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Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective

By Daniel J. Gervais†

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 1948.¹ 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 also cover authors.³ Historically, there is some basis for these assertions, as indeed copyright law in the U.K. 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 was progressively recognized. While this recognition seems to have taken a less prominent place for most of the twentieth century, the role of the author in U.K. copyright law is perhaps more palpable of late. 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, which is still uneven among common law jurisdictions, was first signalled in the United States in a decision by the 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 data.⁶ A similar conclusion was reached by the Federal Court of Appeal in this country, in a decision in which the traditional line of United Kingdom cases was discussed in great detail.⁷ This decision now seems to be in peril, however.⁸ Courts in the U.K. require that the skill and labour be "original"⁹ 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 U.K.) must internalize in their domestic copyright legislation.¹⁰ Only in Australia is the traditional U.K. criterion still clearly applied: the Federal Court (Full Court), in a lengthy and interesting decision,¹¹ refused to follow *Feist* and *Tele-Direct* and considered itself bound by the traditional line of U.K. cases, including the *University of London Press* case. However, the two judges who expressed their views recommended that the High Court or Parliament should reconsider the matter.¹²

The Supreme Court of Canada, in a much-awaited judgment, recently decided that, at least as far as economic rights are concerned, the origins of Canadian copyright law, and its underlying theory, were strictly common law.¹³ However, the majority of the Court cited American, U.K., Australian and New Zealand cases as emanating from "like-minded jurisdictions".¹⁴ This does not answer the question whether Canada should follow the U.S.¹⁵ and the Europeans,¹⁶ or stay the older British precedents as the Australian Federal Court recently felt compelled to do.¹⁷

Independently of whether Canadian copyright law is one origin or another, the central role of authors in copyright policy is nothing new in this country. 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*¹⁸ should be interpreted in light of its object and purpose which is to benefit authors".¹⁹ In another recent decision, the Quebec Court of Appeal also insisted on the role of

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the author.²⁰ 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 GDP.²¹

What is the role of collective management of copyright²² in this picture? In a recent 7–2 decision, the United States 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 edition.²³ 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.²⁴ The only “model” the 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 this *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 U.S. 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).

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 works²⁵ 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; others 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.

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),²⁶ the largest and oldest association of CMOs, or to the International Federation of Reproduction Rights Organizations (IFRRO).²⁷ 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*. In some cases, this is the result of the rightsholders' unwillingness to authorize the use and a legitimate application of their exclusive rights. Yet, 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 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* case²⁸ 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 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 and commercially. 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. Consequently, only rightsholders who are prepared to meet this demand will survive. In fact, as we have argued in several other papers,²⁹ is not the real question to ask whether the best course of action for rightsholders is to minimize unlawful uses or rather to maximize lawful, legitimate uses? 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, a simple 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 “organized”, 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 Web site or an Intranet, e-mailing it to a group of people, reusing all or part of it to create new copyright material, storing it and perhaps 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 could 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 suggest 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 paper only addresses some of the specific issues raised by the 1996 WCT and WPPT.³⁰

Collective Management of Rights in Canada: An Overview

Finding An Appropriation Classification

Bill C-32³¹ introduced a definition of the expression “collective society”.³² 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 (see attached Annex for the list)³³ and identified the following areas: music (11);³⁴ literary (6); audiovisual and multimedia (5); visual arts (4); retransmission (8); private copying (1); educational rights (1); and media monitoring (1).

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

Music Performing Rights and Certain Neighbouring Rights

This type of collective management is regulated by section 67 of the *Copyright Act*. Collective Management Organizations active in this field grant licences 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, the Society of Composers, Authors and Music Publishers of Canada (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.³⁵ 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 Artisti)³⁶ is voluntary. In fixing tariffs in this area, the Act imposes specific criteria to be applied by the Copyright Board.³⁷

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 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); the rights of performers concerning first fixation of their performances, reproduction and communication to the public of live performances (section 15); and 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)³⁸ and the Société québécoise de gestion collective des droits de reproduction (COPIBEC);³⁹ and to the so-called “mechanical rights”.⁴⁰ It also applies to 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”,⁴¹ 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”.⁴²

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 the use”.⁴³ This also 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”.⁴⁴

Collective Management Organizations operating under this regime can file tariffs for approval by the Board⁴⁵ or conclude agreements with users⁴⁶ that will take precedence over tariffs.⁴⁷ 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.⁴⁸ The Board may also be asked to determine the royalty applicable in individual cases (arbitration).⁴⁹

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; 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; and 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);⁵⁰ Canadian Broadcasters Rights Agency (CBRA);⁵¹ Canadian Retransmission Collective (CRC);⁵² Canadian Retransmission Right Association (CRRA); Copyright Collective of Canada (CCC); FWS Joint Sports Claimants (FWS); Major League Baseball Collective of Canada (MLB); 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.⁵³

Private Copying

A specific regime was put in place concerning the private copying of sound recordings.⁵⁴ 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.⁵⁵ 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 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 1999-2000⁵⁶ and for 2001-2002.⁵⁷

Collective Management of Rights in Canada: An International Perspective

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, performing rights Collective Management Organizations in the United States 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.⁵⁸ By comparison, SOCAN's collections reached US\$76 million, or US\$2.53 per capita⁵⁹ (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.

Performing Rights Income (1998) in US\$
(per capita basis)

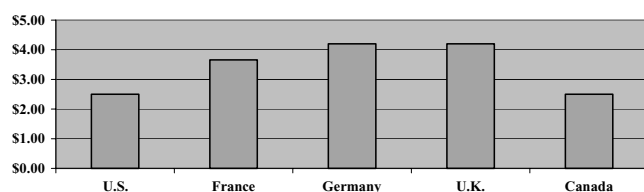


Figure 1: Performing Rights Collection Comparison

In the field of reprography, the situation is uneven. Organizations were usually established much more recently. Still, there are striking contrasts. Using 1999

data,⁶⁰ the U.S. 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).

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

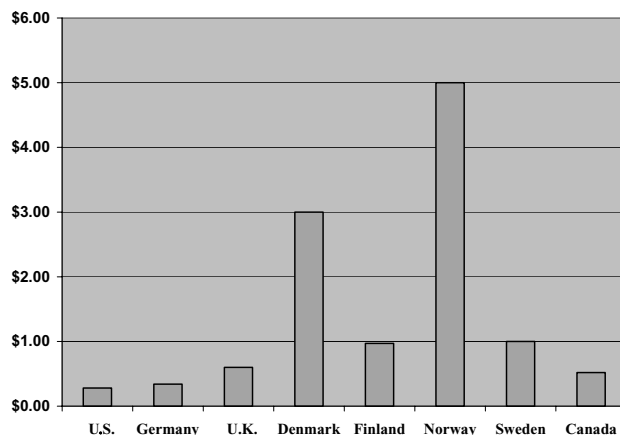


Figure 2: Reprography Collection Comparison

The huge differences in this field can usually 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.

Table 1: Areas of Collective Management in Foreign Countries⁶¹

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

Right Administered	Examples of Countries
Music performing rights (authors)	Almost 100 countries worldwide
Music mechanical rights	More than 70 countries worldwide
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, U.K., U.S.A.
Photographers' Reproduction Right	Nordic countries, U.K., U.S.A.
Use of videocassettes in public places	U.S.A.

Aspects To Be Considered

There are several aspects of collective management of rights and its relation to the legislative and regulatory framework to review. They are: the legal status of CMOs; the modes of acquisition of rights (mandates) by CMOs; the legislative support, if any, for CMOs' rights acquisition process(es); state control of CMOs (formation and/or operations); tariffs & licensing practices; and distribution practices and accounting. We will use these areas to map out our comparative analysis.

Analysis

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.⁶² 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 principal Collective Management Organization in the country is in fact a public authority, while in Greece, AEPI is a commercial (for-profit) company.⁶³

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.

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. This 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.⁶⁴ 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),⁶⁵ Denmark (KODA only), Finland (certain rights only) and the Netherlands (certain rights only).⁶⁶ In a great number of countries, in fact a majority of the countries where CMOs operate,⁶⁷ 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.⁶⁸ Against this backdrop, there is little 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 Man-

agement 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.⁶⁹ That said, a statutory approval mechanism for the establishment of new Collective Management 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".)

The post-formation control of the activities and operations of CMOs is discussed later in this article. 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.

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 licences (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; a non-exclusive licence; an authorization to act as agent; a *sui generis* (mixed) regime; or a legal (non-voluntary) licence. 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 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 licence 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. Since the mandate given to a collective is non-exclusive and participation in a CMO is entirely voluntary, real blanket licences are not 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 licence 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.⁷⁰ A *sui generis* rights acquisition model is used in Austria and Germany.⁷¹ 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 EU.⁷² 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.⁷³ 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: "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".⁷⁴

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 withdraw.⁷⁵ In the EU, six countries impose a maximum duration, which varies from three to five years.⁷⁶ 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. From the point of view of Collective Management Organizations, it is fair to ask that rightsholders give reason-

able 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.

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's 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.⁷⁷

An argument has also been made that the freedom of association guaranteed by paragraph 2(d) of the *Canadian Charter of Rights and Freedoms* includes a right not to associate.⁷⁸

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, say, 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 licences (transactional or blanket) that are granted by the CMO. Preventing work-by-work withdrawals may work for creators collectively

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

Models of Legislative Support for Rights Acquisition

The current system of collective management of copyright and related rights⁷⁹ 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* 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,⁸⁰ or ensure transparency.⁸¹ 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.⁸² For example, section 76 of the *Copyright Act* 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 rightsholder'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*.

The only such system in use in Canada is the legal licence 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.⁸³ 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 copying or publicly performing by an educational institution of subject matter already communicated to the public by telecommunication. The key for the application of subsection 76(2) is the existence of an approved and effective tariff "that is applicable to that kind of work or other subject matter".⁸⁴ 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 proper,⁸⁵ 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 licence.⁸⁶ In a related field, the *Status of the Artist Act*⁸⁷ provides that a certified artists' association has "the exclusive authority to bargain on behalf of artists in the sector".⁸⁸ Furthermore, only one association may be present in each sector.

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

*Implied Licence/Indemnity*⁸⁹

When the law contains an indemnity/implied licence, 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 repertory.⁹⁰ It is, therefore, a measure that may be perceived as being favourable to users. A good example of this technique is contained in paragraph 136(2)(b) of the U.K. *Copyright Design and Patents Act*,⁹¹ which includes an implied indemnity for any act *apparently* covered by a collective licence. The indemnity mechanism is 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.

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. Paragraph 13(b)(2) of the German *Administration of Copyright and Neighbouring Rights Act*⁹² contains an interesting model for a legal presumption.

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 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"),⁹³ public lending,⁹⁴ private copying,⁹⁵ and retransmission.⁹⁶ 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.

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 involves 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. 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*. Sections 36 and 38 of the Norwegian *Copyright Act*⁹⁷ establish such a regime. In Sweden, paragraph 26(i) of the *Copyright Act*⁹⁸ 1960: 729, of December 30, 1960, as amended up to January 1, 1996, provides for a similar result, although Royal Assent does not seem necessary. Article 15(a) of the Icelandic *Copyright Act*⁹⁹ provides for an extension similar to that contained in Swedish law, but adds an opt-out clause. An extended collective system also exists in Denmark.¹⁰⁰

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.

Summary and analysis

The implied licence system creates potential uncertainty around the introduction of the concept of “apparent licence” and 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 U.K. 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 advantages. First and foremost, 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 also 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. Finally, 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 *Canadian Charter of Rights and Freedoms*,¹⁰¹ 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 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. (The system is currently managed by the Copyright Board,¹⁰² which could then 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 licences on behalf of individual rightsholders (e.g., for rightsholders who cannot be located), unless 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.

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 would 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.

State Control of the Operations of Collective Management Organizations

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 establishment of the Canadian Performing Right Society (CPRS) and investigations, first by Mr. Justice Erwing in 1932¹⁰³ and then 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.¹⁰⁴

In fact, Canada was the first country to impose a statutory mechanism for the fixation of licence fees in 1936.¹⁰⁵

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

Table 2: Existing Control of CMOs Under Canadian Law

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. ¹⁰⁶ Government intervention through subsidies.
Licences by CMOs	Copyright Board (filing of agreements and 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> (subsection 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)

Let us now see how this level of control compares with the situation in key foreign countries.

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*¹⁰⁷ amended section 101 of the Act by adding a definition of “performing rights society”. This definition is only used in the context of the interactive transmission right.¹⁰⁸ Where a compulsory licence applies, the Copyright Office can establish Copyright Arbitration Royalty Panels (CARPs) to determine “reasonable terms and rates of royalty payments”.¹⁰⁹ 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 U.S. collectives have a fairly traditional board of directors (from the

perspective of other countries) composed of authors and publishers (e.g., ASCAP), others have a board composed entirely of “users” (BMI’s Board is composed entirely of broadcasters), while still others have authors, publishers and users on their Board (e.g., Copyright Clearance Center (CCC), a CMO in the field of reprography).¹¹⁰

The two principal U.S. 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 U.S. Department of Justice (DoJ) under antitrust laws and then given the force of a judicial decision by a federal court.¹¹¹ 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 repertoire and gives the DoJ access to the

premises of ASCAP and to documents as well as the right to interview employees and request reports.¹¹² Even though it is not copyright-specific, the U.S. 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.¹¹³ This is the case of, *inter alia*, CCC.¹¹⁴ In the U.S., CMOs may also be asked to register for the right to collect under certain compulsory licences.¹¹⁵

Japan

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

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 and the 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.¹¹⁶ 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. Twelve 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.¹¹⁷ 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.

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,¹¹⁸ an obligation to appoint an auditor,¹¹⁹ and an obligation to put their repertory at the disposal of users.¹²⁰ 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 convened.¹²¹ Amongst the changes introduced on August 1, 2000 (Law No. 2000-719)¹²² 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.¹²³ 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.¹²⁴ The application of the new system is too recent to determine its efficacy. The previous control system in France was based solely on the application of competition rules and may offer the best example of why these rules by themselves sometimes fail to work. The association of dis-cotheque 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 82¹²⁵ 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.¹²⁶ 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*,¹²⁷ perhaps the most extensive model of sector-specific State control of the operations of a Collective Management Organization anywhere in the world. Under sections 2–4 of this Act, the German Patent Office (*Patentamt*) must approve the formation of a Collective Management Organization and can revoke said authorization at any time. Under this Act, the Patent Office may appoint board members of any CMO¹²⁸ 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”.¹²⁹ The Act imposes a duty to administer

rights upon request from a qualified rightsholder (EU national) and must provide information on its activities.¹³⁰ 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”.¹³¹ 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 Organization in each field. Each German Collective Management Organization 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*¹³² guarantees the monopoly. 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.¹³³

Analysis

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 them-

selves. 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). Thus, massive state intervention is 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 in Canada, it may make sense to introduce minimal state supervision of those Collective Management Organizations that wish to benefit from any special rights acquisition regime, including transparency or registration obligations. 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.

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.

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.¹³⁴ In the case of non-voluntary licences, the U.S. *Copyright Act* provides the Copyright Office with the authority to convene the Copyright Arbitration Royalty Panel (CARP) to determine the appropriate tariff.¹³⁵ To our knowledge, this system is not in existence in any other country and depends too much on the special characteristics of the U.S. legal system to be of any direct use or application in Canada.

Copyright Board/Tribunal

The Canadian system of control by a specialized administrative tribunal¹³⁶ of the tariffs and other conditions¹³⁷ of repertory (blanket) licences and rights to remuneration is 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.¹³⁸ 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 report¹³⁹ 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*.¹⁴⁰ This excludes action before the courts until an arbitral decision is rendered.¹⁴¹ The Act also mandates publication of tariffs and instructs CMOs to “have due regard to the religious, cultural and social interests of the persons liable to pay the remuneration, including the interests of youth welfare”.¹⁴² A Copyright Licensing Tribunal exists in Denmark to set prices for compulsory licences.¹⁴³

There is no compelling evidence of a need to change the role of the Copyright Board in any major way.¹⁴⁴ 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.¹⁴⁵ Internal mediation (between rightsholders and the CMO) is in place in Denmark,¹⁴⁶ France,¹⁴⁷ and Portugal.¹⁴⁸ Mediation is also part of European law: the Directive on Cable and Satellite¹⁴⁹ makes possible recourse to a mediator to negotiate retransmission royalties.¹⁵⁰ 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 paragraph 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); and 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.

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.¹⁵¹ 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 process.¹⁵² An exception could be made for cases where collective management is mandatory.

Distributions and Accounts

In Canada, distribution of royalties by CMOs is usually 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.¹⁵³ Exceptions include Germany where, under the *Administration of Copyright and Neighbouring Rights Act*,¹⁵⁴ “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 be incorporated in the statutes of collecting societies”.¹⁵⁵ German Collective Management Organizations must establish a pension fund for their members.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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 said, in certain cases, standard market practices have developed,

such as in the music area, where standard splits apply to most author-publisher agreements.

We found no compelling evidence of a 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 law).¹⁵⁹ 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 aspect of distribution is the use of non-distributable funds. Probably 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”.¹⁶⁰ However, this is more an exception than the rule, and this matter is generally not regulated in national laws. The crucial issue is transparency.

Rights Management in the Digital Age

Background: Copyright in the Digital Age¹⁶¹

A few years ago, it was trendy to suggest that copyright and the World Wide Web went together like fire and water. As a result, copyright would soon either evaporate or be extinguished.¹⁶² Over 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. PDF¹⁶³ published texts, MP3¹⁶⁴ files and, now, high-quality commercial video files. The most talked-about phenomenon is still 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 it?¹⁶⁵ 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 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, when 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) or distribution or both. To name but one example, the Secure Digital Music Initiative (SDMI)¹⁶⁶ is building “a voluntary, open framework for playing, storing, and distributing digital music in a protected form”.¹⁶⁷ In the text world, companies such as Calgary-based Rightsmarket,¹⁶⁸ CyVeillance¹⁶⁹ and Intertrust¹⁷⁰ 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 or a watermark to track content posted on (publicly-available) Web sites. 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 companies.¹⁷¹ Whether they succeed as intermediaries will ultimately depend on users’ reaction and acceptance level.

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 be copied and disseminated easily even with (relatively) low-speed Internet access, such as with 56.6K 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’s IDEAL,¹⁷² Science Magazine,¹⁷³ Elsevier’s Science Direct¹⁷⁴ and Springer-Verlag’s LINK,¹⁷⁵ along with dozens of other systems. Magazine and newspaper publishers are following the same path, with major newspapers in many countries

available online in full text, often on the same day as the paper publication. 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. Some models, often advertising-based, have material available that can be searched and downloaded for free without having to identify oneself. However, 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 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 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 these 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 they would like 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) is indispensable.

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.

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 licences 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 Web site or send it via e-mail 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 (ECMS) 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 Web sites) or to encrypt material in digital containers to limit further uses of the material.

For transactional licences, 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 licence 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 licence 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 licence 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.

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 issues.¹⁷⁶ SODRAC¹⁷⁷ and CMRRA have also filed tariffs concerning the reproduction of music in Internet transmissions and NRCC¹⁷⁸ 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 U.S. performing rights collectives, have tariffs relating to the public performance of music on the Internet.¹⁷⁹ Fairly advanced in this field is the U.S. CCC, which licenses reproduction of printed material for inclusion in “digital coursepacks”, reuse of material on Web sites, 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 only scan material not made available by the publisher himself in digital form.¹⁸⁰ 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.¹⁸¹

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 and 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.¹⁸² 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 obtain information about protected material and have certain licences granted on the spot as well as apply for licences for other material. In several European countries, CMOs have created, or intend to create, a national one-stop-shop. Its purpose would be to provide information on CMOs and the services they offer, offer users an easier way to contact CMOs and perhaps also receive “multimedia” clearance requests that would then be forwarded on to the respective CMOs (which obviously requires staff). Examples include the SESAM in France,¹⁸³ CEDAR in the Netherlands¹⁸⁴ and the CMMV in Germany.¹⁸⁵

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. 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 tools. This explains why several collectives are taking a keen interest in metadata¹⁸⁶ and identification codes,¹⁸⁷ which are necessary to track material automatically. This information is generally referred to as "rights management information". This expression is defined, *inter alia*, in the U.S. *Copyright Act*¹⁸⁸ and in the European Union *Directive on copyright and related rights in the information society*,¹⁸⁹ adopted in May 2001.

As a matter of policy, it would seem to make sense to 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),¹⁹⁰ a definition and appropriate protection of rights management information.

Rights Management Systems Needs of Canadian Collective Management Organizations

In terms of supporting 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 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 far surpass the number of similar organizations in any other country, even those with far more population.

Table 3: Number of CMOs in Key Countries¹⁹¹

Country	Number of CMOs
Canada	28/36 ¹⁹²
Denmark	7/14 ¹⁹³
France	7
Germany	9/14 ¹⁹⁴
Italy	3
Japan	6 ¹⁹⁵
Netherlands	13 ¹⁹⁶
Spain	7
United Kingdom	12
United States	8 ¹⁹⁷

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.

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 copyright;¹⁹⁸ or by focusing on not more, but different rights.¹⁹⁹ 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 oftentimes 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.²⁰⁰

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, is to use all existing technological and legal means to stop this “leakage” from traditional (physical) distribution chains 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.²⁰¹ The problem is caused essentially by the convergence of three exponential curves: the number of users on the Web; the number of rightsholders sharing 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.²⁰² Collective licensing allows users to obtain general (blanket) licence to use a certain type or material without having to obtain an individual licence. It may also offer the possibility of obtaining an individual licence 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 Parliament’s disposal. First, Parliament 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.²⁰³ In other cases, Parliament 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 right)²⁰⁴ 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.²⁰⁵ But their claim is usually that they need to access and use a work lawfully and that in certain cases, obtaining a licence is either impossible or completely impracticable. When a compulsory licence 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 authorize²⁰⁶ 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.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 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 paper 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 e-mail, 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. 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.

Without adequate licensing options for digital and other types of content, 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 use,²¹² users and consumers are increasingly demanding digital access. The exclusive right paradigm is gradually being replaced by a 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 legislative 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 Organiza-

tions, though CMOs should be encouraged to include in 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.

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.

Annex

List of Canadian Copyright Collective Societies²¹⁶

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 licenses 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.

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 five 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 song-

writers 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 rightsholders. 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 and 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 licence 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 distributes 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 Joint 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).

Notes:

- 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. Parliamentary debates surrounding the adoption of the 1842 Act, which extended the term of protection to a term based on the life of the author, showed that great importance was attached to the role of the author and the societal importance of creativity. See M. Woodmansee, "The Cultural Work of Copyright: Legislating Authorship in Britain, 1837-1842", in Austin Sarat and Thomas R. Kearns (eds.), *Law in the Domains of Culture*. (Michigan Univ. Press, 2000), 65, 69; and Brad Sherman and Lionel Bently, *The Making Of Modern Intellectual Property Law*, (Cambridge U. Press, 1999).
- 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 (U.K. 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 F.C. 22.
- ⁸ See *CCH Canadian Ltd. v. The Law Society of Upper Canada*, [2002] FCA 187 (Q.L.).
- ⁹ *Newspaper Licensing Agency Ltd v. Marks & Spencer plc*, [2001] U.K.H.L. 38. This is in keeping of course with the addition of "originality" to the British statute in 1911.
- ¹⁰ A striking example is the adoption on January 1, 1998 in s. 3A(2) of the *U.K. Copyright Act* of the concept of "personal intellectual creation" in respect of databases. A "personal intellectual creation" does seem to have some link to the notion of creativity. Art. 1(3) of the Directive 91/250/EEC of May 14, 1991 on the legal protection of computer programs states that, "A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection". (OJ L 346, Nov. 27, 1992, p. 61, as amended by Directive 93/98/EEC). A similar statement in respect of databases is contained in Article 3(1) of the Directive 96/9/EC of March 11, 1996 on the Legal Protection of Databases (OJ L077, March 27, 1996, p. 0020-0028). Even without the directive, the fact that the word "original" was added to the statute in 1911 may have had the effect of overturning the "pure skill and labor case" of *Walter v. Lane* (see *Robertson v. Lewis*, [1976] R.P.C. 169, 174 (Ch.D.)).
- ¹¹ *Telstra Corporation Limited v. Desktop Marketing Systems Pty Ltd.*, [2001] FCA 612; aff'd [2002] FCAFC 112.
- ¹² *Ibid.* at paras. 217 and 429, respectively.
- ¹³ *Galleries d'art du Petit Champlain Inc. v. Théberge*, [2002] SCC 34.
- ¹⁴ *Ibid.* at para. 64.
- ¹⁵ See also *supra* note 7 and accompanying text.
- ¹⁶ See Article 3(1) and preamble paragraphs 15 and 16 of the Directive of March 11, 1996 concerning the legal protection of databases (No 96/9) and Article 1(3) of the Directive of May 14, 1991 concerning the legal protection of computer programs (No 91/250/CEE).
- ¹⁷ See also *supra* note 12 and accompanying text.
- ¹⁸ R.S.C. 1985, c. C-42, as amended until 1999 [hereinafter the Act].
- ¹⁹ *CCH Canadian Ltd. v. L.S.U.C.*, [2000] 2 F.C. 451, at 454. See also *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at 478-479.
- ²⁰ *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. One could also mention the Ontario case of *Robertson v. Thomson Corp.*, [2001] O.J. No. 3868 (Sup. Ct. of J.). See also Deborah Tussey, *The Creative As Enemy of the True: The Meaning of Originality in the Matthew Bender Cases*, 5 Rich. J. L. & T. 1030-5 (1999).
- ²¹ See for a recent detailed analysis of the importance of copyright in the U.S. 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 online: International Intellectual Property Alliance <<http://www.iipa.com>>. Mr. Siwek estimates that copyright industries added about 7.3% to the U.S. Gross Domestic Product (US\$678 billion) in 1999 and that their share of the U.S. GD has grown by more than 300% between 1977 and 1999.
- ²² 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.
- ²³ *Tasini et al. v. New York Times et al.*, 121 U.S. 2381 (2001). The decision is also available online: Supreme Court of the United States <<http://www.supremecourtus.gov/opinions/00slipopinion.html>>.
- ²⁴ *Ibid.* at 20 "... 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."
- ²⁵ To simplify the text and unless the context clearly indicates otherwise, the expression "works" includes protected performances and sounds recordings.
- ²⁶ See online: International Confederation of Societies of Authors and Composers <www.cisac.org>. As of January 1, 2001, CISAC had 181 member organizations, though not all would qualify as active CMOs.
- ²⁷ See online: International Federation of Reproduction Rights Organizations <www.ifrro.org>. As of August 13, 2001, IFRRO had 95 members, including 39 CMOs.
- ²⁸ *A&M Records, Inc. et al. v. Napster, Inc.* U.S. Court of Appeals for the Ninth Circuit, Feb. 12, 2001. The decision is available online: <<http://www.riaa.com/pdf/napsterdecision.pdf>>.
- ²⁹ See for example, D. Gervais, "Lock-It Up or License?". Available online: Copyright Clearance Center, Inc. <<http://www.copyright.com/News/AboutArticlesIntellectualProp.asp>>. See also M. Einhorn, "Digital Rights Management and Access Protection: An Economic Analysis". This paper was presented at the 2001 Congress of the Association Littéraire Artistique Internationale (ALAI) in New York. Available online: Columbia Law School <http://www.law.columbia.edu/conferences/2001/1_program_en.htm>.
- ³⁰ 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.
- ³¹ Assented to on April 25, 1997. It became S.C. 1997, c. 24.
- ³² Section 2: "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)
- ³³ The author is grateful to Mr. Claude Majeau, Secretary of the Copyright Board, for the permission to use the list in this paper.
- ³⁴ The number in parentheses is the number of societies operating in the area in question mentioned on the Copyright Board's list.
- ³⁵ *Supra* note 19 at s. 19(1) and (2).
- ³⁶ Artist is the collective society of the *Union des artistes* (UDA) for the remuneration of performers' rights. Available online: Union des Artistes <<http://www.uniondesartistes.com>>.
- ³⁷ Subsection 68(2).
- ³⁸ "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 pro-

vide 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." See online: the Canadian Copyright Licensing Agency <www.cancopy.com>.

³⁹ "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)." See online: The Société québécoise de gestion collective des droits de reproduction <<http://www.copibec.qc.ca>>.

⁴⁰ Basically the right to reproduce musical works to make sound recordings.

⁴¹ See (www.sodrac.com).

⁴² See (www.cmrra.org).

⁴³ See (www.carfac.ca).

⁴⁴ See (www.raav.org/sodart). A complete list of collectives active in this area may be found in the Annex.

⁴⁵ The Act, *supra* note 19 at s. 70.13 and following.

⁴⁶ *Ibid.* at s. 70.12(b).

⁴⁷ *Ibid.* at s. 70.191.

⁴⁸ *Ibid.* at s. 70.5(2) to (5).

⁴⁹ *Ibid.* at s. 70.2. If an agreement between the parties, the Board shall not proceed (s. 70.3).

⁵⁰ "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.

⁵¹ See online: Canadian Broadcasters Rights Agency <<http://www.cbca.ca>>.

⁵² See online: Canadian Retransmission Collective <<http://www.crc-src.ca>>.

⁵³ Section 76. See also *Re SARDEC* (1998), 86 C.P.R. (3d) 481 (Copyright Board).

⁵⁴ The Act, *supra* note 19 at ss. 79-88.

⁵⁵ Subsection 80(1).

⁵⁶ See (1999), 4 C.P.R. (4th) 15.

⁵⁷ Decision of January 22, 2001. Not yet published but available from the Board's Web site, online: Copyright Board Canada <<http://www.cb-cda.gc.ca/decisions/c22012001reasons-b.pdf>>.

⁵⁸ 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*, U.S. and U.K. societies.

⁵⁹ See Country Profile: Canada, (New York, NMPA, 1999). Available online: <<http://www.nmpa.org/nmpa/survey9/canada.pdf>>.

⁶⁰ See online: International Federation of Reproduction Rights Organisations <www.ifro.org>.

⁶¹ When the name of a country is in **bold**, collective management is mandatory for the right concerned. See online: International Confederation of Societies of Authors and Composers <<http://www.cisac.org>>; and International Federation of Reproduction Rights Organisations <www.ifro.org>. Also see Gestion collective des droits d'auteur et des droits voisins, Report presented to the French Senate, Nov. 1997. Available online: French Senate <<http://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) [hereinafter *Report on the Collective Management*].

⁶² 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 44.

⁶³ *Report on the Collective Management*, *supra* note 62 at 65. Greek law would also allow AEPI to operate as a "cooperative company".

⁶⁴ *Ibid.* at 68-69.

⁶⁵ "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." Online: JASARAC <<http://www.jasrac.or.jp>>.

⁶⁶ Report on the Collective Management, *supra* note 62 at 68.

⁶⁷ 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 online: International Confederation of Societies of Authors and Composers (www.cisac.org) and International Federation of Reproduction Rights Organisations <www.ifro.org>.

⁶⁸ 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 (broadcasters).

⁶⁹ There are four times as many CMOs in Canada as in the U.S., and not all in the U.S. are successful.

⁷⁰ 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.

⁷¹ Report on the Collective Management, *supra* note 62 at 87.

⁷² 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.

⁷³ *Administration of Copyright and Neighbouring Rights Act*, *op. cit.*, s. 6.

⁷⁴ *Ibid.* s. 11.

⁷⁵ Japanese Copyright Act, s. 95(4).

⁷⁶ Report on the Collective Management, *supra* note 62 at 87. Most German CMOs have a three-year contract, except GEMA, which has a six-year contract (French senate report, at 12); Italy has a five-year maximum (*Idem* at 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 U.K. performing rights societies). See the French Senate report at 26.

⁷⁷ CANCOPY's Author and Publisher FAQ, at <<http://www.cancopy.com/inside.ep?folder=cube3&page=creator.html>>.

⁷⁸ 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.

⁷⁹ The expression "copyright" includes related rights unless the context dictates otherwise. In the same vein, "work" may include subject matter of neighbouring rights.

⁸⁰ For example, ss. 70.12 to 75 and s. 83 of the Act.

⁸¹ For example, s. 70.11.

⁸² See ss. 38.2, 76(1) and (3) and 83(12), and as to a limitation of recourses, also s. 70.17.

⁸³ The prohibitions of enforcement contained in ss. 68.2(2) and 70.17 are different because they apply only to works contained in the CMO's repertory (tariff) concerned.

⁸⁴ 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 76-3.

⁸⁵ Subsection 83(12).

⁸⁶ See the decision of the Copyright Board dated December 17, 1999; (1999), 4 C.P.R. (4th) 15. Also available online: <<http://www.cb-cda.gc.ca/decisions/c17121999-b.pdf>>.

⁸⁷ R.S.C. 1985, c. S-19.6.

⁸⁸ Subsection 28(5).

⁸⁹ These two legal mechanisms are different in theory but their impact is fairly similar. 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 licence is then construed as not covering such excluded rightsholders, their effect is essentially the same.

⁹⁰ Although the infringement might be a criminal offence and the indemnity may not extend to criminal proceedings.

⁹¹ 1988, c. 48. It reads as follows: "(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."

⁹² See *infra* note 128. It reads as follows: "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."

⁹³ As is the case in Denmark (*Copyright Act, op. cit.*, s. 38(5)) and Germany (*Copyright Act, op. cit.*, s. 26).

⁹⁴ Germany (s. 27) and the Netherlands (s. 15a). In Denmark and the U.K., the public lending funds are paid by a state agency (in the U.K., the Department of National Heritage). See Rapport sur la gestion collective, *op. cit.*, at 33 and 36.

⁹⁵ Denmark (s. 39), Germany (s. 54(h)), Italy (Law of Feb. 5, 1992), Netherlands (s. 16c) and Spain (s. 25). Art. 5 of *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). U.S. *Copyright Act* (U.S.C. Title 17), ss. 1003-1007. Distribution is supervised by the Librarian of Congress (of which the U.S. Copyright Office forms part).

⁹⁶ Denmark (s. 35(3)), U.K. (see the Rapport sur la gestion collective, *op. cit.*, at 36). The system in the United States (role of the Copyright Office) amounts to mandatory collective/compulsory licensing.

⁹⁷ Act no. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works, as amended. Section 36 reads in part as follows: "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."

⁹⁸ Act

⁹⁹ 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.

¹⁰⁰ *Copyright Act 1995*, subsection 51(2). See also Rapport sur la gestion collective, *op. cit.*, at 7.

¹⁰¹ See *supra* note 79.

¹⁰² The Act, *supra* note 19 at s. 77.

¹⁰³ 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.

¹⁰⁴ *Vigneux v. CPRS* (1943), 3 Fox Pat. C. 77 at 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.

¹⁰⁵ See N. Tamaro, *The 2001 Annotated Copyright Act*, (Toronto: Carswell, 2001) at 632.

¹⁰⁶ See ss. 67 and 70.11. Effect of non-compliance not entirely clear.

¹⁰⁷ Pub. L. No. 105-298, 112 Stat. 2827, 2833. "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."

¹⁰⁸ Section 114(d)(3)(C) of the U.S. Act.

¹⁰⁹ § 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.

¹¹⁰ See online: The American Society of Composers, Authors and Publishers <<http://www.ascap.com>>; BMI <<http://www.bmi.com>>; Copyright Clearance Center, Inc. <<http://www.copyright.com>>.

¹¹¹ See "ASCAP and the Department of Justice Agree on New Consent Decree," press release dated Sept. 5, 2000, available online: The American Society of Composers, Authors and Publishers <<http://www.ascap.com/press/afj2-090500.html>>.

¹¹² At the time of this writing, the text of the decree was available at <<http://www.ascap.com/press/afj2final.pdf>>.

¹¹³ For an example of a business review letter, see online: United States Department of Justice <<http://www.usdoj.gov/atr/public/business-review/0125.htm>>.

¹¹⁴ DOJ Review 93-11.

¹¹⁵ See, for example, section 201.37 of title 37 of the *Code of Federal Regulations*.

¹¹⁶ Report on the Collective Management, *supra* note 62 at 74. And see *supra* note 66 concerning JASRAC.

¹¹⁷ "La gestion collective des droits d'auteur et des droits voisins." Rapport établi pour le Sénat français, 1997. Online: Available at the time of this writing at <http://www.senat.fr/lc/lc30/lc30_mono.html> [hereinafter "*Rapport sur la Gestion collective*"] and see *Report on the Collective Management, supra* note 62 at 79."

¹¹⁸ *Intellectual Property Code*, s. L321.3.

¹¹⁹ *Ibid.* s. L321-4.

¹²⁰ *Ibid.* s. L321-7.

¹²¹ *Ibid.* s. L321-12.

¹²² See especially ss. 11 and 12 of this Law.

¹²³ *Ibid.*, s. L321-13. One of the five members of the Commission is appointed by the Minister of Culture. Others are professional (State) financial auditors.

¹²⁴ 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)

¹²⁵ Formerly Articles 85 and 86.

¹²⁶ 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.

¹²⁷ Of September 9, 1965, as last amended by the Law of June 23, 1995.

¹²⁸ *Ibid.* ss. 18 and 19.

¹²⁹ *Ibid.* s. 19(4).

¹³⁰ *Ibid.* ss. 6, 9 and 10.

¹³¹ *Ibid.* s. 8.

¹³² 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.

¹³³ See online: International Federation of Reproductions Rights Organisations <<http://www.ifro.org/members/aidro.html>>.

¹³⁴ A new consent decree was agreed upon between ASCAP and the U.S. Department of Justice (DoJ) last fall. It is said to streamline rate proceedings. See the DoJ press release dated Sept. 5, 2000 online: United States Department of Justice <<http://www.usdoj.gov/opa/pr/2000/September/517at.htm>>.

¹³⁵ 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 online: Library of Congress <<http://www.loc.gov/copyright/licensing>>.
- ¹³⁶ The Copyright Board is the successor to the Copyright Appeal Board (see R.S.C. 1985, c. C-42, ss. 66–68 and R.S.C. 1970, c. C-30, s. 50). See also Michel Héту, “La Commission du droit d’auteur: fonctions et pratiques”, (1993), 6 Cahiers de propriété intellectuelle 407.
- ¹³⁷ 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 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, *supra* note 19 (see s. 68(3)).
- ¹³⁸ That is the case, *inter alia*, in Denmark, Finland, Greece, Italy, Luxembourg, Spain, Sweden. See *Report on the Collective Management*, *supra* note 62, s. 4 at 4.
- ¹³⁹ *Ibid.* at 7.
- ¹⁴⁰ See *supra* note 128.
- ¹⁴¹ *Ibid.* s. 16.
- ¹⁴² *Ibid.* s. 13.
- ¹⁴³ *Act on Copyright 1995*, s. 47 (amended 1996). Such licences apply to lending to the blind (s. 17(2)), use for educational purposes (s. 18(1)), cable retransmission (s. 35), and remuneration for performers and producers (for secondary use s. 68).
- ¹⁴⁴ 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.
- ¹⁴⁵ See *Report on the Collective Management*, *supra* note 62 s. 4.
- ¹⁴⁶ COPY-DAN, the Danish RRO, has an internal tribunal for questions concerning the split of remuneration among its member CMOs.
- ¹⁴⁷ SACD, the “grand rights” CMO.
- ¹⁴⁸ The Portuguese Society of Authors (SPA), the main CMO in Portugal.
- ¹⁴⁹ 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.
- ¹⁵⁰ See Article 11 of the Directive on Cable and Satellite.
- ¹⁵¹ Report to the French Senate, *supra* note 62 at 12.
- ¹⁵² 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”. However, we still prefer to let rightsholders concerned deal with that matter within their own CMO.
- ¹⁵³ Approval of distribution plans applies to some or all CMOs in Belgium, Denmark, Germany and the Netherlands. See *Report on the Collective Management*, *supra* note 62 at 80.
- ¹⁵⁴ See *supra* note 128.
- ¹⁵⁵ *Ibid.* s. 7.
- ¹⁵⁶ See *supra* note 128.
- ¹⁵⁷ Rapport sur la gestion collective, *op. cit.*, p. 8.
- ¹⁵⁸ See s. 39 of the *Copyright Act 1995*, which reads 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.”
- ¹⁵⁹ See s. 83(11) and following.
- ¹⁶⁰ See Article L.321-9 of the *Intellectual Property Code*. See also A. and H.-J. Lucas. *Traité de propriété littéraire et artistique*, 2e édition. (Paris: Litec, 2001), at 541-542.
- ¹⁶¹ 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).
- ¹⁶² See, e.g., WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighbouring Rights. (Geneva: WIPO, 1993). WIPO Publication 723 (E).
- ¹⁶³ “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 online: Adobe Acrobat <<http://www.adobe.com/products/acrobat>>.
- ¹⁶⁴ 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.
- ¹⁶⁵ See (U.S.) National Research Council. *The Digital Dilemma: Intellectual Property in the Information Age*. (Washington: National Academy Press, 2000), at 76–87; and Michael D. Crawford, “Modern Technology and the Death of Copyright”, GOINGWARE, Feb. 2, 2000 online: <http://www.goingware.com/comments/2000/feb/05top.html>>.
- ¹⁶⁶ See online: Secure Digital Music Initiative <<http://www.sdmi.org>>.
- ¹⁶⁷ *Ibid.*
- ¹⁶⁸ See online: Rights Market <<http://www.rightsmarket.com>>.
- ¹⁶⁹ See online: <http://www.cyveillance.com/web/us/solutions/digital_asset_protect.htm>.
- ¹⁷⁰ See online: Intertrust <<http://www.intertrust.com>>.
- ¹⁷¹ 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 online: Secure Digital Music Initiative <http://www.sdmi.org/pr/TO_Mar_05_2001_PR.htm>.
- ¹⁷² See online: Ideal Online Library <<http://www.idealibrary.com>>.
- ¹⁷³ See online: Science Magazine <<http://www.sciencemag.com>>.
- ¹⁷⁴ See online: Science Direct <<http://www.sciencedirect.com>>.
- ¹⁷⁵ See online: Link <<http://links.springer.de>>.
- ¹⁷⁶ See (1999) 1 C.P.R. (4th) 417. The Federal Court of Appeal upheld most of the Board’s decision but did not agree that caching should be exempted. See *SOCAN et al. v. CAIP et al.*, [2002] FCA 166 (QL).
- ¹⁷⁷ All proposed tariffs are published in the *Canada Gazette* (Part 1). In SODRAC’s case, see online: <<http://www.cb-cdagc.ca/tariffs/proposed/i13052000-b.pdf>>.
- ¹⁷⁸ See <<http://www.cb-cdagc.ca/tariffs/proposed/s29051999-b.pdf>>.
- ¹⁷⁹ See www.ascap.com and www.bmi.com.
- ¹⁸⁰ See www.copyright.com.
- ¹⁸¹ 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 online: World Intellectual Property Organization <<http://www.wipo.int>>.
- ¹⁸² See www.verdi-project.com.
- ¹⁸³ See www.sesam.org.
- ¹⁸⁴ See www.cedar.nl.
- ¹⁸⁵ Clearingstelle Multimedia für Verwertungsgesellschaften von Urheber- und Leistungsschutzrechten GmbH <<http://www.cmmv.de>>.
- ¹⁸⁶ 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).
- ¹⁸⁷ Such as the Digital Object Identifier (DOI). See www.doi.org for details.
- ¹⁸⁸ United States Code, Title 17, § 1202(c).
- ¹⁸⁹ Art. 7 of 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.
- ¹⁹⁰ WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

- ¹⁹¹ Sources: CISAC, IFRRO, CMMV, SESAM, 1997 Report to the French Senate (Gestion collective des droits d'auteur et des droits voisins, report presented to the French Senate, Nov. 1997. Available online: French Senate <<http://www.senat.fr/lc/lc30/lc300.html>>).
- ¹⁹² Eight CMOs in Canada do not have direct relations with users and only operate as part of umbrella collectives, essentially for distribution purposes.
- ¹⁹³ 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.
- ¹⁹⁴ In addition to nine traditional CMOs, there are five central collecting offices operated by the CMOs, which one might also consider as CMOs, for a total of 14.
- ¹⁹⁵ Based on partial data. There may be more.
- ¹⁹⁶ Eight of the 13 operate out of a single location and share services.
- ¹⁹⁷ A number of copyright "claimants" in the U.S. are not organized as CMOs proper but could be added to this list.
- ¹⁹⁸ 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>.
- ¹⁹⁹ Copyright Protection: Not More but Different. Working paper No. 122. CPB Netherlands Bureau for Economic Policy Analysis. March 2000.
- ²⁰⁰ And creators who want neither are always free to waive all rights.
- ²⁰¹ See the U.S. NRC Report, *op. cit.*, at 79, and D. Gervais, "Electronic Rights Management and Digital Identifier Systems" (1998), 4 J. of Elec. Pub. 3.
- ²⁰² 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.
- ²⁰³ For example, s. 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.
- ²⁰⁴ Property as a chose in action. See R.J. Roberts, "Canadian Copyright: Natural Property or Mere Monopoly" (1979), 40 C.P.R. 33; and A.A. Keyes & C. Brunet, "A Rejoinder to Canadian Copyright: Natural Property or Mere Monopoly" (1979), 40 C.P.R. (2d) 54.
- ²⁰⁵ 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 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 ed. (London: Sweet & Maxwell, 1980), § 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.
- ²⁰⁶ *Copyright Act*, section 3(1) *in fine*.
- ²⁰⁷ See Mihály Ficsor, "Collective Administration of Copyright and Neighboring Rights" (Geneva: WIPO 1990), at 6. Dr. Ficsor is a former Assistant Director General of the World Intellectual Property Organization (WIPO).
- ²⁰⁸ Being Annex 1C of the April 15, 1994 Agreement Establishing the World Trade Organization. The substantive provisions of the Berne Convention (except Article 6b is 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 71-79. The same requirements apply to exemptions. Paragraph 110(5)(b) of the U.S. *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 U.S. 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).
- 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 8-9.
- ²¹² See *A&M Records, Inc. et al. v. Napster, Inc.*, Nos 00-16401, 00-16403 (U.S. 9th Cir. Court of Appeals, Feb. 24, 2001). See also Lesley Ellen Harris, *Digital Property* (McGraw-Hill Ryerson, 1998) at 77.
- ²¹³ *Ibid.* 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).
- ²¹⁵ See J. McNanama, "Copyright Law: Libraries and Their Users Have Special Needs" (1991), 6 *IPJ.* 225.
- ²¹⁶ List prepared by the Copyright Board of Canada. See *supra* note 34.