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# Collective Management of Copyright and Related Rights

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# Introduction

## Note Concerning This New Edition

This new edition of *Collective Management of Copyright and Related Rights* is different from the previous edition in several ways. Amongst the useful comments on the first edition was that it did not contain a general introduction to collective management. It was, in other words, a book for experts only. This has been remedied by the addition to the first chapter of a description of the operations of a collective management organization (CMO), in addition to a sharper focus on the history of collective management and its possible futures. A new chapter on multi-territorial licensing was added to address the topic – even though it was discussed in the European chapter of the first edition and in the same chapter in this edition. All individual chapters were updated to reflect not just changes that have occurred since 2005 but also constructive critiques received after the publication of the first edition.

The topic of this book is collective management, which refers to licensing (i.e., the grant of an authorization to use a protected work) performed by a CMO on behalf of a plurality of right holders. It implies that a group of right holders pooled some or all of their rights so that users can obtain a license to use such pooled rights from a single source, namely the CMO.

CMOs function in a variety of ways. Collective management, therefore, does not refer to a particular legal structure, regime or model. Some CMOs function as mere agents of a group of right holders who voluntarily entrusted the licensing of one or more uses of their works to a collective. Other collectives are assignees of copyright. In some cases, right holders transfer rights to all their present and future works or rights to a CMO; in other cases, they are allowed to choose which works or objects the CMO will administer on their behalf. Some CMOs license

work-by-work, some offer users a whole 'repertory' of works; and others do both. This may be combined with an indemnity clause or equivalent.[1]

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 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 toward collective management. For instance, are CMOs considered 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),[2] the largest and oldest association of CMOs, or to the International Federation of Reproduction Rights Organizations (IFRRO).[3] There are also several CMOs representing holders of related rights, and those may belong to other associations.[4] 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 right holders and users of collective licensing when compared to individual licenses by right holders.

CMOs are 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 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 the exclusive rights contained in copyright laws around the world. Although in some cases, this is the result of

1. 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 license. This indemnity often takes the form of an obligation to defend the user in court proceedings.
2. See online: <www.cisac.org>.
3. See online: <www.ifrro.org>.
4. Examples would include the International Federation of Musicians ('FIM'), online: <www.fim-musicians.com/eng/index.html> and the International Federation of the Phonographic Industry ('IFPI'), online: <www.ifpi.org>.

the right 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 right holders and users are losers in this scenario – right holders because they cannot provide authorized (controlled) access to their works and lose both income and the benefits of orderly distribution of their works, and users because there is no often easy authorized access to the right to use or reuse digital material. In other words, this inability to 'control' means that copyright works are simply unavailable (legally) on the Web. The *Napster, KaZaa* and *Grokster* cases[5] come to mind in that respect.

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 use and 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 distributing it. Authors and other right holders will want to ensure that they can put some reasonable limits on those uses and more importantly get paid for uses for which they decide that users should pay (again, absent a specific exemption or compulsory license 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.

## The Approach Chosen for This Book

This book is divided into two main parts. Part I presents 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 seem 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

5. *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).

Hungarian CMO ARTISJUS, discusses the role of collectives in the digital age, using the Berne Convention (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 right holders established collective management systems'. He then considers the impact of the US Digital Millennium Copyright Act[6] and the Napster[7] case, along with the EU Papers and the Copyright (Infosoc) Directive.[8] 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 right 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[9]) 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,[10] as well as the public's right 'to enjoy the arts and to share in scientific advancement and its benefits',[11] 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 form the fact that both authors' rights and access to copyright works may

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

be considered fundamental rights (thus limiting the ability of states to legislate). He notes that in the comments[12] concerning Article 15(1)(c) of the Covenant (a 'non-binding, 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.[13] 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.

The last chapter in this part, by Tanya Woods, discusses the issue of transnational licensing and the possible role of multi-territorial licensing. In doing so, using historical and theoretical approaches, she notes that copyright was and is fundamentally territorial. She considers efforts by CMOs and dissects the well-known Santiago Agreement with great acuity. She then suggests the parameters of an optimal post-Santiago multi-territorial solution, concluding that 'CMOs must expand their traditionally restrictive approach to licensing by injecting more clarity into the process, cooperating with users, finding creative or unconventional solutions, relinquishing some control over the way content is used and, perhaps above all else, abandon their habit of not globally working together.'

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 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 the chapters varies, owing to the 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 efforts to regulate CMOs at the European level. Prepared by Dr Lucie Guibault and Stef van Gompel 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,[14]

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12. 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 Nov. 2004), (Reporter: Eibe Riedel).
13. *Ibid.*, at paras 36 and 50.
14. Notably *Gesellschaft fur Musikalische Auffuhrungs- und Mechanische Vervielfaltigungsrechte (GEMA) v. Commission of the European Communities*, (1971) OJ L 134/15; *Belgische Radio en Televisie (BRT) v. SABAM*, (1974) ECR 51 [*BRT v. SABAM*]; *Musik-Vertrieb Membran GmbH v. GEMA*, (1981) ECR 147; *GVL v. Commission*, (1983) ECR 483; *Ministère public v. Tournier*, (1989) ECR 2521; and the *Lucazeau v. SACEM*, (1989) ECR 2811.

which dealt with, on the one hand, the relationship among CMOs, between CMOs and users and, on the other hand, relations between CMOs and their members. The chapter contains an analysis the most recent normative efforts and work on a Community framework and relevant cases, including *MyVideo v. CELAS* (25 June 2009) and CISAC (16 July 2008). The authors also discuss the impact of recent measures on the market for cross-border licensing of rights, noting that among

> the biggest concerns is the fear that the implementation of the Recommendation will lead to the emergence of monopolies or regional oligopolies for the management of online music rights which, in the long term, could have a negative effect on the cultural diversity. By allowing right-holders to assign their online rights to the CMO of their choice, competition will arise at the level of the repertoires, which leads to a segmentation of the market, favouring the establishment of monopolies and the appearance of network effects.

Other chapters in Part II focus on one or more national systems. They were prepared by some of the most well established and recognized experts in each region. 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, 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 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. 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, discussed also in Chapters 1 and 2; it was developed in the highly socially cohesive system of the *Nordic countries*. It is now under consideration in 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 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, Louisiana, one of the most prolific and original intellectual property scholars in that country. The US situation is somewhat different from that of other countries. Controlled and 'tolerated' 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. In recent years, however, copyright specific supervisory mechanisms were established.

Collective management is a very important activity in *Japan*, where CMOs collect more than United States Dollar (USD) 1 billion per 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, 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.

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 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.

Daniel Gervais
Nashville, June 2010

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