

COLLECTIVE MANAGEMENT OF COPYRIGHT AND
NEIGHBOURING RIGHTS IN CANADA:
AN INTERNATIONAL PERSPECTIVE

REPORT PREPARED FOR
THE DEPARTMENT OF CANADIAN HERITAGE

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INTRODUCTION

It is a generally held view that copyright in civil law countries is a child of the French Revolution and should be considered an inalienable right of the author, a human right in other words. In fact, it is enshrined in the Universal Declaration of Human Rights of 1948¹. Granted, in several cases the economic component of the right² is transferred to, *e.g.*, a publisher or a producer, but it remains, at source, a right of the author, the creator of the protected work (or object of a related right). By contrast, one often hears that, in common law jurisdictions, copyright is essentially a publisher's monopoly that was extended over the years to cover also authors³.

¹. Article 27(2) reads: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Adopted and proclaimed by U.N. General Assembly resolution 217 A (III) of 10 December 1948.

². The other component is the "moral right".

³. In fact, the *Statute of Anne* of 1710, the first modern copyright law, protected both authors and publishers/booksellers.

Historically, there is some basis for these assertions, as indeed copyright law in the UK originated as publishing monopolies accorded to the Stationers' Company, while in France, clearly the human right (author-centred) approach has dominated since the late 18th century. However, civil law jurisdictions have had to deal with realities of commerce, such as the decision made in the mid 1980s to protect databases and computer programs (that often have no identifiable human author) by copyright.⁴ Conversely, in common law jurisdictions the importance of the author as the originator or *sine qua non* of literary and artistic creation is being progressively recognized. One of the visible signs of this shift is the insistence in recent high-profile court cases on the need for "originality" to award copyright creation, a more "human" test than the previous criterion, which only required evidence of some "skill and labour"⁵.

This shift was first signalled in the United States in a decision by the US Supreme Court denying copyright protection to a telephone directory, in spite of the enormous number of hours of work and research ("skill and labour") required to amass the necessary data⁶. A similar conclusion was reached by the Federal Court of Appeal in this country, in a decision in which the traditional line of UK cases was discussed in great detail⁷. In fact, courts in the UK now require that the skill and labour be "original"⁸ to satisfy the copyright requirement, owing perhaps in part to the harmonization of copyright within the European Union through the adoption of so-called "directives" that EU member States (including the UK) must internalize in their domestic copyright legislation. Only in Australia is the traditional UK criterion still clearly applied: the Federal Court, in a lengthy and interesting decision⁹, refused to follow *Feist* and *Tele-*

⁴. Now an international rule contained in Article 10 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (known as "TRIPS") of 1994, which is administered by the World Trade Organization.

⁵. See *University of London Press Limited v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601 (UK Chancery Div.).

⁶. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 506 U.S. 984 (1992).

⁷. *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 C.F. 22 (Federal Court of Appeal).

⁸. *Newspaper Licensing Agency Ltd v. Marks & Spencer plc*, [2001] UKHL 38.

⁹. *Telstra Corporation Limited v. Desktop Marketing Systems Pty Ltd.*, [2001] FCA 612.

Direct and considered itself bound by the traditional line of UK cases, including the *University of London Press* case.

The central role of authors in copyright policy is nothing new in Canada. In fact, Canadian courts have recognized the principle several times. For example, in a recent Federal Court decision (on appeal), Gibson J. stated, “The *Copyright Act* should be interpreted in light of its object and purpose which is to benefit authors.”¹⁰

In another recent decision, the Quebec Court of Appeal wrote:

“[35] Le droit d'auteur est reconnu comme bi-frontal, droit de la personnalité et droit pécuniaire¹¹. L'œuvre protégée par le droit d'auteur est, en effet, à la fois une émanation de la personnalité de l'auteur et une source d'intérêts économiques. Une œuvre n'est pas seulement un produit que l'on peut vendre, c'est le résultat d'un acte de création personnelle. L'auteur communique sa pensée, ses émotions de sorte que l'œuvre fait partie de la personnalité de l'auteur et lui demeure attachée toute sa vie¹².”

[36] *La Loi canadienne sur le droit d'auteur* protège sous le titre *Des droits moraux* cet aspect éminemment personnel du droit d'auteur.”¹³

It is equally true of course to say that copyright is a *strategic industrial right* that allows key cultural industries, such as book and music publishing, record production, computer software programming and film production to develop and grow. In fact, studies generally place the value of copyright between 4 and 7.5% of an industrialized country's GDP¹⁴.

¹⁰ . *CCH Canadian Ltd. v. L.S.U.C.*, [2000] 2 F.C. 451, 454. See also *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at pp. 478-479.

¹¹ C. COLOMBET, *Grands principes du droit d'auteur et des droits voisins dans le monde*, Paris, Litec, 1990, p. 37.

¹² M. GOUDREAU, «Le droit moral de l'auteur au Canada», (1994) *R.G.D.* p. 428.

¹³ . *Desputeaux v. Les Editions Chouette Inc. et al.*, case No. 500-09-006389-985, April 18, 2001. Motion for leave to appeal the decision to the Supreme Court of Canada was granted.

¹⁴ . See for a recent detailed analysis of the importance of copyright in the US the study prepared by economist Stephen E. Siwek entitled [Copyright Industries in the U.S. Economy: The 2000 Report](#). It was published by the International Intellectual Property Alliance (IIPA). See www.iipa.com. Mr. Siwek estimates that copyright industries add about 7.3% to the US Gross Domestic Product (US\$678 billion) in 1999 and that their share of the US GD has grown by more than 300% between 1977 and 1999.

What then is the role of collective management of copyright¹⁵ in this picture?

In a recent 7-2 decision, the US Supreme Court upheld the rights of individual freelancers to control the electronic reuse of texts submitted to newspaper and periodical publishers, including the New York Times and Time Inc., for publication in their paper edition¹⁶. The decision is interesting because while the Court fully recognized that copyright vests in the author (absent an express transfer), it refused to enjoin the publishers from using the material. Instead, it “forced” the parties to negotiate:

“...it hardly follows from today’s decision that an injunction against the inclusion of these [freelance] Articles in the [publisher] Databases (much less all freelance articles in any databases) must issue. [...] The Parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors’ works; they, and if necessary the courts and Congress, may draw on numerous *models* for distributing copyrighted works and remunerating authors for their distribution.”¹⁷ (Emphasis added)

The only “model” the US Supreme Court referred to in the decision is the licensing of musical works for broadcast use, *i.e.*, collective management.

It is too early to know whether the parties to the *Tasini* case will find a way to remunerate authors for the electronic use of their works and whether this will entail any form of collective administration. The court’s thinly veiled warning is clear: if the parties do not succeed, the Court and/or Congress may do so in their stead. Clearly, the US Supreme Court thought that given the number of publications in the United States and the number of freelance writers that submit content to these publications, a collective system would make sense (though it is not necessarily the only option).

¹⁵ . The expression “collective *administration*” is also widely used. The term “gestion” is clearly appropriate in the French language. In this paper, unless the context clearly indicates otherwise, the term “copyright” includes also rights of performers, producers and broadcasters.

¹⁶ . *Tasini et al. v. New York Times et al.*, 121 S.Ct.2381 (2001). The decision is also available at <<http://www.supremecourtus.gov/opinions/00slipopinion.html>> .

Collective management of copyright allows authors and other rightsholders such as performers, publishers and producers to monitor and, in some cases, control certain uses of their works¹⁸ that would be otherwise unmanageable individually due to the large number of users worldwide. The use of music for broadcast by radio stations is perhaps the best example of such a use.

Collective management may also allow authors to use the power of collective bargaining to obtain more for the use of their work and negotiate on a less unbalanced basis with large multinational user groups. That being said, most collective schemes value all works in their repertory on the same economic footing, which may be unfair to those who create works that may have a higher value in the eyes of users.

Last but not least, collective management ensures that users will have easy access to the rights needed to use material protected by copyright.

Collective Management Organizations (CMOs or simply “collectives”) function in a variety of ways. They may be agents for a group of rightsholders who voluntarily entrusted the licensing of one or more uses of their works to a collective. Or they may be assignees of copyright. In some cases, rightsholders must transfer rights to all their works to the CMO, while in other cases rightsholders are allowed to pick and choose which works the CMO will administer on their behalf. Certain Collective Management Organizations license work-by-work, other offer users a whole “repertory” of works. This may be combined with an indemnity clause, according to which the Collective Management Organization will indemnify the user if she/he is sued for using (according to the terms of the licence) one of the works whose use was licensed by the CMO. This indemnity often takes the form of an obligation to defend.

¹⁷ . *Idem*, at p. 20.

¹⁸ . To simplify the text and unless the context clearly indicates otherwise, the expression “works” includes protected performances and sounds recordings.

Collective Management Organizations usually belong to one of the two main “families” of Collective Management Organizations, namely the International Confederation of Societies of Authors and Composers (CISAC)¹⁹, the largest and oldest association of CMOs, or to the International Federation of Reproduction Rights Organizations (IFRRO)²⁰. It is worth mentioning Article 1 of IFRRO’s Statutes, which states, “collective or centralized management is preferable where the individual exercise of rights is impracticable.” This, in fact, is the essence of collective management: make copyright work when individual exercise would be impracticable for rightsholders, users, or both, usually due to the sheer number of rightsholders, users and/or uses.

Collective Management Organizations are now facing the challenges of the digital age. Claims that copyright does not work in the digital age are usually the result of the inability of users to use protected material lawfully. Especially using the Internet, users of copyright material can easily access millions of works and parts of works, including government documents, legal, scientific, medical and other professional journals, music, video excerpts, e-books, etc. While digital access is fairly easy once a work has been located (though it may require identifying oneself and/or paying for a subscription or other fee), obtaining the right to use the material beyond its primary use (which is usually only listening, viewing or reading) is more difficult unless already allowed under the terms of the licence or subscription agreement or as an exception to exclusive rights contained in the *Copyright Act*.

While in some cases, this is the result of the rightsholders’ unwillingness to authorize the use--and a legitimate application of their exclusive rights--, there are several other cases where it is simply the unavailability of simple, user-friendly licensing that makes authorized use impossible. Both rightsholders and users are losers in this scenario: rightsholders because they cannot provide authorized (controlled) access to their works and lose the benefits of orderly distribution of their works, and users because there is no

¹⁹ . See <www.cisac.org>. As of January 1, 2001, CISAC had 181 member organizations, though not all would qualify as active CMOs.

²⁰ . See <www.ifrro.org>. As of August 13, 2001. IFRRO had 95 members, including 39 CMOs.

easy authorized access to the right to reuse digital material. In other words, this inability to “control” their works means that these works are simply unavailable (legally) on the Web. The *Napster* case²¹ comes to mind in that respect.

The pervasive nature of the Internet and the increasing tendency to link various appliances and devices such as Personal Digital Assistants (PDAs) and, soon, also television sets and stereo receivers to the global network mean that keeping any material that can be digitized off the Internet will become increasingly difficult, technically, commercially, or both. While a combination of technology and law might allow rightsholders to keep material off major servers in a number of countries (though not all countries have copyright laws) and/or request that Internet Service and Access Providers (ISPs/IAPs) block access to (domestic and foreign) web sites that make possible access to “pirated” material, user/consumer demand for digital access may ultimately prevail (and consequently only rightsholders who are prepared to meet this demand will survive). In fact, as we have argued in several other papers²², is not the real question to ask whether the best course of action for rightsholders to try to minimize unlawful uses or rather to maximize lawful, legitimate uses? In fact, especially for mass-market works such as pop music, any attempt to prevent access on digital networks may be perceived by some users as an invitation to circumvent legal or technical protection measures.

Beyond that debate, however, one fact remains: a large amount of copyright material is (and more will be) available through digital networks and that “market” will need to be organized in some way. By organization, we mean that users will want access and the ability to reuse material lawfully. These uses include putting the material on a commercial or educational website or an Intranet, emailing it to a group of people, reusing all or part of it to create new copyright material, storing it and perhaps

²¹ . *A&M Records, Inc. et al. v. Napster, Inc.* US Court of Appeals for the Ninth Circuit, Feb. 12, 2001. The decision is available at <<http://www.riaa.com/pdf/napsterdecision.pdf>>.

²² . See, e.g., D. Gervais. “Lock-It Up or License?”. Available at <<http://www.copyright.com/News/AboutArticlesIntellectualProp.asp>>. See also M. Einhorn. “Digital Rights Management and Access Protection: An Economic Analysis”. Paper presented at the 2001 Congress of the Association Littéraire et Artistique Internationale (ALAI) in New York. Available at <http://www.law.columbia.edu/conferences/2001/1_program_en.htm>.

distributing on a CD-ROM. Authors and other rightsholders will want to ensure that they can put reasonable limits on those uses and reuses and get paid for uses for which they decide that users should pay (again, absent a specific exemption or compulsory licence in the *Copyright Act*).

Collective Management Organizations will be critical intermediaries in this process. Their expertise and knowledge of copyright law and management will be essential to make copyright work in the digital age. To play that role fully and efficiently, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks.

In this paper, we will compare the current Canadian framework and activities of Collective Management Organizations with the situation in a number of other major countries and propose possible improvements to the current regime. The comparison will focus first on the general legal background for collective management and, second, on issues specific to the digital age.

The report contains a detailed analysis of several aspects of the operations of Collective Management Organizations, not all of which are accompanied by specific suggestions. It is hoped that this data can be used by readers to make other suggestions about ways in which collective management of rights could be improved in Canada.

The report does not address the issues raised by certain associations of rightsholders and/or Collective Management Organizations concerning the addition of new rights to the *Copyright Act*, for example those that may be necessary to implement the 1996 WCT and WPPT.²³

²³ . WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, both signed on December 20, 1996. Not in force at the time of this writing (although only three additional ratifications were required in the case of the WCT and six in the case of the WPPT). Both instruments were signed but have not yet been ratified by Canada.

I. Collective Management of Rights in Canada: An Overview

A) Finding An Appropriation Classification

Bill C-32²⁴ introduced a definition of the expression “collective society”, as follows:

“A ‘collective society’ means a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and (a) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or (b) carries on the business of collecting and distributing royalties or levies payable pursuant to this Act.” (Emphasis added)

In spite of this unified definition, the *Act* contains various (and the 1997--“C-32”-amendments introduced new) legal regimes concerning the collective administration of copyright and neighbouring rights.

Before turning to these legal regimes, it is worth noting that there are several valid ways to classify Collective Management Organizations. One could look at the legal basis on which they operate (in Canada) and distinguish among four main categories of Collective Management Organizations:

- Music performing and certain neighbouring rights (section 67 of the *Copyright Act*);
- General regime (section 70);
- “Particular cases” regime (retransmission and educational institutions—section 71); and

- Private copying.

This is the method we will use. However, they could also have been classified according to their field of activity, as was done by the Copyright Board when it listed existing Canadian collectives (the list is attached as Annex 1²⁵) and identified the following areas:

- Music (11)²⁶
- Literary (6)
- Audiovisual and multimedia (5)
- Visual arts (4)
- Retransmission (8)
- Private copying (1)
- Educational rights (1)
- Media monitoring (1)

In fact, Collective Management Organizations could also be classified according to:

- The ways they acquire rights (if any), *i.e.*, voluntarily by signing contracts with rightsholders, by a legal (non-voluntary) license or by some other mechanism;
- The way they are structured (for-profit, not-for-profit);
- The way they are managed (type governance, type(s) of membership organization, agency, etc.);
- The way they license (on a transactional basis, *i.e.*, work-by-work, or on a blanket or other basis); or

²⁴ . Assented to on April 25, 1997. It became S.C. 1997, c. 24.

²⁵ . The author is grateful to Mr. Claude Majeau, Secretary of the Copyright Board, for the permission to use the list in this report.

²⁶ . The number in parentheses is the number of societies operating in the area in question mentioned on the Copyright Board's list.

- The way they distribute their funds (use of surveys, application of national treatment, use of funds for purposes other than distribution, etc).

Yet another useful way of categorizing Collective Management Organizations is the schema used by IFRRO, which classifies CMOs according to their rights acquisition regime in one of the three following ways:

- Full voluntary system
- Voluntary system with legal back-up²⁷
- Legal licence.²⁸

These systems will be described in greater detail below.

Because the purpose of this report is to analyze the framework within which Collective Management Organizations operate and possible changes thereto, it is more appropriate to use the legal regime classification, recognising nonetheless that the categorization by area of activity (as was done by the Copyright Board) is also very useful. The other possible ways in which CMOs could be classified are more properly viewed as characteristics of one or more CMOs and they will be discussed as part of our examination of the applicable legal and regulatory regimes.

B) The Four Legal Regimes

Collective management of rights in Canada is governed in four different ways, according to the right(s) involved. These regimes (since 1997) are as follows:

- Music performing rights (and certain neighbouring rights)
- General regime

²⁷ . The back up could be a limit on the damages/royalties that can be claimed by a non-participating rightsholders, or the extension of a voluntary scheme to non-participating rightsholders once a substantial number of rightsholders of a certain categories have joined.

²⁸ . See <<http://www.ifrro.org/laws/index.html>>.

- Retransmissions and certain uses by educational institutions; and
- Private copying.

1) Music Performing Rights and Certain Neighboring Rights

This type of collective management is regulated by Section 67 of the *Copyright Act*. Collective Management Organizations active in this field grant licenses for the public performance and communication to the public of music (the underlying musical work, the performer's performance and the producer's sound recording). In the case of authors, SOCAN, the only collective representing copyright holders in this field, represents holders of an exclusive right under section 3 of the *Act*--performers and producers have a right to equitable remuneration. Authors voluntarily assign their rights to SOCAN, while the *Act* imposes collective management of the rights to remuneration.²⁹ The Neighbouring Rights Collective of Canada (NRCC) is a non-profit umbrella collective, created in 1997, to administer the rights of performers and makers of sound recordings. This is done through its member collectives.

Collective management of rights for dramatic and literary works contained in sound recordings (notably through ArtistI³⁰) is voluntary.

In fixing tariffs in this area, the *Act* imposes specific criteria to be applied by the Copyright Board.³¹

2) The General Regime

We refer here to the regime that governs Collective Management Organizations in Section 70.1 and following as the "general" regime because it applies to all voluntary licensing schemes other than those of Section 67. It is important to note, however, that in

²⁹ . S. 19(1) and (2) of the *Copyright Act*.

³⁰ . ArtistI is the collective society of the *Union des artistes* (UDA) for the remuneration of performers' rights. (www.uniondesartistes.com).

³¹ . Section 68(2).

terms of financial flows, Section 67 CMOs collect (and distribute) more money than all Section 70.1 collectives combined.

This general regime could apply to the collective management of the rights of reproduction, adaptation, rental, publication and public performance in the area of copyright (section 3) and to the rights of performers concerning (first fixation of their performances, reproduction and communication to the public of live performances – section 15) and to certain rights of sound recording producers (section 18) and broadcasters (section 21). In practice, it applies to:

- Reprography, where the two main societies are the Canadian Copyright Licensing Agency (CANCOPY)³² and the Société québécoise de gestion collective des droits de reproduction (COPIBEC).³³
- Mechanical rights, and CMOs such as (a) the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC), which “administers royalties stemming from the reproduction of musical works”³⁴; and (b) the Canadian Musical Reproduction Rights Agency (CMRRA), “a Canadian centralized licensing and collecting agency for the reproduction rights of musical works in Canada.”³⁵
- The visual arts and Collective Management Organizations such as the Canadian Artists' Representation Copyright Collective (CARCC/CARFAC), “established in 1990 to create opportunities for increased income for visual and media artists. It provides its services to artists who affiliate with the Collective. These services include negotiating the terms for copyright use and issuing an appropriate license to

³² “The Canadian Copyright Licensing Agency (CANCOPY) represents writers, publishers and other creators for the administration of copyright in all provinces except Quebec. The purpose of the collective is to provide easy access to copyright material by negotiating comprehensive licences with user groups, such as schools, colleges, universities, governments, corporations, etc. permitting reproduction rights, such as photocopy rights, for the works in CANCOPY's repertoire.” (www.cancopy.com)

³³ . “La Société québécoise de gestion collective des droits de reproduction (COPIBEC) is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with CANCOPY) and foreign rights holders. COPIBEC was founded in 1997 by l'Union des écrivaines et écrivains québécois (UNEQ) and the Association nationale des éditeurs de livres (ANEL).” (www.copibec.qc.ca).

³⁴ . *Idem.* (www.sodrac.com)

the use”³⁶. This includes SODRAC and the Société de droits d'auteur en arts visuels (SODART) “created by the Regroupement des artistes en arts visuels du Québec (RAAV) and responsible for collecting rights on behalf of visual artists. It negotiates agreements with organizations that use visual arts, such as museums, exhibition centres, magazines, publishers, audio-visual producers, etc. SODART issues licences to these organizations and collects royalties due to the artists it represents.”³⁷

A complete list of collectives active in this area may be found in Annex 1.

Collective Management Organizations operating under this regime can file tariffs for approval by the Board³⁸ or conclude agreements with users³⁹ that will take precedence over tariffs.⁴⁰ A CMO may, under this regime, file a copy of an agreement concluded with a user with the Board, which prevents the application of Section 45 of the *Competition Act* (dealing with conspiracies to limit competition). However, the Commissioner of Competition may ask the Copyright Board to examine the agreement if he considers it is contrary to the public interest.⁴¹ The Board may also be asked to determine the royalty applicable in individual cases (arbitration).⁴²

3) Retransmissions and Certain Uses by Educational Institutions (Section 71)

This is a legal (non-voluntary licence) regime. The criteria that apply to tariff fixing procedures under this regime are different than those of the general regime. The Section 71 regime, also known as the “particular cases regime”, applies to:

- The retransmission of a distant signal;

³⁵ . *Idem.* (www.cmrra.org).

³⁶ . *Idem.* (www.carfac.ca)

³⁷ . *Idem.* (www.raav.org/sodart)

³⁸ . S. 70.13 and following.

³⁹ . S. 70.12(b).

⁴⁰ . S. 70.191.

⁴¹ . S. 70.5(2) to (5).

⁴² . S. 70.2. If an agreement between the parties, the Board shall not proceed (section 70.3).

- The retransmission regime which includes, since the 1997 amendments, the making and conservation beyond one year of a copy of a news program or commentary by an educational institution and the public performance of the copy;
- The making of a copy of a work at the time it is communicated to the public by an educational institution and keeping the copy beyond 30 days to decide whether to perform the copy and the public performance (primarily to students) of the copy.

There are eight CMOs who operate in whole or in part under this “particular cases regime”:

- Border Broadcasters' Inc. (BBI);⁴³
- Canadian Broadcasters Rights Agency (CBRA);⁴⁴
- Canadian Retransmission Collective (CRC);⁴⁵
- Canadian Retransmission Right Association (CRRRA);⁴⁶
- Copyright Collective of Canada (CCC);⁴⁷

⁴³ . “Border Broadcasters' Inc. (BBI) represents U.S. border broadcasters (a mix of network affiliated and independent stations in large and small markets along the Canada-U.S. border). The royalties that BBI collects and distributes to its members are for programs produced by the stations (*i.e.* the local programming) as opposed to the network or syndicated programming which is represented by other collectives.” From the Copyright Board of Canada.” .

⁴⁴ . www.cbra.ca. “The Canadian Broadcasters Rights Agency (CBRA) claims royalties for programming, compilations and signals owned by commercial radio and television stations and networks in Canada, including CTV, TVA and Quatre-Saisons networks and their affiliates, the Global Television Network, independent television stations and the privately-owned affiliates of the Canadian Broadcasting Corporation (CBC) and *Société Radio-Canada* (SRC).” *Idem*.

⁴⁵ . www.crc-scr.ca. “The Canadian Retransmission Collective (CRC) represents all PBS and TVOntario programming (producers) as well as owners of motion pictures and television drama and comedy programs produced outside the United States (*i.e.* Canada and other countries).” *Idem*.

⁴⁶ . “The Canadian Retransmission Right Association (CRRRA) is an association representing certain broadcasters, *i.e.*: the Canadian Broadcasting Corporation (CBC), the American Broadcasting Company (ABC), the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS) and *Télé-Québec* with respect to their interests as copyright owners of radio and television programming retransmitted as distant signals in Canada. CRRRA acts as the collective for its members, collecting and distributing royalties paid by retransmitters in Canada.” *Idem*.

- FWS Joint Sports Claimants (FWS);⁴⁸
- Major League Baseball Collective of Canada (MLB);⁴⁹ and the
- Society of Composers, Authors and Music Publishers of Canada (SOCAN).

Non-member rightsholders may claim royalties collected on the basis of an approved tariff, subject to conditions applicable to member rightsholders.⁵⁰

4) Private Copying

A specific regime was put in place concerning the private copying of sound recordings.⁵¹ It does not concern licensing as such, but rather a remuneration designed to compensate rightsholders for a use of works (and objects of neighbouring rights) that is otherwise considered non-infringing.⁵²

Collectives concerned created the Canadian Private Copying Collective (CPCC), “which is responsible for distributing the funds generated by the levy to the collective societies representing eligible authors, performers and makers of sound recordings. The member collectives of the CPCC are: the Canadian Mechanical Reproduction Rights Agency (CMRRA), the Neighbouring Rights Collective of Canada (NRCC), the Société

⁴⁷ . “The Copyright Collective of Canada (CCC) represents copyright owners (producers and distributors) of the U.S. independent motion picture and television production industry for all drama and comedy programming (such as companies represented by the Motion Picture Association of America), except for that carried on the PBS network stations.” *Idem*. Should not be confused with the United States Copyright Clearance Center, Inc. (CCC--- www.copyright.com), the US Reproduction Rights Organization (RRO).

⁴⁸ . “The FWS Joints Sports Claimants (FWS) represents the teams in major sports leagues whose games are regularly telecast in Canada and the United States. The leagues are the National Hockey League, the National Basketball Association and the Canadian, National and American Football Leagues. The programs for which copyright royalties are claimed are games broadcast between the member teams on distant signals carried by Canadian cable systems, except for those for which a television network is the copyright owner.” *Idem*.

⁴⁹ . “The Major League Baseball Collective of Canada (MLB) is the sole party entitled to claim royalties arising out of the retransmission of major league baseball games in Canada.” *Idem*.

⁵⁰ . S. 76. See also *Re SARDEC*, (1998) 86 C.P.R. (3d) 481 (Copyright Board).

⁵¹ . S. 79-88 of the *Act*.

⁵² . S. 80(1).

de gestion des droits des artistes-musiciens (SOGEDAM), the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) and the Society of Composers, Authors and Music Publishers of Canada (SOCAN).” Tariffs were set for 1999-2000⁵³ and for 2001-2002.⁵⁴

⁵³ . See (1999) 4 C.P.R. (4th) 15.

⁵⁴ . Decision of January 22, 2001. Not yet published but available from the Board’s website, <http://www.cb-cda.gc.ca/decisions/toocopy-e.html>.

II. Collective Management of Rights in Canada: An International Perspective

A) Overview of Foreign Collective Management

It may be useful to start by looking at sectors in which collective management is in place at the international level, which of course depend in large part on the existence of the right concerned.

In 1998, the US performing rights Collective Management Organizations collected US\$698 million, or approximately US\$2.50 per capita, while France collected US\$216 million, or US\$3.66 per capita; Germany collected US\$344 million, or US\$4.20 per capita; and the United Kingdom US\$248 million, or US\$4.20 per capita.⁵⁵ By comparison, SOCAN's collections reached US\$76 million, or US\$2.53 per capita⁵⁶ (see Figure 1). Differences stemmed from a combination of higher or lower tariffs and the depth of a CMO's licensing efforts. "Depth" in this context may be succinctly defined as the degree of effort expended to license smaller, occasional or remote users.

⁵⁵ . These statistics are not entirely reliable, because (a) they depend on voluntary reporting and (b) they may not accurately track payments between music CMOs, which represent a large share of the revenues of, inter alia, US and U.K. societies.

⁵⁶ . See Country Profile: Canada. (New York, NMPA, 1999). Available at <<http://www.nmpa.org/nmpa/survey9/canada.pdf>>.

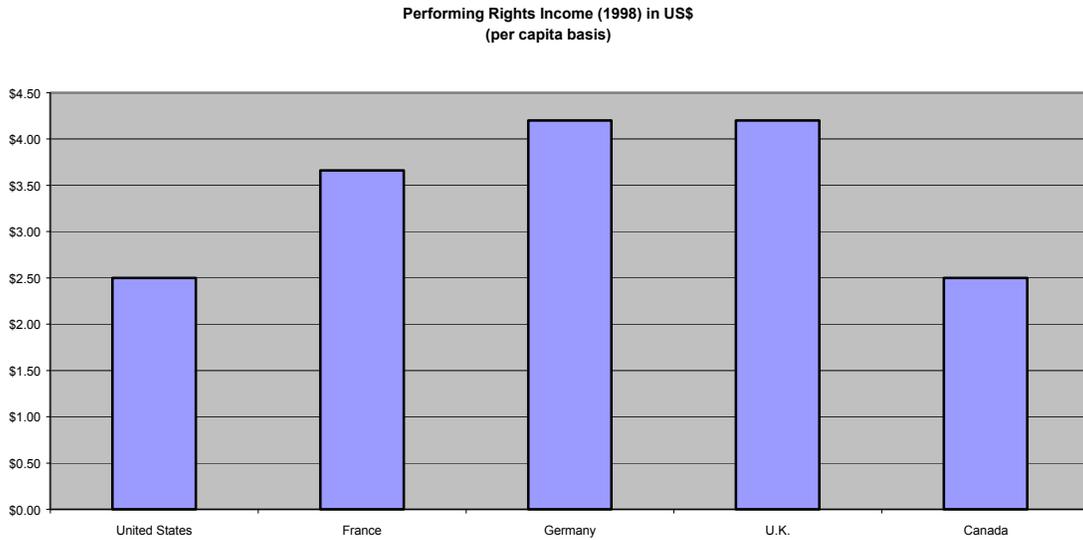


FIGURE 1: PERFORMING RIGHTS COLLECTIONS COMPARISON

In the field of reprography, the situation is uneven. Organizations were usually established much more recently. Still, there are striking contrasts. Using 1999 data,⁵⁷ the US RRO collected US\$79 million, or US\$0.28 per capita, while Germany collected US\$28 million or US\$0.34; and the U.K. US\$ 36 million or US\$0.60. The Nordic countries have the largest per capita collections in this field: Denmark US\$3.00 per capita; Finland US\$0.92; Norway US\$5.00; and Sweden US\$1.00. In Canada, the two RROs (COPIBEC and CANCOPY) collected \$24 million (US\$16 million) or \$0.77 (US\$0.52) per capita (see Figure 2).

⁵⁷ . www.ifrro.org.

**Reprographic Royalties (1998) in US\$
(per capita basis)**

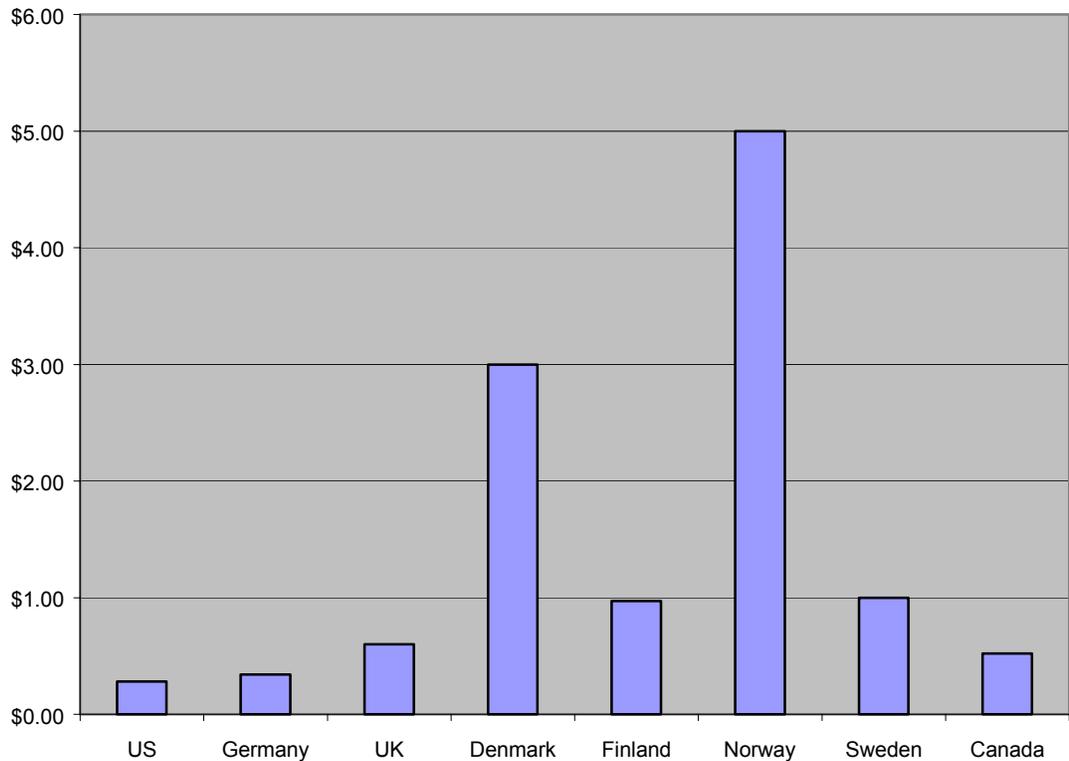


FIGURE 2: REPROGRAPHY COLLECTIONS COMPARISON

The huge differences in this field usually can be explained by the same factors as for performing rights, namely tariffs and depth of licensing. As we will see below, however, the application of such factors is more directly influenced by the applicable legal regime than by the political or management decisions made by the Collective Management Organization. In fact, the four countries with the highest reprography collections all use the system known as “extended collective licensing”, which will be described in greater detail below. Its potential application in Canada will also be discussed.

A more complete list of the rights administered collectively around the world is contained in Table 1.

RIGHT ADMINISTERED	EXAMPLES OF COUNTRIES
Droit de suite	Denmark , France, Germany , Spain
Private Copying	Denmark, Germany, Italy, Netherlands, Spain
Reprography	32 countries worldwide. Mandatory in France, Germany, Netherlands (libraries and education),
Rental right	Denmark, Spain
Cable retransmission	Denmark, Germany , Italy, Netherlands, Spain, U.K.
Secondary use of radio or television broadcasts	Denmark
Music performing rights (authors)	Almost 100 countries world-wide
Music mechanical rights	More than 70 countries world-wide
Copies of television programs for the benefit of handicapped persons	Denmark
Public lending right	Germany, Netherlands , Spain (not fully applicable yet)
Public performance of performers' performances	Netherlands, Spain
Public communication of audiovisual works	Spain
Public performance of phonograms (producers)	Spain
Transformation (adaptation) right	Spain
Grand rights (theatrical)	France
Visual Artists' Reproduction Right	France, Germany, UK, USA
Photographers' Reproduction Right	Nordic countries, UK, USA
Use of videocassettes in public places	USA

TABLE 1: AREAS OF COLLECTIVE MANAGEMENT IN FOREIGN COUNTRIES

Notes:

- When the name of a country is in **bold**, collective management is mandatory for the right concerned
- Sources:
 - www.cisac.org
 - www.ifro.org
 - Gestion collective des droits d'auteur et des droits voisins, Report presented to the French Senate. Nov. 1997. Available at www.senat.fr/lc/lc30/lc300.html
 - Report on the Collective Management of Copyright in the European Union, by Deloitte & Touche, EU document 98/B5/3000/E/79, made available May 11th, 2000 by the European Commission's Directorate-General Internal Market (unit E3).

B) Aspects to Be Considered for Comparative Study

There are several aspects of collective management of rights and its relation to the legislative and regulatory framework to review. They are:

- Legal status of CMOs;
- Modes of Acquisition of rights (mandates) by CMOs;
- Legislative Support for CMOs' Rights Acquisition Processes;
- State Control of CMOs (formation and/or operations);
- Tariffs & Licensing Practices
- Distribution Practices & Accounting

We will use these areas to map out our comparative analysis.

C) Analysis

1) Legal Status of CMOs

The current Canadian system does not impose a particular legal form for the collective management of copyright and neighbouring rights. A number of models are in existence. Some CMOs are for-profit corporations, but often controlled by a not-for-profit foundation, while several others are themselves not-for-profit entities.⁵⁸

In foreign countries, the situation is similar. While a majority of Collective Management Organizations are not-for-profit entities, that is not always the case. In Europe, only two of the 15 European Union countries' legislation requires a specific legal form for CMOs. In Italy, SIAE, the Italian Society of Authors and Publishers and the

⁵⁸. See Pierre Trudel and Sylvie Latour, Les mécanismes de la gestion collective des droits d'auteur au Canada. Actes du colloque, Montréal, March 18, 1994, at p. 44.

principal Collective Management Organization in the country is in fact a public authority, while in Greece, AEPI is a commercial (for-profit) company.⁵⁹

The success or failure of collectives does not seem to be linked to their legal status. Successful collectives operate under various legal configurations, and the same could be said of less successful ones. As a result, this area does not seem to require harmonization or governmental intervention. No changes in current regulation governing the legal status (structure) of Collective Management Organizations are recommended.

Another aspect of the examination of the structure of a Collective Management Organization is to determine its status as a monopoly, *de jure* or *de facto*. There are a number of cases in Canada where a single collective operates in a given field. The best-known example is probably SOCAN for music performing rights. In other cases, competition is possible between two Collective Management Organizations, while in others two CMOs operate in the same field but within different language or territory-based markets.

Very few countries impose a *de jure* monopoly. That is the case in Italy, where the main Collective Management Organization (SIAE) is a public authority, in the Netherlands (BUMA) and in Spain, where the law expressly discourages competition among Collective Management Organizations.⁶⁰ In countries where a state authorization is required to set up a new collective, monopolies exist by reason of an exclusive appointment. That is the case in Austria, Japan (JASRAC only),⁶¹ Denmark (KODA only), Finland (certain rights only) and the Netherlands (certain rights only).⁶² In a great

⁵⁹. Deloitte & Touche report, *supra*, at p. 65. Greek law would also allow AEPI to operate as a “cooperative company”.

⁶⁰. Deloitte & Touche report, *supra*, at 68-69.

⁶¹. “Any entity who intends to serve as a copyright society in Japan, such as JASRAC, is required to seek authorization from the Commissioner of the Agency for Cultural Affairs according to the Law on Intermediary Business concerning Copyrights. Any revision of the articles of association or change in terms of a copyright trust agreement, as well as any enactment or revision of a regulation, is subject to authorization and/or approval by the Minister of Education and/or the Commissioner of the Agency for Cultural Affairs.” From www.jasrac.or.jp.

⁶². Deloitte & Touche report, at p. 68.

number of countries, in fact a majority of the countries where CMOs operate,⁶³ there is only one Collective Management Organization per field of activity.

A combination of market forces and the application of existing competition rules if and when appropriate are sufficient to prevent abuses of the rights of rightsholders and users. In the current legal environment, Canadian rightsholders may create a new Collective Management Organization if they are dissatisfied with an existing one. In fact, *users* themselves could do the same, as was suggested by a well-known author in the area of reprography.⁶⁴ Against this backdrop, we found no evidence of a need for additional regulation in this field.

With respect to the establishment of a legal monopoly in the *Copyright Act* itself, this practice is clearly the exception at the international level. Should the State decide to intervene to limit the number of Collective Management Organizations, then the appropriate procedure would not be to establish a *de jure* monopoly in favour of a particular CMO. In the same way that rightsholders should be free to decide whether they want to be part of a collective scheme (except perhaps where individual management is impossible), they should be free to create new Collective Management Organizations. However, as discussed below in relation to the development of rights management systems, Canada has by far the largest number of Collective Management Organizations, especially in relation to the country's population. This resulted in part from the 1997 amendments to the *Act* (Bill C-32). The number of collectives is probably too high and it seems unlikely that all can survive in a limited market.⁶⁵ That said, a statutory approval mechanism for the establishment of new Collective Management

⁶³ . In the EU: Austria (in cases other than above), Belgium, Denmark (other than KODA), Finland (other than above), France, Germany (except audiovisual), Greece, Italy (other than SIAE), Luxembourg, Netherlands (other than above), Portugal, Spain, Sweden and the U.K. See also the list of members of CISAC (www.cisac.org) and IFRRO (www.ifrro.org).

⁶⁴ . Howard P. Knopf, "Copyright Collectivity in the Canadian Academic Community: An Alternative to the Status Quo?", (2000) 14 C.P.J. 109. In the United States, one of the two major performing rights societies, Broadcast Music Inc. (BMI), was established by users and still today its Board is composed exclusively of users.

⁶⁵ . There are four times as many CMOs in Canada as in the US, and not all in the US are successful.

Organizations, which arguably could have been considered in 1997, is probably of little use now that 36 CMOs are in existence (although eight of those 36 do not have direct contact with users and operate under “umbrella collectives”)

No changes in current regulation pertaining to the monopolistic position of certain Collective Management Organizations or of their formation are recommended at this stage.

The post-formation control of the activities and operations of CMOs is discussed later on in this report. However, it is worth mentioning here that the Government may wish to monitor the operations of CMOs and, should the market show through growing inefficiencies and/or rightsholders (or user) dissatisfaction that the number of (competing) collectives is such that they are unable to operate efficiently, the situation described in this section of the report could be re-examined.

2) Acquisition of Rights (Mandates)

This is perhaps the most important regulatory aspect of the activities of Collective Management Organizations. To a large extent, the credibility of CMOs vis-à-vis users depends on its ability to license the works and rights that users want. For a new Collective Management Organization or a CMO trying to license new use or use by a new group of users, the *critical phase is thus usually the acquisition of the necessary licensing authority from the rightsholders concerned*. This only applies of course to voluntary licensing and not to, *e.g.*, private copying levies or non-voluntary licenses (because then authority is granted by law).

Acquisition of rights by a CMO is done using one or several of the following methods:

- A full assignment of rights to the CMO;

- An non-exclusive licence;
- An authorization to act as agent;
- A *sui generis* (mixed) regime; or
- A legal (non-voluntary) license.

All of these models are in use in Canada. For example in the music field, composers and lyricists assign their copyrights to SOCAN, while authors and publishers usually give CANCOPY and COPIBEC a non-exclusive mandate to license reprographic uses. In the area of theatrical rights (“grands droits”), the Collective Management Organization (*e.g.*, SACD or SOCAD) is usually an agent who will negotiate with the user on behalf of an author. Music publishers represented by CMRRA only authorize that Agency to act as their agent for certain uses (synchronization) but in certain cases (Internet transmissions) may grant CMRRA a right to license directly on their behalf. A *sui generis* regime applies to non-member rightsholders, who are given a right to the royalties based on an approved tariff (section 76) or whose enforcement options outside of the collective regime are limited to those available within the regime. Finally, in the area of retransmission rights, a legal license is imposed and its management can only be done through a CMO.

The same diversity of methods prevails around the world. In the United States, antitrust constraints force all Collective Management Organizations to operate as non-exclusive agents with a simple right to license. Because participation in a CMO is entirely voluntary and that the mandate given to a collective is non-exclusive, no real blanket licences are available. Consequently, no CMO can guarantee that it represents *all* the rightsholders concerned. At best, users obtain a repertory licence (*i.e.*, a licence covering a *list* of works and authorizing certain acts, such as broadcasting or photocopying with respect to such works). This also makes it more difficult to provide an indemnity to users.

In Europe, a mandating approach (*i.e.*, a licence given by rightsholders) is the most common one. It applies to Collective Management Organizations in at least 12 of the 15 EU member countries (in nine of which the license is exclusive).

Collective Management Organizations in at least nine EU countries require a full assignment of rights. That is often the case for music performing rights.⁶⁶ A *sui generis* rights acquisition model is used in Austria and Germany.⁶⁷

Senior officials of the European Commission have indicated that a directive on collective management of copyright and related rights would be drafted in 2002, to harmonize this and other aspects of collective management within the EU⁶⁸. Given the time likely to be needed to adopt a directive in this field and then its implementation by the EU member States, uniform EU legislation is not expected until late 2004.

Because the German model may eventually be used as a model for all of Europe, it is worth noting that in Germany, Collective Management Organizations have an *obligation* to administer rights in their field at the request of any EU national.⁶⁹ They are also required to “grant exploitation rights or authorizations to any person so requesting on equitable terms in respect of the rights they administer.” The German *Act* goes on to say that “should no agreement be reached with respect to the amount of remuneration to be paid for the grant of exploitation rights or of an authorization, the rights or authorization shall be deemed to have been granted if the remuneration demanded by the collecting society has been paid subject to reservation or has been deposited in favour of the collecting society.”⁷⁰

⁶⁶ . A full assignment of music performing rights is probably required by CMOs in all 15 EU member countries, but we were not able to verify this fact for all 15 countries.

⁶⁷ . Deloitte & Touche report, at p. 87.

⁶⁸ . It is possible that the German model, probably the most developed of any EU country, will serve as a basis for the draft directive, although this could not be confirmed.

⁶⁹ . *Administration of Copyright and Neighbouring Rights Act, op. cit.*, section 6.

⁷⁰ . *Id.*, section 11.

The duration of the authorization given to Collective Management Organizations varies. In Japan, the members of CMOs in the neighbouring rights area must by law have the freedom to withdraw⁷¹. In the EU, six countries impose a maximum duration, which varies from three to five years.⁷²

Taking into account the interests of rightsholders, it makes sense to allow them to leave a Collective Management Organization. While, as a matter of principle, one may argue that perpetual agreements should not be allowed, the essential point is whether and under what conditions a rightsholder may leave the system if the contract has no specific duration. It is reasonable from the point of view of Collective Management Organizations to ask that rightsholders give reasonable advance notice: the CMO's repertory must maintain a certain degree of predictability and stability in the eyes of users, which would not be the case if rightsholders constantly came in and out of the CMO.

The question whether rightsholders should be able to join a CMO on a work-by-work basis is also relevant in this context. On the one hand, professional (especially corporate) rightsholders (*e.g.*, publishers and producers) may need to administer some of their rights outside of the collective scheme. In most cases, a non-exclusive arrangement with the Collective Management Organization allows them to do that. On the other hand, authors (and performers) are often asked to create works or deliver performances with a full transfer of all rights (and a waiver of their moral right) to a buyer ("all-rights contracts"). Allowing those creators to leave the system work-by-work makes it possible for them to transfer rights to a particular work, and for the entity commissioning the work to ask for the transfer. Hence, there is a view that for the good of the creator community as a whole, it would make sense to make it impossible for individual creators to enter into these buy-out arrangements by *imposing* collective management.

⁷¹ . Japanese *Copyright Act*, section 95(4).

⁷² . Deloitte & Touche report, at p. 87. Most German CMOs have a three-year contract, except GEMA, which has a six-year contract (French senate report, at p. 12); Italy has a five-year maximum (*Idem*, at p. 20); Spain imposes a five-year maximum duration (Article 148 of the *Copyright Act*). In other cases (*e.g.*, U.K.), contracts have an indeterminate duration and may be terminated upon reasonable notice (six months at the PRS, the UK performing rights societies). See the French Senate report, at p. 26.

While there is some logic to this argument, many individual creators would argue that it is preferable to maintain their freedom to choose and encourage instead Collective Management Organizations to “sell” their services (including the advantages of collective management) to the rightsholders they want to represent. At the same time, the CMO may warn authors of the pitfalls of agreements made outside the collective scheme, namely that authors may accept to sign a complete transfer of their rights in exchange for a one-time fee that may in the end be much less than they could otherwise have gotten through their collective. Separate agreements and free permissions may also weaken the value of the repertory and/or of the user’ needs that the CMO can fulfill.

A good example of a warning comes from the CANCOPY website, which tells writers:

“Please be prudent in granting free permissions. Some users may interpret your permission as a lack of support for the collective licensing system. As well, ‘free’ permissions make it difficult to argue that collective licensing is an equitable solution for all users. So, while it is possible to grant free permissions, we request that, whenever possible, you forward all requests to CANCOPY for processing.”⁷³

An argument has also been made that the freedom of association guaranteed by Section 2d) of the *Canadian Charter of Rights and Freedoms* includes a right not to associate.⁷⁴

In light of the above, it makes sense as a matter of policy to encourage Collective Management Organizations to have rightsholder agreements with a maximum duration (of 3 to 5 years), including reasonable notice of termination provisions. The duration of a contract varies according to the type of rights and more importantly the type of licenses (transactional or blanket) that are granted by the CMO. Preventing work-by-work

⁷³. CANCOPY’s Author and Publisher FAQ, at <http://www.cancopy.com/owners/faq.html>.

⁷⁴. See *Lavigne v. O.P.S.E.U. et al*, [1991] 2 S.C.R. 211. See also J. Daniel, “Le cadre juridique de la gestion collective des droits d’auteur au Canada,” (1998) 11 *Cahiers de propriété intellectuelle* 257, 275.

withdrawals may work for creators collectively but by the same token may be viewed as a restriction on the freedom of individual creators.

While these remain issues of high importance for Canadian Collective Management Organizations, and issues which the Government should continue to monitor, we are not aware of significant problems in this area that would require legislative or regulatory action. That being said, some umbrella organizations created after the 1997 reforms (CPCC, NRCC, CRC) have not yet achieved their full cruising speed and we would recommend that the Government closely monitor future developments in this area. Mechanisms for this type of monitoring will be suggested below.

In conclusion, collective management should be imposed only in cases where individual exercise of the right (s) concerned is impossible or would lead to chaotic results. In other cases, it is unnecessary to impose collective management, although it makes sense to encourage and help Collective Management Organizations “sell” their services and the advantages of collective management to both rightsholders and users.

No new regulation of rights transfers to collective management organizations is necessary at this stage. As a matter of policy, however, Collective Management Organizations should be encouraged to (a) offer contracts to rightsholders/members that include a reasonable duration (or an indeterminate duration) and reasonable withdrawal periods (with adequate advance notice); and (b) offer rightsholders information on the risks of, and the appropriate degree of flexibility to, enter into direct agreements with users where appropriate in light of established market practices.

3) Models of Legislative Support for Rights Acquisition

The current system of collective management of copyright and related rights⁷⁵ in Canada is by and large a voluntary system. Authors and holders of neighbouring rights can choose to participate in a collective scheme or to form a collective of their own. While the *Copyright Act*⁷⁶ contains a number of provisions dealing with collective management, these usually only empower the Copyright Board to remedy failures in negotiations among interested parties or otherwise set appropriate tariffs,⁷⁷ or ensure transparency.⁷⁸ While similar measures may be found in other national copyright laws, the Canadian *Act* is original in the way it limits recourse available to rightsholders who do not participate in a collective scheme.⁷⁹ For example, S. 76 provides that an owner of copyright who does not authorize a Collective Management Organization to collect royalties for that person's benefit is only entitled to be paid those royalties by the collective designated by the Board subject to the same conditions as those to which a person who has so authorized that collective is subject.

In a number of foreign jurisdictions, the law provides support for or backup to the rights acquisition process. This can be done in a number of ways:

- Limiting a non-represented rightholder's rights and recourses;
- Extending the rights of a Collective Management Organization to an entire class of works or uses once a certain number of rightsholders have joined (with or without opting out), a system known as *extended collective licensing*;
- Establishing a legal *presumption* that a Collective Management Organization has certain rights; or
- Making collective management *mandatory*.

⁷⁵ . The expression "copyright" includes related rights unless the context dictates otherwise.

In the same vein, "work" may include subject matter of neighbouring rights.

⁷⁶ . R.S.C. 1985, c. C-42, as amended until 1999. Hereinafter the "*Act*".

⁷⁷ . For example, sections 70.12 to 75 and section 83 of the *Act*.

⁷⁸ . For example, section 70.11.

⁷⁹ . See sections 38.2, 76(1) and (3) and 83(12), and as to a limitation of recourses, also s.

As already mentioned, the only such system in use in Canada is the legal license concerning “particular cases” (retransmission and certain uses by educational institutions) in Section 71, and a limit on non-represented rightsholders rights under Section 76 concerning the right of a rightsholder who does not participate in some collective schemes to collect the royalties that he/she would have obtained under the tariff.⁸⁰ This limit applies to the following rights to remuneration:

- Retransmission of a distant signal;
- Reproduction by an educational institution of a copy of a news program (or documentary);
- Public performance by an educational institution of a news program; and
- Copy or public performance by an educational institution of subject matter communicated to the public by telecommunication.

The key for the application of Section 76(2) is the existence of an approved and effective tariff “that is applicable to that kind of work or other subject matter.”⁸¹ It should also be noted that a similar exclusion applies to enforcement proceedings concerning private copying of sound recordings, but this does not concern licensing proper⁸², because private copying levies are a form of *compensation* for copying that is not illegal (under Part VIII of the *Act*) and/or is untraceable; such levies are not a licence⁸³.

⁸⁰ . The prohibitions of enforcement contained in section 68.2(2) and 70.17 are different because they apply only to works contained in the CMO’s repertory (tariff) concerned.

⁸¹ . Authors Léger & Robic have questioned whether a licensee or other interested party other than the copyright owner would be covered by the limitation contained in this Section, in light of the fact that it applies to “owners of copyright” See Hugues G. Richard et al. Robic-Léger Canadian Copyright Act Annotated. Vol. 3, at p. 76-3.

⁸² . S.83(12).

⁸³ . See the decision of the Copyright Board dated December 17, 1999; (1999) 4 C.P.R. (4th) 15. Also available at < <http://www.cb-cda.gc.ca/decisions/c17121999-b.pdf>>.

In a related field, the *Status of the Artist Act*⁸⁴ provides that a certified artists' association has "the exclusive authority to bargain on behalf of artists in the sector."⁸⁵ Furthermore, only one association may be present in each sector.

The most common techniques used in foreign countries include: implied licenses, legal presumptions, mandatory collective management and so-called "extended collective licensing" system.

(i) Implied license/Indemnity⁸⁶

When the law contains an indemnity/implied license, the legislator limits the recourse available to a rightsholder not covered by the collective scheme or, from the user's perspective, his/her potential liability. This gives users the "peace of mind" to continue using the works contained in the licensed repertory without having to check beforehand whether an individual work is in fact contained in such repertory⁸⁷. It is, therefore, a measure that may be perceived as being favourable to users.

A good example of this technique is contained in Section 136 of the UK *Copyright Design and Patents Act*⁸⁸, which includes an implied indemnity for any act *apparently* covered by a collective licence. It reads as follows:

"(1) This section applies to-
(a) schemes for licensing reprographic copying of published literary, dramatic,

⁸⁴ . R.S.C. 1985, c. S-19.6.

⁸⁵ . S. 28(5).

⁸⁶ . These two legal mechanisms are different in theory but their impact is fairly similar in its the practical effects. An indemnity assures a user that it can use any work of the type licensed by the Collective Management Organization and will be held harmless if a non-represented rightsholder sues the user while an implied licence says that all works in the repertory are presumed to be covered. If rightsholders are given the option to stay out of the system and if the indemnity/implied license is then construed as not covering such excluded rightsholders, their effect is essentially the same.

⁸⁷ . Although the infringement might be a criminal offence and the indemnity may not extend to criminal proceedings.

⁸⁸ . 1988, ch. 48

musical or artistic works, or the typographical arrangement of published editions, and

(b) licences granted by licensing bodies for such copying, where the scheme or licence does not specify the works to which it applies with such particularity as to enable licensees to determine whether a work falls within the scheme or licence by inspection of the scheme or licence and the work.

(2) There is implied-

in every scheme to which this section applies an undertaking by the

(a) operator of the scheme to indemnify a person granted a licence under the scheme, and

(b) in every licence to which this section applies an undertaking by the licensing body to indemnify the licensee, against any liability incurred by him by reason of his having infringed copyright by making or authorising the making of reprographic copies of a work in circumstances within the *apparent* scope of his licence.

(3) The circumstances of a case are within the apparent scope of a licence if-

(a) it is not apparent from inspection of the licence and the work that it does not fall within the description of works to which the licence applies, and

(b) the licence does not expressly provide that it does not extend to copyright of the description infringed.

(4) In this section 'liability' includes liability to pay costs; and this section applies in relation to costs reasonably incurred by a licensee in connection with actual or contemplated proceedings against him for infringement of copyright as it applies to sums which he is liable to pay in respect of such infringement.

(5) A scheme or licence to which this section applies may contain reasonable provision-

(a) with respect to the manner in which, and time within which, claims under the undertaking implied by this section are to be made;

(b) enabling the operator of the scheme or, as the case may be, the licensing body to take over the conduct of any proceedings affecting the amount of his liability to indemnify."

(Emphasis added)

The indemnity mechanism is, as indicated above, a measure that, at least on the surface, may seem quite favourable to users. However, it goes against the principle that underlies all forms of collective licensing, namely that the Collective Management Organization should acquire the proper licensing authority from the rightsholders concerned (by assignment, as an agent, etc.). By using an indemnity, the legislator recognizes that uses do occur outside the scope of the licence but then limits available recourses. In that sense, it resembles a compulsory licence. Such licences are subject to stringent international obligations (as will be explained below). In addition, a user may in good faith believe that her/his licence covers works or uses that in fact are not covered

due to the vagueness of concepts such as that of “apparent licence”. There are better ways to facilitate the rights acquisition process and to allow Collective Management Organizations to offer users a licence with the broad coverage they want.

(ii) Legal Presumption

The legal presumption greatly accelerates the acquisition of rights because it reverses the burden of proof on the user to show that the Collective Management Organization does not hold the right to license. Naturally, if the presumption is not rebuttable, the system may then resemble a compulsory licence, especially if rightsholders cannot opt out.

Section 13(b) of the German *Administration of Copyright and Neighbouring Rights Act*⁸⁹ contains an interesting model for a legal presumption:

- (1) “Where a collecting society asserts a claim to information that may only be asserted by a collecting society, it shall be presumed that it administers the rights of all right holders;
- (2) Where a collecting society asserts a claim to remuneration under Article 27, 54(1), Article 54a(1) or (2) [remuneration paid on recording equipment and blank media], Article 75(3) [rental and lending of audio and video recordings], Article 85(3) [private use and exceptions re sound recordings] or Article 94(4) [private use and exceptions re video] of the Copyright Law, **it shall be presumed that it administers the rights of all right holders.** Where more than one collecting society is entitled to assert the claim, the presumption shall only apply where the claim is asserted jointly by all entitled collecting societies.” (Emphasis added)

(iii) Mandatory Collective Management

Collective licensing is often made directly mandatory (as opposed to a presumption or implied licence system). In the case of private copying levies and public lending, a collective system seems inevitable, although it need not be done through a Collective Management Organization, because private use/copying levies do not

⁸⁹ . See note 123, *supra*.

constitute licensing *per se* but are rather intended to *compensate* rightsholders for activities that usually cannot be licensed.

Other cases where collective licensing was made mandatory in foreign countries include the artist's resale right ("droit de suite"),⁹⁰ public lending,⁹¹ private copying,⁹² and retransmission.⁹³

As a matter of principle, collective management should only be compulsory when there is no other way to exercise the right. In all other cases, rightsholders should have a choice.

(iv) Extended Collective Licensing

One of the most interesting techniques is to combine a voluntary licence, which ensures the legitimacy of the Collective Management Organization with a legal "extension" of the repertory to non-represented rightsholders. In other words, this system consists in the establishment of a legal back-up licence, which simplifies and accelerates the rights acquisition process and is known as *extended collective licensing*. Such a system might work well for a number of Canadian collectives currently struggling to acquire both domestic and foreign rights. In the meantime, they are losing credibility in the eyes of user groups to whom they are unable to offer licences.

⁹⁰ . As is the case, *e.g.*, in Denmark (*Copyright Act, op. cit.*, section 38(5)) and Germany (*Copyright Act, op. cit.*, section 26).

⁹¹ . Germany (section 27) and the Netherlands (section 15a). In Denmark and the UK, the public lending funds are paid by a state agency (in the UK, the Department of National Heritage). See *Rapport sur la gestion collective, op. cit.*, pp. 33 and 36.

⁹² . *E.g.*, Denmark (section 39), Germany (section 54(h)), Italy (Law of Feb. 5, 1992), Netherlands (section 16c) and Spain (section 25). Art. 5 of the *Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society*. In the United States, a levy is imposed on digital audiotapes only, under the *Audio Home Recording Act* of 1992 (Pub. L. No. 102-563, 106 Stat. 4237). US *Copyright Act* (U.S.C. Title 17), sections 1003-1007. Distribution is supervised by the Librarian of Congress (of which the US Copyright Office forms part).

⁹³ . Denmark (section 35(3)), U.K. (*see the Rapport sur la gestion collective, op. cit.*, p. 36). The system in the United States (role of the Copyright Office) amounts to mandatory collective/compulsory licensing.

Under this system, used mostly in Northern Europe, as soon as a substantial number of rightsholders of a certain category agree to participate in a collective scheme, the scheme is automatically extended not only to other national rightsholders in works of the same category, but to all foreign ones as well.

For example, Section 36 of the Norwegian *Copyright Act*⁹⁴ states:

“When there is an agreement with an organization referred to in section 38 [a which allows such use of a work as is specified in sections 13 [copies for educational activities], 14 [copies by business users], 17 [use by the disabled], fourth paragraph, and 34 [retransmission], a user who is covered by the agreement shall, in respect of rightsholders who are not so covered, have the right to use in the same field and in the same manner works of the same kind as those to which the agreement (extended collective licence) applies.”

And section 38(a):

“Agreements intended to have an effect as specified in section 36, first paragraph, shall be entered into **by an organization which represents a substantial part of Norwegian authors in the field**, and which is approved by the Ministry. For use in certain specified fields, the King may decide that the organization which is approved shall be a joint organization for the rightholders concerned.” (Emphasis added)

In Sweden, section 26(i) of the *Copyright Act*⁹⁵ provides for a similar result, although royal assent does not seem necessary:

“An extended collective agreement license referred to in Articles 13 [copies for educational activities], 26(d) [simultaneous satellite transmissions] and 26(f) [cable retransmission] apply to the use of works in a specific manner, **when an agreement has been concluded concerning such a use with an organization which represents a substantial number of Swedish authors in the field concerned**. The extended collective agreement license gives the user the right to use works of the type referred to in the agreement notwithstanding the fact that the authors of those works are not represented by the organization.

⁹⁴ . Act no. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works, as amended.

⁹⁵ . Act 1960:729, of December 30, 1960, as amended up to January 1, 1996.

[...]

When a work is used on the basis of Articles 13 or 26(f), the following applies. The conditions concerning the use of the works which result from the agreement apply. As regards remuneration deriving from the agreement and as regards other benefits from the organization which are essentially paid for out of the remuneration, **the author shall be treated in the same way as those authors who are members of the organization.** Without prejudice to what has now been stated such authors have, however, always a right to remuneration in respect of the utilization provided that they claim such a remuneration within three years from the year in which the use took place. Claims for remuneration may be directed only against the organization.

Only the contracting organizations are entitled to put forward claims for remuneration against the user of a work on the basis of Article 26 f. All such claims shall be forwarded at the same time.”
(Emphasis and bracketed notes added)

Article 15(a) of the Icelandic *Copyright Act*⁹⁶ provides for an extension similar to that contained in Swedish law, but adds a clear opt-out clause:

”Anyone having obtained permission to photocopy works or reproduce them in a similar fashion for business purposes by agreement with the organisations of copyright holders, **who act in the interests of a significant portion of Icelandic authors to this end and have received formal legal recognition from the Ministry of Education, Science and Culture** for this purpose, shall also be entitled to reproduce the works in the same fashion, without requiring the express consent of the author in each case, even though the author is not a member of the organisation. **Each individual author can, by a written interdict (*sic*), prohibit the reproduction of his works in accordance with this paragraph.**”

An extended collective system exists also in Denmark.⁹⁷

It is worth noting that an almost identical result is reached when a copyright tribunal or board determines that only a particular Collective Management Organization should act in a certain field, because that determination is usually based on the fact that the CMO represents a considerable or substantial number of the rightsholders concerned.

⁹⁶ . The *Copyright Act*, No. 73, of 29 May 1972, as amended by Act No. 78, of 30 May 1984, Act No. 57, of 2 June 1992, Act No. 145, of 27 December 1996 and Act No. 60, of 19 May 2000.

⁹⁷ . *Copyright Act* 1995, section 51(2). See also Rapport sur la gestion collective, *op. cit.*, p. 7.

(v) Summary and analysis

We do not recommend using the implied licence system due to the potential uncertainty around the introduction of the concept of “apparent licence” and the fact that it resembles a compulsory licence. In fact, this British system is probably not a model in this field given the number of long and protracted cases brought before the UK Copyright Tribunal.

New *compulsory* regimes should only be established in areas where the individual exercise of rights is impossible. Even in these cases, a combination of rightsholders’ needs and user/market forces should lead to the creation of the necessary collectives. Where the individual exercise of rights is possible (though perhaps not desirable), mandatory collective management can be perceived as a serious encroachment or restriction on the freedom of rightsholders, and as a form of compulsory licensing--implying that it must be compatible with Canada’s international treaty obligations (especially Article 9(2) of the Berne Convention).

The *presumption* system works well in Germany, but does not have the same degree of legitimacy that follows from voluntary or extended licensing. It is preferable to let rightsholders concerned (at the very least a substantial number of them) decide whether a particular CMO should be authorized to represent them.

A system of *extended collective licensing* seems to work best in countries where (a) rightsholders are fairly well informed and organized; and (b) a significant proportion of the material comes from foreign countries, because foreign rights acquisition is usually even more difficult and time-consuming. In the field where the system is most widely used, namely reprography, Scandinavia is by far the most successful part of the world both in terms of coverage and collections.

Such a system could be of interest to Canadian rightsholders, users and Collective Management Organizations in certain fields. It would offer several key advantages:

- It greatly accelerates and reduces the cost of the rights acquisition process for both new and “old” Collective Management Organizations. Older CMOs can use it to acquire new rights to offer new (*e.g.*, digital) licences;
- This in turn means that the Collective Management Organization is able to offer users a licence covering a much broader repertory, with greater certainty and much more rapidly;
- It is fully consistent with the principle that a Collective Management Organization should acquire the rights it wishes to license.
- It does not force rightsholders to participate; they may opt out of the collective system. In reality, however, the biggest hurdle that a Collective Management Organization generally faces is not rightsholders who clearly *decide* they do not want the system, but rather those who are not aware of the existence of the system and cannot be easily reached or who for one reason or another have failed to decide whether to participate;
- It is far better than a presumption system because it only applies once a substantial number of rightsholders of the category concerned have joined;
- It is not restricted by the international rules that govern compulsory licensing (provided rightsholders can opt out).

Canadian Collective Management Organizations should not be forced to use extended collective licensing. Instead, organizations that wish to do so should be given the option of using it. It is similarly important to allow rightsholders who wish to opt out to do so, although their recourse could be limited to claiming the amount otherwise available under the collective scheme. This is important both under national law, including the *Charter and Rights and Freedoms*,⁹⁸ and because without opting out, the system resembles a non-voluntary licence and may have to comply with all applicable international rules in this area, notably Article 9(2) of the Berne Convention, which was

⁹⁸ . See note 74.

incorporated by reference into the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Article 9).

In summary, an extended collective licensing system could:

- Accelerate the rights acquisition process in newer areas of rights management, such as electronic (digital) uses of protected material while respecting rightsholders who do not wish to participate in the system; and
- Be of great benefit to users, because they get the assurance that the repertory of works they are paying for is indeed complete;

In areas where it applies, it would also replace the system of rightsholders who cannot be located managed by the Copyright Board, which could use its resources in other ways.

Such a system should be applicable first and foremost to blanket (repertory) licensing environments. In the case of transactional (work-by-work) licensing, the system could be used efficiently where prices are identical and no negotiation is possible. It may be inappropriate to use this legislative technique to allow Collective Management Organizations to negotiate individual transactional licenses on behalf of an individual rightsholders, unless (*e.g.* for rightsholders who cannot be located) a regulatory mechanism ensures transparency. One could insist that a copy of any negotiated transactional licence on behalf of non-member rightsholders be filed with the Copyright Board.

RECOMMENDATION 1: EXAMINE THE POSSIBILITY OF ESTABLISHING AN EXTENDED COLLECTIVE LICENSING THAT COLLECTIVE MANAGEMENT ORGANIZATIONS COULD USE, IF AND WHEN APPROPRIATE, FOR BLANKET (REPERTORY) OR TRANSACTIONAL LICENSING PURPOSES.

THIS WOULD INCLUDE AN EXAMINATION OF

- A) WHAT AN APPROPRIATE “CATEGORY” OF RIGHTSHOLDERS IS FOR THE PURPOSE OF AN EXTENSION;**
- B) THE NUMBER OF CANADIAN RIGHTSHOLDERS WITHIN SUCH A CATEGORY THAT WOULD HAVE TO BE REPRESENTED BY THE COLLECTIVE MANAGEMENT ORGANIZATION FOR THE EXTENSION TO APPLY;**
- C) HOW AND WHO (PRESUMABLY THE COPYRIGHT BOARD) WOULD DETERMINE THAT THE NUMBER IS SUFFICIENT (SUBSTANTIAL ENOUGH) TO GIVE RISE TO THE EXTENSION; AND**
- D) HOW RIGHTSHOLDERS WHO SO WISH COULD LEAVE THE SYSTEM.**

BECAUSE THE SYSTEM SHOULD BE VOLUNTARY (*i.e.*, NO CMO WOULD BE FORCED TO USE IT), THERE MAY NOT BE A NEED TO LIMIT LEGISLATIVELY THE AREAS IN WHICH THE EXTENDED LICENSE COULD APPLY, ALTHOUGH, BASED ON CURRENT PRACTICES, IT WOULD SEEM TO BE APPLICABLE MAINLY TO “GENERAL REGIME” CMOs (SECTION 70.1).

To introduce such a system in Canada, a number of legislative changes would be necessary, including the establishment of the extended licence itself, perhaps along the lines of Section 36 of the above-mentioned Norwegian *Copyright Act*, with a clear opt-out clause added.

A solution will also have to be found to situations in which two Collective Management Organizations license the same type of works for the same type of use. One option would be for each Collective Management Organization to “notify” its Canadian and foreign repertory to the other, thereby excluding it from the notified CMO’s repertory (because rightsholders who have entrusted their rights to the notifying Collective Management Organization would be considered to have opted out of the notified CMO’s licensing scheme). In practice, this would mean that two Collective Management

Organizations would represent rightsholders that did not expressly join one of the two collectives (directly or through an agreement with a foreign CMO). This would thus not be a huge problem once most (and probably all significant) rightsholders, including foreign ones) have joined one of the two. Clearly, however, the situation would work better if the two Collective Management Organizations were able to agree on a mutually acceptable *modus vivendi*.

Our analysis of rights acquisition mechanisms has shown that there may be an interest in exploring further the application of the extended collective system to at least some Canadian Collective Management Organizations. We now turn to the appropriate level of State control of the operations of Collectives.

4) State Control of the Operations of Collective Management Organizations

(i) Canada

Control by the State of Collective Management Organizations is not new, though its form and scope vary greatly from country to country. In Canada, following the establishing of the Canadian Performing Right Society (CPRS) and investigations first by Mr. Justice Erwing in 1932⁹⁹ and the Parker Commission in 1935, it has been recognized, at least with respect to music performing rights, that the activities of Collective Management Organizations may affect the public interest. As Chief Justice Duff wrote in 1943:

“It is of first importance, in my opinion, to take notice of this recognition by the legislature of the fact that these dealers in performing rights (*i.e.*, the societies) which rights are the creature of statute, are engaged in a trade which is affected with a public interest and may, therefore, conformably to a universally accepted canon, be properly subjected to public regulation.”¹⁰⁰

In fact, Canada was the first country to impose a statutory mechanism for the fixation of licence fees, in 1936.¹⁰¹

The various forms of control of CMOs in Canada may be summarized as follows:

⁹⁹ . See Order-in-Council No. 169 of January 28, 1932. Justice Erwing’s report was published in 1933 by F.A. Acland, King’s Printer.

¹⁰⁰ . *Vigneux v. CPRS* (1943) 3 Fox Pat. C. 77, at pp. 80-81. This passage is followed by a reference to the case of *Hanfstaengl v. Empire Palace* [1894] 3 Ch. 128, in which copyright is described as a monopoly, indistinguishable from patents, and which according to Duff C.J., “expresses the *raison d’être* of the enactments under consideration.” The Privy Council, in allowing the appeal, basically agreed with Duff C.J. (see (1945) 4 Fox Pat. C. 183, 193. As explained below, we would disagree with this view that amalgamates patents and copyrights.

¹⁰¹ . See N. Tamaro. *The 2001 Annotated Copyright Act*. (Toronto: Carswell, 2001), at p. 632.

Activity	Control
Formation	None specifically. General laws (corporations, competition) may apply.
Operations	No direct supervision. Information (and direction) may be provided by CMOs as part of Copyright Board proceedings. CMOs must answer requests for information about their repertoire. ¹⁰² Government intervention through subsidies.
Licenses by CMOs	Copyright Board (filing of agreements & supervision/determination of tariffs)
Licensing practices	Possible interventions under the <i>Competition Act</i> . However, agreements filed with the Copyright Board not subject to section 45 of the <i>Competition Act</i> (section 70.5(3) of the <i>Copyright Act</i>).
Tariffs	Copyright Board (mandatory/optional)
Relations with users/exceptions	Possible arbitration by the Copyright Board (section 70.2)

TABLE 2: EXISTING CONTROL OF CMOs UNDER CANADIAN LAW

How does this level of control compare with the situation in key foreign countries?

(ii) United States

In the United States, the U.S. *Copyright Act* does not regulate formation of and participation by rightsholders in a collective scheme. Though the *Copyright Act* is basically silent on this point, the *Fairness in Music Licensing Act of 1998*¹⁰³ amended section 101 of the *Act* by adding a definition of “performing rights society,” which reads:

“A ‘performing rights society’ is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.”

This definition is only used in the context of the interactive transmission right. Section 114(d)(3)(C) of the US *Act* reads as follows:

“Notwithstanding the grant of an exclusive or nonexclusive license of the right of public performance under section 106(6),¹⁰⁴ an interactive service may not publicly perform a sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording: Provided, That such license to publicly perform the copyrighted musical work may be granted either by a **performing rights society** representing the copyright owner or by the copyright owner.”

Where a compulsory licence applies, the Copyright Office can establish Copyright Arbitration Royalty Panels (CARPs) to determine “reasonable terms and rates of royalty payments.”¹⁰⁵ In fact, there is no regulation concerning formation or governance of Collective Management Organizations as such. They can be for-profit, though that is the exception. While certain US collectives have a fairly traditional (from the perspective of other countries) board of directors composed of authors and publishers (*e.g.*, ASCAP), and others have a board composed entirely of “users” (BMI’s Board is

¹⁰² . Sections 67 and 70.11. Effect of non-compliance not entirely clear.

¹⁰³ . Pub. L. No. 105-298, 112 Stat. 2827, 2833.

¹⁰⁴ . 106(6): “Subject to sections 107 (fair use) through 121 (other exemptions), the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: [...]

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”

¹⁰⁵ . § 801. See also § 114, 115, 116, 118 and 119 concerning the situations for which a CARP may be established, and § 802 and 803 concerning CARP membership and proceedings.

composed entirely of broadcasters), still others have authors, publishers and users on their Board (e.g., Copyright Clearance Center-- (CCC), a CMO in the field of reprography).¹⁰⁶

The two principal US performing rights societies (ASCAP and BMI) are subject to “consent decrees.” These decrees are judicial decisions that govern their operations and which are “negotiated” with the US Department of Justice (DoJ) under antitrust laws and then given the force of a judicial decision by a federal court.¹⁰⁷ The most recent ASCAP decree, though much less constraining than the previous one, still establishes a rate court to adjudicate disputes with users on tariffs and licensing conditions; it also governs certain aspects of distribution, imposes transparency obligations concerning the repertory and gives the DoJ, access to the premises of ASCAP and to documents as well as the right to interview employees and request reports.¹⁰⁸ Even though it is not copyright-specific, the US system of regulation of Collective Management Organizations imposes a significant degree of control over the two performing rights CMOs.

To avoid being considered monopolistic, Collective Management Organizations may apply to the DoJ for a “business review letter,” which will state that a CMO is not violating antitrust legislation if it continues doing business as stated in the letter.¹⁰⁹ This is the case of, *inter alia*, CCC.¹¹⁰ In the US, CMOs may also be asked to register for the right to collect under certain compulsory licenses.¹¹¹

(iii) Japan

In Japan, the Agency for Cultural Affairs maintains an oversight authority over all Collective Management Organizations under the *Law on Intermediary Business*

¹⁰⁶ . See www.ascap.com; www.bmi.com; www.copyright.com.

¹⁰⁷ . See “ASCAP and the Department of Justice Agree on New Consent Decree,” press release dated Sept. 5, 2000, available at < <http://www.ascap.com/press/afj2-090500.html>>.

¹⁰⁸ . At the time of this writing, the text of the decree was available at <http://www.wcbcourses.com/wcb/schools/LEXIS/law/ln800576/14/files/afj2final.pdf>.

¹⁰⁹ . For an example of a business review letter, see <http://www.usdoj.gov/atr/public/busreview/0125.htm>.

¹¹⁰ . DoJ Review 93-11.

¹¹¹ . See, e.g., Section 201.37 of title 37 of the Code of Federal Regulations.

concerning Copyrights. The extent of this authority is not clear, but in practice the Agency is closely involved in matters concerning collective management of rights. A prior approval procedure for the formation of new collectives is in place.

(iv) Europe

Within the European Union, the level of State control over Collective Management Organizations varies greatly. In at least 11 of the 15 EU countries, prior approval is necessary to begin operating as a CMO, although in five of those (Denmark, Finland, France, Italy, Netherlands), only certain collectives are concerned. A registration procedure is provided in Ireland and Portugal, while no control exists in Sweden and the U.K.¹¹²

When prior approval is required, most often the task belongs to the Ministry of Culture or a cultural entity. There are other options, however: in Germany, the responsibility lies with the Patent Office; in Austria, with the Ministry of Education; in Belgium, with the Ministry of Justice and in Luxembourg, with the Ministry of Finance.

12 of the 15 EU member countries have given a branch of government the authority to monitor some or all of the Collective Management Organizations operating on their territory. In five of those countries (Belgium, Denmark, Italy, Luxembourg and the Netherlands), the supervisory authority can routinely attend decision-making meetings. Generally, however, the supervision is limited to the communication of relevant documents.¹¹³ In four countries (Belgium, Denmark, Germany and the Netherlands) the distribution plan of some or all Collective Management Organizations must be approved. However, once approved can no longer be questioned. In six countries (Austria, Belgium, France, Germany, Greece and Spain), the government can reprimand or “penalize” a CMO.

¹¹² . Deloitte & Touche report, at p. 74. And see above concerning JASRAC.

¹¹³ - “La gestion collective des droits d’auteur et des droits voisins”. Rapport établi pour le Sénat français, 1997. Available at the time of this writing at

Some of the models used in Europe are worth exploring in greater detail.

France introduced fairly extensive control of the operations of Collective Management Organizations in the year 2000. Until August 2000, there was very little control over Collective Management Organizations: approval of new CMOs by the Minister of Culture,¹¹⁴ an obligation to appoint an auditor,¹¹⁵ and an obligation to put their repertory at the disposal of users.¹¹⁶ A Collective Management Organization also had to provide the Minister of Culture with annual accounts and any proposal to modify its statutes, at least two months before the General Assembly was convoked.¹¹⁷ Amongst the changes introduced on August 1, 2000 (Law No. 2000-719¹¹⁸) was the creation of a commission composed of five members with full authority and access to all documents, data and software used by a Collective Management Organization, and even the right to ask questions of a collective's auditors, whose confidentiality obligation was suspended in such a case.¹¹⁹ Failure by a Collective Management Organization manager to respond to an inquiry may result in the imposition of a fine of 100,000 FF (approximately CDN\$21,000) and/or one-year imprisonment. Members (rightsholders) of a Collective Management Organization also have a right to obtain specific information from their Collective Management Organization.¹²⁰ The application of the new system is too recent to determine its efficacy.

<http://www.senat.fr/lc/lc30/lc30_mono.html>. Hereinafter “Rapport sur la Gestion collective”); and the Deloitte & Touche report, at p. 79.

¹¹⁴ . Intellectual Property Code, section L.321.3.

¹¹⁵ . *Id.*, section L.321-4.

¹¹⁶ . *Id.*, section L.321-7.

¹¹⁷ . *Id.*, section L.321-12.

¹¹⁸ . See especially section 11 and 12 of this Law.

¹¹⁹ . *Id.*, section L.321-13. One of the five members of the Commission is appointed by the Minister of Culture. Others are professional (State) financial auditors.

¹²⁰ . Article L. 321-5 of the *Intellectual Property Code*: “Any member shall be entitled, subject to the conditions and time limits set out by decree, to obtain communication: 1° Of the annual statement of accounts and the list of administrators; 2° Of the reports of the administrative council and of the auditors, that are to be submitted to the general meeting; 3° Where appropriate, the text and motivation of resolutions submitted and information concerning candidates for the administrative council; 4° The overall amount, certified by the auditors, of the remuneration paid to the most highly remunerated persons, whereby the number of such persons shall be 10 or five depending on whether the staff exceeds 200 employees or not.” (WIPO Translation)

The previous control system in France was based solely on the application of competition rules and offers perhaps the best example of why those rules by themselves sometimes fail to work. The association of discotheque owners in France launched a series of legal battles both in French and European courts, arguing that SACEM (the French performing rights collective) was abusing its monopolistic position and violating a number of other competition rules, including Articles 81 and 82¹²¹ of the EU's main legal document, the Treaty of Rome. More than 1,000 legal decisions were rendered, including several by the French Supreme Court.¹²² Although SACEM won almost all its cases, it had to expend enormous resources to fight these battles and rightsholders ended up losing a considerable amount of royalties.

In Germany, Collective Management Organizations are governed by the *Administration of Copyright and Neighbouring Rights Act*,¹²³ perhaps the most extensive model of sector-specific State control of the operations of Collective Management Organizations anywhere in the world. Under sections 2-4 of this *Act*, the German Patent Office (*Patentamt*) must approve the formation of Collective Management Organizations and can revoke said authorization at any time. Under this *Act*, the Patent Office may appoint board members of any CMO¹²⁴ and revoke any “person entitled by law or the statutes to represent a collecting society [who] does not possess the trustworthiness needed for the exercise of his activity; the supervisory authority shall set a date for him to be relieved from his post to avoid revocation of authorization under Article 4(1). The supervisory authority may forbid him to exercise his activity further pending expiry of the time limit where necessary to prevent serious detriment.”¹²⁵ The *Act* imposes a duty to administer rights upon request from a qualified rightsholder (EU national) and must

¹²¹ . Formerly Articles 85 and 86.

¹²² . See, e.g., *SACEM v. S.A. Princesse*, (1987) 133 RIDA 188; and *Sté Le Xenon v. SACEM*, 85-2 J.C.P. 227. See also W. Nordemann, “Les problèmes actuels des sociétés d’exploitation des droits d’auteur au sein de la communauté européenne,” (1988) 135 RIDA 31.

¹²³ . Of September 9, 1965, as last amended by the Law of June 23, 1995.

¹²⁴ . *Id.*, sections 18 and 19.

¹²⁵ . *Id.*, section 19(4).

provide information on its activities.¹²⁶ By law, each Collective Management Organization must also “set up welfare and assistance schemes for the holders of the rights and claims that they administer.”¹²⁷ While the *Act* does not prevent the formation of more than one society in a given field, at present there is only one Collective Management Organizations in each field. Each German Collective Management Organizations is therefore in a *de facto* monopoly situation.

In Italy, the Authors’ Society (SIAE) has been a monopoly since 1941 in the field of authors’ rights. It is controlled by the Presidency of the Council of Ministers. Section 180 of the *Copyright Act*¹²⁸ reads as follows:

“The right act as an intermediary in any manner whether by direct or indirect intervention, mediation, agency or representation, or by assignment of the exercise of the rights of performance, recitation, broadcasting, including communication to the public by satellite, and mechanical and cinematographic reproduction of protected works, shall belong **exclusively** to the SIAE.

It shall pursue the following activities:

1. The granting of licenses and authorizations for the exploitation of protected works, for the account of and in the interests of the right holders;
2. The collection of the revenue from the licenses and authorizations;
3. The distribution of that revenue among the right holders.”

A new Italian Collective Management Organization called IMAIE was established to administer the secondary use rights of performers and producers of phonograms. The Government appoints part of IMAIE’s board. A third collective known as AIDRO was set up to administer reprographic royalties.¹²⁹

(v) Analysis

¹²⁶ . *Id.*, sections 6, 9 and 10.

¹²⁷ . *Id.*, section 8.

¹²⁸ . Copyright Statute, Law No. 633 of April 22, 1941, for the Protection of Copyright and Other Rights Connected with the Exercise Thereof as amended up to November 16, 1994.

¹²⁹ . See <http://www.ifpro.org/members/aidro.html>.

The question of the control of the operations of Collective Management Organizations' by the State boils down to a fundamental policy question: do Collective Management Organizations perform a "public" function? Given the fact that Collective Management Organizations handle substantial funds that belong to third parties, should rightsholders be treated as bank customers, in the sense that only approved (*e.g.*, chartered) banks can operate as such? It is certainly true that most financial intermediaries are licensed and sometimes extensively regulated by the State. However, contrary to most financial intermediaries, Collective Management Organizations are often owned and/or controlled by the rightsholders they represent. In addition, most Collective Management Organizations consider that they play a cultural role in addition to acting as financial intermediaries.

Treating Collective Management Organizations to a certain extent as entities playing a "public" role and consequently imposing a certain right to oversee their operations may lead to greater credibility because users who know that Collective Management Organizations are subject to certain obligations may find it easier to deal with them. By the same token, "approved" CMOs may find that it is easier to negotiate and/or enforce the rights entrusted to them. In other words, regulated Collective Management Organizations could gain a certain degree of additional institutional recognition. On the other hand, most CMOs operated as *private* associations of rightsholders and their business is (presumably) well supervised by the rightsholders who serve on their boards, many of whom would no doubt argue that the Government has no business controlling what they do or how they do it.

There is no easy answer to or unanimity of views on this question, including among the collectives themselves. On several occasions, including before the Legal Advisory Board (LAB) of the European Commission, representatives of German Collective Management Organizations (as explained above, German law provides for extensive state control of CMOs) *advocated* State control of the activities of collectives within the EU. They argued it gave them legitimacy and credibility. In addition, in "exchange" for the control, the law made it more difficult to question tariffs or

distribution plans. Several Collective Management Organizations from other countries opposed any intervention by individual member States or the EU Commission.

In Canada, there are a number of instances of complaints about the actual operations of Collective Management Organizations, but those complaints usually deal with tariffs--usually a matter for the Board--or lack of repertoire--a rights acquisition problem. Massive state intervention is thus not required. As noted above, there is already a degree of state control: certain Collective Management Organizations must, under certain circumstances, provide the Copyright Board with copies of their licences, and often also other information about their activities, *e.g.*, in the course of hearings. If additional measures are taken to support Collective Management Organizations in their rights acquisition efforts, as suggested below, it would make sense to introduce minimal state supervision of Collective Management Organizations that wish to benefit from any special rights acquisition regime. In other words, if the law were changed to facilitate repertoire acquisition by certain Collective Management Organizations (*e.g.*, extended collective licensing), it would make sense, as a counterpart obligation, to impose minimal transparency or registration obligations, two of the most common obligations imposed on Collective Management Organizations. The purpose would be to ensure that all rightsholders, including those that are not a member of the CMO but whose rights are managed by the Collective Management Organizations under the extended licence have access to the necessary information (management, finances, etc.) about the organizations administering their rights. Compliance with these requirements by CMOs should be voluntary, although non-compliers could not benefit from the special rights acquisition regime.

RECOMMENDATION 2: IF A SPECIAL RIGHTS ACQUISITION REGIME IS ESTABLISHED IN FAVOUR OF COLLECTIVE MANAGEMENT ORGANIZATIONS, WE RECOMMEND IMPOSING CERTAIN TRANSPARENCY (FILING OF REPORTS, ETC.) AND REGISTRATION REQUIREMENTS TO THE COLLECTIVE MANAGEMENT ORGANIZATIONS THAT WISH TO BENEFIT FROM THE REGIME. OTHERWISE, NO

CHANGES ARE SUGGESTED TO EXISTING STATE CONTROL MECHANISMS.

5) Control of Prices (Tariffs) and Licensing Practices

Let us now examine the various legal systems in place to control the tariffs applied by Collective Management Organizations.

(i) Control Only Under Competition/Antitrust Laws

This is the system in place in the United States, for example. Under the consent decrees that govern the operations of ASCAP and BMI (see previous section), a federal judge acts as a “rate court” in case of a dispute between one of these Collective Management Organizations and a user or user group.¹³⁰ In the case of non-voluntary licenses, the US *Copyright Act* provides the Copyright Office with the authority to convene Copyright Arbitration Royalty Panel (CARP) to determine the appropriate tariff.¹³¹ To our knowledge, this system is not in existence in any other country and depends too much on the special characteristics of the US legal system to be of any direct use or application in Canada.

(ii) Copyright Board/Arbitration

The Canadian system of control by a specialized administrative tribunal¹³² of the tariffs and other conditions¹³³ of repertory (blanket) licences and rights to remuneration is

¹³⁰ . A new consent decree was agreed upon between ASCAP and the US Department of Justice (DOJ) last fall. It is said to streamline rate proceedings. See the DOJ press release dated Sept. 5, 2000 at <http://www.usdoj.gov/opa/pr/2000/September/517at.htm> .

¹³¹ . U.S. *Copyright Act*, § 801. See also § 114, 115, 116, 118 and 119 concerning the situations for which a CARP may be established, and § 802 and 803 concerning CARP membership and proceedings; and www.loc.gov/copyright/licensing.

¹³² . The Copyright Board is the successor to the Copyright Appeal Board (see R.S.C. 1985, c. C-42, S. 66-68 and R.S.C. 1970, c. C-30, section 50). See also Michel Héту, “La Commission du droit d’auteur: fonctions et pratiques,” (1993) 6 *Cahiers de propriété intellectuelle* 407.

¹³³ . The power of the Board to examine matters other than strict tariffs, but also the terms and conditions of licensing arrangements follows from jurisprudence (see, e.g., *Maple Leaf*

fairly common, although the exact procedures and scope of the powers of equivalent control entities followed in each country vary greatly.

Tribunal and specialized boards most often have a jurisdiction confined to tariffs, and/or cases where collective management is mandatory.¹³⁴ A role over other disputes exists only in the laws of Austria, Finland and the Netherlands. In other foreign laws and practices, arbitration and mediation, generally on an entirely voluntary basis, often work side-by-side with a more formal system. A recent Deloitte & Touche report¹³⁵ noted that in many of these countries the system is seldom used.

In Germany, an arbitration board may be set up under Section 14 of the *Administration of Copyright and Neighbouring Rights Act*.¹³⁶ This excludes action before the courts until an arbitral decision is rendered.¹³⁷ The *Act* also mandates publication of tariffs and instructs CMOs as follows:

“The basis for calculating the tariffs shall normally be the monetary advantages obtained from exploitation. The tariffs may also be computed on other bases where these result in adequate criteria for the proceeds of exploitation that may be assessed with reasonable economic outlay. When establishing tariffs, **the proportion of the utilization of a work in the total exploitation shall be taken into appropriate account. In establishing the tariffs and in collecting the remuneration, collecting societies shall have due regard to the religious, cultural and social interests of the persons liable to pay the remuneration, including the interests of youth welfare.**”¹³⁸ (Emphasis added)

Broadcasting Co. v. Composers, Authors and Publishers Assn. of Canada Ltd., [1954] S.C.R. 624; and *Performing Rights Organization of Canada Ltd. v. Canadian Broadcasting Corp.*, [1986] F.C.J. No. 8 (F.C.A.); and, since 1988, also from the *Act* (see, e.g., section 68(3)).

¹³⁴ . That is the case, *inter alia*, in Denmark, Finland, Greece, Italy, Luxembourg, Spain, Sweden. See the Deloitte & Touche report, Section 4, at p. 4.

¹³⁵ . *Idem*, at p. 7.

¹³⁶ . See note 123, *supra*.

¹³⁷ . *Id.*, section 16.

¹³⁸ . *Id.*, section 13.

A Copyright Licensing Tribunal exists in Denmark to set prices for compulsory licences.¹³⁹

We do not believe that a need to change the role of the Copyright Board in any major way has been demonstrated.¹⁴⁰ However, certain changes and enhancements could be envisaged, including the introduction of an upstream Alternative Dispute Resolution (ADR) procedure. Such a mediation system exists in Denmark, Ireland, Italy, the Netherlands, Spain and Sweden. *Ad hoc* commissions of rightsholders and users play a similar role in Austria, Germany, Finland and Luxembourg.¹⁴¹ Internal mediation (between rightsholders and the CMO) is in place in Denmark,¹⁴² France,¹⁴³ and Portugal.¹⁴⁴ Mediation is also part of European law: the Directive on Cable and Satellite¹⁴⁵ makes possible recourse to a mediator to negotiate retransmission royalties. Article 11 of the Directive reads as follows:

- “1. Where no agreement is concluded regarding authorization of the cable retransmission of a broadcast, member States shall ensure that either party may call upon the assistance of one or more mediators.
2. The task of the mediators shall be to provide assistance with negotiation. They may also submit proposals to the parties.
3. It shall be assumed that all the parties accept a proposal as referred to in paragraph 2 if none of them expresses its opposition within a period of three months. Notice of the proposal and of any opposition thereto shall be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents.
4. The mediators shall be so selected that their independence and impartiality are beyond reasonable doubt.”¹⁴⁶

¹³⁹ . *Act on Copyright 1995*, section 47 (amended 1996). Such licences apply to lending to the blind (section 17(2)), use for educational purposes (section 18(1)), cable retransmission (section 35), and remuneration for performers and producers (for secondary use—section 68).

¹⁴⁰ . A number of changes were suggested since 1997 by rightsholders, CMOs and user groups. However, many of those (*e.g.*, notice provisions) cannot be easily analyzed from an international perspective. They are too closely linked to the exact set up of the Board and will not be discussed here.

¹⁴¹ . See the Deloitte & Touche Report, Section 4.

¹⁴² . COPY-DAN, the Danish RRO, has an internal tribunal for questions concerning the split of remuneration among its member CMOs.

¹⁴³ . SACD, the “grand rights” CMO.

¹⁴⁴ . The Portuguese Society of Authors (SPA), the main CMO in Portugal.

¹⁴⁵ . Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (the “Satellite and Cable Directive”), OJ L 248/15 of Oct. 6, 1993.

¹⁴⁶ . *Idem*.

The Copyright Board already has an arbitration role between Collective Management Organizations and individual users (in section 70.2), but it is still fairly formal in nature. The establishment of a voluntary mediation system should be considered. There are many ways in which this could be implemented. Perhaps a mediation procedure could be adopted as regulations under the existing Section 66.6(1)(a) of the *Act*. Issues to examine further include:

- The way in which the public interest would be taken into account;
- Whether the mediator would report to the Board and in which way;
- How an agreement reached during mediation feeds into the Board's formal decision-making process (presumably as agreements do under the existing provisions);
- Who would act as mediator (presumably not Board members, but external experts);
- The secrecy or reusability of submissions made during the mediation process (normally, these submissions are made without prejudice to any further process and cannot be used against the party that made them);
- Whether ADR would slow down the existing process. If the ADR process were voluntary (*i.e.*, both sides must agree), this problem would be less critical. In addition, safeguards (*e.g.*, provisional tariffs) should be included to avoid this result.

RECOMMENDATION 3: EXAMINE THE POSSIBILITY OF GIVING THE COPYRIGHT BOARD BROAD ALTERNATIVE DISPUTE RESOLUTION CAPABILITIES (VOLUNTARY MEDIATION).

Another aspect to consider is the status of agreements. In Germany, for example, where state control of Collective Management Organizations is extensive, CMOs must publish their tariffs but are always free to agree on different terms with users. For

example, a 20% discount is generally given when an arrangement can be made with an association of users on behalf of its members.¹⁴⁷ In fact, we found no legislation that prevents individual agreements or makes them subject to mandatory approval, except in cases where collective management is mandatory.

As a matter of policy, Collective Management Organizations and users should be allowed to conclude agreements that take precedence over tariffs (if any), whether before, during or after the tariff fixing process¹⁴⁸. An exception could be made for cases where collective management is mandatory.

6) Distributions and Accounts

In Canada, distribution of royalties by CMOs is done on the basis of usage surveys (*e.g.*, music performing rights), work-by-work (*e.g.*, mechanical rights) or on a different basis that combines survey or other usage data with other criteria (*e.g.*, private copying). There are no specific legal requirements in Canadian law concerning the distribution of royalties, except with respect to non-members. That is the case in most other countries.¹⁴⁹

Exceptions include Germany where, under the *Administration of Copyright and Neighbouring Rights Act*¹⁵⁰, “a collecting society shall distribute the revenue from its activities according to fixed rules (distribution plan) that prevent any arbitrary act of distribution. The distribution plan shall conform to the principle that culturally important works and performances are to be promoted. The principles of the distribution plan shall

¹⁴⁷ . Report to the French Senate, *supra*, at p. 12.

¹⁴⁸ . This assumes that a CMO will always act in the best interest of its members. It has been mentioned that this system seems flawed when a “price break” is given to a user and that lower price is then applied to other users as a matter of “horizontal equity”. We still prefer to let rightsholders concerned deal with that matter within their own CMO, however.

¹⁴⁹ . Approval of distribution plans applies to some or all CMOs in Belgium, Denmark, Germany and the Netherlands. See the Deloitte & Touche report, at p. 80.

¹⁵⁰ . See note 123, *supra*.

be incorporated in the statutes of collecting societies.”¹⁵¹ German Collective Management Organizations must establish a pension fund for their members.¹⁵² Additionally, a distribution “plan” filed with the supervisory authority (Patent Office) can no longer be contested once approved.

In the Netherlands, the distribution plan of those CMOs whose management is supervised by the State (*i.e.*, music CMOs and those whose role is mandatory) must be submitted to and approved by the Minister.¹⁵³

In several national laws, distribution is regulated to the extent that part of the funds collected must be used for “collective purposes.” For example, in Denmark one third of the private copying levies must be used for such purposes. Section 39 of the *Copyright Act 1995* provides as follows:

“(3) Administration and control, including collection, shall be carried out by a **joint organization representing a substantial number of Danish authors, performers and other rightsholders**, including record producers, etc., and photographers, and which is **approved by the Minister** for Culture. The Minister may request to receive all information about collection, administration and distribution of the remuneration.
(4) The organization lays down guidelines for payment of the remuneration to the beneficiaries so that to the greatest possible extent distribution will take place in accordance with the copying actually made. **One third of the annual amount for payment shall, however, be used to support purposes common to the authors and others** within the groups represented by the organization.”
(Emphasis added)

In the United States, no standard distribution scheme is provided and funds collected are generally paid to those who hold rights to a work. There are no restrictions on transfers. That being said, in certain cases standard market practices have developed, such as in the music area, where standard splits apply to most author-publisher agreements.

¹⁵¹ . *Id.*, section 7.

¹⁵² . See note 127, above.

¹⁵³ . Rapport sur la gestion collective, *op. cit.*, p. 8.

We see no need to incorporate distribution rules in the *Act* itself. However, difficulties in this area have been mentioned concerning the distribution by the so-called “umbrella” collectives. The Copyright Board did not set the distribution rules for those rights as it did for private copying levies (as is required by law¹⁵⁴). It may make sense to provide rightsholders with recourse to the Board to examine distribution systems also for rights to remuneration.

Other than as mentioned in the previous sentence, the distribution of funds is best left to the organizations and rightsholders concerned. The same applies to the use of funds for general or cultural purposes.

Another related area is how Collective Management Organizations report their financial operations. If transparency obligations were imposed (see **RECOMMENDATION 2**), it may be useful to recommend accounting standards. Collective Management Organizations that have *audited* accounts are already submitted to stringent standards but each accounting firm may approach certain aspects of the accounts from a different angle. The harmonization of the various accounting practices would allow members and, where appropriate, other rightsholders and governmental authorities to better understand whether a particular Collective Management Organization is working optimally. It would also allow the financial performance and results of collectives to be meaningfully compared. Finally, it might allow newer Collective Management Organizations to have access to useful standard information and best practices.

Legislative action is not the proper tool to use in this context. It should be a matter of policy orientation.¹⁵⁵ Perhaps a committee composed of experts from Collective Management Organizations and the financial community should be established to examine current practices and offer detailed suggestions on this matter, based on Canadian best practices and taking account of practices of collectives in relevant foreign

¹⁵⁴ . See S. 83(11) and following.

markets as appropriate. The existing Roundtable of collectives could be a launch pad for this initiative.

Another aspect of distribution is the use of non-distributable funds. All Collective Management Organizations administering a repertory licence may from time to time receive funds that cannot be distributed according to their distribution plan, often because the rightsholder cannot be located. We found no major problem in that regard in Canada, and no uniform or dominant solution in foreign countries. There are a few examples of laws that require the use of those funds for a specific purpose. For example, under French law, funds received by Collective Management Organizations in cases where collective management is mandatory (reprography, retransmission, private copying) that could not be distributed 10 years from the date at which they could first have been paid out must be used in their entirety for activities that support artistic creation. In addition, 50% of the non-distributable royalties received by neighbouring rights Collective Management Organizations must be used “to promote creation, to promote live entertainment and trainee activities for performers”.¹⁵⁶ However, this is more an exception than the rule and this matter is generally not regulated in national laws. The crucial issue is transparency.

¹⁵⁵ . A similar approach was recommended within the European Union. See the Deloitte & Touche report, at p. 84.

¹⁵⁶ . See Article L.321-9 of the *Intellectual Property Code*. See also A. and H.-J. Lucas. Traité de propriété littéraire et artistique. 2^e édition. (Paris : Litec, 2001), at p. 541-542.

III. Rights Management in the Digital Age

A) Background: Copyright in the Digital Age¹⁵⁷

A few years ago, it was trendy to suggest that copyright and the World Wide Web went together like fire and water and that, as a result, copyright would soon be either evaporated or extinguished¹⁵⁸. Over approximately the past two years, the increasing bandwidth and user base of the Internet as well as powerful new compression algorithms have made it possible to download and use new types of works. PDF¹⁵⁹ published texts, MP3¹⁶⁰ files and, soon, high-quality commercial video files.

The most talked-about phenomenon was and still is music, notably due to MP3 technology and its use by file-exchange services such as Napster, although sites such as iCraveTV and JumpTV have drawn much attention to the phenomenon of video streaming. Will peer-to-peer technology and other forms of online transmission and exchange be the death knell of copyright as we know it¹⁶¹? The answer depends in large part on how fast the so-called “content industries” are able to provide business models in tune with the demands of the various user communities. Chances are that copyright will survive. But the way in which it is used and administered will change. Some of the traditional exclusive rights used to prohibit use of protected material are much more

¹⁵⁷ . Some of the text in this subsection is an updated version of an article by this author entitled “Lock-It Up or License”, published as a chapter in Hugh Hansen (ed.), International Intellectual Property Law and Policy, 6th ed. (New York: Juris Publishing, 2000).

¹⁵⁸ . See, e.g., WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighbouring Rights. (Geneva: WIPO, 1993). WIPO Publication 723 (E).

¹⁵⁹ . “PDF” or portable document format, also known as “Acrobat”, is a common format used to publish texts online. It is made available by Adobe Systems Incorporated. See <http://www.adobe.com/products/acrobat>.

¹⁶⁰ . MP3 is short for MPEG Audio Layer 3. MPEG refers to the Moving Pictures Experts Group, an organization that sets international standards for digital formats for audio and video. The file-shrinking technology itself was developed by the Fraunhofer Institute in Germany.

¹⁶¹ . See (US) National Research Council. The Digital Dilemma: Intellectual Property in the Information Age. (Washington: National Academy Press, 2000), pp. 76-87; and Michael D. Crawford, “Modern Technology and the Death of Copyright,” GOINGWARE, Feb. 2, 2000. Available at <<http://www.goingware.com/comments/2000/feb/05top.html>>.

difficult to apply to the Internet environment. Even if technology allows rightsholders to prevent copying and/or online distribution and sharing, in some cases overprotection may lead to consumer/user dissatisfaction and, paradoxically, lower revenues. Yet, properly applied the copyright “concept” is still the best basis to claim financial compensation and organize markets, two essential tools for creators, performers, publishers and producers.

To protect content on the Internet, a number of “secure” initiatives, sometimes referred to as “rights management systems”, have been proposed and several systems are in advanced “beta testing” phase or already in the active commercialization phase. These technologies are used to prevent unauthorized access to the material, prevent unauthorized reproduction (copying)/distribution or both. To name but one example, the Secure Digital Music Initiative (SDMI)¹⁶² is building “a voluntary, open framework for playing, storing, and distributing digital music in a protected form”¹⁶³. In the text world, companies such as Calgary-based Rightsmarket,¹⁶⁴ Reciprocal¹⁶⁵, CyVeillance¹⁶⁶ and Intertrust¹⁶⁷ are marketing technology that prevents reuse of online content (except as authorized at the time the content was acquired). This may take the form of a “container” in which digital content is delivered and/or a watermark to track content posted on (publicly-available) websites. The protection technology checks for authorization before providing access to the protected content or allowing the user to make or send a copy. The need to balance a high level of protection with users’ needs is (officially) recognized by all these technology companies¹⁶⁸. Whether they succeed as intermediaries will ultimately depend on users’ reaction and acceptance level.

¹⁶² . See www.sdmi.org.

¹⁶³ . From the SDMI website. See previous note.

¹⁶⁴ . See www.rightsmarket.com.

¹⁶⁵ . See www.reciprocal.com.

¹⁶⁶ . See <http://www.cyveillance.com/web/us/solutions/digital_asset_protect.htm>.

¹⁶⁷ . See www.intertrust.com.

¹⁶⁸ . For example, in a press release dated March 5, 2001, the leader of the SDMI project, Dr. Leonardo Chiariglione is quoted as saying “final technology selection [will] meet both consumer demands for ease of use and simplicity, as well as content owners' needs for protection.” See <http://www.sdmi.org/pr/TO_Mar_05_2001_PR.htm>.

While music is on the front lines, text publishers were the first in the digital trenches. Their content takes up fewer bytes (even in PDF) and can thus be copied and disseminated easily even with (relatively) low-speed Internet access such as 56.6 Kbytes modems. Yet, several large publishing houses now offer very high-quality content over the Web. For example, readers of scientific, technical and medical literature can find thousands of high-quality journals offered online (usually in addition to the paper copy): Academic Press' IDEAL,¹⁶⁹ Science Magazine,¹⁷⁰ Elsevier's Science Direct¹⁷¹ and Springer-Verlag's LINK¹⁷² and dozens of other systems which could be mentioned here. Hundreds of magazine and newspaper publishers are following the same path and major newspapers in many countries are available online in full text, often on the same day as the paper publication. In Canada and in most countries worldwide, several major newspapers are available online. One advantage often mentioned by users of the online version is that they can be word-searched, and archives are often searchable as well. If providing online access to content was supposed to torpedo copyright, as we know it, these "content providers" would all be dead by now!

The business models that support the delivery of online content vary greatly. The most common models may be summarized as follows: in some cases, the material is available for free and can be searched and downloaded without identifying oneself. These models are often advertising-based. Most often, however, and especially in light of the rapid drop in advertising revenue, material will be offered only after the user has registered. This process provides content owners and service providers with valuable demographic and other market information and allows them to compile possible e-mail lists for future direct marketing efforts. In other cases, while an abstract or a few seconds of the song is used to illustrate the content ("teaser"), fees are charged to download the full text or song. Other providers prefer a subscription model which, for the print world, can be a subscription to the electronic version only, or combined with a paper

¹⁶⁹ . See www.idealibrary.com.

¹⁷⁰ . See www.sciencemag.com.

¹⁷¹ . See www.sciencedirect.com.

¹⁷² . See <http://link.springer.de>.

subscription (in some cases, the electronic version is offered as a “bonus” for subscribers to the paper version).

What is common among most content providers, however, is that the material provided online is almost always subject to a “mouse-click contract” (also referred to as a “click-wrap” contract) and/or terms and conditions limiting what the user can legally do with the material. Such restrictions typically limit use to a single user and allow that user only to read/listen (and possibly print) a single copy. Redistribution or reuse of the material is generally prohibited. While in the world of text publishing (newspapers, journals and magazines) this is (still) by and large done on an honour basis (based on law and contract), other industries seem to prefer technical solutions, such as digital containers and encryption systems, to enforce those terms and conditions.

Preventing any and all use and reuse of the material may not be possible. In fact, it may not be desirable. In other words, locking up digital content is not necessarily the best option. Instead, a properly organized licensing market, where users can painlessly and quickly obtain the rights they need (within reasonable limits and respecting moral rights) is a far better solution than locking everything up. Very often (especially in a business-to-business (B2B) environment), users want more rights *after* having received and reviewed the content. For example, a company may find a newspaper or journal article that they want to e-mail to customers, post to an Intranet or publish in their corporate newsletter. They don’t know this *before* reading the article (*i.e.*, at the time of the acquisition of the content).

These new needs are prompting rightsholders and the Collective Management Organizations that represent them to offer reasonably flexible licensing options. Yet, while complex transactional licensing seems to make sense in a B2B digital environment, most users probably still prefer the convenience of repertory licensing, even if more detailed reporting of use may be possible in a digital environment. Collective Management Organizations can offer users another significant advantage: by aggregating

usage data in the way it is reported to rightsholders, they protect the confidentiality of usage data (for business users) and the privacy of consumers.

Independently of the model chosen, one point remains: to be able to license online, quickly and efficiently, an Electronic Copyright Management System (ECMS)¹⁷³ is indispensable.

B) The Technology for Digital Copyright Management

Before we can understand electronic copyright management systems, we need to understand the concepts that underlie such systems, starting with “rights management” itself, from a more technical perspective. Copyright Management Systems (CMS) are basically databases that contain information about content (works, discrete manifestations of works and related products) and, in most cases, the author and other rightsholders. That information is needed to support the process of authorizing the use of those works by others. A CMS thus usually involves two basic modules, one for the identification of content and rightsholders, the other for licensing (or, rarely, for other rights transactions, such as a full assignment). In many cases, ancillary modules such as payment or accounts receivable are also considered part of the system, but the core of a CMS is content and rights identification and a licensing tool.

A Copyright Management System can be used by individual rightsholders or by third parties who manage rights on behalf of others. A rightsholder might use the system to track a repertory of works, manifestations, or products, or an organization representing a group of rightsholders might use a CMS to track each rightsholder's rights and works. Such an organization might be a literary agent representing a number of writers, or, more commonly, a Collective Management Organization.

¹⁷³ . En français, Système Électronique de Gestion de Droits d’Auteur (SEGDA).

Applying the above concepts, we see that rights management functions are made much easier with computers, which can act both as huge rights databases and automated licensing engines. Computerized systems allow rightsholders to automatically grant licenses to users without human intervention, which has the benefit of keeping transaction costs low and making licensing an efficient, Internet-speed process: licences to use a specific work can be granted online, 24 hours a day, to individual users. Ideally, such licences will be tailored to a user's needs. For example, a corporation may want to post a flattering newspaper article on its website or send it via email to its customer base; an individual author may decide to purchase the right to use an image, video clip, or song to use in her/his own creative process; a publishing house might purchase the right to reuse previously published material. Electronic Copyright Management Systems may also be used to deliver content in cases where the user does not have access to such content in the required format. Or they may be used to create licensing sites or offer licensing options at the point where the content is made available. Finally, digital technology can also be used to track usage ("metering" and "monitoring"), look for unauthorized online uses (programs known as "spiders" scour the Web looking for unauthorized copies of material on websites) or to encrypt material in digital containers to limit further uses of the material.

For transactional licenses, an *ECMS* thus basically acts as a licensing engine. There are various implementations of such systems that range in technical sophistication from the very basic to the very complex (and expensive). In the least sophisticated scenario, a user mails, faxes, or e-mails a license request to a collective management organization that processes it manually and returns an answer to the user. In a slightly more automated environment, the organization uses an electronic works-and-rights database, but still processes the license request manually. Another step up in the ladder of automation is where an internal computer-based licensing system processes the request. With a full *ECMS*, a user searches available content and rights online, submits a license request electronically (usually via the World Wide Web) and receives a response from the system without any human intervention. A variation on this theme is where the user

first locates the content (using a search engine or portal) and is then offered licensing options at the point of content.

C) Overview of Current Digital Licensing Efforts

In Canada, licensing of digital uses is not new. SOCAN filed a tariff for the public performance of music (known as “Tariff 22”) and the Copyright Board rendered a “Phase I” decision on legal issues¹⁷⁴. SODRAC¹⁷⁵ and CMRRA have also filed tariffs concerning the reproduction of music in Internet transmissions and NRCC¹⁷⁶ with respect to the neighbouring rights involved in the transmission. The case of iCraveTV is also relevant in this context. It raised doubts about the extent to which Internet transmissions of broadcasts could qualify as “retransmissions” and consequently benefit from the non-licensing voluntary regime of Section 31 of the *Copyright Act*. COPIBEC and CANCOPY have already obtained the right to license certain digital secondary uses of printed material from several member rightsholders.

Internationally, very few countries have adopted *compulsory* licensing of digital uses. Such a system exists in the Danish legislation but has yet to be applied in practice. Another similar system is under consideration in Norway, in both cases only for reprography-type uses. Under the extended licensing system, however, Northern European Collective Management Organizations may gain the right to license digital uses once they have been able to convince a substantial number of their national rightsholders.

Voluntary licensing of digital uses by Collective Management Organizations is already in place in the United States, in some cases on an experimental basis. ASCAP and BMI, the two US performing rights collectives, have tariffs relating to the public performance of music on the Internet.¹⁷⁷ Fairly advanced in this field is the US CCC, which licenses reproduction of printed material for inclusion in “digital coursepacks”, reuse of material on websites, intranets, CD-ROMs and other digital media under their Republication Licensing Service. CCC also offers a repertory-based licence for internal digital reuse of material by corporate users. Interestingly, in the latter program, users can

¹⁷⁴ . See (1999) 1 C.P.R. (4th) 417. The matter is now before the Federal Court of Appeal.

¹⁷⁵ . All proposed tariffs are published in the Canada Gazette (Part 1). In SODRAC’s case, see < <http://www.cb-cda.gc.ca/tariffs/proposed/i13052000-b.pdf>>.

¹⁷⁶ . See < <http://www.cb-cda.gc.ca/tariffs/proposed/s29051999-b.pdf>>.

¹⁷⁷ . See www.ascap.com and www.bmi.com.

only scan material not made available by the publisher himself in digital form¹⁷⁸. CCC's ability to license digital uses is entirely based on voluntary and non-exclusive rights transfers from rightsholders.

A number of multimedia initiatives are also underway in Europe and Japan. In Japan, the government helped launch a project called J-CIS (Japan Copyright Information Service). This service would provide information on copyrighted material of all types and allow users to contact the current rightsholders directly (or a competent CMO) to obtain necessary permissions. Certain conditions of use may also be predetermined by the rightsholder.¹⁷⁹

In Europe, the best example of an ECMS is probably the Very Extensive Rights Data Information (VERDI) project. Its aim is to build an infrastructure to license use of multimedia content for European users and rightsholders. VERDI partners include a number of key European CMOs. The purpose of this "consortium" is to pool (in a distributed fashion) existing rights & works databases, link them to an online licensing engine, while maintaining each partner's role in acquiring rights from local rightsholders and distributing collected royalties and fees to those rightsholders. Content delivery will be added at a later date.¹⁸⁰ VERDI partners could allow the consortium to license on their behalf, or ask the consortium to forward a licensing request. In the latter case, the request would either be dealt with by the CMO directly or sent on to the rightsholder. The main advantage to users would be the establishment of a one-stop-shop ("guichet unique") where they could get information about protected material, get some licences on the spot and apply for licenses for other material.

In several European countries, CMOs have created or intend to create a national one-stop-shop, the purpose of which would be to provide information on CMOs and the services they offer, offer users an easier way to contact CMOs and perhaps also receive

¹⁷⁸ . See www.copyright.com.

¹⁷⁹ See the paper presented by Ms. Mikiko Sawanishi at the First Session of the WIPO Advisory Committee on Management of Copyright and Related Rights in Global Information Networks. WIPO document ACMC/1/2. Available at www.wipo.int.

“multimedia” clearance requests that would then be forwarded on to the respective CMOs (which obviously requires staff). Examples include the SESAM in France,¹⁸¹ CEDAR in the Netherlands¹⁸² and the CMMV in Germany.¹⁸³

The idea of creating a national information point about Collective Management Organizations, as part of an online information service about copyright and neighbouring rights, is undoubtedly a useful endeavour. A good first step in that direction is the creation of the [copyrightcanada.org](http://www.copyrightcanada.org) site¹⁸⁴.

Yet, the general enthusiasm for *multimedia* rights licensing centres seems to have waned. The production of multimedia CD-ROMS is not a fast-growth sector. In fact, several CD-ROMs are merely electronic encyclopaedias. While rights clearance for encyclopaedia has never been simple, before investing into an online rights clearance system that would presumably cost millions, one would need to obtain additional data on its potential usage and ensure that it is not built solely or mainly for the benefit of encyclopaedia producers, a market that, in spite of its undeniable value, may not justify the expense or indeed the need for such a complex, automated rights clearance system.

The most promising sectors for copyright and neighbouring rights clearance on the Internet are the mass uses of music, text and video, and the licensing of corporate and educational reuse of scientific, professional and financial material. Internet-based usage of protected content will require some degree of collective management of rights (as the Tariff 22 example demonstrates). It is probably not up to Collective Management Organizations to put in place the technology to prevent reuse (although some may wish to take part in that process), but it could be in their interest to have access to monitoring

¹⁸⁰ . See www.verdi-project.com.

¹⁸¹ . www.sesam.org.

¹⁸² . www.cedar.nl.

¹⁸³ . Clearingstelle Multimedia für Verwertungsgesellschaften von Urheber- und Leistungsschutzrechten GmbH. www.cmmv.de.

¹⁸⁴ . See < <http://www2.copyrightcanada.org/copyright/index-e.htm>>, and in French <<http://www2.droitdauteurcanada.org/copyright/index-f.htm>>.

tools. This explains why several collectives are taking a keen interest in metadata¹⁸⁵ and identification codes,¹⁸⁶ which are necessary to track material automatically. This information is generally referred to as “rights management information”. This expression is defined in the US *Copyright Act* as follows:

“Any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of a work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
- (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.
- (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
- (6) Terms and conditions for use of the work.
- (7) Identifying numbers or symbols referring to such information or links to such information.
- (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.”¹⁸⁷

In the European Union *Directive on copyright and related rights in the information society*¹⁸⁸ adopted in May 2001, the relevant provisions read as follows:

¹⁸⁵ . Examples include the “Dublin Core” project, which is an attempt to identify the core elements of metadata that are needed to satisfy the needs of all those involved in the exchange of or commerce in electronic-information resources. It was developed over a three-year period at workshops in which “experts from the library world, the networking and digital library research communities, and a variety of content specialties” participated. This metadata “core” was named after the city (in Ohio) in which the first meeting was held. Another important effort in this field is the INDECS project (www.indecs.org).

¹⁸⁶ . Such as the Digital Object Identifier (DOI). See www.doi.org for details.

¹⁸⁷ . United States Code, Title 17, §1202(c).

Article 7 Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:
 - (a) The removal or alteration of any electronic rights-management information;
 - (b) The distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,If such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression ‘rights-management information’ means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

As a matter of policy, the Government should support and participate in the coordination of standardization efforts for metadata and digital identifiers. This should include, as part of the implementation of the two 1996 WIPO treaties (WCT and WPPT)¹⁸⁹, a definition and appropriate protection of rights management information.

¹⁸⁸ . Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society.”

¹⁸⁹ . WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

D) Rights Management Systems Needs of Canadian Collective Management Organizations

In terms of support of digital licensing, Canadian Collective Management Organizations should consider obtaining the necessary rights from their members/rightsholders if they have not already done so. In addition, to be optimally efficient and able to deal with digital usage information, online member and work registration, user requests and online transactional licensing (where such licensing on reasonably standard terms is possible), Collective Management Organizations need a rights management system with both an efficient back-end system and a user-friendly Web front-end. However, an all-encompassing online multimedia licensing system operated jointly by all Canadian Collective Management Organizations seems to be justified neither by licensing practices nor by prevailing market conditions. An information point should suffice.

The problem is that the sheer number of collectives in Canada, which far surpasses the number of similar organizations in any other country, even those with far more population.

Country	Number of CMOs
Canada	28/36 ¹⁹⁰
Denmark	7/14 ¹⁹¹
France	7
Germany	9/14 ¹⁹²
Italy	3
Japan	6 ¹⁹³
Netherlands	13 ¹⁹⁴
Spain	7
United Kingdom	12
United States	8 ¹⁹⁵

TABLE 3: NUMBER OF CMOs IN KEY COUNTRIES

(Sources: CISAC, IFRRO, CMMV, SESAM, 1997 Report to the French Senate¹⁹⁶)

While the existence of market forces and rightsholder choices may explain the high number of collectives in Canada, it is not economically feasible to build an integrated (front-end/back-end) rights management system for each of them. Clearly, some collectives have rights management needs that can be met with a very basic infrastructure. As a rule, however, to offer online services and deal with online users and usage, including rights management information, an efficient system is required. That does not mean that to perform other functions, the fractioning of the “CMO market” in Canada is necessarily counter-productive. As noted already, it is too early to draw such a conclusion.

¹⁹⁰ . Eight CMOs in Canada do not have direct relations with users and only operate as part of umbrella collectives, essentially for distribution purposes.

¹⁹¹ . One of the seven CMOs, COPY-DAN, is composed of seven associations that perform certain independent CMO functions. If counted separately, the total would thus be 14.

¹⁹² . In addition to none traditional CMOs, there are five central collecting offices operated by the CMOs, which one might also consider as CMOs, for a total of 14.

¹⁹³ . Based on partial data. There may be more.

¹⁹⁴ . Eight of the 13 operate out of a single location and share services.

¹⁹⁵ . A number of copyright “claimants” in the US are not organized as CMOs proper but could be added to this list.

¹⁹⁶ . Gestion collective des droits d’auteur et des droits voisins, Report presented to the French Senate. Nov. 1997. Available at www.senat.fr/lc/lc30/lc300.html.

As a matter of policy, Collective Management Organizations (at least those that are or will be called upon to license digital uses) should be called upon to (a) cooperate within appropriate groupings (i.e., CMOs having a sufficient degree of commonality) to limit the number of rights management system to be developed, and (b) develop compatible systems (and data architectures) to ensure that the exchange of data (on works, licensing terms, etc.) will be possible.

These would seem to follow the best practices emerging from ongoing efforts in countries other than the U.S. (but the size of that country means it may not be a good model in that respect).

It also makes sense to see how the needs of Collective Management Organizations, the rightsholders they represent and users of protected material could intersect with the Government's need to manage digital uses of material protected by Crown copyright.

Given the cost of developing ECMS and the need for interoperability at least within similar sectors, the Government should encourage Collective Management Organizations to develop rights management systems in a way that, within appropriate groupings, will allow them to combine their development efforts and share systems resources.

Implementation would include factoring these criteria in decisions made concerning use of the *Electronic Copyright Fund*.

E) Collective Licensing of Copyright in the Digital Age

Copyright is at a crossroads: it must adapt to the increasing needs and demands for legitimate online access to protected works, especially materials used for research and distance education and in particular scientific texts. There have been calls for its simplification by reducing the number of rights in the bundle that we now call copyright¹⁹⁷; or by focusing on not more, but different¹⁹⁸. Will it be possible or even desirable to keep material off the Internet when the Internet is omnipresent, linked to PDAs, watches, cell phones even home appliances! When all kinds of material will be available on the Net (and often times only on the Net)?

By the same token, however, all this material cannot be free: it has been the rationale of all intellectual property rights since at least the 17th century that a creator or inventor who put her/his creation at the disposal of others should get a fair reward. It is, in fact, a fundamental component of societal and industrial innovation and creativity, at least what we would call “organized creativity”, *i.e.*, the creation of new, sometimes expensive literary and artistic creations made available in professional quality to the public. Not all creators want to get an economic reward, but most want recognition of authorship/attribution. Copyright provides both.¹⁹⁹

Against that backdrop, what is an author or other owner of copyright to do when her/his creations will almost inevitably find their way on the Net? One reaction, which the film and recording industry have clearly decided to adopt, what to use all technological and existing legal means to stop this “leakage” from traditional (physical)

¹⁹⁷ . See the report by the Copyright Law Review Committee (Australia) entitled “Simplification of the Copyright Act 1968: Categorisation of Subject Matter and Exclusive Rights, and other Issues”. February 1999. Available online at the time of this writing at <http://www.law.gov.au/clrc/gen_info/clrc/Report%20Part%202/ReportHeadings2.html>. At the annual meeting of the Association Littéraire et Artistique Internationale (ALAI) held at Columbia University in New York in June 2001, we suggested replacing the entire bundle of economic rights with a right to use. See <www.alai2001.org>.

¹⁹⁸ . Copyright Protection: Not More but Different. Working paper No. 122. CPB Netherlands Bureau for Economic Policy Analysis. March 2000.

¹⁹⁹ . And creators who want neither are always free to waive all rights.

distribution chains it in its tracks. That may stop or more realistically contain some of the leakage, but if users find the convenience of the Web to be such that they want to make it a primary source of information, those who use the approach just described will face dwindling revenues, unless their material is of such high quality and irreplaceable that users are forced to get it through other (non digital) means. But all these approaches are bound to fail sooner or later: access on the Internet will have to be organized and not simply prevented.

It is better, therefore, to allow access and adopt a “licensing perspective”.

The answer to the current quandary (users wanting authorized access to copyright material being “forced” to access illegally or at least not to access it digitally) depends on how fast the so-called “content industries” are able to provide business models in tune with the demands of the various user communities.²⁰⁰ The problem is caused essentially by the convergence of three exponential curves:

- The number of users on the Web,
- The number of rightsholders. Very often, several rightsholders will share the rights on a copyright work, which may be split by type of right (reproduction, communication, translation, etc.); and
- The number of works and parts of works, including new collections, databases and compilations made available everyday on the Internet.

The difficulty, time and costs involved in trying to perform an individualized licensing transaction for each use of each work (belonging to one or several rightsholders in one or more countries) by each user are astronomical.²⁰¹ Collective licensing allows users to obtain general (blanket license) to use a certain type or material without having to obtain an individual license. It may also offer the possibility of obtaining an individual

²⁰⁰ See the US NRC Report, *op.cit.*, at 79, and D. Gervais. “Electronic Rights Management and Digital Identifier Systems,” (1998) 4 J. of Elec. Pub. 3.

²⁰¹ . Although for mass consumer uses of commercial material, the combination of a micro-payment system and protection technology will allow rightsholders to distribute protected material in an orderly fashion.

license for extraordinary (in the literal sense) uses, thereby acting as a one-stop shop. In both cases, the Collection Management Organization makes copyright work in the digital age.

This allows us to draw a crucial distinction between two legislative tools at the Parliament's disposal. First, the Government may take away the rights of authors entirely, by exempting certain acts that would otherwise require an authorization from the author. Perhaps the best example is the inclusion of those acts into the fair dealing sphere although there are other types of exemptions in the *Act*²⁰². In other cases, the Government may decide that it would be impractical or unfair to require that an authorization be obtained and impose a compulsory licence: a work covered by a compulsory licence may be used without authorization, provided the tariff (if any) set by the Copyright Board is paid.

There is a fundamental difference between these two tools, however. In one case, the author or other rightsholders might argue (assuming copyright is a property right²⁰³) that they are expropriated without compensation (though ostensibly in the public interest). Users might argue that in such a case the copyright monopoly is simply not extended into areas where it does not belong.²⁰⁴ But their claim is usually that they need to access and

²⁰² . For example, section 69(2), which exempts from the payment of public performance royalties owners or users of "radio receiving sets" located in public establishments such as hotels, bars, etc.

²⁰³ . Property as a chose in action. See R. J. Roberts, "Canadian Copyright: Natural Property or Mere Monopoly," (1979) 40 C.P.R. 33; and AA. Keyes & C. Brunet, "A Rejoinder to Canadian Copyright: Natural Property or Mere Monopoly," (1979) 40 C.P.R. (2d) 54.

The document "A Charter of Rights for Creators" argued that "the copyright owner owns the intellectual works in the same sense as a landowner owns land" (at p. 9). See also *Cie générale des établissements Michelin-Michelin & Cie v. C.A.W.-Canada*, (1996) 71 C.P.R. (3d) 348 (Fed. Ct. Trial Div.).

²⁰⁴ . Unlike patents, which prevent use of the invention, copyright is not a monopoly proper. As J. McKeown points out, "if it were shown that two precisely similar works, which are subject-matter of copyright, were in fact produced wholly independently of one another, the author of the work published first would not be entitled to restrain publication by the subsequent author of that author's independent original work." J.S. McKeown, *op. cit.*, at p. 5. Similarity gives rise to an inference of copying and shifts the evidentiary burden on the defendant to disprove copying. But copying (reproduction) must be established. See Copinger and Skone James on Copyright. 12th

use a work lawfully and that in certain cases, obtaining a licence is either impossible or completely impracticable. When a compulsory license is in place, these “obstacles” are removed and the issue then boils down to whether the authors and other rightsholders should be financially compensated.

Collective management is a *method*, a tool that rightsholders choose when the individual exercise of their right(s) to authorize²⁰⁵ is impracticable. Rightsholders then *choose* to let users within a defined group or category use their works and all those within a repertory in exchange for a compensation set by mutual agreement or by the Copyright Board. As stated by Prof. Mihály Ficsor²⁰⁶ in his seminal book on this topic:

“The idea emerges, time and again, that, if the exclusive rights concerned cannot be exercised in the traditional, individual way, they should be abolished or reduced to a mere right to remuneration. It is not, however, justified to claim that, if a right cannot be exercised in a way in which it has been traditionally exercised, it should be eliminated or considerably reduced.

The reason why, in a number of cases, copyright and neighbouring rights cannot be exercised by individual owners of rights is that the works concerned are used by a great number of users. Individuals, in general, do not have the capacity to monitor all those uses, to negotiate with users and to collect remuneration.

In such a situation, there is no reason for drawing the conclusion that a non-voluntary license system is needed. There is a much more appropriate option, namely the collective administration of exclusive rights.”²⁰⁷

A voluntary collective system has the clear advantage of reducing the legislative distortion of compulsory licensing which, in addition, must be compatible with Canada’s

ed. (London: Sweet & Maxwell, 19080), § 460; *Hay v. Saunders* (1958) 30 C.P.R. 81 (Ont. H.C.); and *Francis, Day & Hunter Ltd. v. Bron*, [1963] All. E.R. 16. However see *Formules municipales Ltée v. Pineault* (1975), 19 C.P.R. (2d) 139, 144.

²⁰⁵ . *Copyright Act*, section 3(1) *in fine*.

²⁰⁶ . Former Assistant Director General of the World Intellectual Property Organization (WIPO).

²⁰⁷ . M. Ficsor. Collective Administration of Copyright and Neighboring Rights. (Geneva: WIPO, 1990), at p. 6.

obligations under the Berne Convention and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).²⁰⁸

While the purpose of this report is not to argue for or against new exemptions or compulsory licensing, as an alternative to those the Government should consider encouraging collective licensing to respond to the challenges posed to copyright holders and users by the Internet. Whether for use of material in digital form by educational institutions and businesses (by email, on their Intranets, etc.), or mass Internet transmissions of music and audiovisual material (interactive or not), collective licensing offers a powerful way for rightsholders to make available the rights to use their material, while making it simple for users to get those rights. In other words, it makes licensing better and more efficient. If coupled with an efficient online licensing system (for users) and registration/information (for rightsholders), copyright can be well managed and used, and prove to be the best way to protect “content” on the Internet and other digital networks.

The Government should thus continue to encourage Collective Management Organizations to offer efficient licensing of digital uses of copyright material for the benefit of both rightsholders and users. This could be done notably by providing assistance for the coordinated development of the necessary systems at the level of both infrastructure and data.

²⁰⁸ . Being Annex 1C of the April 15, 1994 Agreement Establishing the World Trade Organization. The substantive provisions of the Berne Convention (except Article 6bis dealing with moral rights) were incorporated by reference into the TRIPS Agreement (Article 9(1)). See D. Gervais. The TRIPS Agreement: Drafting History and Analysis. (London: Sweet & Maxwell, 1998), at pp. 71-79. The same requirements apply to exemptions. Section 110(5)(b) of the US *Copyright Act* was struck down by a WTO dispute settlement panel adopted in July 2000. It contained a full exemption from public performance royalties for a vast majority of US hotels, bars, restaurants and supermarkets. On November 9, 2001, an arbitration panel estimated damages at €1,219,900 per year, or approximately CDN\$1.8 million (WTO document WT/DS160/ARB25/1).

If this approach and, where appropriate, rights acquisition support that could take the form of extended licensing were used a system could be in place rapidly and users could easily obtain licences to meet their digital needs in the copyright area.

Another question is whether the Government should encourage the creation of new Collective Management Organizations to license digital rights. Given (a) the already very high number of Collective Management Organizations in Canada; (b) the fact that the markets for traditional (analog) and digital uses overlap (for example, business and educational users use the same type of material in both forms for similar purposes); and (c) the fact that setting up new collectives requires the development of expensive new systems and finding the necessary expertise, digital-only collective management does not seem the best option—at least until market forces eventually dictate otherwise. Though strictly an example and not conclusive evidence of this, the fate of TERLA could be mentioned here.

As a matter of policy, the Government should thus encourage existing Collective Management Organizations to license appropriate digital uses of material (works, etc.) within their repertory.

Without such licensing, users will continue to demand access and, if no proper licensing is available, may feel justified in asking Parliament for an extension of fair dealing and/or a specific exemption from copyright. This would hurt Canadian authors, creators and the copyright industries who, for the most part, are willing to give *organized* access to copyright material on the Web provided a proper licensing and, where appropriate, payment mechanism is in place, perhaps coupled with technological measures of protection.

CONCLUSION

Digital technology is a very unique and powerful medium:

- It allows all kinds of copyrighted material to be stored, mixed and matched on a single, digital medium. Even 3-D representations of sculptural works can be digitized.
- Creators can search, locate and reuse pre-existing material to create new works, thus accelerating what French Philosopher Blaise Pascal referred to as the continuous human creation process.²⁰⁹ From that viewpoint, it can be said that digital technology is the great common denominator of copyright.
- The technology also allows creators to disseminate their material almost cost-free²¹⁰ around the world;²¹¹
- By the same token, users can download material made available on the Web, send it to friends, work colleagues or others and (for the time being at least) without leaving a trace.

This technology is forcing the way in which copyright is used and administered to change. The traditional exclusive rights (to prohibit use of protected material) are difficult to apply in the Internet age: even where a combination of technology and legal means may allow rightsholders to prevent such use²¹², users/consumers more and more demand digital access. The exclusive right paradigm is gradually being replaced by a

²⁰⁹ . One could also mention Pierre Vendryès, who wrote: «L'homme est devenu l'homme qu'il est par ses créations intellectuelles et, par elles, il deviendra l'homme qu'il sera. ». P. Vendryès. Vers la théorie de l'homme. Collection SUP. (Paris: PUF, 1973).

²¹⁰ . Of course, production itself may not be free but computer-assisted creations may significantly lower also those costs.

²¹¹ . The transnational nature of the Internet is a challenge for national legislators. See G.A. Gow, *op. cit.*, at pp. 8-9.

²¹² . See *A&M Records, Inc. et al. v. Napster, Inc.*, Nos 00-16401, 00-16403 (US 9th Cir. Court of Appeals, Feb 24, 2001). See also Lesley Ellen Harris. Digital Property. (McGraw-Hill Ryerson, 1998), at p. 77.

compensation/limited control paradigm. The focus is thus shifting from preventing unauthorized uses to organizing the types of acceptable uses and getting paid for such uses.²¹³ Yet, the copyright “concept” is still the best basis to claim financial compensation and organize markets. It remains an absolutely essential tool for Canadian authors, creators, publishers and producers. Copyright does not have to be used by rightsholders (who may waive their rights) but it allows those who want to claim authorship (and no financial rewards) to do so. It also allows those who expect a fair financial reward for their creative efforts to obtain it.

A constant objective of copyright reform is the need to strike a balance between creators’ rights and users’ needs.²¹⁴ For example, educational institutions need material to perform their educational function and libraries have needs concerning archiving, preservation of damaged or special works, out-of-print works etc.²¹⁵

In this context of rapid technological and business change, the Canadian collective management system is at a critical juncture. Fuelled by the 1997 legislatives changes, several new Collective Management Organizations have been established and are in the process of setting up or developing their licensing services. CMOs should endeavour to weave the licensing of digital uses within their current sphere of activity. Whether copyright and neighbouring rights are appropriate for the digital age depends in a large measure on the ability of users to obtain in a user-friendly way the rights they need to use material in digital form.

To this end, and in the light of the experience of other countries, it does not seem desirable to introduce new regulations concerning the formation or operations of Collective Management Organizations, though CMOs should be encouraged to include in

²¹³ See *Id.* at 230.

²¹⁴ Canadian law does not support the contention that users have a *right* to access specific copyright works. In the United States, an argument can be made that users have a right to access material and to do so anonymously under their First Amendment rights. See Julie Cohen. “A Right to Read Anonymously: A Closer Look at ‘Copyright Management’ in Cyberspace,” 28 *Conn. L. Rev.* 981 (1996).

their contracts a limited duration of rights transfers and the appropriate degree of flexibility in letting rightsholders leave or remove some of their works from the system. This is already in place in many Collective Management Organizations.

The most critical phase of the existence of a Collective Management Organization is the acquisition of rights (to license). To accelerate and facilitate this process, a review of foreign legislative techniques shows that an extended licensing system would greatly facilitate the work of certain Canadian collectives, especially those operating under the Section 70.1 regime. Contrary to mandatory or even presumption-based systems, extended licensing only works once a Collective Management Organization has garnered a sufficient degree of credibility among the category of rightsholders it wishes to represent. It then offers users the security of knowing that the repertory of the Collective Management Organization is as complete as it can be. We suggest examining the possibility of introducing such a system in Canada, but only for Collective Management Organizations who so wish (*i.e.*, the system should be voluntary) and giving rightsholders the option not to participate. Collective Management Organizations who choose to use the system could be the subject of specific transparency and/or registration obligations, especially in light of their duties towards non-member rightsholders.

The Copyright Board of Canada does not require a major overhaul. Its processes and resources can always be improved, however, and a system of alternative dispute resolution could be useful, provided appropriate safeguards are in place. Individual agreements (that can take precedence over tariffs) should be allowed in all cases, except, perhaps, in cases where collective management is mandatory. Introducing extended licensing would also eliminate (in areas where it applies) the system of rightsholders who cannot be located, thus eliminating a significant administrative burden placed on the Board's shoulders. The Board could direct those energies towards other tasks.

²¹⁵ . See J. McNanama. "Copyright Law: Libraries and Their Users Have Special Needs," (1991) 6 I.P.J. 225.

To be able to work efficiently in the digital environment and the complex rights matrix that licensing digital uses involves, Collective Management Organizations need a powerful system (“back-end”) to keep track of the rights, their collections and distributions, and a sophisticated interface (“front-end”) to offer member services (*e.g.*, online membership information, works registration) and licensing options. Given the size of the Canadian market and the budgets required to build such systems, which can easily reach into the millions of dollars, it seems unlikely that all Canadian Collective Management Organizations can find the necessary funds. However, the “need” identified a few years ago to build an all-encompassing multimedia rights clearance centre has not been demonstrated conclusively in any market, except perhaps for encyclopaedia and anthology producers--hardly a justification for such an investment. While an information centre on copyright and its management is useful (at least as a Web presence) as part of a generic copyright information service, a one-stop-shop for the licensing of all works for all uses has not been shown to be a priority.

To attain optimal efficiency on a reasonable scale, Collective Management Organizations should thus be encouraged to build sector-based systems. Each major sector, the needs of which will vary, should be able to justify and support the necessary investment, especially if it can be shown that their own interests (and the survival of copyright) are at stake. In addition, CMOs should be encouraged to work on common or at least interoperable digital identification systems, to allow the exchange of appropriate data among themselves.

SUMMARY OF RECOMMENDATIONS

Note: We also draw the reader's attention also to the various conclusions drawn throughout the report. The text of such conclusions is underlined.

RECOMMENDATION 1: EXAMINE THE POSSIBILITY OF ESTABLISHING AN EXTENDED COLLECTIVE LICENSING THAT COLLECTIVE MANAGEMENT ORGANIZATIONS COULD USE, IF AND WHEN APPROPRIATE, FOR BLANKET (REPERTORY) LICENSING PURPOSES.

THIS WOULD INCLUDE AN EXAMINATION OF:

- A. WHAT AN APPROPRIATE "CATEGORY" OF RIGHTSHOLDERS IS FOR THE PURPOSE OF AN EXTENSION;
- B. THE NUMBER OF CANADIAN RIGHTSHOLDERS WITHIN SUCH A CATEGORY THAT WOULD HAVE TO BE REPRESENTED BY THE COLLECTIVE MANAGEMENT ORGANIZATION FOR THE EXTENSION TO APPLY;
- C. HOW AND WHO (PRESUMABLY THE COPYRIGHT BOARD) WOULD DETERMINE THAT THE NUMBER IS SUFFICIENT (SUBSTANTIAL ENOUGH) TO GIVE RISE TO THE EXTENSION; AND
- D. HOW RIGHTSHOLDERS WHO SO WISH COULD LEAVE THE SYSTEM.

BECAUSE THE SYSTEM WOULD BE VOLUNTARY (*i.e.*, NO CMO WOULD BE FORCED TO USE IT), THERE MAY NOT BE A NEED TO LIMIT LEGISLATIVELY THE AREAS IN WHICH THE EXTENDED LICENSE COULD APPLY, ALTHOUGH, BASED ON CURRENT PRACTICES, IT WOULD SEEM TO BE APPLICABLE ONLY TO GENERAL REGIME CMOs (SECTION 70.1).

RECOMMENDATION 2: IF A SPECIAL RIGHTS ACQUISITION REGIME IS ESTABLISHED IN FAVOUR OF CMOs, IT MAKES SENSE TO IMPOSE OR

SUGGEST CERTAIN TRANSPARENCY (FILING OF REPORTS, ETC.) AND REGISTRATION REQUIREMENTS TO CMOs THAT WISH TO BENEFIT FROM THE REGIME. OTHERWISE, NO CHANGES ARE SUGGESTED TO EXISTING STATE CONTROL MECHANISMS.

RECOMMENDATION 3: EXAMINE THE POSSIBILITY OF GIVING THE COPYRIGHT BOARD ALTERNATIVE DISPUTE RESOLUTION CAPABILITIES, (VOLUNTARY MEDIATION).

ANNEX 1

LIST OF CANADIAN COPYRIGHT COLLECTIVE SOCIETIES (List prepared by the Copyright Board of Canada)²¹⁶

A collective society is an organization that administers the rights of several copyright owners. It can grant permission to use their works and set the conditions for that use. Collective administration is widespread in Canada, particularly for music performance rights, reprography rights and mechanical reproduction rights. Some collective societies are affiliated with foreign societies; this allows them to represent foreign copyright owners as well.

Music

ACTRA Performers' Rights Society (PRS)

www.actra.com/prs

The ACTRA Performers' Rights Society (PRS) is responsible for the collection and distribution of fees, royalties, residual fees and all other forms of compensation or remuneration to which members and permit holders of the Alliance of Canadian Cinema Television and Radio Artists (ACTRA), and others may be entitled to as a result of their work or engagement in the entertainment and related industries.

American Federation of Musicians (AFM)

www.afm.org

The American Federation of Musicians (AFM) advocates the rights of musicians in their live and recorded performances in the United States and Canada and other countries, and where it deems appropriate, collects and distributes government mandated or other compulsory royalties of remuneration that are subject to collective administration.

ArtistI

www.uniondesartistes.com

ArtistI is the collective society of the *Union des artistes* (UDA) for the remuneration of performers' rights.

Audio-Video Licensing Agency (AVLA)

www.avla.ca

The Audio-Video Licensing Agency (AVLA) is a copyright collective that administers the copyright for the owners of master audio and music video recordings. AVLA licences the exhibition and reproduction of music videos and the reproduction of audio recordings for commercial use.

Canadian Musical Reproduction Rights Agency (CMRRA)

www.cmrra.ca

The Canadian Musical Reproduction Rights Agency (CMRRA) is a Canadian centralized licensing and collecting agency for the reproduction rights of musical works in Canada. It represents over 6,000 Canadian and U.S. publishers who own and administer approximately 75% of the music recorded and performed in Canada. Licensing is done on a per use basis.

²¹⁶ . See note 25, above.

Christian Copyright Licensing Inc. (CCLI)

www.ccli.com

The Christian Copyright Licensing Inc. (CCLI) was created to help churches comply with the copyright law and to compensate copyright owners fairly for such compliance. The CCLI issues licences to reproduce songs in bulletins, liturgies and congregational song sheets; make slides and transparencies of songs; print songs in customized songbooks; make customized arrangements of songs and record worship services for tape ministry.

Neighbouring Rights Collective of Canada (NRCC)

www.nrdv.ca

The Neighbouring Rights Collective of Canada (NRCC) is a non-profit umbrella collective, created in 1997, to administer the rights of performers and makers of sound recordings. This is done through 5 member collectives: the American Federation of Musicians (AFM), ArtistI, the Audio-Video Licensing Agency (AVLA), the *Société collective de gestion des droits des producteurs de phonogrammes et vidéogrammes du Québec* (SOPROQ) and the Alliance of Canadian Cinema Television and Radio Artists Performers Rights Society (ACTRA PRS).

Société collective de gestion des droits des producteurs de phonogrammes et vidéogrammes du Québec (SOPROQ)

www.adisq.com

The *Société collective de gestion des droits des producteurs de phonogrammes et vidéogrammes du Québec* (SOPROQ) is a collective society which was created to administer the rights due to producers of audio and music video recordings. These rights include remuneration for neighbouring rights and for private copying of sound recordings.

Société de gestion des droits des artistes-musiciens (SOGEDAM)

The *Société de gestion des droits des artistes-musiciens* (SOGEDAM) is a collective society created in 1997 to represent Canadian performers (musicians) and performers who are members of foreign societies that have mandated it to represent their interests.

Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC)

www.sodrac.com

The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) administers royalties stemming from the reproduction of musical works. It represents some 4,000 Canadian songwriters and music publishers as well as the musical repertoire of over 65 countries.

Society of Composers, Authors and Music Publishers of Canada (SOCAN)

www.socan.ca

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) is a performing rights society that administers performing rights in musical works on behalf of Canadian composers, authors and publishers as well as affiliated societies representing foreign composers, authors and publishers.

Literary (Literary works, dramatic works, texts, etc.)

Canadian Copyright Licensing Agency (CANCOPY)

www.cancopy.com

The Canadian Copyright Licensing Agency (CANCOPY) represents writers, publishers and other creators for the administration of copyright in all provinces except Quebec. The purpose of the collective is to provide easy access to copyright material by negotiating comprehensive licences with user groups, such as schools, colleges, universities, governments, corporations, etc. permitting reproduction rights, such as photocopy rights, for the works in CANCOPY's repertoire.

Canadian Screenwriters Collection Society (CSCS)

www.writersguildofcanada.com/cscs

The Canadian Screenwriters Collection Society (CSCS) was created by the Writers Guild of Canada with the mandate to claim, collect, administer and distribute royalties and levies that film and television writers are entitled to under the Canadian and other national copyright legislation of several European countries and other jurisdictions.

Playwrights Union of Canada (PUC)

www.puc.ca

The Playwrights Union of Canada (PUC) is the national service organization for professional playwrights. It represents nearly 335 members, distributes more than 1,500 plays and offers many services to the theatre-loving public. It acts as agent for the distribution of rights and collection of royalties.

Société des auteurs et compositeurs dramatiques (SACD)

www.sacd.fr

The *Société des auteurs et compositeurs dramatiques* (SACD) represents authors, composers and choreographers of dramatic works. It administers the copyright in dramatic works (ballet, operas, etc.) and audiovisual works (televised mini-series, motion pictures and television movies).

Société québécoise de gestion collective des droits de reproduction (COPIBEC)

www.copibec.qc.ca

La *Société québécoise de gestion collective des droits de reproduction* (COPIBEC) is the collective society which authorizes in Quebec the reproduction of works from Quebec, Canadian (through a bilateral agreement with CANCOPY) and foreign rights holders. COPIBEC was founded in 1997 by *l'Union des écrivaines et écrivains québécois* (UNEQ) and the *Association nationale des éditeurs de livres* (ANEL).

Société québécoise des auteurs dramatiques (SoQAD)

www.aqad.qc.ca

Founded in 1994, the *Société québécoise des auteurs dramatiques* (SoQAD) has the mandate of redistributing (redirect/forward) to Quebec, Canadian and foreign playwrights whose works are performed in public or private teaching institutions to the pre-school, primary and secondary levels, royalties provided for in the financial agreement between the Ministry of Education and the *Association québécoise des auteurs dramatiques* (AQAD).

Audio-Visual and Multimedia

Audio Ciné Films

www.acf-film.com

Audio Ciné Films Inc. (ACF) is Canada's exclusive non-theatrical distributor and public performance licensing agent for Canadian, American and foreign feature film producers such as Universal Studios, Walt Disney Pictures, Alliance-Atlantis, Paramount Pictures, MGM Studios, Touchstone Pictures, PolyGram Filmed Entertainment, United Artists, FineLine Features, Orion Pictures, Hollywood Pictures, New Line Cinema, Behaviour, Miramax Films, Odeon, Sony Classics, Paramount Classics, Blackwatch Releasing, Artisan Entertainment, DreamWorks SKG among others. Films in 16MM, 35MM, videocassette and DVD.

Criterion Pictures

www.criterionpic.com

Criterion Pictures administers and manages both educational (Visual Education Centre) and entertainment audiovisual works, including motion pictures distributed by Astral Films, Columbia Pictures, Tri-Star, Warner Bros. and 20th Century Fox. It grants licences for the use of these protected works.

Directors Rights Collective of Canada (DRCC)

email: Christiane@dgc.ca

The Directors Rights Collective of Canada (DRCC) is a non-profit corporation founded by the Directors Guild of Canada. Its mandate is to collect and distribute royalties and levies to which film and television directors are entitled under the copyright legislation of jurisdictions throughout the world.

Producers Audiovisual Collective of Canada

email: info@pacc.ca

The Producers Audiovisual Collective of Canada (PACC) is a non-profit corporation founded by the Canadian Film and Television Production Association (CFTPA). Its purpose is to act on behalf of the producers as a collective society for the management and distribution of royalties deriving from the sale of blank audiovisual media ("blank tape levies") and from the rental and lending of video recordings.

Société civile des auteurs multimédias (SCAM)

www.scam.fr

The *Société civile des auteurs multimédias* (SCAM) represents the authors of literary works. It issues licences and administers reproduction rights of literary works intended for audio-visual media such as cinema, television and radio.

Visual Arts (photographs, paintings, etc.)

Canadian Artists' Representation Copyright Collective (CARCC)

www.carfac.ca

CARCC (Canadian Artists' Representation Copyright Collective) was established in 1990 to create opportunities for increased income for visual and media artists. It provides its services to artists who affiliate with the Collective. These services include negotiating the terms for copyright use and issuing an appropriate license to the user.

Masterfile Corporation

www.masterfile.com

Masterfile Corporation is a visual content provider, a stock image agency/library in the

business of licensing images for commercial use in media ranging from print advertising to Internet Web sites. It acquires images under exclusive contract from professional photographers and illustrators and organizes, archives, keywords, promotes, licenses the images and distribute the royalties to the artists.

Société de droits d'auteur en arts visuels (SODART)

www.raav.org/sodart

The *Société de droits d'auteur en arts visuels* (SODART) was created by the *Regroupement des artistes en arts visuels du Québec* (RAAV) and is responsible for collecting rights on behalf of visual artists. It negotiates agreements with organizations that use visual arts, such as museums, exhibition centres, magazines, publishers, audio-visual producers, etc. SODART issues licences to these organizations and collects royalties due to the artists it represents.

Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC)

www.sodrac.com

SODRAC's *Visual Arts and Crafts Department* manages the rights of more than 17,000 Canadian and foreign creators of artistic works. SODRAC negotiates on their behalf the conditions for the use of their works for any of the purposes outlined in the *Copyright Act*, and grants licences for public exhibition, communication to the public by telecommunication and the reproduction of their works on any media, including audiovisual and multimedia. It collects and distributes royalties paid for the right to use their works. To check if an artist is represented by SODRAC's Visual Arts and Crafts Department, please consult the "Repertoire" page under the "Artistic Works" section on its Web site.

Retransmission

Border Broadcasters' Inc. (BBI)

Border Broadcasters' Inc. (BBI) represents U.S. border broadcasters (a mix of network affiliated and independent stations in large and small markets along the Canada-U.S. border). The royalties that BBI collects and distributes to its members are for programs produced by the stations (*i.e.* the local programming) as opposed to the network or syndicated programming which is represented by other collectives.

Canadian Broadcasters Rights Agency (CBRA)

www.cbra.ca

The Canadian Broadcasters Rights Agency (CBRA) claims royalties for programming, compilations and signals owned by commercial radio and television stations and networks in Canada, including CTV, TVA and Quatre-Saisons networks and their affiliates, the Global Television Network, independent television stations and the privately-owned affiliates of the Canadian Broadcasting Corporation (CBC) and *Société Radio-Canada* (SRC).

Canadian Retransmission Collective (CRC)

www.crc-scrc.ca

The Canadian Retransmission Collective (CRC) represents all PBS and TVOntario programming (producers) as well as owners of motion pictures and television drama and comedy programs produced outside the United States (*i.e.* Canada and other

countries).

Canadian Retransmission Right Association (CRRA)

The Canadian Retransmission Right Association (CRRA) is an association representing certain broadcasters, *i.e.*: the Canadian Broadcasting Corporation (CBC), the American Broadcasting Company (ABC), the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS) and *Télé-Québec* with respect to their interests as copyright owners of radio and television programming retransmitted as distant signals in Canada. CRRA acts as the collective for its members, collecting and distributing royalties paid by retransmitters in Canada.

Copyright Collective of Canada (CCC)

The Copyright Collective of Canada (CCC) represents copyright owners (producers and distributors) of the U.S. independent motion picture and television production industry for all drama and comedy programming (such as companies represented by the Motion Picture Association of America), except for that carried on the PBS network stations.

FWS Joint Sports Claimants (FWS)

The FWS Joints Sports Claimants (FWS) represents the teams in major sports leagues whose games are regularly telecast in Canada and the United States. The leagues are the National Hockey League, the National Basketball Association and the Canadian, National and American Football Leagues. The programs for which copyright royalties are claimed are games broadcast between the member teams on distant signals carried by Canadian cable systems, except for those for which a television network is the copyright owner.

Major League Baseball Collective of Canada (MLB)

The Major League Baseball Collective of Canada (MLB) is the sole party entitled to claim royalties arising out of the retransmission of major league baseball games in Canada.

Society of Composers, Authors and Music Publishers of Canada (SOCAN)

www.socan.ca

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) is a performing rights society that administers performing rights in musical works on behalf of Canadian composers, authors and publishers as well as affiliated societies representing foreign composers, authors and publishers. With respect to retransmission, SOCAN represents owners of the copyright in the music that is integrated in the programming carried in retransmitted radio and television signals. Rather than claiming ownership of individual programs, SOCAN asks for a share of the royalties for all works.

Private Copying

Canadian Private Copying Collective (CPCC)

www.cpcc.ca

The Canadian Private Copying Collective (CPCC) is the collective society for the private copying levy. CPCC is also responsible for distributing the funds generated by the levy to the collective societies representing eligible authors, performers and makers of sound recordings. The member collectives of the CPCC are: the Canadian

Mechanical Reproduction Rights Agency (CMRRA), the Neighbouring Rights Collective of Canada (NRCC), the *Société de gestion des droits des artistes-musiciens* (SOGEDAM), the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) and the Society of Composers, Authors and Music Publishers of Canada (SOCAN).

Educational Rights

Educational Rights Collective of Canada (ERCC)

The Educational Rights Collective of Canada (ERCC) is a non-profit collective established in 1998 to represent the interests of copyright owners of television and radio programs (news, commentary programs and all other programs), when these programs are reproduced and performed in public by educational institutions for educational or training purposes.

Media Monitoring

Canadian Broadcasters Rights Agency (CBRA)

www.cbra.ca

The Canadian Broadcasters Rights Agency (CBRA) claims royalties for programming and excerpts of programming owned by commercial radio and television stations and networks in Canada, including CTV, TVA and Quatre-Saisons networks and their affiliates, the Global Television Network, independent television stations and the privately-owned affiliates of the Canadian Broadcasting Corporation (CBC) and *Société Radio-Canada* (SRC).

ANNEX 2

BACKGROUND AND OBJECTIVE

The current digital environment raises new challenges for copyright management. The ease and rapidity with which copyrighted works can be transmitted over networks as well as the frequently voiced difficulties linked to copyright clearance may require the adoption of novel approaches to copyright management, especially copyright clearance.

In certain circumstances, copyright clearance is carried out under blanket licenses, compulsory licensing regimes or private copying schemes. These alternatives, although practical in certain circumstances, cannot be extended to all circumstances where copyright clearance is required.

Since adoption of Phase I of Copyright Reform in 1988, the collective management of rights has become a cornerstone of copyright in Canada. Spurred to a certain extent by Government policies, the number of Canadian copyright collectives has grown to approximately 36 in 2001. These collectives range from relatively large collectives such as SOCAN and CANCOPY to very small collectives with meagre budgets. Because most collectives have very limited resources, they have been unable to undertake the necessary measures to improve copyright management by maintaining efficient and interoperable computerized databases. The problem is compounded by the fact that not all the so-called collectives operate in the same manner. In certain instances, rights holders have assigned their rights to the collectives who are mandated to negotiate on their behalf. In other cases, so-called collectives are, in fact, agents for rights owners and are not mandated to negotiate rights on their behalf.

The Department of Canadian Heritage has attempted to address this issue in many ways thus far. The Department has convened all copyright collectives to three roundtables to 1) survey the current situation with a view to identifying the issues and 2) bring the collectives together to help find common solutions to shared problems.

The Department also created an *Electronic Copyright Fund* to provide seed money for the development of streamlined copyright clearance systems that will ultimately allow users to negotiate licenses online via a single window. Streamlined copyright clearance mechanisms are critical to the creation of an environment that is conducive to the creation of quality Canadian digital cultural content.

The purpose of this report is two-fold:

- a) Create a typology of collective management models in Canada with an assessment of what model of collective management is most appropriate for the digital environment and most responsive to users' needs;
- b) Based on an overview of measures (legislative, regulatory or otherwise) that have been used or considered in foreign jurisdictions as a way of encouraging a specific type of copyright management model, provide an analysis of policy options that may be considered by the Canadian Government as a means of strengthening collective management in Canada and recommend a course of action for implementation of the recommended policy options that are best suited to the Canadian environment.