Collective Management of Copyright and Related Rights

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Introduction

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

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

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

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

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

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

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

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

newspapers, but also of course music and audiovisual content. While digital access is fairly easy once a work has been located (though it may require identifying oneself and/or paying for a subscription or other fee), obtaining the right to use the material beyond the "initial contact" (which is usually only listening, viewing or reading all or a part of the work) is more difficult unless already allowed under the terms of the licence or subscription agreement or as an exception to exclusive rights contained in copyright laws around the world. While in some cases this is the result of the rightsholders' unwillingness to authorize the use – *a priori* a legitimate application of their right to prohibit –, there are several other cases where it is the unavailability of adequate licensing options that makes authorized use impossible. Both rightsholders and users are losers in this scenario: rightsholders because they cannot provide authorized (controlled) access to their works and lose the benefits of orderly distribution of their works, and users because there is no easy authorized access to the right to reuse digital material. In other words, this inability to "control" their works means that these works are simply unavailable (legally) on the Web. The *Napster*, *KaZaa* and *Grokster* cases[6] come to mind in that respect.

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

6. *A&M Records, Inc.* v. *Napster, Inc.* 284 F.3d 1091 (9th Cir., 2002); *Universal Music Australia Pty Ltd.* v. *Sharman License Holdings Ltd.*, [2005] FCA 1242; and *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 125 S.Ct. 2764 (US Sup. Ct., 2005).
7. *See*, e.g., D. Gervais, "The Price of Social Norms: Towards a Liability Regime for File-Sharing" (2004), 12 *Journal of Intellectual Property* 40; D. Gervais, "Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing", in M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law*. (Toronto: Irwin Law, 2005), 602 at 517–549; *see also* M. Einhorn. "Digital Rights Management and Access Protection: An Economic Analysis", in J. Ginsburg and J. Besek (eds.), *Adjuncts and Alternatives to Copyright: ALAI Congress, June 13–17, 2001, New York, U.S.A.* (New York: Kernochan Center for Law Media and the Arts, Columbia University School of Law, 2002).

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

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

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

Collectives and the Paradox of Copyright

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

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

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

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

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

The Approach Chosen for this Book

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

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

cases that rightsholders established collective management systems." He then considers the impact of the US Digital Millennium Copyright Act[8] and the Napster[9] case, and EU Papers and the Copyright Directive.[10] In reaction to the lowering of the level of levies, the use of which may increase, Dr. Ficsor warns:

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

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

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

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

creativity and innovation." Suggesting that a "human rights framework for intellectual property puts the public's interest front and center and on an equal footing with property rights in intangibles", Professor Helfer then examines how Article 15(1)(c) of the Covenant could be expanded into a coherent framework. His analysis includes a detailed review of the work done by the Committee on Economic, Social and Cultural Rights (and its "Draft General Comment") and difficulties stemming form the fact that both authors' rights and access to copyright works may be considered fundamental rights (thus limiting the ability of states to legislate). He notes that in the Draft General Comment[14] concerning Article 15(1)(c) of the Covenant (a "nonbinding, albeit highly persuasive" interpretation of the Covenant), the Committee mentioned affirmative measures to facilitate "the formation of professional associations," and "to ensure the active and informed participation" of authors in those associations to protect their moral and material interests.[15] Professor Helfer concludes that "a human rights framework for intellectual property offers a possible focal point around which all parties can structure a revised regulatory regime" instead of the increasingly conflictual and "corporate" approach to copyright regulation.

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

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

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

members. The chapter then presents briefly how individual EU member States have regulated CMOs. The chapter contains an analysis of the most recent normative efforts and work on a Community framework, including those outlined in the European Commission's Communication on the Management of Copyright and Related Rights in the Internal Market[17] and in the Commission's Work Programme 2005.[18] It covers the fundamental aspects that govern any intervention by the European Union in the area of collective management (notably attribution, subsidiarity and proportionality). In Part IV of her chapter, the authors discusses the need for harmonization at the EU level. They note that "effective structures for the cross-border collective management of copyright for legitimate online music services would require regulatory intervention. The main reason for this lies in the fact that the market has failed to produce effective structures for cross-border licensing and cross-border royalty distribution; and that it has not rectified a series of contractual restrictions preventing authors or other rightholders from seeking the best collective rights management service across national borders. In all likelihood, the Commission would not limit itself to the regulation of the cross-border licensing of online music services but would probably aim at all types of multi-territorial licensing." Their analysis includes thoughts on possible legislative and non-legislative intervention by Brussels.

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

Belgische Radio en Televisie (BRT) v. *SABAM*, (1974) E.C.R. 51 [*BRT* v. *SABAM*]; *Musik-Vertrieb Membran GmbH* v. *GEMA*, (1981) E.C.R. 147; *GVL* v. *Commission*, (1983) E.C.R. 483; *Ministère public* v. *Tournier*, (1989) E.C.R. 2521; and *Lucazeau* v. *SACEM*, (1989) E.C.R. 2811.

17. Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – The Management of Copyright and Related Rights in the Internal Market* (16 April 2004), COM(2004) 261 final.

18. Commission of the European Communities, *Commission Work Programme for 2005 – Communication from the President in agreement with Vice-President Wallström* (26 January 2005), COM(2005) 15 final.

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

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

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

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

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

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

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

Daniel Gervais
Ottawa, February 2006

Table of Contents