Collective Management of Copyright and Related Rights

EDITED BY DANIEL GERVAIS

Third Edition

Wolters Kluwer

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Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-5441-5

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

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Preface

About This Book

The topic of this book is collective management, which refers to licensing (i.e., the contractual grant of an authorization to use a work protected by copyright where such use is not otherwise allowed by an applicable exception or limitation) performed by a CMO on behalf of a plurality of rights holders.

Other entities license on behalf of several authors or right holders. For example, a publisher licenses use of works by several authors. However, a publisher is not a CMO. Why? There are few national statutes that define the term. The Canadian *Copyright Act* defines 'collective society' as a 'society, association or corporation that carries on the business of collective administration of copyright [...] 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 operates a licensing scheme' and/or 'carries on the business of collecting and distributing royalties or levies payable pursuant to this Act.' The US *Copyright Act* only defines 'performing rights society' as an 'association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works.' A number of national laws require that an entity be approved before operating as a CMO, which then requires an administrative decision that the entity is in fact a CMO even absent a formal statutory definition.

If one were to limit the analysis to this definition many types of entities could qualify as CMOs, including book and music publishers. Yet, as just mentioned, they are not considered as CMOs. This is because the best way to define a CMO operationally or functionally is to use definitional elements of the two statutory definitions above only as the one side of the coin that makes a CMO. CMOs are indeed in the business of licensing a *repertoire* of copyright rights. There is, however, another side to the definition, which is that a CMO is *not* in the business of commercially exploiting the works or objects of related rights. It licenses users including those who will commercially exploit the works. This explains why a book publisher, for example, is not a CMO even though it does manage a repertoire of rights. While this negative aspect is not

present (at least not expressly) in the two statutory definitions above, it is reflected in the definition contained in the 2014 EU Directive on collective management. The Directive defines a CMO as an organization that manages 'copyright or rights related to copyright on behalf of more than one right holder, for the collective benefit of those right holders, *as its sole or main purpose*'. Hence, a publisher is not a CMO because it main purpose is not licensing per se but broader commercialization.

These two (positive/negative) elements are functional in nature. Are there structural components to the definition as well? The EU Directive suggests that there are – at least in the EU context. The definition contained in the directive also requires that a CMO be: (a) owned or controlled by its members and (b) organized on a not-for-profit basis. This rule is not observed uniformly worldwide, however. Hence, it seems better for our purposes to focus primarily on functions rather than structure to define collective management.

CMOs function in a variety of ways. Some CMOs function as mere agents of a group of rights holders who voluntarily entrusted the licensing of one or more uses of their works to a collective while other collectives are assignees of copyright. In some cases, rights holders transfer rights to all their present and future works to a CMO; in other cases, they choose the individual works or objects that the CMO will administer on their behalf. Some CMOs license work-by-work, others offer users a whole 'repertory' of works; and others do both. This may be combined with an indemnity clause or equivalent.

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

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

CMOs are now facing the challenges of the digital age. Claims that 'copyright does not work' in the digital age are often the result of the inability of users to use protected

material lawfully. On the Internet, users of copyright material can easily access millions of works and parts of works, including government documents, legal, scientific, medical and other professional journals, and newspapers, but also of course music and audiovisual content. Although digital access is fairly easy once a work has been located (though it may require identifying oneself and/or paying for a subscription or other fee), obtaining the right to use the material beyond the initial contact (which is usually only listening, viewing or reading all of or a part of the work) is more difficult unless already allowed under the terms of the license or subscription agreement or as an exception to exclusive rights contained in copyright laws around the world. Although in some cases, this is the result of the rights holders' unwillingness to authorize the use – a priori a legitimate application of their right to prohibit – there are several other cases in which it is the unavailability of adequate licensing options that makes authorized use impossible. Both rights holders and users are losers in this scenario – rights holders because they cannot provide authorized (controlled) access to their works and lose the benefits of orderly distribution of their works, and users because there is no easy authorized access to the right to reuse digital material. In other words, this inability to 'control' their works means that these works are simply unavailable (legally) on the Web.

Whatever the optimal answer to those questions may be, one fact remains: – a large amount of copyright material is (and more will be) available on the Internet and that 'market' will need to be organized in some way. By 'organized', it is suggested that users will want access and the ability to reuse material lawfully. These uses include putting the material on a commercial or educational website or an Intranet, emailing it to a group of people, reusing all or part of it to create new copyright material, storing it and perhaps distributing on a USB key or other storage medium. Authors and other rights holders will want to ensure that they can get paid for uses for which they decide that users should pay, absent an exception or limitation.

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

The Approach Chosen for This Book

This book is divided into two main parts. Part I presents a number of horizontal issues that affect collective management in almost every country. The part begins with an introductory chapter that describes collective management models, and paints a brief historical overview of the evolving role of CMOs. It explains how copyright collectives are organized and the various models under which CMOs operate and discusses the current role of collectives and their likely evolution over the coming years. The chapter also considers whether extended repertoire systems (also known as extended collective licensing), which seems to be playing an increasingly important role in policy

discussions, is compatible with the prohibition of certain formalities and conditions contained in Article 5(2) of the Berne Convention.

Chapter 2, by Dr Mihály Ficsor, former Assistant Director General of the World Intellectual Property Organization ('WIPO') and Director General of the Hungarian CMO ARTISJUS, discusses the role of collectives in the digital age, using the Berne Convention (in particularly the three-step test) and the 1996 WIPO Copyright Treaties (and the 'making available' right) as a backdrop. Dr Ficsor reminds us that 'with the advent of ever newer and better technologies, the areas in which individual exercise became equally difficult, and – in certain cases, even impossible – began widening. It was in those cases that rights holders established collective management systems'. He then considers the impact of the US Digital Millennium Copyright Act, along with the EU Papers and Directives. Dr Ficsor offers key insights into the changing nature of collective management and the relationship between collective management, rights to remuneration and the ways in which CMOs acquire the rights they need to function (i.e., the authority to license). Insisting on the freedom of rights holders to choose between individual and collective management of rights, he concludes that the cases in which mandatory collective management is possible are limited, but notes that extended repertoire (extended collective licensing) is allowed, provided certain important safeguards are in place.

In Chapter 3, Professor Laurence Helfer tackles the interface between collective management and human rights issues. That interface is seldom discussed, but collectives manage rights in human knowledge, the creation of and access to which are crucial in every country, notably as a basis for a well-functioning democratic system. The chapter is one of the deepest analyses of that crucial rights intersection available. The chapter begins with a reminder that the Universal Declaration of Human Rights ('UDHR') and the 1966 International Covenant on Economic, Social and Cultural Rights ('ICESCR' or 'the Covenant') protect the moral and material interests of authors and inventors, as well as the public's right 'to enjoy the arts and to share in scientific advancement and its benefits', but that 'without elaboration, however, these provisions provide only a skeletal outline of how to develop human rights–compliant rules and policies for governments to promote creativity and innovation'. Suggesting that a 'human rights framework for intellectual property puts the public's interest front and centre and on an equal footing with property rights in intangibles', Professor Helfer then examines how Article 15(1)(c) of the Covenant could be expanded into a coherent framework. His analysis includes a detailed review of the work done by the Committee on Economic, Social and Cultural Rights (and its 'general comments') and difficulties stemming from the fact that both authors' rights and access to copyright works may be considered fundamental rights (thus limiting the ability of states to legislate). He notes that in the comments concerning Article 15(1)(c) of the Covenant (a 'nonbinding, albeit highly persuasive' interpretation of the Covenant), the Committee mentioned affirmative measures to facilitate 'the formation of professional associations', and 'to ensure the active and informed participation' of authors in those associations to protect their moral and material interests. Professor Helfer concludes that 'a human rights framework for intellectual property offers a possible focal point around which all

parties can structure a revised regulatory regime' instead of the increasingly 'corporate' approach to copyright regulation.

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

The exception in Part II is its first chapter, which examines at efforts to regulate CMOs at the European level. Prepared by Stef van Gompel and Lucie Guibault of the Institute for Information Law of the University of Amsterdam, the chapter begins with an analysis of the existing regulatory context, in particular, key decisions by the European Court of Justice and the European Commission, including the recent (2104) Directive, which dealt with, on the one hand, the relationship between CMOs and users and, on the other hand, relations between CMOs and their members. The chapter then presents briefly how individual European Union (EU) Member States regulate CMOs. The chapter contains an analysis the most recent normative efforts and work on a Community framework and relevant cases.

Other chapters in Part II focus on one or more national systems. In *Europe*, the cradle of collective management, France, Germany, the United Kingdom & and Ireland and the Nordic countries were selected and a specific chapter is devoted to each one. The contributors of those chapters are, respectively, Dr Sylvie Nerisson, who recently completed her work on a doctorate on this topic; Dr Jörg Reinbothe, former head of the Intellectual Property Unit at the European Commission, where he oversaw the development and application of several key directives; Professor Paul Torremans, who teaches intellectual property law at the University of Nottingham; and Ms Tarja Koskinen-Olsson, former director of the Finnish RRO KOPIOSTO and former Chair of IFRRO. In this third edition, a new chapter on Central and Eastern Europe was added, authored by Dr Mihály Ficsor and Mitko Chatalbashev. Each country and region has a different approach to collective management In *France*, where copyright, and copyright management are anchored in post-Revolution human rights doctrines, collectives have undergone very significant changes since 2000. *Germany*, whose model was considered by several CMOs in Central and Eastern Europe, has developed a unique system of government oversight, located in the Patent Office. The *United Kingdom*, whose copyright law served as a model for the laws of most Commonwealth members, uses a specialized tribunal to settle tariff disputes. Finally, the extended repertoire system (or extended collective licensing) is examined, which is also discussed also in Chapters 1 and 2; it was developed in the highly socially cohesive system of the *Nordic countries*.

It has is now cast a swarm, as it were, and is under consideration in several a number of other countries.

Moving to the Americas, the *Canadian* chapter was contributed by Mr Mario Bouchard, General Counsel of the Copyright Board. Canada's collective management system is in transition, after the introduction in the late 1990s of both neighbouring rights and a private copying levy. Canada's Copyright Board has also adopted fairly unique measures to improve collective management over the past several years. The situation in the *United States* is presented by Professor Glynn Lunney of Texas A&M University. The US situation is somewhat different from that of other countries. Controlled mostly under antitrust (competition) law judicial decrees (though there are tariff hearings administered by the Copyright Office), several CMOs 'compete' in the same area of licensing, namely, the public performance of music.

In the Asia-Pacific region, collective management is a very important activity. In *Japan*, alone CMOs collect more than United States Dollar (USD) 1 billion/per year. The situation may seem complex to observers outside the Land of the Rising Sun in part because of the way in which CMOs are supervised, which differs to a certain extent from methods now in use elsewhere. Yet, the Japanese collective management system seems to work quite well. In a detailed chapter, Associate Professor Koji Okumura from the Faculty of Business Administration at Kanagawa University offers one of the first complete presentations of collective management in Japan. A new chapter on collective management in China, co-authored by the Editor and Dr Fuxiao Jiang, was added to this third edition. As China's presence in this field increases, this seemed both appropriate and necessary. In this third edition, a new chapter discusses collective management in Australia and New Zealand. Its author is Professor Susy Frankel, who also serves as Chair of the New Zealand Copyright Tribunal.

The reader who wishes to obtain information on other countries in Asia may consult the chapter by Mr Ang Kwee Tiang (the representative of CISAC in the region for more than a decade and now working for IFPI), in the second edition of this book.

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

Finally, the third edition adds a very useful chapter on collective management in Africa, co-authored by Professor Tana Pistorius and Dr Joel Baloyi, of the University of South Africa. As of this writing, Dr Pistorius was President of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP).

Daniel Gervais
Nashville, October 2015

Summary of Contents

Table of Contents