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**Collective Management of Copyright
and Related Rights**

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Editor

Daniel Gervais



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Chapter 1

Collective Management of Copyright: Theory and Practice in the Digital Age

*Daniel Gervais**

1 INTRODUCTION

This initial chapter examines, first, the basic features of ‘collective management’ of copyright and related rights.¹ This is useful both to delineate the scope of this book and to explain to readers less familiar with collective management where it comes from and what it does. Second, the chapter aims to provide theoretical foundations for the collective management of copyright and to that end discusses both the paradox of copyright and the fragmentation of rights.

The apparent paradox of copyright is that in order to maximize the creation and dissemination of new works of art and the intellect while adequately rewarding authors and other owners of copyright and related rights, intellectual property law seemingly poses obstacles both to the creation of new works – because authors may not create derivative works without authorization, and to their

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1. I use the term ‘related rights’, as does the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), to refer to rights owned not by authors (creators) and their successors in title but by performers, broadcasting organizations and sound recording producers. The term ‘neighboring right’ is also used in this context. Unless the context requires otherwise, the expression ‘collective management of copyright’ includes related rights.

dissemination – because it provides copyright owners with a right to exclude others from copying, performing and communicating those new works.

The fragmentation of rights² may be defined as the fact that copyright and related rights are expressed as a bundle of rights applicable to various types of use and defined by their technical nature, such as making copies (reproduction), performing in public, communicating (by wire or wireless means), renting, displaying, etc. Making matters even more complex, each right in the bundle can be shared by co-authors or their successors in title and it can be divided contractually by territory, language, type of media, etc. This means that, for a single use of a copyright work, a user may need several authorizations.

Let us take a concrete example. A radio station (broadcaster) wishing to copy music on its computers and then use that copy to broadcast the music will need to clear two rights: the right to copy (reproduction) and the right to communicate the work to the public.³ The radio station will need both rights in respect to three different objects: (1) the musical work, (2) the sound recording and (3) the musical performance of the musical work incorporated in the sound recording.⁴ Our hypothetical broadcaster will need, at least occasionally but probably very frequently, to use works, sound recordings or performances, the rights in which are owned in whole or in part by foreign nationals and entities.⁵ The broadcaster probably uses thousands of songs from around the world each week. However, a typical broadcaster does not know in advance which songs it will play enough to seek individual licenses. Or the broadcaster may have a change of mind. For example, after the death of Michael Jackson, several radio stations decided to play his music much more than usual. In sum, a broadcaster may need up to twenty licenses (or payments) if some of the rights have been transferred to are split among various right holders. That clearance process will be required for each song, performance and recording used by the station.

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2. The chapter does not, however, analyse the economics of collective management. Some of the economic aspects are discussed in various chapters of this book (e.g., Professor Lunney's chapter on the United States). For a more complete look at the economics of collective management, the reader might consult Hansen, Gerd and Schmidt-Bischoffshausen, Albrecht, *Economic Functions of Collecting Societies – Collective Rights Management in the Light of Transaction Cost – and Information Economics* (19 Oct. 2007). Available at SSRN: <<http://ssrn.com/abstract=998328>>. That paper focuses on the transaction costs for the licensee. For a different view, see Ariel Katz, 'Is Collective Administration of Copyrights Justified by the Economic Literature?', in *Competition Policy and Intellectual Property*, ed. Marcel Boyer, Michael Trebilcock & David Vaver (Toronto: Irwin Law, 2009), 451–461.
 3. Referred to in the United States as part of the right of public performance and in some jurisdictions as part of the right of representation.
 4. Some countries grant only some of those rights. As of this writing (2010), the United States is one of the very few World Trade Organization (WTO) Members that does not grant performers a statutory right in public performances. Many other countries do grant such a right but only as a right to 'remuneration' (payment) – that is, not as a full exclusive right.
 5. In fact, the broadcaster may not know whether the work, performance or recording is in fact from this or that country, and it may be from several. The composer might be American, the lyricist Canadian, the performer Nigerian and the producer German.

This leads us to another issue – who are these right holders, and where are they? Why would a broadcaster not go online and find out who owns every piece of the work the broadcaster wants to use and obtain rights that way? There are at least three sets of reasons. First, because under Article 5(2) of the Berne Convention – most substantive provisions of which were incorporated into the TRIPS Agreement – mandatory formalities – such as registration with a governmental entity – cannot be imposed by the State as a condition for the normal exercise or enjoyment of copyright. Put differently, a country party to the Berne Convention and/or member of the World Trade Organization (WTO) cannot impose a mandatory registration system for copyright, at least not if the sanction is a reduction in copyright rights below the minimum thresholds established under the Berne Convention and the TRIPS Agreement.⁶ Second, where registration systems exist (e.g., the United States), not only are right holders, especially foreign ones, not required to use them, but once a work is registered, total or partial transfer of rights are often not registered, at least not in a timely fashion. This means that a radio station, even if it wanted to, could not find some or all of the right holders it needs. Third, it is also rather obvious that the transaction costs would likely be astronomical and make it probably impossible to run the business.

What is needed, therefore, to make the copyright system work for the broadcaster, is a license to use *all the right fragments* (reproduction, communication, etc.) for the copyright work(s) (music and lyrics) and the objects of related rights (performance and sound recording). The license must be for all or as close to all existing works, performances and recordings that the radio station might use, which in practice means a worldwide license. This is exactly what collective management organizations (CMOs) do. They perform those licensing functions not just for radio stations, but also for small and large music users (hotels, cinemas, television stations, discotheques, restaurants, public events, etc.) and in areas other than music as well (including the reproduction of printed and online material for business and education, reproduction of images and photographs and use of theatrical plays in theatres).

2 COLLECTIVE MANAGEMENT IN HISTORICAL PERSPECTIVE

Understanding collective management may be easier in historical context. The story of the rise of collective management has become a quaint and famous tale. It begins in France with the French playwright Pierre-Augustin Caron de Beaumarchais in the dark and dingy Parisian theatres in the 1700s.⁷ Theatrical

6. This was confirmed by a WTO panel report issued in January 2009 examining a complaint filed by the United States against China, in which copyright was denied for works that failed censorship review. See D. Gervais, 'World Trade Organization Panel Report on China's Enforcement of Intellectual Property Rights', *American Journal of International Law* 103, no. 3 (2009): 549–554.

7. A more detailed history is contained in the chapter on France.

companies at the time were enthusiastic in their encouragement of promoting plays and artists, but were less generous when it came time to share in the revenues. The term ‘starving artist’ was more literal than figurative.⁸ Beaumarchais was the first to express the idea of collective management of copyright. In 1777, he created the General Statutes of Drama in Paris. What began as a meeting of twenty-two famous writers of the *Comédie française* over some financial matters turned into a debate about collective protection of rights. ‘They appointed agents, conducted the now famous pen strike and laid a foundation for the French Society of Drama Authors (*Société des auteurs dramatiques*).’⁹ In 1838, Honoré de Balzac and Victor Hugo established the Society of Writers,¹⁰ which was mandated with the collection of royalties from print publishers.

A net of authors’ societies, shaped by the cultural environment of each country, slowly spread throughout the world. The collective management of copyright was seen as a practical and efficient way of allowing creators to be compensated. In Italy the *Società Italiana degli Autori ed Editori* (SIAE), under the direction of Barduzzi, was empowered them to collect theatre and cinema taxes.¹¹

Developments were not limited to the domestic scene, however. As CMOs flourished in their own national States, the need for cooperation and harmonization on the international level became apparent. In 1925, Romain Coolus organized the Committee for the Organization of Congresses of Foreign Authors’ Societies. This Committee was founded to tackle some of the insurmountable problems involving international issues.¹² Around the same time, Firmin Gémier succeeded in creating the Universal Theatrical Society.¹³ Both of these initiatives led to the founding congress meeting in 1926 of the International Confederation of Societies of Authors (CISAC).¹⁴ The founding members identified the need to establish both uniform principles and methods in each country for the collection of royalties and

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8. Although this may be an exaggeration on the authors’ part, this cliché remains, nonetheless, a somewhat accurate portrait of financially struggling artists both then and now.
 9. See CPTech’s Page on Collective Management of Copyright, online: <www.cptech.org/cm/copyrights.html> (last visited: 7 Jan. 2010).
 10. Société des gens de lettres, see online: <www.sgd.org/> (last visited: 17 Oct. 2009).
 11. For a complete historical account of the formation of CMOs, see International Confederation of Societies of Authors and Composers (CISAC), *As Long as There Are Authors* (International Confederation of Societies of Authors and Composers, 1996), 64.
 12. As one commentator noted:

The Portuguese Society of Authors offered to represent French authors, and the theatre managers of Lisbon immediately threatened to boycott French plays. The Spanish society SGAE would not allow the SACD to deal with its members on an individual basis.
 - Ibid.*, at 10.
 13. The biography of Firmin Gémier may be found online: <www.answers.com/topic/firmin-g-mier> (last visited: 17 Jan. 2010).
 14. See online: <www.cisac.org> (last visited: 8 Feb. 2010).

the protection of works and to ensure that literary and artistic property¹⁵ were recognized and protected throughout the world.¹⁶ Today, CISAC has 225 member societies in 118 countries,¹⁷ a majority of which license either the public performance and communication of musical works or the reproduction of those works. Other CISAC members license reprography and reproduction of works of the fine arts and performance in theatres (the so-called 'grand rights'). Many countries have fostered the growth of CMOs through legislative initiatives in the belief that CMOs offer a viable solution to the problem of individually licensing, collecting and enforcing copyright.

Although the formation of CMOs may have once been considered revolutionary, the pivotal role that they continue to play as facilitators in the copyright system is more properly characterized as evolutionary. CMOs facilitate the establishment of unified methods for collecting and dispersing royalties and negotiate licensing arrangements for works. Yet, licensing and royalty payment, while still important, is not the only preoccupation of CMOs. Over time the role of CMOs has evolved to oversee copyright compliance, fight piracy and perform various social and cultural functions.¹⁸ Collective management has also allowed authors to use the power of collective bargaining to obtain more for the use of their work and negotiate on a less unbalanced basis with large multinational user groups.¹⁹ That being said, most collective schemes value all works in their repertory on the same economic footing, which may be unfair to those who create works that may have a higher value in the eyes of users.

Although CMOs were initially promoted as an efficient way to collect and disburse monies to compensate right holders for copyright works, increasingly the structure of CMOs, on both a national and an international level, has raised questions about their efficiency.²⁰ In addition to those significant structural issues, the market conditions and business trends of copyright owners are changing, and CMOs must adapt.²¹ Just as the role of CMOs is evolutionary, so is their underlying

15. The French law on authors' rights (the civil law version of copyright) is actually known as the *Code of Literary and Artistic Property*, Law No. 92–597 of 1 Jul. 1992, as amended by Laws No. 94–361 of 10 May 1994, and 95–4 of 3 Jan. 1995.

16. By 'world', I am referring only to the Western World. This is inclusive of the Anglo-Saxon and *droit d'auteur* traditions of copyright.

17. See *supra* n. 14.

18. See M. Ficsor, *Collective Management of Copyright and Related Rights* (World Intellectual Property Organization, 2002), at 99–106.

19. For instance, imagine if corporations such as music video television (e.g., MTV) negotiated the use and fee for each song/video it broadcasted with individual artists. Although artists such as U2 or Madonna would be in a position to negotiate on a balanced power basis, the same would not be said for new groups struggling to find airtime.

20. For example, often rights are governed by multiple CMOs within a particular nation. Coordination is therefore required not only among national CMOs, but also on an international basis among CMOs. There is a significant lack of standards among many CMOs. Identification alone of an underlying right and right holder can be a convoluted process.

21. As one author notes, 'efficiency will be what, in the end, members and music users most want and will most easily recognize, however it is measured'. See J. Hutchinson, 'Collection and

stated efficiency.²² Although the current milieu of CMOs may have served both creators and users reasonably well in the past, the system must adapt to remain both efficient and relevant.²³

3 HOW COLLECTIVE MANAGEMENT OPERATES

As this book shows, CMOs in various countries, and even sometimes within the same country, operate and are regulated differently; however, their basic modus operandi is fairly linear.

Once established (sometimes an authorization is required to operate as a CMO), it must acquire the authority to license (or collect) and create the repertory of works, performances or recordings. Such authority to license may be granted by law or by contracts with right holders or other CMOs. Then it must license on the basis of agreed tariffs or, if agreement with the user is not possible, prices set by a third party (court, tribunal, board, etc.).²⁴ The CMO will then collect usage data, process them and apply those data to distribute the funds to right holders. CMOs may also engage in other activities, such as cultural promotion, awards, etc. Let us look at each of those areas of operation.

– Obtaining the authority to license

Once established – sometimes with the support of a governmental authority – CMOs, most of which are private entities, obtain from a group of right holders (e.g., music composers, music publishers, book publishers, music performers) the ability to license on behalf of those right holders. This can be done by a full transfer of copyright (assignment) or by an agency agreement (license) allowing the CMO to represent the right holder, whether on an exclusive or non-exclusive basis.

Most CMOs operate alone in their field in their territory, which means they are a de facto (and sometimes de jure) monopoly and as such subject to competition law scrutiny or to another, more specific form of governmental supervision. The one CMO per territory model is not uniform worldwide, however. As Professor Lunney's chapter on the United States shows, in that country there are three

Distribution of Performing and Mechanical Royalties: A View from the UK', *Copyright World* 84 (1998): 30, at 32.

22. As Peter Drucker notes, 'efficiency is doing better what is already being done'. See P. Drucker, *Innovation & Entrepreneurship: Practices and Principles* (New York: Harper & Row, 1985), 277. Drucker discusses the nexus between technology, innovation and efficiency.
23. Licensing, collecting and enforcing copyright may now be done on an individual basis through the aid of technologies such as digital rights management systems. While most authors' do not adopt the view that collectives will no longer have a role to play in the digital environment, the point is that new technologies alleviate some of the concerns relating to the inefficiency of individual licensing, collecting and enforcement of copyright.
24. Sometimes the price is set by a governmental authority without the need to seek a voluntary agreement first.

organizations licensing the same right to publicly perform music although there is usually one CMO per country (per field of activity). In Europe, as Dr Guibault and Stef van Gompel's chapter demonstrates, CMOs operating in the field of music may 'compete' within the territory of the European Union (EU).

There is no uniformity in the type of government supervision either. In some jurisdictions (e.g., the United States), the matter is dealt with under normal competition law – and enforced by the Department of Justice's antitrust division. In many European countries, a specific governmental body or commission was established for that purpose, sometimes operating in conjunction with the competition law enforcement agency.

Once a CMO has acquired the right to license on behalf of a plurality of right holders, it can enter into 'reciprocal representation agreements' with similar CMOs in other territories. Those agreements allow the parties to license each other's pool of rights, known as their repertoire (sometimes called repertory) in the other party's territory. For example, GEMA (the German music CMO) has such an agreement with the Society of Composers, Authors and Music Publishers of Canada (SOCAN), its counterpart in Canada. As a result, SOCAN can license GEMA's repertoire in Canada and GEMA can license SOCAN's repertoire in Germany.

– Setting licensing terms and tariffs

Having acquired right to as much of the world repertoire as possible, a CMO then turns to users. Often, the users and the CMO will disagree on the terms of the license. Each jurisdiction basically decides which type of state intervention is warranted in that context. To take just a few examples, in the United States, a federal judge is empowered (for music performing rights organizations the American Society of Composer, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)) by the agreement entered into between those CMOs and the Department of Justice to decide the appropriate rate for the licenses. In Australia, Canada and the United Kingdom, a specialized copyright tribunal or board was established for that purpose. The power of the tribunal varies greatly from one jurisdiction to another, as the respective chapters explain. In other cases, the matter is left entirely to civil courts, and in yet other jurisdictions, the terms of the license, or some of them, are set by government regulation or decree.

There is also a layer of regulation decided by the CMOs themselves, particularly in their reciprocal representation agreements. Most CMOs belong to CISAC.²⁵ CISAC developed over the years a model for reciprocal representation agreements among its members. One of its features, for example, it to limit the percentage (10%) of a CMO's total collections that be used for social or cultural purposes. However, for private copying income, the percentages of funds collected used for such purposes may be much higher and that percentage is often prescribed by statute.

25. See *supra* n. 14.

This takes us to the next phase in our analysis of the work of CMOs. Once a license has been signed by a user – often after a price-setting intervention by a court, specialized body or other third party, the CMO will receive payments from that user. In some cases, the payment is received not as consideration for the license but as a form of regulatory compensation for a form of use that is otherwise considered not licensable (as a practical and/or normative matter). A major example of this is the ‘private copying’ levies on blank media and on recoding, copying, computer and other equipment. The monies are typically paid to a CMO according to applicable legislation or sometimes a decision by an administrative or quasi-judicial body (tribunal or board).

– Usage data collection and distribution

The CMO’s task then is to distribute the funds. To do so, it will need data. From an operational standpoint, CMOs are essentially data collecting and processing entities.

CMOs need and process two types of information: identification and ownership. The former is used to identify works, performances and recordings in the CMO’s repertoire. The latter is used to know whom to pay for the use of a particular work, recording or performance. The rights to a musical work composed by *x* may well have been sold to *y* and then to *z*. That work may have been performed by several artists and find itself on several recordings. Usage data reported by a user may use the name of the performer, song, recording, composer or any combination of the above. That identification data will not necessarily match current ownership data, and the CMO needs both. Worldwide databases of identification data have been created by CISAC and the International Federation of Reproduction Rights Organisations (IFRRO) for reprographic rights.²⁶ This allows their members to identify foreign works, performances and recordings licensed to them under reciprocal representation agreements. Each CMO tends to keep some or all of the ownership data (contact information, etc.) confidential.

Identification data will be used to match usage data reported by users or generated by the CMO to specific works, recordings or performances. License contracts with users typically will require usage reporting for all or part of the works, performances or recordings used. A radio station may use computer logs, for example, to report the music used. For other types of users (e.g., hotels, bars, restaurants), it is more difficult to require 100% reporting. Sometimes surveys are used. For example, some (hopefully a representative number) of users may be surveyed for a specific period, and the data thus gathered will then be extrapolated to the class of users concerned using statistical regressions and other similar models.

Despite some work by CISAC in this area, there is little uniformity and each CMO decides for itself the extent of the surveys and the type and accuracy of data capture tools it wants to use and/or request its users to use. Typically, a larger pool of data will produce more accurate results and present a more fine-grained picture

26. See <www.ifrro.org>.

of works, performances and recordings actually used and the frequency of such use by each user or class of users, but it will increase the data processing costs, thereby diminishing the amount available for distribution. A CMO will normally distribute all of its collections after deduction of its administrative expenses, a small reserve and possible deductions for other purposes (e.g., social and cultural purposes, including promotion of members, pension funds, award ceremonies, training programmes, etc.). A CMO's revenue includes not just the actual license fees or levies paid to it but interest earned on the 'float', that is, the period of time between the day a payment is received from a user and the day on which it will be paid (distributed) to a right holder or a foreign CMO.

Having matched usage data to identification data and knowing which works, performances or recordings have been used, the CMO then matches that dataset against ownership data to apportion the funds to each right holder and to foreign CMOs. Funds owed to right holders represented by CMO A through a reciprocal representation agreement with CMO B are typically not paid to the right holder directly. They are sent to CMO B together with appropriate usage data. CMO B will add this (foreign) income to its own income and distribute it to the right holders it represents. In some (fairly rare) cases, two CMOs will agree to let the other party to a reciprocal representation agreement license their respective repertoire but not exchange data or money. In other words, under this arrangement (known as a 'B' agreement in CISAC terminology), CMOs keep funds generated by the use of foreign works, performances or recordings in the other CMO's repertoire as part of their own revenue. This type of arrangement is less expensive to administer and may be helpful to fledgling CMOs or in situations in which strict currency exchange controls hamper cross-border financial flows. Yet, it is much less fair to right holders whose works, performances or recordings were used. For that reason, it is generally considered a temporary arrangement.

To increase fairness and accuracy, several CMOs keep discrete data pools. For example, a music performing right CMO may separate data from radio stations, television stations, cinemas, background music users (e.g., large stores), etc. It can then separate those revenue streams and use separate datasets for distribution. CMOs also sometimes use keys or factors that are applied to usage data before distribution. One model of distribution is known as 'follow the dollar' (or euro or yen, etc.). It means simply that each right holder will receive the exact share of the CMO's distribution pool that usage data has determined. Under other models, a further processing of the data occurs.²⁷ For example, some CMOs will give greater 'weight' to a work performed for the first time on their territory. Because first worldwide use typically occurs in the country where the composer or creator of the work resided, this tends to favour domestic right holders. Some CMOs actually evaluate the 'quality' of works and may give greater weight to a performance of contemporary music than to the latest pop single.

27. Even 'follow the dollar' distribution systems are sometimes tweaked to reflect other concerns.

– Transparency issues

As this brief *tour d’horizon* has shown, collective management of copyright is complex. In several areas (e.g., rights ownership, financial data), CMOs tend to maintain secrecy (even from other CMOs) as a matter of policy. In other areas, the data (survey methods, distribution keys, etc.) is not released for a variety of reasons and often leads to claims of opaqueness. There is undoubtedly room for greater transparency, although many CMOs do provide annual reports and try to provide some insight into their operations.²⁸ What is arguably lacking is a uniform standard or code of conduct in that respect.

4 THEORETICAL APPROACHES

4.1 FRAGMENTATION

Copyright is a bundle of rights (reproduction, public performance, communication to the public, translation, adaptation, etc.). Each sub-right (or copyright ‘fragment’) can be split among many right holders. For music, there are several distinct layers of rights: rights in the musical work – itself a combination of music and lyrics; the performance; and the recording. Right fragments²⁹ such as ‘reproduction’ or ‘public performance’ are complex and increasingly a source of frustration for users because they no longer map out discrete uses, especially on the Internet. Put differently, a single use of a copyright work or object of a related right (e.g., performance, recording) often requires multiple authorizations (right fragments) from several different right holders. The way in which right fragments are expressed no longer matches who does what, and for which purpose, with a work or object of a related right. Contracts present a partial solution to fragmentation. A contract can define a ‘use’ that is allowed rather than which fragments of rights are licensed, but that simplification is apparent only if right fragments are owned by, and a license negotiated with, multiple entities.

Fragmentation has its roots in the pre-Internet history of copyright (from the late seventeenth century until the 1990s – approximately 300 years), which was essentially that of the adaptation to new forms of creation (e.g., cinema, computer programs) and dissemination of copyright works (radio, then television broadcasting, cable and satellite). Copyright adapted and was able successfully to regulate new markets made possible by these new technologies because they were created by *professionals* who were willing to live with a certain degree of complexity as

28. CISAC also releases an annual survey of collections. The 2008 edition was available (as of February 2010) at <www.cisac.org/CisacPortal/consulterDocument.do?id=17829#>. It shows 2008 stable compared to the previous year, with total collections of over Euro (EUR) 7 billion.

29. Fragment or fragmentation is derived from the Latin adjective ‘fractus’. See Kimberly Wertemberger, *Fractals, Mandelbrot Sets & Julia Sets*, available at <www.ms.uky.edu/~lee/ma502/fractals/FRACTALS.html>.

part of their compliance efforts. However, many new technologies added a layer of complexity because the right fragments in the copyright bundle grew, usually by analogy, to bring many new uses under the copyright umbrella. For example, playwrights and music composers were able to obtain rights in respect to the live performance of their works by arguing that this was their main economic use. When radio was invented, those same live performances (mostly of opera and music) were then broadcast directly to the homes of listeners. People did not attend the live performance, and the existing exclusive right of live public performance did not apply. Yet broadcasters were making a commercial use of the material similar to the use made by theatre or concert hall operators. It was quite logical then, to extend the right of public performance to the communication of the performance of a work by radio (or Hertzian waves). It was only a small step after that to add television and later communication by cable and satellite. The result of this historical process is the bundle composed of ‘copyright rights’ we find in most national copyright laws.

The fragmentation of copyright, therefore, occurs on many different levels – rights contained in national laws, which recognize several economic rights (reproduction, communication to the public, adaptation, rental, etc.); within market structures; within licensing practices; within a repertory of works; within different markets (language, territory); and through the interoperability (or lack thereof) of rights clearance systems. Fragmentation has an impact directly on all affected parties, whether they be right holders, users of copyright works or regulatory authorities that oversee the process; it also affects, of course, CMOs.

Although the division of labour among traditional rights ‘fragments’ (reproduction, performance, communication, etc.) is less relevant in mapping newer uses (as already mentioned, a broadcaster making a copy of the recording and then broadcasting it requires at least a license to copy the content on a server and another to communicate the work to the public³⁰), collective management is (still) organized mainly around those traditional fragments. Quite often, one CMO licenses the right of communication to the public/public performance, while another license the right of reproduction (for musical or textual works). Although so-called ‘one-stop shops’ have been set up in some countries, they often operate as services that copy or transfer authorization requests to the various CMOs concerned. A ‘one-stop-shop’ set up in this fashion assumes that at least one member CMO actually has the authority to license each fragment that the user requires and is willing to license the user in question, which may not be the case. Perhaps no CMO in the group has the right, or perhaps they do not issue license to the type of user concerned. In short, even when reasonably efficient systems are available, rights clearance may prove a difficult task.

The inherent difficulty in rights clearance in today’s world is perhaps best illustrated by way of examples. If the hypothetical broadcaster mentioned in the

30. Or its public performance. In some jurisdictions, the right fragment is not the right to communicate to the public but the right to authorize that communication, which is yet another fragment.

opening pages of this chapter wanted to put music on the Internet, at least four right fragments could be involved, namely:

- reproduction on the emission server³¹;
- authorization of communication to the public in territory of emission;
- communication to the public in territory of reception; and
- reproduction in territory of reception.³²

In fact, this rights matrix is more complex because there are three levels of rights involved in music:

- composers and lyricists;
- performing artists; and
- makers (producers) of the sound recording.

The rights matrix is demonstrated in Table 1.1.

Table 1.1 Rights Matrix to License a Point-to-Point Internet Communication of a Sound Recording Containing a Performance of a Protected Musical Work

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

C, Right likely administered by a collective; PC, use possibly covered by private copying regime; R, right is only to remuneration (as opposed to exclusive).

In short, twelve different analyses are required. Actually, if the composer and lyricist's rights are administered separately or if multiple authors and performers are involved, the matrix would be even more complex. Naturally, there are ways in which the situation could be simplified, notably by agreements among CMOs that allow one participating CMO to grant a worldwide license on behalf of all other participating entities, especially with respect to the right of communication to the

31. Unless, at the time the copy is made, it is a 'private copy'. Even then theories based on the right of destination might apply.

32. Which is also potentially a 'private copy'.

public. Still, one must proceed with each of the rights analyses in Table 1.1 to avoid a potential finding of infringement. In other words, the rights clearance process involves multiple layers of rights. Clearing each of these rights can be a labyrinthine process even if each such process is in itself efficient. Because rights ownership and licensing arrangements change through time, the matrix becomes four-dimensional.

Rights analyses concerning audiovisual works add another layer of complexity to the analysis. A film might include rights to a screenplay, a book on which the screenplay was based, musical works incorporated in the film, any art or photographs used in the setting, as well as the end product of the film itself. Each of the works³³ in turn involve several different rights fragments and, consequently, multiple right holders and systems of rights clearance and possibly also guilds or unions. Some right holders may have moved or died. And of course any one of the right holders who has an exclusive right may prevent the use and stop or force a rearrangement of the entire project. Each holder of a right fragment has a potential veto. CMOs can help because, as *de facto* or *de jure* monopolies, they usually cannot refuse to grant a license. Still, several organizations may be involved. Additionally, one CMO may represent a creator for part of its repertoire and another CMO for the remainder.³⁴

Fragmentation may not be an essential ingredient of an optimal national copyright system, but it is the reality for most if not all such systems. CMOs can do much to alleviate the burden of users by bundling fragments. For example, as Mario Bouchard explain in the chapter on Australia and Canada, the Copyright Board of has essentially forced CMOs to work together to offer a single fee license to users who need multiple right fragments. This allows them to pay a single fee and it allows the Board to determine the entire value of the copyright bundle (all of the fragments) needed by the user. The bundle must then be split for distribution purposes (as the Board did) between the various CMOs representing different groups of right holders. But that is of no concern to the user.

4.2 THE COPYRIGHT PARADOX

Another role of CMOs is to provide an ‘answer’ to the copyright paradox. It may indeed seem paradoxical that, in order to maximize the creation, dissemination and access to new human knowledge expressed as works of art and of the intellect, the law chooses to provide those who create, publish, produce or otherwise disseminate this knowledge with exclusive rights to prohibit many forms of use of the knowledge. That paradox is real, but only up to a point. The rights to prohibit contained in the bundle of copyright rights (and related rights) apply in specific

33. Or object of a related right.

34. Many composers change their US performing right affiliation from ASCAP to BMI or to the Society of European Stage Authors and Composers (SESAC) and back, etc. They thus have rights that at a certain point in time were administered by one society and later by another, adding a temporal element to the complexity equation.

cases and, in theory at least, with the principal aim of *organizing* access, not denying it, at least for published content.³⁵

4.3 CMOs AND THE TWO WORLDVIEWS

The 1710 *Statute of Anne* emerged 300 years ago after the demise of a licensing monopoly that allowed only members of the Stationers' Company (publishers' guild) to publish books in England. That monopoly had expired, and stationers were unable to justify a renewal of their publishing monopoly, which many saw as a form of censorship. They joined authors in a petition to Parliament in demanding a 'copy-right' to be vested initially in authors but then normally assigned to publishers. This led to the adoption of the *Statute of Anne*, which contained a fourteen-year monopoly granted to authors (fully assignable). The Statute also renewed for a limited period of time the Stationers licensing monopoly. British authors' already had common law rights to prevent first publication and false attribution.³⁶ British 'copyright' was thus born by merging two quite different approaches – on the one hand, there was the economically motivated desire of publishers to prevent copying of their books, and, on the other, the demands of authors to 'own' their works, anchored in a natural rights perspective and based on the Lockean principle that all persons should own the fruits of their labour.

The last justification seemed perhaps more morally acceptable for public opinion. It was also a view very strongly held on the Continent after the 1789 French Revolution and before that date in Germany, and defended by philosophers such as Kant and later Hegel. Yet, even if the *droit d'auteur/Urheberrecht* tradition can be seen as a child of the European Enlightenment tradition of individual human rights, Josef Kohler made it clear that copyright's purpose was to be used by and between professionals.³⁷ Interestingly, similar debates took place also in the United States, with Thomas Jefferson advocating an 'economic' approach to copyright while James Madison apparently supporting the author's natural right.³⁸

To this day, the difference between the economic/instrumentalist view of copyright prevalent in common law jurisdictions and inspired by British legal principles and history and the natural right (indeed human right) approach

35. A right to decide when the first publication will occur is a key component of the copyright bundle.

36. After long debated before British courts, it was determined in *Donaldson v. Becket* ((1774) 4 Burr. 2408, 98 Eng. Rep. 257) that there is no common law right in published works that could be used to prevent copying of books after the expiry of the statutory monopoly.

37. J. Kohler, *Das Autorrecht* (1880), 230. Whether CMOs can solve the copyright paradox for individual (non-professional) user is explored in s. 5 below.

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

defended in civil law jurisdictions inspired by, *inter alia*, French and German thinkers, is seen as profound.³⁹

Yet the history of European and then American copyright since the eighteenth century shows that the picture is more complex, and that copyright is both an economically justifiable right required to organize markets for certain types of works of art or the intellect, *and* a 'moral' right that authors have to prevent the publication of their works without consent and to be recognized as the authors of such works.⁴⁰ Trying to squeeze copyright on one side of that philosophical fence is incorrect in historical perspective, both in common law and civil law jurisdictions.

Many if not most CMOs are a good reflection of this history. They see themselves as champions of the rights of their members (or represented right holders if not a membership organization) and recognize the value of administering rights that can be justified as human rights or natural rights.⁴¹ But they also operate as 'businesses', handling large sums of money. They are part of the multibillion dollar business of copyright, and their work determines the economic livelihood of many an author worldwide. More importantly, CMOs can solve the copyright paradox, by proving that the role of copyright (for published works, performances and recordings) is not to deny access and use but rather to *organize it* by making it reasonably simple, if not always inexpensive, for users to secure the rights they needs. Naturally, much more can be done. If right holders want to license individual and small-scale users beyond what fair use and other exceptions allows them to do freely, then it behoves them to offer user-friendly systems to obtain such licenses; a collective approach would seem to present efficiency gains.

5 CMOS AND THE INTERNET

5.1 THE CHALLENGES

As mentioned in the previous section, from the seventeenth century until the 1990s copyright was aimed at, and used by, professional entities, either legitimate ones such as broadcasters, cable companies or distributors, or illegitimate ones, such as makers and distributors of pirated cassettes and later CDs and DVDs. In many cases, these professionals were intermediaries with no particular interest in the content itself.

In recent years, however, and especially since the advent of the Internet, copyright has also been used to try to prevent *mass individual uses* (e.g., music

39. See A. Strowel, *Droit D'auteur et Copyright: Divergences et Convergences* (Bruxelles: Bruylant, 1993), 722 and Laurence Helfer's chapter.

40. Philosophically, one may derive the right to prevent mutilation from the latter. It may be linked either to the right to protect one's reputation or in the link that united the author and his or her work.

41. See the chapter by Professor Helfer.

and video file-sharing), in many cases without providing an equivalent market (e.g., legal downloads; monetized file-sharing). In addition, to enforce copyright, many right holders have tried to obtain usage information concerning individual users, thus confronting the right of privacy, a duel between rights not seen before because copyright was used by (or against) and transacted between professionals of the copyright industries, such as authors, publishers, producers, distributors and professional pirates, not by or against individual end-users.

Even more strikingly, the invention of peer-to-peer (P2P) software, also known as ‘file-sharing’, has radically altered the copyright landscape. P2P started as a centralized system known as Napster,⁴² the demise of which was made possible, in large part, by its easily locatable and controllable nature. Napster was, in reality, only a few Internet servers, which made their owner and operators an easy enforcement target; put differently, Napster was very easy to shut down. The recording industry then tried to stop file-sharing software. In addition to lawsuits, it is using technological locks to make it harder to ‘rip’ music from compact discs. It also uses spoofing (sending corrupted files into peer-to-peer networks). Yet, exchanges of music files have apparently continued to grow, and events since 2001 seem to beg the question whether the music industry underestimated the strength of the demand for, and the societal role of, file-sharing and ‘free music’. Distributed file-sharing technologies such as torrents are extremely hard to pin down, and music users are now turning to anonymizing software and secure USENET access to continue to ‘share’ music undetected.⁴³ Even if the authors of the software and/or some operators of sites promoting the technology can be fined, as in the PirateBay case, trying to stop file-sharing is essentially impossible short of kicking users off the Internet, a solution that some countries (e.g., France) may put into practice. Yet, this may reduce Internet traffic and commerce, and it raises privacy concerns, two undesirable side effects. For example, if one file-sharer is identified among a group of users (e.g., a family), the entire group will be punished collectively and denied access to email, online governmental and commercial services, etc. This hardly seems an optimal solution. More importantly, although the focus of the approach is strictly a limited, property-based view of music designed to minimize unauthorized use, *no one can demonstrate conclusively that the industry will in fact make more revenue* because it is able to shut down Internet accounts of music users. As stores selling physical media disappear or morph into

42. Napster was shut down after injunctions were issued by various courts in the United States. See *A&M Records, Inc. v. Napster, Inc.*, 284 F. 3d 1091 (9th Cir., 2002).

43. See Lior Strahilevitz, ‘Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks’, *Virginia Law Review* 89 (2003): 505; and Bobbie Johnson, ‘Internet Pirates find “Bulletproof” Havens for Illegal File Sharing’, *The Guardian* 5 Jan. 2010 (noting that ‘[b]efore going completely dark in October 2009, Demonoid physically moved their servers to Ukraine, and remotely controlled them, said John Robinson, of Big-Champagne, a media tracking service based in Los Angeles. Ukrainian communications law, as they paraphrase it, says that providers are not responsible for what their customers do. Therefore, they feel no need to speak about or defend what they do’). Available at <www.guardian.co.uk/technology/2010/jan/05/internet-piracy-bulletproof> (last visited: 21 Jan. 2010).

retail outlets for other types of products (e.g., DVDs, games and consoles) and the resentment of users whose Internet accounts were suspended (even if they were prepared to pay for a download) grows, the likelihood of a steep upward curve in the revenue stream of the music industry as a result of the crackdown remains low. Historically, copyright industries have done well, one could argue, *when their primary focus was not to minimize unauthorized uses but rather to maximize authorized use.*

In reality, the Internet-based picture is far more complex than the ‘piracy’ label implies.⁴⁴ File-sharing software is used in ways that mirror social sites. People use the Internet to share music and music preferences. This is widely acknowledged as a form of free advertising, though one that does not necessarily compensate for lost sales. Yet, it seems clear that a significant, though admittedly hard to quantify, portion of music that is file-shared would never be purchased. It may remain on a user’s computer because of today’s computers huge storage capacity, but it will be seldom if ever listened to. If recipients of the file like the music, they might become new fans and buy some music (data analyses show that many people get some of their music for free and pay for some – perhaps a form of self-appraisal of what music is worth to them in aggregate).

If this analysis is correct, even in part, online mass and P2P uses should be a market that needs to be organized not quashed, absent a paradigmatic change in the technology itself. Part of that organization could be a broad license to use the music – and perhaps other types of content as well, and CMOs would be well placed to be partners in such an endeavour. In fact, it is difficult to see how such a system could operate without them.

Some observers argue that, with the aid of technology such as Digital Rights Management (DRM), the individual exercise of rights will become not only feasible but a more efficient solution, at least in certain cases.⁴⁵ A layer of individually or collectively managed transactional uses can coexist with a free or uncontrolled space that would be covered by a general license, perhaps one that would be paid as part of a monthly Internet or other subscription.

The role that CMOs will play in managing transactional uses and/or general online use licenses (which one could then compare to a compensation regime) is

44. For a discussion of the use of the term ‘piracy’, see William Patry, *Moral Panics and the Copyright Wars* (Oxford: Oxford University Press, 2009). Whereas the term is now used for its apparent rhetorical appeal, it has been in use for centuries as a fairly technical term of the art to refer, *inter alia*, to an unauthorized printing of a book etc.

45. M. Kretschmer, ‘The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments’, *European Intellectual Property Review* 24 (2002): 126, at 133. Under this theory, right holders will use digital rights management systems to control and disseminate the use of their works. The author explains:

In short, the transaction cost argument for collective administration from the cost of individual contracting may support not a universal rights administration system (to which all right holders have access on similar terms), but a system where the major rightholders selectively decide, supported by sophisticated information technology, whether collecting licence fees is worthwhile.

unclear, and it depends in large part to the degree that they can facilitate and develop new business models. It may be the case that the advancement of new technologies will minimize the role of CMOs, but it could also lead to a significant expansion of their role. Whatever view is taken, the rationalization of the collective management of copyright remains an important task. In fact, if CMOs are to play the role of intermediary fully and efficiently, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks.

The ability of CMOs to meet the needs of both authors and users is contingent on the evolution of both their internal practices, and the framework in which CMOs work to alleviate the many concerns of fragmentation within the current system.⁴⁶ Countries and CMOs throughout the world must adapt their laws and infrastructure to meet the challenges of digital technology irrespective of the philosophical underpinnings of each nation's copyright system – that is, whether it is rooted in economic rights, natural/human rights, utilitarian rights or any combination of these.

CMOs also will face possible competition from new players. Commercial entities that offer music on the Internet, whether on a subscription basis or individual song downloads, could combine their service with rights management in order to circumvent CMOs altogether. This is unlikely to work for individual authors, given the sheer number of composers and lyricists concerned, but could apply to other right holders, especially publishers and producers, in light of the high concentration of the music market among major labels and the decreasing daylight between music publishers and producers.

In countries where collective management is not mandatory and non-exclusive (e.g., the United States), one could see these new entities offering their services to authors as well. New 'de facto CMOs' of that sort could operate on a trans-national basis, which raises the spectre of territoriality. The example of the Google Book Settlement and the proposed establishment of a new CMO whose purpose would be precisely the administration of that settlement is another example of possible new players intersecting with existing CMOs.

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

5.2 THE DEFRAGMENTATION OF DIGITAL USES

Rights clearance systems are often based on the rights fragments discussed earlier, and each tends to come with its 'practices' and other idiosyncrasies. This means

46. The proliferation of digital technology presents problems both to authors and copyright holders, as well as for users. See S. Handa, *Copyright Law in Canada* (Markham: Butterworths, 2002) at 354.

that even if each such ‘sub-system’ (for a clearance process requiring several clearance transactions performed through different intermediaries (including several CMOs)) is efficient, the efficiency of the process as a whole is in jeopardy.

Collective management is not a neutral service. Given the fragility of Internet-based business models for delivery of copyright content on the Internet, economically efficient clearance ‘should ensure that copyright administration favours no one delivery method over another’.⁴⁷ In fact, regardless of whether digital technology is involved, the standardization of practices among CMOs would lead to greater efficiencies and would alleviate some of the fragmentation under the current system. To play that role fully and efficiently, however, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks. Additionally, CMOs need to cooperate more fully on both a national and international scale to fully achieve their role as facilitators of rights clearance. The following suggestions are offered as potential means of achieving this goal.

Technology and, in particular, copyright management systems (CMS), are a useful tool in copyright clearance because they assist with proper identification of the works, performances, recordings and right holders involved and the rights that will need to be cleared. CMS are basically databases that contain information about content – works, discrete manifestations of works and related products and, in most cases, the author and other right holders.⁴⁸ They may be used by individual right holders or by third parties who manage rights on behalf of others. A rights holder might use the system to track a repertory of works or products embodying such works (or substantial parts thereof), or an organization representing a group of right holders might use a CMS to track each right holder’s rights and works. Such an organization might be a literary agent representing multiple writers or, more commonly, a CMO.

Some CMS allow right holders or CMOs to automatically grant transactional licenses to users without human intervention, which has the benefit of keeping transaction costs low and making licensing an efficient, Internet-speed process: licenses to use a specific work can be granted online, twenty-four hours per day, to individual users. Ideally, such licenses will be tailored to a user’s needs.⁴⁹ For example, a company may want to post a flattering newspaper article on its website

47. M. Einhorn & L. Kurlantzick, ‘Traffic Jam on the Music Highway’, *Journal of the Copyright Society of the USA* 8 (2002): 417, at 420.

48. See J. Cunard, ‘Technological Protection of Copyrighted works and Copyrighted Management Systems: A Brief Survey of the Landscape’, ALAI Congress 2001; and D. Gervais, ‘Electronic Rights Management and Digital Identifier Systems’, *Journal of Electronic Publishing* 4, no. 3 (March 1999), online: <<http://quod.lib.umich.edu/cgi/t/text/text-idx?c=jep;view=text;rgn=main;idno=3336451.0004.303>> (last visited: 8 Feb. 2010).

49. Many licenses to use a work are granted where the user obtains permission for several different uses of a work. It may be the case that the user requires the work for only a specific purpose. Why should the user pay to acquire rights to use a work in a manner for which the user has no intention of using it?

or send it via email to its customer base; an individual author may decide to purchase the right to use an image, video clip or song to use in her or his own creative process; a publishing house might purchase the right to reuse previously published material.⁵⁰ CMS may also be used to deliver content in cases in which the user does not have access to such content in the required format or to create licensing sites or offer licensing options at the point at which the content is made available.

To be optimally efficient and able to deal with digital usage information, online members and work registration, user requests and online transactional licensing (where such licensing on reasonably standard terms is possible), CMOs need CMS with both an efficient 'back-end' system and a user-friendly online interface ('front-end'). However, building an all-encompassing online multimedia licensing system operated jointly by all CMOs in a country is hard to justify under current licensing practices or indeed in light of prevailing market conditions.⁵¹

The sheer number of CMOs that may be involved in the licensing of a single economic use of a protected work (or works and possibly combined with one or several related rights) poses another problem. To implement an efficient system, CMOs should cooperate within appropriate groupings (i.e., CMOs having a sufficient degree of commonality) to limit the number of systems to be developed, and they should develop compatible systems and standards to ensure that the exchange of data will be possible.⁵²

A repertoire license (i.e., one that allows the user to use any work or object contained in the repertoire of works licensed by a CMO) presents an attractive alternative in the online environment. The two most relevant uses of such licenses are where there are inherent difficulties in advance clearance of rights and where consolidation is more practical from a user's (and sometimes creator's) perspective. From a functional point of view, CMOs are a practical substitute for a compulsory license because of the multitude of uses and the difficulty of advance clearance. This solution has the advantage of being fairer to users and

50. Copyright Clearance Center, Inc. (CCC) licenses reproduction of printed material for inclusion in 'digital coursepacks', reuse of material on websites, intranets, CD-ROMs and other digital media. CCC also offers a repertoire-based license for internal digital reuse of material by corporate users. Interestingly, in the latter programme, users can only scan material not made available by the publisher in digital form. CCC's ability to license digital uses is entirely based on voluntary and non-exclusive rights transfers from right holders. See <www.copyright.com>.

51. These systems often perform several functions. The first, if so required, is to break down the rights in a work (more the case with multimedia works). The second function is to identify the right holder(s) of the work. The third function is then to clear these rights, followed by establishing license terms, and payment of fees for the use of a work. Such technologies facilitate the expediency and efficiency of licensing content online. See T. Koskinen-Olsson, 'Secure IPR-Content on the Internet', ALAI Congress 2001.

52. These would seem to follow the best practices emerging from ongoing efforts in countries other than the United States. This will be explored in greater detail when addressing centralized licensing regimes or one-stop-shop services.

potentially achieves administrative efficiencies for both creators and users. Such a system would be fairer to users in that there would no longer be a discrepancy in fees to be paid for similar uses of a work.⁵³ In essence, a single tariff could be established for different types or uses of works. Put differently, a user would pay an ‘admission fee’ at the entrance.

5.3 THE EXTENDED REPERTOIRE SYSTEM AND INTERNET USES

One system that may be worth a second look to make the licensing of mass online uses more efficient and workable is the extended repertoire system (ERS – also known as ‘extended collective licensing’), used in all Nordic countries⁵⁴ and under consideration or being implemented in other parts of the world, including Central and Eastern Europe, Africa and possibly also Canada.⁵⁵ ERS is a voluntary assignment or transfer of rights from right holders to a CMO followed by a *legal extension of the CMO’s repertoire* to encompass non-member right holders. It greatly simplifies the acquisition of rights. In fact, it has been called a ‘backup legal license’, but this expression is confusing because the right holder can opt out of the system. This, of course, is not possible under a compulsory or legal license.⁵⁶

Usually the legal extension applies after a determination that a ‘substantial’ number of right holders in a given category have agreed to join a CMO.⁵⁷ Then the repertoire of the CMO is automatically extended (for the licensing scheme concerned) to other domestic right holders in the same category and to all foreign right holders. The license also extends to deceased right holders, particularly in cases in which estates have yet to be properly organized. Thus, ERS is a powerful solution to the orphan works issue.

The extended repertoire is an interesting model for countries where, on the one hand, right holders are reasonably well organized and informed, and, on the other hand, a great part of the material that is the object of licenses comes from foreign countries. It is often more difficult and time consuming to obtain an authorization for the use of foreign material. The extended repertoire provides a legal solution to this situation, because the agreements struck between users and right holders

53. As it stands, collectives sometimes negotiate different licensing terms and fees with users regardless of whether the actual ‘use’ of the work is similar in nature.

54. See the chapter by Tarja Koskinen-Olsson.

55. See D. Gervais, ‘Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation (2003)’, study prepared for and published by the Government of Canada, online: <http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf> (last visited: 2 Feb. 2010).

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

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

will include all non-excluded domestic and foreign right holders. Finally, by accelerating the acquisition of rights, the extended repertoire also increases the efficiency and promptness of royalties' collection. The monies redistributed to right holders are thereby increased.

An argument raised against the ERS is its alleged incompatibility with Article 5(2) of Berne, which prohibits formalities concerning the existence and exercise of the rights granted by virtue of the Convention. This argument must fail.

Article 5(2) came into being in the very early days of the Berne Convention. It was then and remains part of the Convention's provisions dealing with the treatment of foreign authors (i.e., national treatment) and place of (first) publication. In the first draft of the Convention published in 1884⁵⁸ the relevant part of Article 2 read as follows:

Authors who are nationals of one of the countries of the Contracting Countries shall enjoy in all the other countries of the Union, in respect of their works, whether in manuscript or unpublished form or published in one of those countries, such advantages as the laws concerned do now or will hereafter grant to nationals. The enjoyment of the above rights shall be subject to compliance with the conditions of form and substance prescribed by the legislation of the country of origin of the work or, in the case of a manuscript or unpublished work, by the legislation of the country to which the author belongs.⁵⁹

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

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

58. See WIPO, *Berne Convention Centenary: 1886–1986* (Geneva: WIPO, 1986) at 94.

59. *Ibid.*

The President noted that the Conference agreed with Dr. Meyer on the scope of the words '*formalities and conditions*'.⁶⁰

The Report of 1896 Paris Conference contains the following:

Under the text of the Convention, the enjoyment of copyright shall be subject to the accomplishment of the *conditions and formalities prescribed by law in the country of origin of the work*. The meaning of this provision does not seem to be seriously debatable. As a result of it, the author needs only to have complied with the legislation of the country of origin, to have completed in that country the conditions and formalities which may be required there. He does not have to complete formalities in the other countries where he wished to claim protection. This interpretation, which is in keeping with the text, was certainly in the minds of the authors of the 1886 Convention. (Emphasis in original.)⁶¹

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

Authors who are nationals of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to their nationals as well as the rights specially granted by this Convention. The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.⁶²

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

The enjoyment and exercise of these rights shall not be subject to any formality. It should be noted that it is exclusively the rights claimed by virtue of the Convention that are involved here. The legislation of the country in which the

60. *Ibid.*, at 94–95.

61. *Ibid.*, at 137.

62. *Ibid.*, at 149.

work is published and in which it is nationalized by the very fact of publication continues to be absolutely free to subject the existence or the exercise of the right to protection in the country to whatever conditions and formalities it thinks fit; it is a pure question of domestic law. Outside the country of publication, protection may be requested in the other countries of the Union not only without having to complete any formalities in them, but even without being obliged to justify that the formalities in the country of origin have been accomplished. This is what results, on the one hand, from a general principle which is going to be stated and explained and, on the other, from the deletion of the third paragraph of Article 11 of the 1886 Convention. This paragraph provides that:

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

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

The new Convention simplifies matters still further since it requires no justification. Difficulties had arisen with regard to the production of a certificate from the authority of the country of origin – this production having been considered, occasionally, as the preliminary to infringement action, which caused delays. The new provision means that a person who acts by virtue of the Convention does not have to provide proof that the formalities in the country of origin have been accomplished, as the accomplishment or non-accomplishment of these formalities must not exert any influence. However, if it is in his interest to produce a certificate to establish a particular fact, he cannot be prevented from doing so (the Article in the draft only refers to *formalities*, but it is meant to cover the *conditions and formalities* to which the 1886 Convention refers.)⁶³ (Emphasis in original.)

Unquestionably, in light of the above, the formalities that are prohibited under Article 5(2) are essentially registration with a governmental authority, deposit of a

63. *Ibid.*, at 148.

copy of the work or similar formalities when they are linked to the existence of copyright or its exercise, especially in enforcement proceedings.

Interestingly, in its pre-1908 incarnation, the provision was arguably derogating from national treatment, though it was clearly not intended as such. Rather, Convention drafters saw it as a simplification of the multiple registration/deposit requirements.⁶⁴ If 'pure' national treatment had been applied, it would have been sufficient to grant protection to foreign authors on the condition of accomplishing the same formalities as nationals in every country. In 1908, the provision was realigned along the principle of national treatment by making it a provision against mandatory formalities while maintaining the meaning of the expression 'conditions and formalities' defined in 1884–1886. Formal requirement in existence at the time essentially involved registration, deposit (in national libraries) and, in rare cases, translation. For many reasons, although it was necessary to respect each country's ability to impose such requirements, they had to be decoupled from copyright. Deposit is still required for published works in many countries, but the sanction for failure to provide free copies to the national library cannot be the removal of copyright. The issue of mandatory translation is similarly separate from copyright, though its political importance led to the adoption of the Appendix to the Paris Act in 1971 allowing developing countries to impose compulsory translation licenses. The provision does not prevent requirements of other types.

This is further confirmed in World Intellectual Property Organizations (WIPO's) latest commentary on the Convention:

Formalities are any conditions or measures – independent from those that relate to the creation of the work (such as the substantive condition that a production must be original in order to qualify as a protected work) or the fixation thereof (where it is a condition under national law) – without the fulfillment of which the work is not protected or loses protection. Registration, deposit of the original or a copy, and the indication of a notice are the most typical examples.⁶⁵

'Enjoyment' is thus the very existence of the right, whereas exercise refers in particular to enforcement.⁶⁶ It would be patently incongruous to read Article 5(2) as preventing the mandatory doing of anything. Should authors just have to walk into a courtroom (itself a 'formality') without having to file a statement of claim? Not have to deal with foreign publishers and distributors because those are 'formalities'? Not have to deal with foreign tax authorities to avoid deductions at source in a foreign country? Not have to deal with foreign CMOs to ensure the protection of their rights in cases in which they cannot or do not want to join a

64. *Ibid.*

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

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

worldwide system through their national CMO (if any)? That is clearly not the intent or meaning of Article 5(2). Those are all normal acts that authors and other copyright holders must perform routinely to exploit their copyright works and not – as was made abundantly clear during the adoption and revision of the Convention, ‘formalities’ prohibited under Article 5(2).

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

To consider restriction on the freedom to exercise one’s rights fully, see Table 1.2.

Table 1.2 Copyright Restriction Levels

<i>LEVEL</i>	<i>TYPE OF RESTRICTION</i>
0	Full Individual Exercise
1	Voluntary Collective Management (opt in)
2	Collective Management With Extended Repertoire (and opt out)
3A	Mandatory Collective Management/Presumption
3B	Limitation of Damages to Tariff
4	Compulsory Licensing
5	Exception ⁶⁷

Several countries routinely impose restrictions of levels 3A, 3B and 4.⁶⁸ Damages available to a right holder are limited to what would be available under a tariff, if that right holder was a member. In effect, although membership is not mandatory, the effect of membership is. In other cases, as in Germany, there is a ‘presumption’ that all right holders are members of the CMO. Those are simply ways in which the exploitation of the works concerned is organized and tasks that copyright holders must fulfil. Even at Level 0, authors must still negotiate and sign exploitation contracts, file statements of claim, testify in court or before an arbitration panel, for example, and, of course, deal with CMOs.

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

68. See Gervais, ‘Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective’ (2001), online: <www.docstoc.com/search/Neighbouring-Rights-Collective-of-Canada> (last visited: 2 Feb. 2010).

Properly structured, ERS 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, perhaps even as simple as an email. The ERS provides CMOs with the immediate ability to license all or almost all works that users may need to license. Although not affecting the scope of exceptions, it ensures that uses that go beyond such exceptions are paid for; that is, that the objective of providing a fair reward is fulfilled. At the same time, licensing removes the (theoretical) obstacle and frustrating attempts by certain right holders to stop Internet use. This would fulfil the other side of the equation, namely the promotion of the public interest in the encouragement and dissemination of works of the arts and intellect.

6 CONCLUSION

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

There is a similar motif that runs through each of the outlined solutions, namely that centralization and standardization are prerequisites to efficiency, particularly in the digital era. There may in fact be a greater role for CMOs in the area of mass online uses. If copyright's excludability does not easily reach individual end-users, neither does it reach without difficulty users who have no direct (one-on-one) transactional contact with the right holders concerned. To maximize efficiency, it seems that copyright's power to exclude should be limited to cases in which an exclusive distributorship (or other form of dissemination) is negotiated by the first owner of copyright or someone else who acquired rights from that first owner and in cases of commercial piracy. It was thus not an obvious step for copyright to try to reach Internet users who do not consider themselves pirates or act with intent of commercial gain.

What does it mean for the future of copyright? We should recognize that copyright is not intended to be used to stop uses by end-users completely. Historically, it has been used to organize markets for those uses. Additionally, copyright works best, as an exclusion tool, when its rules are internalized by users. If one abandons attempts to *stop* end-users, by essentially preventing use and reuse and even terminating their access to the network copyright remains as a market organization tool, an entitlement to remuneration for mass uses at least when such

uses reach the level of interference with normal commercial exploitation under the Berne Convention and the TRIPS Agreement's three-step test.⁶⁹ Unfortunately, by treating file-sharers as pirates, they may push the majority of Internet users into the 'deviant' camp and damage respect for the rule of law. The solution – at this point, the only solution – is to *license* massive Internet uses in a way that respects all of those involved in the creation, performance, publication, production and use of copyright content. Naturally, this includes respect for existing exceptions. Soft enforcement measures may be used to help convince users to accept the scheme, but it cannot be overly emphasized that the best way to ensure adoption is to offer users practicable terms they will perceive as fair. The best way to achieve this, barring a major technological paradigm shift, is collective management.

69. See Martin Senftleben, *Copyright, Limitations and the Three-Step-Test* (The Hague: Kluwer Law International, 2004); and D. Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test', *Marquette Intellectual Property Law Review* 9 (2005): 1–37, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=499924> (last visited: 1 May 2010).