

SOME CAUTIONARY TALES ABOUT COLLECTIVE LICENSING

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INTRODUCTION

Collective licensing occurs where a single agent is empowered to license uses on behalf of many individual copyright holders. Agents can be empowered voluntarily, with copyright holders opting in to permit licensing of their works, or they can be established or empowered by statute. Collective licensing has been suggested as a possible solution for the obstacle copyright law places in the path of new uses of works enabled by innovative technologies.² Collective licensing does have the potential to reduce transaction costs when a large number of works are licensed to a large number of users, thereby benefiting both rightsholders and users. However, the track record of collective organizations (CROs),³ the entities that manage collective licenses, reveals that they often fail to live up to that potential. Although there are a wide variety of CROs operating under divergent legal frameworks, many unfortunately share the characteristic of serving their own interests at the expense of artists and the public.

CROs are well-funded and well-organized, and have succeeded in promoting themselves and the collective licensing model.⁴ The objective of this article is to tell the other side of the story to provide balance to any policy discussion that addresses collective licensing and CROs. Even experts who tout the benefits of collective licensing in the abstract often include the caveat that in practice these bodies require a “well-developed

2. See U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT 17 (2011), available at http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf (“It is possible that direct licensing, collective licensing, and other emerging business models will be capable of balancing the needs of user groups and the interests of copyright owners.”); Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 34 COLUM. J. L. & ARTS 697, 705 (2011)

If Congress wanted to authorize the creation of an [institutional subscription database] of in-copyright, out-of-print books, such as that contemplated in the [Google Book Search] settlement, without the necessity of clearing rights on a book by book basis, one option would be to adopt an extended collective licensing (ECL) regime akin to those authorized in several Nordic countries;

David R. Hansen, *Orphan Works: Mapping the Possible Solution Spaces* 17 (Berkeley Digital Library Copyright Project, White Paper No. 2, 2012), <http://ssrn.com/abstract=2019121> (“[S]ome suggest that ECL regimes can be adapted to specifically allow for the mass digitization initiatives that are required to bring about large online digital libraries”).

3. CROs are also referred to as copyright management organizations or collecting societies.

4. See, e.g., the many interventions of the International Federation of Reproduction Rights Organizations in national and international policymaking processes. *Position Papers*, IFRRO.ORG, <http://www.ifrro.org/content/position-papers> (last visited July 12, 2013).

structure and culture of collective management.”⁵ The episodes recounted below reveal a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, CROs have often aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system. While properly regulated CROs in some circumstances may enhance efficiency and advance the interests of rightsholders and users, policymakers must be aware of CROs’ mixed history as they consider the appropriateness of CROs as a possible solution to a specific copyright issue.

In discussions of copyright policy, lawmakers generally consider two broad stakeholder groups: authors on the one hand and the general public on the other.⁶ This paper will examine how CROs have done significant harm to each of the groups they are supposed to help.⁷

I. HOW CROS HARM AUTHORS

While CROs hold rights in the sense that they are empowered by rightsholders to permit certain uses of covered works, they are not the rightsholders whose creative endeavors copyright is meant to motivate. Copyright is meant to motivate authors (conceived broadly to include all creators of original works—writers, artists, musicians, and so on) to create and publish their work. Intermediaries can also serve that purpose by helping authors to make their works available to the public, but to the extent

5. Johan Axhamn & Lucie Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe’s cultural heritage?* viii (Instituut Voor Informatierecht, 2011), http://www.ivir.nl/publicaties/guibault/ECL_Europeana_final_report_092011.pdf. See also *id.* at 41 (“[ECL] presupposes the existence of a representative CMO with a sound culture of good governance and transparency.”); Samuelson, *supra* note 2, at 24 (noting that the unfamiliarity of ECLs may be a barrier to their adoption in the U.S.); Tarja Koskinen-Olsson, *Collective Management in Nordic Countries*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 283, 306 (Daniel J. Gervais ed., 2010) (“[The system of ECLs in Nordic countries] presupposes in other words that the ‘copyright market’ is well organized and disciplined.”). Experts have suggested that the United States has a copyright culture that would be less favorable to a broader role for CROs. See, e.g., Daniel Gervais, *Keynote: The Landscape of Collective Management Schemes*, 34 COLUM. J.L. & ARTS 591, 593-94 (2011) (explaining that “the fundamentally *economic* model under which [CROs] operate in the United States, and the worldview that informs it, are likely to limit” the role that CROs play in the copyright ecosystem in the U.S.).

6. The U.S. Constitution clearly designates the public as the primary stakeholder where copyright is concerned, with rightsholders benefiting only insofar as their limited rights ensure “progress” for the public. U.S. CONST. art. 1, § 8, cl. 8 (“The Congress shall have the Power . . . to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”). See also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts”).

7. The various anecdotes contained in this paper are based on published reports. We have not independently verified the accuracy of any of these reports.

that intermediaries like CROs treat authors unfairly, they demoralize authors and undermine copyright's constitutional purpose. There are several ways a CRO can harm an author, but the most commonly reported harms are corruption, mismanagement, lack of transparency and choice, mistreatment of songwriters, mistreatment of performers, and slow adaptation to new technology. The anecdotes collected below show that CROs can do significant harm to the authors that copyright is supposed to benefit.

A. Corruption

No human institution is perfect, but as Professor Ariel Katz explains in connection with Canadian collecting societies, CROs have unique incentives for corruption and mismanagement. CROs are subject to systemic problems that have been well-documented in the literature of corporate governance, and are not subject to mechanisms that check misbehavior by corporate managers—a recipe for disaster:

If copyright owners are indeed numerous and dispersed, then we may assume that Canadian collectives will exhibit the classic problems associated with the separation of ownership and control. Collective action problems would prevent the individual members from exercising their right of control to the benefit of insiders (either members with greater representation or influence or managers). While such problems associated with dispersed ownership are pervasive in the corporate world (and have generated a voluminous corporate governance literature), the Canadian collectives' situation is quite unique among Canadian corporations because not only do they not face market discipline, they also do not have to respond to other disciplinary threats: the threat of exit by their members, or the threat of takeover. Under such conditions, productive inefficiency seems almost inevitable.⁸

1. Brazil

In April 2012, fifteen officials of Escritório Central de Arrecadação e Distribuição (ECAD), the Brazilian CRO responsible for the collection of licensing fees for music, faced indictment after a Senate investigation of charges of embezzlement, fraud, and price-fixing.⁹ The Senate panel

8. Ariel Katz, *Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?* in COMPETITION POLICY & INTELLECTUAL PROPERTY 449, 463-64 (Marcel Boyer et al. eds., 2007).

9. Attilio Gorini, *Brazilian collection society under scrutiny*, ENT. L. BRAZ. (May 2, 2012, 9:00 AM), <http://entertainmentlawbrazil.com.br/2012/05/02/brazilian-collection-society-under-scrutiny/>; Timothy Lee, *Not just the pirates: Brazilian rights holders indicted for ripping off artists*, ARSTECHNICA (May 1, 2012, 7:00 PM), <http://arstechnica.com/tech-policy/2012/05/copyright-cops-behaving-badly/>.

described ECAD's collection system as a "black box," where only 76 percent of the fees collected were paid to artists. The ECAD directors paid themselves large bonuses even though the CRO was losing money. In response, amendments to the copyright law to increase government oversight are under discussion.

2. Spain

In 2011, government raids on Spanish music CRO Sociedad General de Autores y Editores (SGAE) uncovered the embezzlement of close to \$550 million.¹⁰ This money was meant to go to artists whose the organization was managing. The theft allegedly was perpetrated by leaders of the organization, including president Teddy Bautista. Bautista has since stepped down from his position and other members of the organization are still under investigation.

3. Italy

The Italian government investigated its mandatory CRO, Istituto Mutualistico Artistico Interpreti Esecutori (IMAIE), in 2009. The investigation was based on allegations of the funneling of \$24-30 million into nonexistent projects.¹¹

4. Sweden

In 2007, Hans Lindström, the chief executive of Swedish music performance CRO Swedish Artists and Musicians Interet Group (SAMI), was removed from office because of charges of corruption.¹² Lindström subsequently became the object of a large-scale criminal investigation regarding the misuse of SAMI funds. After Lindström's removal, a new chief executive was appointed in secret without consultation of the CRO's members.

10. *Detuvieron a los beneficiarios del "canon digital" español*, PERFIL.COM (Jan. 7, 2011, 3:25 PM) (Arg.), http://www.perfil.com.ar/contenidos/2011/07/01/noticia_0024.html; Enigmax, *Music Rights Groups Raided By Police, Bosses Arrested For Fraud*, TORRENTFREAK (Jul. 3, 2011), <http://torrentfreak.com/music-rights-group-raided-by-police-bosse's-arrested-for-fraud-110702/>.

11. Mark Worden, *The Royal Scam? Italian Fraud Investigation Targets Members of Collection Society IMAIE*, BILLBOARD, Nov. 29, 2008, at 14.

12. Per Gulbrandsen, *Detta är SAMI-härvan*, SVERIGESRADIO (Oct. 18, 2007) (Swed.), <http://sverigesradio.se/sida/artikel.aspx?programid=1012&artikel=166491>.

5. Ghana

Musicians in Ghana “have claimed that officials of the Copyright Society of Ghana and the government copyright officials have corruptly diverted the royalties they do collect.”¹³

6. Nigeria

Mayo Ayilaran, CEO of Nigerian CRO Musical Copyright Society Nigeria (MCSN), was arraigned along with several top executives of MCSN in December 2012 on charges of collecting illegal copyright royalties and running an unapproved collecting society. The charges were brought in response to allegations of harassment from three major hotels in Lagos.¹⁴

B. Mismanagement, Excessive Overhead, and Unfair Distribution

While there have been instances of outright corruption and illegality at CROs, the more common complaint from artists is that CROs violate standards of fairness and efficiency. The stories below show CROs extracting profits at the expense of artists, operating bloated bureaucracies, wasting collective resources, and favoring superstars at the expense of ordinary working artists.

The stories below highlight individual instances, but there are some general problems that seemingly plague CROs wherever they operate. For example, CROs often create substantial lag times between a licensee paying and an artist receiving his money. This is especially true in international markets, where royalties are customarily paid to a publisher’s local representative in a given country. Months can pass as the royalty earnings migrate from these international, to regional, and finally home offices of CROs.¹⁵ In some cases, money never reaches artists. For example, according to TuneCore CEO, Jeff Price, foreign CROs often collect license fees for digital music downloads of songs written by American songwriters that the CROs do not represent.¹⁶ The CROs might distribute some of these fees to local affiliates of record labels or to American CROs such as *American Society of Composers, Authors and Publishers* (ASCAP),

13. Mark Schultz & Alec Van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 Ky. L.J. 79, 131 (2009).

14. *MCSN’s Mayo Ayilaran and 6 Other Officials Arraigned for Illegal Collection of Royalties*, COPYRIGHT SOCIETY OF NIGERIA, <http://www.cosonng.com/?p=604> (last visited Apr. 1, 2013).

15. Glenn Peoples, *Accounts Viewable: Music Publishing Moves Toward Greater Transparency and Accountability*, BILLBOARD, Jan. 28, 2012, at 21.

16. Jeff Price, *How Major Music Companies are Getting Your Royalties: The Global Songwriter Shell Game*, HYPEBOT (Mar. 5, 2013), <http://www.hypebot.com/hypebot/2012/03/the-global-songwriter-shell-game-why-the-major-music-companies-are-getting-your-royalties.htmk>.

Broadcast Music, Inc. (BMI), or Society of European Stage Authors and Composers (SESAC), but little of the money ever reaches the copyright owner. Another licensing industry study claims that music CROs engage in “retitling”—registering the same song under alternate titles—in order to “to control and earn a significant share of the royalties collected.”¹⁷

1. Canada

Access Copyright is the powerful CRO that administers reproduction rights for print books in Canada. In 2011, Professor Michael Geist attempted to untangle Access Copyright’s notoriously obfuscated financials.¹⁸ In 2011 its revenue was \$33.7 million, of which \$8.7 million directly went to administrative costs, largely salary for lawyers and administrators. Beyond this, Access Copyright spends \$6.7 million compensating foreign CROs, \$10 million is deferred due to ongoing legal battles (much of which would go to rights holders if court cases go Access Copyright’s way), and \$491,000 is paid towards the Access Copyright Foundation, which collects fees for copyright owners who cannot be located.

After that, \$7.8 million is left to distribute to rights holders. The split here is estimated to be a 60/40 split in favor of publishers. In the end, only \$3.1 million, less than 10% of its revenue, goes to the authors of creative work. Geist estimates that the average distribution to authors based on this licensing was \$319.

Another Canadian copyright attorney, Howard Knopf, examined Access Copyright’s financial reports in 2008 and discovered that a surprising \$2.5 million had been spent on legal fees for Copyright Board filings in 2006-2007.¹⁹

Many Canadian artists have alleged unfairness in the way Access Copyright distributes funds to publishers and authors. The League of Canadian Poets complained in 2008 that “only a handful of large publishers are receiving significant benefits,” and that “writers and the small presses that publish most Canadian culture receive virtually nothing from the system.”²⁰ The League asked the Minister of Canadian Heritage to conduct a full audit of Access Copyright. In 2011, the Writers Union of Canada also

17. Press Release, Music Licensing Directory, Music Industry Plagued by Retitling of Songs (Mar. 15, 2013), available at <http://www.musiclicensingdirectory.com/blogs/mld-blog/press-releas-music-industry-plagued-by-retitling-of-songs/#sthash.BQB8AIUM.dpuf>.

18. Michael Geist, *The Economics Behind Access Copyright*, MICHAELGEIST (May 26, 2011), <http://www.michaelgeist.ca/content/view/5819/125/>.

19. Howard Knopf, *Auditing Access Copyright?*, EXCESS COPYRIGHT (Oct. 16, 2008, 4:42 PM), <http://excesscopyright.blogspot.ca/2008/10/auditing-access-copyright.html>.

20. Howard Knopf, *Creators v. Access Copyright*, EXCESS COPYRIGHT (Oct. 15, 2008, 2:26 PM), <http://excesscopyright.blogspot.com/2008/10/creators-v-access-copyright.html>.

called for investigation and reform in Access Copyright. Among their concerns was the following: “key differences in the copyright interests of publishers and creators will always prevent Access Copyright from fully and effectively representing creators’ copyright interests.”²¹

Canadian writer Brian Brett, former chair of the Writers’ Union, issued a scathing critique of Access Copyright in 2012. Among Brett’s criticisms were that Access Copyright refuses to distribute to authors income from works older than twenty years, yet it continues to collect that income in their name. Brett also alleged that Access Copyright continues to pay publishers the income for works whose rights have reverted totally to the authors.²²

2. *United States*

By 2007, U.S. digital performance rights CRO SoundExchange had accumulated over \$100 million in undistributed compulsory license fees. SoundExchange took the position that it could retain unclaimed fees, even from well-known artists that it asserted it could not find. In 2012, SoundExchange announced that any fees unclaimed for more than three years could be distributed to performers who had registered with SoundExchange.²³

In 2011, SoundExchange admitted in a filing with the Copyright Office that more than 10% of the recordings played by its statutory licensees consist of recordings made prior to 1972, which are not covered by federal copyright and so are not covered by federal statutory licenses.²⁴

According to its annual financial reports from December 2011, SoundExchange was carrying a \$363 million balance of money that had not yet passed through to artists and other rightsholders. According to a *Billboard* analysis, the balance is a “collection of moneys in transit, in

21. Michael Geist, *The Access Copyright Backlash: Writers Union of Canada Calls for Collective Licensing Reform*, MICHAELGEIST (May 29, 2011), <http://www.michaelgeist.ca/content/view/5821/125/>.

22. Brian Brett, *An Open Letter on Access Copyright and the Canadian Copyright Emergency*, STRAIGHT.COM (June 26, 2012, 2:59 PM), <http://www.straight.com/news/open-letter-access-copyright-and-canadian-copyright-emergency>.

23. Cory Doctorow, *Ex-RIAA Agency “Can’t Find” Artists It Owes Money to, Like Public Enemy*, BOINGBOING (Sept. 21, 2006, 4:59 PM), <http://boingboing.net/2006/09/21/exriaa-agency-cant-f.html>; Fred Wilhelms, *\$101 Million ‘Stuck to SoundExchange’s Fingers’*, P2PNET (Mar. 19, 2009), <http://www.p2pnet.net/story/18864; Unregistered Artists, SOUNDEXCHANGE>, <http://www.soundexchange.com/performer-owner/does-sex-have-money-for-you/unregistered-artists/> (last visited July 12, 2013).

24. Steven R. Englund, SoundExchange, Inc., *Comments of SoundExchange, Inc. Before the U.S. Copyright Office In The Matter Of: Federal Copyright Protection of Sound Recordings Fixed Before February 15, 1972* 5 (Jan. 31, 2011), available at <http://www.copyright.gov/docs/sound/comments/initial/20110131-Steven-R-Englund-Sound-Exchange.pdf>.

limbo and in doubt.”²⁵ While the money that is “in transit” will be paid to artists in the near future, a significant amount is in the “in limbo or in doubt” category. According to *Billboard*, “After all the organization’s efforts to find and sign up artists and sound recording owners, and after all the media attention given to Pandora and SoundExchange, tens of millions of dollars still sits waiting to be paid.”²⁶

The Copyright Clearance Center, a U.S. CRO for publishers, used the copyright license fees it collected to underwrite half the expense of litigation brought by three publishers against Georgia State University (GSU) for its electronic reserves system. After several years of litigation, the publishers were able to prove only five infringements out of 99 allegedly infringing works. The court subsequently found that GSU was the “prevailing party,” and ordered the plaintiffs to pay GSU’s attorneys’ fees and costs, which totaled over \$2.8 million. Funders of the lawsuit stated publicly that they had spent millions of dollars for their own legal fees; in the end the court found only \$750 in lost licensing revenue across three representative semesters. The misguided litigation was thus an enormous waste of resources, supposedly on behalf of rightsholders.

Several photographers sued the Copyright Clearance Center in 2006 for copyright infringement and false advertising because the CRO implied that its licenses for books gave a “green light” for licensees to reproduce photographs contained in the books, without regard for the rights of photographers whose works are not covered by CCC licenses. Although the CCC prevailed on technical grounds, the case demonstrates a CRO overstating its authority and ignoring interests of other rights holders.²⁷

3. Bahamas

According to the Bahama Tribune, the Copyright Royalty Tribunal has collected license fees for eleven years but has never made any payments to copyright owners.²⁸ The U.S. Trade Representative has complained to the Bahamian government about Copyright Royalty Tribunals’ failure to distribute funds.²⁹

25. Glenn Peoples, *Exclusive—SoundExchange Financials: How Much Paid vs. How Much in Limbo?*, BILLBOARD (Dec. 24, 2012, 4:03 PM), <http://www.billboard.biz/bbbiz/industry/legal-and-management/exclusive-soundexchange-financials-how-much-1008061022.story#3Dap4xsDi6Utmw8W.99>.

26. *Id.*

27. *Resnick v. Copyright Clearance Ctr., Inc.*, 422 F. Supp. 2d 252 (D. Mass. 2006).

28. Michael Geist, *Copyright Holders Receive ‘Not One Cent’ In 11 Years*, MICHAELGEIST (Jan. 6, 2012), <http://www.michaelgeist.ca/content/view/6223/>.

29. Candia Dames, *Copyright Blacklist Threat*, DENNIS DAMES ONLINE, DENNIS DAMES ONLINE (Apr. 3, 2004), <http://dennisdamesonline.net/Copyright.html>.

4. Colombia

The Colombian National Directorate of Copyrights under the Ministry of the Interior provisionally suspended the governing board of the Society of Authors and Composers of Colombia (Sayco), after the resignation of the Sayco chief executive because of allegations of mismanagement and two days of protests by music composers.³⁰ The Directorate noted that Sayco does not have transparent rules to ensure the fair distribution of the funds it collects. The Directorate also hinted that there was evidence of corruption and excessive spending on entertainment and the remodeling of Sayco's headquarters.

5. Brazil

The Brazilian Senate investigation of ECAD in the wake of the corruption scandal described above revealed that ECAD had a policy of "retaining" royalties whenever it had difficulty identifying rightsholders.³¹ In 2004, ECAD used approximately \$500,000 in retained royalties to cover operating deficits—an unauthorized use of rightsholder funds. (After a five-year waiting period, the royalties should have been distributed to the other rights holders represented by ECAD).

6. United Kingdom

The band U2, which has consistently been among the most successful performing artists of the last 30 years, brought legal action in 1994 against the UK CRO Performing Right Society (PRS), saying PRS and its continental partners were highly inefficient in collecting performance rights, and seeking to administer its own rights going forward. The group dropped its complaint in 1998 in exchange for an undisclosed payment from PRS and assurances of increased efficiency. At the commencement of the dispute, European CROs were taking 30-40% of royalties as fees and taking up to a year to distribute funds.³²

30. *Gobierno suspende provisionalmente al Consejo Directivo de Sayco*, LA REPUBLICA, (Aug. 10, 2012), http://www.larepublica.co/asuntos-legales/gobierno-suspende-provisionalmente-al-consejo-directivo-de-sayco_17887.

31. *Comissão Parlamentar de Inquérito, Relatório Final: Comissão Parlamentar de Inquérito destinada a investigar supostas irregularidades praticadas pelo Escritório Central de Arrecadação e Distribuição—ECAD* (Apr. 2012), available at <http://www.senado.gov.br/atividade/materia/getPDF.asp?t=106951&tp=1> [hereinafter *Comissão Parlamentar de Inquérito*].

32. Jeff Clark-Meads, *U2 Settles Royalty Suit with U.K.'s PRS*, BILLBOARD, Apr. 18, 1998, at 4 available at <http://books.google.com/books?id=mQ4EAAAAMBAJ&pg=PA8-IA2#v=onepage&q&f=false>.

7. *Extended Collective Licensing in the Nordic Countries*

“Extended collective licensing” (ECL) is a device whereby a CRO that obtains permission from a portion of a category of rightsholders is deemed by law to have authority to grant licenses on behalf of all rightsholders in the category. ECL regimes are common in the Nordic countries, and have been proposed as solutions to many of the problems presented by copyright in the age of new technological uses.³³ As one scholarly examination of ECLs points out, however, foreign rightsholders who seek fair remuneration from domestic CROs are “confronted with severe practical obstacles....”³⁴ It is difficult for foreign rightsholders to know that their works are being used, especially in the case of orphan works. CROs often use some of their proceeds to fund collective projects to benefit their members, but those benefits generally do not accrue to foreign rightsholders. Foreigners are more likely than domestic rightsholders to have their income repurposed in this way, as they are more likely to have marginal amounts of income, to have their work deemed “orphans,” or otherwise to be excluded from ordinary distribution. Foreigners may also be excluded from remuneration if they are not members of a CRO in their own country that is partnered with the domestic CRO administering the ECL.

8. *Romania*

In Romania, the government office responsible for supervising the functioning of CROs is the Office for Author Rights (ORDA). Since 2010, the activities of three CROs have been suspended for various periods of time due to mismanagement, lack of transparency, and abuses. These measures were taken after complaints from rightsholders, mostly independent writers, performers or other types of artists.

COPYPRO, a CRO that manages rights in literary works, lost its operating permit in 2011 because the fees for managing the collection and distribution of rights were not in accordance with legal provisions.³⁵ COPYPRO retained 60% of the collected amounts, while ORDA allows a maximum fee of 15%. COPYPRO’s operating permit was reinstated after changes in the CRO statute, but rightsholders continue to express concerns with its activities.³⁶

33. See, e.g., Samuelson, *supra* note 2.

34. 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 (2010).

35. Robert Bucur, ORDA Director General, *ORDA Notice for Compliance* (Sept. 27, 2011), available at <http://www.orda.ro/fisiere/Toate%20OGC%20date%20control%20pt%202010/COPYRO/Decizia%20260%20COPYRO%20intrare%20in%20legalitate.pdf>.

36. ORDA Findings, *Proces-verbal privind activitatea Societatii de Gestiune Colectiva a Drepturilor de Autor CopyRo in anul 2010* (Sept. 9, 2011), available at <http://w>

At the beginning of 2012, ORDA suspended Centrul Român pentru Administrarea Drepturilor Artiștilor Interpreți (CREDIDAM), a CRO that manages rights for performing artists, for not respecting the legal requirement that it start negotiations concerning the distribution of collected license fees.³⁷ Artists had identified irregularities in the way the amounts were distributed. Currently, the CRO's activities have resumed on the basis of a court order, but the main issues are still under debate.

CREDIDAM was also investigated by the European Commission's Competition Unit due to a complaint by the UK-based Right Agency that CREDIDAM and EJI (a Hungarian CRO) were imposing discriminatory administrative requirements on foreign performers.³⁸ The investigation ended after the accused parties modified their administrative requirements and the UK company withdrew its complaint.

UCMR-ADA, a CRO that manages the rights of composers, was suspended by ORDA in 2011 because of irregularities in the way royalties were distributed resulting from a lack of an integrated IT system.³⁹ The distribution was temporarily resumed by court order, but the main issues remain unsolved.

9. Netherlands

In 2009, Dutch CRO Buma/Stemra lost a substantial amount of the money it collected for artists in the stock market. These losses resulted in the society withholding 10.4% of each artist's payout.⁴⁰

In 2011, Dutch anti-piracy group *Bescherming Rechten Entertainment Industrie Nederland* (BREIN) used a song by Melchoir Rieveldt in an anti-piracy video. Rieveldt had only given BREIN permission to use the song in very limited circumstances: to be screened at a local film festival. Subsequently, however, the anti-piracy message was attached to millions of Dutch DVDs without any further compensation to the composer. BREIN denies involvement with the subsequent uses. When Rieveldt contacted the CRO that represented him, Buma/Stemra, for help collecting compensation for these uses, he got no response. Later Rieveldt was contacted by Jochem Gerrits, a member of the Buma/Stemra board, who said he would be happy

www.orda.ro/fisiere/Toate%20OGC%20date%20control%20pt%202010/COPYRO/PV%202011%20COPYRO.pdf.

37. ORDA Announcement, *Oficiul Român pentru Drepturile de Autor* (Jan. 31, 2012), available at <http://www.orda.ro/default.aspx?pagina=749>.

38. Press Release, Eur. Comm'n, Antitrust: Commission Welcomes Steps Taken by Collective Rights Management Bodies in Hungary and Romania to Improve Competition (Mar. 11, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/284&type=HTML>.

39. Robert Bucur, ORDA Director General, *Oficiul Român Pentru Drepturile de Autor Decizie* (Sept. 28, 2011), available at http://ucmr-ada.ro/fisiere/decizia_259.pdf.

40. Music Rights Society Loses on Investments, DUTCH NEWS (May 26, 2009), www.dutchnews.nl/news/archives/2009/05/music_rights_society_loses_on.php.

to alert the board to Rieveltdt's situation, if the composer assigned the music to Gerrits' publishing company and gave Gerrits one third of the estimated \$1.3 million in royalties. A local news organization recorded Gerrits making the demand.⁴¹

10. Belgium

Through a series of increasingly absurd stunts, the satirical television show *Basta* in Belgium caught Belgian CRO Société d'Auteurs Belge—Belgische Auteurs Maatschappij (SABAM) charging licensing fees for fictional bands. *Basta* made up a list of bands and songs and called SABAM to see how much it would charge for these fictional songs. Since the songs did not exist, SABAM should not have been able to claim any fees. Five days later, a representative called back to claim that all the songs were "100% protected." After paying the fee, *Basta* attempted to register to collect any funds SABAM took on their behalf. At this point, SABAM refused to pay out; it was happy to collect money for a band that it never heard of, but unwilling to distribute the funds.⁴²

11. France

The French Standing Committee of Corporate Control Management and Distribution Rights (SPRD) releases annual reports that highlight problems with CROs, including executive compensation rates, which constitute a significant portion of overhead fees, and the structure of management fees, whose multiple overlapping layers tend to inflate rates and inefficiencies through redundancies and waste. The SPRD is charged with ensuring greater transparency after the salary scandal and stepping-down of SACEM president Bernard Miyet.

The 2010 report detailed the notably high salaries for senior executives despite being in an era of financial crisis, while the 2011 report focused on the complex financial flows among CROs. The 2012 report urges artists to demand greater accountability, and encourages reorganization, both for the benefit of artists and to achieve greater efficiency and transparency in CRO management.⁴³

41. Ernesto, Copyright Corruption Scandal Surrounds Anti-Piracy Campaign, TORRENTFREAK (Dec. 1, 2011), <http://torrentfreak.com/copyright-corruption-scandal-surrounds-anti-piracy-campaign-111201/>.

42. Enigmax, Music Royalty Society Collects Money for Fake Artists Bathroom Equipment and Food, TORRENTFREAK (Feb. 8, 2011), <http://torrentfreak.com/music-royalty-society-collects-money-for-fake-artists-bathroom-equipment-and-food-110308/>.

43. Guillaume Champeau, Un rapport officiel dénonce la "galaxie" Sacem et ses montages, NUMERAMA (May 4, 2011, 7:31 PM), <http://www.numerama.com/magazine/18703-un-rapport-officiel-denonce-la-galaxie-sacem-et-ses-montages.html>; Sophian Fanen, Culture: La Cour des comptes réclame une gestion des droits vraiment collective, ÉCRANS (Apr. 26, 2012, 1:41 PM), <http://www.ecrans.fr/Gestion-collective-les-artistes,14562.html>;

12. *Russia*

Under the Russian Copyright Statute of 1993 an unlimited number of CROs were allowed to represent authors in absentia, without specific contracts. “The situation allowed for extensive gaming and abuse. In several cases, publishers and distributors registered as [CROs] and began publishing and distributing work—often without the consent of the rights holders. Nonpayment of fees and royalties was a recurring problem in this context....”⁴⁴ AllofMP3 was one exploiter of these provisions. It obtained licenses from two legally licensed Russian CROs and sold music online to international audiences at low prices, realizing a profit. The legitimacy of these licenses was challenged, but the owner of AllofMP3, Denis Kvasov, was acquitted for lack of evidence of actual illegal activity.

Amendments in 2008 introduced a process of state accreditation of CROs; only the accredited CROs would be able to represent authors and rights holders without formal agreements. Because the law did not have a retroactive effect, several of the CROs in existence before 2008 continued to operate.

The accreditation process in Russia has introduced a new set of problems related to competition among CROs. “In 2008, RAO [Russian Authors Society] affiliates launched the Russian Organization for Intellectual Property (VOIS) in a bid to become the accredited organization for ‘neighboring rights,’ such as those granted to broadcasters or producers. Concerns about the VOIS’s lack of transparency regarding royalties and governance, however, led many producers to back a separate group in the accreditation process, the Equal Rights Phonographic Alliance (RFA). By all accounts, the political jockeying for accreditation was intense. The RFA’s general director, Vadim Botnaruk, was assassinated during this period, although clear motives for the crime were never established. Ultimately, the VOIS won accreditation in 2009. The RFA continues to operate, however, grandfathered under the 2008 law, and is still the preferred organization of many foreign CRM societies.”⁴⁵

13. *Africa*

Because African CROs are managed by the local government or are government-sanctioned monopolies, they are not accountable to their members. As Mark Schultz and Alec van Gelder note in their study of African intellectual property industries, “[r]estricting competition provides

Marc Rees, Un rapport dénonce les coûts tordus des sociétés d’ayants droit, PC INPACT (Apr. 12, 2010, 2:57 PM), <http://www.pcinpact.com/news/56327-hadopi-crise-cour-compte-control-e.htm>.

44. Olga Sezneva & Joe Karaganis, *Russia*, in *MEDIA PIRACY IN EMERGING ECONOMIES* 149, 164 (Joe Karaganis ed., 2011).

45. *Id.* at 165.

little incentive for collecting agencies to respond to artists' concern. According to the Africa Music Project, 'distribution [of royalties], when it takes place, is a political process rather than an objective one.'⁴⁶ Additionally, "government involvement with collective rights organizations can also threaten the independence of musicians. In fact, artists in Ghana have accused the Chairman of the Ministry of Culture-controlled Copyrights Office of withholding payments from artists in an attempt to influence the content of their music."⁴⁷

14. Kenya

The high administrative costs of the Music Copyright Society of Kenya (MCSK), the CRO that acts on behalf of music composers, prompted the Kenya Copyright Board (KECOBO) in 2011 to deregister MCSK.⁴⁸ KECOBO found that MCSK had expenses of Sh137 million against revenues of Sh185 million, leaving it with only Sh48 million to distribute in royalties to the rightsholders. Under KECOBO guidelines, only 30% of monies collected by CROs can be spent on administrative costs, with the remaining 70% distributed to rightsholders. MCSK, however, had the opposite ratio, with 70% of collections going to administrative costs, and only 30% reaching the rightsholders.

15. South Africa

The Copyright Review Commission (CRC), established by the South Africa Ministry of Trade and Industry, identified serious problems with the operation of CROs in South Africa. A major focus of the CRC was determining why, nine years after the enactment of performance rights in sounds recordings, "not a cent had been paid in royalties to musicians and record companies."⁴⁹ Among the many problems identified were multiple collecting societies operating within the same set of rights, inadequate statutory protection for the interests of rights holders, disputes between the Registrar of Copyrights and the CROs, and the CROs' failure to comply with applicable regulations. For example, one CRO's administrative cost ratio was 30%, significantly higher than the 20% ratio allowed by regulation.⁵⁰ The South African Music Performing Rights Association

46. Schultz & Van Gelder, *supra* note 13, at 132.

47. *Id.*

48. VNZOMO, The Fate of Music Copyright Society of Kenya (MCSK), IP KENYA (Jan. 9, 2012), <http://ipkenya.wordpress.com/2012/01/09/the-fate-of-music-copyright-society-of-kenya-mcsk/>.

49. Republic of South Africa Dep't of Trade & Indus., COPYRIGHT REVIEW COMMISSION REPORT 3 (2011), available at <http://www.info.gov.za/view/DownloadFileAction?id=173384>.

50. *Id.* at 5.

(SAMPRA), the CRO that represented the record industry, engaged in protracted litigation with the Registrar of Copyrights over the record labels refusal to equitably share royalties with performers.⁵¹

The CRC report also discusses in detail the collapse of the South African Recording Rights Association (SARRAL), the CRO for the mechanical rights of composers. Many composers lost “huge amounts of monies” after the liquidation of SARRAL because of insolvency.⁵² External auditors could not verify receipts and distributions for a three-year period: “The amounts involved are significant and warranted a formal investigation. Based on the investigations carried out, the members were never provided with satisfactory answers as to what happened to the money.”⁵³ Furthermore, the CRC stated that SARRAL’s change of business model and accounting practices constituted a breach of contract with its members. The CRC noted that “SARRAL’s collapse was preceded by corporate governance failure.”⁵⁴ Similar governance failures exist at other South Africa CROs: lack of independent directors, lack of internal audits, limited disclosure of executive director’s remuneration, lack of annual reports, and outdated constitutive documents.⁵⁵

16. Senegal

Artists in Senegal accuse the Bureau Senegalaise du Droits d’Auteurs (BSDA) of overcharging for its services and inconsistent royalty payments.⁵⁶

17. Nigeria

A long-running dispute between the Copyright Society of Nigeria and the Music Copyright Society of Nigeria concerning how to manage the collection of license fees resulted in the Attorney General suspending the authority of both CROs to collect license fees.⁵⁷ This in turn caused rights holders to lose significant amounts of revenue.

51. *Id.* at 19.

52. *Id.* at 46.

53. *Id.* at 47.

54. *Id.* at 52. A chart beginning at page 47 of the Report details the various failures of corporate governance that plagued SARRAL. *See generally id.* at 47-48.

55. A chart beginning at page 49 summarizes the governance failings of the three major South African CROs. *See generally id.* at 49-52.

56. Schultz & Van Gelder, *supra* note 13, at 131.

57. *See COSON illegal until*, VANGUARD (Visited Mar. 10, 2011), <http://www.vanguardngr.com/2011/03/coson-illegal-until/>.

18. China

The China Audio-Visual Copyright Association (CAVCA), the CRO representing the performers of music, collected fees that should have been paid to the Music Copyright Society of China, the CRO representing the composers. This led to litigation.⁵⁸

19. Australia

The Australian reprographic CRO Copyright Agency Limited (CAL) spent more in 2009 on staff salaries than on distributions to authors.⁵⁹ The CRO spent \$9.4 million on salaries, including \$350,000 for its chief executive, while allocating only \$9.1 million to authors. CAL also paid \$76 million in license fees to publishers, but the Australian Society of Authors questioned whether the publishers “carry out their legal obligation to pass on money” to authors. Of the \$114 million collected by CAL in 2009, more than \$80 million came from schools, libraries, and universities.

C. Lack of Transparency and Choice

Without a reasonable degree of transparency, artists cannot know for sure whether they are being treated fairly. Without a range of choices (of licenses, licensing terms, agents, and so on), artists miss opportunities to connect with their audience and are limited in how they can monetize their work. Moreover, without a choice of how their rights are administered, artists have no way to impose market discipline on CROs by walking away or trying new models.

1. Canada

In 2007, Professor Martin Friedland conducted a study of Canadian CRO Access Copyright’s distribution policy and methodology at the request of its board of directors.⁶⁰ He found that

The present distribution scheme is extremely complicated and I found it surprisingly difficult to understand how the system worked. I have undertaken a number of other public policy studies over the years,

58. Luo Yanjie, Will Collective Management Organization Be Liable for Its Unauthorised License?, *BRIDGE IP LAW COMMENTARY* (May 10, 2012), <http://www.chinaiplawyer.com/collective-management-organization-liable-unauthorised-license/>.

59. Luke Slattery, Copyright Staff Get More Than They Give to Authors and Artists, *THE AUSTRALIAN* (Feb. 18, 2010, 12:00 AM), <http://www.theaustralian.com.au/arts/copyright-staff-get-more-than-they-give-to-authors-and-artists/story-e6frg8n6-1225831556653>.

60. Martin Friedland, Report to Access Copyright on Distribution of Royalties, *ACCESSCOPYRIGHT 2* (Feb. 15, 2007), available at http://www.accesscopyright.ca/media/8359/access_copyright_report_-_february_15_2007.pdf.

including such reasonably complex topics as pension reform, securities regulation, and national security, and have never encountered anything quite as complex as the Access Copyright distribution system. It is far from transparent.

Very little is written down in a consolidated, cohesive, comprehensive, or comprehensible manner. There is no manual describing in detail how the distribution system operates. There is a one-page description on the web site, but it is less than the bare bones of the system. The policy that contracts between the publisher and the creator may override the splits established by the board is not mentioned in that description, but is mentioned in the affiliation agreement available through the web site. The staff has produced very brief descriptions of the models used for distributing the money, but they do not go into the type of detail that is necessary to develop a good understanding of the policies and procedures, and none of what is written is readily available to affiliates.⁶¹

After describing the many flaws of the electronic rights management system, Professor Friedland observed that “Members of the present board are the first to admit that they do not have a good grasp of how the system operates.” He added that “there is little institutional memory and very little has been properly documented either on paper or electronically.” He explains that

The principal reason for this complexity is that the details for distribution have been worked out over the past 20 years or so as a series of compromises, accommodations and adjustments. It is not just publishers against creators, but also compromises, accommodations and adjustments within the creator community as well as within the group of publishers. There is not always uniformity of interest within each community. What might help one genre financially will ordinarily harm another.⁶²

Professor Friedland bluntly stated that “power politics has also played a significant role in the development of the distribution scheme.”⁶³

CROs use a number of different methods of managing and licensing the rights under their care. Many organizations will only license authors for their entire body of work. Access Copyright in Canada has proposed a non-voluntary licensing method that would make it the only entity able to collect royalties on behalf of a category of work, forcing creators to choose between it and no royalties. Even less voluntary are statutory licensing schemes.

Canadian author Russell McOrmond raised this concern: “Where an author wishes to use alternative business models (such as the model I use,

61. *Id.* at 5.

62. *Id.* at 6.

63. *Id.*

which is charge once for material that is then released royalty-free under a public license), that choice should be respected. Respect for the choices of authors necessitates a rejection of non-voluntary licensing systems.”⁶⁴

Recent Canadian copyright legislation transfers to Access Copyright the rights to authorize digital reproduction of the works of its members even when the members never authorized Access Copyright to grant such licenses on their behalf. Unless the rightsholder expressly opts out, any rightsholder that has authorized Access Copyright to administer reprographic reproduction for educational use is deemed to have authorized administration of digital reproduction rights for that purpose as well.⁶⁵ Canadian copyright scholar Ariel Katz characterizes the provision as a “copyright grab” by Access Copyright, which further “entrenches Access Copyright as a collector of what is in effect an ‘education tax.’”⁶⁶

2. Brazil

In 2009, Brazilian CRO ECAD retained BDO Trevisian Audites Independentes to audit its books. After initiating the audit, Trevisian asked ECAD for a number of documents, including contracts between ECAD and other companies. Trevisian also asked for a detailed description of ECAD’s systems for collecting and distributing royalties. ECAD’s board of directors refused to deliver the requested information. Instead, it retained another firm, Martinelli Auditores, to perform a much more limited audit.⁶⁷

3. European Commission’s Proposed Directive

In July 2012, the European Commission proposed a new directive to address the many problems of CROs. These problems include difficulty in adapting to online environments, operating internationally, lack of transparency in their financials, and lack of rightholder input on rights management. In the explanatory memorandum justifying the Directive, the Commission stated that “concerns have been expressed with regard to the accountability of certain societies to their members in general, and to the management of their finances in particular.”⁶⁸ It remains to be seen whether the Directive, if adopted, will actually alleviate the problems that prompted

64. Russell McOrmond, Independent Authors Just Wanting a Little Respect... From Fellow Creators and Collective Societies, DIGITAL COPYRIGHT CANADA (Mar. 5, 2006, 7:53 PM), <http://www.digital-copyright.ca/node/1979>.

65. Ariel Katz, *Bill C-11 and the Big Access Copyright Grab*, ARIELKATZ (Mar. 10, 2012), <http://arielkatz.org/archives/1347>.

66. *Id.*

67. *Comissão Parlamentar de Inquérito*, *supra* note 31, at 884.

68. Press Release, European Comm’n, Copyright: Commission proposes easier music licensing in the Single Market (July 11, 2012), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/772&format=HTML&aged=0&language=en&guiLanguage=EN>.

its drafting; indeed, artists are already expressing concern about the proposal.⁶⁹

Rightsholders voiced complaints about CROs at the public hearing the European Commission held when developing the Directive mentioned above. The Motion Picture Association observed that rightsholders became “unintended victims” when disputes with CROs concerning accounting for collections or distributions were not subject to third party resolution.⁷⁰ The RTL Group, a European broadcaster and television producer, stated: “Let’s be clear: collecting societies are not owners of the rights that they represent but fiduciaries to the right owners—nothing more and nothing less. Collecting societies have the obligation to put in motion what is in the interest of the members and right holders represented. Collecting societies are not a licensee in the traditional sense and may therefore not confuse their fiduciary remit with their own organizational interests.”⁷¹ Concerns were raised about CROs’ discriminatory practices, lack of transparency, and monopolistic leveraging. CROs collect “large quantities of black-box monies that are withheld for national purposes, thereby avoiding transparency and distribution.”⁷²

Some artists are already expressing concern over the proposed Directive. Bands like Radiohead and Pink Floyd list as chief among their concerns the CROs’ ability to inappropriately retain money that should be distributed to artists. They stated that the Directive does not address this problem, and may even make it worse by allowing for a five-year grace period for difficult-to-attribute royalties.⁷³

4. France

French CRO Société des auteurs, compositeurs et éditeurs de musique (SACEM) requires music venues to pay for public performance rights, a portion of which SACEM will distribute to the artist only after the artist has

69. See Claire Davenport, *EU Copyright Law Plan Angers Radiohead, Pink Floyd*, REUTERS (July 11, 2012, 6:08 PM), <http://in.reuters.com/article/2012/07/11/eu-copyright-idINL6E8IB3QK20120711>.

70. Ted Shapiro, Motion Picture Ass’n, *MPA Presentation at the Public Hearing on the Governance of CRM in the EU* (Apr. 23, 2010), http://ec.europa.eu/internal_market/copyright/docs/management/hearing20100423/panel_1_mpa_en.pdf.

71. Christian Hauptmann, Deputy Gen. Counsel, RTL Group, *Relationship between Collective Rights Managers and Commercial Users* (Apr. 23, 2010), http://ec.europa.eu/internal_market/copyright/docs/management/hearing20100423/panel_3_rt%20group_en.pdf.

72. Bendik Hofseth, Int’l Council of Authors & Composers of Music, *Presentation at the Public Hearing on the Governance of Collective Rights Management in the EU* (Apr. 23, 2010), http://ec.europa.eu/internal_market/copyright/docs/management/hearing20100423/panel_1_ciam_en.pdf.

73. Davenport, *supra* note 69.

paid SACEM membership fees.⁷⁴ Similarly, CD manufacturers in France may not press CDs without prior authorization from SACEM, even if the artist himself is producing the CD.⁷⁵ This again requires an artist to pay SACEM a membership fee should the artist wish to collect a portion of his mechanical royalties.

French band Uniform Motion notes that instead of being able to work directly with the venue or CD manufacturer, SACEM “makes the artist pay them to have their own CD’s [sic] manufactured, takes a portion of their live revenues and then uses the money to sue the guy who came to the gig and bought a CD!”⁷⁶

In 1998, SACEM entered into a lengthy conflict with the band Daft Punk, which wanted to transfer only some of its rights to the CRO. In response, the CRO claimed that this was impossible and refused to pay out royalties collected on behalf of the band.⁷⁷

5. *United Kingdom*

The United Kingdom recently collected and published responses to the Hargreaves Review of intellectual property in the digital age. A number of contributors have come forward and said that significant portions of their comments were removed. One contributor, Andrew Norton, stated that a list he had provided of news stories about CROs pursuing small businesses for minor offenses was removed entirely.⁷⁸

6. *India*

Indian IP attorney Nikhil Krishnamurthy has raised concerns regarding the transparency of the operations of Phonographic Performance Ltd (PPL), a sound recording CRO registered under the Indian copyright law. While PPL implies that “over 95%” of international recorded music is represented

74. See *Remunate creators*, SACEM, http://www.sacem.fr/cms/site/en/home/about-sacem/remunate_creators (last visited July 10, 2013); *Live entertainment in France in 2009: Overview and prospects*, SACEM, http://www.sacem.fr/files/content/sites/en/files/mediacent er/about_sacem/press_office/study_spectacle_vivant_sacem_2010april_anglais.pdf (last visit July 10, 2013).

75. See *Authorization to produce a record*, SACEM, <http://www.sacem.fr/cms/site/en/home/users/useful-informations-record/authorization-to-produce-a-record> (last visited July 10, 2013).

76. *Jean-Pierre and the Copyright Collection Society*, UNIFORM MOTION (Sept. 15, 2012), <http://uniformmotion.tumblr.com/post/31527902102/jean-pierre-and-the-copyright-collection-society>.

77. Rémi Bouton, *SACEM Decides Not to Pay Daft Punk*, BILLBOARD, Oct. 17, 1998, at 12.

78. Andrew Norton, *UK IPO Redacts Responses Critical of Rights Societies*, POLITICS & P2P (July 26, 2012, 9:58 PM), <http://www.ktetch.co.uk/2012/07/uk-ipo-redacts-responses-critical-of.html>.

in its catalog, the extent of PPL's authority to collect fees for foreign-owned sound recordings is unclear." Additionally, it does not publicly specify its license rates.⁷⁹

7. China

Chinese rightsholders have long complained about their CROs' lack of transparency on financial matters. They also object to the lack of input on rights management. Some rightsholders even considered bringing antitrust claims against the CROs. Nonetheless, the draft revision of the Chinese copyright law expands the role of CROs through extended collective licensing.⁸⁰

8. Russia

The Russian Authors' Society (RAO) has been "repeatedly criticized for a lack of transparency and for failure to deliver collected funds to musicians."⁸¹ The organization keeps 30% of its gross licensing revenues.

9. Ukraine

In its latest Special 301 Report, an annual review of the state of intellectual property rights protection and enforcement at US trade partners, the Office of the US Trade Representative designated Ukraine a "Priority Foreign Country" (PFC) due in part to "the unfair, nontransparent administration of the system for collecting societies, which are responsible for collecting and distributing royalties to U.S. and other rights holders."⁸² Ukraine is the first country in seven years to receive the PFC designation, which is "reserved by statute for countries with the most egregious IPR-related acts, policies and practices with the greatest adverse impact on relevant U.S. products, and that are not entering into good faith negotiations or making significant progress in negotiations to provide adequate and effective IPR protection."⁸³

79. Nikhil Krishnamurthy, *Indian Copyright Collecting Societies and Foreign Royalties: Whither Transparency?*, SPICY IP (Nov. 18, 2008, 10:36 PM), <http://spicyipindia.blogspot.ch/2008/11/indian-copyright-collecting-societies.html>.

80. Dou Xinying Jiang Shuo (窦新颖 蒋朔), *Collective management organizations are objects of antitrust review*, PEOPLE'S DAILY (Aug. 28, 2013, 8:05 AM), <http://ip.people.com.cn/n/2012/0828/c136655-18849170.html>; Luo Yanjie, *supra* note 58; Tang Yue, *Industry Calls for Improved Collectives in Copyrights*, CHINA DAILY (May 12, 2012, 7:52 PM), http://www.chinadaily.com.cn/cndy/2012-12/05/content_15986119.htm.

81. Sezneva & Karaganis, *supra* note 44, at 164-65.

82. Demetrios Marantis, Acting U.S. Trade Representative, Office of the United States Trade Representative, *2013 Special 301 Report 7* (May 2013), available at <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>.

83. *Id.* at 6.

D. Bad for Songwriters

Professor Ivan Reidel has demonstrated that the blanket licenses offered by CROs such as ASCAP and BMI to broadcasters harm most songwriters in two respects: 1) the supracompetitive cartel pricing of the blanket license requires broadcasters to devote more time to advertising, which in turn allows less airtime for the performance of songs by lesser-known artists; and 2) the blanket licenses eliminate price competition between songwriters, thereby encouraging broadcasters to play the most popular songs, and royalties to flow to the most popular songwriters.⁸⁴

Unlike a traditional monopolist, who is capable of reducing its output to increase profits, when PROs increase prices and force broadcasters to air more ads, the output that the PRO is restricting is both individual songs and songwriters. Those songwriters that are excluded from the market, don't get to participate in the larger royalty pie they helped generate by colluding, because all PROs distribute royalties based on actual air-time. Therefore, only songwriters whose songs are played receive the benefit of supra-competitive prices that all colluding songwriters helped create.⁸⁵

Reidel argues that “online transactional platforms can allow markets to vastly outperform blanket licenses—quantitatively and qualitatively—by allowing different songwriters to employ several pricing strategies simultaneously (e.g. auctions or any arbitrarily set price).”⁸⁶

The following are other specific examples of the problems CROs create for songwriters.

1. United States

Early in its history, ASCAP was free to distribute the royalties it collected according to whatever scheme it preferred. As Shourin Sen explains, in the 1930s,

The prevailing distribution methods were skewed to ensure that career composers, rather than those composers whose songs were performed most, were granted the lion's share of the societies' intake.... [ASCAP] allowed entrenched composers aligned with industry powerbrokers to essentially garner the royalties of less-established composers, whose compositions were often being performed more frequently. For example, in 1933 a member of the ASCAP directorate received \$3,417 for 1,020

84. Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 N.Y.U. J.L. & Bus. 731, 755 (2011).

85. *Id.* at 751.

86. *Id.* at 735.

performances, whereas Cole Porter was only paid \$1,174 for 24,476 performances.⁸⁷

Before the rise of radio and competition from the broadcaster-created BMI, US composer CRO ASCAP discriminated systematically against rural⁸⁸ and African-American songwriters.⁸⁹ This discrimination disserved audiences as well as songwriters, as these genres came to dominate popular culture once they were allowed widespread airplay.

2. Norway

Kråkessølv is a Norwegian band that recently released an album for free on a torrent site as a means of promoting itself. TONO is a CRO that administers copyrights for music in Norway. According to TONO, it is owned and governed by its members. However, TONO forced Kråkessølv to remove its album from the site, claiming “[t]he management contract in TONO means that we cannot allow the TONO members posting things on your own at some commercial sites.”⁹⁰

3. France

French composers allege that CRO SACEM stopped distributing royalties to its Jewish members during the Vichy regime -- a claim SACEM has contested.⁹¹ Documents from the time show that SACEM distributed a letter to its members asking “Jewish authors to identify themselves or face ‘internment in a concentration camp.’”⁹²

87. Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?*, 21 HARV. J.L. & TECH. 233, 244-45 (2007) (citing *How ASCAP Cuts a Melon: Songwriters’ Payoff for ‘33*, VARIETY, Dec. 4, 1935, at 37).

88. DIANE PECKNOLD, *THE SELLING SOUND: THE RISE OF THE COUNTRY MUSIC INDUSTRY* 54-55 (2007) (explaining that in the 1930s so-called ‘hillbilly’ artists “were aggressively excluded from the unions, licensing societies, and social formations that constituted the music business. . . . Perhaps no single event in its history had more impact on hillbilly music than the clash between publishers and broadcasters that resulted in the formation of Broadcast Music, Inc., and the temporary boycott of ASCAP music on the air”).

89. CATHERINE SQUIRES, *AFRICAN AMERICANS AND THE MEDIA* 147 (2009) (“Blues and jazz performed by blacks was termed ‘race music.’ The music on these records was usually not included in the ASCAP catalogue, because ASCAP rarely allowed Black members”).

90. Jared Moya, *Norwegian Royalty Group: You Can’t Upload Own Music to Pirate Bay*, ZEROPAID (Nov. 25, 2009), <http://www.zeropaid.com/news/87293/norwegian-royalty-group-you-cant-upload-own-music-to-pirate-bay/>.

91. Rémi Bouton, *SACEM Says Documents Prove WWII Payments*, BILLBOARD, July 10, 1999, at 95.

92. *Id.*

4. Lithuania

After complaining that the Lithuanian Copyright Protection Association, LATGA-A, was not fairly distributing license fees to them, a group of music authors in 2012 formed the Music Authors Rights Association, NATA. The dispute between the two groups became so heated that the Ministry of Culture had to intervene.⁹³

5. Israel

Israeli CRO PIL was formed as a result of incumbent CRO IFPI Israel's refusal to accept independent producers of Middle-Eastern music.⁹⁴ Ariel Katz reports that at the time IFPI members claimed the excluded songwriters were making inferior music, but there may also be an economic explanation: once a CRO reaches a critical mass of popular songwriters, they may exclude smaller songwriters who will add trivial revenues to the collective in order to avoid sharing revenues with them.

E. Bad for Performers, Venues, and Journalists

The marketplace for music copyright is not neatly divided between creators on one hand and consumers on the other. In addition to songwriters and their audiences, there are also performers (who are often writers themselves), venues, and journalists, among other stakeholders. While some songwriters may benefit from CROs when they receive royalties for performance or reproduction of their works (assuming they are fairly compensated, which is not necessarily the case), performers and the venues and journalists that support them are often on the wrong side of CRO efforts to extract maximum profit from the music ecosystem. When CROs mistreat performers and venues, they discourage dissemination and enjoyment of creative work and undermine the purpose of copyright. The injustice is particularly acute when the performer is also a writer, relying on revenue from performance to help subsidize her creative efforts.

93. Danas Bereznickas, *How Will the LATGA-A—NATA Scramble End*, BAKARU EKSPRESAS (Oct. 26, 2012, 11:43 AM), <http://www.ve.lt/naujienos/kultura/muzika/kuo-baigsis-latga-a-ir-nata-pestynes-831753/>; *Press Release*, Seven Entertainment, Major Lithuanian Event Coordinators Launch Collaboration with NATA (Apr. 27, 2012), available at <http://www.seven.lt/en/news/major-lithuanian-event-coordinators-launch-collaboration-with-nata.html?p=16> (“The NATA agency was established by music writers dissatisfied with the activities of LATGA-A”).

94. See generally Ariel Katz, *Monopoly and Competition in the Collective Administration of Public Performance Rights*, 2 HAIFA L. REV. 551 (2006).

1. *United States*

The Harry Fox Agency, the U.S. CRO for mechanical licenses, claimed that the Thailand Youth Orchestra (Siam Sinfonica) infringed copyright by posting a video of its performance of the Radetsky March by Johann Strauss.⁹⁵ The Radetsky March is 164 years old. Although more recent arrangements might be under copyright, the Youth Orchestra performed the original arrangement, which is in the public domain.

Richard Phillips is an independent folk musician who performs his own original songs and arrangements of traditional Irish folk songs. In the early 2000's, he convinced a restaurant with no other musicians to give him a regular performance slot. The restaurant stopped hosting the performances when it received a letter from BMI which indicated that "whatever music you perform to benefit your business, its public performance requires a license."⁹⁶

Richard Phillips contacted BMI directly, and attempted to explain that he was the only performer who played at the restaurant and he did not play any songs to which BMI had rights. BMI claimed there was no way he could know that. When he asked them for "a statement, in writing, that I am at liberty to perform my own songs, copyrighted in my name, and traditional folk songs, in the public domain, anywhere I want to, whether or not the venue has a license from BMI," the BMI representative replied "we're not going to give you that." Phillips ultimately wrote to his congressman, who obtained an opinion from an attorney at the U.S. Copyright Office explaining that BMI could not demand a license for performance of works it does not represent. The restaurant owner nevertheless stopped featuring live music, citing the hassle of fighting with BMI.

Zoë Keating is a cellist and songwriter who tours regularly in many countries. When performing at a U.S. venue, she saw that the venue deducted an \$86 dollar ASCAP fee.⁹⁷ Zoe contacted ASCAP to ask how she could go about claiming her portion of that fee, since it is meant to support songwriters of the songs performed -- in this case, her. The ASCAP representative informed Zoe that it only pays royalties to the top 200 grossing concert tours, live symphonic and recital concerts, and winners of the ambiguous "ASCAP Plus Cash Award," which has no clear criteria.

As Keating writes: "Every day, thousands of venues are required to pay a percentage of their gross ticket sales to ASCAP who then gives that money

95. Cory Doctorow, *Harry Fox Agency Claims Copyright on Strauss*, BOINGBOING (Nov. 1, 2012, 8:39 PM), <http://boingboing.net/2012/11/01/harry-fox-agency-claims-copyri.html>.

96. Richard Hayes Phillips, *How One Independent Musician Defeated BMI*, WOODPECKER (2003), <http://www.woodpecker.com/writing/essays/phillips.html>.

97. Zoë Keating, *Another Post Where I Attempt to Understand the Performance Royalty System*, ZOË KEATING (Mar. 23, 2012), <http://zoekeating.tumblr.com/post/19796519069/another-post-where-i-attempt-to-understand-the>.

to...let's look here on Pollstar and find the highest-grossing concerts for 2011....U2, Taylor Swift, Kenny Chesney, Lady Gaga, Bon Jovi, etc.”

In 2010, ASCAP filed suit against Connolly's Pub and Restaurant for failure to properly license music performances. It filed suit in the name of one of its affected artists, Bruce Springsteen. He was not involved in the decision to sue this restaurant and was so uncomfortable with ASCAP's behavior that he demanded that his name be removed from the complaint.⁹⁸

In a 2011 blog post, Florida attorney Allan Gregory relays an unpleasant encounter between a friend (a restaurateur to whom he gives the pseudonym “John”) and an attorney from performance rights CRO BMI.⁹⁹ According to John, his restaurant began having local bands play original songs at the restaurant on Friday nights. The move was a success, but John ended the local music night when a lawyer from BMI stopped by to demand the restaurant purchase a \$3,000 blanket license. When John argued that the band played all original music, the BMI attorney claimed a license was necessary for even the most minor uses, such as “a Led Zeppelin riff while they tune-up their instruments.” John suspended live music night indefinitely and, in John's words, “Net result? Our customers suffered, local music suffered. A complete lose-lose situation.”

Somethin's Brewin' was a café bookstore that had weekly lunchtime sets by a local musician and monthly open mic nights. Neither had an admission charge. Eventually ASCAP and SESAC got wind of this and demanded the owner pay a license fee. Owner Lorraine Carboni offered to have performers agree to perform only their own works or works that are in the public domain. This did not satisfy the CROs, and Ms. Carboni was forced to post the following sign: “Due to concerns with music license companies we are forced to take all music entertainment off line until all concerns can be addressed ... this includes our Friday Night Entertainment Series [and] Thursday Lunch with Tom.”¹⁰⁰

Musician Howie Newman, a long time BMI member, left the organization due to growing frustration that small venues were canceling performances because they could not afford the licensing fees demanded by the CROs. Newman told a reporter, “It seems like this is set up for the rich to get richer, it's not set up to protect the little guy. I don't feel the intent of this policy and the regulations fit the small venues. It seems like they are closing down these little places, where people can go and enjoy the music

98. Press Release, Bruce Springsteen, Statement (Feb. 4, 2010), available at <http://www.shorefire.com/index.php?a=pressrelease&o=3650>.

99. Allan Gregory, *Music Copyright Police Ruin Artists' Gigs (and Coconut Curry)*, TORRENTFREAK (Oct. 8, 2011), <http://torrentfreak.com/music-copyright-police-ruin-artists-gigs-and-coconut-curry-111008/>.

100. Cindy Dow, *Copyright Issue Brings an End to Music at Cafe*, MIDDLEBORO GAZETTE (Apr. 29, 2010, 1:41 PM), <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20100429/PUB04/4290397/-1/pub04>.

for short money. Do they have any awareness that this is decimating the small organizations?"¹⁰¹

2. United Kingdom

CROs generally cannot keep track of each use and distribution of the works under their care, so they use statistical sampling methods to estimate proper division of revenue. Journalist and academic Andrew Dubber observed that there is a fundamental data problem with PRS (Performing Right Society) Music in Britain, the CRO that licenses performances on behalf of songwriters, in that statistical methods designed to determine how much money members deserve inevitably favor more popular artists. He gives the example, "if your music gets played on the radio five times, but only one of those times are counted, the collection society will assume, based on statistical probability, that it was not your song but, let's say, Elton John's that got played those other four times."¹⁰²

One of the most detailed studies of income distribution in the music industry used data from PRS to reveal that 80% of performance rights owners earned less than £1000 from performance royalties in 1993, while a mere 10% of owners received 90% of the total amount of distributions.¹⁰³

3. Ireland

In 2010, the Irish Music Rights Organization (IMRO), decided to make music bloggers who failed to pay an Online Exploitation License a priority. Many of these blogs were small amateur websites with no commercial revenue. Additionally, many of the MP3s they used were provided *gratis* by bands and their labels for promotional purposes. Blogger Nialler9 summarized the situation as follows, "Like many I thought that MP3s which were cleared by bands and labels for promo were provided as is—gratis and without any attachments or additional requirements other than to promote the band and song. Y'know, the same way an entire music blogosphere and a digital PR industry has been allowed to grow up over the course of the last 10 years thinking the same."¹⁰⁴

101. *Id.*

102. Andrew Dubber, *How to Solve Royalty Collection Societies*, MUSIC THINK TANK (June 13, 2010), <http://www.musicthinktank.com/blog/how-to-solve-royalty-collection-societies.html>.

103. Birgitte Anderson et al., *Rents, Rights, N'Rhythm: Cooperation, Conflict and Capabilities in the Music Industry*, 14 *INDUSTRY & INNOVATION* 513 (2007).

104. Rossa McMahon, *IMRO vs. The Blogs: Collective Licensing of Music*, A CLATTER OF THE LAW (Apr. 29, 2010), <http://aclatterofthelaw.com/2010/04/29/imro-vs-the-blogs-collective-licensing-of-music/>.

4. *Russia*

Russian CRO RAO has sued promoters of a Beyoncé concert held in Moscow where she performed only her original compositions, alleging they should have purchased a performance rights license for the event.¹⁰⁵ The same CRO successfully sued the promoters of a concert by Deep Purple and obtained a fee of \$15,000 for failure to license public performance of the band's own original songs.

F. CROs Can Be Slow To Adapt to Digital Technologies

Even major labels can be frustrated with CROs acting against their interests. Edgar Berger, a Sony Music executive, spoke publicly about his frustration with German CRO Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) for its refusal to license to YouTube. He believed that the refusal to license was preventing artists from making money from the lucrative ContentID system.¹⁰⁶

In an effort to innovate in the field of digital licensing, record company EMI decided to go in-house for management of online licensing of its April Music Catalog, reclaiming those rights from CRO ASCAP.¹⁰⁷ EMI Music Publishing Chairman Roger Faxon said the move was not an indictment of ASCAP in particular, but rather a general problem with dividing digital rights across the various CROs that manage them. EMI hopes to achieve more efficient licensing by retaining all of its digital rights.

II. HOW CROS HARM USERS

CROs are intended to address the market failures that prevent would-be licensees from making valuable arrangements with would-be licensors. CROs should therefore be equally beneficial to both sides of copyright transactions. In reality, CROs often pursue profit for themselves at the expense of both artists and users. We have seen how CROs can misallocate profits and mismanage their portfolios of rights to the detriment of authors; Part II will show the ways that CROs abuse their power at the expense of the public, who are the ultimate intended beneficiaries of copyright. CROs

105. Vladimir Kozlov, *Russian Collecting Society Sues Over Beyonce Concert*, BILLBOARD (Feb. 19, 2010, 12:00 AM), <http://www.billboard.com/biz/articles/news/1210973/russian-collecting-society-sues-over-beyonce-concert>.

106. Ernesto, *Sony Music Boss: Censored YouTube Videos Cost Us Millions*, TORRENTFREAK (Feb. 24, 2012), <http://torrentfreak.com/sony-music-boss-censored-youtube-videos-cost-us-millions-120224/>.

107. Ed Miller, *EMI releases ASCAP in Rights Reshuffle*, MUSIC WEEK (May 9, 2011, 12:45 PM), <http://www.musicweek.com/news/read/emi-releases-ascap-in-rights-reshuffle/045640>.

harm users in two primary ways: monopolistic conduct and aggressive enforcement actions.

A. Monopolistic Conduct

Because CROs are often the only seller of required licenses, they can demand monopoly prices from users with no choice but to pay. The following are just a few examples of this monopolistic conduct.

1. Canada

In 2010, Canadian CRO Access Copyright proposed to increase its annual license fee by 1300%, then tried to mute objections by changing its complaint reporting system.¹⁰⁸ The rate hike, which required authorization by the Canadian Copyright Board, was opposed vociferously by Canadian universities. However, in 2012, the Association of Universities and Colleges of Canada (AUCC) and Access Copyright negotiated a new agreement that increased the annual per student licensing cost from \$3.38 to \$26. Many Canadian educators opposed the deal's extraordinary rate increase as well as several of its terms.¹⁰⁹ In an effort to discourage universities from opting out of the Access Copyright blanket license and relying instead on fair dealing and one-by-one licenses, AUCC and Access Copyright negotiated a "Limited Time Offer of Discounted Pricing on Retroactive Payments" that promised a stiff penalty in the form of retroactive license fees for institutions who did not accede immediately to the negotiated license terms.¹¹⁰

Critics of the deal pointed out that the new \$26 per student fee is significantly higher than the \$3.56 per student fee the CCC sought from Georgia State University (and the \$0.06 per student fees actually paid by GSU to the CCC).¹¹¹

For years the Access Copyright license has included rights that have already been granted through the Canadian copyright law. "The licence attempts to subsume non-infringing activity such as fair dealing (which

108. Howard Knopf, *Access Copyright Strikes Back re Status of 99 of 101 Objectors*, EXCESS COPYRIGHT (Sept. 30, 2010, 12:09 AM), <http://excesscopyright.blogspot.com/2010/09/access-copyright-strikes-back-at-99-of.html>.

109. See, e.g., Michael Geist, *Opposition Mounts to AUCC-Access Copyright Deal*, MICHAEL GEIST (May 14, 2012), <http://www.michaelgeist.ca/content/view/6484/196/>; Letter from Christian Rouillard, President, Ass'n of Professors of the University of Ottawa, to Jean-Yves Leduc and Leslie Weir, University of Ottawa (May 30, 2012), available at http://www.apuo.uottawa.ca/info/2012-05-30_APUO_Position_Copyright.pdf.

110. Ariel Katz, *The Best Possible Outcome for Universities, Really?*, ARIEL KATZ (Apr. 17, 2012), <http://arielkatz.org/archives/1673>.

111. Howard Knopf, *AUCC Settlement with Access Copyright—Questions and Answers—or Still More Questions?*, EXCESS COPYRIGHT (May 2, 2012, 7:34 PM), <http://excesscopyright.blogspot.ca/2012/05/aucc-settlement-with-access-copyright.html>.

allows copying for research and private study), interlibrary loans, copies made for preservation, and alternate format material for people with perceptual disabilities.”¹¹² Other problems with the license include substantial annual price increases without substantiation or negotiation; the burdensome administrative task of reporting all copies; and the exclusions list.¹¹³

In the wake of the rate hike and a series of landmark court decisions favoring educational fair use, all K-12 schools in Canada ceased purchasing the Access Copyright blanket license.¹¹⁴ Access Copyright strongly disputes the schools’ claim that fair dealing protects their uses, and says the action “will have a serious impact on Access Copyright’s licencing revenue in 2013, we are working hard on plans to address this challenge....”¹¹⁵

Access Copyright is just one of over 37 copyright CROs in Canada, and it is not the only one that has generated controversy. The Copyright Board of Canada approved Re:Sound, the music performance CRO, doubling its fee for the performance of recorded music at events -- such as weddings -- that include dancing.¹¹⁶ As Ariel Katz has explained, the proliferation of collecting societies in Canada has created a system of taxing the public for private benefit, a system that answers directly to neither market competition nor democratic processes.¹¹⁷

2. *United States*

American CROs ASCAP and BMI have been operating pursuant to antitrust consent decrees with the U.S. Department of Justice since 1941 and 1966 respectively.¹¹⁸ The Department of Justice brought the actions in response to ASCAP and BMI requiring broadcasters and other licensees to obtain a blanket license covering all performances of their entire catalogue. Under the consent decrees, the broadcaster can obtain a blanket license on a per program basis as opposed to a blanket license for all programs.

112. Victoria Owen, *The Librarian’s Perspective on Collecting Societies*, WLIC DURBAN (Nov. 10, 2007), <http://archive.ifla.org/IV/ifla73/papers/153-Owen-en.pdf>.

113. *Id.*

114. *K-12 Schools to Stop Paying for Access Copyright License*, ACCESS (Dec. 2012), <http://myemail.constantcontact.com/Access---an-e-newsletter-for-Creator-Affiliates--Decem-ber-2012.html?soid=1102732265591&aid=6LjZTBtb5Ms>.

115. *Id.*

116. Steve Ladurantaye, *Music Played at Public Events to be Subject to New Copyright Fees*, THE GLOBE AND MAIL (May 31, 2012, 2:38 PM), <http://www.theglobeandmail.com/arts/music/music-played-at-public-events-to-be-subject-to-new-copyrightfees/article4219846/>.

117. Ariel Katz, *Copyright Taxation Without Representation*, ARIEL KATZ (June 21, 2012), <http://arielkatz.org/archives/1882>.

118. Noel Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 743 (1998).

Additionally, the U.S. District Court for the Southern District of New York maintains a rate court to ensure the rates imposed by ASCAP and BMI are fair. The consent decree also requires transparency regarding the titles in their catalogue.

Both CROs have been sued multiple times for allegedly monopolistic conduct in the aftermath of the consent decrees, but courts have been unwilling to restrain them. Noel Hillman, an Assistant U.S. Attorney in the Fraud and Public Protection Division of the Department of Justice, recounts several instances of ASCAP or BMI abusing their market power and even violating the consent decrees under which they both still operate.¹¹⁹ Despite the consent decrees' goal of encouraging fair pricing and choice, the two CROs still drive the vast majority of licensees into purchasing expensive blanket licenses.¹²⁰

In 2009, SoundExchange filed written comments with the United States Copyright Royalty Judges seeking to exclude Royalty Logic from becoming a competing CRO with SoundExchange.¹²¹

In 1982, the U.S. Tax Court affirmed the revocation of CCC's tax exempt status by the Internal Revenue Service. The court quoted the IRS Commissioner's statement that:

Any public benefits from your activity are subordinate to your primary purpose of furthering the economic interest of publishers and copyright owners. The fact that your activities support a business purpose serving publishers and copyright owners is a strong indication that your activities are not charitable as required by the Code and regulations.¹²²

The court further stated that:

We are not faced here with a truly joint undertaking of all parties—publishers, copyright owners, users, and governmental agency—concerned with proper enforcement of the copyright laws, in which efforts are focused on meeting the needs and objectives of all involved. Instead, petitioner was organized by a segment of a publishers' trade group, the Technical, Scientific, and Medical division of the AAP, and there is little persuasive evidence that petitioner's founders had interests of any

119. *Id.* at 756-62 (“These examples demonstrate that ASCAP and BMI have continued to attempt to derive income from non-music programming, have failed to provide meaningful per-program licenses, and have sought to require royalties from entities engaged in non-compensable public performances. Each of these activities is a substantive violation of the consent decrees”).

120. *Id.* at 742.

121. David A. Handzo et al., SoundExchange, Inc., *Written Direct Statement of SoundExchange, Inc. Before the Copyright Royalty Board In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Sept. 29, 2009), available at <http://www.loc.gov/crb/proceedings/2009-1/statements/wds-sx.pdf>.

122. *Copyright Clearance Ctr. v. Comm'r of Internal Revenue*, 79 T.C. 793, 803 (T.C. 1982).

substance beyond the creation of a device to protect their copyright ownership and collect license fees.¹²³

In 2012, Sirius XM filed an antitrust suit against SoundExchange, the U.S. digital performance rights CRO, claiming that SoundExchange is preventing its independent label members from negotiating directly with Sirius for performance licenses.¹²⁴

Professor Ivan Reidel argues that U.S. consumers are subjected to excessive advertising on broadcast media due to high CRO blanket license fees.¹²⁵ A licensing market that was not subject to monopoly pricing would lower costs for broadcasters, freeing them to air more of the entertainment content that viewers desire. Under the current system, Reidel argues, “Audiences and broadcasters...are necessarily worse off: Audiences are served more annoying ads than a competitive market would provide and broadcasters pay artificially inflated prices for songs.”¹²⁶

3. Brazil

In 2013, Brazil’s performance rights CRO ECAD, made up of six Brazilian licensing organizations, was convicted of being an illegal cartel engaged in price fixing.¹²⁷ Brazilian prosecutors showed that leaders of the six ECAD member groups met to set rates and colluded to prevent new entrants into the market for licenses. The group has been fined \$38 million, which it cannot pay from artist revenue, and ordered to restructure its business in compliance with competition laws.

Additionally, ECAD demands monthly license fees from bloggers that embed YouTube videos on their sites, even though YouTube Brasil already pays license fees for those videos. One artist joked, “At my place even the cock is forbidden to crow. I don’t want problems with ECAD.”¹²⁸

123. *Id.* at 805.

124. Ed Christman, *Sirius XM Files Lawsuit Against SoundExchange and A2IM, Alleging Licensing Interference*, BILLBOARD (Mar. 28, 2012, 9:28 AM), <http://www.billboard.biz/bbbiz/industry/legal-and-management/siriusxm-files-lawsuit-against-soundexchange-1006591952.story>.

125. *See* Reidel, *supra* note 84.

126. *Id.* at 752.

127. Mike Masnick, *Brazil’s Music Collection Societies Convicted of Price Fixing*, TECHDIRT (Mar. 22, 2013, 2:24 PM), <http://www.techdirt.com/articles/20130322/10344122419/brazils-music-collection-societies-convicted-price-fixing.shtml>.

128. Ricardo Geromel, *Scandal! In Brazil, Blogs with Embedded Youtube Videos are Charged Monthly Fees*, FORBES (Mar. 9, 2012, 10:31 AM), <http://www.forbes.com/sites/ricardogeromel/2012/03/09/scandal-in-brazil-blogs-with-embedded-youtube-videos-are-charged-monthly-fees/>.

4. *Europe*

In 1993, MTV Europe sued the International Federation of the Phonographic Industry (IFPI) and the major record labels for price fixing and abuse of a dominant market position.¹²⁹ The U.S. Department of Justice also investigated the issue, and accused IFPI and major record labels of withholding information.¹³⁰ After six years of litigation, MTV suddenly and mysteriously withdrew its complaint, citing a confidential settlement reached with IFPI and the other parties.¹³¹ The dispute had threatened the legitimacy of all European collecting societies and created significant tensions within the European Commission.¹³²

5. *Germany*

The German government in the early 1960s investigated GEMA, the German CRO, for allegations of price-fixing with other organizations including IFPI and Bureau International de L'Édition Mécanique (BIEM).¹³³

6. *Spain*

SGAE, a Spanish CRO, was fined 1.8 million Euros for abusing its monopoly position in the Spanish market. The specific concerns raised were “discriminatory and non-transparent application of discounts” and a “so-called replacement fee, which is unfair and discriminatory.”¹³⁴

7. *United Kingdom*

Upstart Welsh CRO Eos was formed when Welsh musicians complained that UK CRO PRS was shortchanging artists. The new CRO took control of over 30,000 Welsh songs on January 1, 2013, and demanded that Welsh language radio station Radio Cymru pay 10 times the license fee to broadcast songs in Eos' catalog. When no agreement was reached before January 1, Radio Cymru shortened its broadcast day by two hours and

129. Roger Pearson, *MTV Europe vs. Majors Goes To Trial*, BILLBOARD, Dec. 3, 1994, at 107.

130. Bill Holland, *Majors Holding Up Inquiry, Gov't Says*, BILLBOARD, Nov. 26, 1994, at 1.

131. Jeff Clark-Meads, *MTV Europe, VPL Resolve Years-Long Licensing Dispute*, BILLBOARD, May 16, 1998, at 1.

132. *Id.* at 16.

133. Omer Anderson, *German Govt. Mulls Probe of GEMA*, BILLBOARD, May 8, 1961, at 3.

134. Mike Palmedo, *BNA Reports Two Stories on Collecting Societies in Europe*, INFOJUSTICE (July 21, 2012), <http://infojustice.org/archives/26695>.

replaced its normal Welsh pop and rock fare with classical music and hymns.¹³⁵

8. Australia

Copyright Agency Limited, the Australian reprographic CRO, collects millions of dollars in license fees from schools for their use of freely available Internet content. Most of these fees are then distributed to foreign website operators who do not expect payment.¹³⁶ Australian law also requires schools pay compulsory license fees for in-class handouts, a practice that would be allowed for free under US fair use law. Australia is currently considering revisions to its copyright law, and schools and universities have urged a move away from statutory licenses toward fair use or fair dealing as a way to “future proof” the law and to allow more efficient use of technology in teaching.¹³⁷

B. Aggressive Actions

Many of the users harmed by CROs expect to pay some sort of license for their use; they are commercial actors or are otherwise making uses where it seems reasonable to seek a license. These users, described in the previous section, are primarily harmed by the monopolistic behaviors of CROs seeking additional rents by raising prices.¹³⁸ But another way that CROs can be harmful to users is by trying to expand their customer base by aggressively demanding payment from users who reasonably believe their activities do not require payment or by demanding exorbitant payments from small entities who can't possibly afford to pay. This aggressive pursuit of revenue imposes a tax on legitimate social practices, intrudes offensively into private, non-commercial activities, and penalizes small, innovative cultural practices in favor of large, corporate ones.

1. United States

Not content with receiving royalties for performances, ASCAP sought to collect license fees for digital downloads from Yahoo! and RealNetworks.¹³⁹

135. *Welsh Music Dispute: BBC Radio Cymru Cuts Airtime and Amends Playlists*, BBC NEWS (Jan. 1, 2013, 6:35 PM), <http://www.bbc.co.uk/news/uk-wales-20878895>.

136. Kim Arlington, *Schools Pay Millions for Material Free on Net*, SYDNEY MORNING HERALD (July 23, 2012), <http://www.smh.com.au/technology/technology-news/schools-pay-millions-for-material-free-on-net-20120722-22ibg.html>.

137. Ariel Katz, *Australian Educators: Repeal the Education Statutory License, Expand Fair Dealing*, ARIEL KATZ (Dec. 10, 2012), <http://arielkatz.org/archives/2150>.

138. The Australian tax on educational use described above seems aggressive but is a well-established, if wrongheaded, aspect of the current law, rather than an aggressive move to enforce commercial rights against previously untaxed uses or users.

139. *United States v. ASCAP*, 627 F.3d 64, 68 (2d Cir. 2010).

The Second Circuit rejected ASCAP's argument that digital downloads implicated the public performance right.

ASCAP also sought to collect fees for "public performance" of ringtones. (The user already pays for the reproduction right for copying the ringtone in his phone.) The court ruled that the playing of a ringtone in public does not implicate the public performance right.¹⁴⁰

In 1995, ASCAP demanded that each of the 2,300 camps represented by the American Camping Association (including the Girl Scout camps), obtain a blanket license for the public singing of songs. Many of the camps paid the \$250 per camp fee. In 1996, ASCAP sent a letter to 6,000 other camps in the United States, demanding a fee of up to \$1,439 per camp. Many Girl Scout camps refused to pay the fee, but instructed the counselors to refrain from the singing of songs not owned by the Girl Scouts. This led to a public relations nightmare for ASCAP, which caused it to retreat.¹⁴¹

2. *Canada*

In 2012, the Supreme Court of Canada issued five landmark fair dealing decisions, including a broad interpretation of "private study" that made clear the provision's application to a wide variety of uses related to teaching and learning. The decision came just as Access Copyright sought an extraordinary increase in licensing fees from Canadian colleges.¹⁴² In the wake of the Supreme Court's decision, several universities and all K-12 institutions in Canada ended their practice of purchasing blanket licenses from Access Copyright and announced their intention to rely on fair dealing instead.

Access Copyright has responded with a series of aggressive actions that one expert described as "a declaration of war against fair dealing."¹⁴³ The CRO sued York University over its fair dealing guidelines, which are grounded in Canadian Supreme Court precedent, stating that the guidelines are "arbitrary and unsupported" and "authorize and encourage copying that is not supported by the law."¹⁴⁴ Access Copyright also sought a tariff that would force K-12 schools to purchase its license rather than rely on fair

140. *United States v. Am. Soc'y of Composers, Authors, and Publishers*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009).

141. Elisabeth Bumiller, *Ascap Asks Royalties From Girl Scouts, and Regrets It*, THE NEW YORK TIMES (Dec. 17, 1996), <http://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html?pagewanted=all&src=pm>.

142. See *supra* note 102 and accompanying text.

143. Michael Geist, *Access Copyright's Desperate Declaration of War Against Fair Dealing*, MICHAEL GEIST (Apr. 9, 2013), <http://www.michaelgeist.ca/content/view/6818/125>.

144. *Id.*

dealing, as well as a new tariff for post-secondary education that purports to cover uses widely regarded as fair dealing.¹⁴⁵

3. Slovakia

The Slovak Performing and Mechanical Rights Society (SOZA) has sought money from villages when their children sing. One case involved children singing to their mothers on Mothers' Day. Another involved singing public domain folk songs about the village.¹⁴⁶

In 2012, SOZA urged high school students to register with the CRO and pay € 15 for a license to perform music at their graduation parties. After public protests, the Ministry of Culture appealed to SOZA to stop requesting fees on the ground that these parties were not public events. SOZA agreed to stop requesting the fees "due to the special social character" of the parties, but insisted that it was still legally entitled to the fees.¹⁴⁷

4. Belgium

SABAM, a Belgian CRO, sought expanded protection for readings of copyrighted works. One consequence of their action was that it would require librarians to pay a license to read books to children in a children's library. Since libraries do not accept payment for these readings, they were not able to budget for licensing, and the result was that SABAM put a stop to the nefarious practice of reading to children.¹⁴⁸

SABAM also sought a licensing fee from truck drivers who listened to the radio alone in their trucks.¹⁴⁹

Finally, SABAM has sought a public broadcast license from three Belgian Internet service providers on the theory that their failure to

145. Howard Knopf, *Access Copyright Thrashes Thrice*, EXCESS COPYRIGHT (Apr. 8, 2013, 7:30 PM), <http://excesscopyright.blogspot.com/2013/04/access-copyrights-thrashes-thrice.html>.

146. John Boyd, *Villages Furious about Copyright Fees for Folk Songs*, THE DAILY (June 5, 2012), <http://www.thedaily.sk/villages-furious-about-copyright-fees-for-folk-songs/>.

147. Tibor Blazko, *Slovakia: Protesting SOZA's Newest Copyright Fees*, GLOBAL VOICES, (Oct. 28, 2012, 12:38 AM), <http://globalvoicesonline.org/2012/10/28/slovakia-protesting-sozas-newest-copyright-fees/>.

148. Robin Wauters, *Belgian rightsholders group wants to charge libraries for READING BOOKS TO KIDS*, THE NEXT WEB (Mar. 13, 2012), <http://thenextweb.com/media/2012/03/13/belgian-rightsholders-group-wants-to-charge-libraries-for-reading-books-to-kids/>.

149. Ernesto, *Copyright Police Want Truck Drivers to Have Licensed Cab Music*, TORRENTFREAK (Mar. 27, 2011), <http://torrentfreak.com/copyright-police-want-truck-drivers-to-have-licensed-cab-music-110327/>.

eliminate piracy amounts to consent to widespread dissemination of covered works.¹⁵⁰

5. *United Kingdom*

British CRO Phonographic Performance Limited (PPL) sought a fee from a hardware store owner who listened to the radio in his store while cleaning it after he had closed. When the hardware store owner hired lawyers to challenge the charge, PPL initially offered to reduce the fee. A few days later, with public pressure from a newspaper story, PPL withdrew the charge.¹⁵¹

UK CRO PRS has sought performance licensing fees from a host of unexpected places, including: a woman who played classical music to her horses;¹⁵² mechanics who listened to the radio while working (if the volume was high enough that it could be heard through the walls in the waiting room);¹⁵³ police officers who listened to the radio in their offices, gyms, and waiting rooms, as well as using music in PowerPoint presentations;¹⁵⁴ and small, home-based businesses if customers could hear the music over the phone.¹⁵⁵

6. *Germany*

GEMA, a German CRO, generally insists that it must be consulted and paid for virtually every use of music, with the burden on the user to prove that a license is *not* required. This insistence is based on a legal ruling that states: "Because of the large and comprehensive repertoire GEMA manages, at performances of national and international dance and

150. Ernesto, *Music Rights Group Sues ISPs Over "Pirate Tax,"* TORRENTFREAK (May 1, 2013), <https://torrentfreak.com/music-rights-group-sues-isps-over-pirate-tax-130501/>.

151. *Hardware store wins fight against music licence body*, DIY WEEK (Oct. 18, 2011), <http://www.diyweek.net/news/news.asp?id=15084&title=Hardware+store+wins+fight+against+music+licence+body>.

152. John Bingham, *Woman Who Plays Classical Music to Soothe Horses Told to Get License*, TELEGRAPH (Mar. 27, 2009, 4:02 PM), <http://www.telegraph.co.uk/news/newstopics/howaboutthat/5061004/Woman-who-plays-classical-music-to-soothe-horses-told-to-get-licence.html>.

153. *Kwik-Fit Sued Over Staff Radios*, BBC NEWS, (Oct. 5, 2007, 2:25 PM), http://news.bbc.co.uk/2/hi/uk_news/scotland/edinburgh_and_east/7029892.stm.

154. Camilla Sutcliffe, *Lancashire Police Face Music Over Copyright*, THIS IS LANCASHIRE (June 12, 2008, 10:50 AM), <http://www.thisislancashire.co.uk/news/2336965.print/>.

155. Mike Masnick, *Performance Rights Society Calls Small Business & Threatens Them Over Music Heard In The Background*, TECHDIRT (Feb. 2, 2009, 8:51 AM), <http://www.techdirt.com/articles/20090202/0128383597.shtml>.

entertainment music there is an actual assumption militating in favour of the existence of a liability fee.”¹⁵⁶

In pursuing these fees, GEMA has refused to recognize the validity of licenses issued by a competing CRO. Startup company Jamendo offers artists a platform to distribute music freely to the public for non-commercial uses under a Creative Commons license (or similar sharing-friendly licenses). Jamendo also acts as a CRO for the artist, facilitating commercial uses and issuing license certificates to commercial licensees. However, GEMA will not accept a certificate issued by Jamendo as proof that a fee is not required.¹⁵⁷

After a free music festival in November 2011, GEMA demanded royalties for performances of music for which it controlled no rights. The organizer of the festival had asked all disk jockeys to only play music under Creative Commons or other free licenses, and had announced the concept to GEMA. GEMA demanded the list of all artists whose music would be performed, including their full names, place of residence, and date of birth. The organizer provided the information to GEMA. Nonetheless, GEMA presented him with a bill, claiming that it wasn't certain that everyone on the list wasn't a GEMA artist because some of the artists had pseudonyms. As noted above, in Germany, the burden of proof that a rights holder is not represented by a CRO falls on the user, not the CRO. Relatedly, GEMA is now being sued for attempting to collect personal information concerning non-GEMA members.¹⁵⁸

In 2011, GEMA tried to claim a fee from a nonprofit organization for releasing a compilation CD featuring the winners of its Creative Commons competition “Free! Music! Contest.” After receiving an invoice from GEMA, the contest organizers filed a complaint for fraud.¹⁵⁹

In one of its efforts to charge school children for singing, GEMA seemingly attempted to claim licensing fees for the performance of the Turkish National Anthem. When the school reached out to the Turkish government for help in its assertion that the song was not in GEMA's catalog, the government decided to pursue copyrighting this work that had intentionally been left in the public domain.¹⁶⁰

156. Wolfgang Senges, *GEMA vs. Jamendo et al.—Get Money for Nothing*, CONTENTSPHERE (Apr. 6, 2009), <http://contentsphere.de/2009/04/06/gema-vs-jamendo-et-al-get-money-for-nothing/>.

157. *See id.*

158. BSOD, *Copyright Group Tries to Collect From Creative Commons Event*, ACTIVE POLITIC (Nov. 13, 2011), http://activepolitic.com:82/News/2011-11-13e/Copyright_Group_Tries_To_Collect_From_Creative_Commons_Event.html.

159. Ernesto, *Music Royalty Collectors Accused of Copyfraud*, TORRENTFREAK (Oct. 2, 2011), <https://torrentfreak.com/music-royalty-collectors-accused-of-copyfraud-111002/>.

160. *Copyright Unclear: Turkey Scrambles to Protect National Anthem*, SPIEGEL ONLINE (Dec. 8, 2010, 12:36 PM), <http://www.spiegel.de/international/world/copyright-unclear-turkey-scrambles-to-protect-national-anthem-a-733515.html>.

GEMA also triggered controversy in Germany when it sent a reminder to preschools that they must pay a license fee for using sheet music in music class.¹⁶¹

GEMA announced in 2012 its plan to “simplify” its fee structure to charge solely based on size of venue, price of admissions, and length of events.¹⁶² Some estimate this could result in a 500% to 1000% fee increase for some of Berlin’s legendary dance clubs, which operate for very extended hours (10pm to 5am is common) compared to traditional bars and clubs. Club owners complained that not only would the fees be punitive, but the proceeds would benefit mainstream artists rather than the underground DJs whose music is actually played in their clubs. Furthermore, GEMA continues to place the onus on club owners to prove that material they played *wasn’t* owned by GEMA artists. Club proprietors say they may be forced to shut down as of April 2013, when the new fee structure goes into place. GEMA has also announced a “laptop surcharge” that would add an additional fee for the use of MP3s as opposed to vinyl LPs or CDs to facilitate performances.¹⁶³

7. *Russia*

In March 2010, Russian CRO RAO sued a World War II veterans’ choir for performing patriotic Soviet songs at a free concert in Samara without signing a licensing agreement.¹⁶⁴

8. *Japan*

The Japanese Society for Rights of Authors, Composers, and Publishers (JASRAC) caused an uproar when its Managing Director suggested in an interview that including music lyrics in a post to micro-blogging platform Twitter would require a license. When users panicked, JASRAC backpedaled and said it was merely looking into whether it could work out a blanket licensing regime to charge Twitter itself for lyrics posted to the site. One observer pointed out, “since Twitter users are not (presumably) tweeting lyrics for commercial gain, quoting lyrics in tweets seems to come

161. Catherine Bolsover, *Kindergartens Ordered to Pay Copyright for Songs*, DEUTSCHE WELLE (Dec. 28, 2010), <http://www.dw.de/dw/article/0,,14741186,00.html?maca=en-rss-en-all-1573-rdf>.

162. *Legendary Berlin Clubs Face Closure*, THE QUIETUS (July 6, 2012, 8:16 AM), <http://thequietus.com/articles/09272-berlin-clubs-face-closure-berghain-watergate>. For a detailed account of the GEMA tariff reform controversy and the deeper history of GEMA’s unpopular moves, see Luis Manuel Garcia, *GEMA and the threat to German nightlife*, RESIDENT ADVISOR (Apr. 24, 2013), <http://www.residentadvisor.net/feature.aspx?1757>.

163. *GEMA Reportedly Crack Down on DJs as Well as Clubs, Adding New “Laptop Surcharge” to Sets*, FACT (Nov. 30, 2012), <http://www.factmag.com/2012/11/30/gema-reportedly-crack-down-on-djs-as-well-as-clubs-adding-new-laptop-surcharge-to-sets/>.

164. Sezneva & Karaganis, *supra* note 44, at 165.

under the category of Fair Use. Unfortunately, there is no such category in Japan's Copyright Law...."¹⁶⁵

CONCLUSION

At first glance, empowering a CRO to issue blanket licenses on behalf of disparate rightsholders can seem like a useful hybrid of free markets and regulation. As the anecdotes above demonstrate, however, a CRO is just as likely to combine the worst excesses of both approaches: all the profit maximization of a private business with none of the market discipline of competition, all the power of a government agency with none of the political accountability. Experts who advocate the use of collective licensing often condition their recommendation on the presence of appropriate cultural or regulatory conditions that would restrain CRO excesses.¹⁶⁶ The stories collected here suggest that these conditions seldom, if ever, obtain, even in countries with a history of collective licensing.

165. *JASRAC, Twitter Users in War of Words*, MCCLUREMUSIC.COM (Mar. 4, 2010), <http://www.mccluremusic.com/jasrac-twitter-users-in-war-of-words/>.

166. *See supra* note 5.