



# Educational Material on Collective Management of Copyright and Related Rights

## **Module 2:** Management of copyright and related rights in the field of music

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## PURPOSE OF THE MATERIAL

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Management of copyright and related rights has become an increasingly important element in a well-functioning copyright infrastructure, alongside with legislation and enforcement. There is a need for relevant information both among governmental representatives, working for instance in copyright offices, and people working in the private sector, for instance in collective management organizations.

WIPO has therefore commissioned experts to write educational material to be used as reference material in conjunction with various training activities. The experts have, in close collaboration with many non-governmental organizations, drafted a comprehensive set of materials that covers all areas where collective management is customarily applied. The contribution of NGOs has been invaluable and the experts wish to thank all representatives for their assistance and guidance.

The program takes a modular structure and covers the following sectors:

1. Module 1: General aspects of collective management
2. Module 2: Management of copyright and related rights in the field of music
3. Module 3: Management of copyright and related rights in the audiovisual field
4. Module 4: Management of rights in print and publishing
5. Module 5: Management of rights for visual arts and photography
6. Module 6: Management of rights in dramatic works

Each module is written as independent reading, together with module 1. For instance a reader, who is interested in the audiovisual field, can study modules 1 and 3.

The experts are Mrs. Tarja Koskinen-Olsson (Finland/Sweden) and Mr. Nicholas Lowe (the United Kingdom). Their short biographies are enclosed.

## How to use the material

In all modules, the material is written on different levels to serve the purpose of different readers:

- The text under each main heading offers a general overview and can be read separately for quick comprehension of the issues at stake.
- The next level is operational and offers a description of collective management of copyright and related rights in each sector.
- The third level offers detailed information, examples and experiences from various regions.

The needs and interest of the reader will decide how to use the program. Cross references are used throughout the text, as many issues touch upon more than one sector.

### **Terminology**

A list of terms and how they are used is annexed to the program. This list also offers some explanations and alternative terms that are used in various countries.



## LIST OF TERMINOLOGY USED IN THE TRAINING MATERIAL

(EXPLANATION OR ALTERNATIVE TERM IN PARENTHESIS)

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**Blanket license** (general license covering the repertoire of a CMO)

**Cable-originated programs** (initiated by cable operators; program content from many sources)

**Collective management** (also called collective administration)

**Collective management organization** (CMO) (also called collecting society and collective rights management organization, CRM)

**Composer, lyricist and music publisher** (rights holders of musical works)

**Copyright** (in common law countries; in civil law countries also called authors' rights)

**Grand rights** (dramatic and dramatico-musical works)

**Individual exercise of rights and collective management of rights**

**Management based on legislative support** (generic term for extended collective license, legal presumption and obligatory collective management)

**Mechanical rights** (right of reproduction in relation to musical works)

**Non-voluntary collective management** (management of rights under a non-voluntary license)

**Non-voluntary license** (generic term for compulsory license and statutory license)

**Owner of rights** (author or subsequent owner of rights)

**Performing right** (right of public performance, broadcasting, communication to the public)

**Private copying remuneration** (also called levy on recording equipment and media)

**Reciprocal representation agreement** (specific form of representation agreement)

**Related rights** (rights of performers, phonogram producers and broadcasting organizations; also called neighboring rights)

**Remuneration right** (right to equitable remuneration, fair compensation)

**Reproduction rights organization (RRO)** (specialized CMO in the text and image based sector)

**Reprography** (also called reprographic reproduction)

**Retransmission of broadcast programs** (simultaneous and unchanged retransmission by wire or by rebroadcasting)

**Rights holder** (generic name for authors, performers, producers, publishers and broadcasters)

**Small rights** (non-dramatic musical works)

**Transactional license** (work-by-work license)

**Voluntary collective management** (management of exclusive rights)



## TABLE OF CONTENTS

<b>PURPOSE OF THE MATERIAL</b>	<b>3</b>
<b>LIST OF TERMINOLOGY USED IN THE TRAINING MATERIAL</b>	<b>5</b>
<b>MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE FIELD OF MUSIC (MODULE 2)</b>	<b>11</b>
<b>CHAPTER 1</b>	<b>11</b>
<b>EXERCISE AND MANAGEMENT OF RIGHTS IN THE FIELD OF MUSIC</b>	<b>11</b>
<b>1.1 Market and Economic Contribution</b>	<b>11</b>
<b>1.2 Players in the Market</b>	<b>12</b>
<b>1.3 How is Copyright Exercised and Managed?</b>	<b>13</b>
<b>1.4 Collective Management as an Effective Solution.</b>	<b>14</b>
<b>CHAPTER 2</b>	<b>15</b>
<b>COLLECTIVE MANAGEMENT OF RIGHTS IN MUSICAL WORKS</b>	<b>15</b>
<b>2.1 Legislative Framework</b>	<b>15</b>
2.1.1 International, Regional and National Legislation	15
2.1.1.1 Regional Example from Europe	17
2.1.1.2 Regional Example from Europe: Greece	19
2.1.1.3 Regional Examples from the Caribbean: Trinidad and Tobago and Grenada	19
<b>2.2 Rights Holders and Rights</b>	<b>20</b>
2.2.1 Performing Right	20
2.2.2 Mechanical Right	21
<b>2.3 Rights Acquisition</b>	<b>21</b>
2.3.1 Mandates from National Rights Holders	22
2.3.1.1 Regional Examples from Europe and Asia: Germany and Japan	22
2.3.1.2 Regional Example from North America: the United States	22
2.3.1.3 Regional Example from Asia: India	23
2.3.2 Reciprocal Agreements with Foreign CMOs	23
<b>2.4 Governance Issues</b>	<b>24</b>
2.4.1 Statutes	24
2.4.1.1 Regional Example from North America: the United States	25
2.4.2 Membership Disputes	25
2.4.3 CISAC and its Professional Rules	25

<b>CHAPTER 3</b>	<b>27</b>
<b>MANAGEMENT OF THE PERFORMING RIGHT</b>	<b>27</b>
<b>3.1 Operational Principles</b>	<b>27</b>
<b>3.2 Main Users and Licensing Areas</b>	<b>27</b>
3.2.1 Example from Asia: China	28
<b>3.3 Tariffs and Other Conditions</b>	<b>28</b>
3.3.1 Example from Africa	28
3.3.2 Regional Example from Europe: the United Kingdom	31
3.3.3 Regional Example from Asia: Singapore and India	31
<b>3.4 Documentation of Works and Rights Holders</b>	<b>32</b>
3.4.1 Regional Example from the Caribbean: The Association of Caribbean Copyright Societies (ACCS)	32
<b>3.5 Distribution Principles</b>	<b>33</b>
<b>3.6 Cost Coverage Principles</b>	<b>34</b>
<b>3.7 Technical Standards and Tools</b>	<b>34</b>
<b>3.8 Market Control</b>	<b>35</b>
<b>3.9 Settlement of Disputes</b>	<b>36</b>
<b>CHAPTER 4</b>	<b>37</b>
<b>MANAGEMENT OF MECHANICAL RIGHTS</b>	<b>37</b>
<b>4.1 Operational Principles</b>	<b>37</b>
4.1.1 Regional Example from Asia: Singapore	37
<b>4.2 Main Users and Licensing Areas</b>	<b>37</b>
<b>4.3 Tariffs and Other Conditions</b>	<b>38</b>
<b>4.4 Documentation of Works and Distribution Principles</b>	<b>39</b>
<b>4.5 Market Control</b>	<b>39</b>
<b>4.6 Anti-piracy Activities</b>	<b>40</b>
<b>CHAPTER 5</b>	<b>41</b>
<b>MANAGEMENT OF PERFORMING AND MECHANICAL RIGHTS IN THE DIGITAL ENVIRONMENT</b>	<b>41</b>
<b>5.1 New Licensing Platforms</b>	<b>41</b>
<b>5.2 Main Users and Licensing Areas</b>	<b>41</b>
<b>5.3 Multi-territorial / Cross Border / Global Licensing</b>	<b>42</b>
<b>5.4 Mandates from National and Foreign Rights Holders</b>	<b>44</b>
5.4.1 Regional Examples from Europe	45



<b>CHAPTER 6</b>	<b>46</b>
<b>INTERNATIONAL ORGANISATIONS AND THEIR TASKS</b>	<b>46</b>
<b>6.1 CISAC</b>	<b>46</b>
6.1.1 Cooperation Agreement with WIPO	47
<b>6.2 BIEM</b>	<b>47</b>
<b>CHAPTER 7</b>	<b>48</b>
<b>MANAGEMENT OF RELATED RIGHTS IN THE FIELD OF MUSIC</b>	<b>48</b>
<b>7.1 Legislative Framework</b>	<b>48</b>
7.1.1 International, Regional and National Legislation	48
<b>7.2 Rights of Performers</b>	<b>50</b>
7.2.1 Exclusive Rights	50
7.2.2 Rights to Equitable Remuneration	51
<b>7.3 Rights of Phonogram Producers</b>	<b>52</b>
7.3.1 Exclusive Rights	52
7.3.2 Rights to Equitable Remuneration	52
<b>7.4 Collectively Managed Related Rights</b>	<b>53</b>
7.4.1 Broadcasting and Public Performance	53
7.4.2 Other Collectively Managed Rights	53
7.4.2.1 Regional Example from Asia: Japan	53
<b>7.5 CMOs in the Field of Related Rights</b>	<b>54</b>
7.5.1 Performers' CMOs	54
7.5.2 Phonogram Producers' CMOs	55
7.5.3 Joint CMOs for Performers and Phonogram Producers	55
7.5.3.1 Regional Example from North America: the United States	56
7.5.4 Good Governance Standards	56
7.5.4.1 Regional Example from Europe: Sweden	57
<b>7.6 Collective Management in Practice</b>	<b>58</b>
7.6.1 Operational Principles	58
7.6.2 Main Users and Collection Areas	58
7.6.3 Tariffs and Other Conditions	58
7.6.3.1 Regional Example from Europe: United Kingdom	59
7.6.4 Documentation of Performances, Phonograms and Respective Rights Holders	59
7.6.5 Distribution Principles	61
7.6.6 Market Control	61
7.6.7 Settlement of Disputes	62
<b>7.7 Music Videos</b>	<b>63</b>

<b>CHAPTER 8</b>	<b>65</b>
<b>MANAGEMENT OF RELATED RIGHTS IN THE DIGITAL ENVIRONMENT</b>	<b>65</b>
8.1 Mandates from Rights Holders	66
8.2 Main Areas of Collective Licensing	66
8.3 Multi-territorial / Cross-border / Global Licences	68
8.4 Direct Licensing by Phonogram Producers	69
<b>CHAPTER 9</b>	<b>70</b>
<b>JOINT CMOS FOR ALL MUSIC RIGHTS HOLDERS</b>	<b>70</b>
9.1 Rationale and Benefits	70
9.1.1 Regional Example from Africa: Nigeria	71
9.2 Operational Principles	71
<b>CHAPTER 10</b>	<b>73</b>
<b>INTERNATIONAL ORGANISATIONS AND THEIR TASKS</b>	<b>73</b>
10.1 SCAPR	73
10.2 AEPO-ARTIS	74
10.3 IFPI	74
<b>CHAPTER 11</b>	<b>75</b>
<b>PRIVATE COPYING REMUNERATION</b>	<b>75</b>
11.1 Operational Principles in the Field of Music	75
11.1.1.1 Regional Example from Europe	75
11.1.1.2 Regional Example from Africa: Burkina Faso	75
11.2 Collection and Tariffs	76
11.3 Distribution of Remuneration	77
11.4 Cultural Purposes	77
11.4.1.1 Regional Example from Europe: France	77
<b>ANNEX</b>	<b>78</b>
<b>About the authors</b>	<b>78</b>



## MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE FIELD OF MUSIC (MODULE 2)

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Nicholas Lowe  
August 30, 2012

### CHAPTER 1 EXERCISE AND MANAGEMENT OF RIGHTS IN THE FIELD OF MUSIC

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**It is always desirable, where rights can be exercised individually by rights owners that they be given the legislative and administrative support to exercise and enforce those rights. It is only when it is not feasible for rights owners to exercise their rights themselves that collective management should play a part. This section summarises the various players in the market and the function of collective management organisations.**

#### 1.1 Market and Economic Contribution

**Music is a ubiquitous part of almost all societies. Music can be heard by live performances or by sound recordings or by radio or television broadcasts and via the internet.**

The market for music can be thought of as two distinct parts. Music itself is composed and can then be performed so in its purest form can only be heard by those who are present and can listen to a live performance. This restriction was overcome by the invention of wireless broadcasting, which has enabled millions to hear and see performances wherever they may take place, and also by the invention of mechanical recording devices which enabled music to be recorded so it could be reproduced at another time or many other times. The recording and storing of music has progressed from perforated rolls to vinyl records to compact discs to “cloud based” services.

The economic contribution of music and collective management is enormous. CISAC’s<sup>1</sup> over 200 member societies collected € 7.545 billion in 2010<sup>2</sup> of which the music repertoire made up 86% of the total.

The trade value of the digital music market worldwide was US\$ 4.6 billion in 2010.<sup>3</sup> The economic contribution of the “copyright industries” was measured at 11.10% of

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<sup>1</sup> CISAC – International Confederation of Societies of Authors and Composers, [www.cisac.org](http://www.cisac.org). See section 6.1.

<sup>2</sup> CISAC Global Economic Survey of Authors’ Royalties in 2010. <http://www.cisac.org/CisacPortal/listeArticle.do?numArticle=1446&method=afficherArticleInPortlet>

<sup>3</sup> IFPI Digital Music Report 2011

GDP in the United States in 2010 yielding an 8.19% contribution to employment in that year.<sup>4</sup>

## 1.2 Players in the Market

**There are two distinct sides to the market and the players in each contribute to the creation of music and its presentation to the public.**

The two parts of the market for music have given rise to distinct businesses. The first may be called the “music business” involving composers and music publishers. Their rights are known as **copyright**. The second is the “record industry” comprising record companies and performers. Connected with both are the broadcasters, both of radio and television. The rights of the record industry and broadcasters are known as **related rights**.

**Composers** create music and sometimes write the words to go with the music to produce songs. **Music publishers** bring music to the record and broadcasting industries by providing them with a selection of the music they need for recordings or broadcasts. Music publishers also nurture composers by providing financial advances to them to enable them to compose.

In the record industry **performers**, who are sometimes composers and songwriters as well, perform musical works which are recorded by **record companies** and then sold to the public as CDs or by enabling the public to download the recordings from web sites available on the internet, so that they will own and have access to their own individual copy of a recording, or to “stream” the recordings to their own computers to listen to them without making a copy for future use.

**Broadcasters** produce programmes (or commission others to produce programmes for them) and transmit those programmes containing music to the general public. The programmes can be watched or listened to and even recorded to see or hear at a more convenient time.

The composers, publishers, performers, record companies and broadcasters are all **rights holders** owning copyright or related rights.

Central to all these activities are the **collective management organisations (CMOs)** which enable the rights holders to obtain payment for the uses of their musical works or recordings.

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<sup>4</sup> Source: “Copyright Industries in the US Economy: The 2011 Report” by Stephen E. Siwek of Economists Incorporated and the International Intellectual Property Alliance



### 1.3 How is Copyright Exercised and Managed?

**Copyright and related rights are bundles of different rights which can be exercised individually or, where for practical purposes it is very difficult to enter into individual arrangements, can be managed by collective management organisations (CMOs).**

Individual exercise of rights is widely practised by composers who enter into direct contracts with music publishers. Similarly, record companies enter into direct contracts with performers to record music and with music publishers for the right to reproduce the music in a record (mechanical rights). In some countries, however, collective management is widely practised in the field of mechanical rights. Collective management is also widespread in the fields of public performance of both music and sound recordings whether it be live performances to the public or broadcasts.

Composers and song-writers will usually conclude a publishing contract with a music publisher which will give the publisher the right to license the various uses of the music. The composer will, in return, usually be paid a royalty being a share of the fees obtained by the music publisher. Often the music publisher will also pay an advance to the composer which is an up-front payment to encourage the conclusion of the contract. The advance is usually recouped from the payments which would otherwise be due to the composer.

In a similar way featured performers will enter into recording contracts with record companies in return for royalties from the sale of records or the licensing of the recorded works. An advance is often paid and is usually recoupable by the record company.

As mentioned above there are two ways in which to manage mechanical rights. Music publishers can enter into direct contracts with record companies allowing them to record the musical works administered by the music publisher. In many countries this activity is also undertaken by a collective management organisation.

Other activities more effectively undertaken by a collective management organisation are the licensing of public performances and broadcasting of both musical works and sound recordings.

## 1.4 Collective Management as an Effective Solution.

**Performing right organisations license the public performance, broadcasting and communication to the public of musical works and sound recordings when it is practically impossible for rights holders to enter into individual contracts. Similarly, mechanical rights organisations license the reproduction of musical works.**

Broadcasters and other users of music wish to bring the music to the public. It would be virtually impossible for individual broadcasters or other users to try to establish the identity and location of each individual composer or music publisher to seek their permission to use a piece of music and then possibly just as difficult to try to negotiate a fee for the use of the music given barriers such as distance, language and culture.

Similarly, composers and music publishers want to ensure that they are able to control and be remunerated for uses of their music. Given the worldwide nature of music services this would be practically impossible without the establishment of collective management organisations.

The authority of CMOs to negotiate and license use of music and sound recordings derives from their agreements with composers, music publishers, performers and record companies. The nature and effect of these agreements differs by country and they may, in some places, give additional rights to take action and obtain effective relief in the courts. National legislation may also give authority for CMOs to license certain rights or to collect remuneration for certain uses.

There is one area of music where it is traditional for rights holders to exercise their rights individually. This is the field of the so-called “grand rights” in “dramatico-musical works” such as operas, musicals, revues and pantomimes. Music publishers generally can and do license such activities individually. There are some exceptions which vary from country to country but which, in general, enable a CMO to license excerpts from a dramatico-musical work under certain circumstances.

Shows sometimes known as “compilation shows” are dramatico-musical performances which contain music *not* specially written for the show. Common examples are shows which celebrate the life of a famous composer or performer in which their famous songs or tunes are performed. The practice for licensing such shows varies from country to country; in some countries they are licensed by the CMO and in others by music publishers.

Although dramatico-musical works are not usually licensed by CMOs it is the case that CMOs do usually license the music in films of dramatico-musical works when the films are shown in cinemas or broadcast on television.



## CHAPTER 2

# COLLECTIVE MANAGEMENT OF RIGHTS IN MUSICAL WORKS

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This section goes into more detail about how collective management functions in practice and how collective management organisations obtain their mandates to enable them to operate effectively.

### 2.1 Legislative Framework

**Copyright and related rights are limited legal rights introduced into the legislation of individual countries. The legislation can comply with the international copyright treaties that have been negotiated between governments thus giving the players in the market access to the rights enjoyed in other countries.**

It is the job of governments to provide an adequate legislative framework for the enforcement and management of copyright and related rights; without such a framework CMOs simply could not function. Although copyright and related rights are national in scope they are clearly international in terms of applicability and the ability of rights holders to exercise their rights.

For this reason copyright and related rights legislation is broadly similar throughout the world and any deviation from international norms should be to add, rather than to take away, rights. In that way composers and those who work in the music related industries can flourish and be given an incentive to create.

#### 2.1.1 International, Regional and National Legislation

**The international copyright system is founded on the Berne Convention for the Protection of Literary and Artistic Works<sup>5</sup> of September 1886.<sup>6</sup> “Musical compositions with or without words” are specifically covered under the definition of “literary and artistic work” in Article 2(1) of the Convention.**

Musical works are composed to be heard rather than viewed or read. The articles of the Berne Convention most relevant to musical works are therefore those which give

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<sup>5</sup> As at August 2012 there were 165 contracting parties to the Berne Convention. [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) “Literary and Artistic Works” is construed widely and is intended to cover all works capable of being protected.

<sup>6</sup> There is another international convention: the Universal Copyright Convention or UCC. It was established in 1952 and enabled countries which disagreed or could not comply with aspects of the Berne Convention to nevertheless take part in a form of international copyright protection. The UCC’s original members included the United States and the Soviet Union. Its significance has waned in recent years because countries have joined or wish to join the World Trade Organisation and thus comply with the TRIPS Agreement. The requirements of the TRIPS Agreement are strict in relation to copyright, with many having been taken directly from the Berne Convention.

protection to the modes of hearing music: Article 11, the right of public performance and Article 11*bis*, the right of broadcasting. Together these two articles cover all aspects of public performance by singers or musicians as well by means of recordings of performances and all aspects of wireless broadcasting and communication by cable.

For many years it has been customary to record performances of music so that they can be heard more than once and so that performances can be preserved. The recording of a musical work is a “reproduction” of the work and Article 9(1) of the Berne Convention provides for an exclusive right for the author of a work to authorise the reproduction of his works in “any manner or form”. That phrase is plainly all encompassing but Article 9(3) specifically (and perhaps superfluously) provides that “Any sound ... recording shall be considered as a reproduction ...”. Thus reproduction of a musical work can include a number of different forms:

- Graphical reproduction (such as printed sheet music)
- Analogue reproduction (such as a recording on a magnetic tape such as a cassette or on a vinyl record)
- Digital reproduction (such as a recording on a CD or DVD or on a hard disc or a flash drive)

The exclusive right of Article 9(1) to authorise reproduction is subject to certain exceptions permitted by Article 9(2):

*“(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”*

This is the so-called “three step test”: (1) certain special cases, (2) no conflict, (3) no unreasonable prejudice. The steps are cumulative and all three must be present for any exception to be permitted. National laws generally provide for exceptions in varying degrees which are relevant to questions of infringement of copyright and especially private copying.

Another agreement forming a basis for the international copyright system is the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) administered by the World Trade Organisation (WTO)<sup>7</sup> which is a multilateral agreement covering intellectual property in general.

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<sup>7</sup> As at 10 May 2012 there were 155 members of the WTO who undertake to adhere to certain agreements of which TRIPS is one.



In respect of copyright the TRIPS Agreement also provides for exceptions to protection and in respect of reproduction the three step test appears, in very similar form to the Berne Convention, in Article 13.

A further convention on copyright, the WIPO Copyright Treaty (WCT)<sup>8</sup> administered, as its name suggests, by WIPO, is a special agreement under Article 20 of the Berne Convention and thus grants more extensive rights than those of Berne. In particular Article 8 of the WCT grants authors:

*“... the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”*

This will therefore cover on-demand access to music through the internet and transmissions to individual members of the public rather than the public at large.

An agreed statement to the WCT also clarified that:

*“The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.”*

thus providing that for parties to the WCT storage in digital form does constitute a reproduction within the meaning of the Berne Convention.

## **Regional**

Some political and economic groupings of countries, with differing legal traditions and legislation, have found it advantageous to try to harmonise the laws of copyright and related rights across their region.

### **2.1.1.1 Regional Example from Europe**

In the European Union many areas of copyright and related rights have been affected by a Directive of 2001 on harmonisation<sup>9</sup> which was introduced partly in response to the WIPO Copyright Treaty. It introduced a “making available” right which reflects Article 8 of the WCT, a distribution right and provisions relating to the protection of devices or components which are intended to prevent or restrict acts which are not authorised by a rights holder and for the legal protection of rights management

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<sup>8</sup> As at August 2012 there were 89 contracting parties to the WCT.

<sup>9</sup> Directive 2001/29/EC commonly called the Information Society Directive.

information. The Directive also lists a large number of exceptions to copyright which must all satisfy the three step test.

The term of protection has also been the subject of Directives<sup>10</sup> in 2006 and 2011 which extended or made changes to the term of copyright and the term of related rights.

### **National Laws**

National laws will be subject to each country's obligations under the treaties or conventions it adheres to so that a country which is a contracting party to the Berne Union, the WTO or the WCT will have to ensure that its national laws are in compliance.

In this way national copyright laws around the world are broadly similar with many characteristics taken directly from treaties or directives. Where national laws may differ is in the interpretation given to exceptions to copyright and the application of the three step test.

The best national laws will strike a balance between the rights of the general public to access works and express themselves freely and the rights of creators to enjoy a period in which they will be able to control uses of their works and be remunerated for their use. Access to and use of works will be governed by the arrangements made with the relevant rights holders or their CMOs and by the exceptions to copyright contained within the law and, in turn, with the country's obligations under the relevant treaties or conventions to which it adheres.

One aspect of the law which is of particular interest to CMOs is to be able to enforce their rights and, in particular and if necessary to obtain injunctions (or the locally equivalent court order) to prevent further infringements of their rights. The difficulty which all CMOs have is that their repertoires can be large and, if they represent foreign repertoires as well, can be truly enormous. If a CMO had to prove infringement of each individual work in its repertoire in every case the evidential burden would be insurmountable. If a CMO had to prove actual infringement of each work in advance then its ability to obtain injunctions would effectively be removed.

Legislators around the world have come up with a method of assisting CMOs to enforce their rights and to obtain injunctions. This is by means of a concession that a CMO need only establish its rights in a small number of works and that the rights *in those works* have been infringed but the court can then grant relief or an injunction in respect of *all* the works in the CMOs repertoire. The precise nature of the laws will vary between jurisdictions.

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<sup>10</sup> Directive 2011/77/EC amending Directive 2006/116/EC



### 2.1.1.2 Regional Example from Europe: Greece

Article 55(3) of the Greek Copyright Law of 1993 as amended<sup>11</sup> provides:

*“When seeking the protection of the courts for works or authors under its protection a collecting society shall not be required to provide an exhaustive list of all of the works which have been the object of the unlicensed exploitation, and it may lodge only a sample list.”*

### 2.1.1.3 Regional Examples from the Caribbean: Trinidad and Tobago and Grenada

A slightly different approach and one which is becoming more common in countries whose legal systems are based on the English system is the concept of the “wide injunction”. In this case an infringement need only be proved in respect of one or some works but the court may grant an injunction covering all the works in the repertoire of the CMO. There are several good examples of this in the laws of Trinidad and Tobago<sup>12</sup> and also Grenada.<sup>13</sup> The Trinidad and Tobago Copyright Act, 1997 provides, in section 39:

*“39. Where, in an action under this Part—*

*(a) the infringement of copyright or neighbouring rights is proved or admitted;*

*(b) the plaintiff is a licensing body; and*

*(c) the Court, having regard to all material circumstances, is satisfied that effective relief would not otherwise be available to the plaintiff,*

*the Court may grant an injunction extending to all the protected works, sound recordings, broadcasts or performances, as the case may be, of which the plaintiff is the owner of copyright or neighbouring rights, notwithstanding that the infringement related to only one or some of the said works, sound recordings, broadcasts or performances.”*

Note that the concession applies only where the plaintiff is a “licensing body”; ie a CMO and that the concession is also granted to “neighbouring rights” CMOs (related rights CMOs).

<sup>11</sup> [http://www.wipo.int/clea/docs\\_new/pdf/en/gr/gr219en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/gr/gr219en.pdf).

<sup>12</sup> Section 39 of the Copyright Act, 1997 as amended. [http://www.wipo.int/clea/docs\\_new/pdf/en/tt/tt032en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/tt/tt032en.pdf)

<sup>13</sup> Section 26 of the Copyright Act of 1989. <http://www.wipo.int/wipolex/en/details.jsp?id=1760>.

## 2.2 Rights Holders and Rights

**The international conventions and national legislation specify who owns the specific rights which make up copyright and related rights. The rights can generally be transferred to others but the extent and means of such transfers varies from country to country.**

The composer of a musical work (which, in this context, includes the writer of any words which accompany the music) will generally<sup>14</sup> be the first owner of the copyright in the work (the first rights holder). The copyright is a bundle of separate rights the most important of which, for musical works, are the rights of public performance, broadcasting and communication to the public and the right of reproduction.

The rights of public performance and communication to the public are generally known collectively as the **performing right**. The particular form of the right of reproduction relevant to musical works is the making of copies of a recording of the work (for sale or distribution). This is generally known as the **mechanical right**. The “performing right” and the “mechanical right” are terms of custom and practice rather than terms of the law and they are used extensively in the collective management of rights.

### 2.2.1 Performing Right

The performing right means the rights of public performance and communication to the public by wire or wireless means (broadcasting and cable). It has also come to include, in countries which are contracting parties to the WIPO Copyright Treaty<sup>15</sup>, the “making available” right whereby works are made available to the public in such a way that members of the public may access the works from a place and at a time individually chosen by them.<sup>16</sup>

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<sup>14</sup> There are usually exceptions: works created in the course of employment, works the subject of an assignment of future copyright (to name just two and depending on the jurisdiction).

<sup>15</sup> The treatment of the “making available right” is different in the WCT and the WPPT. In the WCT it is, by Article 8, part of the right of communication to the public. In the WPPT the making available right is provided as separate exclusive rights of performers in their fixed performances and of producers in their phonograms by Articles 10 and 14.

<sup>16</sup> Even in countries which are not contracting parties to the WCT and where national legislation is restricted to the traditional forms of the rights making up the performing right, it is sometimes the case that the licensing of on-demand services can be effected if the national legislation is drawn appropriately. An example is the original wording of the UK Copyright, Designs and Patents Act 1988 which included a definition of “cable programme service” which covered user requested services.



## 2.2.2 Mechanical Right

The mechanical right is the right to make a sound recording of a work (a particular case of the reproduction of a work) and to manufacture and distribute copies of the recording.

Sound recordings can now take many forms, both analogue and digital, but all types are still covered by the now archaic term “mechanical reproduction”.

The mechanical rights holder will have to give permission each time a musical work is recorded onto a CD or a DVD or any other physical medium. A broadcasting organisation will also have to obtain permission before it records musical works for the purposes of making programmes for later transmission although such permission will normally form part of the agreement between a rights holder and a broadcaster.<sup>17</sup>

## 2.3 Rights Acquisition

**Collective management organisations license the performing right and mechanical right in musical works when it is difficult or impossible for the original rights holders to do it themselves. However, to be able to manage those rights it is first necessary for the organisations to obtain the authority to do so.**

This authority can take a number of forms but can be split into two main categories. Collective management organisations manage the rights of their own members (usually but not necessarily nationals or residents of the country in which the organisation is established) and also the rights mandated to similar organisations in different countries abroad. For this reason a CMO in a particular country obtains a mandate from its own members and also mandates from foreign CMOs to manage the rights of their members.

It is first, however, necessary to have regard to a preliminary step in the chain of rights. In the music business it is very common for a composer, the first rights holder, to enter into a publishing contract with a music publisher. In some jurisdictions this contract takes the form of an outright assignment of the copyright in all the works written and to be written by the composer. The music publisher will therefore become a rights holder himself.

Given these two parties, each with his own expectations, it is usual for CMOs to admit both composers and music publishers to membership of the CMO. Sometimes

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<sup>17</sup> Although Article 11bis (3) of the Berne Convention does provide that countries may “determine regulations for ephemeral recordings”. In practice this means that if the recording is made and used subject to certain conditions and is destroyed within a fixed period the broadcaster is treated as licensed by the rights holder to make the recording. Although this is, strictly speaking, an exception it is often known as the “ephemeral right”.

in rare cases only music publishers are admitted to membership (as in the case of the Harry Fox Agency which manages mechanical rights in the United States) because the publishers have a direct contractual relationship with the composers and will account to them.

### 2.3.1 Mandates from National Rights Holders

The mandate to enable a CMO to manage the rights of national rights holders can take many forms depending on the rights involved, the country or region in which the CMO is located and, in some cases, the local laws relating to competition or the control of monopolies.

At one end of the scale is a simple mandate to administer rights. This can be as an agent of the rights holder. An example of this type of mandate can be found with the Mechanical Copyright Protection Society (MCPS, now part of PRS for Music<sup>18</sup>) in the United Kingdom which acts as an agent of its member mechanical rights holders.

At the other end of the scale the practice in many English speaking countries is for CMOs to take a full legal assignment of the performing right in the works of their members. The CMOs thus have all the rights previously owned by the member to license and to take action for infringements of rights. The CMOs become rights holders themselves.

Between those two extremes in countries with differing legal systems are varying mandates of rights from original rights holders to CMOs.

#### 2.3.1.1 Regional Examples from Europe and Asia: Germany and Japan

In Germany and Japan and some other countries a CMO will hold the rights in trust for the individual creators. There is generally an agreement appointing the CMO as trustee of the rights with an obligation to administer the rights and to distribute royalties to the creators.

#### 2.3.1.2 Regional Example from North America: the United States

In the United States, as another example, it is the practice for CMOs to obtain the right to license their members' works with a non-exclusive licence in the performing right. Such a grant of rights can lead to difficulties in enforcement if the law of a particular country only permits the owner or sometimes an *exclusive* licensee to sue for infringement. It is possible to deal with this problem by the additional grant of a power of attorney in favour of the CMO to give the CMO the right to take action for infringement and to recover damages.

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<sup>18</sup> <http://www.prsformusic.com/pages/rights.aspx>



### 2.3.1.3 Regional Example from Asia: India

The Indian CMO, the Indian Performing Right Society, IPRS has long had difficulties with third parties such as film producers claiming to be the owners of the copyright in the works of IPRS members. IPRS has also been the subject of petitions filed by music publishers claiming that IPRS admitted as members composers and authors who were not copyright owners thus making music publishers into a minority in the affairs of the society. An amendment passed to the Indian Copyright Act in May 2012 will go a long way to assisting Indian composers and authors. The amendment now declares authors or song creators as owners of the copyright, which cannot be assigned to the film producers. The amendment also specifies that it will now be mandatory for radio and television broadcasters to pay a royalty to the owners of the copyright each time a work is broadcast.

### 2.3.2 Reciprocal Agreements with Foreign CMOs

The system of international copyright treaties has meant that CMOs can enter into agreements with foreign CMOs to represent their members' rights as well as their own members'.

The other route by which CMOs obtain mandates to manage the rights of composers and music publishers is through reciprocal representation agreements with foreign CMOs.

A foreign CMO will have obtained a mandate from its members but will only be able to license their works easily in their own country.<sup>19</sup> For that reason it is usual for CMOs to enter into reciprocal representation agreements with CMOs in foreign countries so that their respective repertoires of works can be licensed by the other and revenues distributed between the CMOs which then account to their own members.

There are no set forms of reciprocal representation agreements but the main points will be common to each; a reciprocal grant of rights to license the works in the repertoire of the other, provisions on allocation of revenues and provisions on the timing and mode of distribution to the other CMO.

Given that different CMOs obtain different mandates from their members a CMO can only grant to another CMO in a reciprocal representation agreement those rights which it obtains for its own members. Thus even if a CMO obtains a full assignment of rights from its own members it may only obtain a mandate of non-exclusive rights from another CMO.

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<sup>19</sup> This is changing with the availability of music on-line. The on-line world knows no international borders so it can be just as easy for a CMO to license the transmission of a musical work originating in another country as it would be in the CMO's home country.

Reciprocal representation agreements may also be exclusive or non-exclusive depending on what the parties want but also on the competition or anti-trust laws of the region involved. A CMO may only want to enter into non-exclusive reciprocal representation agreement if it intends to license in the foreign country itself or it may be prevented from granting exclusive rights because of local competition laws.

## 2.4 Governance Issues

**Because composers and music publishers entrust the management of their rights to a CMO (and sometimes assign their rights to a CMO) it is important that the CMO can be trusted to manage those rights and the money due to the composer or publisher in an honest and open way.**

### 2.4.1 Statutes

So that all members of a CMO know their rights and responsibilities a CMO should have statutes setting out clearly who may join the CMO and how it will be governed.

In the vast majority of cases CMOs are non-profit making membership organisations owned by the members themselves and managed on their behalf. They are usually companies incorporated under the laws of their home country or associations, which exist in many countries. That being the case the statutes of a CMO may be in a form prescribed by law but there should be common characteristics in CMOs' statutes (or in rules made under the formal statutes):

- A governing body (board of directors) comprised of representatives of the members which should meet regularly.
- Provision for regular meetings of the whole membership.
- The mandate to be conferred on the CMO by the members.
- What the CMO will do by way of licensing to obtain revenue.
- The administration expenses it shall be allowed to deduct.
- Rules on the allocation and distribution of revenue to the members and the dissemination of financial information.

This is not the only form a CMO may take and the legal structure can vary from country to country.



#### 2.4.1.1 Regional Example from North America: the United States

In the United States one CMO<sup>20</sup>, the American Society of Composers, Authors and Publishers (ASCAP), is an unincorporated membership society whereas another CMO, SESAC Inc, is a privately owned profit making company.

#### 2.4.2 Membership Disputes

A CMO will not usually be in a position to know first hand if a particular composer wrote a piece of music or if a music publisher really does represent all the composers it claims. There is therefore an element of trust involved in the acquisition of rights so that disputes between members sometimes arise.

A CMO should therefore have a clear disputes resolution policy to enable it to settle a dispute between two members or to allow members to settle their own disputes. The policy should be transparent and fair, showing no bias towards any type of member or genre of music involved.

Because of the element of trust it is sometimes the case that a member of a CMO will try to claim from the CMO more royalties than are due to him. As modern methods of monitoring and allocating royalties are developed this is maybe less of a problem but a CMO should also have a clear policy on how it deals with a dispute between itself and one of its members.

#### 2.4.3 CISAC and its Professional Rules

CISAC, the International Confederation of Societies of Authors and Composers, is a non-governmental, non-profit organisation with its headquarters in Paris, which, as its name suggests is a confederation of CMOs. Section 6 describes CISAC in more detail.

While it is not obligatory for a CMO to be a member of CISAC it is can be highly desirable because other CMOs will generally expect a CMO to be a member before entering into a reciprocal representation agreement with that CMO and because CISAC has Professional Rules with which its members must comply thus reinforcing the protection given to individual composers and publishers and other CMOs which enter into reciprocal representation agreements with it.

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<sup>20</sup> The United States is one of the few countries where there is more than one CMO managing similar rights. The three major performing right CMOs, ASCAP, BMI and SESAC operate in competition with each other.

CISAC's Professional Rules came into force in 2008 and set out specific obligations with which all member CMOs of CISAC must comply. The principal objectives for each CISAC member CMO are to:

- a have as its aim and effectively ensure the advancement of Creators' moral interests and the defence of the material interests of Creators and publishers;*
- b have at its disposal effective machinery for the collection and distribution of Licensing Income ... to Creators and publishers and assume full responsibility for the administration of the rights entrusted to it;*
- c have regard to its high and long-standing duty to its Affiliates in the conduct of all its operations;*
- d encourage the lawful dissemination of Works by facilitating the licensing of rights in return for equitable payment ("Licensing Income");*
- e distribute Licensing Income (less reasonable Deductions) to Creators, publishers and Sister Societies on a fair and non-discriminatory basis;*
- f conduct its operations with integrity, transparency and efficiency;*
- g strive to adopt best practice in the collective administration field; and*
- h adapt continually to market and technological developments."*

These objectives therefore ensure that CISAC member CMOs operate to the highest standards. To ensure standards are maintained the Professional Rules also require each CMO to supply CISAC each year with a "a declaration stating that it has complied with all relevant and applicable laws and regulations" and to make available to CISAC, other CMOs and its own members certain financial and licensing information.

A certain number of CMOs from each region are selected randomly by CISAC each year for a further investigation into their compliance with the Professional Rules.



## CHAPTER 3

### MANAGEMENT OF THE PERFORMING RIGHT

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**Once collective management organisations have obtained the necessary mandates from their members they will be in a position to manage the rights of those members. The management requires certain basic functions to be available; tariffs for different types of music use, documentation of works and rights holders, distribution rules so that distributions are not arbitrary and technical standards and tools to facilitate dealings between CMOs.**

#### 3.1 Operational Principles

**In principle if musical works are performed in public, broadcast or transmitted by cable the only practical way for rights holders to be compensated and the only practical way for music users to obtain permission to use the works is by way of collective management.**

#### 3.2 Main Users and Licensing Areas

**Collective management of the performing right is suitable for use by all rights holders of musical works be they composers or publishers of any type of music from popular (in all its forms) to classical. It is important to the bargaining power of a CMO that as many eligible rights holders as possible are encouraged to join and to license through the CMO.**

Licensing areas will include television and cable and radio (both public service and commercial), and may include on-line and mobile phone applications (including ringtones). Concerts and festivals, hotels, bars, shops and restaurants, offices and factories, colleges and schools and sports stadiums and charity events are all areas in which live performances, relays of broadcast programmes or performances by the use of sound recordings can take place and which can be licensed by a CMO.

It is unfortunately the case that a “main user” does not always equate easily to a “licensing area”. Even the biggest users, such as television stations, may be unwilling to take a licence if they have been unused to paying in the past or they do not perceive that the CMO can grant them all the rights they need or if they think their competitors are not paying a licence fee. This is where negotiating skills and persuasion come in. A newly formed CMO will always face these problems and it is important to get a critical mass of membership and a critical mass of licensees before licensing becomes routine.

### 3.2.1 Example from Asia: China

It took the Chinese CMO the Music Copyright Service of China (MCSC) over 10 years to come to a deal with certain broadcasters on licensing terms. In January 2012 MCSC signed an agreement with the China Radio & Television Association (CRTA) for the licensing of music used in its members' television broadcasts. MCSC had already licensed China Central Television and China National Radio but it had to wait until 2012 to license the 32 members of the CRTA. This agreement will give MCSC the momentum it needs to license further throughout China.

## 3.3 Tariffs and Other Conditions

**In the licensing of the performing right in musical works it is quite usual to offer a "blanket licence" giving the user the opportunity of using any musical work in the repertoire of the CMO. This will be all of the musical works managed by the CMO, be they the works of the CMO's own members or the works of the members of foreign CMOs which have entered into a reciprocal representation agreement with the CMO. A blanket licence frees the music user from having to check on the copyright status of every work it wishes to broadcast as it can be almost certain that all the works it wishes to use will be licensable by the CMO. The CMO should, of course, impose on the music user an obligation to report all its uses of all musical works. Ideally this should be of *all* musical works used so that the CMO can check to ensure that they are in copyright and do form part of its repertoire. It is generally not advisable to allow the music user to decide if a work should be reported to a CMO.**

### 3.3.1 Example from Africa

Africa came late to the deregulation of broadcasters and the opening up of broadcasting to private companies. It has been found that the newer private broadcasters often do not submit broadcast logs at all and, when they do, they are often wrong. It is absolutely critical to the success of a CMO that complete and accurate logs are provided. CISAC's Regional Director is currently assisting African CMOs in this important field.

In the case of a broadcaster the fee for a blanket licence can fall into three main groups;

- a percentage of the relevant revenue or operating expenditure of the broadcaster,
- an amount per viewer or listener of the broadcaster and
- a lump sum



or, possibly, a combination of two or more varieties. The fee, however it is expressed, should represent the value placed on the music broadcast. Plainly this will be different for different types of service. A music channel cannot be a “music channel” without music so music is centrally important and should be charged accordingly. On the other hand background music used to create an atmosphere is important to a programme but not central and its value will be correspondingly less. Radio broadcasting is generally simpler to license because without the visual element the contribution of music is easier to calculate.

A percentage of the relevant revenue or operating expenditure is really two different ways of trying to value the programming of a broadcaster. For commercial broadcasters the revenue of the broadcaster should encompass all the revenue directly related to its programming. For other types of broadcasters such as public service broadcasters it may be more appropriate to base the royalty calculation on its operating expenditure especially if it does not have any advertising revenue and is funded, for example, by a government grant or subsidy or by licence fee income. The percentage of revenue or expenditure method of charging is particularly attractive because it automatically takes account of inflation but in recessionary times can work against a CMO if the revenue or expenditure of a broadcaster decreases.

The percentage rate should reflect the price which the rights holders require for the broadcasting of their works. Strictly speaking, if the right of broadcasting is an exclusive right, the CMO should be able to set its own price. However, CMOs are often monopolies in their own territory and local laws may prevent them exercising their monopoly rights unreasonably.

Attempts have been made to provide a rule to fix the amount which should be charged and one such attempt was known as the “10% rule”. This suggested that for 100% music use a rate of 10% of relevant revenue should be charged. Such a formula may be valuable in some jurisdictions but is not used in jurisdictions which do not acknowledge the relevance of international norms or which do not accept a “causal connection” between the use of the music and the revenue of the broadcaster. It has also not been widely used in developing countries where music users are not familiar with tariffs and where CMOs have to struggle to license at all.

A fixed amount per viewer or listener can be more difficult to calculate; should it be based on the potential audience or the actual audience of the broadcaster? The potential audience can be quite easy to calculate; the number of households or the number of television or radio sets will give a good starting point. Actual audience can be more difficult but, in countries which impose a licence fee or other tax on viewing or listening, the number of licences granted will be a starting point. Alternatively, in some countries commercial audience research data is available and can be used. For subscription television the calculation can come down to a simple “cents per

subscriber” formula. Both varieties should be adjusted annually to take account of inflation and an adjustment formula should be included in the tariff.

Multi-channel television has made this method of charging more open to criticism. It can be argued that a potential audience is no longer a realistic measure given that that audience has access to many channels and cannot watch more than one at a time. A measure of actual audience can similarly be criticised; the payment of a subscription is no guarantee of actual viewing although pay-per-view channels do, perhaps, give the best scope for applying an actual audience method of charging.

The lump sum is the easiest of all the methods of charging but inherently unfair unless adjusted often to take account of changes in inflation and the fortunes of the broadcaster.

In many countries, especially where there is regulation of a CMO’s charges, it is important to negotiate with a broadcaster to try to reach agreement on the tariff to be applied. With a new broadcaster or one which has not paid royalties before there is no reference point on which to base a tariff. In that case a good starting point is the tariffs applied in other countries of the region (although some regulators do not consider foreign comparisons to have much relevance) or the tariffs applied for other uses of music such as music in cinemas. An argument frequently raised by new (and even established) broadcasters is that broadcasting promotes the music and the tariff should reflect the promotional value to the composers. This is a controversial subject but copyright is an exclusive right and whatever the perceived promotional value the owner of the copyright is entitled to charge for any uses. The skill of the negotiator will be important.

With broadcasters which have held licences before, the starting point for negotiations should be what they were willing to pay the last time the tariff was freely negotiated. That fixes an agreed rate in time and the question is then to look at what has changed in the meantime. Such factors will include changes in the cost of living (measured by prices indices), changes in the standard of living (measured by wages indices or a combination of wages and prices), changes in the amount of music broadcast (hours of music per year), changes in broadcast hours, changes in the size of the audience and changes in the size or scope of the repertoire. (The scope of the repertoire may be very important when a CMO is just starting to license. It may initially have only a limited number of local composers and publishers as members but, over time, it will attract other members and will sign reciprocal representation agreements with CMOs overseas thus increasing the size of its licensable repertoire).

When those factors have been taken into account it should be possible to negotiate a new tariff based upon the old agreed tariff.



### 3.3.2 Regional Example from Europe: the United Kingdom

The UK has a copyright tribunal as do many countries in the English speaking world. In a case heard in 1981 between PRS and the Independent Television Companies Association<sup>21</sup> the Performing Right Tribunal (as it was then called) said that changes in factors such as audience size, PRS music hours broadcast and the size of the PRS repertoire *should not be mathematically applied*. Thus negotiation and compromise will still be needed to arrive at a new tariff.

Another factor which should also be taken into account (but probably with far less room for manoeuvre), especially in regions with a less developed or changing broadcasting industry or where the licensing of broadcasters is a relatively new activity, is changes in the relative “bargaining power” of a broadcaster or CMO. This particularly applies where broadcasting stations are politically owned. Their bargaining power can change markedly over time thus having a corresponding effect on the ability of a CMO to negotiate fees.

Tariffs for the public performance of music can also have differing methods of charging. The licensing of concerts, clubs, restaurants, shops and offices or factories all needs to be treated differently in accordance with the value placed on the use of the music by the venue. Music at a concert will clearly be central to the event itself whereas the playing of music in a shop will be secondary to the main activity. The tariff can be based on the receipts of the venue or on the capacity of the venue or on the number of tickets sold; whichever method is the most appropriate for the event.

Again negotiation can play an important role. It is often the case that different music using industries such as stadiums, shops, discotheques and so on have trade bodies who are able to negotiate on behalf of their members to reach agreement on a tariff. This can save time and money because the likelihood of a challenge to the tariff is reduced and music users will feel that a fair level of payment has been achieved. Similar factors can be taken into account as in negotiations with broadcasters.

### 3.3.3 Regional Example from Asia: Singapore and India

The CMO in Singapore, COMPASS, and the CMO in India, IPRS, both have a similar tariff structure for the licensing of retail premises. The tariffs are based on the floor area of the premises with additional charges for the use of video monitors or television sets. Both tariffs have a minimum charge.

Although a tariff is essentially a price list, the tariff should also contain some details of the other things required of a broadcaster or other music user. Sometimes these can usefully be included in general terms and conditions if they apply to more than one

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<sup>21</sup> Independent Television Companies Association Ltd and Independent Television News Ltd –v– PRS [PRT 38/81]

type of music use. One important requirement relevant to most tariffs is an obligation to report uses of works. This has been mentioned before but needs to be stressed; a CMO cannot distribute money to the proper rights holders if it does not know what works were used but it may be far simpler for a broadcaster to report what was broadcast than for a club to report what a visiting DJ played one night. Whatever is the best method of gathering the necessary data and reporting usage should be set out in the tariff.

### 3.4 Documentation of Works and Rights Holders

**Once revenues have been collected from a music user they need to be distributed to the correct rights holders so the CMO needs to have as complete documentation as possible to enable it to identify particular works and all the rights holders associated with those works.**

The CMO should maintain details of each musical work in its repertoire with full details of all the rights holders associated with it (sometimes called the “interested parties”). In respect of the same work these details may differ from country to country depending on the publishing arrangements for the work.

There are tools and standards for identifying works and rights holders and these are discussed in section 3.7.

For newly formed CMOs the costs of documenting works and rights holders can be prohibitive although the functions are essential. The sharing of regional facilities should therefore be considered having regard to any data protection or confidentiality laws applicable.

#### 3.4.1 Regional Example from the Caribbean: The Association of Caribbean Copyright Societies (ACCS)

ACCS was founded as the Caribbean Copyright Link (CCL) in 2000 and serves as a regional centre to maintain a centralised database. ACCS also serves as a communications link between the Caribbean CMOs. COSCAP in Barbados, JACAP in Jamaica, COTT in Trinidad and Tobago and the Hewannora Musical Society (HMS) in St. Lucia were the founding members of the CCL which now, as ACCS, also provides services additionally to CMOs in Cuba, Suriname, Belize and two other CMOs in Jamaica. ACCS currently uses a database program created by the Spanish CMO, SGAE and as a data processing organisation its functions are to research works and performances, to make regional data available to CMOs outside the Caribbean, to maintain the integrity and functionality of the regional data network and to assist with royalty distribution processing.



### 3.5 Distribution Principles

**A CMO should distribute the licensing income it has collected “(less reasonable deductions) to creators, publishers and sister societies [other CMOs] on a fair and non-discriminatory basis”.<sup>22</sup>**

This principle, which should apply to all CMOs, not just those which are members of CISAC, sums up the reasons why CMOs exist; to collect licence income and to distribute it to rights holders. Ideally, remuneration should be paid to rights holders according to the actual use of their works; sometimes known as “pay per play”. For reasons of cost and practicality this is not always possible, in which case distributions can be based on two different methods. A sample of music use, such as the musical works broadcast on one day each week could be used to distribute remuneration for all the works broadcast on every day of that week. Alternatively, data from a different source of music use could be used. An obvious example is if a shop is playing a radio for customers then radio information could be used to distribute for those public performances. A less obvious example may be music played on a juke box. Since it is likely to be popular works, radio information from a popular music station could be used to distribute for public performances by juke boxes.

Each CMO should have its own distribution rules which are agreed with its members. Although such rules have many common elements of principle there are differences around the world according to local practice.

It will be very common for each musical work to have at least two rights holders; a composer and a music publisher. Any distribution will have to make a division of the remuneration between them. This will be principally according to the contract between the composer and the publisher or according to the rules of the CMO or a combination of both. This will be particularly relevant if the CMO has rules as to the minimum proportion which a composer may receive. The distribution may become notionally more complicated in the case of a song where someone has written the music and someone else has written the words but distribution rules should be structured to take care of any combination of rights holders.

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<sup>22</sup> CISAC Professional Rules, rule 8(e).

### 3.6 Cost Coverage Principles

**CMOs need to pay their own expenses and cover their costs. Reasonable deductions from revenue to cover those costs should therefore be permitted. Deductions may include administrative costs, expenses, fees and any other deductions agreed with the rights holders they represent. It is important that administration expenses are kept to the minimum possible to enable the CMO to undertake its responsibilities efficiently.**

CISAC takes the question of cost coverage seriously and the CISAC Professional Rules require each member CMO of CISAC to make available to each CMO with which it has a representation agreement "... a clear explanation of the purpose and the amount of all deductions which it makes from the monies due to [the other CMO]".

Deductions may include "social and cultural deductions". These are common in many (but by no means all) countries and may include deductions for social purposes and for the promotion of music. Since these deductions are not specifically to cover the costs incurred by the CMO they must be agreed in advance with rights holders and with other CMOs. Mere membership of CISAC does not imply any special privileges in relation to social and cultural deductions.

### 3.7 Technical Standards and Tools

**The days of paper and card records are coming to an end but are still unfortunately a reality in some parts of the world. To distribute royalties to rights holders a CMO needs tools which meet international standards and ideally which are available to all and interoperable. The more modern tools available to CMOs are now described.**

A universally recognised tool for the identification of musical works is the International Standard Musical Work Code or ISWC. The ISWC is "a unique, permanent and internationally recognized ISO reference number for the identification of musical works".<sup>23</sup> It is part of the Common Information System which CISAC has developed in response to the need for definitive information about musical works.

The ISWC relies on information about the "interested parties" in a work; the rights holders such as the composer, the publisher and so on. This information is contained in the IPI System maintained by the Swiss CMO, SUISA, for CISAC. The ISWC links each work to one or more of the rights holders on the IPI System.

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<sup>23</sup> CISAC is the International Agency for the ISWC.



Many CMO members of CISAC are also regional or local agencies for the ISWC.<sup>24</sup> A regional agency represents a number of different CMOs' repertoires which usually use the same language. A local agency represents just one repertoire. Both regional and local agencies assign ISWCs to works. Works may be searched on the publicly available ISWC-Net.<sup>25</sup>

WIPOCOS or WIPO Software for Collective Management of Copyright and Related Rights is, as its name suggests, a software application for documentation and distribution for all interested CMOs. WIPO has a project to build a common digital platform which will assist in the identification of musical works in West African countries using a simplified and standardized rights registration system which builds on WIPOCOS. A project using WIPOCOS to build more efficient copyright infrastructures in developing countries was approved by WIPO member states as part of the Organisation's Development Agenda. WIPOCOS will help collecting management organisations in the participating countries share information on the identification of works and relevant interested parties, making cross border licensing easier. The upgraded and improved WIPOCOS system will interconnect systems in the 11 countries involved in the current phase of the project; Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Guinea, Mali, Niger, Nigeria, Senegal and Togo although the basic WIPOCOS system is in use in other African countries such as Malawi and Kenya.

### 3.8 Market Control

**One of the jobs of a CMO is to try to ensure that all users of music are licensed so the CMO needs to have procedures in place to identify music users and to ensure they have the appropriate licence.**

Not all music users will understand that they need a licence to play music in public and even those who do may not be at all keen to pay copyright royalties. A CMO should therefore explore methods of educating the public into the existence and value of copyright and the means to manage the enforcement of their rights on a day to day basis.

The backbone of day to day control is usually a force of licensing agents employed by the CMO. The actual make-up of the force and its name will be a matter for local conditions and preferences. CMOs in some countries like to employ ex-police officers or customs officials; they are used to dealing with the public and to identifying wrong-doers. Other organisations prefer a more sales based approach where a local manager will make contact with potential users of music and invite them for a discussion. This might be useful if broadcasters or other large scale users of music are involved. Any

<sup>24</sup> <http://www.iswc.org/en/agencies.html>

<sup>25</sup> <http://iswcnnet.cisac.org/iswcnnet/publicLogin.do>

approach depends on the local conditions and, even in a single country, what suits a city centre may not suit a sparsely populated rural area.

One method of identifying unlicensed music users is a simple payment for information. If a member of the public or an employee of the CMO identifies unlicensed premises then they can be rewarded by a suitable payment. This can be very successful and there is always an incentive to find every unlicensed use.

Regional offices are used in some countries. They can raise the profile of the national CMO and be the base for the licensing agents. Again, their usefulness depends on many factors including the size of the country, whether there is more than one national language or whether one particular area needs a greater presence from the CMO.

### 3.9 Settlement of Disputes

**Disputes are inevitable between CMOs and music users because it is duty of a CMO to maximise the income which it can pay on to its members and usually the duty of a music user such as a broadcaster to keep its costs down and to maximise its return to its shareholders.**

As copyright is an exclusive right it is usually the case that a rights holder can prescribe such conditions as he wishes for the use of his works. Those conditions will include the price to be paid. However, because CMOs are organisations made up of individual rights holders the usual opportunity for a music user “to go elsewhere” if he does not like the price to be charged is very limited especially if a CMO has been successful in attracting virtually all the composers and publishers to join it.

In many countries there are therefore safeguards to protect music users and these can take different forms. If a CMO is effectively a monopoly then local or regional anti-trust or competition laws may help a music user and such a user could take action in the courts. Alternatively, in some countries such as the United Kingdom and Ireland, there are tribunals set up under the law to hear disputes between CMOs and music users as to tariffs and to the amount to be charged and in other countries, such as Canada, public bodies to decide on tariffs.



## CHAPTER 4

### MANAGEMENT OF MECHANICAL RIGHTS

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**Just as with the management of the performing right, mechanical rights management requires certain basic elements to be in place; tariffs for different types of reproduction and distribution, documentation of works and rights holders, distribution rules so that distributions are not arbitrary and technical standards and tools to facilitate dealings between CMOs.**

#### 4.1 Operational Principles

**If sound recordings of musical works are to be made there are occasions when the only practical way in which a record company or broadcaster may obtain permission and the rights holders may be remunerated is through collective management. This is not universally the case and the practice varies from country to country.**

##### 4.1.1 Regional Example from Asia: Singapore

In its membership application form the Singapore CMO COMPASS provides that “The assignment of performing rights is compulsory and exclusive” but that “The assignment of reproduction rights is optional to the member”.

#### 4.2 Main Users and Licensing Areas

**The main users of mechanical rights are record companies which require a licence to manufacture and distribute physical copies (records) of musical works and to distribute digital copies via the internet by way of streaming or downloading. Radio and television stations and film production companies require a licence to record musical works into their programmes or films for later broadcast or showing in cinemas.**

The licensing of mechanical rights can therefore be divided into two main areas; retail products and programme productions. There are, of course, uses which do not fall easily into either category such as karaoke tracks or backing tracks used to accompany live performances.

### 4.3 Tariffs and Other Conditions

**The manufacture and sale of retail products are usually licensed under tariffs which can be based on a percentage of the “published price to dealer” or “PPD” of the products which is the highest price which would be payable by a retailer (the dealer) before any discounts or promotions are applied. Alternatively, it can be based on a percentage of the retail price of the products; the price at which the retailer sells to a customer.**

For BIEM<sup>26</sup> members using the BIEM “standard contract”<sup>27</sup>, BIEM agreed a royalty rate of 11% of PPD with IFPI. Two deductions were allowed on the gross royalty rate; 9% for rebates and discounts and 10% for packaging costs which results in an effective rate of 9.009% of PPD. The standard contract expired in June 2000 and terms for a new standard contract have not been finalised. However, in many places mechanical rights CMOs and record producers are still operating broadly under the structure of the old contract.

It is just as important for a tariff to include reporting obligations as it is to set out the price for the licensee to pay. A member of a CMO cannot be paid without the CMO knowing how much is due to him. For physical products such as CDs or vinyl records the reporting requirements should include an obligation to report all shipments of products on a regular basis together with the applicable PPD or the retail price if appropriate.

A tariff for the mechanical rights in retail products will not cover the related rights in the sound recording embodied in the product. If this is a copy of an existing sound recording then the permission of the owner of the related rights in the recording will also be required.

Tariffs can also cover the activities of radio and television broadcasters who wish to use musical works in their programmes and also independent production companies which produce content for the broadcasters. Music can have many different uses in a broadcast programme; it can be a music programme where it is central to the programme itself or it can be featured in the programme (ie audible to the participants in the programme) or it can simply be background music (inaudible to the participants) used to create a mood or ambience. Music will therefore have a different value to a programme depending on its use and the tariff rates or charges can be adjusted accordingly.

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<sup>26</sup> Bureau International des Sociétés gérant les droits d’enregistrement et de reproduction mécanique. See section 6.2 for a description.

<sup>27</sup> A contract used in countries where local laws or conditions do not dictate otherwise.



Another factor to take into account is the percentage of “music use” of a programme; the amount of time taken up by the performance of music compared to the total duration of the programme. High music use can attract a higher tariff rate.

As with physical products there need to be reporting obligations in tariffs covering the reproduction of music for broadcasting. All instances of music reproduction should be reported together with the circumstances in which the reproduction was made and the uses to which it will be put. For example, music may originate as a specially commissioned work which is recorded for a broadcast performance or it may be library or production music intended for a broadcast programme or it may be in the form of a commercial recording which is re-recorded as part of the programme. The possibilities are numerous and it will usually be advantageous, if possible, to have a specific person to liaise with the broadcaster or the production company to ensure that the correct royalty is being paid and that all the necessary reporting requirements are being complied with.

#### 4.4 Documentation of Works and Distribution Principles

**The principles governing the documentation of works and distribution principles are essentially the same as for the performing right and so reference should be made to sections 3.4 and 3.5 and also to section 3.7 for details of technical standards and tools.**

However, although the distribution principles may be very similar, care must be taken in the detail of the documentation. For example, the actual splits of royalties between different rights holders may be different depending on whether mechanical rights or the performing right is being considered.

#### 4.5 Market Control

**It is the job of a CMO to ensure that all users of music are licensed but, in many cases, it is harder for a CMO managing mechanical rights to monitor and enforce the rights of its member rights holders. The copying of records for the retail market can be done behind closed doors in copying plants well hidden from public view. This is in complete contrast to the broadcasting and public performance of music because, in those cases, a public presence is required.**

The copying of musical works can take two forms;

- the copying of existing records without permission. This is commonly known as piracy and has been well publicised by the record companies.
- first manufacture of records of musical works for which no permission has been obtained nor mechanical royalty paid.

Piracy has become an enormous burden to the music and record industries, especially in the era of simple digital copying and market control is a continuing problem for the CMOs. It is fair to say that the copying of CDs by private individuals is extremely difficult, if not impossible, to police or control. One partial solution, private copying remuneration, is considered in section 11. More public abuses, such as unlicensed downloads, will be discussed in more detail in section 8.

The first manufacture of records for which no mechanical royalty has been paid needs to be controlled by licensing agents who know their local territory and know who is selling records. One method which has proved successful is the use of security stickers or banderoles, sometimes in the form of a hologram and these will be discussed in the next section 4.7.

#### 4.6 Anti-piracy Activities

**Because physical copies of records can be manufactured to look exactly like the genuine articles, anything which can be used to distinguish the genuine product will aid anti-piracy activities.**

When licensing the mechanical right CMOs can, for example, supply the music user, on payment of the required royalty, stickers or banderoles to fix to licensed products to indicate they are genuinely licensed. For the unscrupulous, unlicensed manufacturer it is, of course, just as tempting to copy the sticker or banderole to pass off the record as licensed. In some countries one solution has been the use of security hologram stickers or banderoles to indicate a licensed product. The great benefit of using a security hologram is that it cannot be copied by a photocopier or by scanner attached to a computer and it cannot be printed by conventional printing processes. This makes the use of a hologram a reasonably foolproof method of identifying a licensed product.

If a CD or other record does not bear a hologram it can easily be identified by the police or a licensing officer of a CMO as an unlicensed product. Members of the public may or may not be put off buying an unlicensed recording; their reaction may be dictated by price or by their attitude to copyright.

## CHAPTER 5

# MANAGEMENT OF PERFORMING AND MECHANICAL RIGHTS IN THE DIGITAL ENVIRONMENT

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**The advent of digital storage and transmission via the internet has changed the management of musical rights forever. Some aspects of the digital revolution have made it more difficult to manage and enforce rights but other aspects have opened up the whole field, giving new opportunities to different parties to manage rights.**

### 5.1 New Licensing Platforms

**The digital environment can be widely defined. A CD is a digital recording but it is a physical product used in virtually the same way as a vinyl disc. Broadcasters are quickly moving to digital transmission in many parts of the world but again, with the right television set, a digital broadcast can be viewed in the same way as an analogue broadcast. There are very good technical and quality reasons for moving to digital but apart for uses which mirror their analogue counterparts there are environments which are truly digital; the internet and mobile phone applications. The discussion which follows will concentrate on those environments.**

### 5.2 Main Users and Licensing Areas

**Musical works and sound recordings can be transmitted across the internet in two different ways; by streaming or as a download. Internet transmissions are technically very different from traditional cable transmissions or traditional broadcasts and it is for convenience only that we will use similar language to describe them.**

Streaming is the transmission over the internet by a service which allows a musical work to be heard using the computer or device of a consumer without a permanent copy being made in that computer or device. Streaming can take the form of programme similar to a traditional television broadcast when the consumer merely has to switch on his equipment and listen. Such transmissions are called webcasts. Streaming can also take place when a consumer requests a particular musical work from the service provider and that work is then streamed to him. Such a service is called an “on-demand” service.

A download takes place when a digital copy of the musical work is transmitted to the computer of a consumer and permanently recorded on it so that it can be heard more than once.

All such activities may be licensable but in different ways depending on the applicable law and the jurisdiction.

A consumer can be someone with a computer who wishes to listen to music or to download music to listen more than once. Music can also be streamed or downloaded to laptop computers, tablets, mobile phones, MP3 players and similar appliances. The potential market is vast and expanding. For convenience we will refer to the environment for such services simply as the internet.

### 5.3 Multi-territorial / Cross Border / Global Licensing

**“The internet knows no borders”. This is a truism and a challenge to the capability of CMOs to ensure that users of music on the internet are licensed.**

Anyone who makes music available on the internet has a vast potential audience but also great difficulty in ensuring that he can be remunerated for the uses of the music. This an area in which CMOs are truly indispensable.

Given the necessary legislation in a country, the local CMO can license the streaming and downloading of digital files of musical works. Streaming involves the communication to the public in similar ways to a broadcast or a cable transmission but can involve the extra elements of being available on-demand to a consumer and being made available to the consumer at a place and at a time chosen by him rather than chosen by the service making the transmission.

Downloading, on the other hand, is more complicated because it involves both a transmission and the making of a recording on the device of the consumer. In some jurisdictions CMOs license both activities and split the royalty between performing and mechanical rights in a set proportion agreed by the membership. In other jurisdictions only the making of the recording can be licensed.<sup>28</sup>

The real difficulties arise when a consumer in one country accesses an internet service originating in another country to hear or download a musical work. Where have the act or acts capable of being licensed taken place? Which CMO is to license? Will the CMO who licenses have all the documentation with which to effect a distribution? What if the work of a rights holder from a third country is used? Will there be an element of double charging if more than one CMO attempts to license? These questions are difficult and sometimes political but have become commonplace in some regions. Differing attempts have been made to answer them.

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<sup>28</sup> Most notably in the United States where, in late 2011, the US Supreme Court declined to hear an appeal by ASCAP, agreeing with a lower court that a download was not a public performance. There is a clear difference in approach in jurisdictions which treat broadcasting as a form of public performance and in those which treat broadcasting as a separate right corresponding to Article 11 bis of the Berne Convention.



One attempt to solve the problem is by multi-territorial licensing. If an internet service originates in a particular country the CMO in that country licenses the service but can also license the service to use its repertoire in other countries as well. So, if a service in country A, licensed by a CMO in country A (“CMO-A”), has customers in country B then CMO-A licenses the service for both country A and country B. This has many attractions because CMO-A will have all the documentation for the works in its repertoire and its member rights holders and can obtain usage information from the service in relation to both countries. It should therefore be able to distribute effectively.

However, there are a number of complications which make this approach controversial:

1. If the reciprocal representation agreement between CMO-A and the CMO in country B (“CMO-B”) is *exclusive* then only the CMO-B will be able to license in country B. Negotiations to amend the representation agreements might be necessary but may not be successful.
2. CMO-A will only be able to license its *own* repertoire in country B; it will not be able to license any other repertoire (unless third party CMOs agree to alter their reciprocal representation agreements with CMO-A to cover country B). The internet service will therefore need a further licence from CMO-B for its repertoire and any other repertoire which it licenses in country B through other reciprocal representation agreements.
3. If the repertoire of CMO-A is extensive and popular CMO-B will lose out. If more CMOs from other countries decide to do the same thing then CMO-B could be left with very little to license and its ability to manage and promote its own repertoire and enhance its own country’s culture could be compromised.
4. Differing practices, administration expenses and licence fees in different countries can make one CMO attractive to music using services but less attractive to rights holders and vice versa. A conflict therefore arises between CMOs as to which is best to license a service and which may be best to protect rights holders’ interests.

These difficulties have not yet been overcome because so far there has been no consensus among CMOs or legislators as to a solution. However, in July 2012 the European Union published a proposal for a Directive on the subject.<sup>29</sup>

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<sup>29</sup> COM (2012) 372/2

In 2005 the European Commission had previously published a Recommendation<sup>30</sup> on the collective cross-border management of copyright and related rights for legitimate online music services. The recommendation (now very well known within the EU as “Option 3”) is:

*“Right-holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder.”*

While Option 3 is only a recommendation it has made it very clear what the European Commission thinks on the subject and that cross-border licensing should not be restricted by internal rules of CMOs or the reciprocal representation agreements between CMOs. This is reflected in the much wider proposal for a Directive published in July 2012.

#### 5.4 Mandates from National and Foreign Rights Holders

**When a composer or music publisher joins a CMO he will usually grant the CMO rights to his musical works on a worldwide basis. This enables to CMO to grant licences in its domestic territory but also to enter into reciprocal representation agreements with CMOs in other countries and to grant them the necessary rights to licence music users in their own country.**

As was discussed earlier those rights may be granted on an exclusive or non-exclusive basis subject to local or regional anti-trust or competition laws.

A worldwide mandate from a composer or music publisher to a CMO also gives the CMO the right to license in foreign territories and, subject to what its agreement with its members may say, a CMO can therefore enter into cross-border licensing on behalf of its members.

A CMO is only likely to obtain a mandate for its own territory from a foreign CMO so that if it wishes to license more than its own repertoire in other countries it will have to enter into discussions with other CMOs for the right to license their repertoires as well as its own. Such discussions should include the ability of a CMO to monitor and analyse the transmissions of internet services, the extent of the documentation available to it and its ability to enforce its own rights and the rights of the foreign CMO. If successful such discussions can lead to an extension of the reciprocal representation agreement to other territories or to separate agreements for different countries depending on the conditions agreed.

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<sup>30</sup> OJ L267, 21.10.2005, p 54 (2005/737/EC)



Care must be taken to avoid infringing the rights of other CMOs, especially if they have been granted exclusive rights. Care should also be taken of simply just annoying other CMOs which have their own reputations and status to maintain and which might become less helpful in licensing more traditional activities.

One recent development in this area has been the direct involvement of the music publishers into what have been the traditional activities of the CMOs.

#### **5.4.1 Regional Examples from Europe**

CELAS GmbH is a German company jointly owned by PRS in the United Kingdom and GEMA in Germany which licenses the Anglo-American repertoire of EMI Music Publishing in Europe. CELAS licenses the EMI mechanical rights and the performing right in musical works published by EMI for the whole of Europe.

Another example is the PEDL Agreement of Warner/Chappell Music Publishing. PEDL is the Pan-European Digital Licensing initiative. Under that initiative certain European CMOs have been authorised to offer pan-European digital licenses in Warner/Chappell's Anglo-American repertoire. CMOs which can demonstrate and comply with a common set of standards intended to ensure the efficient, transparent management of rights as well as appropriate and accurate compensation for songwriters are permitted to join the initiative.

A further example which enables independent publishers to take advantage of the European Commission's Option 3 is the IMPEL Initiative. IMPEL is the Independent Music Publishers' European Licensing initiative whereby independent publishers appoint PRS for Music as their agent to license the mechanical rights in their Anglo-American repertoire throughout Europe while PRS licenses the performing right in that repertoire alongside the mechanicals so that licensees have a genuine one-stop-shop to obtain all the rights to music used in on-line or mobile services. There are some administrative steps which an independent publisher must first take (such as withdrawing their mechanical rights in their online and mobile Anglo-American repertoire from their existing European sub-publishers or from the terms of any direct society membership they have in Europe) to ensure that PRS can represent them but, after that, the service gives independent publishers access to one-stop-shop licensing in the same way as the major international publishers.

All of these examples of publisher involvement in the pan-European licensing of rights are believed by the publishers and CMOs concerned to fall within Option 3 of the Recommendation of the European Commission discussed above in section 5.3.

## CHAPTER 6

### INTERNATIONAL ORGANISATIONS AND THEIR TASKS

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**Where different CMOs operate in different countries it is obviously desirable that there should be common standards of competence and business practices so that each CMO can be confident when mandating another with the rights of its members. International Organisations have therefore been developed to give guidance and to set rules for the conduct of CMOs.**

#### 6.1 CISAC

**The International Confederation of Societies of Authors and Composers, more usually known by its French acronym CISAC<sup>31</sup>, is, as its name suggests, the confederation of collective management organisations throughout the world.**

CISAC was founded in 1926 in France and it still has its headquarters in Paris. Its objective was to unite authors and composers from around the world and to coordinate the work of their collective management societies, “to improve national and international copyright law, to foster the diffusion of creative works and, in general, to attend to all common problems of creation in its widest sense”.<sup>32</sup> CISAC is a non-governmental, non-profit organisation and does not have political affiliations.

CISAC’s main activities are<sup>33</sup>:

- to strengthen and develop the international network of copyright societies;
- to secure a position for creators and their collective management organisations in the international scene;
- to adopt and implement quality and technical efficiency criteria to increase copyright societies’ interoperability;
- to support societies’ strategic development in each region and in each repertoire;
- to retain a central database allowing societies to exchange information efficiently;
- to participate in improving national and international copyright laws and practices.

As a result of those activities CISAC has become a governing body for CMOs which choose to join it. It has Statutes which provide which CMOs may join CISAC and

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<sup>31</sup> Confédération Internationale des Sociétés d’Auteurs et Compositeurs

<sup>32</sup> CISAC web site: [www.cisac.org](http://www.cisac.org)

<sup>33</sup> CISAC web site: [www.cisac.org](http://www.cisac.org)

Professional Rules governing the conduct of different types of CMO, the first of which were rules for organisations collectively managing music rights. These Rules set out very high standards and consequently membership of CISAC is a badge of approval for a CMO.

### 6.1.1 Cooperation Agreement with WIPO

WIPO concluded a co-operation agreement with CISAC in September 2002. Both organisations have as their general aim the promotion of the protection of copyright and intellectual property rights throughout the world and the cooperation agreement assists in the two organisations working together in the areas of:

- Awareness promotion activities – to cooperate where possible in developing and strengthening the necessary infrastructure for collective management organisations.
- Training programmes – to enable partners to give courses for the training of the staff of collective management organisations in developing countries.
- Information technology – including development of procedures for the documentation, identification, and exchange and management information.

## 6.2 BIEM

**BIEM<sup>34</sup> is the international organisation representing mechanical rights societies. It was founded in 1929 in France and has its headquarters in the same office block as CISAC in Paris.**

BIEM represents and defends the interests of its member mechanical right CMOs and in addition negotiates a standard agreement for its members with the International Federation of the Phonographic Industry (IFPI) which itself represents the recording industry worldwide. (IFPI will be discussed later in section 9). BIEM also assists in collaboration between its member CMOs and helps in solving problems that arise between its individual members.

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<sup>34</sup> Bureau International des Sociétés gérant les droits d'enregistrement et de reproduction mécanique but usually known by its acronym BIEM.

## CHAPTER 7

### MANAGEMENT OF RELATED RIGHTS IN THE FIELD OF MUSIC

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**Just as music rights are managed collectively so too are related rights. It is important to know the similarities between the two systems and where they overlap but also the differences in their collective management.**

#### 7.1 Legislative Framework

**Related rights are similar in nature to copyright but there is no universally accepted definition. They apply to the rights of individuals and legal entities who are not the creators of works but who enable works to be enjoyed. There are many examples but most fall within the main categories of performers, record producers and broadcasters.**

It is, however, the case that *copyright* works may not be involved at all. Related rights will subsist in a sound recording of bird song or of the sound of a waterfall; no underlying copyright work is involved. Similarly related rights will subsist in sound recordings of the musical works of a long dead composer even though any copyright there may have been in his works will have expired.

Related rights are often called neighbouring rights (which is a direct translation of the French “droits voisins”).

#### 7.1.1 International, Regional and National Legislation

##### International

The international system of related rights of performers, producers and broadcasters is governed by the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations dating from 1961. For various reasons not all Berne Convention countries are parties to the Rome Convention including the country with the biggest market for related rights, the United States.

Since the Rome Convention there have been a number of further conventions extending the scope of related rights, the most relevant of which to music is the WIPO Performances and Phonograms Treaty (WPPT) of 1996.

The Rome Convention of 1961 was written in response to the technologies of the time; broadcasting and audio and video tape recording, which began to prejudice performers and record producers who had no protection under the Berne Convention.

The Rome Convention gave certain minimum protection to performers in relation to broadcasts of their performances without their consent, to recordings made of their



performances without their consent and to further copies of such recordings. The convention also gave phonogram<sup>35</sup> producers (record producers) the right to authorise or prohibit the direct or indirect reproduction of their phonograms. Broadcasting organisations also benefited from the convention by being granted the right to authorise or prohibit the rebroadcasting of their broadcasts, the fixation (recording) of their broadcasts and the reproduction of certain fixations of their broadcasts.

The WPPT of 1996 was also written in response to the technologies and practices of *its* time, which by then included the rental of phonograms, and to extend protection of performers and phonogram producers in the on-line world with a new right of “making available” the phonogram or the performance fixed in the phonogram “... by wire or wireless means, in such a way that members of the public may access the [fixed performance / phonogram] from a place and at a time individually chosen by them.” This will therefore cover on-demand services on the internet.

## Regional

The European Union adopted Directive 1992/100/EEC (known as the Rental and Lending Rights Directive) which provided for an exclusive right to authorize or prohibit rental and lending and which was expressed to belong to “the performer in respect of fixations of his performance [and] to the phonogram producer in respect of his phonograms”. The Directive also established certain exclusive rights of fixation, reproduction, broadcasting and communication to the public and distribution.

To become a contracting party to the WPPT countries had to amend their laws to ensure they could comply with the minimum requirements of the WPPT. Performers and producers of phonograms could then enjoy the benefits of national treatment in other contracting parties.

The European Union itself became a contracting party and ratified the WPPT in December 2009. 16 member states of the EU also ratified the treaty at the same time, the other member states already having ratified. Work had already been done to ensure compliance with the WPPT in the EU and Directive 2001/29/EC (known as the Information Society Directive) had been adopted in 2001. The Directive served to implement a number of the new obligations of the WPPT.

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<sup>35</sup> Defined in Article 3 of the Rome Convention as “any exclusively aural fixation of sounds of a performance or of other sounds”.

In terms of related rights the Directive contains provisions requiring member states to introduce into their laws:

- an exclusive right of reproduction for performers, of fixations of their performances and for phonogram producers, of their phonograms.
- an exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
  - a) for performers, of fixations of their performances,
  - b) for phonogram producers, of their phonograms.
- legal remedies against the circumvention of technological measures that are used in the exercise of rights.
- legal remedies against the removal or alteration of electronic rights management information.
- sanctions and remedies for infringement of rights.

## National

Apart from the countries of the European Union which were required to implement the Information Society Directive other countries which are contracting parties to the Rome Convention or to the WPPT will have laws which provide at least the minimum protection to performers and phonogram producers as required by the convention or treaty.

## 7.2 Rights of Performers

**“Performers” are defined in the Rome Convention as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works”. The definition is wide and will include singers and musicians of all kinds from internationally known singers to session musicians who may never play to a public audience.**

The WPPT added “persons who ... perform ... expressions of folklore” to the definition of “performers” thus widening it even further.

### 7.2.1 Exclusive Rights

The concept of an exclusive right for performers is different from that of a copyright work for the obvious reason that a performer’s performance must be exclusive to



that performer. An exclusive right is therefore restricted to an exclusive right to do something *connected with* a performance, such as fixation.

The Rome Convention did not go as far as conferring an exclusive right but provides, in Article 7, that the protection provided for performers shall include “the possibility of preventing”.<sup>36</sup>

- a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation,
- b) the fixation, without their consent, of their unfixed performance,
- c) the reproduction, without their consent, of a fixation of their performance [under certain circumstances].

(“fixation” in each case includes a recording or a broadcast of a performance).

The WPPT clarified and extended the rights of performers to certain exclusive rights in their unfixed performances, a right of reproduction, a right of distribution, a right of rental and a right of making available their performances fixed in phonograms (by wire or wireless means).

## 7.2.2 Rights to Equitable Remuneration

If there is consent involved in the fixation of a performance then the Rome Convention provides that the domestic law of the contracting state must regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes. This generally means something less than the right to prevent and usually takes the form of equitable remuneration for the performer.

The WPPT is more explicit and provides, in Article 15(1):

*“Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.”*

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<sup>36</sup> A very much lesser concept. In the United Kingdom, for example, all that was possible was criminal prosecution and the performer did not have any rights in any fine imposed.

### 7.3 Rights of Phonogram Producers

**The Rome Convention defines a “producer of phonograms” as “the person who, or the legal entity which, first fixes the sounds of a performance or other sounds”. In modern parlance this would generally be the record company which makes the sound recording but could also refer to self-funded performers making their own master records. This phenomenon is becoming quite common given the ease by which performers can record their performances and make them available on the internet. For this reason references to phonogram producers must be read as encompassing performer-producers who record and make available their own performances.**

#### 7.3.1 Exclusive Rights

The Rome Convention provides for a single exclusive right for phonogram producers; the right of reproduction. Under Article 10 phonogram producers “shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms”.

The WPPT goes further and provides, in addition to a right of reproduction, for a right of distribution, a right of rental and a right of making available to the public by wire or wireless means in such a way that members of the public may access the phonograms from a place and at a time individually chosen by them. These additions were intended to ensure that domestic laws can cope with the realities of the modern age.

#### 7.3.2 Rights to Equitable Remuneration

If a phonogram has been published for commercial purposes or a reproduction of such a phonogram is used for broadcasting or communication to the public then the Rome Convention provides for a single equitable remuneration to be paid by the user to the performers or to the producers or to both. Domestic law may, in the absence of agreement between performers and producers, lay down the conditions as to the sharing of this remuneration.

The WPPT provides for a similar right to a single equitable remuneration (see section 7.2.2).



## 7.4 Collectively Managed Related Rights

**Because of the uses to which phonograms and fixations of performances are traditionally put collective management has become an indispensable method by which performers and producers can be remunerated for the uses of their performances or recordings.**

### 7.4.1 Broadcasting and Public Performance

A live public performance by a singer or a musician is not something which is covered by the Rome Convention or the WPPT. It is also not an activity which needs collective management. A singer or musician can negotiate privately with the management of a venue or the promoter to agree a fee for the performance.

When the performance is broadcast or a recording made of it then the performer will almost certainly need the help of a collective management organisation. It would not be possible for the performer to monitor every broadcast or subsequent broadcast of his performance nor check every time the recording of his performance was played in public or re-recorded. Similarly it would be difficult for broadcasters or other users of publically performed recorded music to find the rights owners for each recording they played. These are jobs for a collective management organisation.

### 7.4.2 Other Collectively Managed Rights

To phonogram producers and performers the WPPT gave a right of the commercial rental to the public of their phonograms and their performances fixed in phonograms.

#### 7.4.2.1 Regional Example from Asia: Japan

Japan is one of the few countries of the world which still has a record rental market. Rights are collectively managed by the Center for Performers' Rights Administration (CPRA). The CPRA has entered into agreements with foreign performers' rights CMOs under which remuneration received from the commercial rental of CDs is distributed to those CMOs even though no record rental market exists in their own countries.

Record companies generally license the reproduction of their recordings themselves but there is another activity which has become more convenient to collectively manage.

In this age of easy digital recording it has become the practice for DJs and karaoke suppliers to copy sound recordings into a digital format before use. This enables DJs who may travel around from venue to venue to carry a few records on to which all the recordings which they frequently use have been copied. The DJs do not therefore have to carry around vast quantities of records. It also enables such users as fitness

clubs to copy all the sound recordings they use on to a few records in digital format so that he records can play continuously with little need for changing the record being used.

This activity would be impossible for the owner of a sound recording or a performer to monitor so related rights CMOs now offer licences which will cover the copying and subsequent use of the recordings.

## 7.5 CMOs in the Field of Related Rights

**It should be remembered that although performers and record companies both have rights a record company is a user of the rights of a performer (in addition to the rights of composers and publishers).**

The rights of a performer to have his performances recorded by a record company can be negotiated privately between them without the need for a CMO. However, once a sound recording is used in a manner which is licensable more effectively by a CMO there is potentially a conflict between the performers' and record companies' entitlements although some countries demand joint management of rights.

Another factor which can necessitate the use of a CMO is that a copyright work such as a song may have a small number of joint authors and perhaps more than one publisher but a sound recording may be the product of perhaps a hundred performers in the case of an orchestral work. The logistics of tracing every performer and ensuring that each are remunerated is a task best suited to a CMO.

### 7.5.1 Performers' CMOs

A performer such as a singer or musician who has had his performances recorded may potentially have three important sources of income which all lend themselves to collective management:

- Equitable remuneration – for the broadcast or other uses of the recorded performances.
- Private copying remuneration – for the copying of recorded performances (dealt with more specifically in section 11).
- Specific negotiated agreements – where the CMO has negotiated rates for the recording or broadcasting of performances by its members.

Given the vast quantity of musical performances recorded or broadcast it would be virtually impossible for individual performers to be able to trace, monitor and collect remuneration for their performances in different countries of the world. Similarly it would also be very difficult for broadcasters and other users of recorded music to



find each performer to ensure that he was paid. Collective management is therefore essential and ideally suited to recovering remuneration due to performers.

In some countries performers join together with other artists, such as actors, comedians and conductors, in a joint CMO administering all of their respective rights (such as the Société pour l'Administration des droits des artistes et musiciens interprètes (ADAMI) in France). This arrangement is different from joint CMOs of performers and phonogram producers which will be looked at in section 7.5.3.

Some performers' CMOs cater for the interests of featured performers (those whose names appear on labels or who are credited) and others for non-featured performers. This was the case in the United Kingdom with PAMRA and AURA (before they merged their operations with PPL) and in France with ADAMI and SPEDIDAM.

### **7.5.2 Phonogram Producers' CMOs**

CMOs for phonogram producers (traditionally record companies rather than performer-producers referred to earlier) have existed for many years, the phonogram producers having stronger protection under the Rome Convention in relation to the right of reproduction.

Some are organised to represent all the owners of related rights in sound recordings while others represent multinational record companies and others independent record producers (such as, in France, Société Civile des Producteurs Phonographiques (SCPP) and Société Civile des Producteurs de Phonogrammes en France (SPPF)). Because of the differences in the nature of the membership there can be differences in the mandates they obtain and the types of international agreement they enter into.

### **7.5.3 Joint CMOs for Performers and Phonogram Producers**

Both the Rome Convention and the WPPT give performers and phonogram producers a right to a single equitable remuneration for broadcasting and communication to the public.<sup>37</sup> In most CMOs this will be the great bulk of the collectable remuneration.

The WPPT goes on to provide that the contracting parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer or by both. The single equitable remuneration may be shared by agreement or domestic legislation may provide how the remuneration must be shared.

Given this modern environment it has started to make more sense for the activities of performers' and producers' CMOs to be merged into one organisation; the users are

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<sup>37</sup> Article 12 of the Rome Convention and Article 15 of the WPPT. Although reservations can be made to apply the provisions partially or completely.

the same and the remuneration has to be shared so that it can be more efficient for one organisation to collect and to manage the distribution of the remuneration to the different parties. The efficiencies also benefit the user who only has one organisation to pay. Even in cases where there are two separate CMOs, they can collect jointly but distribute separately. This is the case for instance in Sweden with SAMI and the Swedish Group of IFPI.

#### 7.5.3.1 Regional Example from North America: the United States

The United States is not a signatory to the Rome Convention but is a signatory to the WPPT. Until the late 1990s owners of rights in sound recordings and performers had no right to royalties from the uses of their recordings or performances. Legislation was enacted which gave owners of rights in sound recordings and performers a performance right in certain kinds of *digital* media. The United States Library of Congress has appointed the CMO SoundExchange<sup>38</sup> as the sole administrative organisation for collecting and distributing digital performance royalties to performers and sound recording rights owners for such activities as internet streaming, satellite radio and certain cable television music channels.

#### 7.5.4 Good Governance Standards

In performers' CMOs there will inevitably be tensions between the successful performers who earn a lot and who therefore contribute far more to the running costs of the organisation and the less successful who nevertheless complete the repertoire of fixed performances which the CMO is able to offer to users. The rights of both in the running of the CMO need to be respected.

Similarly, producers' CMOs will also comprise multinational labels and independent producers (unless they choose to organise themselves into separate organisations). Their respective needs and earning power will be different but again both contribute to the completeness of the repertoire the CMO can offer.

Joint CMOs of performers and producers have even further tensions not just between different types of each category but also between the performers and the producers who fix their performances.

Careful governance is therefore required to ensure that all the constituents of a CMO are fairly and properly treated. A typical set up of a performers' CMO is for the CMO to be incorporated as a non-profit making company (depending on the territory) with a board to be elected from amongst the membership with due representation being given to all types of member.

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<sup>38</sup> [www.soundexchange.com](http://www.soundexchange.com)



SCAPR, the Societies' Council for the Collective Management of Performers' Rights, (see section 10.1 for more details) has published a code of conduct for performers' CMOs and guidance as to international cooperation between CMOs.

The SCAPR code of conduct provides amongst other things that:

- The CMO should be under the democratic control of its members who should be represented in a fair and balanced way.
- CMOs should be established as non profit making organisations.
- Remuneration collected should be distributed individually between performers in proportion to the uses of their performances.
- CMOs should strive for the development of systems to identify rights owners and users ensuring equal treatment of *all* rights owners both domestic and foreign.
- Bilateral mandates between CMOs in different countries are encouraged.<sup>39</sup>

There is no equivalent body for phonogram producer CMOs. IFPI, the International Federation of the Phonographic Industry (see section 10.3) represents the recording industry worldwide generally but not the CMOs as such (although it is involved in advising on the establishment of CMOs). This is indicative of the very different bargaining power of record companies and performers and their ability to organise their affairs and collect remuneration due to them. Nevertheless producers CMOs do exist in many countries and their governance standards are generally similar; they are set up to maximise the income of their members and do not generally make a profit themselves.

#### 7.5.4.1 Regional Example from Europe: Sweden

The Swedish group of the IFPI is an exception to this general rule and does, itself, collect and distribute remuneration when sound recordings are used in radio and television broadcasts. It shares the remuneration with the performers' CMO, SAMI, on an equal basis in accordance with national legislation.

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<sup>39</sup> SCAPR regard bilateral mandates as the primary purpose of their existence. See section 10.1 for further details.

## 7.6 Collective Management in Practice

**Collective management organisations first have to obtain the necessary mandates from their members. They will then be in a position to manage those rights on behalf of their members. In the same way as copyright the management of related rights requires a CMO to fulfil basic functions: tariffs for different uses of recorded music, documentation of performances and sound recordings and the rights holders, distribution rules agreed and accepted by the membership and technical standards and tools to ensure the efficient discharge of responsibilities.**

### 7.6.1 Operational Principles

Since the granting of national rights to phonogram producers and to performers following the Rome Convention and the WPPT, CMOs have become the only practical way in which the remuneration due to the two groups may be collected. Because many of the rights are only to remuneration and not to exclusive control CMOs are even more suited in the field of related rights than in the field of copyright.

### 7.6.2 Main Users and Collection Areas

Radio and television broadcasters are major users of recorded music in the form of commercially available recordings or audiovisual recordings. In the modern world programmes are themselves usually recorded and can be rebroadcast or retransmitted by cable. Commercially available sound recordings are also used by clubs, bars, sports stadiums and the like for public performances to entertain their customers. These uses all give rise to a right to a single equitable remuneration. (Rome Convention, Article 12 and WPPT, Article 15).

In the field of music, remuneration can be collected from the rental of sound recordings (WPPT, Articles 9 and 13) but this is nowadays a small and contracting field (see section 7.4.2) which has been taken over by the ease of access to recorded music on the internet.

The other main source or revenue from sound recordings is from the private copying remuneration granted in some countries' legislation. This will be discussed in more detail in section 11.

### 7.6.3 Tariffs and Other Conditions

For broadcasting and communication to the public comparisons will inevitably be made with the tariffs for music rights published by the music CMOs. Views on the relative value of copyright and related rights vary and there is no international consensus.



### 7.6.3.1 Regional Example from Europe: United Kingdom

In the United Kingdom the Copyright Tribunal, in a case<sup>40</sup> brought by an association of commercial radio companies against Phonographic Performance Limited (PPL), the UK's related rights CMO, in 1991 found, when considering the tariffs of PPL and PRS (the Performing Right Society, the music rights CMO), that it was not bound in principle to maintain any fixed relativity between the yields of the two tariffs but considered that the royalty yield "should be in the same general range".

Similar principles apply to tariffs for related rights as for music rights but in making any comparisons it is necessary to remember (i) that there are different terms of protection for copyright and related rights, (ii) that not all music has been recorded, (iii) that music used in advertisements is often collectively managed but the sound recordings of such music are not and (iv) the number of hours of recorded music broadcast.

Tariffs for related rights can be based on a percentage of relevant revenue or operating expenditure of the broadcaster or a flat fee or a per minute fee. Other tariff conditions are often also stipulated depending on local or regional broadcasting rules and competition laws. The record company members of CMOs may be anxious that only a certain proportion of, say, a radio station's output is recorded music. They have an interest in *selling* records. CMOs may therefore insist on a certain amount of non-music broadcasting.

Tariffs should also stipulate the reporting requirements of a broadcaster; whether it is to be a full census or a sample. Similar considerations apply as they do to the reporting of musical works (see section 3.3).

### 7.6.4 Documentation of Performances, Phonograms and Respective Rights Holders

Very similar considerations apply with regards to performers and producers as they do to repertoires of musical works but some guidance has been given by SCAPR (see section 10.1) as to the standards required of a related rights CMO when applying for membership of SCAPR.

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<sup>40</sup> Association of Independent Radio Companies Ltd –v- Phonographic Performance Ltd, CT 9/91.

Article 4 of the SCAPR Statutes provides that will SCAPR will admit as ordinary members performers' rights CMOs which (amongst other things)

*“have established a database with pertinent recording data and of information on the remuneration they administer as well in relation to national as to foreign right owners by use of a recognised unique international performers' identification number”.*

The CMO should therefore maintain details of each phonogram and recorded performance in its repertoire with full details of all the rights holders associated with each (sometimes called the “interested parties”). In respect of the same recording these details may differ from country to country depending on which record company releases the recording in which country and the way it derives its rights from the original owner of the sound recording.

There are tools and standards for identifying phonograms and rights holders. The principal tool is the ISRC or International Standard Recording Code. The ISRC is a unique identifier for sound recordings and music videos. It identifies sound recordings as such and not the physical media on which they are recorded. There is also no conflict between an ISRC number and any other sound recording numbering system.

IFPI (see section 10.3) recommends that its members adopt the ISRC as a means of identification of sound recordings and also “short form” music videos.<sup>41</sup>

With digital recordings ISRCs can be permanently encoded into the sound recording so that it can provide a means of automatically identifying the recording and the recorded performance for distributions of remuneration.

Although a particular recording can be identified by an ISRC it is still necessary for the recording to be registered with the CMO and to be placed in its own database. This will ensure that the CMO is aware of the recording, that it forms part of the CMO's repertoire and the rights holders' interest in it.

In the case of performers, the International Performers Database Association (IPDA)<sup>42</sup> was set up in 1997 to manage the International Performers Database (IPD) to assist in the identification of performers taking part in sound recordings. The IPD assigns a unique identification number to each performing artist. By May 2011 37 performers' CMOs had joined the IPDA and more than 501,000 performing artists are listed in the IPD.

WIPO also has its own system known as WIPOCOS; the WIPO Software for Collective Management of Copyright and Related Rights. It is a software application developed by WIPO and has been described in section 3.7.

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<sup>41</sup> A music video produced to support the release of a sound recording.

<sup>42</sup> <http://www2.ipddb.org/>



### 7.6.5 Distribution Principles

Revenue will be generated from different sources and each will have its own costs of collection and allocation of that revenue to the correct rights holders. The costs of collection of revenue from a broadcaster may be negligible but the costs of analysis of its broadcast output may be large. Public performance revenues may be more difficult to collect but little analysis may be done; reliance being placed on another revenue stream such as radio broadcasts. In general the costs of collection and allocation should be attributed to the particular revenue stream so that there is no cross subsidy.

Once the revenue has been collected and allocated to a particular fund representing a particular licensing activity the analysis of the recordings used can take place. This can be done on the basis of electronic returns if possible. The costs of collection and allocation are then deducted from those separate funds. Sometimes other deductions may be made, such as ant-piracy initiatives or government lobbying activities, with the consent of the membership of the CMO. After the administrative and other deductions have been made the net amounts due to the uses of each sound recording can be calculated and the correct proportions distributed to the rights holders.

There are two basic alternatives for the distribution of net revenue (at least for performers); the per track basis and the per rights holder basis. The per track basis is essentially to divide the pot of revenue by the number of tracks used and then to distribute that sum to each rights holder concerned with each track. Where there is more than one rights holder the sum is divided again either in equal parts or in accordance with an agreed split.

The per rights holder basis is more elaborate but does, in the view of some, result in a fairer distribution. Each performer is allocated points for the roles they perform; a principal soloist may get more points than one of the ordinary musicians in an orchestra. The points allocated to each performer are added into a grand total and the performer gets that proportion which his own points bears to the grand total.

### 7.6.6 Market Control

Just as in the licensing of musical works (see section 3.8) it is one of the jobs of a CMO is to try to ensure that all users of recorded music are licensed. The CMO needs to have procedures in place to identify music users and to ensure they have the appropriate licence.

These procedures are very similar to those for music rights CMOs and can advantageously be undertaken with those CMOs. If a venue is using recorded music remuneration will be due to both the CMO for copyright in the musical works and the CMO for the related rights in the sound recordings. Care must be taken, however;

the management of the rights is similar *but not the same* and the exceptions to the enforcement of copyright and related rights differ. An activity which may be licensable by a music rights CMO may not be licensable by a related rights CMO.

### 7.6.7 Settlement of Disputes

There are three types of dispute in which a related rights CMO may become involved; a dispute between two members of the CMO, a dispute between a member a CMO and the CMO itself and a dispute between a CMO and a music user as to infringement of an exclusive right or the remuneration to be paid.

With respect to dispute between members of a CMO some CMOs will refuse to get involved at all and will require that the members sort out their differences and the CMO will keep any remuneration due to either of them in suspense while the dispute is settled. Other CMOs will have rules of procedure to enable the dispute to be adjudicated by the CMO if it is of a suitable nature. For example, a dispute between members which may involve the ownership rights to a sound recording may be considered by a CMO to be better suited to arbitration or a decision of a court as it involves legal rights. On the other hand a dispute involving the distribution of revenues may be something a CMO would consider competent to adjudicate. Practices will vary as between CMOs and depend on local laws. If a CMO does wish to adjudicate certain disputes it should have a published disputes procedure so that all members will know their rights and responsibilities under the procedure.

If a dispute is between a CMO and one of its members it is most likely to be about remuneration paid to the member; either too much as a result of inaccurate or fraudulent information about performances or too little because of a lack of information or inaccurate processing of performance information.

Again the CMO should have a clearly set out procedure for dealing with such disputes, the consideration of evidence and, in the case of fraudulent claims, how to deal with such members if the case against them is proved. Again local laws will play a part but the procedure should be transparent so that no one is in any doubt.

The third type of dispute; between a recorded music user and a CMO is likely to be a matter for the copyright and related rights laws of the country concerned or even for the competition laws and the courts would be the appropriate venue for the dispute to be heard. In some jurisdictions such as the United Kingdom and Ireland there are tribunals set up under the law to hear and adjudicate such disputes.



## 7.7 Music Videos

**Music videos have been used for many years as a means of promoting sound recordings and for enabling sound recordings to be used on television in the absence of a live performance by the musicians. In many countries the laws provide for a system similar to the system for the licensing and collection for sound recordings but the international position is far from ideal.**

Article 3 of the Rome Convention defines a phonogram as “any exclusively aural fixation of sounds of a performance or of other sounds”. The definition is clear and plain; a phonogram is a fixation of sounds *only*. It begs the obvious question: does the Rome Convention protect performers when the phonogram is exploited with visual images when both the phonogram and the visual images are incorporated into an audiovisual product such as a music video?

The WPPT might have been considered the ideal opportunity to clarify the point but this did not happen. In article 2 of the WPPT “phonogram” is defined as:

*“... the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work”.*

It has been suggested that the words “in the form of a fixation” mean that if the “form” is incorporated into an audiovisual work then the fixation cannot be a “phonogram”. Even the agreed statement in relation to the definition which provides:

*“It is understood that the definition of phonogram ... does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work”.*

has not helped to quell the argument because some say that the agreed statement does not get round the words of the definition which provide for the “form of fixation” to fall outside the definition of phonogram. The rights in the phonogram are not affected but the form of fixation in an audiovisual work does not get protection under the WPPT.

This is just one side of the argument but the debate has not subsided at the international level to the extent that in September 2011 the General Assembly of WIPO itself decided to convene a diplomatic conference in 2012 to agree an international treaty on the rights of performers in the audiovisual performances.

That diplomatic conference was held in Beijing in June 2012 and as a result the WIPO Beijing Treaty on Audiovisual Performances was successfully concluded.

The WIPO Director General Francis Gurry said:

*“The conclusion of the Beijing Treaty is an important milestone toward closing the gap in the international rights system for audiovisual performers and reflects the collaborative nature of the multilateral process,” noting that “the international copyright framework will no longer discriminate against one set of performers”.*

The new treaty strengthens the position of performers in the audiovisual industry by providing a clearer international legal framework for their protection. The treaty will also contribute to safeguarding the rights of performers against the unauthorized use of their performances in audiovisual media, such as television, film and video. The treaty can be accessed at:

[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=208966](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=208966)

The treaty will enter into force when it has been ratified by 30 eligible parties which include countries and certain intergovernmental organisations.

## CHAPTER 8

# MANAGEMENT OF RELATED RIGHTS IN THE DIGITAL ENVIRONMENT

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**There is no doubt that the digital environment has changed related rights beyond all recognition and has both complicated and assisted the exercise and management of the rights and has opened the door to other players and larger territories.**

The Rome Convention of 1961 was written before the electronic digital storage and transmission of works and recordings had become commonplace.

By the time of the WPPT in 1996 electronic digital storage and transmission was well known (if not yet the commonest method of recording and disseminating music) and, although the body of the WPPT does not mention digital storage or transmission, statements were agreed at the diplomatic conference that adopted the WPPT concerning certain provisions of the WPPT. One such statement concerned the reproduction right and provided:

*“Agreed statement concerning Articles 7, 11 and 16: The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.”*

The statement is self explanatory and the second sentence spells out the requirement that, under the WPPT, storage in digital form constitutes a reproduction.

The WPPT also introduced another right of “making available”. This exclusive right, which applies to performances fixed in phonograms as well as phonograms themselves, is the right of making them available to the public “by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them”. This will therefore cover online activities such as downloading and on-demand streaming.

## 8.1 Mandates from Rights Holders

**As we have seen the rights of performers do not mirror the rights of creators in their copyright works. Furthermore the different rights granted to performers by the Rome Convention and the WPPT have been introduced into national laws in different ways. Mandates from performers to CMOs can only be a transfer of those rights which are permitted to be transferred under the local law otherwise they will generally take the form of a right to administer. As for the rights of phonogram producers the mandates to CMOs can include an assignment or other transfer of rights depending on the rights and the jurisdiction concerned.**

Through representation agreements with similar related rights CMOs abroad CMOs can obtain the mandate to license foreign sound recordings and foreign performances in addition to those of their own members depending on the protection granted to foreign performers and entities by the copyright and related rights conventions. Protection offered under the two principal conventions, the Rome Convention and the WPPT, is on the basis of national treatment. A phonogram producer or a performer from a foreign country obtains the same protection as a national of a country if the foreign country is a party to one of the conventions. Membership of the two principal conventions is not as extensive as membership of the Berne Convention so that care needs to be taken to ensure that that foreign producers' or performers' rights are locally protected.

## 8.2 Main Areas of Collective Licensing

**Article 15 of the WPPT provides that:**

*“Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.”*

That right of equitable remuneration will provide the backbone for collections CMOs so that principal licensing area in the digital environment<sup>43</sup> will be the collection of equitable remuneration from digital broadcasting and communication to the public.

The new exclusive right of making available to the public (see section 8) in Article 14 of the WPPT has clarified the position in relation to the *on-demand* streaming and downloading of recorded music but record companies have generally not regarded

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<sup>43</sup> For the purposes of this part “digital environment” means the transmission over the internet of digitally encoded files. The recording and uses of CDs has been dealt with earlier.



this activity as suitable for collective management, with many preferring to exercise the exclusive right themselves.

## **Streaming**

Streaming takes place when a digitally encoded file of a sound recording is transmitted over the internet by a service which allows the sound recording to be heard using the computer or device of a consumer without a permanent copy being made in that computer or device. Streaming can take the form of a programme similar to a traditional television broadcast when the consumer merely has to switch on his equipment and listen. Such transmissions are called webcasts. Streaming can also take place when a consumer requests a particular sound recording from the service provider and that recording is then streamed to him. Such a service is called an “on-demand” service.

Streaming in the form of webcasting generally lends itself well to collective licensing. It would be truly impossible for a record producer or performer to try to identify every use of a sound recording by every webcasting service throughout the world and equally impossible for an internet service to try to identify and remunerate every record producer and performer concerned with the sound recordings it wished to stream.

Sometimes streaming services are used to encourage the downloading of particular recordings. These on-demand services can be free, supported by advertising, or subscription services with the recordings sold in the same way as a retail sale.

In the case of webcasting there are two different forms which can be treated differently by CMOs. A pure webcast is a transmission solely over the internet to consumers with the equipment capable of receiving it. The other type is often known as a simulcast and occurs when a traditional broadcast service is simultaneously transmitted over the internet so that the same programme can be heard by traditional viewers and listeners as well as those who see or hear the service on-line. This potentially expands the audience of the broadcaster to viewers and listeners outside the reach of the traditional broadcast. It is often the case that CMOs choose to collect remuneration for simulcasts within the same licence as the traditional broadcast; the rationale being that the sound recordings are the same, the timings are the same and all that differs is the increased audience of the on-line transmission.

## **Downloading**

A download takes place when a digital file of a sound recording is transmitted to the computer or other device (such as a smartphone) of a consumer and permanently recorded on it so that it can be heard more than once. By definition this activity also involves the reproduction of the recording at the computer of the consumer.

In countries where both the transmission and the reproduction can be licensed a CMO could offer a licence for both activities although a record company may wish to license direct (see sections 8.2 and 8.4).

There have been disputes as to whether downloads should be *licensed* or whether a download should be treated as a *retail sale* and it has been suggested that downloads will mean the death of the physical CD album. Some record companies and artists are countering this by offering better value to the consumer by including more content (and not necessarily music content) on a CD which is not available to download on-line.

### 8.3 Multi-territorial / Cross-border / Global Licences

**Multi-territorial licensing can take place but is subject to two differences over the traditional licensing of copyright works. Firstly, not every country is a party to the Rome Convention or the WPPT so that foreign works and performances are not always protected and, secondly, international record companies may have their own arrangements or their local offices license through the local CMO. Independent record companies may have licensing arrangements with other independent record companies abroad making it potentially more difficult for CMOs to license on a multi territorial basis.**

An important development in the field of cross-border licensing took place in 2000 when IFPI applied to the European Commission for negative clearance or exemption in respect of a model reciprocal agreement between record producers' CMOs for the licensing of simulcasting.<sup>44</sup>

An amendment to their original model agreement ensured that simulcasters located in the European Economic Area (EEA) were able to obtain a multi-territorial license from any one of the related rights CMOs established in the EEA which were a party to the model agreement for simulcasting. A further amendment provided for the parties to introduce a transparency mechanism whereby the CMOs in the EEA which were party to the model agreement would specify which part of the tariff to simulcasters obtaining a multi-territorial and multi-repertoire licence corresponded to the administration fee charged to the user.

The Commission granted an exemption to the model simulcasting agreement until the end of 2004 but (at the beginning of 2012) it is still in force and covers all major countries (and 41 CMOs) with the exception of the United States and France. A "webcasting" agreement was added later, covering non-interactive<sup>45</sup> web radio. 42 CMOs use the webcasting agreement, again with the exception of the United States' CMOs. The on-demand services of broadcasting organisations are covered by

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<sup>44</sup> See earlier discussion in section 8.2.

<sup>45</sup> Although some interactive functions such as "skip it" are included.

a yet further agreement which covers streaming and podcasting and allows “catch-up” services within 30 days of the original broadcast.

In its Recommendation of 2005 (see section 5.3) the European Commission specifically included related rights and so that they will fall within that recommendation.

#### **8.4 Direct Licensing by Phonogram Producers**

**Direct licensing can have advantages to the large international phonogram producers (record companies). They own the rights in the sound recordings, they can license across borders and they do not have to pay commission to the CMOs.**

Because of the international nature of streaming and download services these services often approach the big record companies direct for licences for their repertoires. A consequence is that an internet service will have to approach a number of different record companies and the repertoire it can offer the public will necessarily be restricted to the sound recordings of those companies. However, that may well satisfy the public in terms of access to the most popular recording artists.

As the sales of physical products such as CDs decline the record companies have become even more willing to license their recordings to internet services.

## CHAPTER 9

### JOINT CMOS FOR ALL MUSIC RIGHTS HOLDERS

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**With the development of digital storage and transmission of musical works it is clear that music rights and related rights go hand in hand. A digital file of a musical work must be the subject of related rights and there are good reasons why those different rights may be managed together.**

#### 9.1 Rationale and Benefits

**When recorded music is being used there is clearly a benefit to a user of recorded music in being able to approach one CMO for a licence to play both the musical works and the sound recordings. Indeed, such is the level of ignorance amongst users of music that many users are unaware of the different rights of composers, performers and record companies and that those rights can be owned by different people. The existence of a joint CMO can therefore help even those users of music who are unaware of the rights they need to clear.**

The benefits to rights holders are less obvious. Because recorded music users will only need one licence there will be cost savings to the rights holders in the licensing of the repertoire. Once a licence is granted any recorded music performed on the radio or even performed to a live audience needs to be monitored only once and by one organisation to identify the sound recordings and the musical works involved. Given the identification of the sound recording it will be a straightforward matter to identify the composer and publisher of the underlying musical work by using the ISRC or other tools. If durations are recorded then these, too, will be the same. There can therefore be real financial benefits to rights holders.

However, a word of caution; performers and record companies have traditionally been regarded as users of copyright and not rights holders themselves. This has changed in recent years by the adoption of the WPPT but this view still persists. For example, in the statutes of CISAC (see section 6.1), article 8(g) provides:

*“An organisation shall qualify to be a Member [of CISAC] if it:*

*... does not administer the rights of performing artists, producers, broadcasters or any entity which exploits the rights of authors, composers, or publishers, except as a secondary activity”.*

This reflects the traditional view; a society cannot be a member of CISAC if it administers the rights of performing artists or producers (except as a secondary activity). However, this view does not completely reflect the modern reality, especially in the digital field so that the rule is apparently applied generously and a mere balance



in favour of the rights of authors and composers etc. is sufficient. In developing countries the recent trend has been to try to administer both copyrights and related rights when setting up a music CMO.

### 9.1.1 Regional Example from Africa: Nigeria

The Copyright Society of Nigeria, COSON, was set up in 2010 as “a result of a broad based agreement between the owners of musical works, the users of the works and the statutory regulators on the need of the industry to close ranks and have one formidable national collective management organization to promote and protect the copyright of practitioners in the Nigerian music industry”.<sup>46</sup> COSON, which obtained the approval of the Nigerian Copyright Commission in 2010, admits to membership “authors, composers of music, publishers of music and *owners of copyright in sound recordings exercising such rights through publishers*” [emphasis added]. COSON has already been admitted as a provisional member of CISAC.<sup>47</sup> In their case the exercise of related rights must be through music publishers and is regarded as a secondary activity. For completeness it should also be pointed out that there is another CMO in Nigeria, the Music Copyright Society of Nigeria (MCSN), which administers rights in musical works.

Some CISAC member societies in the Caribbean, such as COSCAP in Barbados, have also started to admit record producers and performers as members. The management of musical works remains their primary activity so they remain within the qualification requirements of CISAC.

## 9.2 Operational Principles

**The principle of a copyright owner of a musical work being paid for its performance or its reproduction is well established and, since the granting of national rights to phonogram producers and to performers CMOs have become the only way in which the remuneration due to the different groups may be efficiently collected. However, when a CMO manages both copyrights and related rights care needs to be taken to ensure complete coverage of uses of music and to ensure fairness as between the groups.**

Not all performances of music will fall within the ambit of both copyright and related rights. Live performances to a paying audience will be a matter for copyright only. Similarly, radio broadcasts by a commercial radio station will contain advertisements with music; a matter for the copyright in musical works only.

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<sup>46</sup> <http://www.cosonng.com/about.html>

<sup>47</sup> Admission as a provisional member of CISAC carries the same restriction on related rights holders as full membership.

It is also the case that activities which a copyright CMO may license may not be the same as the CMO of related rights. One example is the new right of making available which is treated differently by the WCT and the WPPT. In the WCT it is part of the right of communication to the public and, as such, is generally licensed by copyright CMOs. In the WPPT, however, it is regarded as two separate exclusive rights of performers and phonogram producers. Many record companies wish to license this new right covering on-demand and interactive services themselves.

In licensing mechanical rights there is clearly a potential conflict. Money due from the record company to the mechanical right holder will ultimately have to be paid by one member of the CMO to another.

Because there is a need for different licensing practices and a risk of conflicts of interest it should be the practice of a CMO to ensure there is no cross subsidy between the different membership groups in the cost of administering their rights. For example, related rights holder should not have to contribute to the costs of collecting for live performances and record companies should not have to contribute to the costs of collecting mechanical royalties unless the membership as a whole has agreed. The costs of collection and distribution for each licensing activity should therefore be kept separate and charged just to the group of rights holders which benefits.



## CHAPTER 10

### INTERNATIONAL ORGANISATIONS AND THEIR TASKS

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**Just as in the field of music rights it was found that there was a need for international organisations to set standards and to regulate the activities of their member organisations.**

#### 10.1 SCAPR

**SCAPR is the Societies' Council for the Collective Management of Performers' Rights and was incorporated in 1996 as a non-profit association under Belgian law with its registered office in Brussels.**

The principles and objectives of SCAPR are listed in Article 3 of its Statutes and include the development of the practical cooperation between performers' collective management organisations, the establishment of a framework for practical cooperation and to set standards in relation to the collective management of performers' rights, to support new performers' CMOs, to improve the efficiency of management of rights and the conclusion of bilateral agreements and to cooperate with organisations representing other groups of rights holders.

As mentioned in section 7.5.4, SCAPR has published a code of conduct as guidance for international cooperation between performers' CMOs.

The conclusion of bilateral agreements is considered of the utmost importance by SCAPR and the code of conduct requires performers CMOs to "negotiate and sign bilateral agreements and exchange remuneration with all other SCAPR members within 3 years from starting collection ...".

## 10.2 AEPO-ARTIS

**AEPO-ARTIS is the Association of European Performers Organisations, a non-profit making organisation, set up in 1994 with its administrative office in Brussels. It represents 30 performers' CMOs from 23 European countries having about 350,000 performers members between them.**

The objectives<sup>48</sup> of AEPO-ARTIS are:

*To develop and secure wider recognition of the collective administration of performers' rights.*

*To develop further the collaboration between performers organisations at the European level, in the field of performers' rights and collective administration of these rights.*

*To contribute to highlighting the importance of the protection of performers and of the collective administration on their rights.*

*To develop further cooperation concerning the European dimension of international agreements and to make all efforts in order to exchange remuneration to be distributed to performers.*

## 10.3 IFPI

**As has been mentioned before, there is no international organisation for producer CMOs<sup>49</sup> equivalent to music rights CMOs but IFPI, the International Federation of the Phonographic Industry does represent the recording industry worldwide.**

IFPI is a not for profit members organisation registered in Switzerland. Its secretariat is based in London and it has regional offices in Brussels (for Europe), Hong Kong (for Asia with additional offices in China and Singapore) and Miami (for Latin America).

IFPI's mission is to:

- Promote the value of recorded music
- Safeguard the rights of record producers
- Expand the commercial uses of recorded music

IFPI is responsible for co-ordinating international strategies in the key areas of the organisation's work such as anti-piracy enforcement, lobbying of governments and representation in international organisations, legal strategies, litigation and public relations.<sup>50</sup>

<sup>48</sup> Statutes of AEPO-ARTIS. <http://www.aepo-artis.org/usr/docs%20statutes%20aepo/AEPO-ARTIS-Statutes-20111201.pdf>.

<sup>49</sup> Other than the International Performers Database Association with a limited remit. See section 7.6.4 and <http://www2.ipddb.org/>.

<sup>50</sup> IFPI website at [http://www.ifpi.org/content/section\\_about/index.html](http://www.ifpi.org/content/section_about/index.html).



## CHAPTER 11

### PRIVATE COPYING REMUNERATION

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**Since the invention of the home tape recorder the copying of musical works and sound recordings has been a practical possibility. With advent of home computers and other digital devices it has become possible to make near perfect digital copies. In many cases a copy made is potentially a sale lost to a composer, a record company or a performer so steps have been taken in many countries to try to ensure that remuneration is available to rights holders for the use of their works and recordings.**

#### 11.1 Operational Principles in the Field of Music

**Large scale private copying began soon after the advent of compact audio cassette tapes in the 1960s which enabled sound recordings to be re-recorded and used again. This was the first time that sound recordings could be conveniently copied by the public so that they could be heard again with only an acceptable depreciation in sound quality (by the standards of the day).**

In many copyright jurisdictions the private copying of musical works and sound recordings was unlawful but unenforceable as it was usually done in the privacy of the home and in many other jurisdictions it was considered as an exception to the exclusive right but with an obligation for compensation. Strong lobbying by the music industry and the record industry persuaded many governments to introduce a levy on recordable media, such as tapes, and then to ensure the proceeds of the levy were distributed to interested parties in as remuneration for the actual use. Once levies were introduced in some countries it was possible to legalise the private copying of musical works and sound recordings.

##### 11.1.1.1 Regional Example from Europe

The European Union Information Society Directive 2001/29/EC provided in Article 5(2) (b) that Member States may provide for exceptions or limitations to the reproduction right “in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation ...”.

##### 11.1.1.2 Regional Example from Africa: Burkina Faso

Burkina Faso introduced a presidential decree in 2000 to provide for the collection of remuneration for private copying. The collection rate was set at 10% of the value of the blank recording media. Burkina Faso was the first African country to distribute royalties resulting from a private copying levy.

The digital era has increased the problem because digital recordings can be copied with *no* depreciation in sound quality and often no independent recording medium is needed; the equipment itself stores the copies.<sup>51</sup>

The subject of private copying remuneration is still the subject of debate and there are arguments against<sup>52</sup> the imposition of a levy.

## 11.2 Collection and Tariffs

**The practice of collection of private copying remuneration varies greatly from country to country but, generally speaking, a CMO or an alliance of different CMOs is appointed by the government to administer the distribution of the proceeds of the levy.**

The levy itself is often a fixed sum for each physical recording medium or, more often in the digital world, a price per megabyte of the recording medium or a percentage of the price. Stichting de ThuisKopie, the Dutch Private Copying Society, publishes an international survey of levies every year.<sup>53</sup>

Consideration should also be given to the possible differences in the harm caused by digital copying and analogue copying. The EU recognised this in the guidance it gave in the preamble to the Information Society Directive.<sup>54</sup> In relation to the introduction of remuneration schemes Recital 35 provides:

*“... Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.”*

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<sup>51</sup> Such as the hard disc of a computer or an MP3 player or a mobile phone.

<sup>52</sup> One of which is that not all blank media are used to record music and another that some creators are happy for their creations to be copied and disseminated. A levy was held to be unconstitutional in Australia in *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

<sup>53</sup> [http://www.thuiskopie.nl/assets/cms/File/Digital\\_Survey%202010\\_Web%20version.pdf](http://www.thuiskopie.nl/assets/cms/File/Digital_Survey%202010_Web%20version.pdf)

<sup>54</sup> 2001/29/EC.



### 11.3 Distribution of Remuneration

**The distribution of private copying remuneration is complicated by the fact that it is impossible to know with certainty which musical works and which sound recordings have been copied on to blank formats.**

Some solutions to that problem involve the use of surveys to try to find the amount of recording of different sound recordings or by using broadcast data or record sales data. In the digital world more precise data can be obtained if digital recordings are downloaded and an obligation is placed on the internet service to collate all the data on the number of downloads which take place for each recording.

Whatever system is chosen there will always be an element of rough justice which is perhaps why the European Union refers to “fair compensation” in the Information Society Directive.<sup>55</sup>

Once a system is decided upon the remuneration can be distributed under the normal distribution principles of the CMO.

### 11.4 Cultural Purposes

**Because of the impossibility of determining precisely just who is entitled to what from a private copying levy some governments provide that a proportion of the proceeds should be used for funding cultural events and activities. In this way the proceeds of the levy can be used in a non-specific way to vitalise the country’s musical scene.**

It is also a way for CMOs and their members to be seen to be putting back into the general musical heritage some of the money which is seen by some simply to be a tax.

#### 11.4.1.1 Regional Example from Europe: France

In France, and in accordance with the French Intellectual Property Code, ADAMI, which administers performers’ rights, devotes 25% of the proceeds of the private copying levy to artistic projects that promote employment of performers, help new talents emerge and provide professional training for artists.<sup>56</sup>

<sup>55</sup> See section 11.1.1.

<sup>56</sup> <http://www.adami.fr/en/funding-artistic-projects/funding-artistics-projects.html>

## ANNEX

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### About the authors

#### **Tarja Koskinen-Olsson (Mrs)**

International Adviser, Olsson & Koskinen Consulting, Finland/Sweden

#### **Current position**

International Adviser at Olsson & Koskinen Consulting, 2003 –

#### **Board positions**

- NORCODE (Norwegian Copyright Development Association, Vice-Chair, 2010 –
- Copyright Clearance Center, Board of Directors, 2009 –

#### **Previous positions**

- Chief Executive Officer at KOPIOSTO (Joint Copyright Organization in Finland), 1987 – 2003
- Assistant Director at TEOSTO (Finnish Composers' Copyright Bureau), up to 1986

#### **Elected positions**

- Chair of IFRRO (International Federation of Reproduction Rights Organisations), 1993 – 1999
- Honorary President of IFRRO, 2001 – 2009

#### **Expert positions**

- Member of the High Level Expert Group on the Digital Libraries Initiative of the European Commission, 2006 – 2009
- Member of WIPO Stakeholders' Platform facilitating access to copyright works for visually impaired persons, 2008 - 2010



## **Nicholas Lowe**

Copyright and Collective Administration Consultant

### **Previously**

Director of Legal and International Affairs and Director of Broadcasting Licensing at the Performing Right Society (PRS) in London.

Solicitor (admitted in 1977 in England and Wales and in 1993 in Ireland) in private practice specialising in intellectual property law.

### **Experience**

Over 35 years' experience of copyright, contracts and litigation, the last 28 years having been in the field of music, related rights and collective management.

Advising collective management organisations, NGOs and music publishers in Europe, North America and the Caribbean on contractual matters, copyright and neighbouring rights.

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