

2011

## The Landscape of Collective Management Schemes

Daniel J. Gervais

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### Recommended Citation

Daniel J. Gervais, *The Landscape of Collective Management Schemes*, 34 Columbia Journal of Law & the Arts. 423 (2011)

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DATE DOWNLOADED: Wed Oct 19 16:49:18 2022

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Citations:

Bluebook 21st ed.

Daniel Gervais, Keynote: The Landscape of Collective Management Schemes, 34 COLUM. J.L. & Arts 591 (2011).

ALWD 7th ed.

Daniel Gervais, Keynote: The Landscape of Collective Management Schemes, 34 Colum. J.L. & Arts 591 (2011).

APA 7th ed.

Gervais, D. (2011). Keynote: the landscape of collective management schemes. Columbia Journal of Law & the Arts, 34(4), 591-618.

Chicago 17th ed.

Daniel Gervais, "Keynote: The Landscape of Collective Management Schemes," Columbia Journal of Law & the Arts 34, no. 4 (2011): 591-618

McGill Guide 9th ed.

Daniel Gervais, "Keynote: The Landscape of Collective Management Schemes" (2011) 34:4 Colum JL & Arts 591.

AGLC 4th ed.

Daniel Gervais, 'Keynote: The Landscape of Collective Management Schemes' (2011) 34(4) Columbia Journal of Law & the Arts 591

MLA 9th ed.

Gervais, Daniel. "Keynote: The Landscape of Collective Management Schemes." Columbia Journal of Law & the Arts, vol. 34, no. 4, 2011, pp. 591-618. HeinOnline.

OSCOLA 4th ed.

Daniel Gervais, 'Keynote: The Landscape of Collective Management Schemes' (2011) 34 Colum JL & Arts 591

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## Symposium: Collective Management of Copyright: Solution or Sacrifice?

### Keynote: The Landscape of Collective Management Schemes

Daniel Gervais\*

#### INTRODUCTION

The title for this address, suggested by Jane Ginsburg and June Besek, prompted me to take a fresh look at the rules of landscape composition.<sup>1</sup> I found six major ones. The first five rules are as follows: (a) group your subjects of importance within a center of interest; (b) avoid straight lines; (c) allow the viewer to interact and become a participant; (d) make good use of contrast; and (e) add some drama and avoid kissing the edges.<sup>2</sup> I can promise you two of those five, namely that we will interact later, and that I will not be kissing any edges this morning. Unfortunately, I cannot promise drama. As to the center of interest and avoidance of straight lines, let us see what we can do. The last rule is to put striking features in the foreground set against a solid background. That I think I can deliver. Let us start with the background. I will use a realist technique for this part of my talk.

#### I. A COMPARATIVE PERSPECTIVE ON COLLECTIVE MANAGEMENT IN THE UNITED STATES

Collective management comes in many shapes and sizes. There is, however, an interesting definition proposed by WIPO:

[T]he term “collective management” only refers to those forms of joint exercise of rights where there are truly “collectivized” aspects (such as tariffs, licensing conditions and distribution rules); where there is an organized community behind it; where the management is carried out on behalf of such a community; and where the organization serves collective objectives beyond merely carrying out the tasks of rights management . . . . In contrast, “rights clearance organizations” are those which perform joint exercise of rights without any collectivized elements in the system;

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\* Professor of Law, Vanderbilt University Law School. Co-director, Vanderbilt Intellectual Property Program.

1. Professor Jane C. Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia Law School; and June Besek, Lecturer-in-Law and Executive Director and Director of Studies, Kernochan Center for Law, Media and the Arts.

2. Johannes Vloothuis, *Landscape Composition Rules*, WET CANVAS, <http://www.wetcanvas.com/Articles2/135/120/> (last visited Jan. 26, 2011).

simply a single source is offered for users to obtain authorization and pay for it.<sup>3</sup>

This quote illuminates the difference between the practice of collective management in the United States and the practice in many other countries. That difference is real. It is probably due in part to an ideological resistance to collective models in the United States.<sup>4</sup> Operationally, the difference in the regulatory regimes is obviously a relevant factor, but those regimes are themselves informed by ideology and thus they may be more a symptom than a cause.

Simply put, in many countries authors and other rights holders such as performers expect their collectives to do more than just manage their rights.<sup>5</sup> This is what Dr. Ficsor, the author of the WIPO quote above, refers to somewhat cryptically as the “collectivized elements.”<sup>6</sup> In that worldview, the collective model is a legitimate alternative—not an intrinsically inferior one—to the individual exercise of rights. In fact, it may even be seen as superior to individual management precisely because it allows “collectivized elements” to emerge. Those include a collective bargaining function, of course, but also policy advocacy, providing advice on careers, assistance with the application of moral rights and other aspects of authors’ rights.<sup>7</sup>

Would it be fair to say that United States collective management organizations (“CMOs”) operate more as what WIPO refers to as *rights clearance organizations*? Should we ask in the same breath whether it would also be fair to posit that the collective model is seen here as inherently less appealing than the individual

3. MIHÁLY FICSOR, *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 12 (1990).

4. No doubt several Ph.D theses have been written on this topic already. However, for a general discussion from a comparative perspective, see PIERRE BIRNBAUM, *STATES AND COLLECTIVE ACTION* 82 (1988). Birnbaum writes:

[In] the United States, [a] social system deeply marked by individualism, in which the market was created very early on . . . in which the ideology of Social Darwinism and of equality of opportunity gave rise to a genuine belief in social mobility, in which utilitarianism and pragmatism were imposed as social philosophies, and in which socialism . . . had very little resonance . . . systematic and closed ideologies have had, generally speaking, hardly any impact, and belief in social mobility has actually been transformed into a collective myth destructive of collective solidarities.

*Id.*

5. See Violaine Dehin, *The Future of Legal Online Music Services in the European Union: A Review of the EU Commission's Recent Initiatives in Cross-Border Copyright Management*, 32 *EUR. INTEL. PROP. REV.* 220, 224 (2010). Dehin writes:

But not all copyright managers operate in the same way, notably with regard to the level of standardisation of conditions. Where solidarity among members is low, copyright managers appear as “agents” of rights holders. Their main task is to collect and transfer royalties as quickly and as precisely as possible, and at the lowest cost. In extreme cases, this can lead to individualised tariffs and licensing conditions depending on the identity of the member. On the contrary, *other copyright managers have created a significant level of solidarity among their members. Uniform rates are applied to the musical works of any of their members and in certain cases, copyright managers are also involved in social or cultural missions.*

*Id.* (emphasis added).

6. FICSOR, *supra* note 3, at 12.

7. *Id.*

exercise of rights? But for whom? Let us not forget that individual exercise is rarely *by the creator*. A publisher, producer or distributor typically handles commercial exploitation and licensing.<sup>8</sup> That phase, which is often very short compared to the full copyright term, may nonetheless require a full transfer of the author's copyright.<sup>9</sup> There may thus be daylight between authors, on the one hand, and those to whom their rights are assigned, on the other, when it comes to the role of CMOs. However, as I explain below, that gap may be closing in the online environment.

Are U.S. CMOs inherently less collective than their foreign counterparts? There is some evidence to the contrary. Performing Rights Organizations ("PROs") offer services beyond just licensing and collection.<sup>10</sup> For example, they provide songwriting workshops or awards to celebrate successful authors and publishers.<sup>11</sup> Copyright Clearance Center, Inc. ("CCC") also offers a variety of services to individual authors.<sup>12</sup> CMOs can also fund test cases, which may or may not be purely economic in nature.<sup>13</sup> Yet, the fundamentally *economic* model under which CMOs operate in the United States, and the worldview that informs it, are likely to

8. See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 55 (2010). Litman writes:

Our copyright system still bears the imprint of its original design. In 1790, reproduction and distribution were expensive, and Congress chose to give authors narrow, short-lived, alienable rights in the works they created and to encourage them to transfer those rights to distributors in return for publication and, sometimes, a little money. Distribution is no longer so expensive. Copyright rights are no longer so narrow. Copyright terms are no longer short. Copyrights are still, however, alienable, and the system still encourages creators to convey all of their rights to distributors in return for dissemination and, sometimes, a little money. The justifications for concentrating copyrights in distributors' hands make less sense today, when copyrights last lifetimes and cover myriad uses that might intrigue different sorts of distributors at different times, and when mass distribution no longer requires massive capital investment.

*Id.*

9. *Id.*

10. See, e.g., *Career Development*, AM. SOC'Y COMPOSERS, AUTHORS & PUBLISHERS, <http://www.ascap.com/music-career/> (last visited Jan. 24, 2011).

11. *Id.*; see also *2011 BMI Trailblazers*, BMI, <http://www.bmi.com/photos/entry/550291> (last visited Jan. 24, 2011).

12. See *Authors and Creators Rights Licensing and Resources*, COPYRIGHT CLEARANCE CENTER, <http://www.copyright.com/viewPage.do?pageCode=a1-n> (last visited Jan. 24, 2011).

13. For example, a French collective funded the lawsuit against Google for making images of works created by its members available online. In a 2011 decision, the Paris Court of Appeal found that a technical intermediary safe harbor contained in the Digital Economy Act applied to Google, both for making available and caching copyright content. See Cour d'appel [CA] [regional court of appeal] Paris, 1<sup>e</sup> ch., May 20, 2008 (Fr.). The case is a good illustration of my point. The court recognized the collective's (*Société des Arts Visuels et de l'Image Fixe* ("SAIF")) standing because article 9 of SAIF's by-laws provide that it was established to "defend both the economic and moral interests of its members, and to determine rules of professional morals (ethics) of its members" (my translation). *Id.* The court may have been influenced by the fact that SAIF is a CMO with a small repertory. Another French CMO (ADAGP) represents a larger number of rights holders in this area. Illustrating the point below about specific regulation, the court also cites §§ L321-1 and L 331-1(2) of the French Intellectual Property Code. *Id.* Those two sections are part of the provisions regulating copyright CMOs and "regularly constituted bodies for professional defense." They give CMOs the right to act (including in court) for its members to "fulfill its mission." See *Intellectual Property Code*, LEGIFRANCE, [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpialtext.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpialtext.htm) (last visited Jan. 26, 2011) (providing official English translation of the Intellectual Property Code).

limit any of Dr. Ficsor's "collectivized elements."

The U.S. PRO model is further hemmed in by antitrust rules, and that model's first aim is to eliminate or compensate for any monopoly rent.<sup>14</sup> Cheaper is better, some might say—though apparently this is not for rights holders themselves to decide.<sup>15</sup> Not surprisingly, antitrust law paints CMOs with purely economic tones and focuses on financial flows and prices paid by users.<sup>16</sup> As a result, it may be harder for U.S. PROs to spend to justify their integration into, and their contribution to, the cultural fabric than for their foreign counterparts. In many other countries, CMOs are *expected* to devote adequate resources to achieve such nonfinancial aims.<sup>17</sup>

All analogies are imperfect, and so is the one I am about to suggest. However, I would compare collective management, without the "collective elements," to copyright without the moral right.<sup>18</sup> Just as the United States successfully opted

14. See Glynn Lunney, *Copyright CMOs and Collecting Societies: The United States Experience*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 348–64 (Daniel Gervais ed., 2d ed. 2010).

15. The consent decrees set a number of membership and operational conditions. It leaves less room for members and affiliates to decide on "collectivized elements," though, as a cultural matter, they may not support those in the United States. In Northern Europe, for example, CMO implies solidarity. See Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience: It's a Hybrid But Is It a Volvo or a Lemon?*, 33 COLUM. J.L. & ARTS 471, 496 (2010). Riis & Schovsbo write:

It is well known that collective administration of copyrights implies an element of solidarity. The solidarity is most visible in the collecting societies' decisions on using a share of the collected royalties for collective purposes. But arguably in this respect a more important practice is the uniform pricing structure inherent in the blanket license, which dictates that licensing terms and pricing are identical for all works and implies that, in fact, the most popular works subsidize the least popular works.

*Id.*

16. See Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 361 (2001). Einhorn writes:

The objective is to ensure that a substantial number of users within a similarly situated group will have an opportunity to substitute enough of their music licensing needs away from ASCAP to provide some competitive constraint on ASCAP's ability to exercise market power with respect to that group's license fees.

*Id.*

17. See, e.g., Jörg Reinbothe, *Collective Rights Management in Germany*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 14, at 221. Reinbothe provides:

On the whole, the German copyright reform of 1965 built upon functioning collective rights management organizations and increased even further their exclusive competencies and influence. Moreover, the legislator recognized that, *when fulfilling their legal, societal, cultural and social functions, CMOs in Germany discharge the State from those tasks that it would normally have to fulfill itself to safeguard the functionality of copyright.*

*Id.* (emphasis added).

18. See Berne Convention for the Protection of Literary and Artistic Works art. 6bis(1), July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. Article 6bis(1) provides for authors' moral rights by establishing that:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

*Id.*

out of moral rights as an enforceable obligation under the TRIPS Agreement, it could be said that U.S. CMOs opted out of adding significant collective layers on top of their economic functions.<sup>19</sup> However, this was not necessarily by choice, nor is it in the best interest of their members or affiliates.

The fact that U.S. CMOs play culture as a very low card in their deck may be to their own detriment. By painting themselves in the corner of a room built on economic foundations, they may have made it harder to make the role they play, and their overall contribution, as compelling as it could be. By contrast, in Europe CMOs often have direct links to the ministries of education and culture, something that may seem unthinkable on this side of the Atlantic.<sup>20</sup> A map of European CMOs would likely show that it is often perceived as a *preferred* mode of management of copyright, not as a last resort—much less a “necessary evil.”<sup>21</sup>

## II. THE ROLE AND FUNCTION OF COLLECTIVE MANAGEMENT ORGANIZATIONS

### A. TRADITIONAL ROLE AND FUNCTION

Beyond the important differences among CMOs—and specifically those that separate U.S. CMOs from those in a number of other countries described in the previous Part—there are basic economic functions that unite all CMOs.<sup>22</sup> Indeed, the three basic features of collective management are the same all over the world and for all rights.<sup>23</sup> A CMO must (a) acquire the ability to license from a plurality of rights holders, or some other authority to get paid; (b) find a way to offer a license or other rights to users, and this necessarily includes negotiating or setting

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19. TRIPS, Agreement on Trade Related Aspects of Intellectual Property Rights art. 9(1), Apr. 15, 1994, 33 I.L.M. 1197, 1869 U.N.T.S. 299, provides that WTO “[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.” Thus, moral rights are not subject to the WTO dispute-settlement system. This was official because moral rights are not trade-related but, in reality, due to serious doubt about the compliance of the United States with article 6bis. See DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 214–15 (3rd ed. 2008); Rick Mortensen, *D.I.Y. After Dastar: Protecting Creators’ Moral Rights Through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements*, 8 VAND. J. ENT. & TECH. L. 335, 335–49 (2006).

20. See, e.g., Nathalie Piaskowski, *Collective Management in France*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 14, at 182 (describing the situation in France).

21. Collective management has flourished around the world in areas such as the public performance and the reproduction of music, of course, but also in areas such as “grand rights” (performances of dramatic works); photocopying and digital reprography for both literary works and works of fine art; audiovisual cable rights for film producers; private copying levies; and the *droit de suite*. See FICSOR, *supra* note 3, at 37–93 (providing a detailed description of each).

22. Here I use the term broadly to encompass both “true CMOs” and “rights clearance organizations.”

23. See Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 14, at 6–9 [hereinafter Gervais, *Theory and Practice in the Digital Age*].

prices; and (c) obtain usage data or other data from users for purposes of distribution.<sup>24</sup> It is also in the nature of CMOs that rights management is not incidental to their work, as it might be for a publisher or a film company. Rights management is what CMOs do.

Just as there thousands of landscapes, there are myriad ways to set up and operate CMOs to perform those functions. Among the principal features that vary from one model to another, I would underline in particular: (a) whether the acquisition of the ability to license is by a full transfer or assignment of copyright, an exclusive license, a nonexclusive license or the grant of a legislative mandate such as private copying or compulsory licenses; (b) whether the prices are set by rights holders, possibly in negotiations with users; by a regulatory body or by an adjudicatory body; (c) what type, quality and quantity of usage data is collected, if any; and (d) whether distribution of funds collected “follow the dollar,” is prescribed by law or tweaked in some way.<sup>25</sup> Other features that vary from one CMO to another are the type of rights holders represented; the corporate structure; the role of government (whether as *ex ante* approval, as ongoing *ex post* supervision or both); and, beyond legal considerations, the degree of efficiency and transparency of each CMO.<sup>26</sup>

## B. NONEXCLUDABILITY OF COLLECTIVELY LICENSED USES

If I want to follow the composition rules mentioned in the introduction, I should leave aside those differences and focus instead on a *center of interest* that applies to all CMOs independently of the rights that are managed, the structure used or indeed other differences. This center is a key feature of collective management, though it is more in the nature of a consequence than in structural design. This feature is the lack of *excludability*.<sup>27</sup> By this, I mean that if a CMO manages a right on behalf of a plurality of rights holders, excludability of users and/or uses becomes difficult. The default rule is that one can use a work included in the repertory of a CMO by paying the required price and by abiding by applicable terms and conditions.<sup>28</sup> In my view, this feature is a positive one. It affects the long term prospects for collective management of online uses.

Allow me to segue from the background to foreground of our landscape. It may be harder to see straight lines here, but patterns do emerge. There is a big tree in the foreground: the *Internet* and—for now at least—its peer to peer branches. The development of this technology, as Professor Ginsburg noted in an article published

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24. *Id.*

25. The phrase “follow the dollar” (or the euro, as the case may be) means that the funds collected are paid based on the use of each work, performance or recording. Some CMOs tweak the distribution by giving some works and/or uses more “weight.” *See id.*

26. *Id.*

27. *See* Daniel Gervais, *Rethinking Excludability: Use of Internet-Based Content*, in *IN THE PUBLIC INTEREST: THE FUTURE OF COPYRIGHT LAW IN CANADA* 447, 449–54 (Michael Geist, ed., 2005) [hereinafter Gervais, *Rethinking Excludability*].

28. Where relevant, “work” here includes objects of neighboring rights in countries that protect them, such as performances and sound recordings.



in this journal a few years ago, has been mired in greed.<sup>29</sup> Greed by industries enforcing a business model of “no,” from which they are moving away both too slowly and rather awkwardly, and by users who are just as greedy, though in their case more technologically than financially.<sup>30</sup> Users want it all, here and now, on every device.

That is not my point, however, though it largely explains why copyright has not worked well in the online environment for many types of content.<sup>31</sup> At the center of my landscape is the fact that CMOs are in the “business of yes.” In fact, often they *must* say yes.<sup>32</sup> If ASCAP or BMI were to deny a license to a broadcaster prepared to pay the price, those PROs, which are regulated by consent decrees, could run afoul of antitrust rules.<sup>33</sup> SoundExchange, which administers the performer and producer rights (in the rest of the world, we would say neighboring or related rights) in noninteractive digital transmissions of sound recordings, operates under a compulsory license and rates fixed by royalty judges, a system administered by the Copyright Office of the United States with an exemption from antitrust rules.<sup>34</sup> I would think that even CMOs that do not operate under antitrust decrees or compulsory licenses, such as SESAC or CCC, would think twice before

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29. Jane C. Ginsburg, *Essay—How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61–62 (2002). Prof. Ginsburg writes:

Corporate greed and consumer greed. Copyright owners, generally perceived to be large, impersonal and unlovable corporations . . . have eyed enhanced prospects for global earnings in an increasingly international copyright market . . . Consumers, for their part, have exhibited an increasing rapacity in acquiring and “sharing” unauthorized copies of music, and more recently, motion pictures. Copyright owners’ attempts to tame technology notwithstanding, such developments as compression formats, high speed lines, and peer to peer networks, particularly popular on college campuses, recast Annie Oakley’s anthem from “Anything you can do, I can do better,” to “Anything you can steal, I can steal more of.”

*Id.* (footnotes omitted).

30. I say technologically more than financially because whether they actually want it all for free, even in the case of obviously commercial content, is a point on which reasonable people and, I suspect, users themselves might disagree. Users have not (yet) been given the option of continuing to do what they do under a paid, licensed system. In the current environment, joining any paid system implies a significant change in behavior and accepting usage restrictions. The linking up of devices used by a person is known as a platform (such as an iPhone, iPad, iPod, etc., and related content such as AppleTV). See Steve Lohr, *The Power of the Platform at Apple*, N.Y. TIMES, Jan. 29, 2011, <http://www.nytimes.com/2011/01/30/business/30unbox.html?ref=stevvelohr>.

31. For example, this point applies not only to music but also to photographs, as Eugene Mopsik (ASMP) explained to Symposium participants. For more on excludability generally, see Daniel Gervais, *Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing*, in IN THE PUBLIC INTEREST: THE FUTURE OF COPYRIGHT LAW IN CANADA, *supra* note 27, at 524–25.

32. For example, article VI of the ASCAP consent decree provides that “ASCAP is hereby ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all the works in the ASCAP repertory.” *United States v. Am. Soc’y of Composers, Authors and Publishers*, No. 41-1395, 2001 WL 1589999, at \*4 (S.D.N.Y. June 11, 2001).

33. In reality, this is hardly a major issue in practice. The consent decree focused on prohibiting the PROs from obtaining an exclusive assignment of the public performance rights from their members and affiliates; prohibiting the CMOs from discriminating in prices or terms between similarly situated licensees; preventing the PROs from charging local radio broadcasters for programs performed on network radio broadcasts; and finally, ensuring an equitable distribution of the collected royalties through provisions governing the internal structure of the CMOs. See Lunney, *supra* note 14, at 350.

34. Copyright Act, 17 U.S.C. § 114(e)(1) (2006).

saying no to a willing licensee. At first glance, this seems incompatible with the exclusive nature of copyright rights. Perhaps that is why it is considered a sacrifice by some, as reflected in the title for today's symposium. Is it?

The answer requires us to stand back. First, some copyright rights are expressly transformed by law into compulsory or statutory licenses—that is, into rights to remuneration.<sup>35</sup> Those rights are not exclusive to begin with. Second, rights holders may decide *not to join* a CMO if they think they can do a better job on their own. In many cases, even as members or licensors of a CMO, individual rights holders retain the ability to license the rights that are licensed by the CMO, at least in the United States.<sup>36</sup> Authors and publishers who sign up with ASCAP, BMI or CCC can still license their rights directly if they so wish.<sup>37</sup> In Europe and other parts of the world where CMOs often have exclusive rights—or even a full transfer in the case of authors' rights—the traditional argument has been that this was *in the interest of authors* because otherwise powerful users could circumvent the CMO and obtain better terms and conditions, including lower prices.<sup>38</sup> This is reminiscent of union models in labor law, and this may in fact explain why it is resisted in the United States, which has an overall very low unionization rate.<sup>39</sup>

Third and finally, when rights holders say no to the use of a published work, it is usually for one of two good reasons.<sup>40</sup> The first reason is that the price and/or conditions offered by the user are not acceptable. Under a collective model, the determination of conditions is generally done for a repertory of works and there are typically mechanisms and processes in place to set prices when parties cannot agree.<sup>41</sup> True, CMOs such as CCC and Harry Fox Agency provide some individual transactional licenses that apply to specific works, but those cases are more the exception than the rule.<sup>42</sup> The second reason a right holder might say no is to say

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35. There are several examples in the Copyright Act. See, e.g., *id.* § 111 (the statutory license for secondary transmissions by cable systems); *id.* § 112 (the statutory license for making ephemeral recordings); *id.* § 114 (the statutory license for the public performance of sound recordings by means of a digital audio transmission); *id.* § 115 (the compulsory license for making and distributing phonorecords); *id.* § 118 (the compulsory license for the use of certain works in connection with noncommercial broadcasting); *id.* § 119 (the statutory license for secondary transmissions by satellite carriers); *id.* § 122 (the statutory license for secondary transmissions by satellite carriers for local retransmissions).

36. See Lunney, *supra* note 14.

37. *Id.*

38. See Reinbothe, *supra* note 17, at 220 (“The German legislator confirmed that CMOs were much more than just private agents; their activities were clearly considered to be in the public interest and located in the neighbourhood of State agencies or the Unions.”); see also Lunney, *supra* note 14.

39. See Jelle Visser, *Union Membership Statistics in 24 Countries*, 38 MONTHLY LABOR REV. 45 (2006). Visser reports that union membership in the United States dropped from 23.5% to 12.4% between 1970 and 2003. *Id.* Comparable 2003 numbers in a few other countries include: Canada, 28.4%; Germany, 22.6%; Netherlands, 22.3%; Sweden, 78.0%; and the United Kingdom, 29.3%. *Id.*

40. I leave aside the issue of any moral right violation, which CMOs do not administer (though they may have a role in its enforcement). See Lunney, *supra* note 14.

41. Except where the collective provides a case by case transactional license for a single use of a single work, which is still a relatively marginal phenomenon.

42. In those cases, the right holder is often involved in setting the price. The role of rights holders in setting prices in settings in which users license an entire repertory or catalog of works or

yes. By this, I mean that a right holder may want to *organize a market* by organizing release dates or prevent certain uses before others that generate better returns. This is typical in the film industry.<sup>43</sup> Collective management is unlikely to interfere with this. The right holder will entrust her rights in a particular work to the CMO when the time is right.

Therefore, the incompatibility of collective management with the exclusive nature of copyright and the “sacrifice” one makes by joining a CMO strikes me as more a theoretical construct than a practical constraint. It is also worth noting that if a government were to make collective management mandatory or to impose a compulsory license destined to be managed collectively in cases where the Berne Convention does not allow the transformation of an exclusive right into a right to remuneration, a violation of the Convention and, consequently, of the TRIPS Agreement would occur, triggering the possibility of a dispute at the World Trade Organization.<sup>44</sup> The system is, in other words, largely predicated on (a) voluntary assignments and (b) licenses by rights holders to CMOs and rights that were not exclusive to begin with due to compulsory or statutory licenses.

I believe one should look at the limited excludability from a different perspective. The fact that excludability is limited when rights are managed collectively may actually *solve* important problems associated with the exclusive nature of copyright rights. Copyright can be sliced and diced in almost any way imaginable: by type of media; by type of distributor; by country; by date; by language, etc.<sup>45</sup> In the case of music and film, there are multiple rights holders: the authors; the performers; the producers; the authors of works that were adapted or otherwise derived from, etc.<sup>46</sup> This is the problem known as the fragmentation of rights.<sup>47</sup> CMOs can put this Humpty Dumpty of rights back together again by allowing users to obtain all the rights necessary for a particular use.<sup>48</sup> I refer to this

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objects of neighboring rights normally loses individuality. In other words, the user gets access to a repertory of works and distribution will be a factor in determining how many times a work is used. Even though a collective may value each work differently, in the case of music (which is still by far the bulk of licensing activity) each song usually has the same value, though there are exceptions. Harry Fox Agency administers the compulsory license under 17 U.S.C. § 115, and also issues voluntary licenses for rights. See *Other HFA Services*, HARRY FOX AGENCY, <http://www.harryfox.com/public/OtherHFAServiceslic.jsp> (last visited Jan. 24, 2011).

43. In some countries, this is regulated by the government. See Amélie Blocman, *France: Changes to Regulations on Media Chronology*, LEGIPRESSE, <http://merlin.obs.coe.int/iris/2001/1/article28.en.html> (last visited Jan. 24, 2011).

44. See Gervais, *Theory and Practice in the Digital Age*, *supra* note 23, at 505–15.

45. See Daniel Gervais & Alana Maurushat, *Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management*, 2 CAN. J.L. & TECH. 15, 16, 23 (2003) (arguing that CMOs are pivotal in dealing with the fragmentation of copyright law); Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 553 (2010) (describing the fragmentation of the various separately owned rights in the copyright bundle and discussing the consequences to the broad distribution of property entitlements).

46. See *id.*

47. See *id.*

48. See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1293–94 (1996).

as a license for a *single economic operation*.<sup>49</sup> Should a broadcaster have to negotiate separate licenses for the public performance or communication of works; the performances themselves and the sound recordings; and then again for the reproduction, whether ephemeral or otherwise, of those works, performances and recordings? Would it not make more sense to consider broadcasting as a single economic operation for valuation purposes? I discuss this in more detail below.<sup>50</sup>

Before doing so, let me turn to the peer to peer file sharing corner of our landscape, and the very real questions it has raised about the practicality of exclusive rights and their enforceability. A number of author organizations and, more recently, a few CMOs, have embraced the idea that the Internet is a powerful, open and inexpensive distribution platform, though one that has not proven to be very good at getting authors paid.<sup>51</sup> Authors are always free to ask for “contributions” by the public. This voluntary model has worked for Radiohead and a few others.<sup>52</sup> But it is not enough—far from it. As file sharing morphs into “what’s next,” there are still between thirty and forty unpaid downloads for each paid one.<sup>53</sup> The trend is thus towards an environment where all published content is available online, but also one in which, if the environment operated under a license, commercial content could be tracked and paid for. There is a market for this type of license: look at CCC’s license for digital uses of almost every type of printed content and, in a different context, the meteoric rise of Netflix.<sup>54</sup> Those

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49. There is only one economic transaction, despite the number or nature of rights fragments that may be involved.

50. Ironically, any effort by CMOs to implement market-based solutions, such as portals or bundled licenses, would no doubt be criticized from an antitrust perspective.

51. See *The Songwriters Association of Canada’s Proposal to Monetize the Non-Commercial Sharing of Music*, SONGWRITERS ASS’N CAN., <http://www.songwriters.ca/proposal/detailed.aspx> (last visited Feb. 2, 2011) (arguing that music file sharing should be monetized to create a licensing scheme that would compensate creators and rights holders); see also TO THE POINT, APRA/AMCOS NEWS (quoting the CEO of the main Australian CMO, Brett Cottle: “[T]he real solution might yet be found in licensing rather than enforcement. If the music industry’s mindset can change from control to remuneration, and if the ISPs can get serious about facilitating a pay-for-content philosophy . . .”) (on file with author).

52. Mark F. Shultz, *Reconciling Social Norms and Copyright Law: Strategies for Persuading People to Pay for Recorded Music*, 17 J. INTELL. PROP. L. 59, 84–86 (2009).

53. See Susan Krashinky, *Sony’s Streaming Music Service Aimed Squarely at Apple’s Slice*, GLOBE & MAIL, Dec. 23, 2010, <http://www.theglobeandmail.com/news/technology/sonys-streaming-music-service-aimed-squarely-at-apples-slice/article1846779/> (discussing services like Napster, Rhapsody, Sony’s Qriocity and Spotify in Europe).

54. The film industry has fared much better in the Internet era than its music cousin. Why? First of all, the consumption patterns are vastly different. Music is everywhere, and users typically want “their music” on all their devices. Films are generally “consumed” once or a few times at most. Film has a much higher “refresh rate,” while music fans still enjoy vast quantities of music from the 1960s, 70s and 80s. Second, file size is an issue, as users cannot easily store 50,000 films on a computer as they can easily do with songs. This also means that downloading a movie takes much more time and bandwidth. Third, and more importantly, whether a song is downloaded from LimeWire for free or from iTunes, the quality is essentially the same, if one accepts the possibility of spoofs, spyware and viruses when using file sharing networks. By contrast, a film is not “the same” if the file quality is low, and the societal experience of watching a movie in a theater differs from watching it on a computer. Consequently, quantitatively speaking, there is much less file sharing of movies than music, and the product resulting from a download is qualitatively different. As such, file sharing of movies is an

services provide end-users legal access to a repertory—in Netflix’s case also the content. I believe that this business model superimposes itself harmoniously on the limited excludability of copyrighted works on the Internet.

CMOs can make this work. They can *pool* content from rights holders worldwide for the online environment, as they have been doing for decades, arguably from the very beginning of their existence when Beaumarchais, who was both a playwright and a very active politician in France, wanted to ensure in the late eighteenth century that he and other members of the *Comédie Française* could license and get paid by French theatres performing their works.<sup>55</sup>

CMOs can also add transparency to the distribution of payments for online uses and may be in a comparatively better position to protect the rights of creators in the online environment because they should provide transparent and credible data to support their distribution to individual authors.<sup>56</sup>

CMOs have other arrows in their Internet quiver. Rights holders should want usage tracking. Users might accept it more easily if it is decoupled from the identity of each user and they might thus have more confidence in a neutral third party operating under transparent rules than in hundreds of individual rights holders each using their own tracking technology.<sup>57</sup>

This type of collective model also makes sense of the enforcement equation. If a clear majority of Internet users were paying for a repertory license to access a whole repertory of music and the right to use it on a noncommercial basis, then action against the remaining recalcitrant users would make eminent sense and normal financial flows would be restored. For commercially published works, is not that the whole point of excludability? Conversely, when the majority of heavy music users are getting most of their music illegally, traditional notions of deterrence, deviance and marginality lose some of their appeal, if not their meaning.<sup>58</sup> I do not mean to suggest that CMOs should license millions of Internet users directly. However, they can license those who get the content to those users, and organize data collection with proper privacy/disaggregation standards.

This leads me to the conclusion that collective management is here to stay and to grow. I do not know whether *existing* CMOs will thrive and/or whether others will emerge. Not all CMOs are well managed, but this is surely true of any area of

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irritant but not an existential threat to the industry. Fourth and finally, a common source of piracy for new films before they are released on DVDs is hand recording in a theater. This form of piracy is much easier to prevent than file sharing because it is not digital. Fighting it means enforcing a ban on the use of a physical device (the camera) in theaters.

55. See Gervais, *Theory and Practice in the Digital Age*, *supra* note 23, at 3–4.

56. As Séverine Dusollier rightly notes in her article in this Issue, however, this has not always been the hallmark of collective management. See Séverine Dusollier, *Peer-to-Peer File Sharing and Copyright: What Could be the Role of Collective Management*, 34 COLUM. J.L. & ARTS 639 (2011).

57. This may remind some users of the Sony RootKit debacle. See Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats*, 50 ARIZ. L. REV. 577, 578 (2008).

58. See Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 795 (2005) (arguing that deterrence is not effective when not supported by an underlying social norm, which in the copyright context means that deterrence is ineffective because the prevalent social norm dictates that copyrighted materials are “available for personal use”).

business. What I can say, however, is that setting up shop in this area is difficult. I know from personal experience that starting and operating a CMO is a complex task, one that requires specific expertise. Getting the rights, the metadata about works, authors, rights holders, contracts and contacts; designing efficient software and systems; getting people trained; providing service to rights holders and users; processing usage and distribution data; and dealing with the legal complexities of copyright are not for the faint of heart.<sup>59</sup> I am concerned about the setting up of a brand new CMO to administer the monies to be paid by Google under the amended settlement still awaiting approval.<sup>60</sup> But that is for another day.

### III. REGULATORY REFORM OF COLLECTIVE MANAGEMENT

#### A. A MULTIFACETED U.S. REGULATORY REGIME

While I believe collective management is here to stay and grow, I also believe that we need reform. Let me suggest a few, beginning with music licensing in the United States. My suggestions differ from previous changes suggested, such as a deletion of the § 115 license as proposed by the Copyright Office a few years ago, and also differ from the opposite suggestion, namely the expansion of the compulsory license.<sup>61</sup> For instance, Jonathan Cardi suggested that the:

[J]oint licensing of musical composition and sound recording copyrights is central to the goal of reducing transaction costs and inefficient pricing in music licensing. The resolution of these costs does not end here, however. In addition to a merger of the licensing of songs and recordings, blanket licensing ought to be allowed as an option to song-by-song licensing. Moreover, blanket licensing ought to be a viable option for the licensing of all rights in musical compositions and sound recordings, not simply for mechanical rights or performance rights alone. . . . [I]n the face of unified

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59. The romantic view of collective management as waiting for user checks and then paying on the basis of clean data received electronically from users is very far from reality. An example might be useful to demonstrate the point. CMOs license the use of music in films and receive “cue sheets” from film producers, showing the use of seconds of often dozens of works in a single film. The collective must process that information for each work even if used for only a few seconds. Works are often misidentified and/or improperly titled. While the classic counter is that film producers may simply buy all the rights to music instead of dealing with a collective, very often their first goal is to minimize music costs.

60. The settlement would provide considerable funding to set up “a new collective.” This is a recognition that this will require considerable time and money, not to mention specific expertise. See Pamela Samuelson, *Academic Author Objections to the Google Book Search Settlement*, 8 J. TELECOMM. & HIGH TECH. L. 491, 494 n.21 (2010); see also Daniel Gervais, *The Google Book Settlement and the TRIPS Agreement*, STAN. TECH. L. REV. 1 (2011) (analyzing the settlement under international intellectual property law and background information).

61. See *Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. 15 (2005) (statement of Marybeth Peters, Register of Copyrights) [hereinafter Testimony]. The proposed changes were incorporated first in the § 115 Reform Act of 2006, and later into the Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. § 102 (2006). The Act did not pass. My suggestion is to combine an exemption from antitrust with the establishment of a single regulatory regime for music licensing. Antitrust would thus remain only as a default or backup regime in other cases.

licensing of sound recordings, Congress might eventually find it necessary to impose even broader compulsory licenses on musical compositions and sound recordings as a means of combating the ill effects of market power.<sup>62</sup>

In essence, my proposal is that we should reconsider the current regulatory regime(s) for the collective management of music rights.<sup>63</sup> The current focus of regulation is chiefly on *rate setting*. The various branches of licensing are supervised by different entities, with different objectives and without coordination. All of this is suboptimal at best.<sup>64</sup> Reform should focus on coherency first, though there might be other advantages, such as a reduction in transaction costs.<sup>65</sup>

## B. THE ROLE OF ANTITRUST LAW

Before suggesting specific reforms, we should reconsider whether antitrust law is the right regulatory vehicle for PROs. I would argue that the permanent nature of the ASCAP and BMI consent decrees is a sign that it is not.<sup>66</sup> A typical antitrust intervention that ends in a consent decree process is meant to correct a problem, and then parties move on. This explains why consent decrees normally sunset.<sup>67</sup> The decrees that regulate the PROs do not.<sup>68</sup> This amounts to the ad hoc use of the Sherman Act as an ill-fitting regulatory vehicle for copyright management.

The Copyright Office suggested in 2005 that PROs could become MROs, administering all music rights, including reproduction and rights in sound recordings, without the § 115 compulsory license.<sup>69</sup> Interestingly, the suggestion included an antitrust exemption.<sup>70</sup> PROs did not exactly applaud the proposal, for a

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62. W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 888–89 (2007).

63. This would probably include a broad reconsideration of the various statutory and compulsory licenses. See Ralph Oman, *Going Back to First Principles: The Exclusive Rights of Authors Reborn*, 8 HIGH TECH. L.J. 169, 173–75 (2008).

64. In a recent article, a suggestion was made that a clearinghouse might be created to overcome the split among various CMOs and rights. See Brian R. Day, *Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse*, 18 TEX. INTELL. PROP. L.J. 195, 219–34 (2010). There have been some more drastic proposals, such as recasting the various applicable rights fragment as a single right. See Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003); see also Jeffrey W. Natke, *Collapsing Copyright Divisibility: A Proposal for Situational or Medium Specific Indivisibility*, 2007 MICH. ST. L. REV. 483, 504 (2007).

65. See Loren, *supra* note 64, at 699; Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations* 15, 22 (Univ. of Cal., Berkeley Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Paper No. 1266870, 2008), available at <http://ssrn.com/abstract=1266870> [hereinafter Merges, *Music Performance Rights Organizations*].

66. See *United States v. Am. Soc'y of Composers, Authors and Publishers*, No. 41-1395, 2001 WL 1589999, at \*4 (S.D.N.Y. June 11, 2001); *United States v. Broadcast Music, Inc.*, No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. Dec. 29, 1966), modified by 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

67. One of the four main features of a proposed consent decree is its term. See DOUGLAS F. BRODER, *A GUIDE TO US ANTITRUST LAW*, ¶ 8-017 (2005).

68. See *id.*

69. Testimony, *supra* note 61.

70. See *id.*

number of reasons.<sup>71</sup> They were concerned in particular that the merger of the various rights fragments might cause a dilution of the value of authors' rights.<sup>72</sup> Indeed, pestling all rights into a uniform grind is not necessary and it could have unintended effects. Structurally and normatively, there is no obvious harm in maintaining separate organizations for different categories of rights holders. Whether it makes sense to treat them as completely *separate regulatory targets* is a different matter, however.

### C. INTERNATIONAL REFORMS

Internationally, a number of reforms would make sense as well. Indeed, the existence of CMOs with different regulatory regimes in the various member states of the European Union replicates some of the problems just described with respect to the U.S. situation. Would a pan-European approach make sense, in particular to make the licensing of online uses work?<sup>73</sup> Clearly, more work could also be done on two other issues, namely (a) ensuring more transparency and efficiency, and (b) the availability of multiterritorial licensing options. On the former, a *true* code of conduct would no doubt be welcomed by many stakeholders.<sup>74</sup> On the latter front, an increasing number of users operate transnationally and copyright licenses should follow. This has been a vexing issue in Europe, and CMOs could do more to deflect concerns by competition authorities.<sup>75</sup>

The application of competition law to collective management in Europe has been far from ideal. It resulted from a number of factors: first, a patchwork of regulation which, though typically specialized and not linked to antitrust law, varies significantly from one E.U. member state to another and has at times been ineffectual; second, the fact that the E.U. Commission does not have a mandate under E.U. rules to regulate copyright management *per se*, but that it has jurisdiction over competition law and was looking for ways to improve the system; and third, frankly, the unacceptable amount of time it took to offer E.U.-wide solutions. Additionally, some CMOs gave the impression that they were both reluctant to admit past mistakes and intent on fighting for their own interests—not those of the authors and other rights holders whose rights they were administering.<sup>76</sup>

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71. *Copyright Office Views on Music Licensing Reform: Hearing Before the S. Comm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 76 (2005).

72. *See id.*; Merges, *Music Performance Rights Organizations*, *supra* note 65, at 4.

73. *See* Ingo Brinker & Tobias Holzmüller, *Competition Law and Copyright—Observations from the World of Collecting Societies*, 32 EUR. INTELL. PROP. REV. 553, 557–58 (2010); Lucie Guibault & Stef van Gompel, *Collective Management in the European Union*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 14, at 149; Adriane Porcin, *The Quest for Pan-European Copyright Licensing Solutions: A Series of Unfortunate Events*, 4 CONCURRENCES 57, 60 (2009).

74. *See, e.g.*, *Copyright Collecting Societies—Code of Conduct Review Submissions*, APRA AMCOS (Dec. 1, 2010), <http://www.apraamcos.com.au/news/APRAAMCOSnews/CopyrightCollectingSocietiesCodeofConductReviewSubmissions.aspx>.

75. *See* Rita Matulionytė, *Cross-Border Collective Management and Principle of Territoriality: Problems and Possible Solutions in the EU*, 11 J. WORLD INTELL. PROP. 467, 473–81 (2009).

76. *See* Dehin, *supra* note 5, at 233 (providing an example of membership rules with little



Things are moving forward in Europe, albeit slowly and confrontationally. This is partly due to the type of regulation at play. To a competition hammer, every CMO looks like an anticompetitive nail; the end result of the ongoing reform process may be myopic and, as a regulatory effort, partial at best. As Professor Lunney put it, if you look at collective management from an antitrust perspective, it is at best a necessary evil.<sup>77</sup> This has informed the regulation of PROs in the United States and recent efforts in Europe as well. Unfortunately, this has both prevented the emergence of a coherent regime and obscured the valuable “collectivized elements” and added value that a number of CMOs have developed.

#### D. PROPOSED REFORMS

When CMOs are de facto or de jure monopolies, it is not unreasonable to suggest that some governmental supervision is warranted.<sup>78</sup> There are cases (such as CCC, which has nonexclusive rights and lets rights holders set prices and licensing conditions) where no active supervision seems required. However, most CMOs operate more proactively in setting prices on behalf of rights holders, and also in terms of membership and the use of the rights they administer. As the role of rights holders fades into the background in those CMOs, the case for governmental intervention grows stronger. In the case of actual monopolies holding de facto or de jure exclusive rights to an entire repertory, it becomes inevitable, but not necessarily as an antitrust matter.<sup>79</sup> In light of the complexity of the environment and associated regulatory tasks and objectives, however, the regulatory task at hand is more like Swiss watch-making than carpentry; it is more about policy design than bare enforcement of anticartelization rules. In short, it is about more than settling disagreements and setting prices.

Not only do I consider antitrust tools to be suboptimal and only a regulatory intervention of last resort, I also do not favor pure adjudicatory models, such as the Copyright Tribunal set up in the United Kingdom or the rate courts established under the ASCAP and BMI consent decrees.<sup>80</sup> I believe that the public interest is

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flexibility).

77. See Lunney, *supra* note 14, at 340.

78. Or, more modestly, that a decision should be made, even on a case by case basis, that no supervision or control is required.

79. Germany provides an interesting example. See J. Reinbothe, *supra* note 17, at 221. Reinbothe provides:

The [collective] holds many, if not all such monopoly rights of a certain category and may thus even acquire a “world monopoly” of rights for its territory of operation. *Such a dominant position based on the bundling of the rights of all rightholders was considered to be both inevitable and desirable*, as being beneficial for rightholders and users alike and a condition for the efficient management of rights at low cost. At the same time, the legislator wanted to take into account this dominant position by creating a legal basis for a copyright-specific State control over [CMOs] so as to prevent [CMOs] from abusing their position with users or *rightholders*.

*Id.* (emphasis added).

80. See *United States v. Am. Soc’y of Composers, Authors and Publishers*, No. 41-1395, 2001 WL 1589999, at \*4 (S.D.N.Y. June 11, 2001); *United States v. Broadcast Music, Inc.*, No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. Dec. 29, 1966), *modified by* 1994 WL 901652 (S.D.N.Y. Nov.

best served by having a specialized, regulatory body—with an adjudicatory function if and when required. This implies specific expertise; the ability to set prices and other conditions of the license; the ability to consider the relations between rights holders and the CMO; and it may involve creative determinations necessary to make the market work. For example, I think the Copyright Board of Canada got it right when it joined the various tariffs for certain uses of music by combining authors' rights and neighboring rights, thus allowing the Board to (a) determine the value of music as a single economic operation to certain classes of users and (b) to apportion the royalties among the various classes or categories of rights holders.<sup>81</sup> A regulatory body should have the ability to erect a coherent and specific regulatory structure that can take account of the public interest broadly, not just from the narrow lens of competition law, with a view to ensuring that copyright works and achieves its cultural, economic and—in the case of the United States—constitutional objectives.<sup>82</sup>

To contrast this proposal with current regulatory practice in the United States, let me use a hypothetical. As I mentioned already, the two biggest PROs are regulated by consent decrees, with federal judges serving as rate courts.<sup>83</sup> If a bill such as the one that died in the 111th Congress to grant rights holders of *sound recordings* (not musical works, which is the right administered by the PROs) a public performance right is ever adopted, who would set the rate, and how would it interface—or interfere—with the PRO rates?<sup>84</sup> The Performance Rights Act died like its predecessors in the 110th Congress.<sup>85</sup> Under those bills, the rates would have been set under § 114(f) and chapter 8 of the Copyright Act—that is, by the copyright royalty judges (“CRJ”). The CRJ would have applied § 801(b)(1) of the Copyright Act in making their determination, which imposes the following objectives:

(A) To maximize the availability of creative works to the public;

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18, 1994) (discussing rate courts in the United States); Copyright Designs and Patents Act, 1988, c. 48, §§ 149–52 (Eng.) (codifying the Copyright Tribunal in the United Kingdom).

81. See Statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire (Can.), ¶¶ 180–81, available at <http://www.cb-cda.gc.ca/decisions/2010/20100709.pdf>. The Copyright Board of Canada decision provides:

The [broadcaster] contends that as broadcasters consume music as a single input and not in a fragmented fashion, the Board should fix a single value and fix a single tariff for the collectives. The collectives oppose such an approach by reason that they each own individual and distinct rights, which by law must be valued separately. The collectives are correct but we have the discretion to set a single rate for the benefit of the user, as long as we apportion the royalty so established among the collectives.

*Id.*

82. Namely the “Progress of Science and useful Arts.” U.S. CONST. art. I, § 8, cl. 8.

83. See *Am. Soc’y of Composers, Authors and Publishers*, 2001 WL 1589999; *Broadcast Music, Inc.*, 1966 U.S. Dist. LEXIS 10449.

84. H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009); H.R. 4789, 110th Cong. (2007); S. 2500, 110th Cong. (2007).

85. H.R. 4789; S. 2500. See Jessica L. Bagdanov, *Internet Radio Disparity: The Need for Greater Equity in the Copyright Royalty Payment Structure*, 14 CHAP. L. REV. 135, 141–48 (2010) (providing historical background).

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions; and

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.<sup>86</sup>

Interestingly, section 2(e)(3)(B) of H.R. 848 instructed the CRJ *not* to take account of section 801(b)(1)(D), which adds a fourth objective to the list above, namely “[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.”<sup>87</sup> Was this recognition of disruptions to come or of the paucity of useful prevailing practices?

While the Bill would have eliminated this fourth objective, it would have added a new factor, namely “the rates and terms for comparable types of services and comparable circumstances under voluntary license agreements.”<sup>88</sup> This reflects a common bias in favor of voluntary agreements and the belief that a negotiation among stakeholders will lead to a fair determination of market value of the licensed rights.<sup>89</sup>

#### E. A LOOK AT CURRENT PRACTICES

While the hypothetical outlined in the previous Section highlights dysfunctions in the regulatory structure, *actual* cases bring little comfort. Some of the experts testifying before the CRJ in the webcasting rate determinations noted that it was “difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice to license, could truly reflect ‘fair market value’”; and that “neither sellers nor buyers can be said to be ‘willing’ partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power.”<sup>90</sup> This view had led the CRJ in an earlier decision to reject the evidence of fees paid for the public performance of sound recordings in twelve foreign countries (where they are set in relation to the fees paid for musical works and are typically inferior or equal to such fees) because in those countries the right in the broadcasting and communication to the public of sound recordings is a right to “equitable remuneration,” not the theoretical willing buyer and seller price that the CRJ are instructed to ascertain.<sup>91</sup> Yet, the CRJ

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86. 17 U.S.C. § 801(b)(1) (2006).

87. *Id.* § 801(b)(1)(D).

88. H.R. 848.

89. This parallels 17 U.S.C. § 114(f)(2)(B) and § 801(b)(7)(A).

90. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,091 (May 1, 2007) (codified at 37 C.F.R. pt. 380) (discussing the “willing buyer/willing seller standard”); Noncommercial Educational Broadcasting Compulsory License, 63 Fed. Reg. 49,823, 49,834 (Sept. 18, 1998) (codified at 37 C.F.R. pt. 253) (discussing fair market value).

91. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,247 (Jul. 8, 2002) (codified at 37 C.F.R. pt. 261). The regulation provides:

operate under a compulsory license scenario and thus the equitable remuneration is typically associated with that type of license.<sup>92</sup> One wonders whether the insistence on an elusive market rate is more than rhetorical window dressing. If it is, it is perhaps because it favors voluntary, industry-wide agreements, but this is the case even under “equitable remuneration” systems.

But the CRJ already had to set rates in a scenario where authors and publishers of musical works already had rights and rates. I am referring of course to the SoundExchange tariffs for noninteractive digital transmissions.<sup>93</sup> An initial determination of rates for 2011–15, which runs 137 pages, was published on December 14, 2010.<sup>94</sup> Interestingly, the determination also provides for the protection of confidential information, but also instructs the CMO to treat all performances “equally based upon the information provided under the report of use requirements.”<sup>95</sup> The rates were set with no discussion of the value of music for users. In fact, the judges approved rates contained in a number of settlements induced by congressional action.<sup>96</sup>

Did they consider the PRO rates, that is, the rates payable for the performance of the musical works contained in the recordings? Yes, but only to reject them: “PRO agreements do not constitute a benchmark that inspires sufficient confidence to be useful. . . . In *Webcaster II*, we found that another benchmark offered in that proceeding based on the musical works market was flawed because the sellers in that market are different and they are selling different rights.”<sup>97</sup>

The PRO benchmark for valuing the rights in sound recordings was rejected by

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[M]any of the countries surveyed evidently use an “equitable remuneration” standard, which courts have held not to be equivalent to a fair market value. Because it is not possible to ascertain whether any of the rates offered in the survey of foreign countries represented a fair market rate, or that the rights in these countries are equivalent to the rights under U.S. law, the Panel was not arbitrary in its decision to disregard this evidence.

*Id.*

92. See WIPO, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO AND GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS 286 (2003) (“[Equitable remuneration] is usually payable when economic rights are recued to a right to remuneration (and, in general, applied on the basis of a non-voluntary license).”).

93. Digital Performance Right in Sound Recordings and Ephemeral Recordings, Case No. 2009-1 CRB (U.S. Copyright Royalty Judges Dec. 14, 2010), <http://www.loc.gov/crb/proceedings/2009-1/docs/initial-determination-rates-terms-12-14-10.pdf>.

94. *Id.*

95. *Id.* at 94 (discussing webcasters), 112 (discussing broadcasters), 130 (discussing noncommercial educational webcasters).

96. See Webcaster Settlement Act of 2009, H.R. 2344, 111th Cong. (2009); Webcaster Settlement Act of 2008, H.R. 7084, 110th Cong. (2008); see also, Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9,293 (Library of Cong. Mar. 3, 2009); Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796 (Library of Cong. July 17, 2009); Notice of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 40,614 (Library of Cong. Aug. 12, 2009) (for purposes of the 2010 determination). The rates and terms under these settlements “were the basis of approximately 95 percent of web casting royalties paid to SoundExchange in 2008 and 2009.” Digital Performance Right in Sound Recordings and Ephemeral Recordings, Case No. 2009-1 CRB, at 4.

97. Digital Performance Right in Sound Recordings and Ephemeral Recordings, Case No. 2009-1 CRB, at 47–48.

the CRJ for three reasons:

(a) PROs operate in “a marketplace in which, while the buyers may be the same as in the target hypothetical marketplace, the sellers are different and they are selling different rights. Therefore, . . . substantial empirical evidence shows that sound recording rights are paid multiple times the amounts paid for musical works rights in the markets for ring tones, digital downloads, music videos and clip samples”;

(b) “[T]he Copyright Royalty Judges find that [the] equivalence argument also fails because of his reliance on the assumption of ‘sunk costs’ as a justification. This assumption must be rejected on both theoretical and empirical grounds. As a matter of theory, [this] analysis ignores the long-established pattern of investment in the recording industry. Thus, not only are there some initial sunk investments, but there is a requirement of repeated substantial outlays year after year or, in other words, the repeated ‘sinking’ of funds. If sellers are faced with the prospect of not recovering such sunk costs, then the incentive to produce such sound recordings is diminished. And the record is replete with evidence of a substantially greater investment of this type in sound recordings as compared to musical works”;

(c) “[T]here is ample empirical evidence in the record from other marketplaces to controvert [the] premise that the market for sound recordings and the market for musical works are necessarily equivalent.”<sup>98</sup>

In contrast, the Copyright Office, in setting aside a CARP, had previously relied on the musical works rates as a benchmark, noting that (a) “the evidence . . . did not support a conclusion that the value of the sound recording exceeded the value of the musical work” and (b) that the musical works benchmark was not determinative of the marketplace value of the performance in sound recordings.<sup>101</sup> The first point was perceived by the judges as an invitation to produce evidence to the contrary, and it was indeed read as such in *Webcaster I*.<sup>102</sup>

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98. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,095 (May 1, 2007) (codified at 37 C.F.R. pt. 380).

<sup>101</sup> The CRJ were set up under the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (amending 17 U.S.C. § 801 (2000)). Before the CRJ process was established, Copyright Arbitration Royalty Panels (“CARP”) were set up to set rates in the absence of an industry-wide agreement. The Copyright Royalty Tribunal Reform Act of 1993 (the Reform Act), Pub. L. No. 103-198, 107 Stat. 2304, had created a unique system of review of a CARP’s determination: first, by the Librarian of Congress and second, by the United States Court of Appeals for the District of Columbia Circuit. See 17 U.S.C. § 802(f) (2006) (directing the Librarian on the recommendation of the Register of Copyrights either to accept the decision of the CARP, or to reject it). If the Librarian rejects it, he must substitute his own determination “after full examination of the record created in the arbitration proceeding.” *Id.* § 802(f). If the Librarian accepts it, then the determination of the CARP becomes the determination of the Librarian. In either case, through issuance of the Librarian’s Order, it is this decision that is subject to review by the Court of Appeals. *Id.* § 802(g). Under the CRJ system, the Copyright Office “may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under this title that underlies or is contained in a final determination of the Copyright Royalty Judges.” *Id.* § 802(f)(1)(D); see also Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,247 (July 8, 2002) (codified at 37 C.F.R. pt. 261); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25,394, 25,404 (May 8, 1998) (codified at 37 C.F.R. pt. 260).

<sup>102</sup> Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and

But the dubious basis for the judges' decision is not the whole picture. A ping pong game has been going on for years between the regulator and Congress in the webcasting context.<sup>99</sup> Congress adopted two acts to correct the trajectory of rates set by the judges.<sup>100</sup> And this was not the first time they played the game.<sup>101</sup>

## F. WAY FORWARD

This mishmash of congressional, antitrust and rate setting by different bodies strikes me as a regulatory blotch. Specifically, in this discombobulated regulatory environment for music CMOs in the United States—with a foot in the antitrust division of the DOJ and the other in the Copyright Office—rates and conditions for the use of music, performances and sound recordings are set independently and with no regard for one another.<sup>102</sup> Does this make sense? Is it optimal to have some CMOs operating within a regulatory framework designed out of a “necessary evil” vision, while others operate under the umbrella of specialized judges? The former has breadth, the other may have depth, but the public interest might be better served by having both. This would require a coherent structural reform effort. Indeed, all right holders and users could use more coherent and stable regulations. All rights holders would benefit, as would broadcasters and users, from regulation by an entity that can look both at the forest *and* the trees, and consider music as it is in the marketplace: a combination of song writing, performance and studio work (production).<sup>103</sup>

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Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,247 (July 8, 2002) (codified at 37 C.F.R. pt. 261).

99. See Digital Performance Right in Sound Recordings and Ephemeral Recordings, Case No. 2009-1 CRB (U.S. Copyright Royalty Judges Dec. 14, 2010), <http://www.loc.gov/crb/proceedings/2009-1/docs/initial-determination-rates-terms-12-14-10.pdf>.

100. See *id.*

101. See Small Webcasters Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780; Paul Musser, *The Internet Radio Equality Act: A Needed Substantive Cure for Webcasting Royalty Standards and Congressional Bargaining Chip*, 8 LOYOLA L. & TECH. ANN. 1, 14 (2009) (“Congress drafted the [Small Webcasters Settlement Act] explicitly as a temporary substantive fix, stating that any agreement between small webcasters and sound recording copyright owners derived from the SWSA would not be reflective of a ‘willing buyer, willing seller’ standard.”).

102. *Contra* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. at 45,247 (“[T]he Panel is not required to justify why the rates it ultimately recommended here are greater than the rates pre-existing subscription services pay for use of the musical works.”).

103. As Ricketson and Ginsburg write:

While comparisons are always difficult, the degree of skill required of a translator or adapter is not very different from that required of the maker of a sound recording or a broadcast or a performer. Each applies his or her skill to a pre-existing literary or artistic work and there seems to be little reason to distinguish between the results of their respective endeavors. It can be argued that a difference is to be found in the mechanical or technical nature of the work of the recorder or broadcaster. However, such an argument cannot be applied to performers and, in any event, the technical skills of the recording engineer or broadcaster require considerable artistic sensitivity if a successful recording or broadcast is to be made . . . . [T]he exclusion of sound recordings broadcasts and performances from the Berne Convention therefore appears arbitrary.

SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND*, ¶ 19.02 (2005).

Having a single regulatory body for music licensing organizations in the United States and a pan-European regulatory framework would add coherency to rate setting, but it would have at least two other advantages. First, a single body with a broader regulatory mandate than competition law provides would be able to design a responsively coherent framework for both new and existing CMOs.<sup>104</sup> Second, setting a responsive regulatory body might also allow the elimination of some compulsory licenses.<sup>105</sup> In the United States, it would allow Congress to avoid its legislative cementing of applicable criteria, such as those contained in § 114 of the Copyright Act.<sup>106</sup> Does it make sense to have regulation of business models developing and evolving at Internet speed shackled in the type of rigid legislative minutiae reflected in § 114, and/or as a matter of anticartelization polices enconced in quasi-permanent flexible decrees?

Section 114 is counterproductive. The distinction between interactive and noninteractive services may well evaporate in terms of Internet practice, yet the battle either to superimpose the statutory license or to prevent its application on hybrid models will continue and may shape how business models evolve and prevent the emergence of better ones.<sup>107</sup> The section also belies the purported technological and business model neutrality of the statute.<sup>108</sup>

In the same vein, the strict criteria that Congress enshrined in the Copyright Act to determine rates—as will be self-evident to anyone patient or foolish enough to

104. As noted in the discussion that follows, a new PRO, for example, would require a legislative amendment to be able to function like ASCAP, BMI and SESAC, not because of any antitrust concern, but rather because the Copyright Act recognizes only those three.

105. The regulator could also extend a CMO's repertoire, a process known as extended collective licensing, widely used in Northern Europe. See Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, *supra* note 14, at 283, 290–96. It has also been suggested in Canada. See DANIEL GERVAIS, APPLICATION OF AN EXTENDED COLLECTIVE LICENSING REGIME IN CANADA: PRINCIPLES AND ISSUES RELATED TO IMPLEMENTATION (2003), available at [http://works.bepress.com/daniel\\_gervais/29](http://works.bepress.com/daniel_gervais/29). It has been suggested more recently in China. See Jia Wang, *Should China Adopt an Extended Licensing System to Facilitate Collective Copyright Administration: Preliminary Thoughts*, 32 EUR. INTELL. PROP. REV. 283, 287 (2010). Regarding the suggestion in China:

It certainly is feasible for China to adopt an extended licensing system on the basis of the CMO system established under copyright law. First, art. 8 of Copyright Law needs to be amended to include a clause providing that a CMO can apply to extend a collective agreement under certain conditions. Examples of such provisions can be found in the Nordic countries' copyright laws. Then the Copyright Law can authorise the State Council to revise the CCMR to provide details pursuant to art. 8 of the Copyright Law.

*Id.*

106. 17 U.S.C. § 114 (2006) (totaling almost eighteen pages).

107. See *id.* § 114(d)(1).

108. See H.R. REP. NO. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.A.N. 5659, 5665. The legislative history provides:

Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device now known or later developed.

*Id.*

decipher §§ 112 and 114—would likely work better as more flexible (and hopefully less labyrinthine) criteria that a regulatory body could set over time.<sup>109</sup> As Ralph Oman noted recently, “The current Register of Copyrights, Marybeth Peters, has stated publicly that there are large chunks of Section 114 that are utterly incomprehensible to most people, because over the years Congress has spliced and diced them, and then hemstitched them back together.”<sup>110</sup>

At a broader level, collective management is not a panacea, but calls for its demise are rarely accompanied by convincing evidence that things would work better without collective management. In fact, one often forgets that except in the rare cases where it is mandatory, rights holders *chose* to establish a collective model.<sup>111</sup> Regulation should aim to make the system work for all stakeholders rather than to curtail its use based on flawed or at least incomplete assumptions. Let me suggest in the same breath that the United States has already embarked on a path that leads away from the antitrust regulation of performing rights societies.<sup>112</sup> After all, a new PRO could not perform all the duties of ASCAP, BMI and SESAC without a legislative amendment: the Copyright Act recognizes the three PROs by name.<sup>113</sup>

I am well aware of concerns about the time and costs associated with rate determinations and similar adjudicatory proceedings. I am not suggesting that we use the extant CRJ system for all music licensing in the United States. We can do better by using the experience of the past few years to inform ameliorations to the system.<sup>114</sup> The regulatory landscape for music licensing is currently in the hands of several painters, often working with cross-purposes or at least with very different toolsets, assumptions and approaches. It could be streamlined.

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109. Professor Samuelson referred to the current Act as “bloated and ugly.” Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 569 (2007). Looking at provisions like § 114, it is hard to disagree. I also realize that there is a tangential debate that would take this to a different level, namely the debate as to whether regulation should be adopted by elected officials rather than made by agencies. As an empirical matter, however, countries where collective management is more developed have by and large entrusted supervision and rate setting functions to specialized bodies applying more general, and dynamic criteria.

110. Oman, *supra* note 63, at 173.

111. I realize that in some cases that decision was made decades ago in a different environment and that today’s rights holders may be “stuck” with that system. However, these legacy/incumbency issues have not been shown to prevent the use of other models. In fact, ASCAP members and BMI affiliates can and sometimes do license directly, as do CCC-represented authors and publishers. And each member/affiliate is free to leave and license all her rights directly. The fact that songwriters and publishers stay is arguably a “ratification” of the collective model.

112. See 17 U.S.C. §§ 101, 114(d)(3)(C), (3)(E)(ii).

113. *Id.*

114. Under the CARP system—that is, until 2004—lengthy debates before the panels would then be followed by determinations by the Librarian of Congress, and appeals to the D.C. Circuit and possibly the Supreme Court. Under the CRJ system that replaced CARPs, the Copyright Office can still intervene on matters of substantive law. See Small Webcasters Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780; Musser, *supra* note 101, at 14 (“Congress drafted the [Small Webcasters Settlement Act] explicitly as a temporary substantive fix, stating that any agreement between small webcasters and sound recording copyright owners derived from the SWSA would not be reflective of a ‘willing buyer, willing seller’ standard.”).



In the United States, review of their work by federal courts cannot be expected to provide coherency as between the rate courts in New York and possible appeals to the Second Circuit, on the one hand, and the D.C. Circuit on appeals from CRJ, on the other.<sup>115</sup> Whether the added layer of the Copyright Office intervention on substantive law is required or even useful is another valid question. It adds time and costs, and the office is free to intervene before the court of appeals if it wishes to do so.

I am suggesting, therefore, that we could develop more coherent and more efficient regulation—where regulation is necessary, that is. Does this mean more uniformity? Not necessarily. Coherency is not the same as homogeneity. In fact, except perhaps where a single CMO is given a mandate, such as was the case with SoundExchange, as a normative matter I suggest that we should let rights holders organize themselves as they wish.<sup>116</sup> This means little if any *ab initio* or *ex ante* controls on the *establishment* or organization of new CMOs, at least in well organized markets.<sup>117</sup> The role of a flexible regulatory structure should be to focus on actual operations, with a view to ensuring transparency and efficiency for both rights holders and users and, where necessary, also between CMOs.<sup>118</sup> And rights holders represented by the collective should be able to decide, as they do in Europe, the type, nature and scope of the “collectivized elements” that they wish to have, subject to their agreements with other CMOs.<sup>119</sup>

### G. IMPACT ON FAIR USE

Let me also suggest another key role that CMOs, working with regulatory bodies where appropriate, can play, and a very important one at that. The United States has a fair use rule that is flexible, adaptable and dynamic. Many countries have fairly open-ended exceptions, though rarely, except in the case of Israel, do they compare to the fair use doctrine.<sup>120</sup> The flexible nature of the test has allowed

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115. The ASCAP and BMI rate courts are federal judges in the Southern District of New York, hence the appeal to the Court of Appeals for the Second Circuit. *See, e.g.,* United States v. Am. Soc’y of Composers, Authors and Publishers, No. 41-1395, 2001 WL 1589999, at \*6 (S.D.N.Y. June 11, 2001); *see also* 17 U.S.C. § 802(f)(1)(D) (concerning appeals of the Copyright Royalty Judges’ determinations to the Court of Appeals for the District of Columbia).

116. It was designated by the Copyright Office to administer the new right in noninteractive digital transmissions of sound recordings. *See* 17 U.S.C. § 114(g)(2); Notice of Designation as Collective Under Statutory License, *available at* <http://www.copyright.gov/carp/notice-designation-collective.pdf>.

117. This might prevent competition, although, as I note below, competition in this field is not theoretical market economics. A very significant amount of set up costs, data acquisition and processing and expertise on several different levels is required. This may be, in fact, the real barrier to entry and explain the failure of a number of entities that tried to compete with existing CMOs.

118. Such as when they administer tariffs and/or licenses that users must combine for a specific use. For example, the rates for the statutory licenses under 17 U.S.C. §§ 112–14 (transmission and ephemeral recording) may be considered “combined” in the various webcasting rate determinations. *See* 17 U.S.C. §§ 114(f)(2)(B), 801(b)(7)(A) (2006); *see also* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,247 (Jul. 8, 2002) (codified at 37 C.F.R. pt. 261); *see also supra* the text accompanying note 24.

119. *See* Einhorn, *supra* note 16 (and accompanying text).

120. Section 19(b) of the Israeli Copyright Act of 2007 enunciates four fair use criteria that parallel

creative solutions to emerge, in particular concerning online uses. People in this room might disagree about particular outcomes, but not, I suspect about the fact that it is a reasonably flexible rule.

However, fair use does suffer from the fact that it is fundamentally designed to be applied case by case by courts. It is often described as an affirmative defense.<sup>121</sup> This matters because end-users now must think about copyright and its limitations in their online uses. Those end-users were mostly absent from the copyright enforcement equation, for 290 of the 300 years since the adoption of the Statute of Anne.<sup>122</sup> They did not matter.<sup>123</sup> They certainly did not matter much to right holders. There were neither DRM nor end-user licenses for most types of content. While private use has been around for longer than the World Wide Web and mass online uses, this was seen mostly as acceptable leakage.<sup>124</sup> Things have changed radically, however. Essentially, there are no “end-users” any more. Internet users have become enforcement targets because many of them are now nodes in a global distribution chain, often active not just in redistributing but in transforming and repurposing content. This is where the case by case nature of fair use may seem frustrating. Does it make sense to have thousands of determinations of fair use cases by federal judges?

There are a few options to consider. One might suggest the establishment of a small claims process.<sup>125</sup> This would greatly reduce—though not eliminate—the transaction costs and delays and over time a better jurisprudence of online fair use might emerge. A second option is to ask CMOs to offer a way out. In a license with or through a CMO, rights holders and users could *agree to disagree* on the exact scope of fair use, yet include some of the marginal uses in the scope of the license and reflect that fact in the price. A fair use determination may indeed be easier at the aggregate level. Incurring the costs of a federal court case may make more sense in carefully chosen test cases. They could inform the negotiation or renegotiation of licenses.<sup>126</sup> This is a pragmatic solution that frankly does not

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those contained in 17 U.S.C. § 107. This is rarely found in other national laws. By contrast, the European Parliament provides an exhaustive list of specific mandatory and possible exceptions and limitations. Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC).

121. This is debatable, and debated. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001) (“I believe that fair use should be considered an affirmative right under the 1976 Act, rather than merely an affirmative defense, as it is defined in the Act as a use that is not a violation of copyright.”) (citing *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996)). The statute refers to the “right of fair use.” 17 U.S.C. § 108(f)(4). However, the Supreme Court described fair use as an affirmative defense. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). For my purposes, however, the outcome of the debate is not directly relevant.

122. Statute of Anne, 8 Ann., c. 19 (1710) (Eng.).

123. See Gervais, *Rethinking Excludability*, *supra* note 27, at 526–27.

124. Mix tapes come to mind, for example. See Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001–10 (2006) (covering some mix tapes).

125. See Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1, 32 (2010); see also Daniel Gervais, *The Google Book Settlement and the TRIPS Agreement*, 2011 STAN. TECH. L. REV. 1 (providing a comment).

126. A variant is to ask a regulatory or adjudicatory body to step in, as the Canadian Board did in the recent educational reprography tariffs. The Board factored into the tariff an estimate of free uses due to the application of fair dealing provisions.

satisfy me completely, but I do see its advantages in increasing certainty for users, however.

#### IV. CONCLUSION

In conclusion, I see a bright future for collective management as a model. Each country and each CMO will be different and United States CMOs will likely have fewer collectivized elements than their foreign counterparts. But beyond those differences, a business model of “yes” maps well over mass uses for many types of commercial content and the difficult excludability of online published content.<sup>127</sup> This should appeal to authors but also to those who commercially exploit their works. CMOs could help corral users of commercial content into a paid and structured form of access. Once stable financial flows have been established or restored, contracts and law and in some cases light DRMs can provide support to target recalcitrant users. Users and commercial rights holders can meet, and authors would benefit from the added transparency. The question is whether CMOs can be the matchmaker.

I hasten to add that I am not suggesting a “*fared* use” world.<sup>128</sup> Free uses must remain, both because that is what some authors want and because fair uses are essential. However, litigation against individual users is not optimal and thus fair use should be partially factored into rates for mass access to commercial content. This would not prevent an acknowledgment that certain uses remain outside the scope of those contractual umbrellas, and new test cases will be needed. A license covering some fair uses need not lead to a payment, as some uses can be licensed but “zero-rated.”<sup>129</sup>

There are obvious normative issues at play, and it is not just about the proper boundaries of property rights. There are legitimate questions concerning access and culture, and this debate should not detract from a duty to consider their substantive merit.<sup>130</sup>

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127. Exclusion of users or uses may be effected on a small scale or for certain works where online consumption and use is secondary, such as major motion pictures, but excludability is hard when the majority of Internet users think it is unwarranted. Many users will circumvent DRMs to do what they want to do. See Daniel Gervais, *The Price of Social Norms, Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 52 (2004) [hereinafter Gervais, *The Price of Social Norms*].

128. See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

129. See *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, [2005] 2 F.C.R. 654 (Can. F.C.A.), at ¶ 78 (providing an example of a zero rate in a Canadian tariff, set by the Copyright Board of Canada). Certain events could thus be zero-rated even if not all uses at such events would necessarily be fair use. Such a proposal was put forward for political events, for example. See Lauren M. Bilasz, *Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events*, 32 CARDOZO L. REV. 305 (2010). In other countries, there would be moral rights issues at play. See, e.g., Canadian Copyright Act, R.S. 1985, c. C-42, ¶ 28.2(1) (Can.) (“The author’s right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, . . . (b) used in association with a product, service, cause or institution.”).

130. See Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 48–49 (2010). Litman writes:

Empirically, the continued growth of collective management over the past decade lends support to the view that online access to a repertory for mass noncommercial uses should be a major way forward. At this juncture, my sense is that the best workable option is to do this collectively, not letting each right holder build its own system.

A final, related point, if I may. Our landscape horizon is the computing Cloud, by which I mean that copyright content will progressively reside not on individual computers, but on servers that users will access from any device.<sup>131</sup> Moving content to the Cloud is likely to reinforce collective or repertory-based licensing models, that is, access to “everything.” Will it also reinforce possibilities of control and exclusion? Is it another silver bullet to end P2P and regain control of users?<sup>132</sup> This strikes me as a bit naive for at least two reasons.

First, users will not flock to the Cloud to the exclusion of their own devices and computers if this leads to severe restrictions on what they can do (compared with their extant “off the Cloud” options). Second, film and record companies cannot go back to the olden days when they had much more control over user enjoyment of their content. Yes, a Cloud structure will make legal control easier because there will be fewer instances of content and fewer owners of the servers on which that content resides. Hence, there will be fewer targets to reach to pull content down. It will become less necessary to store copies of content on multiple devices. For PROs this could reenergize the right of communication to the public—or its U.S. cousin, the right of public performance “at a distance.”<sup>133</sup>

But that is not the true arc of the Cloud’s story.

There are two important points to consider. First, focusing on the fact that it might make removal of online content easier obscures the fact that from a commercial standpoint, a “no” should be justified if it empowers a better “yes.” Money is self-evidently made when published content is accessed and paid for, not

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[I]t would enhance the legitimacy of the copyright system if the copyright statute included explicit recognition of the core importance of reader, listener, and viewer liberties to enjoy copyrighted works without undue copyright owner interference. If copyright law expressly recognized that reader, listener, and viewer interests must sometimes be protected against overreaching creators and distributors, it would be much easier for members of the public to invest in the principle that copyright should protect creators and distributors from exploitative readers, listeners, and viewers.

*Id.*

131. Michael Fitzgerald, *Cloud Computing: So You Don't Have To Stand Still*, N.Y. TIMES, May 25, 2008, at B4.

132. The record companies have been listening to those siren songs for years. See Gervais, *The Price of Social Norms*, *supra* note 127, at 52 n.57.

133. In most other national copyright laws and in the Berne Convention, making live or recorded music available at a distance is a communication to the public (broadcasting often being considered as a subset of this right). In the United States, the right of public performance applies both to live/local and distant performances. See 17 U.S.C. §§ 101, 106 (2006). PROs have been unsuccessful in having this right apply to digital transmissions of musical works, but as streaming gradually increases and reduces the need for copies, that may not hold true. See *United States v. Am. Soc’y of Composers, Authors and Publishers*, 485 F. Supp. 2d 438, 442–43 (S.D.N.Y. 2007) (insisting on the need for “contemporaneous perception”), *aff’d in relevant part*, 627 F.3d 64 (2d Cir. 2010). A petition of certiorari was pending as of this writing.

when it is taken down. A takedown is at best a means to an end, and the end must be clear. Second, and more importantly, *if* there is more control in the Cloud, it will likely reside in the intermediation function, not in the hands of rights holders.<sup>134</sup> The value of content on the Internet is not a function of its scarcity and of how often it is removed, but rather a function of the number of connections established between the content and the users who value it.<sup>135</sup> Once “everything” is in the Cloud, then the real masters will be those who can establish those connections. I think Google and other intermediaries have a better shot at this than content owners such as, say, music labels or film studios.<sup>136</sup>

That said, CMOs *should* support the development of Cloud-based licensing models. They can and should assist in setting up and/or administering payments to handle noncommercial mass uses of at least certain forms of commercial content. I believe that would be in the interest of authors *and* users.

In sum, collective management is a small sacrifice—and often not a sacrifice at all. It can form part of a viable solution for the online environment, and that would likely be a positive development for creators. With that, let me now turn the painter’s palette over to our panel.

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134. See Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1555 (2010). Ohm writes:

[I]ntermediation will become an even more important, more pervasive force in the near future. First, the Internet will soon be available everywhere, as millions of people each year trade in their ordinary cell phones for smart phones like the iPhone, bringing intermediated communications to the street. Second, everyday objects now communicate wirelessly through intermediated networks, giving the police new ways to track us: cars come with GPS tracking devices and hidden microphones; toll payment transponders track our movement down a highway; and many other objects embed secret wirelessly communicating RFID chips to speed consumer transactions. Jerry Kang has described this as “ubiquitous access” or “pervasive computing.”

*Id.*

135. A point I have made in several previous papers. See, e.g., Daniel Gervais, *The Protection of Databases*, 82 CHI.-KENT L. REV. 1109, 1159–60 (2007).

136. The market arguably recognizes this if one were to judge by the market value of Google, Netflix and other intermediaries. Interestingly, as the article by Scott Martin demonstrates, rights holders can recognize this and pool their resources. See Scott Martin, *Alternatives to Collective Management: DRMs and Other Business/Technology Options*, 34 COLUM. J.L. & ARTS 675, 677 (2011).

