



# Educational Material on Collective Management of Copyright and Related Rights

## **Module 1:** General aspects of collective management

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## PURPOSE OF THE MATERIAL

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The management of copyright and related rights is an increasingly important element in a properly-functioning copyright infrastructure, alongside legislation and enforcement. Relevant information is needed both among governmental representatives working in copyright offices, for instance, and among people working in the private sector, for instance in collective management organizations.

WIPO has therefore commissioned experts to write educational material to be used for reference in conjunction with various training activities. Working closely with many non-governmental organizations (NGOs), the experts have 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 way rights are exercised and managed varies greatly with the different creative sectors. This program focuses on collective management. It is organized in 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 can be read independently, together with Module 1. For instance, a reader who is interested in management of music can study Modules 1 and 2.

The experts are Ms. Tarja Koskinen-Olsson (Finland/Sweden) and Mr. Nicholas Lowe (the United Kingdom). Their short bios are annexed.

## 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 an 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 determine the use of the program. Cross-references are used throughout the text, as many issues affect more than one sector.

### **Terminology**

A glossary of terms is included. This glossary also offers some explanations and alternative terms as used in various countries.



## GLOSSARY OF TERMS 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 collective rights management organization (CRM); previously known as collecting society)

**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)

## **PUBLICATIONS ON GENERAL ASPECTS OF COLLECTIVE MANAGEMENT**

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- Collective Management of Copyright and Related Rights, Dr. Mihály Ficsor, WIPO, 2002
- The Setting-up of New Copyright Societies: Some Experiences and Reflections, Dr. Ulrich Uchtenhagen, WIPO, 2005
- From Artist to Audience, WIPO-CISAC-IFRRO Publication, 2004

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## GENERAL ASPECTS OF COLLECTIVE MANAGEMENT (MODULE 1)

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### CHAPTER 1 INTRODUCTION

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**The purpose of this material is to highlight how creators and consumers benefit from copyright and related rights and the system of collective management.<sup>1</sup>**

How does a creative work make its way from the artist who created it to his audience? How does a songwriter's music find its way to the radio? How does a writer's short story appear in print, bookstores, and public libraries? When a photograph is reproduced in posters and magazines, how does the photographer get paid?

How are consumers able to reap the benefits of all this creative activity? Equally important, how do composers, artists, writers and other creative individuals make a living from their works?

This material aims to answer some of these questions by exploring one way in which the system of copyright and related rights works, namely the collective management of rights. This system is in place in many countries around the world and is being established in many more countries.

It plays an important role in the development and dissemination of culture by making the works of artists, authors, and other creators available to the general public on a large scale. Its role in economic development is also important: the collective management system not only helps individuals make a living from their work, but also builds upon and strengthens cultural industries.

Authors and artists in many fields have established professional organizations-generally called collective management organizations-to manage their copyrights, to facilitate clearance of those rights and to ensure that they obtain economic reward for their creative output.

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<sup>1</sup> *From Artist to Audience*, WIPO-CISAC-IFRRO Publication, 2004.

This material looks at how collective management of copyright provides for such services, particularly in regards to these key cultural industries:

- Music and sound recordings
- Film and television
- Print and publishing
- Visual arts and photography
- Dramatic works and theatre

As consumers, we are exposed to culture in our day-to-day lives-so much so that we hardly think about its origin. We read our morning newspaper; we listen to music on the way to work. In school, we learn with the help of books; as university students, we study scientific research published in journals. We watch television at home, or go to the cinema or to a concert in the evening; we may visit an art gallery at the weekend. We may have a pile of books on our bedroom table, or a stack of magazines in the living room.

All these products of creativity that surround us nourish us as human beings. We learn new things. We appreciate art, we learn about different cultures. This is why these works were created in the first place; for our education, enjoyment, or enrichment: for improving the quality of our lives.

Creative works not only enrich us, they also collectively constitute our national cultural heritage, an essential part of each nation's identity. All of us can take pride in our creators and artists and in their successes at home and abroad. A nation's cultural heritage can help attract visitors to a country, bringing tourists for music and theater festivals, art exhibitions, museums and library collections, or other activities deriving from the creative resources of the population.

Overall, the economic contribution of cultural industries to a nation's economic wealth is considerable. Surveys conducted in numerous countries indicate that the value added by cultural industries is on average 5.4%<sup>2</sup> of gross domestic product (GDP). It is no wonder that WIPO's summary document of studies performed in 30 countries on the economic contribution of the copyright industries is entitled

"COPYRIGHT + CREATIVITY = JOBS AND ECONOMIC GROWTH".

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<sup>2</sup> WIPO Studies on the Economic Contribution of the Copyright Industries, 2012.



## CHAPTER 2

### ELEMENTS IN A FUNCTIONING COPYRIGHT SYSTEM

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**While good copyright legislation is a prerequisite, that alone is not enough. Financial reward is ensured by managing copyright effectively in the marketplace. Pirates are kept out of the market through efficient enforcement measures.**

These are the fundamental pillars of a country's copyright system: legislation, management and enforcement.

One way to understand the value of copyright is to look at it from the perspective of its creators. These individuals devote their lives to the creation and dissemination of art, knowledge and culture. They write novels, they paint, compose music or make films. They are talented individuals who have something to say through the expression of their minds. That expression is protected by copyright.

Many creators are freelancers, working from their homes or offices and at their own expense. Although they are artists, they have the same responsibilities as many other people. They have to pay for housing, send their children to school, and pay taxes. In order to meet these responsibilities, they must benefit financially when their works are consumed. Copyright provides the mechanism for this benefit.

In many cases, creators entrust professional enterprises, such as book publishers or record producers, with bringing their works to market. These enterprises make significant investments in the dissemination and marketing of works. As a result, consumers everywhere can enjoy products and services in a wide variety of formats and media.

Simply put, copyright is a basic right to receive credit as the author, and to receive remuneration for the use of one's creative work. The protection of this basic right provides the essential basis for pursuing creative activity-recognition and fair reward.

People and enterprises have different roles in a copyright system:

- Authors of literary and artistic works create works;
- Performers – singers, musicians and actors - perform works;
- Producers and publishers invest in bringing products and services to the market; and
- Broadcasters disseminate works.

Creators, performers and producers have rights based on copyright and related rights legislation. Copyright protects their property, even though this property is sometimes

in intangible form. Copyright is based on national legislation which should be in harmony with accepted international norms. These are manifested in international copyright treaties such as the Berne Convention for the Protection of Literary and Artistic Works.<sup>3</sup>

In general terms, these people and enterprises have copyright or rights related to copyright in their works, performances and investment. The term “rights holders” is a generic term to cover them all. The term “related rights” refers to the rights of performers, producers and broadcasters. However, for simplicity, the term “copyright” is used to cover both copyright and related rights.

In principle, rights holders can decide how and by whom their works are used. It is in their interest that their works are enjoyed by the widest audience, provided that they are rewarded for their work. This requires efficient mechanisms to manage creators’ rights so that they can concentrate on their creative activity.

In some cultural sectors, copyright can be managed through individual contracts. However, in many cases it is impossible to negotiate individual licenses or permissions. Think of playing a song on a radio station, showing a movie on a cable network, or performing a play in theaters around the world. In many of these cases rights are managed through the system of collective management.

The purpose of this material is to show how collective management works in specific sectors and industries. Module 1 lays down the framework and deals with general aspects of collective management, irrespective of the sector. Modules 2-6 describe in greater detail collective management in various sectors.

## 2.1 Legislation

**It is of paramount importance that national laws provide a solid and unambiguous foundation, with clear rights and exceptions or limitations. Apart from some basic principles, international conventions leave issues concerning exercise and management of rights to national legislation.**

Legislation is the responsibility of the government. While driven by domestic considerations, national copyright legislation should be in harmony with commonly accepted international norms, that is, the treaty obligations of the country. Good copyright legislation is a prerequisite for establishing an environment where it is attractive to create and invest in culture and creative industries.

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<sup>3</sup> As at July 2012, 165 countries have adhered to the Berne Convention for the Protection of Literary and Artistic Works.



Copyright consists of economic and moral rights. In broad terms, the economic rights fall into the following categories:

- Right to reproduce the work (make copies)
- Right to communicate the work to the public
- Right to create translations and adaptations of the work.

The foundation of economic rights is a set of exclusive rights. This means that the rights holder can decide who can use the work, where and on what terms. A rights holder can also decide to mandate a collective management organization (CMO) to manage his rights.

Moral rights include two aspects:

- Right of paternity; and
- Right of integrity.

In moral rights, the former means the right to claim authorship while the latter means the right to object to any changes that would be prejudicial to the author's honor or reputation.

National legislation may include provisions governing copyright contracts intended to facilitate individual exercise of rights. If so, the provisions lay down the minimum conditions and parties can agree on more favorable terms. Apart from copyright legislation, it is important to study the country's contract law, as copyright contracts are subject to general provisions of contract law.

National legislation may include provisions governing the establishment and functioning of collective management organizations (CMOs). The establishment can be subject to authorization from the competent authority; "copyright office" is used as a generic term for the competent authority. There may also be provisions governing supervision of the operations of CMOs.

National legislation may also include exceptions to and limitations of exclusive rights (hereinafter referred to as exceptions/limitations), subject to the conditions in international treaties. Exceptions/limitations are in the form of "fair use" or "fair dealing", mainly in common law countries, and referred to as specific exceptions/limitations mainly in civil law countries. Irrespective of the form, such provisions mean that the use is permitted by law, without the consent of rights holders and without remuneration to them.

Ideally, national legislation supports collective management and makes it clear that users must obtain permission to use copyright-protected works, something that they might have been doing a long time without any copyright clearance.

In the worst-case scenario, legislation includes extensive or unclear exceptions/limitations. This may lead to a situation where there is no room for licensing or remuneration, and thus the very foundation of collective management is undermined.

Irrespective of the form and method that national legislation takes, any solution for mass uses of copyright-protected works should be founded on the following two principles:

- It should guarantee remuneration to authors and other rights holders; and
- It should be easy for users to respect.

## 2.2 Enforcement of rights

**The unauthorized use of works manifests itself in various ways: as organized piracy for commercial gain, as well as other forms of reproduction and dissemination without the consent of rights holders and without remuneration to them.**

Organized piracy typically takes the form of reproduction of entire works, CDs, DVDs or books for sale in the market in competition with original works. Pirated copies of copyright works are extremely harmful to creative industries and undermine their very foundation.

Piracy must be countered through vigorous and effective enforcement mechanisms. However, that alone is not enough, as no market functions in a vacuum. Legal alternatives are a prerequisite for piracy-free markets. Through the system of collective management, rights holders can offer effective licensing mechanisms and enhance legal offers.

It is important that the illegal uses are curbed effectively, as piracy has a negative effect on the exercise and management of rights. It is virtually impossible to compete with free uses and the positive effects of proper management are severely hampered by piracy.

Apart from copying whole works, other types of infringement also exist, such as photocopying of material for internal purposes, for instance in universities. In these cases, licensing is the most effective countermeasure and authors and publishers have established specialized CMOs to grant such licenses.

In many countries, in particular in smaller language areas, the local market provides the only livelihood for national creators and the only return on investment for publishers and producers. If this market is pirated, rights holders have no alternative, so piracy always hits hardest at the national level. Flourishing national culture with a full range of diversity can only exist if the copyright system of the country functions.



The enforcement and management of rights are both necessary to secure a healthy market for creative industries. Rapid and effective enforcement measures and licensing activities complement each other, as they strive for the same goal through different means.

## 2.3 Exercise and management of rights

**Individual exercise and collective management of rights are two ways for rights holders to obtain remuneration for the use of their works. The type of use and practices in each country and creative sector indicate what form of management functions best in a given situation.**

The prerequisite for creating a compliance culture is that it must be easy for users to obtain the necessary copyright permissions. Rights holders' first choice is to exercise their rights individually, for instance, by concluding licensing agreements with publishers and producers. However, in many cases of mass exploitation of copyright protected works, this is not feasible and thus collective management is an effective and practical solution for rights holders, users and society at large.

To start with, copyright is a tradable right and can, except for moral rights, be transferred or licensed in whole or in part. In general terms, we talk about transfers and permissions.

### 2.3.1 Individual exercise of rights

In most cases, the individual exercise of rights involves a contract between an author or a performer and a publisher or producer who brings the works to the market. This is often the first relationship and consequently the rights are sometimes called "primary rights". A typical example is a book-publishing contract between a writer and a book publisher.

Three different ways of trading with copyrights are:

- assignment of rights;
- licenses; and
- transfer of rights in an employment situation and commissioned works.

An assignment is a complete transfer of rights and this means that ownership changes hands. An assignment can cover all economic rights or only specific uses. An assignment should always include a clear scope and geographic coverage. In some countries, the laws include special provisions concerning assignment of rights. They may not be permitted at all, or may not cover rights that are not known at the time of

the assignment. There may also be provisions that allow renegotiation of a contract in certain cases.

Licenses are permissions to use the work and they can be exclusive or non-exclusive in their nature. An exclusive contract means that the licensee is the only authorized user during the time of the contract. Non-exclusive licenses allow many simultaneous users at the same time, for uses specified in each individual contract.

When works are created in an employment situation or commissioned, national law may include provisions governing the transfer of rights to the employer or commissioner. The provisions vary and it is important to determine whether it is a transfer or the presumption of a transfer. In the latter case, the rights are presumed to be transferred unless otherwise agreed between the contracting parties. In some countries, the term “work for hire” is used when talking about copyright in an employment situation. An example is a journalist working in a newspaper publishing company.

Individual contracts between authors/performers and producers/publishers are important and may have a bearing on the collective management of rights. Rights transferred or licensed under individual contracts designate who the current rights holder is in a given situation. Such contracts may also include provisions on how remuneration collected by a CMO is to be distributed between parties.

### **2.3.2 Collective management of rights**

In a collective management system, two relationships are important: firstly, the relation between an individual rights holder and the CMO and secondly, the relation between the CMO and a user.

In principle, a CMO can only manage the rights of those rights holders who have given it a mandate. Rights acquisition from authors and other rights holders is based on a mandate which can take many different forms (explained in more detail in Chapter 4).

Licensing users is one of the primary functions of a CMO. Users of protected materials are granted a non-exclusive license, meaning that no user gets exclusivity to the repertoire of the CMO. For instance all radio stations can play the music represented by the CMO.

Treating users in a non-discriminatory manner is one of the cornerstones of collective management. All users are served on an equal basis, based on their use of protected materials and their premises. For instance a tariff for performing music in restaurants may be based on the number of seats. Large restaurants with many seats pay a higher price, but the tariff per seat is the same for all (explained in more detail in Chapter 6).





Collective management customarily deals with “secondary rights” involved in multiple uses of protected works. However, the line between primary and secondary rights is not clear-cut and in today’s media landscape it is getting even more blurred.

## 2.4 Role of a copyright office

**The role of a copyright office is multi-faceted, as the office is involved in policy making, formulation and implementation of appropriate legislation, enforcement and management of rights. Other tasks often include education and awareness-raising activities.**

The government body responsible for copyright is called the “copyright office”. In some countries, the office is responsible for all IPR matters; in others, separate offices are responsible for copyright and industrial property rights.

The role of a copyright office in policy making and legislation is advisory. Once legislation has been passed, the office is in charge of implementing it. Education and awareness-raising activities are essential in this respect.

Some copyright offices are directly involved in enforcement. Close collaboration with police and customs authorities is a necessity. In some countries, lawful examples of copyrighted goods, such as discs, videos and books, bear a banderol or hologram and the copyright office may be in charge of selling such authenticating devices.

The copyright office has a pivotal role in facilitating collective management, in particular at its initial stages. In many countries, it would be virtually impossible to establish a properly functioning system of collective management without the assistance of the copyright office.

In many countries, the copyright office also deals with the authorization of CMOs. At the outset of the operation, an authorization, also called an approval or a license, is given to a CMO. During the operations, the office may exercise its supervisory power, subject to legislation.

Dispute settlement functions may also be included in the tasks of the office. In some countries, the office holds a mediation function, in others that of arbitration, that is, final decision-making power in case a CMO and a user cannot agree on the terms and conditions of a license agreement.

### 2.4.1 Regional example from Africa: Kenya

In Kenya, the Copyright Regulations of 2004 specify the exercise of powers conferred by Section 49 of the Copyright Act of 2001. Prior to the new regulations, there were no stipulations concerning approval or supervision of CMOs.

The Kenya Copyright Board (KECOBO)<sup>4</sup> is actively engaged in all aspect of copyright and related rights: legislation and enforcement of rights as well as awareness and education. It approves and supervises the activities of Kenyan CMOs.

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<sup>4</sup> Kenya Copyright Board (KECOBO), [www.copyright.go.ke](http://www.copyright.go.ke).



## CHAPTER 3

### RATIONALE AND BENEFITS OF COLLECTIVE MANAGEMENT

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**The collective management of copyright began at almost the same time as the enactment of the first national copyright laws and has expanded over the centuries with technological advances.**

Copyright has been managed collectively since the late 1700s. It started in France in 1777, in the field of theatre, with dramatic and literary works. Collective management is most common in the field of music. The first music CMO was established in 1851, also in France. Similar organizations now exist in 121 countries (as of June 2012).

Copyright and technology have in fact evolved hand in hand: first printing and then sound recording, cinematography, broadcasting, photocopying, satellite and cable transmission, video recording and, most recently, the Internet.

The rationale for collective management is the same in all sectors. When it is impracticable or impossible for rights holders to manage their rights individually, collective management is a feasible solution. Collective management plays different roles in different creative sectors, such as:

- music and sound recordings;
- film and audiovisual;
- print and publishing;
- visual arts and photography; and
- dramatic works and theatres.

It is therefore important to analyze each creative sector to understand what role collective management plays therein. In some sectors, collective management covers almost all usages; in others, only limited cases. In the field of computer programs and databases, collective management is currently not applied.

In general terms, the services of CMOs include the following tasks:

- CMOs follow when, where and what works are used.
- CMOs negotiate tariffs and other conditions with users.
- CMOs collect the fees and distribute the money to rights holders.

It is important that all stakeholders understand the rationale behind collective management. Therefore, benefits to rights holders, users, legislators and society at large need to be clearly demonstrated.

In short, collective management can be summarized as a system that makes easy and legal access to protected works by users possible, while according remuneration to rights holders.

### 3.1 Rationale of collective management

**In cases where the individual management of copyright is either impracticable or impossible, rights holders have established CMOs to look after their rights.**

By mandating professional organizations to manage copyrights in practice, authors and performers can concentrate on their creative activity and be remunerated for the use of their works, not only in their own country but throughout the world. The same applies to publishers and producers and remuneration is part of their return on investment that enables them to bring new products and services to the market.

The main function of a CMO is rights management, that is, to license the use of protected works on behalf of rights holders. It may be a question of public performance of a musical work or photocopying of a literary work. By licensing, they offer legal access to copyright works and make it easy for users to get the necessary permission from one source.

Rights management includes the following tasks that apply to any collective management organization:

- monitoring where, when and by whom works are being used;
- negotiating tariffs and other conditions with users or their representatives;
- granting licenses in return for appropriate remuneration and under sound conditions;
- collecting remuneration; and
- distributing remuneration to rights holders.

The activities of a CMO can also include outreach and awareness-raising as necessary prerequisites for copyright to function in practice. CMOs may partner with the copyright office.

In many countries, CMOs have social and cultural support functions that are considered to be vital.

CMOs can also be involved in enforcement. They can assist in ensuring compliance with copyright laws, by initiating legal actions in their own name or assisting rights holders to pursue legal actions against unauthorized uses. Anti-piracy actions are usually carried out by industry bodies, such as the local branch of the phonographic industry or the publisher's association.



### 3.2 Benefits to different stakeholders

**In cases of mass uses, it would be burdensome, if not impossible, for individual creators to keep track of all the various uses of their works. It would be equally impossible for users to acquire licenses from individual rights holders throughout the world.**

In order to fully appreciate collective management, its benefits to different stakeholders need to be clearly spelled out and communicated in easily understandable terms.

#### **Benefits to rights holders**

Through the services of CMOs, creators and performers can concentrate on what they know best: creative activity, be it writing, painting or composing, singing or acting. To continue creative activity, it is necessary to guarantee financial benefit from the use of works to their creators. In many instances, CMOs play a decisive role in this chain.

In cases of mass uses, the individual exercise of rights would most likely be both cumbersome and costly, if at all possible. Economies of scale argue for collective management in such cases.

Without the services of CMOs, works would most probably be used without permission and the use would constitute a copyright infringement. In countries where copyright compliance is high, the alternative could be that works would remain unused. That would be equally counterproductive, as creators and other rights holders wish their works to reach their audience.

#### **Benefits to users**

The services of CMOs make it easy to comply with copyright legislation. Users can normally obtain the necessary copyright licenses from central sources, for both national and international works.

For instance, it would be difficult for a pharmaceutical company to ask for permissions every single time when a scientific article is copied for employees. In the same manner, it would be impossible for a radio station to acquire licenses for each individual work of music performed in their programs.

It is common in each field of collective management that tariffs and other conditions for using the works are negotiated between professional organizations. Thus, there is less need for each individual user to get involved in the negotiation process; they would instead rely on their representative associations or unions. In cases of

disagreements, there may be national dispute settlement mechanisms, such as Copyright Tribunals.

### **Benefits to legislators**

CMOs can adapt their operations to cover many new uses without necessitating legislative changes in each case. Practical solutions normally offer more rapid and viable answers to the challenges of technology, which is constantly evolving.

### **Benefits to society at large**

Creative industries contribute to the economic wealth and the social well-being of a nation. Besides economic aspects, knowledge and culture add value to human life. This may be in the form of education with the help of books and interactive CD-ROMs, or research with the help of scientific journals. It may even be in the form of entertainment through music, cinema, videos and DVDs.

In the globalizing world, it is important to foster national creativity and cultural diversity. It is in the interest of each nation that national creators can continue to work in their own countries. This presupposes that they can make a living by bringing their products and services to the market. The market needs to be healthy, without pirates and with properly functioning copyright management.

### **Benefits to the economy of countries**

Benefits to the economy of countries are perhaps the most evident. Creative industries represent on average 5.4% of the value added to the gross domestic product (GDP). Their contribution to national employment is even bigger, 5.9% on average. These industries grow more rapidly than the economy at large. Moreover, creators and artists are tax-payers like other citizens. In cases where pirates take the market share, everybody loses; except the illegal users of others' property.



### 3.3 Typical sectors of collective management

**Creative sectors where collective management is customarily applied have developed over time with technological advances. Today, instances of collective management are continually increasing. Also, new media and the Internet call for flexible licensing solutions and new forms of collective licensing have emerged.**

#### **Music and sound recordings**

Collective management is most widely used in the field of music. There are CMOs dealing with musical works in 121 countries (as of June 2012). These CMOs manage their members' performing right, that is, cases where music is performed publicly. They may also manage members' mechanical rights, that is, cases where music is recorded on a sound or audiovisual recording and copies are reproduced.

CMOs in the field of performers and phonogram producers' rights function either jointly for the two constituencies or with separate organizations for performers and phonogram producers. In the latter case, there is often some form of collaboration between the two, to facilitate relations with users.

#### **Reprography**

Reprography, that is, photocopying and some digital uses, is managed collectively in an increasing number of countries. Reproduction rights organizations (RROs) in most cases represent authors of literary, artistic and musical works as well as publishers in text- and image-based industries. There are various types of licensing models, based on national law. Licensing and/or revenue collection takes place in 75 countries (May 2012).

#### **Visual arts and photography**

In the field of visual arts and photography, management of artists' resale right is the most common area of collective management. Artists are entitled to a share of revenue once their works are resold in an auction. Reproductions and online usages can also belong to the management tasks of the CMOs.

### **Radio and television programs**

Cable retransmission of broadcast programs is an area that is *de facto* impossible to manage on an individual basis. This is a typical example of secondary use of audiovisual works. The main groups of rights holders in a broadcast program are:

- authors (for example, screenwriters and directors) and performers;
- producers; and
- Original broadcasters.

Various forms of coalitions exist in many countries to facilitate the rights clearance for cable operators. There are also other forms of secondary uses of radio and television programs, such as recording of radio and television programs for educational purposes.

### **Private copying remuneration**

In cases where national law provides for remuneration or compensation for private copying, a copyright payment is customarily added to the price of blank media and/or recording equipment. Importers or local manufacturers pay the fee, which is collected by a designated CMO. There may be many distributing CMOs, each based on their representation. Private copying remuneration schemes exist in relation to music and audiovisual works.

### **Dramatic works**

Licensing the use of dramatic and dramatico-musical works in theatres is subject to collective management in some countries. As there is an element of individual negotiation, this licensing often characterized as partial collective management.

### **New media**

The digital landscape, new media and the Internet bring new challenges to collective management and call for some adjustments, for instance in relation to territorially based rights. Consequences are described more in detail in chapter 8 and the various modules.





## CHAPTER 4

### ORGANIZATION AND GOVERNANCE OF CMOS

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**In today's knowledge-based society, legal access to material protected by copyright is crucial. The main task of a CMO is to provide for a link between rights holders and users and thus facilitate the exploitation of works.**

The legal status and organizational form of a CMO varies from country to country, depending on general legislation. Most CMOs are not-for-profit organizations set up and owned by rights holders.

The statutes and scope of operation of a CMO define the governance structure, the objective and operational tasks. When defining the scope of operation, the views of rights holders and needs of users form a point of departure. It is important to find answers to real market needs and to offer viable licensing solutions to users.

One of the key tasks at the outset is getting mandates from participating rights holders. A CMO can license such uses as they are mandated to grant. As trusted third parties, CMOs must manage the rights with integrity and honesty, securing transparency of activities vis-à-vis their constituencies and other stakeholders.

National repertoires can be acquired in the form of mandates received directly from rights holders or through their associations. Foreign repertoires are acquired through representation agreements with CMOs in other countries. The larger the repertoire of a CMO is, the better it can serve the users and grant licenses for all types of works that are exploited.

By providing a link between rights holders and users of copyrighted material, CMOs serve their constituencies – authors, performers, producers and publishers – and secure legal access for users. The role of the government is first and foremost to ensure solid protection in legislation and secondly to support collective management of rights by various means.

Legislation in many countries presupposes authorization from the relevant government authority (a copyright office) before the activities can start. The most crucial issues at the outset are whether the organization has sufficient representation of rights holders in its category and has a good capacity to manage rights. The law may also include provisions on supervision of CMO activities, such as annual reports and tariffs. The aim is in the main to verify the functioning of licensing, as well as the appropriateness of tariffs and dealings with users. In cases where CMOs are in a *de facto* or *de jure* monopoly position, competition legislation needs to be taken into account.

Internal control is in the hands of rights holders themselves. It is important that the organizations adhere to high standards of good governance. Rules and standards to ensure good governance have been established by different NGOs for their members.

## 4.1 Incorporation and legal form

**CMOs take many different legal forms depending on the legislation of the country. Most CMOs function as private, not-for-profit organizations.**

### Incorporation

Most CMOs are incorporated as private, not-for-profit organizations. They are private in that they are set up and run for rights holders. They are not-for-profit in that the remuneration they collect is not the money of the CMO, but money that they hold in trust for rights holders.

In some countries, statutory or semi-governmental CMOs have been established. In some instances, collective management is an integral part of the copyright office. This poses a delicate issue of balance.

Although CMOs are in general and overwhelmingly established in the private sector and managed and owned by rights holders, the state can play an important role in supporting the CMO. It would be difficult to set up a CMO in a developing country without the active support of the government. This should first and foremost take the form of providing an adequate legal framework, but it can also consist of promoting copyright and awareness of it. Even where government involvement goes beyond this, rights holders should play an active management role.

### Organizational form

The scope and organizational form of a CMO are major issues to tackle at the outset, followed by registration and approval by the competent authority, if required by the legislation.

Legal incorporation and registration are subject to the organizational form and legislation of the country. Provisions in general law apply in this respect.

The CMO may be formed, *inter alia*, as:

- an association;
- a limited liability company
- a foundation
- a partnership.



At the time of its incorporation, the CMO needs to consider such matters as:

- whether it will be not-for-profit – most CMOs are not-for-profit organizations;
- how the administrative expenses are to be met – usually costs are deducted from collected revenue before allocation and distribution to rights holders; and
- cost of membership, if any.

## 4.2 Statutes and scope of operation

**The statutes of a CMO define its governance structure, objectives and scope of operation. These fundamental issues are discussed at the outset of any operation.**

The statutes answer the following questions:

- the objective of the CMO;
- the rights managed by the CMO;
- membership qualification and fees, if any;
- governance structure; and
- statutory meetings.

### Scope of operation

When defining the scope of activity, the views of rights holders and needs of users form a point of departure. It is important to find answers to real market needs and to offer viable solutions to users. In particular, the requirements of the digital environment need to be taken fully into account, so that the CMO can grant meaningful licenses to users.

Examples of organizational structures:

- CMO for a given category of rights holders, such as musical works (mono-repertoire CMO);
- CMO for given category of related rights holders, such as performers or phonogram producers;
- Joint CMO for related rights, such as performers and phonogram producers;
- Coalitions of associations and CMOs for several groups of rights holders for a given right, such as retransmission right or reprography (“umbrella” CMO);

- CMO covering rights holders in several creative sectors (multipurpose CMO); and
- Regional initiatives covering a group of countries, customarily in small countries.

### 4.3 Mandates and membership issues

**A CMO may only license what it has received through mandates authorizing it to act on rights holders' behalf. Mandates from national rights holders are obtained either directly from rights holders or through their associations. Foreign mandates are acquired through representation agreements with CMOs in other countries.**

Sometimes there is a need to ensure that rights holders are aware of their rights before rights acquisition can effectively start. Awareness campaigns may be required to educate rights holders on the scope of their rights as provided by national copyright law. Good cooperation between the copyright office and the CMO is beneficial.

#### National mandates

There are various ways of acquiring mandates from rights holders. Rights holders determine the scope of the mandate. The decision on the mandate structure has a significant influence over the practical work of a CMO.

Basic alternatives for acquiring mandates from rights holders or their associations are:

- individual mandates from authors and other rights holders;
- mandates from rights holders' associations; or
- a combination of the two.

Where a CMO receives its mandate through associations, these associations must have proper mandates from their members in order to be able to transfer rights to the CMO.

#### Form and scope of mandate

Rights holders generally give to the CMO a proxy or authority to manage their rights for a given period of time on an exclusive or non-exclusive basis. Existing CMOs work both on the basis of exclusive and non-exclusive mandates. The majority of CMOs, in particular those dealing with musical works, have exclusive mandates.

In certain sectors of collective management, such as reprography, many CMOs function on the basis of non-exclusive mandates. This is also the case with digital



rights: for instance, international music publishers may give their mandate to several CMOs on a non-exclusive basis.

Normally, the authority also specifies whether the CMO is entitled to initiate legal action on its own behalf on the basis of the mandate. If it is not, a special proxy is needed for legal action.

### **Documentation over represented works**

An important element in a mandate is the rights holder's obligation to provide documentation regarding his works to the CMO. The way in which such information is to be provided is customarily standardized and many CMOs offer online functions to their members. Works documentation forms the basis for distributing collected remuneration to rights holders.

In case of legal action, it is important that the CMO has standing to represent its repertoire without the need to provide separate proof of each rights holder and his or her works.

### **Representation of foreign rights holders**

International mandates are commonly acquired by way of representation agreements with CMOs in other countries. These agreements may be based on the principles of reciprocal representation and national treatment. Reciprocal representation means that each CMO represents the other party's repertoire in its own country and issues licenses to use national and foreign repertoire to users in its country.

In the first stages of operation, it may be feasible to acquire tentative indications of mandates in the form of a Letter of Intent or Power of Attorney, before proper representation agreements have been negotiated. Such instruments indicate the will of a foreign CMO to enter into a representation agreement once operations have started. These indications can be instrumental in the approval process in countries where government authorization is required. These instruments have also proven to be useful in negotiations with users, wide repertoire being an asset.

A key element in representation agreement is a careful definition of the repertoire which forms the scope of the agreement. Since CMOs may have differences in their national representation, the repertoires of two contracting CMOs need not be the same but will, rather, reflect the national circumstances in which each CMO operates.

#### 4.4 Role of the government

**The role of the government varies from country to country, depending on legislation. Stipulations concerning external control may be included in copyright legislation or in separate legislation governing CMO activities.**

The most common requirement is that the CMO must be authorized by the relevant authority, such as the Ministry of Culture or a copyright office.

In many countries, there is a provision in the law that only one organization may manage the same group of rights holders or the same category of right. Especially if this is the case, the CMO must observe the requirements of local and regional competition law. However, the requirement to take competition law into account is a general prerequisite for the collective management of rights.

In other countries, more than one organization may be approved for the same right and/or group of rights holders. This situation poses many challenges to management of rights from the perspective of rights holders and users. Users can take undue advantage of this situation and refuse to take a license, blaming unclear representation of each CMO, or speculate on the tariff to be paid. Both acts are detrimental to rights holders. If many CMOs compete for rights holders in the same category, they may be tempted to compete with their administrative costs and as a consequence lower their standards of accuracy in distribution of remuneration.

Special legislation on collective management of copyright exists in some countries.

- The German Patent Office has responsibility for overseeing the operations of CMOs, based on a special law (1964) concerning the activities of collective management organizations. It also functions as an arbitration body in cases of disagreement concerning tariffs. The decisions of this arbitration body may, however, be taken to ordinary courts if parties are not satisfied with the decision.
- In Japan, the “Law on Management Business of Copyright and Neighboring Rights” has been in effect since October 1, 2001. The law introduced a registration system for those who engage in the business of copyright management, with the aim of securing a fair operation of such businesses, facilitating the exploitation of works.

WIPO has drafted guidelines for governments wishing to incorporate stipulations on CMOs into national law.



## 4.5 Settlement of disputes

**Disputes over tariffs and licensing conditions customarily arise between the representatives of users and CMOs. Special dispute settlement mechanisms exist in some countries.**

Some countries have established mechanisms whereby tariffs are set or approved by a competent authority. Mediation or arbitration procedures are among the tasks of some copyright offices. In many Common Law countries, copyright tribunals decide tariffs and licensing conditions in case of disagreement.

For example:

- The CMOs in Canada file their tariff proposals to the Copyright Board of Canada<sup>5</sup> for consideration. The Board may, *inter alia*, organize hearings on proposed tariffs. Confirmed tariffs are published in the official gazette.
- The Copyright Office of Zambia functions as an arbitrator in cases of disagreement and has final decision-making power.
- The arbitration tribunal of the German Patent Office functions as an arbitration body in cases of disputes concerning legal licenses. The decision may be deferred to ordinary courts.
- Under the UK law, licensees may refer a license or a licensing scheme to the Copyright Tribunal if they are dissatisfied. The Tribunal's decisions are binding on both parties, but may be appealed before higher courts on questions of law.
- In Australia, the Copyright Tribunal may determine the rate of payment for educational and government copying licenses in the event the RRO and the user fail to reach an agreement. The Government has established guidelines for the Tribunal to take into account if it is called upon to set fees.

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<sup>5</sup> [www.cb-cda.gc.ca](http://www.cb-cda.gc.ca).

## 4.6 Competition law aspects

**In many countries, CMOs hold a *de jure* or *de facto* monopoly and it is important to ensure that this monopoly is not abused in the marketplace.**

CMOs enjoy a *de facto* or *de jure* monopoly where only one organization can function for a certain category of rights holders or rights. Such a monopolistic situation avoids the disadvantages of a pluralistic system with many competing CMOs. However, in such case, rights holders and users can only work with one society. Hence, the provisions of competition law must be respected in order to prevent possible abuse of a dominant position. Until recently, a number of countries did not have such legislation; some even excluded collective management from the ambit of competition law. However, an increasing number of countries have now introduced it into their legislation and it may therefore be equally applicable to collective management.

Competition law has its basis in international law. The Berne Convention contains provisions which are interpreted to allow governments to take measures against abuse of monopoly positions. Other provisions in international law provide, *inter alia*, that appropriate measures may be taken to prevent abuse of intellectual property rights and to counter anticompetitive practices in contractual licenses.

At the national level, competition law generally contains provisions that enable action against abuse of a dominant position in the marketplace, for instance by applying different conditions in respect of transactions that are similar or in respect of outright refusal, without good reason, to grant licenses. The sanctions for breach of competition law may be quite serious. It is therefore important that collective management organizations perform their activities in a fair, transparent and non-discriminatory manner.

There is case law from the European Court of Justice that deal with three relations:

- relation between a CMO and its members;
- relation between a CMO and users; and
- relation between CMOs in different countries.





## 4.7 Internal control and statutory bodies

**Whereas external control may be exercised by the copyright office, internal control is in the hands of rights holders themselves. They select their representatives in the governing bodies and these representatives are accountable for the smooth running of the organization.**

CMOs are naturally subject to the legal requirements covering their company form, whether the law of associations, company law or an equivalent. Such legislation also governs the way rights holders can exercise control over their CMOs.

Rights holders participate and make decisions in a number of ways.

### General Meeting

Rights holders have normally the highest decision-making power in a CMO. Through participation and the right to vote in a General Meeting, rights holders make strategic decisions concerning the organization. They elect the Executive Organ and, in many cases, the Chair of the CMO.

### The Executive Organ

The Executive Organ, for instance a Board of Directors, is in charge of the general management and policy decisions of a CMO. In many CMOs, balanced representation of rights-holder categories is reflected by the number of representatives in the Executive Organ for each constituency. In some CMOs, the Chair may be elected on a rotating basis.

The strategic decisions of a CMO are the responsibility of its Executive Organ. Members of the Executive Organ are customarily elected by the rights holders at General Meetings of the organization. It is important to ensure that members of the Executive Organ follow standards of good governance.

The Executive Organ normally appoints the Chief Executive Officer, who has overall responsibility for operations.

### Chief Executive Officer

The recruitment of the Chief Executive Officer is an important step which affects the day-to-day business and the CMO's success. While there are no formal qualification criteria for such a post, an understanding of and experience in legal and economic affairs and an interest in creative work and/or cultural industries are valuable assets. Good political contacts and/or experience in lobbying are additional assets.

## 4.8 Good Governance standards

**Collective management organizations must be run in a professional manner, fulfilling the requirements of good governance, both in leadership and management. Some non-governmental organizations have defined standards of service that rights holders and users can expect when dealing with CMOs.**

It is in the interest of the rights holders to exercise internal and proactive control. Hence, standards of good governance are important. It is equally important that the organization uses tools to crystallize its vision, mission and values as well as strategic and operational goals. Only if there is a common understanding of the tasks and goals of the organization is it possible to determine whether the organization is on the right track.

The nature of the business of the CMO is service. Services are rendered to both rights holders and users. The core activity of the organization is rights management. CMOs provide a link between rights holders and users and in so doing, act as an intermediary, trustee or agent. Rights management is a business: CMOs handle other people's money and need to be run with utmost diligence.

### **Vision, mission and values**

What is the role of vision, mission and values?

- Vision answers the question of what are we striving for;
- Mission explains why we exist; and
- Values indicate what principles govern our work.

Vision is customarily linked to the value of creation and dissemination of works protected by copyright, such as “making music matter” or “enhancing local writing and publishing”.

Mission customarily includes elements of the dual role of the CMO, such as:

- providing lawful and easy access to users, and
- remunerating rights holders for the use of their works.

Values define what principles govern all decisions and against which standard the activities of the organization can be evaluated. Values may include expressions like openness, credibility, responsibility, efficiency and good ethical standards. Values must underpin all activities and be explained to all involved. Otherwise they remain mere words without meaning. In this case it may even be counterproductive to define values, as activities are evaluated on the basis of the values.



If, for instance, transparency is an expressed value, but the organization does not explain its tariff structure in an understandable manner to users of works, it is difficult to maintain that value. If efficiency is a value, but the organization does not distribute the collected remuneration regularly, it is difficult to maintain that value in contacts with rights holders.

Sometimes these standards are codified in the form of Codes of Conduct or Best Practices, which may apply to CMOs in a certain category or right or to all CMOs in a given country.

The Professional Rules of CISAC<sup>6</sup> is a set of principles laid down by CISAC to ensure that all members operate according to the best governance, administrative, financial and technical practices. Compliance with the Professional Rules is mandatory for CISAC members and is subject to periodic verification.

The Code of Conduct of IFRRO sets out standards against which the reproduction rights organizations (RROs) as specialized CMOs can evaluate their activities from time to time and ensure that the operations follow commonly agreed standards. The objective of the code is to develop confidence about and to promote best practices in the operations of RROs.

In general, these standards deal with the following issues:

- overarching objectives;
- governance and membership;
- transparency and confidentiality;
- licensing and collection;
- documentation and distribution; and
- compliance and conflicts.

The Australian Code of Conduct<sup>7</sup> is a good example of how a code of conduct can result from negotiations between all CMOs in a country. After explaining the background, scope and objective of the code, it covers the following issues:

- obligations of collecting societies (legal framework, membership, licensees, distribution of remuneration and license fees, collecting society expenses, governance and accountability, staff training, education and awareness);
- complaints and disputes; and
- publicity and reporting.

<sup>6</sup> The International Confederation of Societies of Authors and Composers, [www.cisac.org](http://www.cisac.org).

<sup>7</sup> [www.copyright.com.au](http://www.copyright.com.au) – what we do/corporate governance (Copyright Licensing Agency).

In Australia, a Code Reviewer is appointed to evaluate the functioning of CMOs in relation to the code on a yearly basis and to write a public report on the findings of this scrutiny. The report is published on the webpages of the relevant CMOs.

#### **4.8.1 Regional example from Europe**

In July 2012, the European Commission published a proposal for a directive on collective management of copyright and related rights.<sup>8</sup> The proposal aims to put in place an appropriate legal framework for the collective management of rights by providing for rule ensuring better governance and greater transparency of all CMOs. According to the proposal, collective rights management in all sectors needs to adapt in term of the service provided to members and users as regards efficiency, accuracy, transparency and accountability.

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<sup>8</sup> Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, 2012/0180 (COD).



## CHAPTER 5

### ESTABLISHING A NEW CMO

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**The success of a CMO depends on the understanding and perception of its stakeholders: rights holders, users and government. Consequently, when forming a CMO, it is important to focus on creating, building and maintaining confidence in the CMO and in the collective management of copyright and related rights.**

It is of paramount importance that legislation is sufficiently clear and provides a basis for operations. In cases where licensing cannot function effectively on an individual basis, collective management is a feasible solution.

Rights holders customarily take the initiative to establish a CMO in the country. In some countries, however, the authorities take a leading role at the outset. If this is the case, early contacts with the rights holders is a prerequisite.

It is important to direct early activities towards educating rights holders, both in groups and as individuals, about the benefits that flow from the formation of a CMO and the importance of their active involvement in its establishment. The case needs to be made clear and positive, but not overly optimistic and without a foothold in reality.

Preparation includes the setting up of a forum for discussions and decisions. A preparatory working body, such as a committee or a working group, should be established as soon as deliberations on collective licensing start. This body normally functions until the CMO has been established.

One of the tasks of this working body is to draft a feasibility study, which later on can be developed into a business plan. The feasibility study is a first market analysis. The analysis needs to examine two markets: that of the rights holders and that of the users. On the basis of a feasibility study, a preliminary idea about the size of the operation and its critical success factors and potential risks emerges.

As with any type of activity, a CMO must identify its core activities and structure them efficiently, according to the needs of local market and infrastructure. The scope and the organizational form of a CMO are major issues to tackle at the outset, followed by registration and government approval, if required by legislation.

The first stage in rights acquisition is to draft a mandate from national rights holders. The decision on the mandate structure has a significant influence over the practical work of a CMO.

For international mandates, representation agreements with foreign similar CMOs are needed. This normally presupposes liaising with the relevant international NGO and membership therein.

## 5.1 Involvement of rights holders

**Rights holders may not be clearly aware of their rights at the outset. Awareness-raising programs may be needed and the role of the government is important at this phase.**

A few rights holders normally get together and take the first steps towards the establishment of a CMO. These rights holders have come to the conclusion that they want to establish a CMO in their country in order to stop the unauthorized exploitation of their works which may have been taking place for a long time. Something needs to be done in order to stop this negative spiral and create better compliance with copyright law and respect for intellectual property. Alternatively, the initiative may emanate from the government. In this case, early involvement with rights holders is necessary.

The work normally starts with the building of relations with other rights holders and their associations or unions. It is important to plan for wide participation of rights holders from the outset and to incorporate as many groups of rights holders as possible into working together. Groups of potential rights holders may be organized differently; some of them may already be organized well while others may be poorly organized, while some may be in total disarray. There is a need to make rights holders aware of their rights.

Often, those individuals who have been working on the establishment of a CMO are well aware of the benefits, main aspects and reasons for collective management. They should convey this information to other groups of rights holders who are less familiar with the concept. Sound collaboration with the copyright office is often a good approach here. As well as the support from individual rights holders, it is important to obtain support from local associations. Support from these organizations vests the CMO with credibility in its early dealings with the government, with potential licensees and with potential rights holders.

In practice, the preparations include the establishment of a preparatory working body, be it called a committee or a working group. This body normally functions until the CMO has been established.



## 5.2 Feasibility study and seed funding

**A feasibility study is the initial tool for getting acquainted with the market. A CMO typically functions between two markets, that of rights holders and users. A good knowledge of both is necessary.**

As regards rights holders, it is important to know the approximate number of potential members, who they are and how they can be contacted. Sufficient representation is customarily required in the approval process. This is particularly important if the copyright law stipulates that only one CMO for each category of rights holders or right is allowed. The copyright office must know the structure of the rights holder market.

An analysis of the user market includes first of all the rights that the CMO can grant, based on mandates from participating rights holders. Secondly, what are the user groups that would need a license, based on the copyright law, how many users are there in each category and how are they organized. Using some comparative information over tariffs in countries with similar infrastructure, an estimation of possible revenue can be drawn. A feasibility study can later on be developed into a proper business plan.

Funding is an important element in the establishment of a new CMO and its first years of operation. Like any other business, a CMO needs start-up capital. Financial support can be obtained from several sources, such as those listed below.

- Rights holders can contribute either direct or non-pecuniary support; they can, for example, contribute by donating part of their income due, or turning them into a long-term loan.
- Banks can provide start-up capital; for this, it is important that the operation of a CMO is made understandable in business terms.
- In some countries, the government can offer financial or non-financial aid, such as rent-free or nominal-fee office premises.
- The copyright office can consider whether technical assistance from WIPO would be possible, for instance in the form of standard software for documentation and distribution purposes.
- International NGOs can provide with assistance and know-how, and sometimes also funding by way of loans or grants.
- Sister CMOs can offer know-how and practical assistance.
- Rights holders can organize fund-raising activities, such as concerts, and donate the income to their CMO.

If a CMO is set up properly, the loans required are relatively small and short-term, while benefits may be considerable and long-term. Once the CMO begins to issue licenses and starts to collect fees, it is on its way to become self-financing.

### 5.3 Statutes and governance

**The statutes of a CMO define the governance structure and the objectives of the organization. These, together with the mandates from rights holders, are the building blocks of a CMO.**

Any set of statutes should include the following:

- name, address and legal form of the organization;
- definition of the governing bodies – their roles, rights and obligations;
- composition of the governing bodies – elections and eligibility; and
- members' rights and duties.

The main task of a CMO is to grant licenses on behalf of its constituencies. Apart from licensing, many organizations have additional tasks, such as lobbying for an enabling environment which is a prerequisite for licensing. Awareness of and information about copyright is necessary for compliance and information sharing may thus be among the tasks listed in the statutes.

Defining the scope of a CMO is closely linked to the mandates it receives from participating rights holders. The set of rights defined in the mandate should correspond to the market needs so that the organization can offer viable licenses to potential users.

The most suitable organizational form depends on the legislation of the country. At the time of its incorporation, the organization should consider issues such as:

- whether or not to be a not-for-profit organization – as indicated earlier, most CMOs are not-for-profit;
- the recovery principle of administrative costs and whether there is a maximum share allowed – sometimes, this is stipulated by law; and
- cost of membership, if any.

A CMO functions as a trustee or an agent of rights holders. The highest decision making power in a CMO is normally vested in its rights holders. Through participation in General Meetings, rights holders make strategic decisions and elect the executive organ and in many cases the Chair of the CMO.





The executive organ, for instance the Board of Directors, is in charge of general direction and policy decisions. In some statutes, there are rules concerning the principle of rotation of the Chair. Some statutes also define how many terms members of the body can serve in the board. It is important to ensure both institutional memory and inclusion of new members.

The executive organ normally appoints the Chief Executive Officer, who has overall responsibility for operations of the CMO.

## 5.4 Rights acquisition for the national repertoire

**Mandates from national rights holders are the foundation of a CMO's operation, as any CMO may only license what it has received through mandates from participating rights holders.**

Rights holders generally give the CMO a proxy or authorization to manage their rights for a given period of time, on an exclusive or non-exclusive basis. The mandated rights should be clearly and unambiguously defined.

There may also be a provision as to whether the organization is authorized to initiate legal action on behalf of rights holders. In some countries, there is a provision in the copyright law to this effect.

The mandate of a CMO can be basically in two forms:

### Assignment

- an assignment means that the CMO becomes the legal owner of the right;
- assignment covers all past, present and future works during the period of the assignment; and
- a rights holder cannot re-assign the same rights to another society, person or company, nor can he or she license the users of this works himself or herself.

### Administration of the right

- The right itself remains with the right holder, who transfers the administration of his right to the CMO.

In some cases it is customary to acquire the rights not directly from individual rights holders, but through their associations. This is common in CMOs specialized in the field of reprography; they may acquire the rights by this approach. If this is the case, it is important to ensure that the associations are duly mandated by their members.

## 5.5 Foreign repertoire and international organizations

**International mandates are acquired by way of representation agreements with CMOs in other countries. These agreements are based on reciprocal representation and national treatment.**

In the first stages of operation, it may be feasible to acquire tentative indications of mandates in the form of a Letter of Intent or Power of Attorney, before proper agreements have been negotiated. Such instruments indicate the will of foreign CMOs to enter into representation agreements once operations have started.

Whereas representation agreements are negotiated among parties, the following principles might be useful in drafting and negotiating such agreements.

- National treatment: foreign rights holders must be treated in the same manner as national rights holders; the principle also applies to deduction of costs.
- Territory of application: the territory of operation of the CMO is normally the country in which it operates.
- Rights and works transferred.
- Indemnification.
- Non-assignability: any assignment of rights or obligations must have the consent of the party conveying the repertoire.
- Exercise and enforcement of rights: each CMO agrees to be active in exercising and enforcing the rights of the other CMOs' rights holders, to the same extent as its own rights holders' rights.
- Deductions for social and/or cultural purposes: such deductions are allowed within limits in each sector, therefore they must be negotiated between the concerned CMOs. In some private copying legislation, such deductions are defined by law.
- Exchange of information: general information materials would be sent to the contracting partner and, on request any other documents, subject to confidentiality.
- Accounting for distribution of remuneration: distribution should not be less frequent than once a year, supported with all relevant data for the distribution.

The implications of network environment in general and representation agreements in particular are described in Point 8.

Proof of membership in the relevant NGO is often a prerequisite for representation contracts, as individual CMOs trust that the operations of its potential foreign partner



have been studied carefully when scrutinizing the membership application before approval. This is one of the reasons why liaison with the relevant NGO at an early stage is important.

Various NGOs have drafted templates for guidance in negotiations of foreign agreements. These are explained in the relevant modules.

## CHAPTER 6

### TASKS OF A CMO

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**CMOs operate as facilitators between rights holders on the one hand and users on the other. Operations can be grouped into two categories: services to members and services to users.**

A general summary of a CMO's tasks includes:

- monitoring where, when and by whom works are being used;
- negotiating with users and their representatives;
- granting licenses in return for appropriate remuneration and usage conditions;
- collecting remuneration; and
- analyzing usage data and distributing remuneration to rights holders.

From the rights holders' perspective the following are important:

- confidence that the process is effective and more efficient than alternatives, such as individual licensing;
- confidence that they are receiving fair and equitable payment for use of their works;
- confidence that their economic and moral interests are respected; and
- confidence in the executive and governing organ.

The users as customers place importance on:

- confidence that they can use the works;
- convenience and security of the process; and
- trusting that their tariffs are reliably calculated.

Licensing agreements between the CMO and the user establish the licensee's main obligations: payment and usage reporting. Users' involvement is important in order for them to understand what they are paying for. The responsibility for monitoring the use of works also affords them an opportunity to evaluate when and where they use copyright-protected material.



The license agreement sets out the terms and conditions for the exploitation of works. There are two main methods of licensing:

- blanket licensing, which grants a user a preauthorization to exploit any works in the CMO's repertoire, normally based on a standardized set of conditions; and
- transactional licensing, which grants a user permission to use certain defined works, normally based on work-specific conditions.

Distribution of remuneration to the rights holders is a key function of any CMO. A basic principle of collective management of individual rights is that remuneration should be distributed to rights holders according to the actual use of their works. This may in some cases be impossible for practical and administrative reasons. In such cases, CMOs can base their distribution of remuneration on some form of statistically collected data.

## 6.1 Different forms of collective management

**In their traditional form, CMOs operate with uniform tariffs and conditions on behalf of all rights holders they represent. Rights are managed on a territorial basis and national treatment guarantees that foreign and national rights holders are treated equally. There are also other types of joint rights management options.**

### Collective management

Collective management is defined as follows:

“In a collective management system owners of rights authorize collective management organizations to manage their rights”.

The term collective management organization or CMO is used, reflecting the above definition. In the field of reprography, there are specialized CMOs called reproduction rights organizations (RROs). Their activities are described in more detail in Module 4.

Basic principles of collective management include national treatment, which is one of the basic requirements of international treaties on intellectual property, and territorial representation. Each CMO manages rights on a territorial basis, most often in a given country. New media and online uses pose challenges to this notion and their consequences are described in Chapter 8 and in the sector modules.

### **Collective management of remuneration rights**

In cases where only a remuneration right is granted instead of an exclusive right, the consent of rights holders is not needed, but they have a right to equitable remuneration. In these cases, the CMO collects the remuneration and distributes it to rights holders. An example of a right to remuneration can be performances of phonograms in broadcasting and other public performances. Holders of related rights have established CMOs to collect and distribute remuneration.

### **Partial collective management**

In the field of dramatic works and theatres, CMOs customarily have limited management tasks. They may negotiate framework contracts with theatres, but each performance requires an individual consent from the author/scriptwriter – and he or she normally negotiates remuneration as an individual. The CMO then collects the fee from the theatre and distributes it to the rights holder. “Partial collective management” is the term used for this type of management.

### **Rights clearance organizations**

Some rights holders authorize CMOs to manage their rights on the basis of individual tariffs and other conditions. In such cases, the CMOs perform the role of an agent and offer licenses through a central source. In the digital environment, licensees can check different conditions and buy their licenses online. This type of management is common among many RROs that offer individualized services to their rights holders. In the field of analogue copying, they customarily continue to apply traditional collective management methods with uniform tariffs and conditions.

### **New Licensing platforms**

New media and online uses have led to formation of new platforms where existing CMOs in the field of music partner with rights holders, customarily with music publishers. Two or more CMOs may have joint ventures that offer an aggregated repertoire a multi-territorial basis. In such a system, users of protected materials need to get a license from several platforms for a large and diversified catalogue of music.



## 6.2 Monitoring the use of works, including documentation of works

**Firstly, a CMO must have information over its participating rights holders. Secondly, a CMO must identify which works are used, as well as when, where and by whom. It is necessary to include reporting as a user obligation in the licensing agreement.**

Mandating rights holders have a duty to provide information about their works to the CMO. On the basis of such documentation, the CMO forms its repertoire, and this documentation forms the basis for the distribution of remuneration. Users report what works have been used and this usage data is matched with work documentation.

CMOs obtain relevant usage data in a variety of ways. In general, the following options are used:

- full reporting: the user provides the CMO with details of actual exploitation in each instance;
- partial reporting based on sampling: a subset of users report their uses over a given period of time; and
- statistical surveys: usage habits are measured at given intervals.

Whereas full reporting provides the optimal basis for distribution, it may be perceived as cumbersome by users and be quite costly for the CMO. However, digital technology can enable CMOs to use full reporting more extensively than before.

Many CMOs use some form of statistically obtained data and partial reporting in their distribution.

Behavioral studies may be important to understand the market and to learn more about customers. Such studies may be helpful in product development and provide valuable information for rights holders.

### 6.3 Negotiating with users or their representatives

**Negotiations normally take place between professional bodies: a CMO representing rights holders and an association or another grouping representing users.**

Individual negotiations customarily take place with major licensees, such as a public broadcaster for its use of music.

Whenever a representative of users exists, such as a branch association or union, it is efficient to have negotiations with them. Two scenarios exist in this regard:

- The representative body of users may be in a position to conclude an agreement on behalf of its members and pay the licensing fee.
- The representative body is only in a position to conclude a framework contract with the CMO and recommend to its members to conclude a direct contract with the CMO. Such a recommendation can be of great help in licensing, as users normally trust their representative bodies.

In practice, there is not much difference between the two cases, the most important issue being the existence of a representative association as the negotiating partner.

### 6.4 Licensing and tariffs

**Enormous amounts of copyright-protected works are used every year. To take only two examples: broadcasters play music for about 80% of their airtime, and universities and other educational establishments consume hundreds of millions of pages of protected works in their activities.**

#### Licensing

The very basis of a license agreement stems from mandates CMOs receive from rights holders, as CMOs can only license such uses as they are mandated to grant.

The license agreement specifies the scope of the license: that is, repertoire of the licensor, who is allowed to use the license, for what purposes, under which terms and conditions, and how the licensee reports usage.





What type of a license is in question?

- Blanket licensing (also called repertoire licensing or comprehensive licensing) grants a user permission to exploit any works in the CMO's repertoire within the limits of the agreement. This method is commonly used in collective management that covers large usage sectors.
- Transactional licensing (also called work-by-work licensing) grants a user a permission to use certain defined works. This method is often used in targeted areas, for instance in certain digital licensing areas.

The license agreement sets out the terms and conditions for permitted usage.

### **Tariffs**

The license agreement specifies on what basis remuneration is to be paid. Common tariff parameters include a percentage of revenue, price per user, price per entity of usage, etc.

For example, a commercial FM radio station may pay a percentage fee related to their advertising revenue for the use of musical works. The percentage can vary subject to the proportion of music to the total airtime.

The FM station's tariff for related rights holders may be priced per minute; the more music is played, the higher the remuneration. This per-minute tariff can be different depending on whether the station has nationwide coverage or a smaller coverage area.

In a university, the total amount of photocopies may be studied through statistical surveys. This information leads to an average amount of copies per student in one year. Multiplied by a price per page, the tariff is then based on how much the university pays per student.

## 6.5 Collecting remuneration

**Most users have a licensing agreement with the CMO and collection of revenue is specified in that agreement. Incidental users pay per event or transaction.**

As with all other licensing conditions, collection details are specified in a licensing agreement. Copyright remuneration can be invoiced quarterly, every half-year or at least once a year. Collection is closely linked to reporting obligations. If, for instance, a record producer reports produced records twice a year, the CMO obtains the basis for its collection from these reports and consequently invoices twice a year.

For stand-alone users, reporting of use may be a prerequisite for invoicing. In that case, the payment arrangements are specified in the permission that is given to the user.

## 6.6 Distributing remuneration

**Irrespective of the method of distribution, the goal is the same: to distribute license fees to those whose works are used. The aim is to maximize the distribution to rights holders and minimize the costs, while maintaining sufficient accuracy.**

Distribution of collected remuneration to the owners of rights is a key issue for a CMO. A basic principle of collective management of individual rights is that remuneration should be distributed to rights holders according to the actual use of their works. Thus, ideally, each rights holder would receive individual remuneration according to the actual use of his work in every instance.

However, for practical and administrative reasons, this may not be possible. Therefore, other solutions have been found. CMOs often base collection and distribution of remuneration on some form of statistically obtained data. Data is collected from a subset of users over a specific period of time.

In principle, two main options exist in distributing remuneration:

- title-specific distribution; and
- non-title specific distribution.



### **Title-specific distribution**

Distribution can be based on different underlying data, with the following main methods to achieve title-specific distribution:

- full reporting;
- partial reporting based on sampling; and
- objective availability (also called possibility to be used or distribution on probability).

Full reporting means that a user records details of every copyright work that is used. Full reporting is the ideal basis for distribution. Whereas the advantage is obvious, this method may be perceived as burdensome by the user and entail a lot of costs for the CMO. However, the development of digital technology means that more users than before can now move to full reporting.

In partial reporting, users report their exploitation during a certain period of time, or their usage is observed during a certain period of time. This method can also be called a sampling method, that is, distribution is based on a sample of actual usage instances. The subset is then generalized, with the help of statistical methods, to represent all usage instances.

Objective availability or possibility to be used: this method is based on the assumption that all material that exists on the market can be used and at some stage probably will be used. This method is therefore also called distribution on probability.

Where it is impossible or not feasible to collect information from the users, distribution can be based on the principle of objective availability. This distribution method is widely used for distributing revenue from private copying remuneration.

### **Non-title specific distribution**

Under this distribution method, remuneration is indirectly attributed to individual authors and publishers. The CMOs using this method customarily obtain their mandates through rights holders' associations and not directly from individual rights holders. The association then channels the revenue to their members and rights holders in their category.

In some countries and certain management areas, rights holders have opted for non-title specific distribution of remuneration. Reprography or photocopying is one example. Statistical surveys are used to collect generic, non-title specific information regarding the volume of copying in the type of material and category of publication, rather than identifying the specific publication, author and publisher. Data is collected

from a limited number of users covered by the agreement, for a limited period of time. Surveys are conducted at intervals, normally every 4 to 5 years.

In this method, an RRO distributes remuneration to its member organizations representing authors and publishers. It is generally left to the rights holders' associations to decide on the criteria of further distribution. Authors usually have grant schemes. Publishers may combine data on market share and pay the remuneration individually to publishers.

This method of distribution applies only to national rights holders. The share due to foreign rights holders can be calculated on the basis of survey results and the money is sent to foreign counterparts for distribution to their rights holders.

### **Shares between different rights holders**

One work has customarily several rights holders who may have participated in the creation of that work in different capacities. In case of a musical work, the shareholders can be a composer, a text-writer and a music publisher. In case of photocopying a published work, the shareholders can be the author of the literary, artistic and musical work (for printed sheet music) and the publisher.

Distribution rules of the CMO define how the remuneration allocated to one work is to be distributed among the shareholders of that work. Distribution principles are normally decided by the General Meeting as the highest decision making body of the CMO.

## **6.7 Cost recovery principles**

**Operational costs are deducted from total collection and the rest is distributed to rights holders. The operational principle is based on the notion that the collected remuneration is not the money of the CMO, hence the not-for-profit nature of the CMO.**

At the outset, the CMO needs to become self-financing so that its costs can be deducted from collected revenue, the bulk of which goes to the rights holders. In some countries, the amount of costs that can be deducted from total revenue is defined by the law or regulations pertaining to collective management. Where this is not the case, there are industry standards for defining maximum cost shares.

It is important to note that the development phase of a CMO has a bearing on costs. At the beginning of operations, there is barely any collection, only costs. Stipulating very limited cost shares may be counter-productive, as the operations never really develop with insufficient funding. Therefore, the first three to five first years are a critical stage for the establishment of a CMO and could therefore be treated



differently. The maximum amount of costs is defined in some legislation as between 20 and 30%; in some countries, even lower. It may also depend on the type of rights administered.

What other deductions may be permissible from gross revenue before distribution to rights holders? A deduction for social/and or cultural purposes can be made. It presupposes that two CMOs have agreed in the representation agreement that such a deduction is possible. The deduction must be made from money due to both national and foreign rights holders. In some countries, the law prescribes that a certain percentage is allocated for cultural purposes, in particular from remuneration for private copying.

Some CMOs apply this deduction for both social and cultural purposes, some only to one of these. There is often a special body, such as a committee, in the CMO that is authorized to decide how money is used for social and cultural purposes.

## CHAPTER 7

### LEGISLATIVE FRAMEWORK

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**National copyright legislation must be in harmony with commonly accepted international and regional norms. This chapter discusses the legislative framework in which CMOs operate.**

The main treaty obligations of a country are prescribed in the Berne Convention, the Rome Convention,<sup>9</sup> the TRIPS Agreement,<sup>10</sup> the WIPO Copyright Treaty (WCT),<sup>11</sup> the WIPO Performances and Phonograms Treaty (WPPT)<sup>12</sup> and the Beijing Treaty on Audiovisual Performances (BTAP).<sup>13</sup> There are no direct provisions governing collective management in these international conventions; the enjoyment and exercise of copyright and related rights are left to national legislation.

The starting point in the conventions is a set of exclusive rights. The author of a work has a right to decide whether to authorize or prohibit exploitation of his works. Rights may be transferred or assigned. The rights holder may wish to exercise the rights himself or herself in each and every circumstance or he or she can decide to authorize another person, such as a CMO, to exercise his rights in certain or all cases.

There is a clear link between legislation and management. In case of exclusive rights, the activities of a CMO are based on voluntary mandates from participating rights holders. Where rights holders only have a right to equitable remuneration, the consent to use is given in the law, but the services of CMOs are needed to collect and distribute the remuneration.

Different legislative alternatives lead to different scenarios for both rights holders and users and it is important to understand the consequences of various options when a country adopts its legislation.

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<sup>9</sup> The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) (1961).

<sup>10</sup> Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPS Agreement) (1994).

<sup>11</sup> The WIPO Copyright Treaty (WCT) (1996).

<sup>12</sup> WIPO Performances and Phonograms Treaty (WPPT) (1996).

<sup>13</sup> Beijing Treaty on Audiovisual Performances (BTAP) (2012).



## 7.1 Treaty obligations on exercise and management of rights

**The foundation of modern copyright law is the Berne Convention. For related rights, the Rome Convention is the most central convention. The two new WIPO Treaties of 1996, also called Internet Treaties, include important provisions for the Internet environment. The Beijing Treaty on Audiovisual Performances of 2012 complements the set of Internet treaties.**

The conventions lay down the minimum protection that a country must grant through national law. They also include provisions on exceptions to and limitations of exclusive rights that are permissible in the national law. The rights and exceptions/limitations lay down the foundation of rights management.

National treatment is one of the basic principles of collective management, and based on the provisions in international conventions, this means that foreign rights holders cannot be treated any less favorably than national ones.

### Regional agreements

At the regional level, for instance in the European Union, directives include stipulations on the collective management of rights. This is also the case in the Andean Community, a sub-regional organization bringing together Bolivia, Colombia, Ecuador and Peru.

#### 7.1.1 Directives of the European Community on copyright

Directives of the European Community on copyright (1991-2001) include provisions on collective management of rights. In one case – cable retransmission, collective management is made obligatory.

The European Community has seven directives concerning copyright and one concerning enforcement of rights. The scope of the copyright-specific directives is the following:

- computer programs (1991)<sup>14</sup>
- rental and lending and certain related rights (1992)<sup>15</sup>

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<sup>14</sup> Council Directive of 14 May 1991 on the legal protection of computer programs (91/259/EEC).

<sup>15</sup> Council Directive of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property (92/100/EEC).

- satellite and cable (1993)<sup>16</sup>
- term of protection (1993),<sup>17</sup> (2006),<sup>18</sup> (2011)<sup>19</sup>
- databases (1996)<sup>20</sup>
- information society (2001)<sup>21</sup>
- resale right (*droit de suite*) (2001)<sup>22</sup>

There are other European Union directives that are important for creative industries and have a bearing on rights management, such as the AV Media Services Directive of 2010.<sup>23</sup>

Four of the above directives include provisions concerning management of rights. A summary is provided below.

### Rental and lending

- Article 4 introduces an unwaivable right to equitable remuneration for rental of works to authors and performers even where the right has been assigned or transferred to the phonogram or film producer.
- Member States may regulate whether and to what extent management of the right to equitable remuneration is subject to collective management (Art. 4.4).
- Public lending rights guarantee that at least authors receive remuneration for lending.
- Member States are free to determine this remuneration taking into account their cultural promotion activities.

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<sup>16</sup> Council Directive of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyrights applicable to satellite broadcasting and cable retransmission (93/83/EEC).

<sup>17</sup> Council Directive of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (93/98/EEC).

<sup>18</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

<sup>19</sup> Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

<sup>20</sup> Directive of the European Parliament and of the Council on 11 March 1996 on the legal protection of databases (96/9/EC).

<sup>21</sup> Directive of the European Parliament and of the Council of 22 May on the harmonization of certain aspects of copyright and related rights in the information society (2001/29/EC).

<sup>22</sup> Directive of the European Parliament and of the Council of 27 September 1991 on the resale right for the benefit of the author of an original work of art (2001/84/EC).

<sup>23</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version).



### **Satellite and cable**

- Retransmission in cable networks is subject to obligatory collective management of exclusive rights (Art. 9).
- Obligatory collective management does not apply to a broadcasting organization in respect of its own transmission (Art. 10), so broadcasters can exercise their rights individually.

### **Resale right**

- Member States may provide for compulsory or optional collective management of the resale royalty (Art. 6.2).

### **Information society**

- Exceptions/limitations are allowed in cases listed in the directive, but three of them are only allowed on condition of fair compensation, and these cases are: reprography, private copying and reproductions of broadcasts by social institutions.
- Collective management of this fair compensation is a *de facto* standard as this compensation cannot be collected on an individual basis.

### **7.1.2 Andean Community legislation on CMOs**

The Andean Community<sup>24</sup> is a sub-regional organization founded by the Cartagena Agreement, with an international legal status and its own bodies and institutions. Its members are Bolivia, Colombia, Ecuador and Peru.

Decision 315 of 1993 of the Andean Community sets out basic rules governing intellectual property rights to which the member States must adhere. The decision also deals with collective management, subjecting CMOs in all member states to the supervision of the respective national copyright offices (Art. 43) and, while making affiliation to them in principle voluntary, it also affords member States the option of providing otherwise in national laws (Art. 44). It further contains a set of mandatory rules for member States to impose on their national CMOs (Art. 45), non-compliance with which could lead to the revocation of the authorization to operate as a CMO (Art. 46) and further sanctions (Art. 47).

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<sup>24</sup> [www.comunidadandina.org](http://www.comunidadandina.org).

## 7.2 Different legislative alternatives and their consequences

**The establishment of a CMO will provide an important support mechanism for national copyright legislation, increasing the earnings of national rights holders and thereby encouraging and supporting their creative input and investment.**

The main operational systems of collective management and their subcategories are:

- voluntary collective management
- collective management with legislative support
  - extended collective license
  - legal presumption
  - obligatory collective management
- non-voluntary collective management
  - non-voluntary license
  - private copying remuneration

The main difference lies in the nature of rights. In the case of an exclusive right, licensing is based on voluntary mandates, either in total or for the majority of rights holders. It is possible to prohibit the use of protected works. Licensing is an essential element of collective management.

In the cases of a mere right to remuneration, the essence of a non-voluntary license, exploitation takes place without the consent of rights holders, but they have a right to equitable remuneration. Collective management is needed to collect the remuneration and to distribute it to rights holders.

Experience shows that the various operational systems can bear fruit. The question is thus to analyze which system best suits the infrastructure of the country, and is in line with its legal, political, economic and social realities as well as the international obligations of the country.

Finally, if the law provides for free usage, no management is needed. Free usage may be construed as fair use/fair dealing provisions, as in many common law countries, or as an exception/limitation to the rights, as in many civil law countries. Exploitation in such instances is permitted by law without the consent of rights holders and without remuneration to them. Vast and vaguely defined free usage can be a real hurdle and make collective management impossible.

### 7.3 Voluntary collective management

**In voluntary collective management, a CMO issues licenses to use protected material on behalf of those rights holders who have given it a mandate to act on their behalf.**

Voluntary collective management is based on a set of exclusive rights provided in the copyright legislation, such as a right of reproduction or a right of communication to the public. Rights holders can voluntarily decide to use the services of collective management and mandate a CMO to look after their rights.

In voluntary collective management, mandates from rights holders play a major role. CMOs obtain licensing authority from mandates given by national rights holders, and the international repertoire through representation agreements with CMOs in other countries. These agreements are normally based on the principle of reciprocal representation.

In voluntary collective management, a CMO negotiates licenses on behalf of the rights holders it represents. Consequently, users can only obtain a license from the CMO for the represented rights holders. They would have to approach all other rights holders directly. Users are, however, normally interested in obtaining clearance for all works in a given category.

A CMO may consider offering an indemnity clause in the license contract. Under this clause, the CMO would agree to financially cover all claims made against the user by any rights holder in a given category, whether or not the rights holder is a member of the CMO.

Sometimes rights holders decide to offer a set of different copyright licenses from one central source, a “one-stop-shop”. This kind of collaboration may be triggered by the rights holders’ willingness to offer easily accessible licenses to users. Alternatively, national legislation or regulation may presume that certain rights are licensed jointly. For example, a CMO presenting musical works may also be prescribed to give a license on behalf of related rights holders and collect joint remuneration from users. In such a scenario, distribution can take place through specialized CMOs.

#### 7.3.1 Regional example from the Caribbean: Jamaica

There are countries where legislation clearly encourages rights holders to establish a CMO. For instance, the Jamaica Copyright Act of 1993 allows for certain limitations and exceptions to the right of reproduction where voluntary licensing is not readily

available. After the establishment of the Jamaican Copyright Licensing Agency (JAMCOPY)<sup>25</sup> such copying became subject to a license.

## 7.4 Collective management based on legislative support

**In some countries, licensing of exclusive rights is supported by legislation. The underlying idea is to eliminate the challenge of non-represented rights holders.**

In some countries, legislation includes special provisions that support collective management and deal with the challenge of non-represented rights holders while maintaining an exclusive right as the point of departure. Licenses are negotiated freely between the CMO and the user and rights holders can prohibit exploitation. Three such legislative support mechanisms are:

- extended collective licenses;
- legal presumption; and
- obligatory collective management.

Since no collective management organization can represent all rights holders in its own country, let alone in all countries of the world, legislative support mechanisms cover the situation of non-represented rights holders.

### **Extended collective license**

It is important that licensing negotiations take place on a voluntary basis and there is a possibility of either authorizing or prohibiting the use of works. This is the very nature of exclusive rights. However, users may have a legitimate interest in securing their situation vis-à-vis rights holders who are not represented by the organization.

In the early 1960s, the Nordic countries adopted a legislative solution called the extended collective license (ECL). Under these laws, agreements between users and organizations representing a substantial number of rights holders in a given category of works will be extended by virtue of the law to cover all rights holders in the same category (the extension effect). This includes those rights holders that have not mandated the CMO. The system is best suited to countries where rights holders are well organized, as is the case in Nordic countries.

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<sup>25</sup> The Jamaican Copyright Licensing Agency (JAMCOPY), Jamaica, [www.jamcopy.com](http://www.jamcopy.com).



Characteristics of an extended collective license are:

- the CMO and the user conclude an agreement on the basis of free negotiations;
- the CMO must be the representative for the category of works under the license;
- the agreement is, by law, made binding on non-represented rights holders;
- the user may legally use all materials, without the possibility of receiving individual claims from outsiders or having to face criminal sanctions;
- non-represented rights holders have a right to individual remuneration on the basis of the law; and
- in most cases, non-represented rights holders may prohibit the use of their works (opt-out).

Originating in the Nordic countries and broadcasting rights, this legal technique has been extended to cover other mass-use situations, such as reprography and cable retransmission. It is now in force, or under consideration, in a number of other countries.

### **Legal presumption**

Under legal presumption, the law presumes that the CMO represents all rights holders. The effects of legal presumption are much the same as those of an extended collective license.

### **Obligatory collective management**

Management is based on an exclusive right, but in cases of obligatory collective management, rights holders do not have the choice of granting permissions on an individual basis. All claims must be made through a CMO.

#### **7.4.1 Regional example from Africa: Zimbabwe**

Legal presumption is included in the copyright law of Zimbabwe. In September 2000, the Parliament of Zimbabwe passed the new Copyright and Neighboring Rights Bill. Paragraph 125 of the law includes a presumption regarding registered CMOs. However, it took another four years for the new law to take effect. Regulations were passed in late 2006.

### 7.4.2 Regional example from Europe: France

In 1995, legislation in France introduced the concept of obligatory collective management in the area of reprographic reproduction rights. The law transfers the author's exclusive right to license such reproduction rights to a CMO, which must be approved by the Ministry of Culture. The terms and conditions of the licenses are not determined by the law but agreed by rights holders and negotiated with users through the approved CMO.

The approved CMOs represent all rights holders by virtue of law and are alone entitled to grant reproduction licenses to users for all published works. This safeguards the position of users, as an individual rights holder cannot make claims against them.

## 7.5 Non-voluntary collective management

**The license to copy is given by law and consequently no consent from rights holders is required. They have, however, a right to equitable remuneration, which is collected by a CMO. Private copying remuneration is one form of non-voluntary collective management.**

There are different ways to generate remuneration based on non-voluntary licenses. Two of these ways are non-voluntary licenses and private copying remuneration schemes.

### Non-voluntary licenses

Under a non-voluntary license, the remuneration may be a usage fee which right holders and users can negotiate (compulsory license), or the remuneration may be fixed by law (statutory license). Both statutory and compulsory licenses fall under the broader term of non-voluntary licenses.

### Private copying remuneration

The laws of most countries include an exception/limitation concerning private copying. In many cases, the amount of private copies exceeds what is considered fair and legitimate use of works without compensating rights holders. For this reason, many countries have introduced special remuneration mechanisms to compensate rights holders for large amounts of private copying. These schemes include remuneration for private copying.

A small copyright fee is added to the price of blank carriers and/or copying equipment. Producers, importers and retailers of equipment are liable for paying the fees to the CMO, which distributes collected revenue to rights holders.



### 7.5.1 European Union legislation

The Information Society Directive of 2001 deals with reproduction right and possible exceptions and limitations. A new concept of fair compensation was introduced in the directive.

Article 5 of the directive includes a list of possible exceptions/limitations that Member States may include in national law. Except for one,<sup>26</sup> they are all optional and it is left to Member States to consider whether and in which form to include them in national legislation.

As to the right of reproduction and reprography, the relevant paragraph (Art. 5.2 (a)) states that Members States may provide for exceptions or limitations:

*“in respect of reproduction on paper or any similar medium, effected by the use of any kind of photographic technique or some other process having similar effects, with the exception of sheet music, provided that rightholders receive fair compensation”.*<sup>1</sup>

As to private copying, the relevant paragraph (Art. 5.2 (b)) states that Members States may provide for exceptions or limitations:

*“in respect of reproduction by any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial. on condition that the rights holders receive fair compensation which takes into account of the application or non-application of technological protection measures [...]”*

The new concept of fair compensation is a prerequisite in the following three cases of exceptions and limitations:

- reprography;
- private copying; and
- reproductions of broadcasts made by social institutions.

Preamble 35 of the Directive offers guidelines for national legislators, stating: *“In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their works [emphasis added].”*

The Directive leaves the determination of the form, detailed arrangements and the level of such fair compensation to Member States. This is a minimum requirement and national legislation may provide for an exclusive right of reproduction and/or stipulations concerning management of rights. But what is important is that legislation must as a minimum secure fair compensation to rights holders for private copying in case of an exception/limitation.

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<sup>26</sup> Article 5.(1) on certain temporary acts on reproduction.

## CHAPTER 8

### MANAGEMENT OF RIGHTS IN THE DIGITAL ENVIRONMENT

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**Whereas traditional forms of collective management are territorially based, new media is multi-territorial or global in nature. Management of rights in the Internet environment requires up-to-date legislation, including efficient enforcement mechanisms. The identification and protection of content in digital form are important in the management of rights. Collective management is undergoing some adjustments.**

International legislation was brought to the Internet era in 1996 by the adoption of two new international treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The treaties are also called “Internet Treaties”. A new treaty covering audiovisual performances, called the Beijing Treaty on Audiovisual Performances (BTAP), was adopted in 2012.

These WIPO Treaties do not include provisions for enforcement in the digital environment. The role of Internet service providers (ISPs) is central, as ISPs provide connections, thus forming the digital marketplace. Since the Internet is an effective ordering channel for most commerce, works protected by copyright can be digitized and delivered through the Internet. Without effective enforcement, e-commerce involving copyright protected works is vulnerable to theft.

Different creative sectors operate in different markets:

- entertainment products and services, such as music and audiovisual content, customarily operate in the business-to-consumer (B2C) market; and
- knowledge-based products and services operate to a large extent in the business-to-business (B2B) market.

Licensing mechanisms and the use of technological measures may be different in different markets.

It has been questioned whether CMOs will have a role in the digital environment and if they have, what that role would be. The time when many believed that technology will solve all issues relating to licensing and that consequently there would be no or less need for collective management, seems to be over. The digital environment entails a real mass use situation for protected works and without effective rights management there would be less legal alternatives. CMOs need, however, to evolve and adjust their activities to serve in the new media landscape.

One of the major issues concerns easily available information of represented repertoire. Rights holders may mandate their works for online uses to different CMOs. As a consequence, some CMOs may represent a substantial aggregated





repertoire that they can offer to licensees. Users of copyrighted works need to know from where they can get licenses for works they intend to use.

## 8.1 Legislative framework

**The new WIPO treaties (WCT, WPPT and BTAP) clarify the main exclusive rights in the network environment and introduce two new elements: rights management information and technological protection measures.**

The treaties affirm and clarify the main exclusive rights that are important in the network environment: the right of reproduction and the right of communication to the public, including the right of making available to the public. For copyright works, the right of communication to the public covers transmission over a network. Countries ratifying the treaties are free to call this right differently in their national law, as long as it is construed as an exclusive right. Whereas the majority of countries classify the right under some of the existing concepts, a few have introduced the transmission right as an exclusive new right.

Provisions governing rights management information (RMI) and technological protection measures (TPM) are the real novelty of the WIPO treaties. These are necessary because of the nature of material in digital form, meaning that everything is in binary code consisting of zeroes and ones.

In order to know what work is in question and who the rights holders are, rights management information (RMI) can be embedded in the digital file. This information may be a digital number that leads to additional information in databases supporting the numbering system. Rights holders are free to decide whether to use RMI, but if they have merged such information into the files, unauthorized removal constitutes an infringement. RMI is extremely important for CMOs as it forms the basis for tracking usage and distributing collected revenue to rights holders.

The underlying idea of a technological protection measure is to prevent unauthorized users from using works. There are two main types of TPMs:

- access control; and
- copy control.

Access control can take place by storing material in databases with an access key, such as a password. Encryption is another form of access control: material is converted into such a form that enjoyment is impossible without a decryption key. A copy control system usually limits the number of authorized copied that can be made from the acquired file. - It is up to the rights holders to decide if they want to protect their works by a TPM, but if such measure is used, breaking the measure constitutes an infringement.

CMOs do not decide the business model that rights holders decide to use, neither whether they use TPMs in the delivery of content. CMOs are there to license all kinds of uses on behalf of their members and thus monetize all relevant usages also in the digital environment.

## 8.2 Enforcement of rights in the Internet environment

**It is important for countries that bring their legislation up to date with the digital environment to decide an appropriate enforcement mechanism. Governments have an important role to play in this regard.**

The question is when and under which conditions an Internet service provider (ISP) can be held liable or co-labile for copyright violations committed by the users of its services.

The WIPO Treaties state that the mere provision of physical facilities for enabling or making communication does not in itself amount to communication within the meaning of the WCT or the Berne Convention.<sup>27</sup>

A number of national solutions exist and these solutions could be regarded as options for countries considering the matter. Some of the early ones come from the United States of America and from the European Union:

- Section 512 of the United States Digital Millennium Copyright Act (DMCA); and
- Articles 12-15 of the Directive on Electronic Commerce of the European Union (2000/31/EC).

In recent years, more countries have introduced provisions on enforcement and ISP liability in their national laws. The main models can be summarized as follows.

- Graduated response leading to suspension of accounts with repeated infringements (also called the “3-strikes law”). While details differ, this model is currently in force in France, New Zealand, South Korea, Taiwan and the United Kingdom, among others, and under preparation in some countries.
- As infringers can hide behind anonymous IP-addresses, an important issue relates to the ISP’s obligation to reveal information concerning the entity of an infringer to rights holders so that they can take the matter to court. The IPRED<sup>28</sup> Law of Sweden from 2009 is an example of this model.

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<sup>27</sup> Agreed Statement concerning Article 8 of the WCT.

<sup>28</sup> Intellectual Property Rights Enforcement Directive (IPRED), 2009.



Also, in some countries, industry agreements, often codified in a Memorandum of Understanding (MoU), govern or complement legislative provisions. This is the case in the United States, for example.

WIPO is currently making a comparative analysis of national approaches to ISP liability. The role and responsibility of the Internet intermediaries in the field of copyright is one of the key issues in the digital environment.

Whereas this issue of ISP liability is outside the scope of this program, it is important to note that without an effective enforcement mechanism there is little or no room for management. Legal offers cannot compete with unauthorized uses as they have no level playing field: How does one compete with free?

### 8.3 Markets

**Various creative sectors operate in different markets, leading to different licensing patterns and the use of technological protection measures.**

#### **The business-to-consumer market**

Entertainment products and services, such as music and audiovisual content, customarily operate on business-to-consumer (B2C) market.

For instance, a telecoms operator or content provider of music acquires licenses (both copyright and related rights) from music rights holders or their CMOs. They can run a service offering music for downloading and streaming to end consumers. This is a typical consumer market and the delivery of music files may be technologically protected. The term “digital rights management (DRM) systems” is used for complete trading systems that facilitate consumer trade. DRM systems customarily include identification numbers, technological protection and a set of usage rules stating who is authorized to use the file, for how long, on what devices, etc. These rules are coded to the file before sending it to the consumer.

The use of DRM systems has attracted some negative attention, as some usage rules were defined very narrowly at the outset. It is important to note that DRM technology as such is neutral and currently usage rules are more liberal. From a consumer’s perspective, the ultimate desire is to have access to protected material at anytime, anywhere and through any device. This has challenged rights holders and CMOs representing them as they have needed to develop new and attractive business models and new licensing schemes to satisfy consumer demand.

### The business-to-business market

Knowledge-based products and services operate to a large extent in the business-to-business (B2B) market. For instance, a scientific journal publisher may authorize a university library to include their works in a database and offer services to students. The first relationship that exists between the publisher and the university library is trust-based and no technological protection measure is used in the delivery of the file. The agreement may further stipulate that access of the material to students is to be password-protected. It is thus the university's obligation to install access control by using passwords, even though access to student is in principle free of charge.

## 8.4 Collective management of rights in the digital environment

**The services of CMOs will also be necessary in the new media landscape. The use of copyright-protected material is wider than ever before and, without effective management of rights, the very foundation of creativity and cultural industries is in danger.**

However, CMOs need to evolve and adjust to technological advances and consumer needs. Some relevant questions to ask about the management of rights in the digital era are:

- Who has the licensing authority in various scenarios: rights holders individually or CMOs as their representatives?
- To which CMO do rights holders give their digital mandates and repertoire?
- How to offer multi-territorial licenses to users?
- How to distribute the remuneration rights holders?

New forms of collective management organizations can operate side-by-side with traditional collective management. So-called offline uses, meaning uses in the analogue environment, are customarily subject to collective management in its traditional form. In the digital environment, more flexibility can be offered to rights holders, meaning, for instance, differentiated prices and licensing conditions.

In licensing online uses of musical works, new licensing platforms have emerged, in particular within the European Union. Developments have been rapid after the EU Recommendation of 2005<sup>29</sup> which affected two important relations of CMOs. Firstly individual rights holders can choose their preferred CMO for online forms of exploitation. This has led to competition between CMOs for rights holders. Secondly,

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<sup>29</sup> Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC).



CMOs need to offer multi-territorial licenses to users within the European Economic Area.

In 2012, the European Commission published a proposal for a directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market.<sup>30</sup> The proposal emphasizes the need for clarity in information regarding the represented repertoire. It is assumed that not all CMOs in the internal market will be in a position to fulfill the requirements and the proposal fosters voluntary repertoire aggregation and licensing of rights through multi-territorial licensing infrastructures. The proposed directive only concerns the online licensing of musical works.

To conclude, there is no one solution for all creative sectors, which is natural as collective management plays different roles in the various industries. Developments and current scenarios are discussed sector by sector in Modules 2 to 6.

One thing seems clear: the search for an optimal solution is an on-going one. Learning by doing and evolution, rather than revolution, is taking place.

A Chinese proverb says: Even to the highest mountain, one step at a time is taken.

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<sup>30</sup> 2012/0180 (COD), 11.7.2012.

## 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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