

Third, nevertheless, the provisions of the Appendix have been based on some principles that have hardly lost their validity. The Appendix reflects the recognition that developing countries require preferential treatment to facilitate access to works protected by copyright, in particular for educational, research and other development purposes. These specific needs of developing countries – and in particular of the LDCs – do persist, which suggests that the principles justifying preferential treatment should apply also under the new circumstances. For such possible adaptation of the preferential rules (which may also concern some rights that are usually managed collectively), it would have to be taken into account that the Appendix also contains some provisions the purpose of which is to maintain the balance with the legitimate interests of rightholders, which would also have to be applied in an adapted form:

- a compulsory license is only applicable if the work has not been distributed, within the expiration of the above-mentioned three-, five- or seven-year period, in the country, to the general public or in connection with systematic instructional activities by, or with the authorization of, the owner of the right of reproduction “at a price reasonably related to that normally charged in the country” (Article III(2)(a));
- if after granting a compulsory license, the copies of the same work in the same language and with substantially the same content are distributed by, or with the authorization of, the owner of right in the way indicated in Article III(2)(a), the compulsory license terminates, but copies already made may still be distributed until their stock is exhausted (Article II(6));
- no compulsory license extends to the export of copies, and any license is valid only in the territory of the country (Article IV(4)(a)); and
- due provision is to be made to ensure that the license provides, in favor of the owners of rights, for just compensation (Article IV(6)(a)(i)).

It must be evident that any need to grant compulsory (and voluntary) licenses only emerge where no exception to or limitation of the exclusive right of reproduction is applicable; such as the exception allowing use of works as illustration for teaching under Article 10(2) of the Berne Convention, and other exceptions or limitations that are permitted provide that the cumulative conditions of the three-step test under Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement and Article 10 of the WCT are fulfilled.

The provisions of the Appendix on reprint licenses mainly apply to works in the text and image sector, which is where access to knowledge is particularly needed by developing countries. CMOs did not have an active role, if any, in publishing and distributing such works; authors and publishers exercised their rights on an individual basis; and basically, this is still so. However, with the advent

⁶⁰¹ The eight developing countries that have valid declarations are: Algeria, Bangladesh, Cambodia, Cook Island, Cuba, Jordan, Saudi Arabia and Yemen. Previously the following 21 developing countries had declarations which would have had to be renewed before the expiry of each ten-year period as provided in Article I(2) of the Appendix, but they have not been renewed: Bahrain, People’s Democratic Republic of China, Republic of Korea, Egypt, Guinea, Jamaica, Kuwait, Lesotho, Liberia, Malaysia, Mauritius, Mexico, Mongolia, Niger, Oman, Sudan, Suriname, Syrian Arab Republic, Tunisia, United Arab Republic and Vietnam; see https://wipo.lex.wipo.int/en/treaties/ShowResults?search_what=A&act_id=26

of reprography, the situation has changed. Massive uncontrolled and unremunerated reprographic reproduction would conflict with the normal exploitation of such works and would unreasonably prejudice the legitimate interests of rightholders. As discussed in Chapter 1, collective management has been found to be the possible response to this challenge.

Reprographic reproduction organizations (RROs) were established to take care of this task and then they formed the International Federation of Reprographic Reproduction Organization (IFRRO). Later, the activities of RROs extended – beyond traditional reprographic reproduction by photocopying equipment – also to digital reproduction. This is the reason for which now it is more appropriate to speak about collective management of rights in the text and image sector rather than just of reprographic reproduction rights.

With digitization, huge potentials have opened to broaden the access to such works. CMOs – mainly RROs specialized in this field, but also some multi-repertoire organizations (typical in a number of development countries) – have an increasing role in the new environment.

A fine-tuned balance of interests is needed for developing countries to facilitate use of works in the text and image sector for their educational, research and other development purposes – for which it is also necessary to guarantee that rightholders can maintain their chance of normal exploitation of their works and be protected against any unreasonable prejudice to their legitimate interests. CMOs, in particular RROs, play a decisive role to achieve such balance. Their activities are not limited just to collecting remuneration and distributing it to rightholders, they also proactively cooperate with educational institutions, libraries and other public-service institutions to guarantee access to the most up-to-date versions of the works they need. They also promote creativity in developing countries, which, in turn, may ease their dependence on importation of works. WIPO closely work together with IFRRO in pursuing these objectives.

The TRIPS Agreement allowed for developing countries a five-year and for LDCs a ten-year transitional period during which, apart from certain general provisions in Articles 3 to 5 of the Agreement,⁶⁰² they were exempted from fulfilling the obligations under the Agreement. The five-year period for developing countries under Article 65(1) and (2) – which began on the date of entry into force of the Agreement (January 1, 1995) – expired a long time ago and no extension was allowed. In contrast, in Article 66(2), it is provided that the Council of TRIPS, upon a duly motivated request by the LDCs, may accord an extension. The LDC WTO Members have requested and received extensions already twice. The current extension was granted by the Council on June 21, 2021, and it is valid until July 1, 2034.

There are also certain other provisions of the TRIPS Agreement that may have a role in balancing interests by taking into account the specific requirements and expectations of developing countries, including in particular LDCs, and thus may have an impact on copyright legislation and infrastructure, including the need for and operation of CMOs.

Articles 7 and 8 of the Agreement reads as follows:

Article 7. Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8. Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in

602 Of which only Articles 3 and 4 were applicable to copyright and related rights (Article 3: National Treatment; Article 4: Most-Favoured-Nation Treatment); Article 5 was not (Article 5: Multilateral Agreements on Acquisition or Maintenance of Protection), because it only concerned industrial property rights.

- sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

The two articles have been included mainly at the demand of developing countries and LDCs,⁶⁰³ and certain elements of the provisions only relate to industrial property rights. Nevertheless,

- Article 7 may be read in this way too: “The protection and enforcement of intellectual property rights should contribute [...] in a manner conducive to social and economic welfare, and to a balance of rights and obligations”;
- Article 8(1), among other things, provides in general: “Members may, in formulating or amending their laws and regulations, adopt measures necessary [...] to promote the public interest in sectors of vital importance to their socio-economic and technological development [...]”; and
- Article 8(2) may also be understood to apply in general: “Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade [...]”.

These elements are applicable not only to industrial property rights but also to copyright and related rights. In view of this, it is worthwhile reviewing how a WTO dispute settlement panel has interpreted the impact of the provisions of Articles 7 and 8 on the application of the three-step test. The issue emerged in 2000 in the patent dispute *Canada – patent protection of pharmaceutical products* (following a complaint by the European Community and its Member States)⁶⁰⁴ requiring interpretation of Article 30 of the Agreement on exceptions to patent rights. In that article, the three conditions of the test slightly differ from but, in respect of the basic criteria and their relations to each other, they are the same as, or very similar to, those provided in Article 13⁶⁰⁵ on the three-step test of exceptions to and limitations of copyright.

In the view of Canada, the provisions of Articles 7 and 8 should be taken into account in a way that, through their application, the three-step test might become more flexible and liberal than it would be otherwise. This seemed to suggest that the principles laid down in those articles are additional “external” criteria in addition to the three conditions of the test.⁶⁰⁶ The European Community expressed a diametrically opposing view; namely, that the general principles provided in the two articles should neither be applied as kinds of externalities nor be taken into account at all in the application of the three-step test. The E.C. argued that “Articles 7 and 8 are statements that describe the balancing of goals that had already taken place in negotiating the final texts of the TRIPS Agreement” and, thus, taking them into account again in the context of the three-step test would allow to “‘renegotiate’ the overall balance of the Agreement” and “would involve a double counting of such socio-economic policies”.⁶⁰⁷

The interpretation adopted by the WTO panel was somewhat closer to the Canadian position, but it still differed both from it and even more from the view expressed by the E.C. The essence of the WTO’s finding was that the principles laid down in Articles 7 and 8 of the Agreement should not be regarded as externalities applicable in addition to the three conditions (in a way that it might

603 For the preparatory work and subsequent application of these provisions, see Gervais on TRIPS, 120–122.

604 *Canada – patent protection of pharmaceutical products* (a complaint by the European Community and its Member States); report of the panel N° WT/DS114/R of 17 March 2000 (hereinafter: WTO report N° WT/DS114/R).

605 The two provisions of the Agreement read as follows:

Article 13. Limitations and Exceptions

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

Article 30. Exceptions to Rights Conferred

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

606 WTO report No. WT/DS114/R, [7.24].

607 *Ibid.*, [7.25].

modify the meaning of the latter), but they still should be taken into account to establish whether or not the three cumulative criteria of the text are fulfilled.⁶⁰⁸

The application of the three-step test, in accordance with the interpretation adopted by the WTO panel, may lead to a finding that a given exception or limitation that would not be in accordance with the test in an industrialized country, might still be applicable in a developing country, in view of the above-quoted “socio-economic” principles laid down in Articles 7 and 8 of the TRIPS Agreement.

From the viewpoint of collective management, this interpretation may not only concern the scope and nature of the rights in connection with which the need of collective management emerges, but also influence the form of collective management; in particular, in some developing countries it might be found that their specific socio-economic interests – recognized in Articles 7 and 8 of the TRIPS Agreement – justify the limitation of certain exclusive rights by prescribing mandatory collective management (even if it would not be justified under the conditions of industrialized countries).

Economic contribution of copyright industries, creativity and collective management

WIPO has developed and published thorough methodologies to measure the economic contribution of copyright industries. At the initiative of the Member States, a number of national surveys have been made with the support of the Organization which have been published also on the WIPO website.

There are various reasons for which not all – and not even the majority – of the results of the studies thus made are useful to explore the status of collective management in developing countries. Nevertheless, some findings may be deduced concerning the status and copyright strategy of developing countries by analyzing and comparing the data of the great number of national studies.

The methodologies of the surveys are described in a guide published by WIPO in 2015⁶⁰⁹ – the second edition, the first was published in 2003 – that also reviews the results of a number of national studies. The Guide offers detailed guidance for the collection and analysis of the necessary statistical data and other information, calculation techniques, mathematical formulas and the like. For the purpose of this chapter, it seems sufficient to present the categories of copyright industries applied in the Guide and to refer to the key findings of a recent report which has analyzed the results of the surveys on the basis of specific categorization of the countries according to the level of their socio-economic development.

The Guide differentiates between four categories of copyright industries and outlines methodologies to assess their contribution to national economies:

- core copyright industries – defined as: “industries which are wholly engaged in the creation, production and manufacture, performance, broadcasting, communication and exhibition, or distribution and sale of works and other protected subject matter”;⁶¹⁰
- interdependent copyright industries – defined as: “industries which are engaged in the production, manufacture and sale, and renting or leasing of equipment”;⁶¹¹
- partial copyright industries – defined as: “industries in which a portion of the activities is related to works and other protected subject matter and may involve creation, production and manufacture, performance, broadcasting, communication and exhibition, and distribution and sales”;⁶¹² and
- non-dedicated support industries – defined as: “those in which a portion of the activities is related to facilitating broadcast communication and the distribution or sale of works

608 *Ibid.*, [7.26]

609 WIPO (2015). *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*, Geneva: WIPO. Publication No 893 (E) (hereinafter: Guide on Economic Contribution).

610 *Ibid.*, 51, [121].

611 *Ibid.*, 59, [145].

612 *Ibid.*, 60, [149].

and other protected subject matter whose activities have not been included in the core copyright industries".⁶¹³

The "independent copyright industries" relate to the backward and forward linkages in the economy and are not of primary interest in the analysis of collective management of rights.

The "non-dedicated support industries" refer to delivery modes of creative content and measure spillover and secondary impacts. To the extent to which they facilitate distribution, they are relevant for the measurement of the total value chain contribution; however, they are only indirectly related to collective management issues.

The "partial copyright industries" refer to areas where copyright protection can play only a certain role, depending on the scope of national protection and where qualitative judgments need to be made to establish the level of copyright-dependence. This category, however, falls outside the topic of this book.

The category of "core copyright industries" is the central group, where collective rights management may have a role. Several activities of such "industries" relate to productions and services to which copyright and/or related rights apply, and where collective management is a typical way of exercising the rights. The list is quite detailed; only the titles of subcategories are quoted (verbatim, but the footnotes are left out):

- a) Press and literature,
- b) Music, theatrical productions, operas,
- c) Motion picture and video,
- d) Radio and television,
- e) Photography,
- f) Software, databases and computer games,
- g) Visual and graphic arts,
- h) Advertising services,
- i) Copyright collective management societies (turnover should not be included).⁶¹⁴

The last category – copyright collective management societies – is listed here to recognize their role in the copyright infrastructure. The word "industries" refers to "economic activities", as formulated in the system of national accounts. CMOs perform economic activities, which are essential for the functioning of the copyright system. It is to be noted that the methodology refers here to measuring only the value added that societies produce and the employment therein.

The copyright industry sectors listed above as subcategories a) to h) include some aspects where collective management may have a role. This is true partly also regarding subcategory f) since computer games – and, in certain contexts, also databases, although computer programs (software) certainly do not – have some elements protected by copyright – for the effective exercise of the rights in which collective management may be needed.

While the Guide does not analyze in detail the role of CMOs in the specific core copyright sectors, the analysis of the results of the surveys enables the deduction of certain findings, which may offer useful information to developing countries to determine their copyright strategy, including as regards their collective management systems.

A report – an overview of the results from a number of WIPO studies made by means of the application of the Guide's methodologies – published by WIPO just around the end of writing and the beginning of editing of this book⁶¹⁵ has been based on such an analysis. As the introduction to the publication indicates: "This report provides an update to the overview of studies on the economic contribution of the copyright industries [...], The analysis covers 50 countries that have implemented research in this area and takes into account the most recent data."

⁶¹³ *Ibid.*, 62, [157].

⁶¹⁴ *Ibid.*, 60.

⁶¹⁵ WIPO (2021) *The Economic Contribution of the Copyright Industries – An Overview of the Results from WIPO Studies Assessing the Economic Contribution of the Copyright Industries*, Geneva: WIPO, (hereinafter: Overview of WIPO Studies), available at https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/overview_results_2021.pdf

An important new feature of the report – which makes it a useful source also in this chapter – is that it “provides a detailed data analysis [...] with disaggregation according to the development classification of countries” and that, for this, it uses the categorization of countries by their development classification, adopting standard approaches applicable up to 2019 by international institutions, in particular the World Bank,⁶¹⁶ IMF⁶¹⁷ and UN/DESA.⁶¹⁸ The classification thus applied differs somewhat from the official United Nations classification of “developing countries” and “least-developed countries”; it differentiates between developed countries (8),⁶¹⁹ emerging economies (7),⁶²⁰ transition countries (11)⁶²¹ and developing countries (24).⁶²² In the report, the data of emerging economies and transition countries – due to their similar features – are frequently presented together. While under the Guide, the economic contributions are surveyed in three aspects – contribution to economic output (GDP), employment and foreign trade – the report reduces its analysis to the first two aspects because it has been found that the available data on the contribution to foreign trade have not been sufficient (the studies of most countries do not include them).

Of the data and findings that may be relevant in the context of this chapter, first, the contribution of the entire copyright industries (core, interdependent, partial and non-dedicated) industries may be mentioned. The reported contributions of these industries to the GDP and employment, respectively, were as follows:

- in developed countries, 7.42 percent and 6.94 percent;
- in transition and emerging economies, 5.07 percent and 5.80 percent; and
- in developing countries, only 4.60 percent and 4.56 percent.⁶²³

The really relevant findings may be deduced from the data showing the differences between the contributions of the core copyright industries, on the one hand, and the non-core copyright industries, on the other hand,

The contribution of the core copyright industries to the GDP and employment, respectively, were as follows:

- in developed countries, 4.43 percent and 4.15 percent;
- in transition and emerging economies, 2.88 percent and 3.42 percent; and
- in developing countries, only 2.33 percent and 1.87 (!) percent.⁶²⁴

The data of the contribution of non-core copyright industries to the GDP and employment, respectively, show a similar, but, in one aspect, conspicuously bigger difference:

- in developed countries, 2.99 percent and 2.79 percent;
- in transition and emerging economies, 2.19 percent and 2.30 percent; and
- in developing countries, 2.28 percent and 4.69 (!) percent.⁶²⁵

The big differences of the employment data of developing countries concerning core copyright and non-core copyright industries requires analysis and offer significant guidance for the copyright strategies of developing countries.

616 *Ibid.*; footnote III: “World Bank (various years). *World Development Indicators*. Washington, D.C.: World Bank Group.

617 *Ibid.*; footnote IV: IMF (various years). *World Economic Outlook*. Washington, D.C.: International Monetary Fund.

618 *Ibid.*; footnote V: UN/DESA (2014). *World Economic Situation and Prospects 2014*. New York: United Nations Department of Economic and Social Affairs.

619 Australia, Canada, Finland, France, the Netherlands, Singapore, Republic of Korea and the United States.

620 People's Democratic Republic of China, Indonesia, Malaysia, Philippines, South Africa, Thailand and Turkey.

621 Bulgaria, Croatia, Hungary, Latvia, Lithuania, Republic of Moldova, Romania, Russian Federation, Serbia, Slovenia and Ukraine.

622 Argentina, Bhutan, Botswana, Brunei Darussalam, Colombia, Dominica, Ghana, Grenada, Ecuador, Ethiopia, Jamaica, Jordan, Kenya, Lebanon, Malawi, Mexico, Pakistan, Panama, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and United Republic of Tanzania.

623 Overview of WIPO Studies, 15.

624 *Ibid.*, 15–16.

625 *Ibid.*, 16.

The report adds the following comments to these data:

With their high concentration on low-technology products, the developing economies stood out as having 19.2 percent of their copyright-based output and 21.5 percent of their jobs coming from the supporting non-dedicated distribution activities. By comparison, the transition economies generated 16.3 percent of output and 13.8 percent of jobs, the developed economies 12.2 percent of output and 14.2 percent of jobs, and the emerging economies 11.5 percent of output and 9.0 percent of jobs.

The general principle that arises from these comparisons is that in the pursuit of the development goals of economies, there are development benefits to be gained from efforts to shift production of copyrighted output, and related employment, towards the core industries where most of the creativity and innovation occurs.⁶²⁶

From these figures and from their analysis, three findings can be deduced that may be useful for the establishment and application of adequate copyright strategies of developing countries, including the development of their collective management systems:

- although the contribution of copyright industries to national economies tends to be significant, in the majority of developing countries, it is much lower;
- the structure of, and the relationship between, the four categories of copyright industries reveal (or rather confirm as expected) that the developing countries, in general, are net importers of cultural products and services; and
- the potential of domestic creativity in developing countries for generating economic returns is not fully exploited.

The first finding is of a descriptive nature; still it is worthwhile noting, because it shows an obvious task of developing countries; where it is possible, they should try to narrow the gap.

The second finding may be easily deduced from the huge difference of the contributions of core and non-core industries in developing countries. It explains the proportionally very high employment in the non-core copyright industries and its very low level in the core copyright sectors. This is so because the activities of the “interdependent” industries (consisting in importing, manufacturing, sale, rental, lending, etc. of equipment necessary for the use of productions and services relevant for copyright), as well as those of the “non-dedicated” industries (mainly the operation of the distribution and logistical network) are needed also for the imported productions and foreign-origin services. Thus, the difference may be explained by the fact that the use of foreign productions and services is much higher than that of the domestic ones. That is, developing countries usually are net importer countries, some of them with a huge negative balance.

The third finding may be deduced from the first two and in particular from the second one. For the establishment and development of domestic industries, there is a need for an active creative community and for efficient exploitation of the potential thereof, which, in several developing countries, are not truly available. A further finding follows from this – and it is the most relevant in the context of this chapter. Namely, that this also shows that there is a need for the establishment and development of an appropriate collective management system. It seems to be indispensable for organizing creative people, for offering a reasonable economic basis for their work and, in general, for promoting creativity.

Protection and use of expressions of folklore (traditional cultural expressions) and collective management

The need emerged for intellectual property protection of expressions of folklore, or as now it is frequently referred to “traditional cultural expressions” (TCEs), mainly in developing countries. Folklore is an important element of the cultural heritage of every nation, but it is of particular importance for developing countries, which recognize folklore as a means of self-expression and social identity. In those countries, folklore is truly a living and still developing tradition, rather than just a memory of the past and something for the preservation of which efforts should

626 *Ibid.*, 16.

be made. (Although folklore has a special role in the creativity and cultural life of developing countries – which are the focus of attention in this chapter – it does not mean that the need for the protection of expressions of folklore does not emerge or is not duly recognized in industrialized and “transition” countries. This is particularly true from the viewpoint of the indigenous people and local communities living in those countries, for some of which – e.g., people living in the arctic regions of Canada, the Nordic countries and the Russian Federation or the “first nation” communities of Australia and the Māori in New Zealand – folklore is also a living tradition and essential element of their identity. The comments made on the protection of expressions of folklore/traditional cultural expressions concerning developing countries apply, *mutatis mutandis*, also to the indigenous communities of those other countries.)

It was at the 1967 Stockholm diplomatic conference convened, along with other objectives, to revise the Berne Convention where – due to the acceleration of the decolonization process in that period – the representatives of developing countries were represented in bigger numbers for the first time at such revision conferences. They had two main demands. The first one was the adoption of preferential copyright rules to serve their specific educational and socio-economic purposes, which, as discussed above in this chapter, led to the adoption of a Protocol that was transformed in 1971 at the Paris Diplomatic Conference to an Appendix. Their second demand was the extension of copyright protection to folklore.

As a result, Article 15(4) of the Berne Convention was adopted, which in the 1971 Paris Act has remained the same. It reads as follows:

(4) (a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

However, copyright protection of folklore has not turned out to be the a workable solution. The main reasons may be summed up thus:

- The original version of many folklore expressions were born long before copyright emerged. They went through a long chain of imitations and with step-by-step minor changes, as a result of which they have been transformed in an incremental manner.
- Copyright categories, such as authorship, originality or adaptation, simply do not fit well into this context. It cannot be truly said that the creator or creators of artistic folklore is an unknown author or are various unknown authors. The creator is a community and the creative contributions are from consecutive generations.
- It is hardly appropriate to protect these creations as “unpublished works” with the consequence that, 50 or 70 years after publication, their protection would be over. The nature of folklore expressions does not change by the incidental factor that they are “published”; they remain the same phenomena; if they deserve protection, it should be without such term of protection that would expire.

The Tunis Model Law on copyright for developing countries adopted in 1976⁶²⁷ contained provisions on the protection of folklore creations. They were based on the recognition that, although a national law may refer to such creations as works, they do not correspond to the conception and definition of literary and artistic works as provided in the Berne Convention. The Model Law made it clear that, despite the application of copyright norms, “works of folklore” are not protected by copyright; they are part of the public domain; just – since they deserve protection and it is justified

627 WIPO (1976) *Tunis Model Law on Copyright for developing countries*, Geneva: WIPO, publication No. 812 (E). According to the footnote added to the title “[t]he Tunis Model Law was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23 to March 2 with the assistance of WIPO and UNESCO.”

that the community benefit from their exploitation – in their case, the public domain status should be coupled with the obligation of paying for their use: it should be *domain public payant*.⁶²⁸

When it became more or less clear that the copyright model offered by the Berne Convention is not suitable for the international protection of folklore, attention turned toward some possible *sui generis* options. A series of meetings were held under the aegis of WIPO and UNESCO between 1978 and 1982, and finally, in June 1982, a UNESCO/WIPO Committee of Governmental Experts meeting adopted “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Acts.”⁶²⁹

The Model Provisions, provides for *sui generis* protection of “expressions of folklore” (emphatically not as literary and artistic works).

Section 2 of the Model Provisions defines “expressions of folklore” as follows:

For the purposes of this [law], “expressions of folklore” means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the expectations of such a community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (iv) tangible expressions, such as:
 - (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
 - (b) musical instruments;
 - [(c) architectural forms].

The meaning of “expressions of folklore” as artistic heritage is narrower than “folklore”, and even than “cultural heritage” in general; they are artistic heritage.

As it can be seen, the majority of the categories of expressions of folklore, in regard to their forms of expressions, are similar to literary and artistic works protected by copyright (only the category of musical instruments seem to be an exception).

The utilizations subject to authorization are practically the same as those covered by copyright, Section 3 provides as follows:

Subject to the provisions of Section 4, the following utilizations of the expressions of folklore are subject to authorization by the [competent authority mentioned in Section 9, paragraph 1,] [community concerned] when they are made both with gainful intent and outside their traditional or customary context:

- (i) any publication, reproduction and any distribution of copies of expressions of folklore;
- (ii) any public recitation or performance, any trans-mission by wireless means or by wire, and any other form of communication to the public, of expressions of folklore.

628 Section 17 of the Model Law on “*Domaine public payant*” read as follows:

The user shall pay to the competent authority percent of the receipts produced by the use of works in the public domain or their adaptation, including works of national folklore. The sums collected shall be used for the following purposes:

- (i) to promote institutions for the benefit of authors [and of performers], such as societies of authors, cooperatives, guilds, etc.
- (ii) to protect and disseminate national folklore.

629 For the report of the Committee of Governmental Experts held in Geneva from June 28 to July 2 1982, with the Model Provisions attached to it as an Annex I, see *Copyright*, October 1982 (hereinafter: report of the adoption of Model Provisions on expressions of folklore), 278–284.

In the case of copyright, some of the rights to authorize such acts may be exercised in the form of collective management, and for the exercise of some of them, for example the right of public performance of musical works, collective management is practically indispensable. The reasons for which this is the case in the field of copyright (great number of potential users around the territory of the country and, from the viewpoint of users, the great number of potential works they wish to use) is the same as regards expressions of folklore. In this chapter, the focus of attention is the uses of expressions of folklore where collective management is a necessary means of authorization. Other measures that may be applied for the control of uses of certain categories of expressions of folklore (such as certification procedures, collective trademarks, and the like, for tangible expressions of folklore) are not reviewed.

Under Section 5 of the Model Provisions, exceptions are allowed in certain cases – in general, in those where the Berne Convention also permit exceptions.

The expressions of folklore also enjoy kinds of moral rights: the users are obliged to indicate the source – the community and/or geographical place from where the expressions derive – (Sections 6 and 7.1) and it is prohibited to willfully distort the expressions in a way prejudicial to the cultural interests of the community concerned (Section 7.4). Furthermore, under Section 7.3, also passing-off-type acts are also prohibited (“willfully deceiving others in respect of the source of artifacts or subject matters of performances or recitations made available to the public by him in any direct or indirect manner, presenting such artifacts or subject matters as expressions of folklore of a certain community, from where, in fact, they have not been derived”).

Section 9 on Authorities and Section 10 on Authorization are particularly relevant from the viewpoint of the role of collective management.

Section 9 is a framework provision; it only indicates that, for the purpose of the application of the provisions on expressions of folklore, a competent authority should be designated. The report of the Committee of Governmental Experts, however, also offers some guidance in this respect:

It should be explained that “authority” is to be understood as any person or body entitled to authorize intended uses or to deny such an authorization in conformity with the relevant provisions of the law. Representative body of the community concerned, ministry of culture or art, any public institution for matters related to folklore, *authors’ society or similar institution should be explicitly mentioned* as possible authorities. It should be made clear that the term “the competent authority” *does not preclude the possibility of designating more than one authority, corresponding to the types of expressions of folklore or kinds of their use concerned*. Explanation should be given as regards the difference between the cases where a representative body of the community is designated competent authority, and where the community as such authorizes uses of its expressions of folklore (emphasis added).⁶³⁰

As pointed out above, for any effective application of the system of authorization (or prohibition) of certain uses listed in Section 3 (such as public performance of musical expressions) collective management is needed. This is confirmed in this paragraph of the report. In the last sentence of the paragraph, reference is made to the possibility that a representative body of the community is designated as competent authority. It may not be excluded that the community is satisfied – and able – to exercise its right of authorization in the closer territory where it lives and where the use of its expressions of folklore is typical, but, if the community wishes to exercise its right in a broader scope, such as in the entire territory of a bigger country where different communities live together, probably the service of a CMO is needed to manage the similar rights of copyright owners.

In several developing countries, mainly in Africa, governmental or semi-governmental organizations manage copyright. In those countries, it is a plausible choice to designate those CMOs as competent authorities to authorize the acts for the effective application of the provisions of collective management as needed. But it is also a logical option for a government to trust a CMO to take care of the authorization system in such cases, even if they are private organizations.

630 Report of the adoption of the Model Provisions on expressions of folklore, 281.

Section 10 of the Model Provisions provides as follows:

1. Applications for individual or blanket authorization of any utilization of expressions of folklore subject to authorization under this [law] shall be made [in writing] to the [competent authority] [community concerned].
2. Where the [competent authority] [community concerned] grants authorization it may fix the amount of and collect fees [corresponding to a tariff [established] [approved] by the supervisory authority]. The fees collected shall be used for the purpose of promoting or safeguarding national [culture] [folklore].
3. Appeals against the decisions of the competent authority may be made by the person applying for the authorization and/or the representative of the [interested community.]

The provisions of the section cover different forms of authorizations. The possibility to appeal may be justified in the case of the authorization of certain uses of certain expressions of folklore. But, where collective management is needed and blanket authorization is granted – the applicability of which is confirmed in paragraph 1 of the Section – this is hardly the case.

In December 1984, a WIPO/UNESCO Group of Experts considered a draft treaty for the international protection of expressions of folklore based on the key aspects of the Model Provisions.⁶³¹ The idea of a treaty, however, was rejected by industrialized countries, which raised two realistic problems; namely, the absence of reliable sources of identification of folklore creations in many countries; and the question of “regional folklore”, that is, folklore shared by more than one – or sometimes many – countries.

In contrast, WPPT has brought about a minor improvement in the international norms that may serve the protection of folklore. Even before the adoption of the Treaty, the national laws of many developing countries extended the definition of “performers” to performances of expressions of folklore. In contrast, in the definition in Article 3(a) of the Rome Convention, only the performances of literary and artistic works were mentioned. In the definition of “performers” provided in Article 2(a) of the WPPT, the definition was extended to the performances of expressions of folklore, and this also means the extension of the scope of application of the right to single equitable remuneration under Article 15 of the Treaty, which, in general, is exercised by means of collective management. Furthermore, it has been declared in an agreed statement that “[i]t is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms [the right to a single equitable remuneration] recording folklore where such phonograms have not been published for commercial gain.”

The issue of international protection for folklore creations was raised also more generally during the preparatory work of the WCT and the WPPT. The delegations of several developing countries proposed that a new attempt be made to work out some kind of norms for the protection of folklore. The request was repeated at the UNESCO/WIPO World Forum on the Protection of Folklore held in Phuket, Thailand, in April 1997. This was one of the origins of the establishment of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Its first session was held in Geneva in April-May 2001, and in the course of writing and editing of the present book it has had already 41 sessions.⁶³²

For a while, the Intergovernmental Committee was working on a possible instrument relating to intellectual property concerning all the three subject matters mentioned in its title. However, at the session in April 2019, the then Chairman of the Committee prepared a separate “*Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*”,⁶³³ which was included as a working document of the Committee at its above-mentioned 41st session. In contrast, the preparatory work on similar possible intellectual property norms on traditional cultural expressions (TCE) (a term used in the document

631 For the report of the Group of Experts on the meeting held in December 10 to 14, 1984, see *Copyright*, February 1985, 30–40.

632 The 41st session took place from August 30 to September 3, 2021.

633 WIPO document WIPO/GRTKF/IC/41/5 entitled “Chair’s text of a draft international legal instrument relating to intellectual property, genetic resources and traditional knowledge associated with genetic resources.”

of the Committee frequently as an alternative to expressions of folklore) has somewhat slowed down. It has been recognized that the subject matter and the necessary legal means to be used for traditional knowledge (TK) and generic resources are much more closely linked to the existing protection systems of industrial property rights than any possible rules for the protection of TCEs/exceptions of folklore to copyright.

At the 39th session of the International Committee held in March 2019, a gap analysis was presented to sum up the different proposals for the protection of TCEs/expressions of folklore,⁶³⁴ and at the 40th session, the Secretariat, at the request of the Committee, presented “draft articles” for the protection of TCEs,⁶³⁵ which is the latest version of draft provisions of a possible instrument. However, the draft shows that, for the time being, there are basic differences between the various delegations even regarding a number of basic issues.⁶³⁶

It is a specific aspect of the draft articles that the role of indigenous people and local communities – rather than governmental organizations, folklore institutions or just CMOs – has received paramount attention. The very first paragraph of the Preamble acknowledges the UN Declaration of the Rights of Indigenous Peoples, and several further paragraphs stress that the protection of folklore/traditional cultural expressions:

2. [[Recognizing that indigenous [peoples] and local communities have the right] Recognizing the rights of indigenous [peoples] and the interests of local communities] to maintain, control, protect and develop their intellectual property over their cultural heritage, including their traditional cultural expressions;]
3. Recognizing that the situation of the indigenous [peoples] and local communities varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration;
4. Recognizing that the traditional cultural expressions of indigenous [peoples] and local communities have [intrinsic] value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values;
5. Acknowledging that traditional cultural expressions are frameworks of ongoing creation and distinctive intellectual and creative life that are [intrinsically] important for indigenous [peoples] and local communities.

The definition of “traditional cultural expression” (Article 1), as well as the provisions on the objectives (Article 2) and on the beneficiaries of protection (Article 4) also stress the central role of Indigenous people and local communities. As regards the question of possible application of collective management, Articles 5 on Scope of [Protection]/[Safeguarding] and 6 on Administration of Rights]/[Interests] deserve attention.

Alternative 1 of Article 5 has the broadest coverage of the three alternatives, since it (although in several square-bracketed variants) provides for the safeguarding of the economic and moral interests all the beneficiaries concerning their traditional cultural expressions: This seems to correspond to the majority of national laws that contain provisions currently on the protection of such expressions (see below).

Alternative 2 of Article 5 relates to those cases “[w]here with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, access to traditional cultural expressions is restricted, including where the traditional cultural expressions are secret or sacred” and provides for the beneficiaries’ “exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional cultural expressions; and

634 See WIPO document WIPO/GTRKF/IC/39/7.

635 See WIPO document WIPO/GTRKF/IC/40/5.

636 There are, e.g., three alternatives of Article 2 on Objectives three alternatives of Article 4 on Beneficiaries, three alternatives (and some of them different options) of Article 5 on Scope of [protection]/[safeguarding] the title of which itself reflects the differences concerning the nature and objectives of a possible instrument, etc. Furthermore, the provisions within the same alternatives also include various square-bracketed variants.

receive a fair and equitable share of benefits arising from their use” as well as for moral rights of “attribution” and respect of “the integrity of such traditional cultural expressions.”

Alternative 3 concentrates on those cases where under “the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, access to traditional cultural expressions is restricted, including where the traditional cultural expressions are secret or sacred” and provides partly for the same kind of measures (concerning economic aspects of rights) as Alternative 2, but also some stronger ones as regards the moral rights in such expressions and the protection of their secret and/or sacred nature.

On the basis of the title of Article 6 – “Administration of [Rights]/[Interests]” – it might be expected that under the term “administration”, one could understand also (collective) management of rights. Although such an interpretation seems to be possible too – in particular if governmental or semi-governmental CMOs are meant as set up in certain developing and “transition countries” – but the term “competent authority” used in the article rather suggests some governmental body. The two alternatives of the article differ in that, while under Alternative 1, the competent authority is to administer the rights “in close consultation with the beneficiaries”, Alternative 2 appears to foresee a kind of co-decision system where the authority is to administer the rights “with the explicit consent of/in conjunction with the beneficiaries.”

Although, at the international level, the adoption of such an instrument (in particular if it were supposed to be a treaty) seems to require still further intensive consultations and negotiations, the national laws of many developing countries, mainly in Africa, do contain provisions for the protection of expressions of folklore/traditional cultural expressions. These provisions are reviewed in the rest of the section below, with special attention to those that may be relevant to the role of collective management.

Some national laws list folklore creations as “works” (more or less in accordance with Article 15(4) of the Berne Convention),⁶³⁷ while the laws of others as “expressions of folklore” (in accordance with Article 2 of the WIPO Model Provisions or some variants thereof, but not as works)⁶³⁸ or simply just as folklore productions or creations.⁶³⁹ There are also laws that contain a definition of “expressions of folklore”, but then they are referred to as “works”.⁶⁴⁰ All this, however, does not result in basic differences in the status of folklore creations; it is much more relevant how the rights in genuine literary and artistic works are adapted to such creations.

Both regional governmental organizations of intellectual property in Africa – the African Regional Intellectual Property Organization (ARIPO) and l’Organisation africaine de la propriété intellectuelle (OAPI) – have agreements that include provisions for the protection of expressions of folklore/traditional cultural expressions.

ARIPO has a separate instrument – the Swakopmund Protocol on the protection of expressions of folklore (and of traditional knowledge).⁶⁴¹ Section 2 of the Protocol includes a definition of “expressions of folklore” that is similar in substance to the definition in Article 2 of the WIPO Model Provisions, and this term is used throughout its provisions concerning folklore (without any indication that they may also be regarded as works).

OAPI’s Bangui Agreement⁶⁴² contains provisions on expressions of folklore in Annex VII on Literary and Artistic Property. In Article 2(xx) of the Annex, “expressions of folklore” are defined

637 See the copyright laws of Angola (Art. 4(f)); Cape Verde (Art. 7(4)(m)); Côte d’Ivoire (Art. 6(12)); Guinea (Art. 1(13)); Democratic Republic of Congo (Art. 4(n)); Djibouti (Art. 69(1)); Gabon (Art. 6); Haiti (Art. 1); Kenya (Art. 2(1)); Mauritania (Art. 8); Saudi Arabia (Art. 1); Saint Kitts and Nevis (sec. 22(5)); Zimbabwe (sec. 80); Viet Nam (Art. 14(1)(k)).

638 See the copyright laws of Benin (Art. 1); Burkina Faso (Art. 88); Ghana (Art. 76); Lesotho (Art. 1); Liberia (31(2)); Niger (Art. 54); Papua New Guinea (sec. 2); Qatar (Art. 1); Rwanda (Art. 5(11)); Samoa (sec. 2); Sri Lanka (Art. 24(5)); Togo (Art. 6(15)); Tunis (Art. 7).

639 See the copyright law of Congo (Art. 15); Guinea (Art. 5) (sec. 2); Senegal (Art. 116).

640 See the copyright laws of Gambia (sec 2); Mali (Arts 8(n) and 107); Morocco (Arts 1(10) and 3(m)); Mozambique (Art. 4(1) and Annex (13), (15)); Seychelles (Art. 3); Sierra Leone (sec. 1).

641 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore Within the Framework of the African Regional Intellectual Property Organization (ARIPO) [adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on August 9, 2010, and amended on December 6, 2016] (hereinafter Swakopmund Protocol).

642 Agreement of February 24, 1999, Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization (hereinafter: Bangui Agreement).

in substance also as they are in Article 2 of the WIPO Model Provisions, but they are still listed in Article 5(1)(xii) as a category of literary and artistic works.⁶⁴³

Before turning to those provisions that may be relevant from the viewpoint of collective management – namely, the uses of expressions of folklore subject to authorization, the procedural and organizational aspects of authorization, the beneficiaries of the payments for the use of expressions of folklore and the objectives for which they may be used – it is to be noted that several national laws and also the Bangui Agreement mention adaptation or other derivative works of folklore as well as collections of folklore as subject matters protected by copyright. These provisions are not analyzed separately in this chapter, because it goes without saying that they are protected by copyright provided they represent original transformation of expressions of folklore and, as regards collections, provided that, by reason of the selection or arrangement of their contents, they constitute intellectual creations.

Certain national laws only provide that expressions of folklore/works of folklore are common heritage of the country and that they are owned by the State (or the Crown),⁶⁴⁴ but they do not specify which body may grant authorization (at maximum: a “competent authority”⁶⁴⁵ or a Ministry, in general the one in charge of culture⁶⁴⁶). In some developing countries, the copyright laws have designated specific organizations other than CMOs to take care of authorization.⁶⁴⁷

In contrast, under ARIPO’s Swakopmund Protocol, “the local and traditional communities” are the beneficiaries of the protection of expressions of folklore,⁶⁴⁸ but the copyright laws of African countries, in general, do not apply this rule.⁶⁴⁹

What is, however, noteworthy is that the national laws of many African countries provide that the authorization of the uses of expressions of folklore (or at least of those for which blanket authorization is needed) is to be granted by CMOs against some payments.⁶⁵⁰ In some of the laws, even specific CMOs are designated.⁶⁵¹ This is in accordance with OAPI’s Bangui Agreement, which provides in Article 59(1) of Annex VII that the users must pay for the exploitation of expressions of folklore “to the national collective rights administration body a relevant royalty”.

In some African countries, the copyright laws do not provide expressly that a CMO is to grant authorization, but the designated organizations seem to act like CMOs (they collect royalties for the use of folklore creations which are then used for the purposes determined in the law) or, in fact, might be considered such organizations.⁶⁵²

Many national laws also determine for what purposes the collected payments are to be used, such as cultural development,⁶⁵³ or promotion of creativity,⁶⁵⁴ or the preservation of folklore,⁶⁵⁵ or

643 It is to be noted that, while these provisions are included Title I of Annex VII of the Bangui Agreement on copyright and related rights, Title II on cultural heritage According to Article 67 of Annex VII of the Agreement, “cultural heritage” comprises “all those material or immaterial human productions that are characteristic of a nation over time and space” and they “relate to (i) folklore, (ii) sites and monuments; (iii) ensemble”. Under this Title, however, the meaning of “folklore” is much broader than in Title II; according to Article 68(1), it means “literary, artistic, religious, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation”; that is, it extends beyond traditional cultural expressions (TCEs)/folklore also to traditional knowledge (TK). In Article 73(1), it is provided that “[i]t shall be prohibited to denature, destroy, exploit, sell, dispose of or transfer illegally any or a part of the property that makes up the cultural heritage.” However, in relation to this general provisions, those in Title I on “expressions of folklore” seem to be *lex specialis*.

644 See the national laws of Barbados (sec. 1322), Democratic Republic of Congo (Art. 14), Qatar (Art. 32), Saint Kitts and Nevis (sec. 22(5)) and Sierra Leone (sec. 26).

645 See the copyright laws of Bahrain (Art. 69) and Rwanda (Art. 201).

646 See the copyright laws of Angola (Art. 15(1)), Cape Verde (Art. 15(2)), Liberia (sec. 2.31(5)), Malawi (sec. 25), Mozambique (31(1)), Saudi Arabia (Art. 7(1)); Sudan (sec. 7(1) and (2)), Tunis (Art. 7), Zimbabwe (sec. 85(1)).

647 See the copyright laws of Kenya (Art. 20(2): Copyright Board) and Nigeria (Art. 31(4): Nigerian Copyright Council).

648 See Article 18 of the Protocol.

649 Although Article 48 of the Zambian law contains the same provision practically verbatim.

650 See the national laws of Benin (Art. 81), Haiti (Art. 7), Mali (Art. 11) and Senegal (Art. 157(1)).

651 See the copyright laws of Guinea (Art. 5: BGDA) and Togo (Art. 69: BUTODRA).

652 See the copyright laws of Djibouti (Art. 74: Office of Copyright and Neighboring Rights), Gabon (Arts 8 and 61: National Artistic and Cultural Promotion Agency (ANPAC)), Mauritania (Arts 139 – 140: Copyright Protection Agency), and Niger (Art. 56: Copyright Office).

653 See the copyright laws of Benin (Art. 84), Congo (Arts 18 and 68) and Côte d’Ivoire (Arts 8 and 62).

654 See the copyright laws of Rwanda (Art. 201).

655 See the copyright laws of Mauritania (Art. 40).

promotion and dissemination⁶⁵⁶ of folklore, or cultural and social purposes of national authors.⁶⁵⁷ Article 59(3) of OAPI's Bangui Agreement also provides that "[a] part of the royalties collected with respect to the exploitation of expressions of folklore shall be devoted to welfare and cultural purposes."

As it has been seen above, CMOs – and organizations that *de facto* act like CMOs – may play a decisive role in the protection and exploitation of artistic folklore in favor of the creative communities and culture of developing countries. This has been recognized mainly in Africa, where folklore is a living tradition and a significant form of creativity.

In order that CMOs may effectively fulfill their tasks in this field, they should handle expressions of folklore as integral parts of the repertoires they represent. This means that they should monitor the use of expressions of folklore in the same way as the use of works protected by copyright, that they should build the authorization of the use thereof into their licensing and tariffs systems, and that they should distribute the payments collected for the use of expressions of folklore proportionally for the purposes determined by the law. For instance, Samikopijja is an indigenous-run CMO specifically created (for the Sami) for the management of rights in collectively-held indigenous materials.⁶⁵⁸

The WIPO Development Agenda and collective management; recommendations with special attention to Africa and LDCs

Although the focus of attention of the WIPO Development Agenda⁶⁵⁹ is on the economical, technological and social development of developing countries, still there are some clusters and principles that bear relevance for the more culture-related aspects of copyright and related rights, and for the collective management of these rights.

This applies already to the very first recommendation – Recommendation 1 of the first cluster – which provides that: "WIPO technical assistance shall be, inter alia, development-oriented, demand-driven and ... taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States."

Recommendation 10 – which specifically concerns institution building – is more closely relevant to CMOs: "To assist Member States to develop and improve national intellectual property institutional capacity through further development of infrastructure and other facilities with a view to making national intellectual property institutions more efficient and promote fair balance between intellectual property protection and the public interest."

Various of the recommendations of the Development Agenda stress that particular attention must be paid to the situation in African countries and in LDCs (the reference to which together is justified because no fewer than 36 out of 47 of which are African countries).⁶⁶⁰ Indeed, it is in that region that it is clearest what difficulties the creative communities in developing countries – especially the LDCs – face if they want to set up and modernize CMOs.

The title of one study is particularly telling: "Collective management of copyright: more than two centuries of existence in history; two years old in Ethiopia."⁶⁶¹

In the African countries, CMOs have developed in varied ways and to various levels of sophistication – and these differences, as well as the different economic and social situations, have been commonly influenced by the sort of legal structure a CMO inherited at a country's independence. In some countries, there are stable CMOs with a long history, appropriately managed and duly functioning in terms of the collection and distribution of remuneration. In contrast, in other

656 See the copyright laws of Barbados (sec. 1322).

657 See the copyright laws of Congo (Art. 18), Côte d'Ivoire (Art. 8), Djibouti (Art. 70(3)), Gabon (Art. 8), Haiti (Art. 7), Niger (Art. 111), Togo (Art. 69) and Tunis (Art. 7).

658 See <https://www.samikopijja.org/web/?giella1=eng> and <https://ifro.org/page/member-details/s%EF%BF%BD-mikopijja/?k=ro-12f4649c325a4fb0f0bbbed79f192582b>

659 The WIPO Development Agenda – containing 45 recommendations in six chapters (A to F) was adopted at the 2007 sessions of the WIPO General Assembly, it is available at <https://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>

660 See <https://unctad.org/topic/vulnerable-economies/least-developed-countries/list>

661 Amenti Abera Kajela (2016). Collective management of copyright: more than two centuries of existence in history; two years old in Ethiopia. *International Journal of Research and Scientific Innovation*. 3(12), 1–17 (emphasis added).

countries – in particular, in LDCs – not only is the collective management system at a nascent stage but also copyright legislation and the related infrastructure. Ethiopia is an example of this latter category.

Except during its Italian occupation from 1936 to 1941, Ethiopia has been independent – but subject to internal political and armed fights, and border conflicts, that have created serious social problems. It is understandable that the establishment of a collective management system was not at the top of the agenda for many years. Although steps have recently been taken to remedy this, both the collective management system and the legal framework necessary for its operation are far from complete. Indeed, at the time of writing, Ethiopia was one of the very few countries that was not yet party to the Berne Convention. When Amenti Abera Kajela described the conditions, requirements and difficulties facing Ethiopia, then, it was an authentic description of the conditions, requirements and difficulties common to many developing countries and LDCs, both in Africa and beyond:

The existence of such organizations [CMOs] is of *national importance* in promoting creativity and helping flourishing of national cultural identities in addition to the role they play in lobbying for good legal environment and awareness creation on the concept of copyright protection and benefits to national economy of copyright industries [...]

The government needs to put in place an appropriate legal framework for the collective management of rights that are administered by CMOs on behalf of right holders by providing for rules ensuring the better governance and greater transparency of all CMOs.

All these issues become relevant only when *there is a working CMO in the country* and we currently have no such organization.

The law is framed in a way that leaves initial stage of establishing CMOs to right holders only and has brought no CMO in to existence since the inclusion of the concept in the law of the country two years ago. This reminds us the relevance of government support and cooperation between right holders and EIPO [Ethiopian IP Office] in establishing CMOs.

It is very hard for right holders to accomplish the establishment only by themselves, especially in countries like Ethiopia, where the very concept of copyright itself has not been well understood by majority of the society, let alone the concept of collective management. The government can facilitate the establishment of CMOs by supporting awareness creation campaigns by right holders, giving aids that take either financial or non-financial form, by making contact with WIPO on any support at initial stage of establishing CMOs [...] and by arranging experience sharing opportunities for organizers of the idea of founding CMOs. The absence of such support, on part of government, and understanding the role of EIPO as only to approving of application for establishment of CMOs, will delay the practicality of the concept of collective exercise of rights and establishment and functioning of such organizations in the country (emphasis added).⁶⁶²

This is a powerful and precise description of the situation. The last finding of the study quoted above, which emphasizes the pivotal proactive role of government, in close cooperation with the international partners, is particularly important.

The study stresses the significant role of collective management “in promoting creativity and helping flourishing of national cultural identities”, as well as in delivering “the benefits to national economy of copyright industries”, and the author points toward active government support for “awareness creation campaigns”.

Sometimes, however, also policymakers and government officials need to be persuaded that a collective management system has benefits to bring to their countries. It may be necessary to “wake up” those rights granted under the international treaties and perhaps even provided for domestically which, in the absence of CMOs, cannot be effectively exercised (i.e., “sleeping rights”). Even so, a new obligation to pay for uses that, *de facto* if not *de jure*, have been free to date is hardly attractive from political, economic and social perspectives; hence the uphill battle of proving that a copyright and collective management system is not necessarily a burden, consisting mainly in

662 *Ibid.*, 16–17.

paying money to foreign rightholders, but it may be suitable to deliver economic benefit, promote creativity, and protect the country's cultural identity and diversity.

Special aspects of deductions for cultural and social purposes in developing countries

Support, assistance and patience are needed during the birth and first faltering steps of new CMOs in developing countries – particularly the LDCs. Expectations of efficiency, costs and amounts of distributable remuneration collected must be managed. Generous grace periods should be granted so that new organizations can steady their gait and begin to function appropriately.

Special considerations may emerge too in terms of deductions for cultural and social purposes. Partner organizations may permit the CMOs of developing countries – in particular, the LDCs – to take a higher level of cultural and social deductions as aid.

It is stressed in Chapter 11 that a CMO may deduct a certain percentage from the remuneration due to partner organizations for cultural and/or social purposes only on the basis of an explicit agreement. There might be, however, some alternative ways to make deductions. One such way might be, in principle, a tax on income. However, where remuneration is due to foreign rightholders, the double taxation agreements commonly provide that such tax is collected exclusively in the country of residence – and developing countries are rather source countries. It was in light of this fact that, at meetings of the copyright committees of WIPO and UNESCO in the 1970s, a number of developing countries proposed a multilateral agreement under which income tax on copyright remunerations (“royalties”) might be shared between the source countries and the residence countries, in this way aiming to “institutionalize” deductions for cultural and social purposes. After several preparatory meetings, a WIPO-UNESCO Diplomatic Conference was convened in Madrid. Three weeks of formal and informal sessions (in November and December 1979) of the Main Commission yielded results: the Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties laid down the principle of “sovereignty and equality” of the Contracting States, on the basis of which the sharing of income tax revenues for copyright royalties would be possible (Article 6), on an understanding that it would be up to the States concerned to negotiate and agree on how they avoid double tax burdens on the same sums (Article 8).⁶⁶³

The Convention was adopted amid highly animated debates between developing countries and industrialized countries, only a few of which (such as France) were open to the idea, and it seemed likely that its entry into force would be similarly fraught. In fact, only nine countries ratified or acceded to the Convention – short of the 10 countries necessary to bring it into force – and thus the treaty lies dormant.⁶⁶⁴

This, however, does not change the validity of the arguments justifying generous support and preferential treatment to developing countries, and in particular to LDCs to establish and develop their copyright infrastructures and collective management systems – if necessary also through such measures.

Benefits of regional cooperation – facilitated by online digital technologies

Regional cooperation among developing countries – as in other fields also in the fields of copyright and collective rights management – offers mutual benefits through assisting each other by working out legal and practical solutions to solve similar problems they are faced with and facilitating the achievement of their common economic, social and cultural objectives.

The advent of online digital technologies and their cross-border applicability have created new possibilities in this respect, and they are used ever more intensively.

⁶⁶³ For the text of the Convention and the key documents of the Diplomatic Conference, see *Copyright*, January 1980, 12–33.

⁶⁶⁴ See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVIII-1&chapter=28&clang=_en

Various initiatives have been born in the three major regions of developing countries – Africa, Asia and the Pacific, Latin America and the Caribbean – as a first step, aiming to facilitate the online licensing of music.

To facilitate the licensing of online streaming and download platforms, African CMOs have created a multilateral digital copyright licensing hub. The hub is operated through the Composers, Authors and Publishers Association (CAPASSO) which is based in South Africa and comprises 17 societies at the time of writing. It grants licenses for multi-territorial online use to such major platforms as Spotify, Apple Music, YouTube, Facebook, etc., which bundle the repertoires of the participating CMOs for all territories in which they operate. The central hub uses advanced digital technology to manage copyright online.

Such a system of multi-territorial licensing is in accordance with the core objective of the Agreement on the African Continental Free Trade Area (the AfCFTA Agreement) – namely, to promote creativity and copyright industries through the establishment of a continent-wide online market – and with the overarching goals of pan-African trade liberalization, economic integration and socioeconomic development. The Agreement is supplemented by a Protocol on Intellectual Property, and a 2019 report made 10 major policy recommendations for its application under the AfCFTA.⁶⁶⁵ The report foresaw various regional cooperation programs (under consideration in the second round of negotiations at the time of writing), and the setting up of a pan-African multi-territorial licensing hub clearly is a way of “strengthening the means for copyright holders to secure a fair share of the proceeds from commercial use of their work”.⁶⁶⁶

In Asia, establishing the databases necessary for online multi-territorial licensing has been difficult not only because of the many languages but also the different scripts and characters those languages use. The Asian CMOs have resolved these complex problems by setting up two regional CIS-Net nodes: Mis@Asia and DIVA. (We will look at CIS-Net a little later in the chapter.)

Mis@Asia is the result of collaboration between COMPASS, the authors’ society of Singapore, and MCT (Thailand), IPRS (India), VCPMC (Vietnam) and FILSCAP (Philippines).⁶⁶⁷ Mis@Asia has a fully CIS-compliant system, which has been described as including:

The standards of the IPI (Interested Party Information); CWR (Common Works Registration); WID (International Musical Works Information Database); ISWC (International Standard Work Code) and relevant EDI (Electronic Data Standards) agreed by CISAC for the electronic communication of data have been incorporated in system development. [...]

It meets a wide range of requirements, including the following:

- Easily replicated with flexibility and scalability in any society depending on actual needs. Technically, any one member can provide full or partial back-office services to any other society.
- Web-based where members can automate the exchange of data and information among themselves or with other societies through the Internet seamlessly.
- Reductions of manual data preparation and entry
- Accuracy in calculation of royalties and speedier disbursement of royalties.⁶⁶⁸

DIVA was established likewise as a collaborative effort led by CASH (Hong Kong, People’s Democratic Republic of China), and including MCSC (People’s Democratic Republic of China),

⁶⁶⁵ United Nations Economic Commission for Africa/African Union Commission/African Development Bank (2019). *Assessing Regional Integration in Africa (ARIA IX): Next Steps for the African Continental Free Trade Area*. Addis Ababa: UNECA. Available at <https://repository.uneca.org/handle/10855/42218>

⁶⁶⁶ *Ibid.*, 131, quoted in *Desmond Oriakhogba and Chijioko Okorie* (2020). Multi-territorial digital copyright licensing within the AfCFTA. *openAir*, July 22. Available at <https://openair.africa/multi-territorial-digital-copyright-licensing-within-the-afcfta/>. The article notes further that:

The AfCFTA agreement came into force on 30 May 2019. Phase II negotiations, was scheduled to commence between December 2018 and January 2019 with the development of a draft Protocol on IP, among others. The draft Protocol would then be finalized in December 2019 for eventual adoption in June 2020. However, the summit in which the Protocol would have been adopted did not hold as a result of the uncertainties caused by the COVID-19 pandemic.

⁶⁶⁷ Scot Morris (2017). *Collective Management in the 21st Century*. Paper presented at the WIPO Sub-regional Workshop for the Promotion of WIPO Administered Treaties in the Field of Copyright and Related Rights, Sydney, December 11–13, 20 (hereinafter, Morris, *Collective Management*).

⁶⁶⁸ NetReach Asia Pte. Ltd (undated). Success story: music information system at Asia Project. Available at www.netreachasia.com/DownloadDocuments/Case%20Studies/MIS@ASIA%20-%20Case%20Study.pdf

MÜST (Chinese Taipei), MACP (Malaysia) and WAMI (Indonesia).⁶⁶⁹ In one article, DIVA is likened to “CIS-Net powered by FastTrack” and a “Swiss Army knife for the CMOs”, because it has helpfully overcome the problems that arose when trying to access the system using Chinese characters:

There were some technical issues in the initial setup of the DIVA node. For example, our works titles and IP names could not properly be displayed and searched because the CIS-Net user interface did not support Asian languages. But thanks to the savvy technical team at FastTrack, those issues were ironed out in a timely fashion.

CIS-Net has been an important tool in the operation of DIVA societies, especially for documentation and distribution. We expect its role to continue to grow as the search response time improves and new tools are added. Among sister societies, CIS-Net is now seen as an authoritative source of musical work information and we are grateful to be a part of it.⁶⁷⁰

LatinAutor – in full, the Ibero-American Federation of Copyright – is the regional CIS-Net node for Latin American countries, with the exception of Brazil and Mexico. It was developed by, and has its headquarters at, AGADU, the Uruguayan authors’ society. It was founded by 15 Latin American CMOs,⁶⁷¹ with the objective of creating a joint management policy for musical works in the digital environment and facilitating the negotiation of licenses for the use of their repertoires by online content providers and users.⁶⁷²

Recently, the Caribbean authors societies, regrouped as the Association of Caribbean Copyright Societies (ACCS),⁶⁷³ have also joined LatinAutor.

LatinAutor negotiates licensing fees and conditions with the online music provider platforms and collects the remuneration due on behalf of the organizations it represents, supported – in its management tasks – by BackOffice Music Services, a company based in Buenos Aires.⁶⁷⁴

It goes without saying that the establishment and due operation of these cooperation networks may be beneficial not only for the CMOs within the given regions but also for their partner organizations in the other regions.

669 See Morris, *Collective Management*.

670 Alfred Lau (2012). CIS-Net is DIVA's Swiss Army knife for royalty management. *FastTrack News*, August 1. Available at <http://news.fasttrackdcn.net/news/post/cis-net-is-divas-swiss-army-knife-for-royalty-management>

671 Namely (in alphabetic order by country in which the CMO is based): SADAIC (Argentina); SOBODAYCOM (Bolivia); SCD (Chile); SAYCO (Colombia); ACAM (Costa Rica); SGACEDOM (Dominican Republic); SAYCE (Ecuador); SACIM (El Salvador); AEI (Guatemala); AACIMH (Honduras); SPAC (Panama); APA (Paraguay); APDAYC (Peru); AGADU (Uruguay); and SACVEN (Venezuela).

672 See Eduardo de Freitas Straumann (2020). Latinautor – los licenciamientos regionales; el rol de las entidades de gestión colectiva manteniendo su jurisdicción en el territorio nacional. *Cuadernos Jurídicos*, May 30, 223–229; Murray Stasser (2020). Licensing agency IMPEL expands into Latin America via deal with LatinAutor. *Music Business Worldwide*, March 30. Available at www.musicbusinessworldwide.com/licensing-agency-impel-expands-into-latin-america-via-deal-with-latinautor/

673 ACCS – previously known as the Caribbean Copyright Link (CCL) – was founded by the authors’ societies of Barbados (COSCAP), Jamaica (JACAP), Santa Lucia (ECCO) and Trinidad and Tobago (COTT).

674 See www.backoffice-ms.com/#work

World Intellectual Property Organization
34, chemin des Colombettes
P.O. Box 18
CH-1211 Geneva 20
Switzerland

Tel: +41 22 338 91 11
Fax: +41 22 733 54 28

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