„Collective Management of Copyright and Related Rights. Third Edition”
WIPO publication No. 855E/22

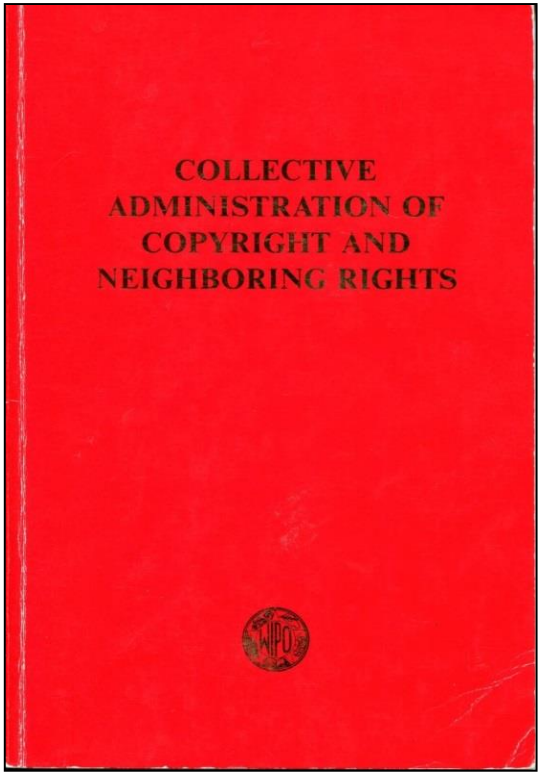
WIPO Webinar, March 28, 2023

INTRODUCTION AND PRESENTATION OF THE MAIN FINDINGS. PART I

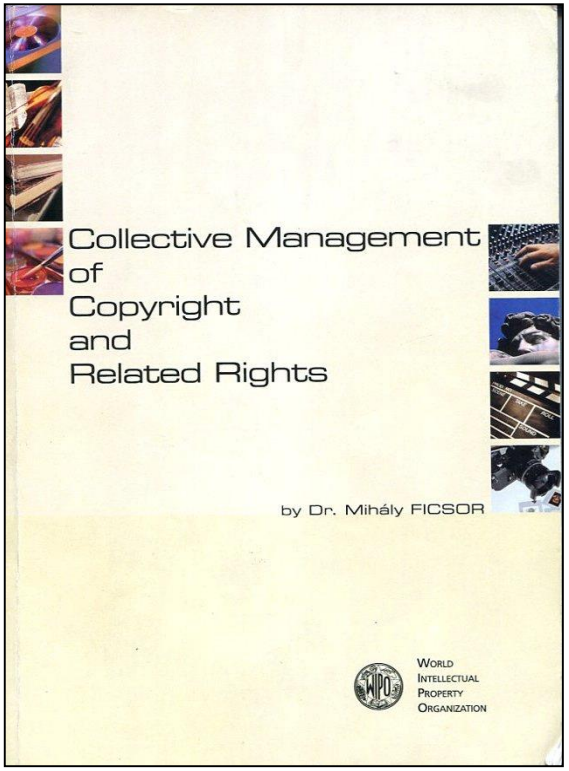
Dr. Mihály Ficsor
Member of the Hungarian Copyright Council, former Assistant Director General of WIPO

First, second and third editions of the book – and other publications of WIPO on collective management

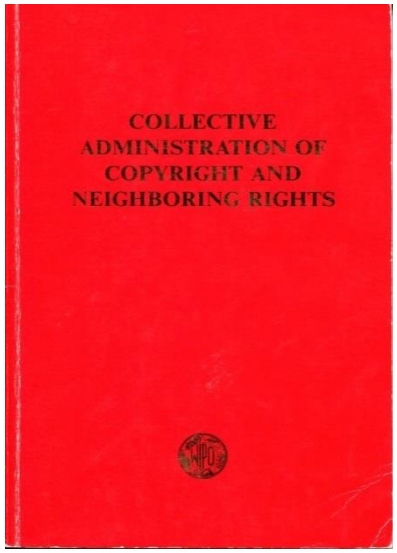
The first and second editions

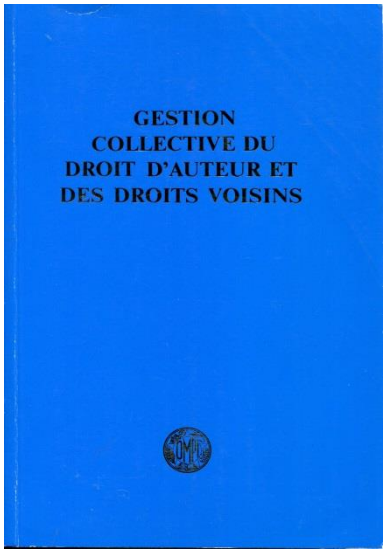


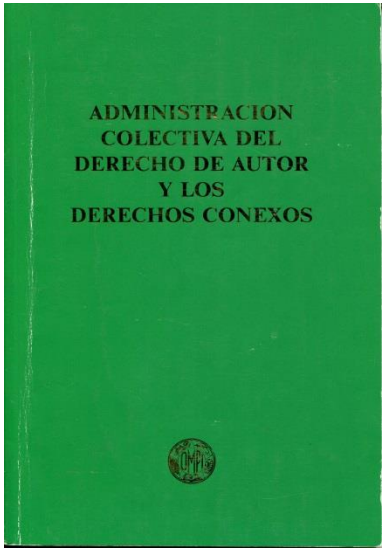
***1990*: adopted by a WIPO Group of Governmental Experts (101 pages)**

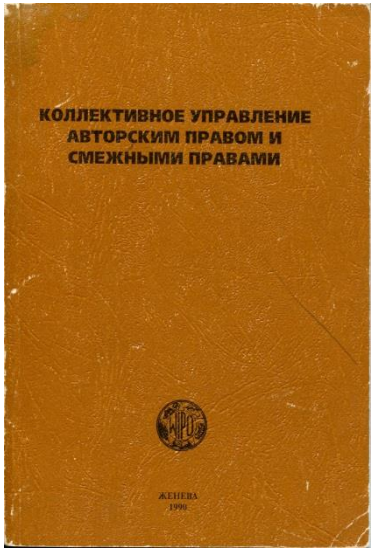


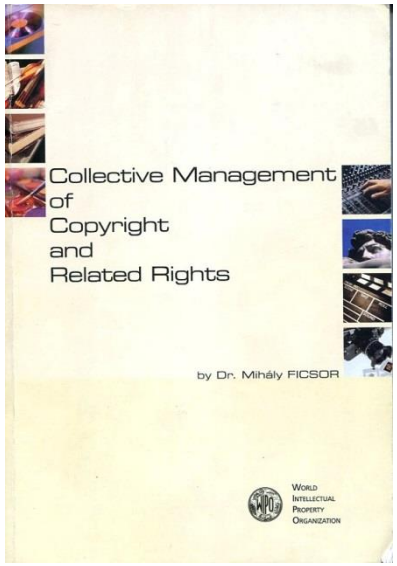
***2002*: updated version of the 1990 WIPO book (176 pages)**

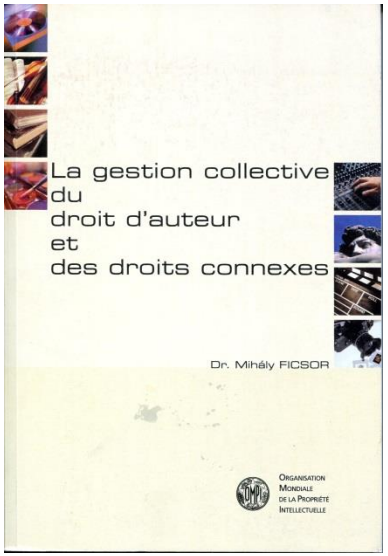

COLLECTIVE
ADMINISTRATION OF
COPYRIGHT AND
NEIGHBORING RIGHTS

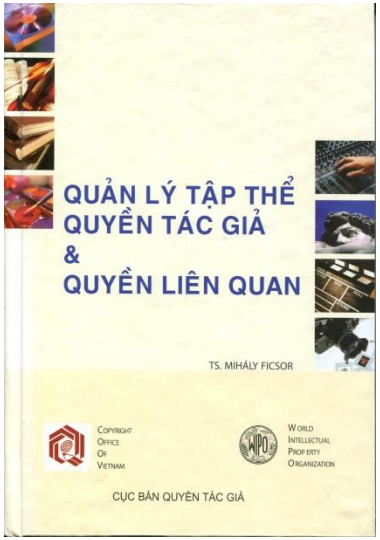

GESTION
COLLECTIVE DU
DROIT D'AUTEUR ET
DES DROITS VOISINS


ADMINISTRACION
COLECTIVA DEL
DERECHO DE AUTOR
Y LOS
DERECHOS CONEXOS


КОЛЛЕКТИВНОЕ УПРАВЛЕНИЕ
АВТОРСКИМ ПРАВОМ И
СМЕЖНЫМИ ПРАВАМИ
ЖЕНЕВА
1990


Collective Management
of
Copyright
and
Related Rights
by Dr. Mihály FICSOR
World
Intellectual
Property
Organization


La gestion collective
du
droit d'auteur
et
des droits connexes
Dr. Mihály FICSOR
Organisation
Mondiale
de la Propriété
Intellectuelle


QUẢN LÝ TẬP THỂ
QUYỀN TÁC GIẢ
&
QUYỀN LIÊN QUAN
TS. MIHÁLY FICSOR
Copyright
Office
Of
Vietnam
World
Intellectual
Prop erty
Organization
CỤC BẢN QUYỀN TÁC GIẢ


Gestiunea colectivă
a
drepturilor de autor
şi a
drepturilor conexe

The third edition

2022: Third edition (246 pages) freely available at WIPO website website basis of *Attribution 4.0 International (CC BY 4.0)* Creative Commons license at https://www.wipo.int/edocs/pubdocs/en/wipo-pub-855-22-en-collective-management-of-copyright-and-related-rights.pdf.

The 12 chapters of the third edition (1)

***Chapter 1*. *Raison d'être,* core functions and various models of collective management**

***Chapter 2*. WIPO activities in the field of collective management**

***Chapter 3*. Collective management and the international treaties on copyright and related rights, and the role of governments**

***Chapter 4*. Structural issues of collective management: monopoly and competition, mono- and multi-repertoires, cooperation and coalitions**

***Chapter 5*. Voluntary, presumption-based, extended and mandatory collective management**

***Chapter 6*. Independent management entities**

The 12 chapters of the third edition (2)

Chapter 7. **Collective management in the countries in transition from a centrally planned economy to a market economy**

Chapter 8**. Proper functioning of CMOs – from the viewpoint of rightholders and partner organizations**

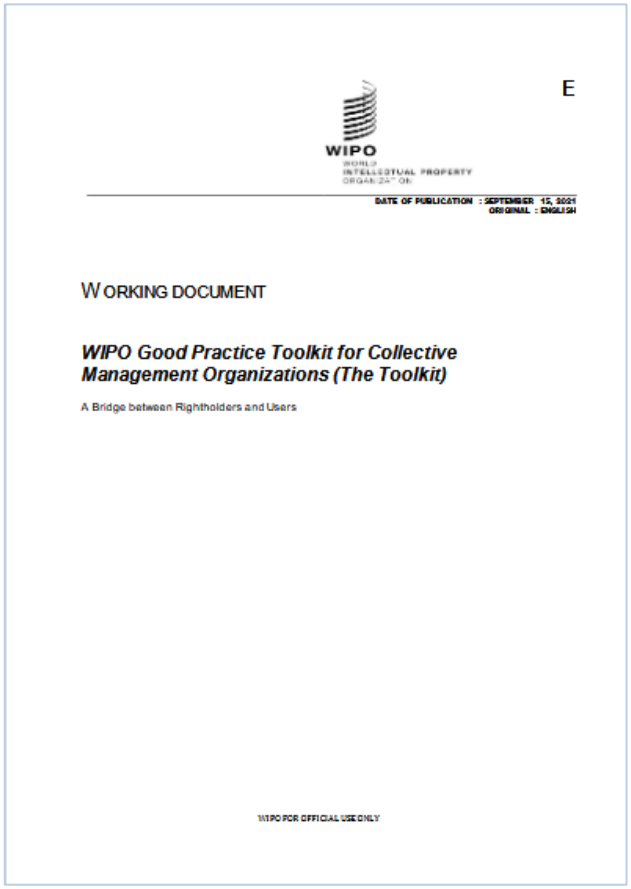
Chapter 9**. Relationship between CMOs and users**

Chapter 10**. Collective management in the online digital environment**

Chapter 11**. Cultural and social aspects of collective management**

Chapter 12. **Collective management in the developing world and the LDCs**

The most important other WIPO publication on collective management



E

WIPO

DATE OF PUBLICATION : SEPTEMBER 15, 2021
ORIGINAL : ENGLISH

WORKING DOCUMENT

WIPO Good Practice Toolkit for Collective Management Organizations (The Toolkit)

A Bridge between Rightholders and Users

WIPO FOR OFFICIAL USE ONLY

***The most important other publication*: WIPO Good Practice Tool for Collective Management Organizations (The Toolkit) a regularly updated rich source of information (130 pages), also freely available on the basis of a Creative Commons license on the WIPO website at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_cmotoolkit_2021.pdf. (The last version is of September 15, 2021).**

Chapter I. Raison d'être, core functions and various models of collective management

Description in the Introduction to the book

In ***Chapter 1*** the **objectives, functions and different models** of collective management are explored. Looking at **how the first authors' societies were establishe**d, how a fully fledged collective management system emerged, and **how the scope of collective management was broadened and diversified**. An attempt is made **to conceptualize "collective management" and define "collective management organizations".**

Raison d'être of collective management; the authors' society model

- **Collective negotiation with users** (some similarity with trade unions)
  - Beaumarchais ; 1777; SACD
- **Professional forum; representation of authors' interests**
  - Balzac, Dumas, Victor Hugo, 1837, SGDL
- **Full collective management of rights** (collective management of rights as a collective for the entire creators' community)
  - Henrion, Parizot, Bourget, 1847-1850, SACEM

Broadening application of collective management (1)

- **Public performance right of authors of musical works**
- **Broadcasting right of authors of musical works**
- **Authors' musical „mechanical" right**
- **Authors' „syncronization right"**
- **Right of performers' and producers of phonograms' to a single equitable remuneration concerning broadcasting and communication to the public of phonograms published for commercial purposes**
- **Cable retransmission right**
- **Satellite to cable rights**

Broadening application of collective management (2)

- **Interactive right of making available to the public in musical works and such rights of performers**
- **Reprographic reproduction right**
- **Right to remuneration for private copying**
- **Resale rights (*droit de suite*)**

- **Authors' and performers' „residual" rights to remuneration after the transfer of their rights to producers**

- **Use of orphan works**
- **Use out-of-commerce works**

Basic functions of CMOs; further roles when acting as collectivities

- **Negotiations with users on remuneration and other licensing conditions**
- **Setting and publishing tariffs**
- **Monitoring of uses**
- **Collection of remuneration**
- **Distribution of remuneration**

- ***Active role in the given countries' cultural life***
- ***Promotion of creativity***
- ***Social assistance to members***

„Collective management:" a generic term with different meanings

- **Genuine collective management organizations** (the authors' society model; also performers' organizations)
- „**Collecting societies/agencies**" – may cover different sorts of entities, but it rather refers to the **technical aspects of management**
- „**Musical licensing companies**" and the like – trade, market, competition as dominant aspects

---

- „**Independent management entities**": no, they have **nothing to do with collective management** (see Chapter 6)

How to define?

- **English version** of Article 3(a) of the Collective Management Directive (Directive 2014/26/EU):

  (a) collective management organisation' means any organisation which is authorised […] **to manage** copyright or rights related to copyright **on behalf of more than one rightholder**, for the collective benefit of those rightholders […]". **More than one? Also two?**

- **Other language versions** are more realistic: French: "**plusieurs** titulaires de droits;" Spanish: "**varios** titulares de derechos."

- Definitions **describing the functions** of collective management organizations on behalf of the rightholders **are more adequate**.

Functional definitions of CMOs (1)

Functions-based substantive definitions (examples from the „The Tollkit”)**:**

- “Collective management organizations **have as their objective**: (a) **to negotiate** with the users […]; (b) **to collect** the corresponding fees **and distribute** them among the rightholders; (c) to carry out and finance **social and cultural actions** for the benefit of their members;[…] *(Côte d’Ivoire: Article 116, Law on Copyright and Related Rights.)*
- “[C]ollective management organizations **shall** primarily **have the following objectives**: (a) **to administer** their members’ **rights** and the rights entrusted to its administration […]; (b) **to provide** the best **benefits and social security** for its members; (c) **to promote the intellectual production and** the improvement of the **national culture**.”(*Colombia: Article 2, “CMO Regulations”.*)

Functional definitions of CMOs (2)

Functions-based substantive definitions (examples from the „The Tollkit”)**:**

- “Collective management organizations **have as their objective**: (a) **to negotiate** with the users […]; (b) **to collect** the corresponding fees **and distribute** them among the rightholders; (c) to carry out and finance **social and cultural actions** for the benefit of their members;[…] *(Côte d’Ivoire: Article 116, Law on Copyright and Related Rights.)*
- “[C]ollective management organizations **shall** primarily **have the following objectives**: (a) **to administer** their members’ **rights** and the rights entrusted to its administration […]; (b) **to provide** the best **benefits and social security** for its members; (c) **to promote the intellectual production and** the improvement of the **national culture**.”(*Colombia: Article 2, “CMO Regulations”.*)

Chapter 2. WIPO activities in the field of collective management

Description in the Introduction to the book

In ***Chapter 2***, it is decribed **how WIPO's activities became ever more intensive** in the field of collective management of copyright in response to the increasing importance of this form of exercise of rights extending to **legislative guidance** (when the governments of the Member States require it), **publications, capacity building** and **training**, and **infrastructure solutions**.

WIPO activities in the field of collective management (1)

After the introductory remarks outlining **the reasons for which collective management of copyright has received growing attention** in WIPO's activities, the chapter offers **description** about these activities, as the subtitles show it:

- **Model statutes** for CMOs

- **Intensive analysis** of the issues of collective management

- **Publication of the book** on *Collective administration of copyright and neighboring rights*

- **Proposals for treaty provisions** on collective management during the preparation of the WIPO Internet Treaties (continues)

WIPO activities in the field of collective management (2)

- **Seville International Forum** on the exercise and management of rights in the digital environment

- **Publication of the book** on *Collective management of copyright and related rights*

- WIPO's **Copyright Management Division**: **ambitious projets and growing scope of activities**

- Rich resources for **capacity building and training**

- WIPO's ***Good Practice Toolkit*** for CMOs

- Collective management **infrastructure solutions; WIPO Connect**

Chapter 3. Collective management and the international treaties on copyright and related rights, and the role of governments

Description in the Introduction to the book

In ***Chapter 3***, **the international norms are analyzed from the viewpoint of their relevance**, if any, **for the establishment and operation of CMOs**. It is discussed **what role governments have** in the regulation of collective management to ensure the enjoyment, due exercise and protection of certain rights of authors and beneficiaries of related rights **in order to fulfill the obligations of the Contracting States** .

General obligation to ensure effective applicability of rights

- **Article 36 of the Berne Convention** provides as follows (and there are **similar provisions in the other treaties on** copyright and related rights):

  (1) Any country party to this Convention undertakes **to adopt**, in accordance with its constitution, **the measures necessary to ensure the application** of this Convention.

  (2) It is understood that, **at the time a country becomes bound** by this Convention, **it will be in a position** under its domestic law **to give effect to the provisions of this Convention**.

- Thesis: **where, for the effective application of a right** to be granted by virtue of a treaty **collective management is needed, it is an obligation** of a contracting party **to provide adequate legislative norms and administrative rules that guarantee such application of the right**.

Treaty provisions relevance for collective management

No specific treaty provisions on collective management, **but certain provisions with relevance:**

- **provisions** of the Berne Convention **allowing imposition of conditions of the exercice of certain exclusive rights** (**mandatory collective management being such a condition**) in **Article 11*bis*(2)** concerning the right of broadcasting and retransmissions of broadcast works and **Article 13(1**) concerning „mechanical right" (recording of musical works in phonograms) – see Chapter 5;

Treaty provisions relevance for collective management

No specific treaty provisions on collective management, **but certain provisions with relevance**:

- **agreed statement concerning Article 17 of the Berne Convention** (which otherwise is on the right of the governments "to permit, to control, or to prohibit" public uses of works; that is, to apply censorship) stating „that the questions of public policy should always be a matter for domestic legislation and that **the countries of the Union would** therefore **be able to take all necessary measures to restrict possible abuse of monopolies**."

Key aspects of the role of governments (1)

Requirements:

- to provide **adequate legislation to guarantee appropriate collective management** where needed, **and that only those CMOs may be established that fulfill conditions good governance, transparency and accountabilit**y – but **not to intervene** into the management activities **where it is not justified**;

- to have a **due authorization and supervision system**;

- to guarantee **one-stop-shop** licensing in case of natural monopolies (see Chapter 4);

-to apply **measures against** possible **abuse** of *de facto* or *de jure* **monopoly** (see Chapter 4);

- to provide appropriate **complaint and dispute settlement procedures**.

Key aspects of the role of governments (2)

Thesis: **level of justification of government intervention** into the management of rights (including tariff setting) **in a decreasing order**:

- **statutory rights to remuneration** (such as resale rights or right to remuneration for private copying);

- **compulsory licenses** (such as those provided in Articles 11*bis*(2) and 13(1) of the Berne Convention): **remuneration to be fi**xed by a competent authority only „**in the absence of agreement**;”

- **exclusive rights of authorization**.

Chapter 4. Structural issues of collective management: monopoly and competition, mono- and multi-repertoires, cooperation and coalitions

Description in the Introduction to the book

Chapter 4 presents the key thesis of a **natural monopoly** situation for the management of certain rights of certain categories of rightsholders. There is consideration of the frequent ***de facto*****,** or even ***de jure*****, monopoly position** of CMOs, **in which cases it is not advisable to introduce competition artificially but adequate measures are needed to prevent its possible abuse.**

Collective management as natural monopoly (1)

Natural monopolies

- A *natural monopoly* is a distinct type of monopoly that may arise **when there are… high fixed costs**…, such as exist **when large-scale infrastructure is required to ensure supply**…

  In the case of natural monopolies, trying to increase competition by encouraging new entrants into the market creates a potential loss of efficiency. The **efficiency loss to society** would exist if the new entrant had to duplicate all the fixed factors - that is, the infrastructure.

  It may be more efficient to allow only one [organization] to supply to the market because allowing competition would mean a *wasteful duplication of resources*.

  (*See* economicsonline.co.uk/Business_economy/Natural_economics.html)

- ***Natural monopoly:* a situation in which one [organization] is able to supply the whole market for a product or service more cheaply than two or more [organizations] could.**

  (*See* dictionary.cambridge.org/dictionary/english/natural-monopoly)

Collective management as natural monopoly (2)

- **Excerpt from Chapter 4 (Conclusions) of „Collective Administration of Copyright and Neighboring Rights", WIPO publication No. 688 (E), 1990:**

  „(f) As a rule, there should be only one organization for the same category of rights in each country. **The existence of two or more organizations in the same field may diminish or even eliminate the advantages of collective administration of copyright**."

- **Excerpt from Chapter VII (Conclusions) of „Collective Management of Copyright and Related Rights", WIPO publication No. 855 (E), 2002:**
  „(11) Usually, there should be only one organization for the same category of rights for the same category of rights owners in each country. **The existence of two or more organizations in the same field may diminish or even eliminate the advantages of joint management of rights**."

Articles 101 and 102 of the TFEU (ex Articles 81 and 82 of the TEC)

The EC Treaty contains **two basic antitrust prohibition rules**.

- First, **agreements** between two or more firms **which restrict competition are prohibited by Article 101 of the Treaty on the Functioning of the EU (TFEU)**, subject to some limited exceptions.
  - The most typical example of illegal conduct infringing Article 101 is a ***cartel*** between competitors (which may involve **price-fixing or market sharing**).

- Second, **under 102 of the TFEU,** firms, organizations **in a dominant position may not abuse that position.**

CJEU judgment in the *CISAC* case

On 12 April 2013, the General Court of **the Court of Justice of the EU (CJEU) annuled the European Commission's Decision C(2008) 3435 final of 16 July 2008 alleging that CISAC had violated the competition rules under Article 81 of the TEC (now Article 101 of the TFEU).**

The Court found **(in T-442/08)** that **the Commission had not proved to a sufficient legal standard the existence of a concerted practice** relating to the national territorial limitations, since it has neither demonstrated that the collecting societies acted in concert in that respect, nor provided evidence rendering implausible the applicant's explanations for the collecting societies' parallel conduct.

Article 3 of the contested EC decision therefore was annulled. In view of this, the Court **did not not find necessary to examine the other arguments** put forward by CISAC and the European Brodacasting Organization (EBU) relating, *inter alia*, to the **importance of national territorial limitations in order to avoid a race to the bottom with regard to royalties and to maintaining the existence of national one-stop-shops.**

CJEU judgment in the *OSA* case

Judgment of the CJEU in Case C-351/12 Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) v Léčebné lázně Mariánské Lázně a.s

The Court has found that **a spa** which transmits protected musical works to its guests by means of devices located in their bedrooms **must pay copyright fees** to be collected by OSA, the Czech authors' society.

However, it has been **a more important finding of the CJEU that the territorial monopoly granted to copyright collecting societies is not contrary to the freedom to provide services under the EU law**. The the Court has noted that the territorial monopoly provided under the Czech Copyright Act granted to OSA constitutes a restriction on the freedom to provide services inasmuch as it does not allow users of protected works to choose the services of a collecting society established in another Member State. It has emphasised, however, that the restriction in question is justified, **since that system is necessary for attaining the objective of the effective management of intellectual property rights. (= since there is a *natural monopoly* situation).**

Chapter 5. Voluntary, presumption-based, extended and mandatory collective management

Description in the Introduction to the book

In ***Chapter 5*****,** it is pointed out that **the exclusive nature of rights may truly prevail if they are exercised individually** and that **mandatory collective management is** therefore **a limitation** of such rights. **In contrast, extended** (or presumption-based) **collective management is an enabling system** that is advantageous to both rightholders and lawful users.

Voluntary collective management (1)

Principles in the Conclusions chapter of the **second edition of WIPO book on CMOs (a version of the text approved by government experts)** – also expressed more **in detail in the third edition**:

(1) Collective management… of copyright and related rights is **justified where individual exercise of such rights** – due to the number and other circumstances of uses – **is impossible or, at least, highly impracticable**.

(4) As regards the choice of rights owners between individual exercise and collective management of rights, their **freedom of association should be respected. Collective management management should not be made obligatory in respect of exclusive rights** which, under the international norms on the protection of copyright and related rights, must not be restricted to a mere right to remuneration, and, **in the case of which individual exercise is possible**.

Voluntary collective management (2)

CMO Directive (Directive 2014/26/EU), Article 5(2):

Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, **categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation** or the right holder. Unless the collective management organisation has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject-matter, provided that their management falls within the scope of its activity.

Mandatory collective management (1)

- **In the case of mere rights to remuneration, mandatory collective management is a normal way of exercising rights** (there is no need for authorization, just the remuneration is to be collected and distributed).
- **In the case of an exclusive right** – where the owners of rights have the right to authorize or prohibit the acts covered by such rights and to determine the conditions of authorization – **mandatory collective management is a limitation of such a right.**

Mandatory collective management (2)

Article 11*bis*(2) of the Berne Convention:

It shall be a matter for legislation in the countries of the Union **to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised,** but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

- The "preceding paragraph" – paragraph (1) of the same Article – provides for the exclusive right of authorizing broadcasting and certain other related acts.

Mandatory collective management (3)

Article 13(1) of the Berne Convention:

Each country of the Union **may impose** for itself reservations and **conditions on the exclusive right granted to the author** of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, **to authorize the sound recording** of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Mandatory collective management (4)

Since mandatory collective management is a limitation of exclusive rights, its application is subject to the cumulative conditions of the three-step test under:

- **Article 9(2) of the Berne Convention**
- **Article 13 of the TRIPS Agreement**
- **Article 10 of the WCT**
- **Article 16 of the WPPT**

Examples of provisions on mandatory collective management (1)

Mandatory collective management under the EU Directives:

- **The Rental, Lending and Related Rights Directive** (Directive 2016/115/EC) on the „unwaivable right to remuneration" for rental in favor of authors and performers when they transfer their exclusive right of rental to producers**:**
  - Article 4(3): „The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers."
  - Article 4(4): "**Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed…"**
- **„May regulate": a permission (*a contrario* !)**
- **This is in accordance with the international norms,** since it does not concern the exercise of exclusive rights itself directly.

Examples of provisions on mandatory collective management (2)

Mandatory collective management under the EU Directives:

- **Satellite and Cable Directive** (Directive 93/83/EEC):
  - Article 9(1): "Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission **may be exercised only through a collecting society**."
- **This is in accordance with the international norms**, due to Article 11*bis*(2) of the Berne Convention.

Examples of provisions on mandatory collective management (3)

Mandatory collective management under the EU Directives:

- **Resale Right Directive** (Directive 2001/84/EC)**:**
  - Article 6(2): "**Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1**."
- **„May provide…": a permission (*a contrario*!)**
- **This is in accordance with the international norms**, since both the Directive and the underlining provision of the Berne Convention (Article 14*ter*) only provides for a right to remuneration.

Examples of provisions on mandatory collective management (4)

Mandatory collective management under the EU Directives:

- **Terms Directive** (Directive 2006/116/EC)**, Article 3:**

  2b Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the phonogram producer… The right to obtain such annual supplementary remuneration **may not be waived by the performer**…

  2d. **Member States shall ensure that the right** to obtain an annual supplementary remuneration as referred to in paragraph 2b **is administered by collecting societies.**

- **In accordance with the international norms** (a right to remuneration which does not limit the application of any exclusive right).

Examples of provisions on mandatory collective management (5)

Mandatory collective management under the EU Directives:

- **CabSat II Directive** (Directive (EU)2019/789), **Article 4(1) concerning online retransmission and parallel direct injection :**

  Member States shall ensure that rightholders may exercise their right to grant or refuse the authorisation for a retransmission only through a collective management organisation.

- **In accordance with the international norms** (including with the three-step test).

Extended collective management

- Extended collective management is based on voluntary collective management**. The effect of licenses granted by the collective management organization on behalf of the owners of rights represented by it is extended by law also to those who are not represented.**
- In the case of exclusive rights, extended collective management is **in accordance with the international norms**
  - **if collective management is the normal way of exercising the right concerned;**
  - **if the repertoire of the organization is sufficiently representative; and**
  - **if the owners of rights may „opt out”** (leave the collective system) **under reasonable conditions.**

The Digital Single Market Directive on extended collective management (1)

Directive on copyright and related rights in the Digital Single Market (Directive (EU) 2019/790), **Article 12. Collective licensing with extended effect:**

1. Member States may provide,… subject to the safeguards provided for in this Article, **that where a collective management organisation…** in accordance with its mandates from rightholders, **enters into a licensing agreement for the exploitation of works or other subject matter**:

(a) such an agreement can be extended to apply **to** the rights of rightholders **who have not authorised** that collective management organisation to represent them… ; or

(b) … the organisation has a **legal mandate or** is **presumed to represent rightholders who have not authorised** the organisation accordingly.

The Digital Single Market Directive on extended collective management (2)

Digital Single Market Directive, Article 12:

2. Member States **shall ensure t**hat the licensing mechanism referred to in paragraph 1 **is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely**, due to the nature of the use or of the types of works or other subject matter concerned, and **shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders.**

The Digital Single Market Directive on extended collective management (3)

Digital Single Market Directive:

3…Member States **shall provide for the following safeguards:**

(a) the collective management organisation is, on the basis of its mandates, **sufficiently representative** of rightholders in the relevant type of works or other subject matter and of the rights which are the subject of the licence, for the relevant Member State;

(b) all rightholders are guaranteed **equal treatment**, including in relation to the terms of the licence;

(c) rightholders who have not authorised the organisation granting the licence **may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism…;** and

(d) appropriate publicity measures are taken… Publicity measures shall be effective **without the need to inform each rightholder individually.**

Chapter 6. Independent management entities

Description in the Introduction to the book

Chapter 6 presents independent management entities (IMEs). The rules governing IMEs in the European Union is reviewed and **it is stated that they have been granted some unjustified advantages in relation to CMOs.** This has led to some **conflicts**, mainly in the traditional fields of collective management, **some of which have been solved in the courts and others through cooperative agreement**.

Provisions on the Directive on CMOs on IMEs that are not CMOs (1)

The **category of "independent management entities" (IMEs**), as alternatives to CMOs, has been **introduced by the Collective Management Directive** but such entities have also been born in other continents, partly set up as branches and partly as stand-alone entities. **The definition of IMEs**, **in Article 3(b) of the Directive reads as fol**lows:

> (b) 'independent management entity' means **any organisation** which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and **which is**:
>
> (i) **neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and**
>
> **(ii) organised on a for-profit basis**;

•

Provisions on the Directive on CMOs on IMEs that are not CMOs (2)

- **Allowing to for-profit commercial entities to "carry out the same activities as collective management organisations**" without any control by the creators, **does not seem to be in accordance with the declared objective of the Directive** of which the aim, under recitals (8) and (9), is to provide for the harmonization of rules to lay down requirements applicable to CMOs.

- **There is no indication in** the Directive **why IMEs**, as organizations that are *not* CMOs, **may carry out** – not just rights management in general, but – **"*the same* activities** as collective management organizations" **with much less demanding requirements** than those prescribed for CMOs **and why they are offered much more advantageous conditions in the competion created by them vis-à-vis CMOs**.

No level playing field for CMOs *vis-à-vis* IMEs (3)

• The **only provision** on IMEs – **through which they have received major competion advantage „under the radar**:"

> 4. Article 16(1), Articles 18 and 20, points (a), (b), (c), (e), (f) and (g) of Article 21(1) and Articles 36 and 42 apply to all independent management entities established in the Union.

• **The overwhelming majority of the requirements only consist in obligations to make available information.**

• **Article 16 (1) is a provision that goes beyond obligations to grant information:** a CMO (thus also an IME) must "**conduct negotiations** for the licensing of rights **in good faith**" and provide with users each other "all necessary information."

No level playing field for CMOs *vis-à-vis* IMEs (4)

Although the general provision of Article 16(1) **applies to IMEs too, the following more demanding concrete requirements prescribed in Article 16 only to CMOs**:

- **licensing terms must be based on objective and non-discriminatory criteria** (paragraph (2)); an IME, must negotiate in good faith, but apart from it, contrary to a CMO, it is not bound by this requirement concerning the determination of the licensing conditions and fees;

- **the rightholders must receive appropriate remuneration for the use of their rights** (paragraph (2)); **no such requirement binds an IME**; although it has to compete for rightholders, **its objective is to increase the management's profit as much as possible without any control by the rightholders**; thus, for an IME, contrary to a CMO, this is not an obligation to respect but, at maximum, **a possible matter of business calculation**;

No level playing field for CMOs *vis-à-vis* IMEs (4)

Although the general provision of Article 16(1) **applies to IMEs too, the following more demanding concrete requirements prescribed in Article 16 only to CMOs:**

- **the tariffs must be reasonable in relation to, *inter alia*, the economic value of the use of the rights** in trade, **taking into account the nature and scope of the use** of the work and other subject-matter, **as well as in relation to the economic value of the service provided** by the collective management organization (paragraph (2)); **IMEs, contrary to CMOs, are not bound by these provisions**; they may apply as high tariffs for the use of rights as they can, even if the nature, the scope and economic value of their "service" may not be as valuable;

- **if a user requests so**, license must be offered without undue delay or a **reasoned statement must be provided why license is not offered** (paragraph (3)); **an IME, contrary to a CMO, is not bound by this rule**.

No level playing field for CMOs *vis-à-vis* IMEs (6)

The IMEs are **exempted from a number of requirements burdening the CMOs:**

- **IMEs, contrary to CMOs**, **are not obligated to accept rightholders as members who fulfill the membership requirements** (see Article 6(2)) and to manage the rights of any rightholder within the scope of their activities (Article 5(2)); they are **allowed to apply "cherry picking"** by only managing the rights of certain rightholders from whom they may expect easy profit, and **leaving the rest to CMOs which do have such obligations**.

- **IMEs, contrary to CMOs, are allowed to enjoy as stable repertoire as they wish** and can ensure this by contracts, **since they are not bound by the provisions** of Article 5(3) and (4) **of the Directive on the freedom of righholders to withdraw their rights and repertoires.**

No level playing field for CMOs *vis-à-vis* IMEs (7)

The IMEs are **exempted from a number of requirements burdening the CMOs:**

- **IMEs, contrary to CMOs, are not bound by any rules on membership**, **on establishment and operation of governing bodies, on control mechanisms, on conflicts of interests and on complaint procedures** (see Articles 6 to 10); they are free to use all their energy on competition and profit making.

- **Neither are IMEs bound, contrary to CMOs, by the rules on the use of "rights revenues", investment, deductions and distribution** (see Articles 11 to 15); all their income may be used to guarantee stronger competition position and to maximize profit.

- **Articles 33 on complaints procedures, Article 34 on alternative dispute resolution procedures and Article 35 on dispute resolution do not apply either to IMEs.** It follows from this, *inter alia*, a further significant competition advantage of IMEs vis-à-vis CMOs, namely that, while **CMOs are subject to tariff control, no such control is foreseen for IMEs.**

No level playing field for CMOs *vis-à-vis* IMEs (8)

The IMEs are **exempted from a number of requirements burdening the CMOs:**

- **Although a declared objective** of the Directive **is to ensure due transparency, from the provisions of Chapter 5, only the application of Article 20 and certain provisions of Article 21 are foreseen for** IMEs; they are **not burdened (as CMOs are) with fulfilling the other transparency obligations** under the Chapter**, in particular** not **with the preparation of annual transparency reports** in accordance with Article 22 and the Annex, which does not only mean that they may function in a less transparent way, but also that they are freed from using money, time and energy for the preparation of such reports.

- **Title III of the Directive on multi-territorial licensing of online rights in musical works does not apply to IMEs**; they are free to choose any methods to compete without any requirements that CMOs must respect.

Thank you for your attention.

Questions?
Comments?