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The Evolution and Equilibrium of Copyright in the Digital Age

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international law spurred the emergence of regimes that propose function-specific responses to problems of a global dimension. TNCs are propelling forces in this constellation. As a consequence, function-specific regulations emanate from formally institutionalised processes of international law as well as from the dynamics of transnational private business networks. Since State-centralised regime activities are partly outpaced by TNC-driven private transnational regimes, coordination between different policy areas becomes more and more difficult. This hypothesis is empirically confirmed in the creative economy sector, where exclusive interests of TNCs and inclusive interests of the public at large are institutionalised within the three partly overlapping and partly competing regimes of IP, global trade and culture. Under the influence of TNCs, the global IP and trade regimes have been producing function-specific regulations that one-sidedly reflect corporate/private rather than public interests.

Whereas national constitutionalism involves a close structural coupling between State politics and the law, new societal constitutionalism emphasises that constitutionalisation may occur independent from activities of the State. This is because constitutive and limitative functions can emerge within constitutions of regimes. A 'neo-liberal' spin on IP law and policy is held responsible for a one-sided constitutionalisation of the global IP regime that has so far resulted in the development of constitutive functions and almost entirely neglected the limitative ones. The recent mobilisation of millions of people worldwide against projects of legislation destined to make IP enforcement more effective at the national or global level must be seen as a reaction against this imbalance. This highly visible public discontent is potentially undermining the credibility of IP as a legal institution.

The countermeasure that is suggested by a societal-constitutionalism-informed approach would be to strengthen the limitative functions in the constitution of the global IP regime. Two options contributing to this aim – as far as copyright is concerned – were considered in this chapter: First, the establishment of a global mechanism of copyright registration (as currently discussed within WIPO's IMR Dialogue) and, second, the globalisation of CRM structures corresponding to strict regulatory standards of transparency and governance. Combined, the two measures would facilitate the development of a thriving online market for audio visual content and at the same time contribute to a fairer global balance between competing economic and cultural policy goals.

12 Copyright collective management in the twenty-first century from a competition law perspective

*Yee Wah Chin**

Collective management of copyright has had a complex legal history in the United States and elsewhere. In the United States, two performing rights organisations (PROs), ASCAP and BMI, have been subject to antitrust prosecution and monitoring for over seventy years. This chapter summarises the competition law context in which all copyright collective management organisations (CMOs), including PROs, are evaluated in the United States. It then reviews the history of the application of US antitrust laws to CMOs, considering copyright collective management through an antitrust prism and the experience with the two PROs, ASCAP and BMI. This history reflects the competition law challenges generally relating to CMOs. The chapter closes by considering the role of CMOs in the twenty-first century from the competition law perspective.

The three pillars of modern competition law are prohibitions against: (1) coordinated anti-competitive conduct; (2) unilateral conduct that abuses a dominant market position; and (3) mergers and other transactions aggregating assets that may create a monopoly. The classic prohibited coordinated conduct is cartels, usually involving price-fixing and market allocation by competitors. These types of coordinated conduct by competitors are considered *per se* violations of US and most competition laws, without regard to any actual impact on competition. That is because the usual result in such situations is higher prices to customers than if the competitors had independently set prices or marketed their products or services. In the United States, section 1 of the Sherman Act prohibits all contracts, combinations and conspiracies in restraint of trade.[1] Unilateral action by a monopolist seller or a monopsonist buyer that adversely affects competition may violate section 2 of the Sherman Act, which prohibits monopolisation, and attempts and conspiracies to monopolise.[2]

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[1] 15 USC § 1. [2] 15 USC § 2.

Section 7 of the Clayton Act[3] prohibits acquisitions of assets or securities that may substantially lessen competition or tend to create a monopoly. The application of the antitrust laws to CMOs potentially implicates all three pillars.

There are four major aspects to CMOs: (1) input in the form of assignments of rights to the CMO or grant of an authority to license; (2) output in the form of licences to users; (3) distribution of licence fees collected to rights-holders; and (4) arrangements with other CMOs generally for cross-representation of each other's repertoires in their home territories.[4] A corollary important function is the enforcement of rights. Most CMOs' essential function is to issue licences (often known as blanket or repertoire licences) with fees set by the CMO (which is a group of competitors) or a neutral third party such as a court or a quasi-judicial body. This function thus may involve price-fixing by competitors. Similarly, arrangements among CMOs for cross-representation of each other's repertoires often involve territorial restrictions and pricing terms, and may be viewed as agreements among competitors. On the other hand, in many cases, a CMO is realistically the only one available, so that it is a monopsonist to rights-holders and monopolist to rights users. CMOs have thus been accused of abuse of power *vis-à-vis* both rights-holders and users.[5] By

[3] 15 USC § 18.

[4] See e.g. Allan Fels, 'Australian Intellectual Property Law, Competition and Collecting Societies: Efficiency, Monopoly, Competition and Regulation', in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.), *European Competition Law Annual 2005: The Interaction Between Competition Law and Intellectual Property Law* (Oxford: Hart Publishing, 2007), p. 5. See www.eui.eu/RSCAS/Research/Competition/2005/200510-CompFels.pdf. In fact, not all CMOs have all four common attributes. Some CMOs handle only remuneration for rights-holders while others actually license. See e.g. Mihály Ficsor, 'Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire', in Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights* (2nd edn, Alphen aan den Rijn: Kluwer Law International, 2010), pp. 54–5.

[5] See e.g. Commission Decision of 12 August 2002, Case C2/37.219, *Banghalter and Honem Christo* v. *SACEM* (Daft Punk) ec.europa.eu/competition/antitrust/cases/dec_docs/37219/37219_11_3.pdf (a CMO infringed competition law by prohibiting its members from retaining some rights for individual management); Commission Decision 71/224/EEC, 2 June 1971, relating to proceeding under Art. 86 of the EEC Treaty (IV/27 760 – GEMA), OJ L 134/15 of 20 June 1971 (GEMA I); CJEU, Case 127/73, *Belgische Radio en Televisie* v. *SV Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (*BRT* v. *SABAM*) [1974] ECR 313 (CMOs required assignments from the rights-holder of more rights than were needed for the CMO to function effectively); Monopolies and Mergers Commission, 'Performing Rights: A Report on the Supply in the UK of the Services of Administering Performing Rights and Film Synchronization Rights' (February 1996), 15–16, 28, 32 (complaints of restrictions on members who wished to leave the society and requirements for exclusive assignments of all rights), www.webarchive.nationalarchives.gov.uk/+/www.competition-commission.org.uk/rep_pub/reports/1996/378performing.htm#full.

the aggregation of assigned rights, a CMO may become a concentration that substantially lessens competition or is a monopoly.

From the competition law perspective, it may be unsurprising that a US court long ago declared that '[a]lmost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theatres, involve a violation of the antitrust laws'.[6] More recently, the European Commissioner for digital issues Neelie Kroes declared: 'If I have enemies – and I assure you it is a long list – on that list are collecting societies. And I can't care less. They are monopolists. That is not about protecting the artist, or creator, it is about protection of that system. Perhaps it made sense a long time ago, but it doesn't make sense at this moment.'[7]

In spite of such rhetoric, in the United States, competition law standards for CMO activities have evolved over the decades. The antitrust standard applied to ASCAP[8] and BMI[9] accommodates the reality of the needs filled by CMOs. After many years of litigation, the US Supreme Court established the antitrust standard in *BMI* v. *CBS*.[10] That case involved an antitrust challenge by the CBS television network to BMI's and ASCAP's blanket licences. The Court concluded that the two PROs' licensing activities should be subject to the antitrust rule of reason, despite their facial attributes of a cartel that would be a *per se* violation of the antitrust laws.[11] The Court held that a fact-specific balancing test should be applied. It stated that the trial court should consider whether a CMO *enabled a new product* that may be an *efficient* way of making 'sales' of music, monitoring use and enforcing rights.[12] An agreement among competitors on fees for blanket licences may be permissible in that context if it is necessary to enable the licences and if the licences are new desirable products. The availability of individual licences as alternatives to blanket licences was a crucial factor in the Court finding the ASCAP and BMI blanket licence programmes subject to the rule of reason instead of the *per se* rule under the antitrust laws.[13]

The result in *BMI* v. *CBS* must be viewed in historical context. The Supreme Court noted the long history of government prosecution and oversight of CMOs in the United States[14] that continues to the present,

[6] *Alden-Rochelle Inc.* v. *ASCAP*, 80 F Supp 888, 893 (SDNY 1948).

[7] Kevin J. O'Brien, 'Fees That Could Spoil the Party in Berlin', *New York Times*, 23 September 2012, www.nytimes.com/2012/09/24/business/media/fees-that-could-spoil-berlin-party.html?pagewanted=all.

[8] Founded in 1914. See American Society of Composers, Authors and Publishers, 'The Birth of ASCAP', www.ascap.com/about/history.aspx.

[9] Founded in 1939. See BMI, 'About', www.bmi.com/about.

[10] *Broadcast Music Inc.* v. *CBS Inc.*, 441 US 1 (1979) (*BMI* v. *CBS*).

[11] *Ibid.*, 24. [12] *Ibid.*, 21–3. [13] *Ibid.*, 23–4. [14] *Ibid.*, 10–13, 24.

and the blanket licences created in the Copyright Act of 1976,[15] which were augmented by the additional statutory regulations created after the Supreme Court's 1979 decision. In fact, the US Solicitor General had filed an *amicus* brief urging rule-of-reason treatment in light of the history of consent decrees authorising blanket licences.[16]

The two PROs are subject to federal court judgments known as 'consent decrees' negotiated between the US Department of Justice (DOJ) and the PROs, and approved by the court. The DOJ had sued ASCAP and BMI for a variety of antitrust violations, culminating in the first two consent decrees in 1941.[17] The ASCAP decree was amended in 1950, 1960 and 2001, while the BMI decree was amended in 1966 and 1994. The decrees cover radio stations, movie theatres, television stations, cable, satellite, Internet and yet-to-be-developed technologies. They provide for:

- continuing DOJ oversight of ASCAP's and BMI's operations, and jurisdiction over enforcement of the decree by the courts in the federal Southern District of New York;
- a prohibition against the CMOs obtaining exclusive public performance rights from their members;
- possible direct licensing by CMO members, with fees paid directly to the members;
- a requirement to offer per programme or per segment licences as alternatives to blanket licences;
- a prohibition against discriminatory treatment of similarly situated licensees;
- a requirement to offer 'through to the audience' licences so that there is only one fee owed for the same performance, and a prohibition against charging local television stations for network broadcasts or movie theatres for music included in movies; and
- conditions on prompt and transparent distribution of revenues.

In the course of the several amendments, conditions on internal governance of ASCAP were added but ultimately deleted in the 2001 amendments.[18] The decrees reflect concerns about possible abuses of both monopoly and monopsony power. In the case of monopsony, the concern was the possible abuse of members even though both ASCAP and BMI are membership organisations. The decrees established a 'rate court': if the CMOs and a user (applicant) fail to agree on a fee, the

[15] *Ibid.*, 15–16. [16] *Ibid.*, 14–15.

[17] This history is recounted in detail in Glynn Lunney, 'Copyright Collectives and Collecting Societies: The United States Experience', in Gervais (ed.), *Collective Management of Copyright and Related Rights*, pp. 348–65.

[18] *Ibid.*, 355–68.

applicant may ask the district court in the federal Southern District of New York to set a 'reasonable' rate.

There have thus been over seventy years of consent decree control in the United States over ASCAP and BMI, since the first decrees were issued in 1941. This is a far longer period than the almost twenty years under which AT&T was governed by the Modified Final Judgment that broke up the Bell Telephone System in 1984 and monitored much of the US telecommunications industry. There was a consensus as to the AT&T Modified Final Judgment that it was undesirable to have a significant sector of the economy being effectively regulated by a single judge, which was a significant impetus to the passage of the Telecommunications Act of 1996 that effectively superseded the Modified Final Judgment. Yet the ASCAP and BMI decrees persist. They may be the only permanent antitrust decrees issued that remain in effect.[19] This persistence may indicate that the CMOs remain natural monopolies in some areas.[20] One might argue, however, that the decrees may also have sustained any monopolies by making them tolerable, so that competitors are less likely to develop.[21]

The Digital Performance Right in Sound Recordings Act of 1995 addressed newer technologies by creating a statutory compulsory licence for sound recording digital public performances, with a CMO designated by the Copyright Office and rates to be set by the newly created Copyright Royalty Board. Nonetheless, SoundExchange, the designated CMO for digital public performance rights, has been negotiating directly with licensees. No CMO has developed to handle licences for interactive

[19] See D. Gervais, 'The Landscape of Collective Management Schemes' (2011) 34 *Columbia Journal of Law and the Arts* 591–617. 'Antitrust Division Announces New Steamlined Procedure for Parties Seeking to Modify or Terminate Old Settlements and Litigated Judgments', Press Release, 28 March 2014, www.justice.gov/atr/public/press releases/2014/304744.htm.

[20] In fact, when a new CMO was designated to administer rights in digital uses of sound recordings under the Digital Performance Right in Sound Recordings Act of 1995, a regulatory system was established outside of antitrust scrutiny, apparently on the assumption that such a CMO was a natural monopoly and therefore should be regulated like a utility instead of being subject to antitrust standards. However, whether a monopoly is a 'natural' one may turn on circumstances. At one time, landline telephone systems were considered natural monopolies. Thus, it is important to re-examine from time to time any claim of natural monopoly. See also Thomas DiLorenzo, 'The Myth of Natural Monopoly' (1996) 9 *Review of Austrian Economics* 43–58.

[21] Lunney, 'Copyright Collectives and Collecting Societies', 353. In fact, Justice Stevens may have been alluding to that possibility in his dissent in *BMI* v. *CBS*, when noting that 'the record also shows that where ASCAP's blanket license scheme does not govern, competitive markets do. A competitive market for "synch" rights exists, and after the use of blanket licenses in the motion picture industry was discontinued, such a market promptly developed in that industry.' *BMI* v. *CBS*, 441 US 1, 33, 35–36 (1979) (Stevens J, dissenting).

transmissions to individual members of the public. Such transmissions are not covered by the compulsory licence and thus require a licence from individual right-holders (generally record labels). Providers of interactive transmissions have thus been negotiating directly with individual right-holders.

A lesson from the US antitrust history of CMOs may be that they are 'necessary evils' from the US perspective, to be tolerated but closely regulated. The reasoning in *BMI* v. *CBS* epitomises the balancing of factors leading to that result. The ease of access by users is balanced with the control of rights by rights-holders. Tolerating and regulating CMOs, and even mandating CMOs, may be the lesser evil than compulsory or statutory licences.[22]

The real question for the twenty-first century is whether CMOs continue to be necessary. If technological changes have rendered CMOs less necessary or even unnecessary,[23] then perhaps they should no longer be tolerated, or at least no longer be treated under competition laws differently from any other arrangement among competitors.

The values being promoted should drive much of the analysis. In the United States, the courts and enforcers must balance the constitutional imperative '[t]o promote the Progress of Science and useful Arts . . . by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries' with the goal of the antitrust laws to protect competition. In the EU, values such as cultural diversity and author's moral rights may weigh against competition concerns even though the single market imperative might weigh on the side of competition.

Technology has enabled direct licensing between holders and users. Prominent examples include the online music services Spotify and iTunes, and the Copyright Clearance Center[24] (CCC) for text. Spotify acquires licences from music rights-holders – CMOs, songwriters, publishers, artists and record labels – and makes music available to individual users. In the case of songwriters and publishers, it gets rights from PROs by paying the applicable tariff. On the other hand, Spotify and iTunes need a licence from each record label to authorise the use of their exclusive rights, and some of those right-holders may have negotiated what seems to be a much better deal with such services than songwriters working through PROs.[25] Rights-holders in text-based works may

[22] Ficsor, 'Collective Management of Copyright and Related Rights', 47. In the EU, the principle of proportionality may lead to the same conclusion.

[23] This possibility was noted by the Court in *BMI* v. *CBS*, 441 US 1, 21 n. 34 (1979).

[24] See Copyright Clearance Center, www.copyright.com.

[25] See Michael Degusta, 'Pandora Paid Over $1,300 for 1 Million Plays, Not $16.89', The Understatement (25 June 2013), www.theunderstatement.com. According to this commentator, for 1 million plays, Pandora pays approximately US$1,300 for the sound recording (paid to the record label, part of which goes to the artist) and less than US$100 for the song (paid to the PRO). The songwriter typically gets half of the second amount, that is, less than US$50.

register their works along with their individual fees schedule with the Copyright Clearance Center. CCC users may check the registry and pay individually set fees for photocopies or digital use of the works. Google's YouTube has entered into direct agreements with individual right-holders for audiovisual works under which it shares some of its advertising revenues.[26] Google Books may offer a potential alternative model for text.

In different ways, these new services fulfil at least three of the four major functions of CMOs. They: (1) aggregate rights so that users may access them readily; (2) enable users to obtain licences of rights, in some cases directly from right-holders; and (3) facilitate payment of licence fees to rights-holders. Given the borderless nature of the Internet, there is less obvious need for any of these new services to enter into cross-representation agreements, the fourth major CMO function. The important corollary function of active enforcement is generally outside the purview of the new services. Users pay before getting access through the services to works, and the technology generally prevents use beyond the licence of works accessed through the services. The services do not monitor unauthorised use of works that were accessed through other means.

If CMOs remain necessary to some extent – at least for the time being – then the questions are: to what extent? And what may be the least anti-competitive ways of fulfilling those needs? Of the four major aspects of CMOs, only some may still be needed, in which case are CMOs the least restrictive ways of filling those needs? As the European Commission has pointed out, technology has obviated the need for territorial monitoring of rights in some contexts.[27] On the other hand, as the European General Court pointed out, it may make sense for CMOs to maintain national territories if extending beyond one's own territory would require the development of monitoring and enforcement structure outside of the territory.[28] Moreover, while the local society may be best-placed to monitor unauthorised uses in its territory, it may be unable to recover its costs of doing so if other societies may also license in the territory.[29] Collective management may make sense in some industries, such as cable with

[26] See e.g. the new type of YouTube 'collection' service offered by Audiam Inc. at www.audiam.com/faq.

[27] General Court, Case T-442/08, *International Confederation of Societies of Authors and Composers (CISAC)* v. *Commission*, 12 April 2013, OJ C 156 of 1 June 2013, [34], curia.europa.eu/juris/celex.jsf?celex=62008TJ0442&lang1=en&type=NOT&ancre=.

[28] *Ibid*., [137].

[29] *Ibid*., [150], [153], [159].

its mass retransmission of television broadcasts, but not others, such as movies which are still individually licensed.[30]

Perhaps the major need for all rights-holders is a database of who owns which rights and the terms on which rights-holders are willing to license. A repertoire database would enable users to know what rights are available and from whom, and would allow holders to know what rights have been licensed and to whom.[31] However, it is unclear that such a database must necessarily be created and/or maintained by a CMO or needs to have other attributes of a CMO. The corollary enforcement function may also continue to be essential, especially for small rights-holders for whom prosecution of infringers may be cost-prohibitive. The question remains whether the full array of CMO functions must be included with the enforcement function.[32]

The arguments in favour of applying to CMOs standards distinct from those applied to other cartels fall into several categories. There is a concern that without CMOs individual rights-holders will have no real way to access the market. Some argue that 'creative competition' is fostered by requiring CMOs to accept all licences offered by rights-holders while allowing rights-holders to determine which rights to license, enabling less

[30] Ficsor, 'Collective Management of Copyright and Related Rights', 32–3. That assessment must be periodically renewed, given changing circumstances. For example, even cable retransmissions are often negotiated individually between cable systems and broadcast networks, as the 2013 fee dispute between CBS Television and Time Warner Cable resulting in CBS going dark on Time Warner Cable systems in major cities including New York, Los Angeles and Dallas confirmed. See e.g. Bill Carter, 'After a Fee Dispute With Time Warner Cable, CBS Goes Dark for Three Million Viewers', *New York Times*, 2 August 2013, www.nytimes.com/2013/08/03/business/media/time-warner-cable-removes-cbs-in-3-big-markets.html. See also Bill Carter, 'CBS Trumpets Deal With FiOS TV in Jab at Time Warner Cable', *New York Times*, 22 August 2013, www.nytimes.com/2013/08/23/business/media/cbs-trumpets-deal-with-fios-tv-in-jab-at-time-warner-cable.html?src=rechp. In fact, there is a significant likelihood that cable systems will cease carrying television entirely, with television being distributed entirely through the Internet. Shalini Ramachandran and Martin Peers, 'Future of Cable Might Not Include TV', *Wall Street Journal*, 4 August 2013, www.online.wsj.com/article/SB10001424127887323420604578647961424594702.html. See also L. Gordon Crovitz, 'TV's Unnatural Monopolies', *Wall Street Journal*, 18 August 2013, www.online.wsj.com/article/SB10001424127887324139404579016850166003972.html.

[31] There would be confidentiality issues and a software standard would need to be developed to ensure interoperability of copyright management systems that tap into the database. Daniel Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', in Gervais (ed.), *Collective Management of Copyright and Related Rights*, pp. 19–20.

[32] In the patent context, non-practising entities (NPEs) have filled in the gap for small inventors to some extent, enabling more of them to enforce their patents against infringers. NPEs do not perform other functions that CMOs do in the copyright context, and there is little indication of any call for them to expand their scope. In fact, the complaints have been that NPEs are abusive within the specific scope of what they do

popular or newer unknown works to gain access to market.[33] However, the rise of YouTube and self-publishing stars on the Internet belies the need for CMOs to ensure access, at least in some markets.[34] The opportunities for successful access through CMOs would seem unlikely to be much greater than through the Internet for such mass uses.[35]

Some argue that CMOs are necessary counterweights to big users.[36] They assume that there is an imbalance in bargaining power between international media conglomerates and national CMOs, and argue that CMOs ensure 'fair' remuneration of authors and composers by eliminating competition between rights-holders and acting as a counterweight to the industrial rights users.[37] First, while elimination of competition

[33] Josef Drexl, 'Collecting Societies and Competition Law' (12 February 2007), www.ip.mpg.de/shared/data/pdf/drexl_-_crmos_and_competition.pdf.

[34] See e.g. Erich Schwartzel, 'Rising Stars of YouTube Learn to Cope With Fans, Fame', *Wall Street Journal*, 15 August 2013, www.online.wsj.com/article/SB10001424127887323420604578649023978077876.html ('VidCon has grown from 1,500 people in 2010 to a crowd of 11,000 that believes it is possible to "make it" without leaving Google Inc.'s YouTube for a mainstream movie or television deal, said VidCon co-founder John Green').

[35] In fact, as Justice Stevens pointed out in his dissent in *BMI* v. *CBS*, pursuant to the ASCAP blanket licence, under which users paid the same fee (namely, a percentage of advertising revenues), regardless of how much or which of the repertoire is used, yet rights-holders are paid according to the use of their works, 'it is no more expensive for a network to play the most popular current hit in prime time than it is to use an unknown composition as background music in a soap opera. Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music, and also of a larger share of what is really more valuable music, than would be expected in a competitive system characterized by separate licenses. And since revenues are passed on to composers on a basis reflecting the character and frequency of the use of their music, the tendency is to increase the rewards of the established composers at the expense of those less well known. Perhaps the prospect is in any event unlikely, but the blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price.' 441 US 1, 32–3 (1979) (Stevens J, dissenting) (footnote omitted).

[36] Drexl, 'Collecting Societies and Competition Law'; Ingo Brinker, 'Competition Law and Copyright: Observations from the World of Collecting Societies', in Giandonato Caggiano, Gabriella Muscolo and Marina Tavassi (eds.), *Competition Law and Intellectual Property: A European Perspective* (Alphen aan den Rijn, London: Wolters Kluwer, 2012), pp. 203–16; Ernst-Joachim Mestmäcker, 'Collecting Societies', in Ehlermann and Atanasiu (eds.), *European Competition Law Annual 2005*.

[37] Some pointed to European Commission competition law objections to mergers among major media companies as support for the need for CMOs. See Mestmäcker, 'Collecting Societies', 8. The EC objected to such transactions in part because of the merged entity's potential ability to bypass CMOs given the large size of the merged rights portfolio it would control, and raise the costs of those rivals who must still license from CMOs. The cure for monopolistic aggregations of market power is disaggregation, not the creation of hopefully counterbalancing behemoths.

among competitors indeed generally results in higher prices paid to the competitors, it is questionable to assume that those prices would be 'fair', especially to users.[38] Moreover, CMOs in fact have big members. In the mid-1990s, 5 per cent of the members of GEMA, the German music CMO, received 60 per cent of the distributed monies. Five media companies receive and pay 80 per cent of fees processed by major CMOs. Approximately 10 per cent of music CMO members received 90 per cent of distributions.[39] There is little indication that the situation has changed much since the mid-1990s. In addition, if a CMO is a monopsonist, small individual rights-holders will have little bargaining power relative to the CMO and there is little reason to expect that the small rights-holders will be protected against large users, or even against large rights-holders.[40] In a context where the majority of CMO rights revenues are received from and distributed to the same few large entities, it is difficult to see how a CMO can be relied upon to protect small author members against large media members/users.[41] In any event, the premise of imbalance of power may no longer be true in the digital age.[42]

CMOs may still be beneficial to small right-holders, especially as to enforcement. If they are monopolies, however, they will tend to be inefficient, and benefits to small right-holders may be diminished as a result.

[38] This concern may be reflected in German law that requires CMOs to accept all copyrights and to set fees taking into consideration the payer's interests, and not to be profit-maximising. Mestmäcker, 'Collecting Societies', 3. 'Fair' is often in the eyes of the beholder.

[39] Frédéric Jenny, 'EC Competition Law Enforcement and Collecting Societies for Music Rights: What Are We Aiming for?', in *European Competition Law Annual 2005: The Interaction Between Competition Law and Intellectual Property Law* (Oxford: Hart Publishing, 2007), www.eui.eu/RSCAS/Research/Competition/2005/200510-CompJenny.pdf.

[40] E.g. Monopolies and Mergers Commission, 'Performing Rights', 11, 25, 27–8; Rafael Allendesalazar, 'Collecting Societies: The Usual Suspects', in *European Competition Law Annual 2005: The Interaction Between Competition Law and Intellectual Property Law* (Oxford: Hart Publishing, 2007), www.eui.eu/RSCAS/Research/Competition/2005/200510-CompAllendesalazar.pdf (discussing a decision of the Spanish Competition Court in proceeding No. R 609/04, *Ediciones Musicales*, 16 December 2004).

[41] Cf. Jenny, 'EC Competition Law Enforcement'; Mestmäcker, 'Collecting Societies'.

[42] As one reporter noted: 'Thirty years ago, record labels often spent millions of dollars on videos by top directors to promote the sale of albums. Then label executives would submit the videos to MTV and pray that the network would put them in its rotation. Along with their disc-jockey counterparts on FM radio, the gatekeepers at MTV and rival channels like VH1 could make or break a song. Not anymore. These days the Internet is the medium for music videos, and legions of music fans surfing the Net determine if a video becomes popular: YouTube, not MTV, is the platform. It has supplanted radio as the main way American teenagers listen to new music, a survey by Nielsen shows. So musicians and directors angle to invent striking films with the potential to go viral, even as their production budgets have shrunk.' See James S. C. McKinley, Jr, 'Pop Music Videos? I Want My YouTube!', *New York Times*, 22 August 2013, www.nytimes.com/2013/08/23/arts/music/pop-music-videos-i-want-my-youtube.html?hp&pagewanted=all.

Much of history in the United States of consent decrees against CMOs resulted from concern over treatment of their own members by ASCAP and BMI. The US Department of Justice in seeking modification of the consent decree in 1960 claimed 'that less than 5 percent of the ASCAP writer-members and less than one percent of the publisher-members have the power to elect all the directors'.[43] There was concern that 'young writers and publishers are being discouraged from writing and publishing new songs',[44] which would vitiate one of the major reasons for leniency under the antitrust laws.

CMOs have internal conflicts of interests, especially where they are captured by their biggest members, the publishers, whose interests may diverge from those of the author members.[45] In other cases, such as the many reciprocity agreements among CMOs that effectively divide the world into exclusive territories, the greatest beneficiaries may be the CMOs,[46] though their members may also benefit from the enforcement that may be facilitated by the territorial allocations. The European General Court decision in *CISAC*[47] in April 2013 highlights some of the benefits that territorial allocations in reciprocity agreements provide.[48]

If CMOs are assumed generally to have only national reach by nature, then in some jurisdictions CMOs may be a natural monopoly. Even in a large economy like the United States, there are only several major CMOs in what may be considered an oligopoly. In such contexts, only limited competition can be expected. However, technology now enables the management at least of online rights worldwide through the Internet. The logistical challenges that in the past may have limited the practical reach of CMOs geographically may no longer exist, or not to the same extent.[49] If there have been natural monopolies or oligopolies in the past,

[43] *US* v. *ASCAP*, 1960 Trade Cas (CCH), para. 69,612, 1960 US Dist. LEXIS 4967 *6 (SDNY 1960).

[44] *Ibid.*, *3.

[45] See notes 35 and 36 above. In jurisdictions where CMOs are formed and operate under government supervision, and are closer to an administrative agency than a member organisation, the conflicts between the CMO and rights-holders may be structural and institutionalised.

[46] Thomas Vinje, 'The Application of Competition Law to Collecting Societies in a Borderless Digital Environment', in *European Competition Law Annual 2005: The Interaction Between Competition Law and Intellectual Property Law* (Oxford, Hart Publishing, 2007), www.eui.eu/RSCAS/Research/Competition/2005/200510-CompVinje.pdf, 6; Lucie Guibault and Stef van Gompel, 'Collective Management in the European Union', in Gervais (ed.), *Collective Management of Copyright and Related Rights*, p. 140.

[47] General Court, Case T-442/08, *International Confederation of Societies of Authors and Composers* v. *Commission*, OJ C 156 of 1 June 2013, curia.europa.eu/juris/celex.jsf?celex=62008TJ0442&lang1=en&type=NOT&ancre=.

[48] See notes 22–5 above. [49] *Ibid.* See also Jenny, 'EC Competition Law Enforcement'

there may be fewer instances of monopoly or oligopoly remaining that might truly be 'natural'.

The current monopoly status of many CMOs may be more the result of law than logistics. There may be grounds for particular concern where CMOs are mandatory, sanctioned monopolies and/or authorised to conduct extended repertoire licensing.[50] Safeguards are needed particularly in such contexts to protect members and absent right-holders against abuse by the CMO.

The threshold issue, however, is what are the justifications for mandating CMOs or authorising them to license extended repertoires. Unless there are compelling reasons,[51] legal requirements leading to monopoly CMOs that in turn require regulation should be eliminated and competition among CMOs should be fostered, so that rights-holders and users may have greater choice and hopefully receive better terms overall. CMOs' transparency and efficiency are likely to increase as a result.[52] It is only when CMOs are presumed to be necessarily monopolies that a panoply of regulation must be imposed as the lesser of evils.[53] It would be

[50] Under extended repertoire licensing, the CMO's repertoire is legally extended to non-members' rights, subject to opt-out by the right-holders.

[51] Cooperation among CMOs may be needed to meet demand for multi-repertoire licences, and is essential where CMOs are limited by national boundaries. A system of reciprocal agreements among CMOs enables users to obtain licences for world repertoires from a single source when CMOs are restricted to national territories. However, such a network of reciprocal agreements among competitors invites regulation as a cartel. While smaller users such as shops and restaurants may benefit the most from blanket licences, they are also the users most subject to a CMO's market power. Larger users may actually find it more efficient to obtain licences directly from rights-holders. See e.g. Fels, 'Australian Intellectual Property Law'. Arguably, CMOs' market power is thus felt most by small rights-holders and small users, in which case their efficiency case is less than compelling. See e.g. Jenny, 'EC Competition Law Enforcement'.

[52] The need for transparency and better governance on the part of CMOs is well recognised. See *US* v. *ASCAP*, 1960 Trade Cas (CCH); Monopolies and Mergers Commission, 'Performing Rights', 3–4, 13–14, 19–24, 26–7, 31; Mestmäcker, 'Collecting Societies', 10; Vinje, 'The Application of Competition Law', 6. In Europe, 'the 250 European copyright collection societies, the semiautonomous associations . . . typically refuse to disclose how they distribute the €6 billion, or nearly $8 billion, they collect each year in fees across the European Union.' Kevin J. O'Brien, 'Fees That Could Spoil the Party in Berlin', *New York Times*, 23 September 2012, www.nytimes.com/2012/09/24/business/media/fees-that-could-spoil-berlin-party.html?pagewanted=all. There is little valid reason for CMOs to be protected from the need to be efficient.

[53] CMOs with market power generally are inefficient and engage in monopoly pricing. The proposals before the EU Parliament to regulate CMOs reflect the abuses, real or perceived, that call for remedy which are facilitated in a monopoly context. They seek improvements in the CMOs' governance and transparency on royalty deductions and payments, and timing of distribution of royalties, and to address concerns over inefficiency, retention of funds due to rights-holders, and methods of fee distribution. Committee on Legal Affairs, Compromise Amendments 1–64, Annex to the Voting List on the draft report on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (8 July 2013); Working Document on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (4 March 2013). However, the proposals build on the current situation of generally monopoly and monopsony CMOs, granting multi-territorial authorisation to selected CMOs while further regulating in hopes of mitigating the natural effects of monopoly, by restricting rights-holders in their ability to withdraw from CMOs and by regulating competitors to CMOs. Draft Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012) 0372 – C7-0183/2012 2012/0180(COD)) (26 March 2013); Draft Opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012) 0372 – C7-0183/2012 2012/0180(COD)) (28 March 2013).

far better to remove the legal support for monopoly CMOs and thus foster competition among CMOs. For example, eliminating requirements that rights in a jurisdiction be assigned only to designated national CMOs would enable other CMOs to compete to acquire rights and users.[54] Where CMOs are formed and operate under government supervision, and are closer to an administrative agency than a member organisation, 'privatising' them may be a first step towards a competitive CMO environment.

This analysis applies to CMOs both as monopsonists and as monopolists. If CMOs are no longer monopsonist acquirers of rights from holders, but must compete to acquire rights, they may become more efficient and increase remuneration to authors.[55] Competition resulting from removal of CMO membership restrictions on granting rights to CMOs for pan-European licensing has already resulted in some large rights-holders having their repertoires administered on a pan-European basis, which benefits the holder and should also facilitate access by users.[56] On the other hand, if CMOs are no longer monopoly providers of rights, then competition for users may lead to lower remuneration for authors.

[54] Cf. Monopolies and Mergers Commission, 'Performing Rights', 28; Brinker, 'Competition Law and Copyright', 207.

[55] Monopolies and Mergers Commission, 'Performing Rights', 28; Brinker, 'Competition Law and Copyright', 207.

[56] Monopolies and Mergers Commission, 'Performing Rights', 28; Brinker, 'Competition Law and Copyright', 207. Unsurprisingly, such cross-border competition among CMOs is effectively also competition among the national regimes governing CMOs. This may lead to national regimes harmonising or converging to an approach to CMOs that may be more optimal than the current one. There is some fear that large rights holders would favour low cost CMOs that stint on cultural and social services. However, such services may be provided, perhaps even more effectively, through means other than CMOs.

It is unclear what the ultimate net impact will be of the two countervailing forces on revenues. The likelihood is that it will vary across CMOs, rights-holders and users, and over time.

Some argue that CMOs in substantially their current form, protected from competition and sometimes mandatory, are necessary for cultural advocacy and cultural diversity.[57] From the competition policy perspective, neither argument is well founded. Cultural advocacy can be separated from the licensing of rights. Many trade associations advocate for their industry without engaging directly in transactions or fixing prices. For example, the California Milk Processor Board is a non-profit marketing organisation funded by California dairy processors, and administered by the California Department of Food and Agriculture. It does not set prices for milk, but runs advertising campaigns to promote the drinking of milk. For many years, it conducted a famous campaign with the slogan 'Got milk?'[58]

The state of economic development of a country may also affect the calculus on the need, real or perceived, for a protected CMO, especially to protect cultural diversity. From the competition policy perspective, cultural diversity may be another form of industrial policy, and is therefore antithetical to competition policy principles. It is also unclear why or on what basis 'cultural diversity' should be a goal of copyright.

More importantly, it is unclear that CMOs are the optimal or appropriate way to further cultural diversity, especially if the way they are expected to do so is by being required to accept administration of all rights offered. Some argue that CMOs allowed to choose which rights to administer

[57] E.g. C. B. Graber, 'Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at a Crossroads' (2012) 4 *WIPO Journal* 35–43; Mestmäcker, 'Collecting Societies'; Brinker, 'Competition Law and Copyright'; Drexl, 'Collecting Societies and Competition Law'. That is a major concern in Europe: Working Document on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (4 March 2013); Draft Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012) 0372 – C7–0183/2012–2012/0180(COD)) (26 March 2013); Draft Opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012) 0372 C7–0183/2012–2012/0180(COD)) (28 March 2013).

[58] Some point out that CMOs also perform statutory social duties such as providing pensions or social benefits to authors in need. See Brinker, 'Competition Law and Copyright', 206. However, as with cultural advocacy, those goals may be achieved without involving collective management.

will specialise in the types of works they will represent, focusing on those with greatest market potential and therefore on mainstream works to promote primarily the interests of rights-holders of internationally popular mainstream music.[59] There is the related argument that appropriate regulation of CMOs should guarantee equal market access of all works to copyright markets, enabling consumers to have the greatest choice of culturally diverse works and avoiding 'pre-selection' by institutional rights-holders that tend to cater only to the average taste of consumers in international markets.[60] This argument points out that CMOs lower transaction costs by creating a new product, the repertoire or blanket licence, and avoids the costs of searching and bargaining for individual works that would otherwise paralyse the market except for established and well-known rights-holders.[61]

Setting aside the questionable validity of the view that it is undesirable to cater to the average taste of consumers and therefore promote the interests of holders of rights to such popular music, the proliferation of choices and outlets on the Internet refutes the premise of that argument.[62] One now has more outlets for one's creations and more sources for satisfying one's desires than ever before, with the click of a mouse. A niche creator may never have had more opportunities to reach a niche audience.[63] It is unclear that a CMO is necessary to reach an online audience at all. Moreover, it is unclear that equal market access should be guaranteed for any product or service. It is similarly unclear that CMO blanket licences cure pre-selection biases.

In all events, if CMOs are unfettered from national boundaries and free to compete across borders, it is entirely possible that they will develop multi-repertoire and multi-territorial licences that many consider desirable. If they still retain their current approach to rights management and yet there is a demand for multi-repertoire and multi-territorial licences,

[59] Drexl, 'Collecting Societies and Competition Law', 19.

[60] *Ibid.* [61] Brinker, 'Competition Law and Copyright', 205–6.

[62] Over 250 online music sites are currently available in Europe, and practically none of them is restricted to the Anglo-American repertoire which apparently is expected to drive out other repertoire in the absence of regulation. In fact, all online music operators consulted by the EC Committee of Legal Affairs indicated that they needed a global or extremely varied repertoire in order to get started. Working Document on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (4 March 2013). In that case, it should be expected that cultural diversity will exist by action of market forces, and regulation will be superfluous and may result in perverse effects and unintended consequences.

[63] 'To make it in Hollywood, it helps to appeal to the masses. To make it on YouTube, it helps to appeal to everyone else.' Schwartzel, 'Rising Stars of YouTube Learn to Cope With Fans, Fame'

the market abhors a vacuum and a new model is likely to develop to fill the need.

At bottom, some of the angst over CMOs may be reflections of consternation over the disruption by technological changes to an established ecosystem of cartels. The potential 'chaos' of CMOs suing each other instead of cooperating as before to 'optimise' licences internationally may reflect only the breakdown of cartels into messy competition and creative destruction that may increase output and lower overall costs. CMOs may not be as necessary as before and certainly should not be given special treatment under competition laws. Another, better model may arise to supplant the CMO. Rather than assume the necessity for CMOs, or all aspects of CMOs, the question should be which, if any, aspects of CMOs are necessary in changing circumstances.

While copyright has attributes distinctive from other property rights, that factor is insufficient to exempt it from competition laws.[64] Every industry claims unique attributes that justify exemption from the competition laws. In the case of intellectual property, the appropriate application of competition law continues to be debated. In the United States, the consensus is that, outside of the scope of the specific intellectual property, conduct relating to intellectual property is fully subject to antitrust law.[65] The debate in the context of CMOs then becomes what conduct is within the scope of the copyright. Nonetheless, the principle is that competition law should be applied to the fullest extent possible, and exemptions and immunities should be limited.[66]

[64] There is a belief among some that application of competition law principles to CMOs is generally unwarranted, in the past because of the need for the unique services provided by CMOs, and now because of technology; they see competition law as an impediment to a necessary system. Tanya Woods, 'Multi-Territorial Licensing and the Evolving Role of Collective Management Organizations', in Gervais (ed.), *Collective Management of Copyright and Related Rights*, p. 125.

[65] Antitrust Modernization Commission, Report and Recommendations, Chapter I.A, 'Antitrust Law and the "New Economy"' (2007), govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf.

[66] *Ibid.*, Chapter IV.B, 'Government Exceptions to Free-Market Competition', govinfo.library.unt.edu/amc/report_recommendation/chapter4.pdf.

13 Copyright on the Internet: consumer copying and collectives

Glynn S. Lunney, Jr

Since Napster first opened its virtual doors in June 1999, widespread consumer copying of copyright works on the Internet has become the new reality. Copyright owners have pursued a variety of strategies in an attempt to control this consumer copying, but their efforts have met with little success. There is more file-sharing traffic carried today on the Internet than ever before. Yet, if we put to one side the 'sky is falling' rhetoric of copyright owners, and take a hard look at how copyright industries have fared since Napster, we find something surprising: while revenue may be down, at least in some respects, output is up, and by some measures, up substantially.[1]

In an article entitled, 'The Death of Copyright', published in 2001,[2] I offered a reason for this seemingly paradoxical result. We enjoy a work of authorship more when we can share our enjoyment of the work with others.[3] The fact that others have seen or heard or read a given work increases, on its own, the satisfaction we individually experience from seeing or hearing or reading that work. The popularity of a work thus generates a type of network effect. In the file-sharing context, this network effect leads consumers to share the most popular works disproportionately.[4] Because consumers tend to share the most popular works disproportionately, file-sharing tends to reduce the excess incentives associated with more popular works, rather than reduce the

[1] See the text accompanying notes 24–9 below; see also F. Oberholzer-Gee and K. Strumpf, 'File Sharing and Copyright' (Harvard Business School Working Paper, 2010), www.hbs.edu/research/pdf/09-132.pdf ('The publication of new books rose by 66% over the 2002–2007 period. Since 2000, the annual release of new music albums has more than doubled, and worldwide feature film production is up by more than 30% since 2003.').

[2] G. S. Lunney, Jr, 'The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act' (2001) 87 *Virginia Law Review* 813–920.

[3] *Ibid.*, 883 (noting that 'the desirability of a work derives in part from the fact that others have experienced it as well').

[4] See Lunney, 'The Death of Copyright', 885–6 (citing a study by Adar and Huberman finding that the top 1 per cent of queries on a file-sharing network accounted for 37 per cent of the total queries).