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Jørgen Blomqvist (ed)

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Preface

This book contains most of the papers and presentations of the annual Congress of the Association Littéraire et Artistique Internationale (ALAI) which took place in Copenhagen on May 17 and 18, 2017. The topic: Copyright – to be or not to be, was chosen because the very existence of copyright and related rights protection is oftentimes cast in doubt, not least in view of the fundamental changes in both the economy and practicalities of the use and dissemination of works, performances, sound recordings and broadcasts. The Danish Group of ALAI, which organized the Congress, felt that it was time to reconsider the fundamental arguments behind this protection, both those that led to its institution several hundred years ago, and those that should lead us to maintain it today as a strong and vibrant legal institution. In addition, the nuances in the fundamental arguments, when comparing authors' rights and related rights, needed to be explored.

Some of the contributions are elaborate papers, prepared in advance and summarized orally by the speakers at the Congress, while others are redacted renderings of the oral presentations.

The Congress was organized by the Danish Group of ALAI, in particular under the guidance of the Board of the Danish Copyright Society (Dansk Selskab for Ophavsret), consisting of Morten Rosenmeier, Professor Ph.d. (President); Christine Bødtcher-Hansen, General Manager, Danish Publishers Association; Martin Gormsen, Consultant; Katja Elgaard Holm, President of Danish Actors' Association; Bjørn Høberg-Petersen, Attorney-at-law; Caroline Reiler, Executive Director, DR Consulting, Strategy and Communications, DR –

Danish Broadcasting Corporation; Peter Schønning, Attorney-at-law; Nicky Valbjørn Trebien, Acting Head of Copyright Unit, Ministry of Cultural Affairs; and Jørgen Blomqvist, Honorary Professor Ph.d. (Secretary).

The Congress was only possible because of sponsorships from: the law firm Lassen Ricard; Udvalget til Beskyttelse af Videnskabeligt Arbejde (UBVA); Dreyers Fond; law firm Kromann Reumert; Oxford University Press; law firm Gorrissen Federspiel; Danish Actors' Union; intellectual property attorneys de Simone & Partners; Copydan Verdens TV; law firm Horten; Jurist- og Økonomforbundets Forlag; Danish Musicians Union; Edward Elgar Publishing; Copydan Writing; and VISDA, Visuelle Rettigheder Danmark. The organizers are deeply grateful for this generous support.

Copenhagen, January 26, 2018
Jørgen Blomqvist

Préface

Cet ouvrage contient la plupart des articles et présentations du congrès annuel de l'Association Littéraire et Artistique Internationale (ALAI) qui a eu lieu à Copenhague les 17 et 18 mai 2017. Le sujet: Droits d'auteur – être ou ne pas être (Copyright – to be or not to be), a été choisi parce que l'existence même de la protection des droits d'auteur et des droits voisins est souvent remise en question, notamment lorsqu'on considère les changements fondamentaux, économiques autant que pratiques, que subissent l'utilisation et la diffusion des œuvres, des interprétations et exécutions artistiques, des enregistrements sonores et des émissions audiovisuelles. Le groupe danois de l'ALAI, qui a organisé le congrès, a jugé qu'il était temps de reconsidérer les arguments fondamentaux à l'origine de cette protection, à la fois ceux qui ont conduit à sa fondation il y a plusieurs siècles et ceux qui devraient nous conduire aujourd'hui à la maintenir comme une institution juridique forte et dynamique. En outre, les nuances des arguments fondamentaux, en comparant les droits d'auteurs et les droits voisins, demandaient à être explorées.

Certaines des contributions sont des articles complets, préparés à l'avance et résumés oralement par les conférenciers au congrès, tandis que d'autres sont des versions rédigées des présentations orales.

Le congrès a été organisé par le groupe danois de l'ALAI, notamment sous la direction du Conseil de la Société danoise des droits d'auteur (Dansk Selskab for Ophavsret), composé de professeur Morten Rosenmeier, Ph.d. (président); Christine Bødtcher-Hansen, directrice générale de l'Association des éditeurs danois; Martin Gormsen, consultant; Katja Elgaard Holm, présidente de l'Association danoise

des acteurs; Bjørn Høberg-Petersen, avocat; Caroline Reiler, directrice exécutive de DR Consulting, Stratégie et Communications, DR (Service national danois de radio et de télévision); Peter Schønning, avocat; Nicky Valbjørn Trebien, directeur par intérim du département des droits d'auteur, Ministère des affaires culturelles; et Jørgen Blomqvist, professeur honoraire, Ph.d. (secrétaire).

Le congrès n'a été possible que grâce au soutien financier des organisations et entreprises suivantes: le cabinet d'avocats Lassen Ricard; Udvalget til Beskyttelse af Videnskabeligt Arbejde (UBVA); Dreyers Fond; le cabinet d'avocats Kromann Reumert; Oxford University Press; le cabinet d'avocats Gorrissen Federspiel; le Syndicat des acteurs danois; les avocats en propriété intellectuelle de Simone & Partners; Copydan Verdens TV; le cabinet d'avocats Horten; Jurist- og Økonomforbundets Forlag; le Syndicat des musiciens danois; Edward Elgar Publishing; Copydan Writing; et VISDA, Visuelle Rettigheder Danmark. Les organisateurs tiennent à exprimer leur profonde gratitude pour ce soutien généreux.

Copenhague, le 26 janvier 2018
Jørgen Blomqvist

Prefacio

El presente libro contiene la mayoría de trabajos de investigación y presentaciones del Congreso anual de la Associatión Literaria y Artistica Internacional (Association Littéraire et Artistique Internationale (ALAI)), llevado a cabo en Copenhague el 17 y 18 de mayo de 2017. El tema: Copyright – to be or not to be [Derechos de autor: ser o no ser] fue elegido puesto que a menudo se pone en duda la mera existencia de los derechos de autor y la protección de derechos relacionados, entre otras cosas a tenor de los cambios fundamentales en la economía y practicalidades del uso y diseminación de obras, interpretaciones, grabaciones de audio y retransmisiones. El Grupo Danés de ALAI, que organizó el Congreso, estimó que era hora de reconsiderar los principales argumentos que subyacen a esta protección, tanto los que llevaron a instaurarla varios cientos de años atrás, como los que nos deberían llevar a mantenerla hoy en día como una institución legal robusta y activa. Además, existía la necesidad de explorar las connotaciones de los principales argumentos a la hora de comparar los derechos de autor y derechos conexos.

Algunas contribuciones son trabajos de investigación elaborados, preparados con antelación y resumidos oralmente por los ponentes del Congreso, mientras que otras son versiones redactadas de las presentaciones orales.

El Congreso fue organizado por el Grupo Danés de ALAI, específicamente bajo la dirección del Comité de la Sociedad danesa de derechos de autor (Dansk Selskab for Ophavsret), constituido por Morten Rosenmeier, Profesor Dr. (Presidente); Christine Bødtcher-Hansen, Directora General, Asociación Danesa de Editores (Danish

Publishers Association); Martin Gormsen, Consultor; Katja Elgaard Holm, Presidente de la Asociación danesa de actores; Bjørn Høberg-Petersen, Abogado; Caroline Reiler, Directora Ejecutiva de DR Consulting, Strategy and Communications, DR – Danish Broadcasting Corporation; Peter Schønning, Abogado; Nicky Valbjørn Trebien, Director interino de la Unidad de Derechos de autor, Ministerio de Cultura; y Jørgen Blomqvist (Profesor Honorario Dr., Secretaio de la Sociedad Danesa de Derechos del Autor).

El Congreso fue posible únicamente gracias a los siguientes patrocinios: bufete Lassen Ricard; Comité para la Protección de Trabajo Cientifico (Udvalget til Beskyttelse af Videnskabeligt Arbejde, UBVA; Fondo); Fonde Dreyers; bufete Kromann Reumert; Oxford University Press; bufete Gorrissen Federspiel; Unión Danesa de Actores; abogados de propiedad intelectual de Simone & Partners; Copydan Verdens TV; bufete Horten; Jurist- og Økonomforbundets Forlag; Unión Danesa de Músicos; Edward Elgar Publishing; Copydan Writing; y Visuelle Rettigheder Danmark (VISDA). Los organizadores están profundamente agredecidos por la generosa colaboración desinteresada.

Copenhague, 26 de enero de 2018
Jørgen Blomqvist

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OPENING SESSION

SÉANCE D'OUVERTURE

SESIÓN DE APERTURA

1

Welcoming speech

Morten Rosenmeier[1]

Mr. President, speakers and panelists, ladies and gentlemen,

On behalf of the Danish Copyright Association it is a great pleasure for me to welcome you all to the 2017 ALAI Congress.

The name of the congress is Copyright – to be or not to be. Most of us here today has copyright as our profession in one way or another. Some of us are barristers working with copyright. Some of us are copyright researchers and some of us work in right holders' organizations. Therefore, I suppose that we might end up with the conclusion that the answer is "to be".

But, nevertheless, I think it is important to have conferences such as this one where we ask: Why do we need copyright? Why is it there? Do we, who play a part in the way copyright is being used, do it the right way? Or is there something which we can do better?

Ever since copyright was invented several hundred years ago, some people have criticized it.

1. President of the Danish Copyright Association, Professor at the University of Copenhagen.

For example, some maintain that copyright is not an effective incentive, which persuades authors to create more works. They insist that, basically, authors do not create works because of the money, but because they simply follow a desire to express themselves.

Others claim that it is impossible to enforce copyright in the digital age. They say that everything is freely accessible on the internet and that it is impossible to apply copyright rules on the millions of private individuals who watch films or listen to music without permission.

Some say that copyright is undemocratic since it hampers freedom of speech.

And finally some people insist that copyright is unnecessary in our modern digital society because it generates huge sums of money for publishers and media companies, but these are no longer necessary since the internet allows the authors to publish their works themselves.

And you know what? This is all nonsense.

For example some critics state that copyright is not an effective incentive which persuade authors to create more works. In my opinion this assertion is totally childish. Certainly, it is true that some authors create works without considering the payment. As an example I can mention this humble speech of mine which I wrote without economic incentives. But what about films which cost one hundred million Euros to produce? Will a film production company invest one hundred million Euros in a film if everybody can watch it for free on the internet even before it opens in the cinemas?

Or some copyright critics assert that it is impossible to enforce copyright in a digital age. This is not a convincing criticism if you ask me. Of course, it is true that it is very difficult to enforce copyright rules towards private individuals in the digital age. But the primary objective of copyright is not, and has never been, to control the activities of private individuals. The primary objective of copyright is to control the activities of the business community, the public bodies and other professional players. And copyright has no problems in that area, not even in the digital age. For example, a publishing house, which owns the copyright in a book, can take action against

other publishing houses if they reprint the book without permission, or against a library that digitizes it illegally. Or a film production company which owns the copyright in a film can take action against cinemas if they show it.

It is not true either that copyright hampers freedom of speech. Among other things, copyright does not protect ideas as such, but only their expression.

Finally, it is not true that publishing houses and media companies are no longer needed in the digital age because the authors can just publish the works themselves on the internet. Of course, it is true that authors can publish works themselves in some cases. But there is also a number of cases where they need help from publishers and media companies. For example, a single author can hardly produce his own blockbuster movie. Most of us are also unable to make our own iPhone apps. But the publishers can.

So, when some critics of copyright claim that copyright is no longer needed it is not true. It is as untrue as it has ever been.

By the way, the critics of copyright also often overlook a very important thing, namely what one could call the social dimension of copyright.

Copyright channels money from economically strong sections of society to economically weak sectors of society. It redirects money to people who don't have much of it. It provides economic support for a part of society, which is economically weak. It is, in a way, a sort of social security law.

Think about it! It is true. A lot of authors earn a living from their art, but make very little money. For them copyright is not just an interesting scholarly topic. They and their families are economically dependent of copyright. It is because of copyright that they can fill up the tank at the gas station. Or that they can buy new football boots for their son.

Some critics of copyright think that copyright is all about getting money for multinational big businesses, and this way they show that they just didn't get it.

They don't understand a very important thing, namely that copyright provides money for the writers, the actors, the musicians,

the photographers, those who have decided to spend their lives writing and playing and taking pictures; and who don't get much money out of it. But when they sometimes get some money, it is to a large extent because of copyright.

Copyright is about getting money for an economically weak part of society. Copyright is about justice. Social justice. Think about it.

So we need copyright as much as we ever did.

But still it can be relevant to have conferences such as this one. For even if we support copyright, it does not necessarily mean that the copyright rules are all perfect. Perhaps some of them might be adjusted and made even better.

We will never know if we don't discuss it. That is why we have this conference.

Some of the best copyright experts in the world are present at this conference. Some of them are speakers and panelists; others are among the audience. I really look forward to hearing them all.

The fact that this ALAI conference is taking place in Copenhagen came about in 2009 where I discussed it for the first time with the former president of ALAI, Honorary Professor Victor Nabhan. We met at the ALAI Congress in London. We were standing in line for coffee. Professor Nabhan asked if it wasn't about time that we had an ALAI Congress in Denmark. Yes, no problem, I said. The thing is, back then I was just an ordinary member of the Danish Copyright Society. I wasn't in the board or anything so I didn't really have the authority to decide such things, I'm afraid. But I thought that the ALAI conference in London was very impressive and that it was a shame that we didn't have such a nice and impressive conference in Copenhagen. Also, I liked professor Nabhan a lot, and it was obvious that he wanted the conference to come to Copenhagen so I didn't want to disappoint him.

Later at the London Congress I met the secretary of The Danish Copyright Association, my friend Bjørn Høberg-Petersen. He had already heard the good news and was very pleased. For some unknown reason he looked rather tired, though. Maybe he was catching a cold or something, I thought. Shortly after he resigned as secre-

tary of the Society. And then some time later the chairman of Society suddenly resigned too. It was all very strange.

But this opened the way for my friend Honorary Professor of international copyright Jørgen Blomqvist and myself! Because now we took over the Danish Copyright Association. Jørgen said that it was ok with him that I become chairman, then he would be secretary. Thanks a lot, Jørgen, I said. That is very kind of you and I really appreciate it. And now I have a surprise for you: You are going to arrange an ALAI conference.

When Jørgen heard this, I think he tried to resign if I am not mistaken. But I had had enough of all these people resigning all the time so as his chairman I could not accept his resignation. I don't know where it will lead us if everybody just resigns all the time. Sometimes you simply have to bite the bullet and pull yourself together and get the job done, you see.

Since then Jørgen has done an enormous effort arranging this conference for us.

Jørgen, thank you very much for all your hard work. I promise that I will never trick you into arranging an ALAI Congress again, or at least I don't think I will.

We have received very generous support from a number of sponsors, including rights holders' organizations, prominent law firms, publishing houses and others. We are most grateful for that.

I have looked forward to this since 2009! Now it is finally happening.

Welcome to all of you!

2

Discours d'ouverture

Frank Gotzen[1]

To be or not to be, être ou ne pas être, cette question existentielle posée par Hamlet, prince du Danemark, dans le troisième acte de la célèbre pièce de William Shakespeare définit exactement le champ des préoccupations qui nous animent aujourd'hui.

Nous entendons parfois aujourd'hui des discours de certains qui prétendent que le droit d'auteur dit « traditionnel » serait condamné par la société de l'information. Ils prétendent que le droit d'auteur moderne devrait désormais se limiter à réclamer certaines rémunérations compensatoires, sans pouvoir constituer une quelconque entrave au bon fonctionnement des intermédiaires sur un marché libre, devenu numérique, et sans gêner les consommateurs dans leurs attente d'une jouissance illimitée et gratuite de n'importe quel contenu, disponible à volonté et de manière universelle. Dans cette vision, le droit d'auteur ne pourrait continuer à « être » que s'il lâche certaines de ses caractéristiques essentielles. Il faudrait en premier lieu le transformer en un droit industriel dépouillé de son aspect personnaliste. Il faudrait ensuite l'amputer en grande partie de son pou-

1. Président de l'ALAI, Professeur à Louvain.

voir d'interdiction pour le réduire à un droit à compensation pécuniaire.

Assurément, ce n'est pas là la vision qui marque la Convention de Berne. Ce texte international, qui constitue la raison d'être même de notre Association Littéraire et Artistique Internationale, part d'une vision personnaliste d'un droit écrit pour ceux et pour celles qui créent des œuvres de l'esprit. Le moyen d'assurer leur subsistance est celui d'une propriété littéraire et artistique, basée principalement sur le système du droit exclusif. Celui-ci, malgré son nom, n'a pas pour première vocation de vouloir tout interdire, mais bien plutôt d'organiser une plateforme permettant d'accorder des autorisations moyennant une juste rémunération, librement convenue.

C'était bien là la préoccupation qui animait Victor Hugo au moment du lancement de notre Association en 1878. Il était conscient bien sûr de l'importance des réglementations juridiques, mais ce qui lui importait en premier lieu c'était le statut de l'artiste dans la société. N'oublions pas dès lors l'importante connotation de droit social qui imprègne notre système de droit d'auteur. Il faut en premier lieu que le droit d'auteur soit en mesure de faire participer les hommes et les femmes qui créent ou interprètent les œuvres dont nous jouissons aux fruits générés par l'utilisation de leurs créations ou de leurs interprétations. Exprimé autrement, il ne faudrait pas que des exploitants ou des utilisateurs tirent de grands profits de réalisations artistiques, sans y associer les auteurs ou les interprètes qui leur procurent la matière première de leur activité.

It is a real pleasure and an honour for me to be able, as President of ALAI, to open a Congress of our Association in Copenhagen. Denmark was the first of the Scandinavian countries to join the European Union in 1973. At that time there were only 9 countries in what was then still called the European Economic Community, and so I could still nourish the illusion to try to be able to understand, at least passively, the written language of all EEC countries. That is the reason why I bought myself a basic grammar of the Danish language, as well as a dictionary Dutch-Danish and Danish-Dutch, the only one on the

market in my country, published in 1976 by Van GOOR Zonen in The Hague. The effort was difficult. However, it lead to the result that somehow I became able to read this delicious introduction on Danish copyright law, written by Willy Weincke, *Ophavsret*, published in Copenhagen in 1976. Another book I got my hands on at that time was *Immaterialretspositioner*, the doctoral thesis presented in 1965 by Mogens Koktvedgaard. What is more, thanks to, inter alia, ALAI meetings, I became friends with Mogens. This was the more so because he was not only a copyright expert like myself, but also got involved, like I did, in the management of a university. So gradually he became more than a friend, but acted also as a sort of an elder brother towards me, giving me good advice on things of professional and private life in general. I cannot but regret that today he is not able to be present amongst us anymore. Surely, he would have loved to be able to organize this conference. But at the same time he would surely have loved to see that the organization of the Copenhagen 2017 Congress had been entrusted to his best scholars, Jørgen Blomqvist, acting together with the President of the Danish Copyright Association, Professor Morten Rosenmeier. Jørgen, I cannot speak your language at all, but I could read your treatise published in 2011 in Danish on *International Ophavsret*, written together with Peter Schønning. It is a very valuable contribution to international literature and in the meantime, it has been supplemented by an English version intended for a larger public under the title of *Primer on International Copyright and Related Rights*, Edward Elgar, 2014.

These books prove that you and your colleagues are the right persons to engage in such a difficult task as the one we are going to initiate now, being the ALAI Congress 2017.

I wish you and us every success with this Conference, which I am now happy to declare open.

THE TRADITIONAL JUSTIFICATIONS FOR COPYRIGHT AND RELATED RIGHTS

LA JUSTIFICATION TRADITIONELLE DE LA PROTECTION DU DROIT D'AUTEUR ET DES DROITS VOISINS

LAS JUSTIFICACIONES TRADICIONALES DE LOS DERECHOS DE AUTOR Y DERECHOS RELACIONADAS

Moderator/Modérateur/Moderador:
Professeur honoraire Victor Nabhan, Université de Nottingham

Frequently, the justification for copyright is discussed on the basis of the original reasons why copyright was introduced in the statutes, starting in the late 18th century, and the different reasons have been used as an explanation why copyright developed differently in common law and civil law countries. These reasons must be seen in their contemporary context before their present validity can be assessed. The much more recent protection of related rights may follow partly the same, but also partly different rationales. The reasons advanced

for national protection may differ from those advanced for international protection.

La justifiation généralement admise pour la protection du droit d'auteur est fondée sur les raisons originales qui ont introduit le droit d'auteur dans les lois, dès le 18ème siècle déjà, lesquelles ont servi d'explication à la différence de développement du droit d'auteur dans les pays de commun law en comparaison à ceux de droit civil. Avant d'examiner la validité de ces raisons, il convient de souligner qu'elles peuvent se percevoir dans le contexte contemporain. La reconnaissance, beaucoup plus récente, de la protection des droits voisins, est également motivée par les mêmes raisons, mais aussi par des raisons différentes. Les raisons avancées pour la protection à l'échelle nationale du droit d'auteur peuvent être différentes de celles justifiant sa protection à l'échelle internationale.

Con frecuencia, se discute la justifiación de los derechos de autor sobre la base de los motivos originales por los que fueron introducidos los derechos de autor en los estatutos, a partir de fiales del siglo XVIII, y los diferentes motivos se han utilizado como una explicación de porque los derechos de autor se desarrollaron de modo diferente en los países que se rigen por derecho común y los que se rigen por derecho civil. Estos motivos se han de considerar en su contexto contemporáneo antes de que se pueda evaluar su validez actual. La mucho más reciente protección de los derechos relacionados puede seguir en parte la misma lógica, pero también puede ser en parte diferente. Las razones aducidas para la protección nacional pueden diferir de las aducidas para la protección internacional.

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3

General Report, Justifications for Authors' Rights

Jane C. Ginsburg[1]

While true copyright, in the sense of the systematic vesting of exclusive rights in authors, begins with the 1710 Statute of Anne, the predecessor system of printing privileges, generally viewed as designed to encourage printers and booksellers to invest in the labor and equipment of printing, sometimes also granted rights directly to authors, nowhere more so than in the Papal States and other jurisdictions over which the Vatican asserted temporal or spiritual authority. The Papal printing privileges and the petitions seeking them together reveal justifications for exclusive rights in books and prints that continue to prevail today: almost every justification adduced in the national reports finds a 16th-century counterpart. The most remarkable of these petitions, by Antonio Tempesta, a Florentine painter and printmaker, evokes justifications spanning the full range of modern intellectual property rhetoric, from fear of unscrupulous competitors, to author-centric rationales.

Tempesta wrote:

1. Professor, Colombia Law School, New York.

> Antonio Tempesta, Florentine painter, having in this city [Rome] printed a work of a new Rome, of which he is not only the creator, but also has drawn and engraved it with his own hand, with much personal expense, effort, and care for many years, and fearing that others may usurp this work from him by copying it, and consequently gather the fruits of his efforts, therefore approaches Your Holiness and humbly requests him to deign to grant him a special privilege as is usually granted to every creator of new works, so that no one in the Papal States may for ten years print, have printed, or have others make the said work, and [further requests] that all other works that the Petitioner shall in the future create or publish with permission of the superiors [Papal censorship authorities] may enjoy the same Privilege as well so that he may with so much greater eagerness attend to and labor every day [to create] new things for the utility of all, and for his own honor, which he will receive by the singular grace from Your Holiness.[2]

Invocations of labor and investment ("with much personal expense, effort, and care for many years"), and unfair competition-based justifications ("fearing that others may usurp this work from him by copying it, and consequently gather the fruits of his efforts") were familiar – indeed ubiquitous – in Tempesta's time, and, as the national reports evidence, still echo today. From the earliest Roman printing privileges in the late 15th century, these rationales figured prominently in petitions by and privileges granted both to authors and to publishers. Frequently, petitions and privileges would emphasize the public benefit that publishing the work would confer, while stressing that the author or publisher hesitates to bring the work forth, lest others unfairly reap the fruits of their labors, to the great detriment of the author or publisher. Other petitions make explicit the incentive rationale that underlies investment-protection arguments. They urge, as did Tempesta, that the grant of a privilege would encourage not

2. Archivio segreto vaticano [ASVat], Sec. Brev. Reg. 208 F. 74 (13 October 1593); the petition appears at F. 76r, translation mine. A full transcription of the original Italian appears in Eckhard Leuschner, "The Papal Printing Privilege", *Print Quarterly XV* (1998), 359, 370 (Appendix); a partial transcription appears in Christopher L.C.E. Witcombe, *Copyright in the Renaissance: Prints and the Privilegio in Sixteenth-Century Venice and Rome* (Leiden, Brill 2004), 242 & n. 24.

only immediate publication of the identified work, but also future productivity, to even greater public benefit ("so that he may with so much greater eagerness attend to and labor every day [to create] new things for the utility of all").[3] We can see that long before the 1710 British Statute of Anne, the precursor regime of printing privileges had well understood printing monopolies to be incentives to intellectual and financial investment. The pre-copyright system thus firmly established one of the philosophical pillars of modern copyright law.

Tempesta's petition, however, goes further than its antecedents with respect to the second pillar of modern copyright law, the natural rights of the author, a rationale that roots exclusive rights in personal creativity. Tempesta's contention that new works routinely receive privileges, implying "ought" (for his work) from "is" (for works in general), was not novel. But he focused the rights on the creator ("as is usually granted to every creator of new works"), and equated creativity with his personal honor, thus foreshadowing the moral rights conception of copyright that characterizes many civil law copyright regimes. It would be anachronistic to argue that Tempesta claimed that exclusive rights inherently arise out of the creation of a work of authorship (rather than solely by sovereign grant); on the contrary, Tempesta carefully acknowledged both that privileges are a "singular grace" from the Pope, and that all works must receive a license from the Papal censors. Nonetheless, in advancing the then-unusual request that the privilege cover "all other works that the Petitioner shall in the future create or publish," Tempesta was urging that his entire future production should automatically enjoy a ten-year monopoly on reproduction and distribution in the Papal States (subject, of course, to the censors' approval of each work Tempesta would bring forth). In effect, Tempesta was seeking a result equivalent to the modern rule, "you create it, it's yours." Tempesta also tied his request to incentive rationales – the broad grant would spur him ever

3. For a general discussion of Papal printing privileges, see Jane C. Ginsburg, "Proto-property in Literary and Artistic Works: Sixteenth-Century Papal Printing Privileges", 36 *Colum. J. L. & the Arts* 345 (2013), <http://www.lawandarts.org/articles/proto-property-in-literary-and-artistic-works-sixteenth-century-papal-printing-privileges/>

more eagerly to greater creativity, but even this conflation of creativity-based and labor-incentive conceptions, one might contend, anticipates the frequent oscillation and overlap in modern copyright between natural rights and social contractarian theories of copyright to which the national reports attest.

Let's compare Tempesta's justifications with the rationales of the current positive law of copyright, drawing modern precepts from the Statute of Anne, the U.S. Constitution, and the French copyright law of 1957, as recodified in the Code de la propriété intellectuelle.

The Statute of Anne is titled, "An Act for the Encouragement of Learned Men to Compose and Write useful books." Its preamble begins:

> Whereas printers Booksellers and other persons have of late frequently taken the liberty of printing reprinting and publishing or causing to be printed reprinted and published Books and other writings without the consent of the authors or proprietors of such books and writings to their very great detriment and too often to the Ruin of them and their families For preventing therefore such practices for the future and for the encouragement of learned men to compose and write useful books…

This text conjoins unfair competition and incentive rationales, justifications that, we have seen, can apply equally to authors and publishers. But it also focuses its rationales specifically on the creators of works. The text retains its author-orientation not only by initially vesting the rights in authors, but, in its final section, by endeavoring to ensure that authors in fact benefit from those rights. Section 11 of the Statute of Anne states:

> Provided always that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the Authors thereof if they are then living for another Term of fourteen years

The U.S. Constitution's patent-copyright clause, clearly inspired by the Statute of Anne, amplifies its predecessor:

> Congress shall have Power…
> To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries

This text identifies both the public-regarding objective (progress of learning), and the means to its achievement (securing time-bounded property rights in works of authorship). It thus plainly expresses the incentive rationale, but grounds it in the public benefit, rather than in the fear of ruinous competition. To that extent, the copyright clause aligns with social contractarian understandings of copyright. But the word "securing" evokes an additional conception, rooted in authors' natural rights. The constitution does not empower Congress to "grant" copyrights, but rather to "secure," that is, to reinforce authors' exclusive rights. The term thus implies pre-existing rights that Congress may strengthen. And the source of those rights, as the Massachusetts Act of March 17, 1783, among several pre-constitutional state copyright statutes, declared, is not only the need for an incentive to create, but also the natural right to the fruits of one's intellectual labor:

> As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is procured by the labor of his mind.

The U.S. Constitution thus melds the two predominant rationales for copyright.

By contrast, the French Law of 1957, article 1 (recodified as Code de la propriété intellectuelle art. L. 111-1) proclaims:

> L'auteur d'une œuvre de l'esprit jouit sur cette œuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous.
>
> Ce droit comporte des attributs d'ordre intellectuel et moral ainsi que des attributs d'ordre patrimonial,…

This text thus expresses the natural rights concept: authors' rights arise are property rights, and they arise "from the sole fact of the work's creation." (You create it, it's yours.) Moreover, it places the author's moral rights (what Tempesta might have called the author's "honor") ahead of her economic rights.

As the national reports demonstrate, however, most copyright regimes combine all the leading rationales to some extent. Some domestic systems may weight some justifications more heavily than others, but in fact, if not always in theory, copyright today manifests mixed motives. The first two of following charts synthesize the national reports along two axes, by justification and by country. The last two sort national justifications by legal basis: constitution, statutes, caselaw.

AUTHOR'S RIGHTS (JUSTIFICATION)									
	FUNDAMENTAL RIGHT		COPYRIGHT AS UTILITARIANISM						INTERNATIONAL HARMONIZATION (Treaty Obligations/EU Directives)
COUNTRY	NATURAL RIGHT (Locke/fruits of labor)	MORAL RIGHT/PERSONALITY (Hegel/Infusion of self)	PROMOTE CREATION/CULTURE (Incentive Theory)	PROMOTE/PROTECT CREATIVE INDUSTRIES (Economics)	REWARD CREATORS (Labor Theory)	PROTECT CREATORS (Livelihood Theory)	PROTECT PRIVATE PROPERTY	BALANCE PUBLIC INTERESTS (Creation v. Access/Idea dissemination)	
Argentina					X	X	X		
Belgium	X		X					X	
Canada		(X)	X	X	X	X		X	X
Croatia		X					X		
Czech Republic		X	X						
Denmark	(X)	(X)	(X)	(X)	(X)	(X)			X
Egypt	X	X				X			X
France	(X)	X	X			X		X	
Germany	(X)	X	X		X	X		X	X
Greece		X	X	X	X		X	(X)	
Hungary			X	X				X	
Israel			X	X				X	
Italy	X	X	X	(X)	X		X	X	
Japan			X	X	X				X
New Zealand		X	X					X	X
Portugal		X	(X)	X	X	X		X	
Spain		X	X	(X)		X	X	X	X

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AUTHOR'S RIGHTS (JUSTIFICATION)									
	FUNDAMENTAL RIGHT		COPYRIGHT AS UTILITARIANISM						INTERNATIONAL HARMONIZATION (Treaty Obligations/EU Directives)
COUNTRY	NATURAL RIGHT (Locke/fruits of labor)	MORAL RIGHT/PERSONALITY (Hegel/Infusion of self)	PROMOTE CREATION/CULTURE (Incentive Theory)	PROMOTE/PROTECT CREATIVE INDUSTRIES (Economics)	REWARD CREATORS (Labor Theory)	PROTECT CREATORS (Livelihood Theory)	PROTECT PRIVATE PROPERTY	BALANCE PUBLIC INTERESTS (Creation v. Access/Idea dissemination)	
Switzerland		(X)		(X)	(X)	X	(X)		X
Netherlands	(X)	(X)	X		X			(X)	X
Turkey		(X)				X			X
UK	X	X	X	X	X	X		X	X
US	(X)	(X)	X	X	X	X	(X)	X	X

X = Justifications attributed to the country's legislation/history and supported by general doctrine; (X) = Discussed as justifications in the country's secondary authority (only)

AUTHORS' RIGHTS JUSTIFICATIONS								
COPYRIGHT AS A FUNDAMENTAL RIGHT		COPYRIGHT AS UTILITARIANISM						INTERNATIONAL HARMONIZATION (Treaty Obligations/EU Directives)
NATURAL RIGHT (Locke/fruits of labor)	MORAL RIGHT / PERSONALITY (Hegel/Infusion of self)	PROMOTE CREATION/ CULTURE (Incentive Theory)	PROMOTE/PROTECT CREATIVE INDUSTRIES (Economics)	REWARD CREATORS (Labor Theory)	PROTECT CREATORS (Livelihood Theory)	PROTECT PRIVATE PROPERTY	BALANCE PUBLIC INTERESTS (Creation v. Access/Idea dissemination)	
Belgium	Croatia	Belgium	Canada	Argentina	Argentina	Argentina	Belgium	Canada
Egypt	Czech Republic	Canada	Greece	Canada	France	Croatia	Canada	Denmark
Italy	Egypt	Czech Republic	Hungary	Germany	Greece	Greece	France	Egypt
U.K.	France	France	Israel	Greece	Italy	Italy	Germany	Germany
(Denmark)	Germany	Germany	Japan	Italy	Spain	Spain	Hungary	Japan
(France)	Greece	Greece	Portugal	Portugal	Switzerland	Sweden	Israel	New Zealand
(Germany)	Italy	Hungary	Sweden	Japan	Turkey	(Switzerland)	Italy	Spain
(Netherlands)	New Zealand	Israel	U.K.	Netherlands	U.K.	(U.S.)	New Zealand	Sweden
(U.S.)	Portugal	Italy	U.S.	Sweden	U.S.		Portugal	Switzerland
	Spain	Japan	(Denmark)	U.K.	(Denmark)		Spain	Netherlands
	Sweden	New Zealand	(Italy)	U.S.	(Sweden)		U.K.	Turkey
	U.K.	Spain	(Spain)	(Denmark)			U.S.	U.K.
	(Canada)	Netherlands	(Switzerland)	(Switzerland)			(Greece)	U.S.
	(Denmark)	U.K.	(Sweden)					
	(Switzerland)	U.S.						
	(Netherlands)	(Denmark)						

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AUTHORS' RIGHTS JUSTIFICATIONS								
COPYRIGHT AS A FUNDAMENTAL RIGHT		COPYRIGHT AS UTILITARIANISM						INTERNATIONAL HARMONIZATION (Treaty Obligations/EU Directives)
NATURAL RIGHT (Locke/fruits of labor)	MORAL RIGHT /PERSONALITY (Hegel/Infusion of self)	PROMOTE CREATION/CULTURE (Incentive Theory)	PROMOTE/PROTECT CREATIVE INDUSTRIES (Economics)	REWARD CREATORS (Labor Theory)	PROTECT CREATORS (Livelihood Theory)	PROTECT PRIVATE PROPERTY	BALANCE PUBLIC INTERESTS (Creation v. Access/Idea dissemination)	
	(Turkey)	(Portugal)						
	(U.S.)							

Countries in parentheses indicate justifications cited in that country's secondary authority, but not generally attributed to copyright legislation or legislative history.

LEGAL BASES FOR COPYRIGHT LAW (SOURCES DU DROIT)						
COPYRIGHT			JUSTIFICATIONS			
CONSTITUTION (IP- or copyright-specific norms)	STATUTES	CASELAW	CONSTITUTION (IP- or copyright-specific, or other norms)	STATUTES	LEGISLATIVE HISTORY	CASELAW
Argentina	Argentina	Belgium	Czech Republic	Belgium	Belgium	Belgium
Croatia	Belgium	Czech Republic	France	Canada	Canada	Czech Republic
Egypt	Canada	Egypt	Germany	Croatia	France	Egypt
Portugal	Croatia	France	Greece	Egypt	Germany	France
[Sweden]	Czech Republic	Germany	Italy	France	Greece	Germany
U.S.	Denmark	Israel	Portugal	Hungary	Netherlands	Israel
	Egypt	Italy	Spain	Israel	Portugal	Italy
	France	New Zealand	U.S.	Japan	Spain	New Zealand
	Germany	Spain		Netherlands	Switzerland	Spain
	Greece	Sweden		Spain	U.S.	Sweden
	Hungary	Turkey		U.S.	U.K.	Turkey
	Israel	U.S.		U.K.		U.S.
	Italy	U.K.				U.K.
	Japan					
	Netherlands					
	New Zealand					
	Portugal					
	Spain					
	Sweden					
	Switzerland					
	Turkey					
	U.K.					
	U.S.					

LEGAL BASES FOR COPYRIGHT LAW (SOURCES DU DROIT)							
	COPYRIGHT			JUSTIFICATIONS			
COUNTRY	CONST. (IP- or copyright-specific norms)	STATUTES	CASELAW	CONST. (IP- or copyright-specific, or other norms)	STATUTES	LEGISLATIVE HISTORY	CASELAW
Argentina	X	X					
Belgium		X	X		X	X	X
Canada		X			X	X	
Croatia	X	X			X		
Czech Republic		X	X	X			X
Denmark		X					
Egypt	X	X	X		X		X
France		X	X	X	X	X	X
Germany		X	X	X		X	X
Greece		X		X		X	
Hungary		X			X		
Israel		X	X		X		X
Italy		X	X	X			
Japan		X			X		
New Zealand		X	X				X
Portugal	X	X		X			
Spain		X	X	X	X	X	X
Sweden	[X]	X	X				X
Switzer-land		X				X	
Nether-lands		X			X	X	
Turkey		X	X				X
U.K.		X	X		X	X	X
U.S.	X	X	X	X	X	X	X

4

Rapport général, les justifications du droit d'auteur

Jane C. Ginsburg[1]

Alors que le véritable droit d'auteur, dans le sens de l'investissement systématique des auteurs de tous les droits sur leurs oeuvres, commence avec la loi anglaise de la Reine Anne de 1710, le système antérieur des privilèges d'impression, était conçu en général pour encourager les imprimeurs et les libraires à investir dans la main-d'œuvre et le matériel l'imprimerie. Parfois, des priviléges accordaient des droits directement aux auteurs, surtout dans les États pontificaux et d'autres juridictions sur lesquelles le Vatican a revendiqué l'autorité temporelle ou spirituelle. Les privilèges d'imprimerie pontificaux ainsi que les pétitions qui les réclament révèlent ensemble des justifications pour les droits exclusifs sur les livres et les gravures qui continuent à prévaloir aujourd'hui: presque chaque justification apportée dans les rapports nationaux trouve une contrepartie au 16^{e} siècle. La plus remarquable de ces pétitions, par Antonio Tempesta, un peintre et graveur florentin, évoque des justifications correspondant à tout le répertoire de la rhétorique de la propriété intellectuelle moderne, de

1. Professeur, Faculté de droit de Colombia University, New York.

la crainte des concurrents sans scrupules, jusqu'aux raisonnements ancrés dans la personnalité de l'auteur.

Tempesta a écrit:

> Antonio Tempesta, peintre florentin, ayant imprimé dans cette ville [Rome] une œuvre montrant une nouvelle Rome, qu'il a non seulement créée, mais l'a aussi dessinée et gravée de sa propre main, avec beaucoup de dépenses personnelles, d'efforts et de soins pendant de nombreuses années, et craignant que d'autres ne l'usurpent en le reproduisant, et par conséquent en recueillant le fruit de ses efforts, il s'approche vers Votre Sainteté et lui demande humblement de daigner lui accorder un privilège spécial, comme il est en général accordé à tout créateur de nouvelles œuvres, de sorte que personne dans les États pontificaux ne puisse imprimer, faire imprimer ou réaliser ce travail pendant dix ans, et [demande en outre] que toutes les autres œuvres que le requérant créera ou publiera à l'avenir avec la permission des supérieurs [les autorités de la censure papale] puissent jouir du même privilège afin qu'il puisse, avec beaucoup plus d'ardeur, s'occuper et travailler chaque jour [pour créer] de nouvelles choses pour l'utilité de tous, et pour son propre honneur, qu'il recevra par la grâce singulière de Votre Sainteté.[2]

Les invocations du travail et de l'investissement (« avec beaucoup de dépenses personnelles, d'efforts et de soins pendant de nombreuses années »), et les justifications fondées sur la concurrence déloyale (« craignant que d'autres n'usurpent ce travail en le copiant, et par conséquent ne récoltent les fruits de ses efforts ») étaient familiers – en fait omniprésents – à l'époque de Tempesta, et, comme le montrent les rapports nationaux, ces arguments résonnent toujours aujourd'hui. Dès les premiers privilèges de l'imprimerie romaine à la

2. Archivio segreto vaticano [ASVat], Sec. Brev. Enregistrement. 208 F. 74 (13 octobre 1593); la pétition apparaît à F. 76r, ma traduction Une transcription complète de l'original en italien apparaît dans Eckhard Leuschner, « Le privilège d'impression papale », *Print Quarterly XV* (1998), 359, 370 (Annexe); une transcription partielle apparaît dans Christopher L.C.E. Witcombe, *le droit d'auteur à la renaissance: Les gravures et le privilège au XVIe siècle à Venise et à Rome* (Leiden, Brill 2004), 242 et n. 24.

fin du 15e siècle, ces raisonnements figuraient de façon large dans les pétitions et les privilèges accordés aux auteurs et aux éditeurs. Fréquemment, les pétitions et les privilèges mettent l'accent sur le bénéfice public que confère la publication de l'œuvre, tout en insistant sur le fait que l'auteur ou l'éditeur hésite à faire avancer le travail, de peur que d'autres ne récoltent injustement les fruits de leurs travaux, au grand détriment de l'auteur ou de l'éditeur. D'autres pétitions expliquent la logique d'incitation qui est à la base des arguments de protection de l'investissement. Ils affirment, tout comme Tempesta, que l'octroi d'un privilège encourage non seulement la publication immédiate de l'œuvre identifiée, mais aussi la productivité future, pour un bénéfice public encore plus grand (« afin qu'il puisse, avec beaucoup plus d'ardeur, s'occuper et travailler tous les jours [pour créer] de nouvelles choses pour l'utilité de tous »).[3] Nous pouvons voir que longtemps avant la loi britannique d'Anne de 1710, le régime précurseur des privilèges d'imprimerie avait bien compris que les monopoles de l'imprimerie incitaient à l'investissement intellectuel et financier. Le système de pré-droit d'auteur a ainsi solidement fondé l'un des piliers philosophiques de la loi sur le droit d'auteur moderne.

La pétition de Tempesta, toutefois, va plus loin que ses antécédents en ce qui concerne le deuxième pilier de la loi moderne sur le droit d'auteur, les droits naturels de l'auteur, un raisonnement qui enracine les droits exclusifs dans la créativité personnelle. L'affirmation de Tempesta selon laquelle les nouvelles œuvres reçoivent régulièrement des privilèges, n'était pas nouvelle. Elle implique que son œuvre « doit » être protégée comme le « sont » les œuvres en général. Mais il a concentré les droits sur le créateur (« comme c'est généralement le cas pour tous les créateurs de nouvelles œuvres ») et a assimilé la créativité à son honneur personnel, présageant ainsi la conception des droits moraux du droit d'auteur qui caractérise de nombreux régimes de droit d'auteur de droit civil. Il serait anachronique de sou-

3. Pour une discussion générale sur les privilèges de l'imprimerie pontificaux, voir Jane C. Ginsburg, Proto-propriété dans les œuvres littéraires et artistiques: Privilèges d'impression papale du XVIe siècle, 36 colonnes. J. L. et les arts 345 (2013), <http://www.lawandarts.org/articles/proto-propriété-dans-les-œuvres-littéraires-et-artistiques-privilèges-d'impression-papale-du-XVIe-siècle/>.

tenir que Tempesta a prétendu que les droits exclusifs découlent intrinsèquement de la création d'une œuvre d'auteur (plutôt que seulement d'un privilége souverain); au contraire, Tempesta a soigneusement reconnu à la fois que les privilèges sont une « grâce singulière » du Pape, et que tous les travaux doivent recevoir une licence des censeurs Pontificaux. Néanmoins, dans l'avancement de la requête alors inhabituelle que le privilège couvre « toutes les autres œuvres que le requérant réalisera ou publiera à l'avenir », Tempesta a insisté pour que toute sa production future jouisse automatiquement d'un monopole de dix ans sur la reproduction et la distribution dans les états pontificaux, sous réserve, bien sûr, de l'approbation par les censeurs de chaque œuvre que Tempesta présenterait. En effet, Tempesta cherchait un résultat équivalent à la règle moderne, « vous le créez, c'est le vôtre ». Tempesta a également lié sa requête à des raisonnements incitatifs – l'octroi général étant une incitation à une créativité tojours plus grande. Cet assemblage de conceptions fondées sur la créativité et l'incitation au travail anticipe aussi l'oscillation fréquente et le chevauchement du droit d'auteur moderne entre les droits naturels et les théories du droit d'auteur basées sur les conceptions des contrats sociaux, ceci étant attesté par les rapports nationaux.

Comparons les justifications de Tempesta aux raisonnements de la loi positive actuelle du droit d'auteur, en tirant des préceptes modernes de la loi d'Anne, dans la constitution des États-Unis et dans la loi française sur le droit d'auteur de 1957, telle que codifiée dans le code de la propriété intellectuelle.

La loi d'Anne est intitulée comme « Une loi destinée à l'encouragement des hommes instruits à composer et à écrire des livres utiles » Son préambule commence:

> Alors que les imprimeurs, les libraires et autres personnes ont récemment pris la liberté d'imprimer, de réimprimer et de publier ou de faire réimprimer et publier des livres et d'autres écrits sans le consentement des auteurs ou des propriétaires de tels livres et écrits à leur très grand détriment et trop souvent à la ruine de ces derniers et leurs familles pour empêcher ainsi de telles pratiques

> dans l'avenir et pour encourager les savants à composer et à écrire des livres utiles.

Ce texte associe une concurrence déloyale et des raisonnements incitatifs, raisonnements qui, nous l'avons vu, peuvent s'appliquer également aux auteurs et aux éditeurs. Mais il concentre aussi ses raisonnements spécifiquement sur les créateurs d'œuvres. Le texte conserve la focalisation sur l'auteur non seulement en conférant initialement les droits aux auteurs, mais, dans sa dernière section, en veillant à ce que les auteurs bénéficient effectivement de ces droits. L'article 11 de la loi d'Anne stipule:

> À condition qu'après l'expiration du délai de quatorze ans, le droit exclusif d'imprimer ou de disposer des copies revienne pour une autre période de quatorze ans à leurs auteurs s'ils sont toujours en vie.

Aux États-Unis, la clause du droit d'auteur et des brevets de la constitution, clairement inspirée par la loi d'Anne, amplifie le texte précédent:

> Le congrès aura le pouvoir
> de promouvoir le progrès de la science et des arts utiles en assurant aux auteurs et aux inventeurs, pour des durées sur limitées, le droit exclusif sur leurs écritures et découvertes respectives

Ce texte identifie à la fois l'objectif relatif au public (progrès de la science) et les moyens de sa réalisation (obtention de droits de propriété limités dans le temps sur les œuvres de l'esprit). Il exprime donc clairement le raisonnement d'incitation, mais le fonde dans l'intérêt public, plutôt que dans la crainte d'une concurrence ruineuse. Dans cette mesure, la clause sur le droit d'auteur s'harmonise avec la conception du droit d'auteur comme un contrat social. Mais le mot « assurant » (securing) évoque une conception supplémentaire, ancrée dans les droits naturels des auteurs. La constitution n'autorise pas le congrès à « accorder » des droits d'auteur, mais plutôt a renforcer « assurant » les droits exclusifs des auteurs. Ce terme implique donc

des droits préexistants que le congrès peut renforcer. Et la source de ces droits, comme l'a déclaré la loi de Massachusetts du 17 mars 1783, entre plusieurs lois pré-constitutionnelles sur le droit d'auteur, est non seulement la nécessité d'une incitation à créer, mais aussi le droit naturel aux fruits de son travail intellectuel:

> Comme principal encouragement, pour que de telles personnes consentent à de grands et bénéfiques efforts de cette nature, il faut l'existence d'une sécurité juridique des fruits de leur étude et de leur industrie pour eux-mêmes; et comme une telle sécurité est l'un des droits naturels de tous les hommes, il n'y a pas de propriété plus singulière à un homme que celle que procure le travail de son esprit.

Aux États-Unis la constitution fusionne ainsi les deux raisonnements prédominants du droit d'auteur.

En revanche, la loi française de 1957, article 1 (codifiée en tant que code de la propriété intellectuelle art. L. 111-1) proclame:

> L'auteur d'une œuvre de l'esprit jouit sur cette œuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous.
>
> Ce droit comporte des attributs d'ordre intellectuel et moral ainsi que des attributs d'ordre patrimonial,...

Ce texte exprime ainsi le concept des droits naturels: les droits de propriété des auteurs naissent « du seul fait de la création de l'œuvre ». (Vous le créez, c'est le vôtre.) De plus, il place les droits moraux de l'auteur (ce que Tempesta aurait appelé « l'honneur » de l'auteur) avant ses droits économiques.

Comme le démontrent les rapports nationaux, cependant, la plupart des régimes de droit d'auteur associent dans une certaine mesure tous les principaux raisonnements. Certains systèmes domestiques peuvent pondérer certaines justifications plus fortement que d'autres, mais en fait, sinon toujours en théorie, le droit d'auteur manifeste aujourd'hui des motifs mixtes. Les deux premiers diagrammes suivants synthétisent les rapports nationaux selon deux

axes, par justification et par pays. Les deux derniers classent les justifications nationales selon leur base légale: constitution, statuts, jurisprudence.

DROITS DES AUTEURS (JUSTIFICATION)									
	DROIT FONDAMENTAL		DROIT D'AUTEUR EN TANT QU'UTILITARISME						HARMONISATION INTERNATIONALE (Obligations conventionnelles/Directives de l'UE)
PAYS	DROIT NATUREL (Locke/fruits du travail)	DROIT MORAL/PERSONNALITÉ (Hegel/Infusion de soi)	PROMOUVOIR LA CRÉATION/ CULTURE (Théorie incitative)	PROMOUVOIR/PROTÉGER LES INDUSTRIES CRÉATIVES (Économie)	RECOMPENSER LES CRÉATEURS (Théorie du travail)	PROTÉGER LES CRÉATEURS (Théorie des moyens de subsistance)	PROTÉGER LA PROPRIÉTÉ PRIVÉE	ÉQUILIBRE DES INTÉRÊTS PUBLICS (Création ou accès/Diffusion d'idées)	
Argentine					X	X	X		
Belgique	X		X					X	
Canada		(X)	X	X	X	X		X	X
Croatie		X					X		
République Tchèque		X	X						
Danemark	(X)	(X)	(X)	(X)	(X)	(X)			X
Égypte	X	X				X			X
France	(X)	X	X			X		X	
Allemagne	(X)	X	X		X	X		X	X
Grèce		X	X	X	X		X	(X)	
Hongrie			X	X				X	
Israël			X	X				X	
Italie	X	X	X	(X)	X		X	X	
Japon			X	X	X				X
Nouvelle-Zélande		X	X					X	X
Portugal		X	(X)	X	X	X		X	

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DROITS DES AUTEURS (JUSTIFICATION)									
	DROIT FONDAMENTAL		DROIT D'AUTEUR EN TANT QU'UTILITARISME						HARMONISATION INTERNATIONALE (Obligations conventionnelles/Directives de l'UE)
PAYS	DROIT NATUREL (Locke/fruits du travail)	DROIT MORAL/PERSONNALITÉ (Hegel/Infusion de soi)	PROMOUVOIR LA CRÉATION/ CULTURE (Théorie incitative)	PROMOUVOIR/PROTÉGER LES INDUSTRIES CRÉATIVES (Économie)	RECOMPENSER LES CREATEURS (Théorie du travail)	PROTÉGER LES CRÉATEURS (Théorie des moyens de subsistance)	PROTÉGER LA PROPRIÉTÉ PRIVÉE	ÉQUILIBRE DES INTÉRÊTS PUBLICS (Création ou accès/Diffusion d'idées)	
Espagne		X	X	(X)		X	X	X	X
Suisse		(X)		(X)	(X)	X	(X)		X
Pays-Bas	(X)	(X)	X		X			(X)	X
Turquie		(X)				X			X
Royaume-Uni	X	X	X	X	X	X		X	X
États-Unis	(X)	(X)	X	X	X	X	(X)	X	X

X = les justifications sont attribués à la legislation ou travaux parlementaires et confirmé dans la doctrine génerale; (X) = discuté comme des justificatións dans les sources sécondaires du pays (uniquement).

JUSTIFICATIONS DES DROITS DES AUTEURS								
DROIT D'AUTEUR EN TANT QUE DROIT FONDAMENTAL		DROIT D'AUTEUR EN TANT QU'UTILITARISME						HARMONISATION INTERNATIONALE (Obligations conventionnelles/Directives de l'UE)
DROIT NATUREL (Locke/fruits du travail)	DROIT MORAL/PERSONNALITÉ (Hegel/Infusion de soi)	PROMOUVOIR LA CRÉATION/CULTURE (Théorie incitative)	PROMOUVOIR/PROTÉGER LES INDUSTRIES CRÉATIVES (Économie)	RÉCOMPENSER LES CRÉATEURS (Théorie du travail)	PROTÉGER LES CRÉATEURS (Théorie des moyens de subsistance)	PROTÉGER LA PROPRIÉTÉ PRIVÉE	ÉQUILIBRE DES INTÉRÊTS PUBLICS(Création ou accès/Diffusion d'idées)	
Belgique	Croatie	Belgique	Canada	Argentine	Argentine	Argentine	Belgique	Canada
Égypte	République Tchèque	Canada	Grèce	Canada	France	Croatie	Canada	Danemark
Italie	Égypte	République Tchèque	Hongrie	Allemagne	Grèce	Grèce	France	Égypte
Royaume-Uni	France	France	Israël	Grèce	Italie	Italie	Allemagne	Allemagne
(Danemark)	Allemagne	Allemagne	Japon	Italie	Espagne	Espagne	Hongrie	Japon
(France)	Grèce	Grèce	Portugal	Portugal	Suisse	Suède	Israël	Nouvelle Zélande
(Allemagne)	Italie	Hongrie	Suède	Japon	Turquie	(Suisse)	Italie	Espagne
(Pays-Bas)	Nouvelle Zélande	Israël	Royaume-Uni	Pays-Bas	Royaume-Uni	(États-Unis)	Nouvelle Zélande	Suède
(États-Unis)	Portugal	Italie	États-Unis	Suède	États-Unis		Portugal	Suisse
	Espagne	Japon	(Danemark)	Royaume-Uni	(Danemark)		Espagne	Pays-Bas
	Suède	Nouvelle Zélande	(Italie)	États-Unis	(Suède)		Royaume-Uni	Turquie
	Royaume-Uni	Espagne	(Espagne)	(Danemark)			États-Unis	Royaume-Uni
	(Canada)	Pays-Bas	(Suisse)	(Suisse)			(Grèce)	États-Unis
	(Danemark)	Royaume-Uni	(Suède)					
	(Suisse)	États-Unis						

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JUSTIFICATIONS DES DROITS DES AUTEURS								
DROIT D'AUTEUR EN TANT QUE DROIT FONDAMENTAL		DROIT D'AUTEUR EN TANT QU'UTILITARISME						HARMONISATION INTERNATIONALE (Obligations conventionnelles/Directives de l'UE)
DROIT NATUREL (Locke/fruits du travail)	DROIT MORAL/PERSONNALITÉ (Hegel/Infusion de soi)	PROMOUVOIR LA CRÉATION/CULTURE (Théorie incitative)	PROMOUVOIR/PROTÉGER LES INDUSTRIES CRÉATIVES (Économie)	RÉCOMPENSER LES CRÉATEURS (Théorie du travail)	PROTÉGER LES CRÉATEURS (Théorie des moyens de subsistance)	PROTÉGER LA PROPRIÉTÉ PRIVÉE	ÉQUILIBRE DES INTÉRÊTS PUBLICS(Création ou accès/Diffusion d'idées)	
	(Pays-Bas)	(Danemark)						
	(Turquie)	(Portugal)						
	(États-Unis)							

Les pays entre parenthèses indiquent les justifications énoncées dans l'autorité secondaire de ce pays, mais ne sont pas en général attribuées au droit d'auteur.

BASES JURIDIQUES DU DROIT D'AUTEUR (SOURCES DU DROIT)						
DROIT D'AUTEUR			JUSTIFICATIONS			
CONSTITUTION (PI- ou les normes spécifiques au droit d'auteur)	STATUTS	JURISPRUDENCE	CONSTITUTION (PI- ou droit d'auteur spécifique, ou d'autres normes)	STATUTS	TRAVAUX PARLEMENTAIRES	JURISPRUDENCE
Argentine	Argentine	Belgique	République Tchèque	Belgique	Belgique	Belgique
Croatie	Belgique	République Tchèque	France	Canada	Canada	République Tchèque
Égypte	Canada	Égypte	Allemagne	Croatie	France	Égypte
Portugal	Croatie	France	Grèce	Égypte	Allemagne	France
[Suède]	République Tchèque	Allemagne	Italie	France	Grèce	Allemagne
États-Unis	Danemark	Israël	Portugal	Hongrie	Pays-Bas	Israël
	Égypte	Italie	Espagne	Israël	Portugal	Italie
	France	Nouvelle Zélande	États-Unis	Japon	Espagne	Nouvelle Zélande
	Allemagne	Espagne		Pays-Bas	Suisse	Espagne
	Grèce	Suède		Espagne	États-Unis	Suède
	Hongrie	Turquie		États-Unis	Royaume-Uni	Turquie
	Israël	États-Unis		Royaume-Uni		États-Unis
	Italie	Royaume-Uni				Royaume-Uni
	Japon					
	Pays-Bas					
	Nouvelle Zélande					
	Portugal					
	Espagne					
	Suède					
	Suisse					
	Turquie					
	Royaume-Uni					
	États-Unis					

BASES JURIDIQUES DU DROIT D'AUTEUR (SOURCES DU DROIT)							
	DROIT D'AUTEUR			JUSTIFICATIONS			
PAYS	CONSTITUTION (PI- ou droit d'auteur spécifique, ou d'autres normes)	STATUTS	JURISPRUDENCE	CONSTITUTION (PI- ou droit d'auteur spécifique, ou d'autres normes)	STATUTS	TRAVAUX PARLEMENTAIRES	JURISPRUDENCE
Argentine	X	X					
Belgique		X	X		X	X	X
Canada		X			X	X	
Croatie	X	X			X		
République Tchèque		X	X	X			X
Danemark		X					
Égypte	X	X	X		X		X
France		X	X	X	X	X	X
Allemagne		X	X	X		X	X
Grèce		X		X		X	
Hongrie		X			X		
Israël		X	X		X		X
Italie		X	X	X			
Japon		X			X		
Nouvelle-Zélande		X	X				X
Portugal	X	X		X			
Espagne		X	X	X	X	X	X
Suède	[X]	X	X				X
Suisse		X				X	
Pays-Bas		X			X	X	

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BASES JURIDIQUES DU DROIT D'AUTEUR (SOURCES DU DROIT)							
	DROIT D'AUTEUR			JUSTIFICATIONS			
PAYS	CONSTITUTION (PI- ou droit d'auteur spécifique, ou d'autres normes)	STATUTS	JURISPRUDENCE	CONSTITUTION (PI- ou droit d'auteur spécifique, ou d'autres normes)	STATUTS	TRAVAUX PARLEMENTAIRES	JURISPRUDENCE
Turquie		X	X				X
Royaume-Uni		X	X		X	X	X
États-Unis	X	X	X	X	X	X	X

5

Informe general, Justificaciones de los Derechos de Autor

Jane C. Ginsburg[1]

Mientras que el verdadero derecho de autor, en el sentido de la sistemática atribución de derechos exclusivos a autores, comienza con el estatuto de Anne de 1710, el sistema precursor de privilegios de impresión, generalmente visto como diseñado para motivar a las impresoras y las librerías a invertir en la mano de obra y el equipo de impresión, a veces también concedió derechos directamente a los autores, en ningún lugar tanto como en los Estados Pontificios y otras jurisdicciones sobre las cuales el Vaticano ejercía autoridad espiritual o temporal. Los privilegios papales de impresión y las peticiones que buscan reunirlos revelan justificaciones para derechos exclusivos en libros y grabados, que siguen prevaleciendo hoy: casi cada justificación presentada en los informes nacionales cuenta con una contraparte del siglo XVI. La más notable de estas peticiones, es la formulada por Antonio Tempesta, un pintor florentino y grabador, la cual evoca justificaciones que abarcan toda la gama de la retórica de

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la propiedad intelectual moderna, desde el miedo a los competidores sin escrúpulos, a los fundamentos centrados en el autor.

Tempesta escribió:

> Antonio Tempesta, pintor florentino, qual en esta ciudad [Roma] imprimió una obra de una nueva Roma, de la cual él no sólo es el creador, sino que también la ha dibujado y grabado con sus propia manos, con mucho cuidado, gastos personales y esfuerz durante muchos años y temiendo que otros puedan usurpar su trabajo copiándolo y por lo tanto recogiendo el fruto de sus esfuerzos. Por esto se dirige a Su Santidad y humildemente le pide que se digne a concederle un privilegio especial como es generalmente otorgado a todo creador de obras nuevas, así que nadie en los Estados Pontificios pueda imprimir durante diez años, haber imprimido, o hacer que otros hagan dicho trabajo y [otras solicitudes], y que todas las demás obras que el peticionante cree o publique en el futuro con permiso de los superiores [autoridades de censura Papal] puedan disfrutar del mismo Privilegio para que a con mucho mayor entusiasmo pueda atender y trabajar cada día [para crear] cosas nuevas para la utilidad de todos y para su propio honor, el cual recibirá por la gracia singular de Su Santidad.[2]

Invocaciones de mano de obra e inversión («con mucho gasto personal, esfuerzo y cuidado durante muchos años») y justificaciones basadas en la competencia desleal («por temor a que otros pueden usurpar este trabajo copiándolo y por lo tanto recoger el fruto de su esfuerzos») eran familiares y, de hecho hasta ubicuas, en la época de Tempesta y, como los informes nacionales demuestran, todavía vigentes hoy en día. Desde los primeros privilegios de impresión romanos a finales del siglo XV, destaca la presencia de estos fundamentos en peticiones llevadas a cabo por tanto autores como editora en pri-

2. Archivio segreto vaticano [ASVat], Sec. Brev. Reg. 208 F. 74 (13 de octubre de 1593); la petición aparece en F. 76r, la traducción es mía. Una transcripción completa del original italiano aparece en Eckhard Leuschner, "El privilegio de la impresión Papal", *impresión trimestral XV* (1998), 359, 370 (apéndice); una transcripción parcial aparece en Christopher L.C.E. Witcombe, *Derechos de autor en el Renacimiento: Impresiones y el Privilegio en el siglo XVI Venecia y Roma* (Leiden, Brill 2004) 242 y n. 24.

vilegios otorgados a los mismos. Frecuentemente, las peticiones y los privilegios remarcaban el beneficio público que supondría la publicación de la obra, mientras subrayaban las dudas del autor o el editor de producir la obra, ya que otros de forma deshonesta recogerían el fruto de su trabajo, perjudicando en gran medida al autor o al editor. Otras peticiones explicitan el fundamento de los incentivos subyacentes a los argumentos relativos a la protección de la inversión. Estas instan, tal como hizo Tempesta, a que la concesión de un privilegio no sólo animaría a una publicación inmediata de la obra identificada, sino también la productividad futura, para un mayor beneficio púbico («para que pueda atender su trabajo cada día con mayor entusiasmo [para crear] nuevas cosas que sean útiles para todo el mundo»).[3] Se puede observar que mucho antes del Estatuto Británico de Anne de 1710, el régimen precursor de privilegios de impresión tenía bien entendidos los monopolios de impresión como incentivos a la inversión financiera e intelectual. El sistema anterior a los derechos de autor había establecido de este modo firmemente uno de los pilares filosóficos de la ley moderna de derechos de autor.

Sin embargo, la petición de Tempesta va más allá de sus antecedentes con respecto al segundo pilar de la ley moderna de derechos de autor, los derechos naturales de autor, un fundamento que tiene su origen en derechos exclusivos sobre la creatividad personal. La intentión de Tempesta de que las nuevas obras rutinariamente recibiera privilegios, que implicaban el «debería» (por su trabajo) de el «ser» (para trabajos en general), no era algo nuevedoso. Sin embargo, él centró los derechos en el creador («como se concede generalmente a todo creador de obras nuevas») y equiparando su creatividad con su honor personal, presagiando así la concepción de los derechos morales de los derechos de autor que caracteriza muchos regímenes de leyes civíles de derechos de autor. Sería anacrónico argumentar que Tempesta afirmó que los derechos exclusivos surgen

3. Para una discusión general de los privilegios de impresión papales, véase Jane C. Ginsburg, Proto-property in Literary and Artistic Works (*Protopropiedad en las obras literarias y artísticas*): Privilegios de impresión papales del siglo XVI, colum. 36 *J. L. & the Arts 345* (2013), <http://www.lawandarts.org/articles/proto-property-in-literary-and-artistic-works-sixteenth-century-papal-printing-privileges/>.

inherentemente de la creación de una obra de autoría (en lugar de únicamente por concesión soberana); por el contrario, Tempesta reconoció cuidadosamente tanto el que los privilegios sean una «gracia singular» del Papa, como que todas las obras deben recibir una licencia de los censores pontificios. Sin embargo, al avanzar con la entonces inusual solicitud de que el privilegio debería cubrire «todas las otras obras que el peticionante cree o publique en el futuro», Tempesta estaba instando a que su producción futura automáticamente debería disfrutar de un monopolio de diez años de reproducción y distribución en los Estados Pontificios (sujeta, por supuesto, a la aprobación de los censores de cada obra que Tempesta creara). En efecto, Tempesta buscaba un resultado equivalente a la regla moderna, «tú lo creas, es tuyo». Tempesta también incluyó en su solicitud fundamentos de incentivos, una concesión amplia que le estimularía a una aún mayor creatividad. Sin embargo uno podría contender, que incluso con esta fusión de concepciones basada en creatividad e incentivos laborales, anticipa la oscilación frecuente y la superposición entre derechos naturales y las teorías contractualistas sociales del derecho de autor en los derechos de autor modernos, de los que atestiguan los informes nacionales.

Comparemos las justificaciones de Tempesta con los fundamentos de la ley positiva actual de derechos de autor, extrayendo preceptos modernos a partir del Estatuto de Anne, la constitución de los EEUU, y la ley de derechos de autor francesa de 1957, como recodificado en el código de la propiedad intelectual.

El Estatuto de Anne se titula, «Una Ley para el Estímulo de Hombres Letrados para Componer y Escribir libros útiles». Su preámbulo comienza asi:

> Mientras que los impresores de las librerias y otras personas últimamente se han tomado con frecuencia la libertad de imprimir, reimprimir y publicar, o provocar que se imprima, reimprima libros publicados y otros escritos sin el consentimiento de los autores o propietarios de dichos libros o escritos, para su gran perjuicio y con demasiada frecuencia provocando su ruina y la de sus familias Por lo tanto, para prevenir tales prácticas en el futuro

> y para estimular a hombres letrados a componer y escribir libros útiles...

Este texto vincula la competencia desleal y fundamentos de incentivos, justificaciones que como hemos visto, puede aplicarse igualmente a autores y editores. Al mismo tiempo, también centra sus fundamentos específicamente en los creadores de obras. El texto conserva su orientación hacia el autor no sólo adjudicando inicialmente los derechos a autores, sino, en su tramo final, tratando de asegurar que de hecho los autores se beneficien de esos derechos. La sección 11 del estatuto de Anne establece:

> Siempre y cuando que después de la expiración de dicho plazo de catorce años el derecho exclusivo de impresión o disposición de ejemplares sea devuelta a los autores de los mismos si viven por otro plazo de catorce años

La cláusula de patentes y de derechos de autor de la Constitución de los EEUU, claramente inspirada por el Estatuto de Anne, amplifica a su predecesor:

> El congreso tendrá poder ...
> para promover el progreso de la ciencia y las artes útiles asegurando a los autores e inventores durante periodos de Tiempo limitados, el derecho exclusivo a sus respectivos escritos y descubrimientos

El texto identifica tanto el objetivo relativo al público (progreso de aprendizaje) como los medios para conseguirlo (asegurar derechos de propiedad de tiempo limitado sobre trabajos en condición de autor). De este modo, expresa claramente el fundamento de incentivos, aunque basado en el beneficio público más que en el miedo a una competencia que conlleve la ruina. En este sentido, la cláusula de derechos de autor se alinea con la comprensión social contractualista de los derechos de autor. Mientras que la palabra «garantía», evoca una concepción adicional arraigada en los derechos naturales de autor. La constitución no da poderes al Congreso para «conceder»

derechos de autor, sino más bien para «asegurar», es decir, reforzar los derechos exclusivos de los autores. El término implica así implica derechos preexistentes que el Congreso debe fortalecer. Y la fuente de esos derechos, como declaró el Acta de Massachusetts del 17 de marzo de 1783, entre varios estatutos de derechos de autor del estado preconstitucional, no sólo se trata de la necesidad de un incentivo para crear, sino también del derecho natural a los frutos del trabajo intelectual propio:

> Como principal estímulo tales personas tendrían que realizar grandes y beneficiosos esfuerzos de esta naturaleza, deben existir en la seguridad legal de los frutos de su estudio e industria para ellos mismos; y como tal seguridad es uno de los derechos naturales de todos los hombres, no habiendo propiedad más peculiarmente propia que la procurada por el trabajo de su mente.

La constitución de los EEUU por lo tanto fusiona los dos fundamentos predominantes para los derechos de autor

En contraste la Ley Francesa de 1957, artículo 1 (recodificada como Código de la propiedad intelectual art. L. 111-1) proclama:

> L'auteur d'une œuvre de l'esprit jouit sur cette œuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous.
>
> Ce droit comporte des attributs d'ordre intellectuel et moral ainsi que des attributs d'ordre patrimonial, ...

Este texto expresa de este modo el concepto de derechos naturales: los derechos de propiedad de los autores surgen «del mero hecho de la creación de trabajo». (tú lo creas, es tuyo). Además, coloca los derechos morales del autor (lo que Tempesta podría haber llamado el «honor» del autor) por delante de sus derechos económicos.

Como demuestran los informes nacionales, sin embargo, la mayoría de régimenes de derechos de autor combinan en cierta medida todos los fundamentos principales. Algunos sistemas domésticos pueden defender con más fuerza algunas justificaciones que otras, pero de hecho y no siempre en teoría, los derechos de autor hoy

en día manifiestan una mezcla de motivaciones. Las dos primeras de las siguientes gráficas sintetizan los informes nacionales a lo largo de dos ejes, por justificación y por país. Los dos últimas ordenan las justificaciones nacionales por base jurídica: constitución, estatutos, jurisprudencia.

DERECHOS DEL AUTOR (JUSTIFICACIÓN)									
	DERECHO FUNDAMENTAL		DERECHO DE AUTOR COMO UTILITARISMO						ARMONIZACIÓN INTERNACIONAL (Obligaciones del tratado/Directivas de la UE)
PAÍS	DERECHO NATURAL (Locke/frutos del trabajo)	DERECHO MORAL/PERSONALIDAD (Hegel/Infusión de uno mismo)	PROMOVER CREACIÓN/CULTURA (Teoría de los incentivos)	PROMOVER/PROTEGER INDUSTRIAS CREATIVAS (Economía)	PREMIAR A LOS CREADORES (teoría del trabajo)	PROTEGER A LOS CREADORES (Teoría de la subsistencia)	PROTEGER LA PROPIEDAD PRIVADA	EQUILIBRAR LOS INTERESES PÚBLICOS (Creación o divulgación de acceso/Idea)	
Argentina					X	X	X		
Bélgica	X		X					X	
Canadá		(X)	X	X	X	X		X	X
Croacia		X					X		
República Checa		X	X						
Dinamarca	(X)	(X)	(X)	(X)	(X)	(X)			X
Egipto	X	X				X			X
Francia	(X)	X	X			X		X	
Alemania	(X)	X	X		X	X		X	X
Grecia		X	X	X	X		X	(X)	
Hungría			X	X				X	
Israel			X	X				X	
Italia	X	X	X	(X)	X		X	X	
Japón			X	X	X				X
Nueva Zelanda		X	X					X	X

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DERECHOS DEL AUTOR (JUSTIFICACIÓN)									
	DERECHO FUNDAMENTAL		DERECHO DE AUTOR COMO UTILITARISMO						ARMONIZACIÓN INTERNACIONAL (Obligaciones del tratado/Directivas de la UE)
PAÍS	DERECHO NATURAL (Locke/frutos del trabajo)	DERECHO MORAL/PERSONALIDAD (Hegel/Infusión de uno mismo)	PROMOVER CREACIÓN/CULTURA (Teoría de los incentivos)	PROMOVER/PROTEGER INDUSTRIAS CREATIVAS (Economía)	PREMIAR A LOS CREADORES (teoría del trabajo)	PROTEGER A LOS CREADORES (Teoría de la subsistencia)	PROTEGER LA PROPIEDAD PRIVADA	EQUILIBRAR LOS INTERESES PÚBLICOS (Creación o divulgación de acceso/Idea)	
Portugal		X	(X)	X	X	X		X	
España		X	X	(X)		X	X	X	X
Suiza		(X)		(X)	(X)	X	(X)		X
Holanda	(X)	(X)	X		X			(X)	X
Turquía		(X)				X			X
G.B.	X	X	X	X	X	X		X	X
EEUU	(X)	(X)	X	X	X	X	(X)	X	X

X = justificaciones atribuidas a la legislación o trabajos parlamentarios de los paisos en cuestión, y apoyadas por la doctrina general; (X) = discusiones de las justificaciones, presentes únicamente en fuentes juridicas secundarias.

JUSTIFICACIONES DE LOS DERECHOS DE LOS AUTORES								
DERECHO DE AUTOR COMO DERECHO FUNDAMENTAL		DERECHO DE AUTOR COMO UTILITARISMO						ARMONIZACIÓN INTERNACIONAL (Obligaciones del tratado/Directivas de la UE)
DERECHO NATURAL (Locke/frutos del trabajo)	DERECHO MORAL / PERSONALIDAD (Hegel/ Infusión de uno mismo)	PROMOVER CREACIÓN/ CUILTURA (Teoría de los incentivos)	PROMOVER/PROTEGER INDUSTRIAS CREATIVAS (Economía)	PREMIAR A LOS CREADORES (teoría del trabajo)	PROTEGER A LOS CREADORES (Teoría de la subsistencia)	PROTEGER LA PROPIEDAD PRIVADA	EQUILIBRAR LOS INTERESES PÚBLICOS (Creación o divulgación de acceso/Idea)	
Bélgica	Croacia	Bélgica	Canadá	Argentina	Argentina	Argentina	Bélgica	Canadá
Egipto	República Checa	Canadá	Grecia	Canadá	Francia	Croacia	Canadá	Dinamarca
Italia	Egipto	República Checa	Hungría	Alemania	Grecia	Grecia	Francia	Egipto
G.B.	Francia	Francia	Israel	Grecia	Italia	Italia	Alemania	Alemania
(Dinamarca)	Alemania	Alemania	Japón	Italia	España	España	Hungría	Japón
(Francia)	Grecia	Grecia	Portugal	Portugal	Suiza	Suecia	Israel	Nueva Zelanda
(Alemania)	Italia	Hungría	Suecia	Japón	Turquía	(Suiza)	Italia	España
(Holanda)	Nueva Zelanda	Israel	G.B.	Holanda	G.B.	(EEUU)	Nueva Zelanda	Suecia
(EEUU)	Portugal	Italia	EEUU	Suecia	EEUU		Portugal	Suiza
	España	Japón	(Dinamarca)	G.B.	(Dinamarca)		España	Holanda
	Suecia	Nueva Zelanda	(Italia)	EEUU	(Suecia)		G.B.	Turquía
	G.B.	España	(España)	(Dinamarca)			EEUU	G.B.
	(Canadá)	Holanda	(Suiza)	(Suiza)			(Grecia)	EEUU
	(Dinamarca)	G.B.	(Suecia)					
	(Suiza)	EEUU						

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JUSTIFICACIONES DE LOS DERECHOS DE LOS AUTORES								
DERECHO DE AUTOR COMO DERECHO FUNDAMENTAL		DERECHO DE AUTOR COMO UTILITARISMO						ARMONIZACIÓN INTERNACIONAL (Obligaciones del tratado/Directivas de la UE)
DERECHO NATURAL (Locke/frutos del trabajo)	DERECHO MORAL / PERSONALIDAD (Hegel/ Infusión de uno mismo)	PROMOVER CREACIÓN/ CUILTURA (Teoría de los incentivos)	PROMOVER/PROTEGER INDUSTRIAS CREATIVAS (Economía)	PREMIAR A LOS CREADORES (teoría del trabajo)	PROTEGER A LOS CREADORES (Teoría de la subsistencia)	PROTEGER LA PROPIEDAD PRIVADA	EQUILIBRAR LOS INTERESES PÚBLICOS (Creación o divulgación de acceso/Idea)	
	(Holanda)	(Dinamarca)						
	(Turquía	(Portugal)						
	(EEUU)							

Los países en paréntesis indica las justificaciones citadas en la autoridad secundaria de ese país, pero no las generalmente atribuidas a derechos de autor.

BASES LEGALES PARA LA LEY DE DERECHOS DE AUTOR (FUENTES DE DERECHO)						
DERECHOS DE AUTOR			JUSTIFICACIONES			
CONSTITUCIÓN (P.I.- o normas de derechos de autor)	ESTATUTOS	JURISPRUDENCIA	CONSTITUCIÓN (P.I.- o específico de derechos de autor, u otras normas)	ESTATUTOS	TRABAJOS PARLAMENTARIOS	JURISPRUDENCIA
Argentina	Argentina	Bélgica	República Checa	Bélgica	Bélgica	Bélgica
Croacia	Bélgica	República Checa	Francia	Canadá	Canadá	República Checa
Egipto	Canadá	Egipto	Alemania	Croacia	Francia	Egipto
Portugal	Croacia	Francia	Grecia	Egipto	Alemania	Francia
[Suecia]	República Checa	Alemania	Italia	Francia	Grecia	Alemania
EEUU	Dinamarca	Israel	Portugal	Hungría	Holanda	Israel
	Egipto	Italia	España	Israel	Portugal	Italia
	Francia	Nueva Zelanda	EEUU	Japón	España	Nueva Zelanda
	Alemania	España		Holanda	Suiza	España
	Grecia	Suecia		España	EEUU	Suecia
	Hungría	Turquía		EEUU	G.B.	Turquía
	Israel	EEUU		G.B.		EEUU
	Italia	G.B.				G.B.
	Japón					
	Holanda					
	Nueva Zelanda					
	Portugal					
	España					
	Suecia					
	Suiza					
	Turquía					
	G.B.					
	EEUU					

BASES LEGALES PARA LA LEY DE DERECHOS DE AUTOR (FUENTES DE DERECHO)							
	DERECHOS DE AUTOR			JUSTIFICACIONES			
PAÍS	CONSTITUCIÓN (P.I.- o específico de derechos de autor, u otras normas)	ESTATUTOS	JURISPRUDENCIA	CONSTITUCIÓN (P.I.- o específico de derechos de autor, u otras normas)	ESTATUTOS	TRABAJOS PARLAMENTARIOS	JURISPRUDENCIA
Argentina	X	X					
Bélgica		X	X		X	X	X
Canadá		X			X	X	
Croacia	X	X			X		
República Checa		X	X	X			X
Dina-marca		X					
Egipto	X	X	X		X		X
Francia		X	X	X	X	X	X
Alemania		X	X	X		X	X
Grecia		X		X		X	
Hungría		X			X		
Israel		X	X		X		X
Italia		X	X	X			
Japón		X			X		
Nueva Zelanda		X	X				X
Portugal	X	X		X			
España		X	X	X	X	X	X
Suecia	[X]	X	X				X
Suiza		X				X	

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BASES LEGALES PARA LA LEY DE DERECHOS DE AUTOR (FUENTES DE DERECHO)							
	DERECHOS DE AUTOR			JUSTIFICACIONES			
PAÍS	CONSTITUCIÓN (P.I.- o específico de derechos de autor, u otras normas)	ESTATUTOS	JURISPRUDENCIA	CONSTITUCIÓN (P.I.- o específico de derechos de autor, u otras normas)	ESTATUTOS	TRABAJOS PARLAMENTARIOS	JURISPRUDENCIA
Holanda		X			X	X	
Turquía		X	X				X
G.B.		X	X		X	X	X
EEUU	X	X	X	X	X	X	X

6

General Report, Justifications for Related Rights

Gillian Davies[1]

6.1. Introduction

Good morning ladies and gentlemen!

It is a real pleasure to be here today and I would like to thank the Danish group for the invitation to speak and for the very warm welcome they have extended to us all here in Copenhagen.

My subject today is the justifications for related rights. As we have just heard from Jane Ginsberg, the justifications for copyright date from historical times and, as Victor Nabhan mentioned, those for related rights have been developed much more recently and, in particular, during the course of the 20th Century. Of course, this was in response to the new technologies such as recording techniques, which came first as a result of the invention of recorded sound by Edison, closely followed by the development of broadcasting. The inventors

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and developers of these technologies, as well as manufacturers and producers of sound recordings and broadcast programmes, then sought protection for them because, from the very beginning, there were problems with unauthorized reproduction, just as the invention of printing led swiftly to piracy of books.

As time went on, the owners of these new means of communication also wanted to be protected against unauthorised performance of sound recordings and broadcasts, unauthorised communication to the public and so on. The term related rights as you all know is used to refer to the rights of performers, producers of phonograms (sound recordings) and broadcasting organisations and, in some countries, it also applies to rights in audio-visual works.

In my presentation, I have divided the justifications for related rights prior to the adoption in 1961 of the Rome Convention for the protection of these three beneficiaries into those applying respectively to performers, producers of phonograms and broadcasters. Finally, I will contrast the traditional justifications to those put forward in the replies to the ALAI Questionnaire on this subject.

6.2. Justifications for the Rights of Performers

Let us start with performers. Performers were the first really to feel the effects of these new technologies. For their part, they regarded both recording techniques and broadcasting as threats to their employment opportunities. If you think about it, prior to the invention of these new technologies, performances had been ephemeral. Performances could not be captured in any way and as a result they could not be reproduced.

Understandably, the performers regarded these new developments as a real threat to their livelihoods and they were anxious to defend their profession. So quite early on they started to seek support for protection of their performances against unauthorised fixation, reproduction and broadcasting.

Performers' representatives first raised their concerns at the international level as long ago as 1903 at the ALAI Congress held at Weimar. At that time, they raised the question of the threat to live

performance and employment opportunities posed by very early recording techniques.

I find it really interesting how long ago this took place and also that the performers were present then at an ALAI Congress to make their case. It showed a surprisingly positive attitude towards performers' rights on the part of ALAI. All that took place at a time when even recording techniques were extremely limited. What they were talking about was the recordings made in Swiss musical instruments, music boxes, cuckoo clocks and things like that – all the very early techniques of recording.

A bit later came the development of wireless broadcasting. To start with at that stage the performers saw broadcasting as giving them new opportunities to be heard and to reach a wider public, but on the other hand they were worried about the effect that broadcasting might have on live performance opportunities.

Come the 1920s, the performers approached the International Labour Office (ILO) to seek help. Even at that time, the ILO had a non-manual workers section which took an interest in their plight and from then on the ILO and the performers together sought protection for performers in relation to these new techniques. Subsequently, international organizations representing performers were set up (the International Federation of Musicians (FIM) and the International Federation of Actors (FIA)).

The next landmark in the case of the performers came in 1926 when a resolution was adopted by FIM complaining about the technological unemployment resulting from recording techniques, film and broadcasting.

Not long after, in 1928 at the conference held in Rome for the revision of the Berne Convention, the performers again made their case on these various threats to their employment. As a result, a resolution was adopted, stating:

> "As regards broadcasting, it would be unjust to permit recording of the sound waves of a concert with a view to transmitting it by radio without authorisation of the author and the performer.
>
> A performance merits protection as a secondary work. A new situation merits a new right. Legal theories must adapt to new eco-

> nomic situations. The performance of an artist is itself an artistic work and has an obvious commercial value."

The Resolution made clear that the commercial value of radio broadcasting depended to a great extent on the art of performers whose performances should be protected.

It is important to note that this principle was recognized as long ago as 1928 by the Berne Convention Congress.

Sadly, the performer's case did not get taken up thereafter within the Berne Union Institutions, but work on the protection of the three eventual beneficiaries of the Rome Convention were being considered in various fora. In particular, a meeting took place in Samadan in 1939 which was the last committee of experts to discuss these matters before the Second World War and before everything was put on hold until 1948.

But at Samadan it was accepted that performances deserved a high standard of protection due to their cultural importance. So here before the war various ideas were recognized: that the contribution of performers should be economically looked after; that their performances were equivalent to artistic works; and that they had commercial value which should be protected.

These arguments showed for the first time that economic arguments for protection were coming forward in addition to recognition of the cultural importance of performances.

6.3. Justifications for the Rights of Producers of Phonograms

I turn now to the justifications put forward before the adoption of the Rome Convention in relation to producers of sound recordings.

As with performers, the need for protection for producers of sound recordings was recognised at an early stage, this time in 1908 at the Berlin Conference for the revision of the Berne Convention, where it was recognised that piracy of "discs" was equally prejudicial to producers, performers and authors.

Today it seems extraordinary that it took more than over 50 years before these rights were recognised formally at the international

level. After 30 years, in 1937, ALAI became involved. An ALAI Congress took place in Paris in 1937, which called for a special international convention for the protection of phonograms.

Later in 1939 at the Samadan meeting, which I've already referred to in relation to performers, it was said that producers of phonograms required protection because the process of making phonographic discs was a highly-qualified activity, which required the investment of large amounts of capital, not only because of the manufacturing costs but also in order to be able to attract the cooperation of the most reputable performers.

Here we find justifications of labour, investment and incentive. Thereafter, as already mentioned, there was a long pause in copyright matters.

After the War, however, the matter of the protection of phonograms was taken up again, and at the Brussels Revision Conference in 1948 of the Berne Convention a resolution was adopted calling on the members of the Berne Convention to continue their efforts to protect "makers of instruments for the mechanical reproduction of musical works".

In 1951, Professor Georg Bodenhausen, (who some of you may remember was Director General of BIRPI (the predecessor of WIPO) at the time), while discussing this whole question of the rights of performers and producers in a very interesting article, said, "What is the fundamental difference between the adaptation, for instance, in the case of a literal translation and the faithful reproduction on a record?" Thus, he was approximating recordings to adaptations of works such as translations.

The last reference I want to bring to your attention is the 1981 WIPO Guide to the Rome and Phonograms Conventions written by the late Claude Masouyé. He talked of the modern techniques which involved a need for the protection of producers of phonograms, their right to be protected against copying and to receive payment if phonograms were used for broadcasting or for communication to the public. Here again you have the labour, investment and incentive rationales for protection put forward.

Meanwhile of course at the national level things were progressing quite differently in the sense that the UK protected sound recordings as musical works as early as the 1911 Act and a number of continental countries also protected sound recordings as musical works to begin with. Of course, there are many common law countries that followed the British example. Later on, common law countries protected sound recordings as copyright works in their own right.

6.4. Justifications for the Protection of Broadcasters

As far as broadcasters were concerned, again at Samadan in 1939 it was said by the Director General of BIRPI that broadcasters deserved protection because broadcasting was a highly qualified activity which benefited national culture and other interests of the general public. So here we have again the labour, public benefit and investment rationales. Masouyé, in his WIPO Guide to the Rome Convention, said,

> "Broadcasting organisations spent considerable time, skill, effort and money on the preparation of their programmes and it was unfair that others perhaps competitors should help themselves to these by broadcasting them, recording them or showing them in places to which the public had access. Without the power to control the use to which broadcasts were put, broadcasters could not guarantee to the performers or the authors that the programs would not reach a wider audience than was envisaged when the permission to the broadcast was given."

6.5. The Road to the Rome Convention

Throughout the years of negotiation leading towards the adoption of the Rome Convention, the performers were working away with the ILO but BIRPI was working together with the producers of phonograms and broadcasters.

However, it is noteworthy that for much of this period, the three beneficiaries of the Rome Convention were seeking protection really each for themselves and the idea of grouping them in one Convention was not on the table until quite a late stage. It was not until the

1939 Samadan Conference that the rights of all three were discussed at the same time.

This was an interesting and important development because here for the first time it became apparent that there was a synergistic relationship between the parties. If broadcasts are not protected, or for that matter, if phonograms are not protected, then the authors and performers are going to suffer as well. It was recognised that there was a need for protection against unauthorised reproduction and other unauthorised uses of the property of all three parties.

By the time the Rome Convention came to be negotiated in 1961, the various justifications for protection I have described here were well established and recognised even though they were not necessarily universally accepted.

We have to remember also that the Rome Convention was a pioneer convention. As we all know, when it was adopted many countries did not protect all three of its beneficiaries; some only protected one, or maybe two, of them. As a result, they all had to legislate in order to be able to ratify or adhere to it.

For this reason, even at the Rome Conference there were countries which said that they did not see the need for this convention, and that conventions usually follow and help develop national legislation. The Rome Convention on the other hand set standards for new rights which were not yet widely established with the result that it had a tremendous influence over the following years on the development of related rights.

6.6. Related Rights post the Rome Convention

Once the Convention had been adopted, related rights developed rapidly in some parts of the world, such as Latin America and in common law countries, but very slowly in many parts of Europe where in some countries the rights were scarcely recognised let alone protected. However, the justifications for related rights came to the fore again when the EU Commission began to take an interest in the harmonisation of copyright and related rights in the 1980's and 90's.

By that time, the differences in the level of protection of related rights were substantial among EU countries and there were still some

countries where one or other of the beneficiaries remained unprotected. The EU decided to do something about that and the justifications for the protection of related rights as the EU Commission saw them came to be reflected in the recitals to the EU directives which were principally concerned.

So first of all, in the rental and related rights directive which was adopted originally in 1992, Recitals 5 and 6 stated:

> "The creative and artistic work of authors and performers necessitates an adequate income as a basis for further artistic and creative work, and the investment required particularly for production of phonograms and films are especially high and risky.
>
> The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequately good protection of the right-holders concerned.
>
> These creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons and the pursuit of such activities should be made easier by providing a harmonised legal protection within the Community."

Here we have the incentive and labour theories and also economic rationales for protection of investment put forward.

The rationales for related rights were again discussed in the Directive on the Term of Protection of Related Rights at Recital 11. Here it is said:

> "The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation".

The Information Society Directive in Recitals 9–12 also talks about these rights being crucial to intellectual creation and an integral part of property. Here you find the intellectual property rationale as well as the investment and economic rationales invoked and reference is also made to the cultural importance of related rights protection.

6.7. Contemporary Justifications for Related Rights

So far, I have spoken about the historical, legislative and international background to these rights. However, it has been very interesting to see the responses to the ALAI questionnaire as regards current, contemporary justifications for related rights. Responses were received from sixteen countries, all of which I have taken into account. And I am most grateful to Jane Ginsberg because she had some charts prepared, which summarised all the responses to the Questionnaire on the subject of both copyright and related rights and kindly made them available to me.

The responses show a rich diversity of justifications for related rights expressed under nine separate headings, all of which apply also to the protection of copyright.

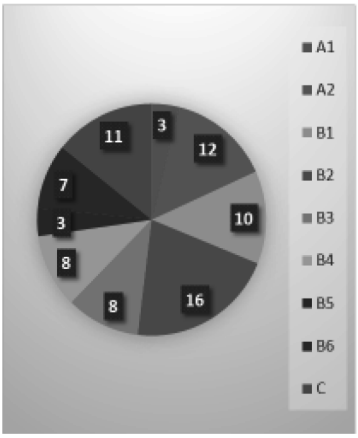
I would like to show you here a pie chart which I have made. On the right-hand side, are the nine justifications that emerged from the replies to the questionnaire. These are divided into two headings: A. Copyright as a fundamental right and B. Copyright as utilitarianism.

The third sub-heading is C. International harmonisation (Treaty obligations /EU Directives).

This latter heading reflects the need to comply with international norms.

You can see from the pie chart that the justification of natural right, not unexpectedly in relation to related rights, appears only in relation to three countries, namely Germany, the United Kingdom and the United States of America.

RELATED RIGHTS JUSTIFICATIONS



No. Value = No. of Countries.

LEGEND

A. Copyright as a fundamental right
A1. Natural right (Locke/fruits of labour)
A2. Moral rights/Personality (Hegel/ infusion of self)

B. Copyright as utilitarianism
B1. Promote creation/culture (Incentive theory)
B2. Promote/protect creative industries (Economics)
B3. Reward creators (Labour theory)
B4. Protect creators (Livelihood theory)
B5. Protect private property
B6. Balance Public Interests (Creation v. access/idea dissemination)

C. International harmonization (Treaty obligations/EU Directives)

The moral right, of course, relates especially to performers so there are quite a number of countries (12), which recognise moral rights as being a rationale for the protection of performers. I am not aware of any country which thinks of giving moral rights to broadcasters or to phonogram producers.

The Chart also shows the various utilitarian rationales: promoting creation and culture (the incentive theory); protecting creative industries (economic rationale); rewarding creators (labour theory); protecting creators (livelihood theory); protecting private property; and finally balancing public interests (creation v access/dissemination).

The following Table sets out the results on which the pie chart was based.

RELATED RIGHTS JUSTIFICATIONS								
COPYRIGHT AS A FUNDAMENTAL RIGHT		COPYRIGHT AS UTILITARIANISM						INTERNATIONAL HARMONIZATION (Treaty Obligations/EU Directives)
NATURAL RIGHT (Locke/fruits of labour)	MORAL RIGHT/PERSONALITY (Hegel/Infusion of self)	PROMOTE CREATION/CULTURE (Incentive Theory)	PROMOTE/PROTECT CREATIVE INDUSTRIES (Economics)	REWARD CREATORS (Labour Theory)	PROTECT CREATORS (Livelihood Theory)	PROTECT PRIVATE PROPERTY	BALANCE PUBLIC INTERESTS (Creation v. Access/Dissemination of Ideas)	
		Belgium	Belgium	Belgium			Belgium	Belgium
	Croatia	Denmark	Croatia	Denmark	Denmark		Germany	Canada
	Czech Republic		Czech Republic			Czech Republic	Hungary	
Germany	Germany	Germany	Denmark	Germany	Germany	Germany	Portugal	Denmark
U.K.	Greece	Israel	Germany	Hungary	Greece	Spain	Netherlands	Germany
(U.S.)	Hungary	Japan	Greece	Portugal			U.K.	
	Italy	Spain	(Hungary)	(Switzerland)	Portugal		(U.S.)	Italy
	Japan	U.K.	Israel	U.K.				Netherlands
	Portugal	U.S.	Italy	U.S.	Spain			New Zealand
	Spain	(Portugal)	Netherlands		Sweden			Spain
	Sweden	(Turkey)	Portugal		U.K.			Sweden
	U.K.		Spain		U.S.			
	(U.S.)		Sweden					U.K.
			(Switzerland)					U.S.
			U.K.					
			U.S.					

Countries in parentheses indicate justifications cited in that country's doctrine, but not generally attributed to copyright legislation or legislative history.

When writing my thesis on the subject of "Copyright and the Public Interest" in the early 1990s, I looked at the commonly accepted justifications for copyright. I did not address related rights specifically but, apart from moral rights, which obviously apply mainly to the rights of authors, the other justifications in my opinion apply equally to related rights. These were: just reward for labour, stimulus to creativity and the social requirement to promote creation while providing access to the public of works and the dissemination of ideas.

Copyright strives to provide a balance between the interests of right owners and the interests of the public.

Looking at the rationales for related rights protection anew based on the results of the ALAI Questionnaire has been a very interesting exercise. Of course, the picture is very similar today to that in the 1990s, but while the traditional rationales for protection remain, others have been developed.

In conclusion, I set out below a comparison of the old and new justifications for related rights as they have emerged from the ALAI Questionnaire.

COMPARISON OF OLD AND NEW JUSTIFICATIONS FOR RELATED RIGHTS	
OLD	**NEW**
— Natural & Moral Rights – Copyright only — Just Reward for Labour – Labour theory – Stimulus to Creativity – Incentive theory — Social Requirements – Creation v access /dissemination of ideas/balance of interests	— CR = Fundamental Rights – CR, RR & performers — CR as Utilitarianism – Labour theory – Incentive theory – Economics – Private property – Balance public interests — International Harmonisation

7

Rapport général, justifications des droits voisins

Gillian Davies[1]

7.1. Introduction

Bonjour mesdames et messieurs!

C'est un réel plaisir d'être ici aujourd'hui et je voudrais remercier le groupe danois pour l'invitation à prendre la parole et pour l'accueil très chaleureux qu'il nous a réservé ici à Copenhague.

Mon sujet d'aujourd'hui porte sur la justification des droits voisins. Comme nous venons de l'entendre de Jane Ginsberg, les justifications du droit d'auteur remontent à des temps historiques et, comme Victor Nabhan l'a mentionné, celles des droits voisins ont été élaborées beaucoup plus récemment, en particulier au cours du 20e siècle. Bien entendu, c'était en réponse aux nouvelles technologies telles que les techniques d'enregistrement qui ont vu le jour, d'abord comme résultante de l'invention de l'enregistrement sonore par Edi-

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son, suivies de près par le développement de la radiodiffusion. Les inventeurs et les développeurs de ces technologies, ainsi que les fabricants et producteurs d'enregistrements sonores et programmes de radiodiffusion ont alors cherché une protection pour eux mêmes parce que, dès le départ, il y avait des problèmes de reproduction non autorisée, tout comme l'invention de l'imprimerie conduisit rapidement au piratage des livres.

Au fil du temps, les propriétaires de ces nouveaux moyens de communication ont également souhaité être protégés contre l'exécution non autorisée d'enregistrements sonores et d'émissions de radiodiffusion, la communication non autorisée au public, etc. Le terme Droits voisins, comme vous le savez tous, est utilisé pour désigner les droits des artistes-interprètes, des producteurs de phonogrammes (enregistrements sonores) et des organismes de radiodiffusion; dans certains pays, il s'applique également aux droits sur les œuvres audiovisuelles.

Dans mon exposé, j'ai réparti les justifications des droits voisins avant l'adoption, en 1961, de la Convention de Rome pour la protection de ces trois bénéficiaires. Elles s'appliquent respectivement aux artistes-interprètes, aux producteurs de phonogrammes et aux radiodiffuseurs. Enfin, je vais mettre en contraste les justifications traditionnelles avec celles avancées dans les réponses au Questionnaire de l'ALAI sur le sujet.

7.2. Justification des droits des artistes-interprètes

Commençons par les artistes-interprètes. Les artistes-interprètes ont été les premiers à ressentir véritablement les effets de ces nouvelles technologies. Pour leur part, ils considéraient à la fois les techniques d'enregistrement et la radiodiffusion comme des menaces à leurs opportunités d'emploi. Si vous y réfléchissez, avant l'invention de ces nouvelles technologies, les prestations étaient éphémères. Les prestations ne pouvaient être enregistrées d'aucune façon et, par conséquent, ne pouvaient être reproduites.

Naturellement, les artistes-interprètes considéraient ces nouvelles technologies comme une menace réelle pour leurs moyens de subsistance et ils étaient inquiets et de ce fait, très engagés dans la

défense de leur profession. Très tôt, ils ont donc cherché à obtenir du soutien pour protéger leurs prestations contre la fixation, la reproduction et la radiodiffusion non autorisées.

Les représentants des artistes-interprètes ont d'abord fait part de leurs préoccupations au niveau international dès 1903, lors du Congrès de l'ALAI qui s'est tenu à Weimar. À cette époque, ils ont soulevé la question de la menace que les techniques initiales d'enregistrement faisaient peser sur les opportunités d'emploi et les prestations en direct.

Je trouve très intéressant de constater depuis combien de temps cet évènement s'est produit et de noter que les artistes-interprètes étaient présents à ce congrès de l'ALAI pour présenter leurs doléances. L'ALAI a manifesté une attitude étonnamment positive à l'égard des droits des artistes-interprètes. Tout ceci a eu lieu à une époque où les techniques d'enregistrement étaient extrêmement limitées. Les techniques d'enregistrement qui prévalaient à cette époque étaient les enregistrements réalisés avec des instruments de musique suisses, les boîtes à musique, les horloges coucous et d'autres choses semblables – toutes les anciennes techniques d'enregistrement.

Un peu plus tard vint le développement de la radiodiffusion sans fil. Au début, les artistes-interprètes ont considéré la radiodiffusion comme un moyen leur donnant de nouvelles possibilités d'être entendus et de toucher un public plus large; mais par contre, ils étaient inquiets de l'effet que la radiodiffusion pourrait avoir sur les opportunités de prestations en direct.

Dans les années 1920, les artistes se sont adressés au Bureau international du Travail (BIT) pour demander de l'aide. Même à cette époque, le BIT disposait déjà d'une section de travailleurs non manuels qui s'intéressait à leur situation et, à partir de ce moment-là, le BIT et les artistes-interprètes ont, d'un commun accord, cherché à obtenir une protection pour les artistes-interprètes au regard de ces nouvelles techniques. Par la suite, des organisations internationales représentant les artistes-interprètes ont été créées (Fédération internationale des musiciens (FIM) et Fédération internationale des acteurs (FIA)).

L'étape suivante dans le cas des artistes-interprètes survient en 1926 lorsqu'une résolution a été adoptée par la FIM se plaignant du chômage technologique résultant des techniques d'enregistrement, du cinéma et de la radiodiffusion.

Peu de temps après, soit lors de la Conférence de la révision de la Convention de Berne en 1928 à Rome, les artistes-interprètes ont à nouveau présenté leurs doléances au sujet des diverses menaces de leur emploi. En conséquence, une résolution a été adoptée:

> « En ce qui concerne la radiodiffusion, il serait injuste de faire l'enregistrement des ondes sonores d'un concert en vue de leur transmission par radio sans l'autorisation de l'auteur et de l'interprète.
>
> Une prestation mérite d'être protégée comme une œuvre secondaire. Une nouvelle situation nécessite un nouveau droit. Les théories juridiques doivent s'adapter aux nouvelles situations économiques. La prestation d'un artiste est en elle-même une œuvre artistique et a une valeur commerciale évidente ».

La Résolution indique clairement que la valeur commerciale de la radiodiffusion dépend, dans une large mesure, de l'art des artistes-interprètes dont les prestations doivent être protégées.

Il est important de noter que ce principe a été reconnu dès 1928 par la Convention de Berne.

Malheureusement, le cas de l'interprète n'a pas été repris par la suite au sein des Institutions de l'Union de Berne, mais les travaux sur la protection des trois bénéficiaires éventuels de la Convention de Rome ont été examinés dans diverses instances. En particulier, une réunion s'est tenue à Samadan en 1939. Il était question pour ce dernier comité d'experts de discuter de ces questions avant la seconde guerre mondiale et avant que tout autre chose ne soit mise en attente jusqu'en 1948.

Mais à Samadan, il était convenu que les prestations méritaient un niveau élevé de protection en raison de leur importance culturelle. Ainsi, avant la guerre, plusieurs idées ont été arrêtées: la contribution des artistes-interprètes doit être prise en compte sur un angle économique; leurs prestations sont équivalentes à des œuvres artistiques; leurs œuvres ont une valeur commerciale qui doit être protégée.

Ces éléments ont montré, pour la première fois, qu'aux arguments économiques en faveur de la protection venait s'ajouter la reconnaissance de l'importance culturelle des prestations.

7.3. Justifications des droits de producteurs de phonogrammes

J'en viens à présent aux justifications avancées avant l'adoption de la Convention de Rome en ce qui concerne les producteurs d'enregistrements sonores.

Tout comme les artistes-interprètes, la nécessité de protéger les producteurs d'enregistrements sonores a été reconnue à un stade précoce, cette fois-ci en 1908 lors de la Conférence de Berlin pour la révision de la Convention de Berne, où il a été reconnu que le piratage des « disques » était également préjudiciable aux producteurs, aux artistes-interprètes et aux auteurs.

Aujourd'hui, il semble extraordinaire qu'il a fallu plus de 50 ans avant que ces droits ne soient officiellement reconnus au niveau international. Après 30 ans, soit en 1937, l'ALAI s'est impliquée. Le congrès de l'ALAI à Paris en 1937 y a adopté une demande de convention internationale spéciale pour la protection des phonogrammes.

Plus tard en 1939 lors de la réunion à Samadan, réunion susmentionnée relative au problème des artistes-interprètes, il a été convenu que les producteurs de phonogrammes devraient être protégés parce que le processus d'enregistrement des disques phonographiques est une activité qui nécessite de très bonnes qualifications, un lourd investissement en matière de finance, non seulement en raison des coûts de fabrication, mais également pour pouvoir attirer la coopération d'artistes-interprètes les plus réputés.

Ici, nous avons des justifications pour le travail, l'investissement et les mesures d'incitation. Par la suite, comme nous l'avons déjà mentionné, il y a eu une longue période de silence sur les questions de droit d'auteur.

Cependant, après la guerre, la question de la protection des phonogrammes a été reprise et, lors de la Conférence portant sur la révision de la Convention de Berne à Bruxelles en 1948, une résolution a

été adoptée invitant les membres de la Convention de Berne à poursuivre leurs efforts pour protéger les « fabricants d'instruments de reproduction mécanique d'œuvres musicales ».

En 1951, le Professeur Georg Bodenhausen (dont certains d'entre vous se souviennent peut-être et qui à l'époque était Directeur général des BIRPI – le prédécesseur de l'OMPI), au cours d'une discussion sur toute cette question de droits des artistes-interprètes et des producteurs, a, dans le cadre de la rédaction d'un article très intéressant, déclaré: « Quelle est la différence fondamentale entre l'adaptation, par exemple dans le cas d'une traduction littérale, et la reproduction fidèle d'un enregistrement ? » Ainsi, il faisait un rapprochement entre les enregistrements et les adaptations d'œuvres telles que les traductions.

La dernière référence que je voudrais porter à votre attention est le Guide de l'OMPI de 1981 sur les Conventions de Rome et les phonogrammes, rédigés par le regretté Claude Masouyé. Il a parlé des techniques modernes qui nécessitaient un besoin de protection des producteurs de phonogrammes, leur droit d'être protégé contre la copie et la réception de paiement si les phonogrammes venaient à être utilisés pour une radiodiffusion ou une communication au public. Une fois de plus, vous avez ici des raisons pour protéger le travail, l'investissement et les mesures d'incitation.

Au niveau national pendant ce temps, les choses naturellement progressaient de façon assez différente dans le sens où le Royaume-Uni protégeait les enregistrements sonores en tant qu'œuvres musicales dès la promulgation de la loi de 1911, et un certain nombre de pays continentaux protégeaient également les enregistrements sonores en tant qu'œuvres musicales dès le départ. Bien entendu, nombre de pays du Common Law ont suivi l'exemple britannique. Plus tard, les pays du Common Law ont considéré les enregistrements sonores comme œuvres protégées par les droits d'auteur.

7.4. Justification de la protection des radiodiffuseurs

En ce qui concerne les radiodiffuseurs, à Samadan en 1939, le Directeur général des BIRPI déclarait que les radiodiffuseurs méritaient d'être protégés parce que la radiodiffusion était une activité qui

nécessitait de très bonnes qualifications et représentait un atout pour la culture nationale ainsi que d'autres intérêts du grand public. Une fois de plus, nous avons ici des raisons liées au travail, à l'intérêt public et à l'investissement. Masouyé, dans son Guide de l'OMPI sur la Convention de Rome, a déclaré:

> « Pour les organismes de radiodiffusion la réalisation des émissions signifie sur les plans artistique, technique et financier des efforts, des activités, des investissements souvent considérables; il serait injuste à leur avis de laisser impunément des organismes tiers, parfois concurrents, se les approprier par voie de réémission, de fixation sur des supports matériels, de reproduction, ou encore de communication dans des lieux accessibles au public. Faute d'être à même de côntroler les utilisations secondaires de leurs émissions, les organismes de radiodiffusion ne peuvent garantir aux artistes, de même qu'aux auteurs, qu'un autre public ne va pas profiter du spectacle. ».

7.5. La route vers la Convention de Rome

Durant les années de négociation qui ont mené à l'adoption de la Convention de Rome, les artistes-interprètes travaillaient avec l'OIT, tandis que les BIRPI travaillaient en collaboration avec les producteurs de phonogrammes et les radiodiffuseurs.

Cependant, il convient de noter que pendant la majeure partie de cette période, les trois bénéficiaires de la Convention de Rome recherchaient en réalité une protection pour chacun d'entre eux et l'idée de les regrouper dans une Convention a été abordée seulement à une étape très avancée. Il a fallu attendre la Conférence de Samedan en 1939 pour que les droits de ces trois bénéficiaires soient examinés en même temps.

Il s'agissait là d'une évolution importante car pour la première fois, il était devenu évident qu'il existait une relation synergique entre les parties. En effet, si les radiodiffusions ne sont pas protégées, ou même si les phonogrammes ne sont pas protégés, les auteurs et les artistes-interprètes pâtiront également en conséquence. Il avait été admis qu'il existait un besoin de protection contre la reproduction

non autorisée et les autres utilisations non autorisées de la propriété de ces trois parties.

Lorsque la Convention de Rome finit par être négociée en 1961, les diverses justifications pour la protection que j'ai décrites ici étaient bien établies et reconnues même si elles ne furent pas toutes nécessairement et universellement acceptées.

Nous devons aussi nous rappeler que la Convention de Rome était une convention pionnière. Comme nous le savons tous, lorsqu'elle fut adoptée plusieurs pays ne protégeaient pas tous les trois bénéficiaires, certains ne protégeaient qu'un ou peut-être deux d'entre eux. Par conséquent, ces pays devaient tous légiférer afin de pouvoir la ratifier ou y adhérer.

C'est pourquoi même lors de la Convention de Rome, certains pays déclaraient qu'ils ne voyaient pas la nécessité de cette convention et qu'en général, les conventions se conforment et contribuent à développer la législation nationale. D'autre part, la Convention de Rome définit les normes des nouveaux droits qui n'étaient pas encore largement établis. De plus, elle a eu une énorme influence au cours des années qui ont suivi sur l'évolution des droits voisins.

7.6. Les droits voisins après la Convention de Rome

Une fois que la Convention de Rome fut adoptée, les droits voisins se sont rapidement développés dans certaines parties du monde, à savoir en Amérique latine et dans les pays du Common Law, mais très lentement dans plusieurs parties de l'Europe où ces droits furent à peine reconnus et encore moins protégés. Néanmoins, les justifications des droits voisins apparurent à nouveau lorsque la Commission de l'UE commença à s'intéresser à l'harmonisation du droit d'auteur et des droits voisins dans les années 1980 et 1990.

À cette époque, les différences de niveau de protection des droits voisins étaient importantes parmi les pays de l'UE et il y avait toujours certains pays dans lesquels l'un ou l'autre des bénéficiaires demeureraient non protégés. L'UE décida de faire quelque chose à ce sujet et les justifications pour la protection des droits voisins telles que la Commission de l'UE les percevaient ont fini par être prises en

compte dans les considérants des directives de l'UE, relatives à ce sujet.

Tout d'abord, dans la directive relative aux droits voisins et de location qui fut initialement adoptée en 1992, les Considérants 5 et 6 stipulaient:

> « Le travail créateur et artistique des auteurs et artistes interprètes ou exécutants exige que ceux-ci perçoivent un revenu approprié et les investissements, en particulier ceux qu'exige la production de phonogrammes et de films, sont extrêmement élevés et aléatoires.
>
> Seule une protection juridique appropriée des titulaires de droits concernés permet de garantir efficacement la possibilité de percevoir ce revenu et d'amortir ces investissements ».

> « Ces activités créatrices, artistiques et d'entrepreneur sont dans une large mesure le fait de personnes indépendantes. Dès lors que ces activités constituent essentiellement des services, il convient d'en faciliter la prestation et l'exercice par la mise en place d'une protection juridique harmonisée dans la Communauté ».

Nous avons ici non seulement les théories incitatives et de travail mais aussi des justifications d'ordre économique pour la protection de l'investissement présenté.

Les justifications des droits voisins ont une fois de plus été abordées dans la Directive relative à la durée de la protection des droits voisins au Considérant 11. Voici ce qu'il y est dit:

> « Le niveau de protection du droit d'auteur et des droits voisins doit être élevé, étant donné que ces droits sont indispensables à la création intellectuelle ».

La Directive sur la société de l'information aux Considérants 9-12 présente également ces droits comme étant cruciaux pour la création intellectuelle et comme faisant partie intégrante de la propriété. Vous trouverez ici la justification de la propriété intellectuelle et les justifications d'ordre économique invoquées. Il est également fait référence à l'importance de la protection des droits voisins.

7.7. Les justifications contemporaines des droits voisins

Jusqu'ici, j'ai parlé du contexte historique, législatif et international de ces droits. Toutefois, il a été très intéressant d'examiner les réponses au questionnaire de l'ALAI relatives aux justifications actuelles, contemporaines des droits voisins. Les réponses viennent de seize pays, et je les ai toutes prises en compte. En outre, je suis très reconnaissant à Jane Ginsburg, d'avoir préparé et aimablement mis à ma disposition les diagrammes récapitulants les réponses au questionnaire sur les droits d'auteurs et les droits voisins.

Ces réponses présentent une grande diversité de justifications des droits voisins formulées dans neuf rubriques distinctes, qui s'appliquent également toutes à la protection du droit d'auteur.

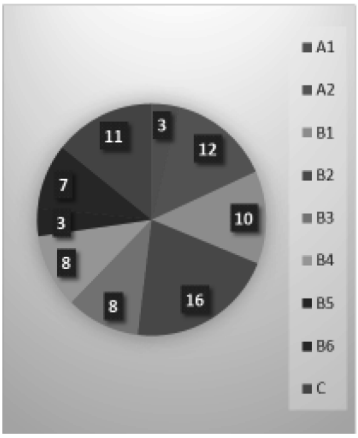
J'aimerais vous présenter un diagramme circulaire que j'ai réalisé. Du côté droit, figurent les neuf justifications qui sont ressorties des réponses données au questionnaire. Celles-ci sont réparties en deux rubriques: A. Le droit d'auteur comme droit fondamental et B. Le droit d'auteur comme utilitarisme.

La troisième sous-rubrique est C. L'harmonisation internationale (Obligations conventionnelles /Directives de l'UE).

Cette dernière rubrique reflète la nécessité de se conformer aux normes internationales.

On peut voir à partir du diagramme circulaire que la justification du droit naturel en rapport avec les droits voisins, comme on pouvait s'y attendre, apparaît uniquement en relation avec trois pays, notamment l'Allemagne, le Royaume-Uni et les États-Unis d'Amérique.

LES JUSTIFICATIONS DES DROITS VOISINS



Valeur numérique = Nombre de pays.

LÉGENDE

A. Le droit d'auteur comme droit fondamental
A1. Le droit naturel (Locke/les fruits du travail)
A2. Les droits moraux/La personnalité (Hegel/l'infusion du moi

B. Le droit d'auteur comme utilitarisme
B1. Promouvoir la création/la culture (Théorie incitative)
B2. Promouvoir/Protéger les industries créatives (Économie)
B3. Récompenser les créateurs (Théorie du travail)
B4. Protéger les créateurs (Théorie de la subsistance)
B5. Protéger la propriété privée
B6. Équilibrer les intérêts publics (La création par opposition à l'accès/la diffusion des idées)

C. L'harmonisation internationale (Obligations conventionnelles/Directives de l'UE)

Le droit moral, bien évidemment, concerne surtout les artistes-interprètes, il existe donc un certain nombre de pays (12) qui reconnaissent les droits moraux comme une justification pour la protection des artistes-interprètes. Je ne connais aucun pays qui envisage de donner des droits moraux aux diffuseurs ou aux producteurs de phonogrammes.

Le graphique présente également les diverses justifications utilitaristes: la promotion de la création et de la culture (théorie incitative); la protection des industries créatives (justification économique); le fait de récompenser les créateurs (théorie du travail); la protection de la propriété privée; et enfin l'équilibre des intérêts publics (la création par opposition à l'accès / la diffusion).

Le tableau suivant présente les résultats à la base du diagramme circulaire

JUSTIFICATIONS DES DROITS VOISINS								
LE DROIT D'AUTEUR COMME DROIT FONDAMENTAL		LE DROIT D'AUTEUR COMME UTILITARISME						L'HARMONISATION INTERNATIONALE (OBLIGATIONS CONVENTIONNELLES / DIRECTIVES DE L'UE)
LE DROIT NATUREL (Locke / les fruits du travail)	LES DROITS MORAUX / LA PERSONNALITÉ (Hegel / l'infusion du moi)	PROMOUVOIR LA CRÉATION / LA CULTURE (Théorie incitative)	PROMOUVOIR/PROTÉGER LES INDUSTRIES CRÉATIVES (Économie)	RÉCOMPENSER LES CRÉATEURS (Théorie du travail)	PROTÉGER LES CRÉATEURS (Théorie de la subsistance)	PROTÉGER LA PROPRIÉTÉ PRIVÉE	ÉQUILIBRER LES INTÉRÊTS PUBLICS (La création par opposition à l'accès / la diffusion des idées)	
		Belgique	Belgique	Belgique			Belgique	
	Croatie	Danemark	Croatie	Danemark	Danemark		Allemagne	
	République tchèque		République tchèque			République tchèque	Hongrie	
Allemagne	Allemagne	Allemagne	Danemark	Allemagne	Allemagne	Allemagne	Portugal	Allemagne
Royaume-Uni	Grèce	Israël	Allemagne	Hongrie	Grèce	Espagne	Pays-Bas	Royaume-Uni
(États-Unis)	Hongrie	Japon	Grèce	Portugal			Royaume-Uni	(États-Unis)
	Italie	Espagne	(Hongrie)	(Suisse)	Portugal		(États-Unis)	
	Japon	Royaume-Uni	Israël	Royaume-Uni				
	Portugal	(États-Unis)	Italie	(États-Unis)	Espagne			
	Espagne	(Portugal)	Pays-Bas		Suède			
	Suède	(Turquie)	Portugal		Royaume-Uni			
	Royaume-Uni		Espagne		(États-Unis)			
	(États-Unis)		Suède					
			(Suisse)					
			Royaume-Uni					
			(États-Unis)					

Les pays entre parenthèses indiquent que la justification citée fait partie intégrante de la doctrine de ce pays, mais n'est généralement pas attribuée à la législation ou l'historique législatif du droit d'auteur.

Lorsque je rédigeais ma thèse portant sur « Le droit d'auteur et l'intérêt public » au début des années 1990, j'ai examiné les justifications communément admises pour le droit d'auteur. Je n'ai pas spécifiquement abordé les droits voisins, mais en dehors des droits moraux, qui s'appliquent bien entendu principalement aux droits des auteurs, les autres justifications s'appliquent également à mon avis aux droits voisins. Il s'agissait de: la juste récompense du travail, la stimulation de la créativité et l'exigence sociale pour promouvoir la création tout en donnant un accès public aux œuvres et la diffusion des idées.

Le droit d'auteur s'efforce d'assurer un équilibre entre les intérêts des détenteurs de droit et les intérêts du public.

Le fait d'examiner à nouveau les justifications de la protection des droits voisins sur la base des résultats du questionnaire de l'ALAI a été un exercice très intéressant. Bien évidemment, ce tableau aujourd'hui est très similaire à celui des années 1990, mais tandis que les justifications traditionnelles de la protection demeurent, d'autres se sont développées.

En conclusion, j'établis une comparaison entre les anciennes et les nouvelles justifications des droits voisins telles qu'elles ressortent du questionnaire de l'ALAI.

COMPARAISON ENTRE LES ANCIENNES ET LE NOUVELLES JUSTIFICATIONS DES DROITS VOISINS	
ANCIENNES JUSTIFICATIONS	**NOUVELLES JUSTIFICATIONS**
— Droits naturel et moral – Droit d'auteur uniquement — Juste récompense du travail – Théorie du travail — Stimulation de la créativité – Théorie incitative — Exigences sociales – La création par opposition à l'accès / la diffusion des idées / l'équilibre des intérêts	— DA = Droit fondamental – DA, DV et artistes-interprètes — DA comme utilitarisme – Théorie du travail – Théorie incitative – Économie – Propriété privée – Équilibrer les intérêts publics — Harmonisation internationale

8

Informe general, Fundamentos de los derechos conexos

Gillian Davies[1]

8.1. Introducción

Buenos días, damas y caballeros.

Es un verdadero placer estar hoy aquí y quisiera darle las gracias al grupo danés por invitarme a dar esta charla y por la formidablemente cálida acogida que nos han brindado a todos nosotros, aquí en Copenhague.

En esta oportunidad hablaré sobre los fundamentos de los derechos conexos. Como hace un momento explicó Jane Gisberg, los fundamentos de los derechos de autor se remontan a un momento histórico y, como ha apuntado Victor Nabhan, en el caso de los derechos conexos, el desarrollo es más reciente, ya que se han ido fundamentado a lo largo del siglo XX. Lógicamente, dicho desarrollo se produjo al calor de las nuevas tecnologías, como por ejemplo, las téc-

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nicas de grabación derivadas de la invención del sonido grabado por Edison, y posteriormente el auge de la radiodifusión. Los inventores y desarrolladores de estas tecnologías, al igual que los creadores y productores de grabaciones de sonido y programas de radiofusión, empezaron a buscar desde un comienzo, una forma de protegerse en vista de los problemas con reproducciones no autorizadas, así como de igual manera la invención de la imprenta llevó a la rápida piratería de libros.

Con el paso del tiempo, los propietarios de estos nuevos medios de comunicación también quisieron protegerse contra las reproducciones no autorizadas de grabaciones de sonido, radiodifusiones, divulgación en público no autorizada, etc. Como sabrán, el término derechos conexos se emplea en referencia a los derechos de intérpretes, productores de fonogramas (grabaciones de sonido) y organizaciones de radiodifusión y, en algunos países, también engloban los derechos de los trabajos audiovisuales.

En esta presentación, he dividido los fundamentos de los derechos conexos entre los existentes antes de la adopción de la Convención de Roma para la protección de dichos beneficiarios en 1961 y aquellos otros que se aplican respectivamente a los intérpretes, productores de fonogramas y emisoras. Finalizaré comparando los fundamentos tradicionales con aquellos otros que se esgrimen en las respuestas al cuestionario de la ALAI sobre este tema.

8.2. Fundamentos de los Derechos de Intérpretes

Comencemos con los intérpretes. Los intérpretes fueron los primeros que padecieron los efectos de estas nuevas tecnologías. A su juicio, las técnicas de grabación y radiodifusión constituían una amenaza para sus oportunidades laborales. Si se piensa bien, antes de la invención de estas nuevas tecnologías las interpretaciones eran efímeras, no existía forma alguna de capturar una interpretación y, por lo tanto, no se podían reproducir.

Entendiblemente, los intérpretes vieron estos nuevos avances como una amenaza real a su forma de ganarse la vida y sintieron urgencia por defender su profesión. Así pues, desde un primer momento se pusieron a buscar ayuda para proteger sus interpretacio-

nes y evitar que se grabasen, reprodujesen o difundiesen sin autorización.

Los representantes de los intérpretes expusieron sus preocupaciones por primera vez a nivel internacional allá por el año 1903 en el congreso de la ALAI celebrado en Weimar. En aquella ocasión, se pronunciaron sobre la amenaza a la interpretación y a las oportunidades laborales que representaban las primeras técnicas de grabación.

Me parece verdaderamente interesante el tiempo que hace que se produjo esto y el hecho de que los intérpretes participasen en el Congreso de la ALAI para exponer su caso. Sorprendentemente, la actitud de ALAI ante los derechos de los intérpretes fue positiva. Todo esto se produjo cuando las técnicas de grabación eran todavía verdaderamente limitadas. Se estuvo discutiendo sobre las grabaciones hechas con instrumentos de música suizos, cajas musicales, relojes de cuco y cosas por el estilo. Se trataba de las técnicas de grabación prácticamente más primitivas.

Poco después se produjo la aparición de las retransmisiones inalámbricas. Para empezar, en este momento los intérpretes vieron que la radiodifusión les ofrecía nuevas oportunidades para ser escuchados y llegar a un público más amplio, si bien, por otra parte, se mostraron preocupados por las consecuencias de dichas retransmisiones en sus oportunidades de actuación en vivo.

Con la llegada de los años 20, los intérpretes acudieron a la Organización Internacional del Trabajo (OIT) en busca de ayuda. Incluso en aquella época, la OIT ya tenía una sección de trabajadores no manuales que se interesó por su reivindicación y a partir de entonces, la OIT y los intérpretes empezaron a colaborar para buscar mecanismos de protección de la profesión frente a estas nuevas técnicas. Seguidamente, se crearon organizaciones internacionales de representación de artistas (la Federación Internacional de Músicos, FIM, y la Federación Internacional de Actores, FIA).

El siguiente hito de los intérpretes se produjo en 1926 cuando la FIM adoptó una resolución que denunciaba el desempleo tecnológico ocasionado por las técnicas de grabación, cinematográficas y radiodifusión.

Poco después, en 1928 y durante la Conferencia de revisión celebrada en Roma para revisar la Convención de Berna, los intérpretes volvieron a defender su postura sobre las diversas amenazas que se cernían sobre su actividad profesional. Como consecuencia de ello se adoptó una resolución que declaraba:

> "En lo referente a la radiodifusión, sería injusto permitir la grabación de las ondas sonoras de un concierto con la intención de retransmitirlo por radio sin permiso del autor o del intérprete.
>
> Una interpretación debe protegerse en tanto obra derivada. De toda situación nueva debe emanar un nuevo derecho. Las teorías jurídicas deben adaptarse a las nuevas realidades económicas. La interpretación de una artista es una obra artística en sí y tiene un valor comercial evidente."

La resolución dejaba claro que el valor comercial de la radiodifusión dependía en gran medida de la clase de intérpretes cuyas interpretaciones debían protegerse.

Conviene destacar que este principio viene estando ya reconocido desde 1928 por el Congreso de la Convención de Berna.

Lamentablemente, la causa de los intérpretes no fue aceptada posteriormente por los organismos sindicales de Berna, si bien existían varios foros en los que sí se siguió trabajando en la protección de los eventuales beneficiarios de la Convención de Roma. Particularmente, en 1939 se celebró una reunión en Samadan, que fue el último comité de expertos que trató estos asuntos antes de la Segunda Guerra Mundial y antes de que se aplazase todo hasta 1948.

Pero en Samadan se aceptó que los intérpretes merecían normas de protección bien definidas dada su importancia cultural. Así pues aquí se reconocieron varias ideas antes de la guerra: que la contribución de los intérpretes debía protegerse económicamente; que las interpretaciones tenían la entidad de obra de arte; y que tenían un valor comercial que debía protegerse.

Estos argumentos mostraron por primera vez que se esgrimían razones económicas para la protección, además del reconocimiento de la importancia cultural de las interpretaciones.

8.3. Fundamentos de los Derechos de Productores de Fonogramas

Ahora pasaremos a los fundamentos expuestos antes de la adopción de la Convención de Roma respecto a los productores de grabaciones de sonido.

Como ocurrió con los intérpretes, la necesidad de proteger a los productores de grabaciones de sonido se reconoció desde un primer momento. En esta ocasión, fue en 1908 durante la Conferencia de Berlín para la revisión de la Convención de Berna, en la que se reconoció que la piratería de «discos» perjudicaba tanto a productores como a intérpretes y autores.

Hoy resulta sorprendente que tuviesen que pasar más de 50 años para que estos derechos se reconociesen formalmente a escala internacional. Pasados 30 años, en 1937, la ALAI se involucró. Ese mismo año la ALAI celebró un Congreso en París en el que se propuso una convención internacional especial para la protección de los fonogramas.

Más tarde, en la reunión de Samadan, mencionada anteriormente en relación a los intérpretes y celebraba en 1939, se dijo que era necesario proteger a los productores de fonogramas porque el proceso de creación de discos fonográficos era una actividad altamente especializada, que necesitaba de la inversión de grande cantidades de capital, no sólo por los costos de fabricación, sino también para poder contar con la colaboración de los intérpretes más prestigiosos.

Aquí vemos fundamentos basados en la mano de obra, inversión e incentivos. Tras ello, como hemos apuntado antes, hubo un gran paréntesis en materia de derechos de autor.

No obstante, después de la guerra, se retomó el asunto de los productores de fonogramas, y en la Conferencia de Revisión de Bruselas de la Convención de Berna celebraba en 1948, se adoptó una resolución en la que se instaba a los miembros de la Convención de Berna a seguir trabajando para proteger a los «fabricantes de instrumentos para la reproducción mecánica de piezas musicales».

En 1951, el catedrático Georg Bodenhausen, (a quien quizá algunos de ustedes recuerden como en aquella época Director General de

los BIRPI, más adelante OMPI), trató todo este asunto de los derechos de los intérpretes y productores en un artículo muy interesante en el que se preguntaba, «¿Cuál es la diferencia fundamental entre la adaptación, por ejemplo, en el caso de una traducción literal, y la reproducción fiel en un disco?». De este modo, aproximó las grabaciones a adaptaciones de obras como las traducciones.

La última referencia que quiero mencionar es la Guía de la OMPI de 1981 sobre las Convenciones de Roma y Fonogramas redactada por Claude Masouyé a finales de su carrera. Él habló de las técnicas modernas que envolvían la necesidad de proteger a los productores de fonogramas, su derecho a protegerse contra las copias y a cobrar si los fonogramas se utilizaban para la radiodifusión o se difundían públicamente. Una vez más, se esgrimen argumentos relacionados con la mano de obra, inversión e incentivos.

Mientras tanto las cosas avanzaban de una forma bastante diferente en el ámbito nacional, como es el caso del Reino Unido donde ya en 1911 se aprobó una Ley que protegía las grabaciones de sonido además de varios países europeos dónde, desde un principio se empezaron a proteger las grabaciones de sonido como piezas musicales. Naturalmente, muchos otros países con sistema jurídico anglosajón siguieron el ejemplo británico. Posteriormente, dichos países protegieron las grabaciones de sonido como obras sujetas a derechos de autor en sí mismas.

8.4. Fundamentos para la Protección de Emisoras

En lo que a emisoras respecta, nuevamente, en la reunión de Samadan de 1939 el Director General de los BIRPI expreso que las emisoras merecían protección, dado que la radiodifusión era una actividad con un alto nivel de especialización beneficioso para la cultura nacional o demás interéses de la audiencia publica en general. De nuevo, vemos como se esgrimen argumentos basados en la mano de obra, interés general e inversión. En su Guía de la OMPI a la Convención de Roma, Masouyé apuntó que,

> «La realización de las emisiones requiere con frecuencia esfuerzos, actividades e inversiones considerables de orden artistico, técnico

> y financiero; y, a juicio de los radiodifusores, es injusto permitir que otros organismos, competidores suyos en algunos casos, se apropien de esas emisiones mediante la retransmisión, la fijación en soportes materiales, la reproducción o la comunicación en lugares accesibles al público. Además, los artistas no pudiendo controlar las utilizaciones secundarias de sus propias emisiones, esos organismos tampoco pueden garantizar a los artistas ni a los autores, que un público distinto del suyo propio no se beneficiará a su vez del espectaculo.»

8.5. El Camino hacia la Convención de Roma

A lo largo de los años de negociación para la adopción de la Convención de Roma, los intérpretes mantuvieron una estrecha colaboración con la ILO, si bien los BIRPI estuvo trabajando con los productores de fonogramas y emisoras.

Sin embargo, resulta llamativo que durante gran parte de dicho periodo, los tres beneficiarios de la Convención de Roma trataron de buscar cobertura legal unilateralmente y la idea de agruparlos a todos en una Convención no se consideró hasta una fase bastante más tardía. No fue hasta la Conferencia de Samadan en 1939, que los derechos de los tres beneficiarios se debatieron en conjunto.

Aquí se dio un paso tan importante como interesante, pués fue la primera vez que se puso de manifiesto la existencia de una relación sinérgica entre las partes. Si no se protegían las emisiones, o en este sentido, los fonogramas carecían de protección, los autores e intérpretes también sufrirían las consecuencias. Se reconoció la necesidad de protección contra las reproducciones no autorizadas y otros usos no autorizados de la propiedad de las tres partes.

Cuando se empezó a negociar la Convención de Roma en 1961, los fundamentos mencionados anteriormente ya estaban totalmente consolidados y reconocidos, si bien todavía no necesariamente gozaban de una aceptación universal.

Tenemos que recordar que la Convención de Roma también fue una convención pionera. Como todos sabemos, en muchos países no había protección jurídica para los tres beneficiarios al tiempo de su adopción; algunos solo protegían a uno o quizá a dos de estos. Como

consecuencia de ello, todos tuvieron que legislar para ratificar o suscribirlo.

Por este motivo, incluso en la Conferencia de Roma hubo países que no veían la necesidad de una convención como a esta, y que, por regla general, las convenciones siguen y ayudan a desarrollar legislación nacional. Por otra parte, la Convención de Roma fijó estándares para los nuevos derechos que todavía no estaban establecidos plenamente, y a lo largo de los años siguientes ejerció una enorme influencia en el desarrollo de los derechos conexos.

8.6. Derechos Conexos después de la Convención de Roma

Una vez adoptada la Convención de Roma, los derechos conexos se desarrollaron rápidamente en algunas partes del mundo, como en América Latina, en países con sistema jurídico anglosajón, y muy lentamente en varias partes de Europa, dónde algunos países tenían un mínimo de reconocimiento y ninguna protección. Sin embargo, los fundamentos de los derechos conexos volvieron a la palestra cuando la Comisión Europea empezó a interesarse en la armonización de los derechos de autor y derechos conexos durante las décadas de los 80's y 90's.

En aquel momento, las diferencias en el nivel de protección de los derechos conexos entre los países de la UE eran considerables y seguía habiendo algunos países que no protegían a alguno de los beneficiarios. La UE decidió tomar cartas en el asunto y el punto de vista de la Comisión Europea sobre los fundamentos para la protección de los derechos conexos acabó reflejándose importantemente en los considerandos de las directivas europeas en dicha materia.

Así pues, en primer lugar, los considerandos 5 y 6 de la directiva relativa a derechos conexos que fue adoptada originalmente en 1992 declaraban:

> «Las obras artísticas y creativas de autores exigen unos ingresos suficientes que sirvan de base a nuevos trabajos artísticos y creativos, y que las inversiones necesarias, en particular, para la pro-

> ducción de fonogramas y películas son especialmente cuantiosas y aleatorias.
>
> Solo una protección jurídica adecuada de los titulares de derechos permite garantizar eficazmente dichos ingresos y amortizar dichas inversiones.
>
> Estas actividades creativas, artísticas y empresariales son, en gran medida, actividades de personas no asalariadas cuyo ejercicio debe facilitarse mediante una protección jurídica armonizada en la Comunidad».

Aquí se esgrimen las teorías sobre el incentivo y la mano de obra, así como argumentos económicos para la protección de la inversión.

Los fundamentos de los derechos conexos se volvieron a debatir en el considerando 11 de la Directiva Relativa al Término de Protección de Derechos Conexos. Aquí se decía:

> «El nivel de protección de derecho de autor y de derechos conexos debe ser elevado, ya que dichos derechos son indispensables para la creación intelectual».

En los considerandos 9-12 de la Directiva relativa a la Sociedad de la Información, también se hablaba sobre la importancia de estos derechos para la creación intelectual y una parte integral de la propiedad. Aquí se esgrime el fundamento de la propiedad intelectual así como los fundamentos de inversión y económicos y también se hace referencia a la importancia cultural de la protección de los derechos conexos.

8.7. Fundamentos Contemporáneos de los Derechos Conexos

Hasta ahora, he hablado sobre los antecedentes históricos, legislativos e internacionales de estos derechos. Sin embargo, resulta muy interesante ver las respuestas al cuestionario de la ALAI en lo relativo a los fundamentos actuales, modernos de los derechos conexos. Se recibieron respuestas de dieciséis países y los he tenido en cuenta a todos. Quiero expresar mi agradecimiento especial a Jane Ginsberg por su ayuda para preparar y pasarme algunas gráficas que resumen

las respuestas al cuestionario sobre los derechos de autor y los derechos conexos.

Las respuestas muestran todo tipo de fundamentos para los derechos conexos expresados en seis bloques principales, que también se aplicaban a la protección de los derechos de autor.

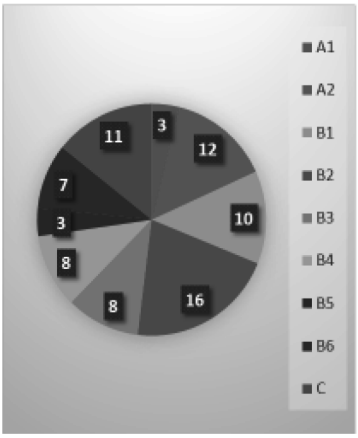
A continuación, les mostraré una gráfica circular que he preparado. En la parte derecha, vemos nueve fundamentos que salieron de las respuestas al cuestionario. Están divididos en dos bloques: A. Derechos de autor como derecho fundamental y B. Derechos de autor como utilitarismo.

El tercer bloque secundario es C. Armonización internacional (obligaciones del Tratado/Directivas de la UE).

Este último bloque refleja la necesidad de cumplir la normativa internacional.

En la gráfica circular podemos ver que el fundamento de derecho natural, que no se supone que guarda relación con los derechos conexos, y solo aparece en tres países: Alemania, el Reino Unido y Estados Unidos.

FUNDAMENTOS DE LOS DERECHOS CONEXOS



N.º de valor = N.º de países.

LEYENDA

A. Derechos de autor como derecho fundamental
A1. Derecho natural (Locke/fruto del trabajo)
A2. Derechos morales/personalidad (Hegel/auto infusión)

B. Derechos de autor como utilitarismo
B1. Fomentar la creación/cultura (teoría del incentivo)
B2. Fomentar/proteger la industria creativa (economía)
B3. Remunerar a los creadores (teoría del trabajo)
B4. Proteger a los creadores (teoría del modo de vida)
B5. Proteger la propiedad privada
B6. Equilibrar el interés general (creación frente a difusión del acceso/idea)

C. Armonización internacional (obligaciones del tratado/directivas de la UE)

El derecho moral, obviamente, está relacionado especialmente con los intérpretes, por lo que hay una gran cantidad de países (12) que consideran que los derechos morales son un fundamento para la protección de los intérpretes. No sé de ningún país que contemple la posibilidad de reconocer derechos morales a emisoras y productores de fonogramas.

La gráfica también muestra varios fundamentos utilitarios: fomentar la creación y la cultura (teoría del incentivo); proteger industrias creativas (fundamento racional); remunerar a los creadores (teoría del trabajo); proteger a los creadores (teoría del modo de vida); proteger la propiedad privada; y, por último, sopesar el interés general (creación frente a acceso/difusión).

La siguiente tabla expone los resultados en los que se ha basado la gráfica circular.

FUNDAMENTOS DE LOS DERECHOS CONEXOS								
DERECHOS DE AUTOR COMO DERECHO FUNDAMENTAL		DERECHOS DE AUTOR COMO UTILITARISMO						ARMONIZACIÓN INTERNACIONAL (obligaciones de la teoría/directivas de la UE)
DERECHO NATURAL (Locke/fruto del trabajo)	DERECHOS MORALES/ PERSONALIDAD (Hegel/auto infusión)	FOMENTAR LA CREACIÓN/CULTURA (teoría del incentivo)	FOMENTAR/PROTEGER LA INDUSTRIA CREATIVA (economía)	REMUNERAR A LOS CREADORES (teoría del trabajo)	PROTEGER A LOS CREADORES (teoría del modo de vida)	PROTEGER LA PROPIEDAD PRIVADA	EQUILIBRAR EL INTERÉS GENERAL (creación frente acceso/difusión de las ideas)	
		Bélgica	Bélgica	Bélgica			Bélgica	Bélgica
	Croacia	Dinamarca	Croacia	Dinamarca	Dinamarca		Alemania	Canadá
	República Checa		República Checa			República Checa	Hungría	
Alemania	Alemania	Alemania	Dinamarca	Alemania	Alemania	Alemania	Portugal	Dinamarca
Reino Unido	Grecia	Israel	Alemania	Hungría	Grecia	España	Holanda	Alemania
(Estados Unidos)	Hungría	Japón	Grecia	Portugal			Reino Unido	
	Italia	España	(Hungría)	(Suiza)	Portugal		(Estados Unidos)	Italia
	Japón	Reino Unido	Israel	Reino Unido				Holanda
	Portugal	(Estados Unidos)	Italia	(Estados Unidos)	España			Nueva Zelanda
	España	(Portugal)	Holanda		Suecia			España
	Suecia	(Turquía)	Portugal		Reino Unido			Suecia
	Reino Unido		España		(Estados Unidos)			
	(Estados Unidos)		Suecia					Reino Unido
			(Suiza)					(Estados Unidos)
			Reino Unido					
			(Estados Unidos)					

Los países entre paréntesis indican el fundamento citado en la doctrina de dicho país, pero no se atribuye generalmente a la legislación sobre derechos de autor o historia legislativa.

Cuando escribí mi tesis sobre «Derechos de Autor e Interés Publico» en los años 90, analicé los fundamentos comúnmente aceptados en cuanto a derechos de autor. No me detuve en los derechos conexos pero, a parte de los derechos morales, que, lógicamente, se aplican a los derechos de autor, en mi opinión, los otros fundamentos también son válidos a los derechos conexos. Aquí se incluían: remuneración justa por el trabajo, estimular la creatividad y el requisito social de fomentar la creación permitiendo el acceso del público a las obras y la difusión de ideas.

Los derechos de autor tratan de proporcionar un equilibrio entre los interéses de los titulares del derecho y el interés público.

Volver a observar los fundamentos para la protección de los derechos conexos a partir de los resultados del cuestionario de la ALAI ha sido un ejercicio muy interesante. Lógicamente, la situación es muy similar a la de los años 90, pero mientras los fundamentos tradicionales para la protección se mantienen, otros han sido desarrollados.

Como conclusión, dejo una comparativa de los fundamentos nuevos y antiguos en cuanto a los derechos conexos, a partir de los resultados del cuestionario de la ALAI.

COMPARACIÓN DE LOS FUNDAMENTOS ANTIGUOS Y NUEVOS DE LOS DERECHOS CONEXOS	
ANTIGUOS — Derechos naturales y morales – Solo derechos de autor — Remuneración justa por el trabajo – Teoría del trabajo — Estimular la creatividad – Teoría del incentivo — Requisitos sociales – Creación frente a acceso/ difusión de ideas/equilibrio de intereses	**NUEVOS** — DA = Derechos fundamentales – DA, DC e intérpretes — DA como utilitarismo – Teoría del trabajo – Teoría del incentivo – Economía – Propiedad privada – Equilibrar el interés general — Armonización internacional

ECONOMIC ASPECTS OF COPYRIGHT AND RELATED RIGHTS

ASPECTS ÉCONOMIQUES DU DROIT D'AUTEUR ET DES DROITS VOISINS

ASPECTOS ECONÓMICOS DE LOS DERECHOS DE AUTOR Y DERECHOS RELACIONADOS

Moderator/Modérateur/Moderador:
Dr. Mihály Ficsor, Budapest

Based on a common methodology, there is now much quantitative research regarding the economic aspects of copyright and related rights in different countries. What significance does that have for maintaining and further developing the system of copyright and related rights? More recently, attempts are being made to establish a methodology for a qualitative assessment of copyright and related rights. What are the results so far, and are they pointing the same way as the quantitative research? If copyright and related rights are beneficial, who is benefiting? There are many interests at stake, authors, performers, producers, publishers, disseminators, users, ISPs, Telcos, users, the general public. How are their economic interests balanced against each other? How can such quantitative and qualitative infor-

mation be used to guide policy-making on copyright and related rights?

Il existe aujourd'hui une abondante recherche d'approche quantitative fondée sur une même méthodologie concernant les aspects économiques du droit d'auteur et des droits voisins dans différents pays. Quelle signifiation revêt-elle pour la préservation et la développement futur du système du droit d'auteur et des droits voisins ? Depuis peu, l'on essaie de mettre sur pied une méthodologie commune pour une évaluation qualitative du droit d'auteur et des droits voisins. Quels en sont les résultats jusqu'ici, et cette évaluation indique-t-elle les mêmes résultats que la recherche quantitative ? Si le droit d'auteur et les droits voisins sont avantageux, qui en profie ? Plusieurs parties prenantes ont leurs intérêts en jeu: les auteurs, les interprètes, les producteurs, les éditeurs, les distributeurs, les utilisateurs, les FSI, les télécommunications, le grand public... Comment chacun trouve-t-il son compte sur le plan économique ? Comment ces informations quantitatives et qualitatives peuvent-elles être utilisées pour orienter les politiques sur le droit d'auteur et les droits voisins ?

Basado en una metodología común, hay mucha investigación cuantitativa con respecto a los aspectos económicos de los derechos de autor y los derechos relacionados en distintos países. ¿Qué importancia tiene esto para mantener y seguir desarrollando el sistema de derechos de autor y derechos relacionados? Más recientemente se han estado realizando intentos para establecer una metodología para una evaluación cualitativa de los derechos de autor y los derechos relacionados. ¿Cuáles son los resultados hasta ahora? y ¿está indicando lo mismo que la investigación cuantitativa? Si los derechos de autor y los derechos relacionados son benefiiosos ¿quién se está benefiiando? Hay muchos intereses en juego, autores,artistas intérpretes o ejecutantes, productores, editores, difusores, usuarios, ISPs, empresas de telecomunicaciones, usuarios, público en general. ¿Cómo se equilibrant sus intereses económicos entre sí? ¿Cómo se puede utilizar dicha información cuantitativa y cualitativa para guiar

la formulación de políticas sobre los derechos de autor y los derechos relacionados?

9

Moderator's introduction

Mihály Ficsor[1]

This is the second panel in the program of the congress at which we are to address the question: "Copyright to be or not to be?" The first panel concentrated on "the traditional justifications for copyright and related rights", and the topic of the third one after ours is this: "Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights". The reference to "acceptance" in the latter title shows that the third panel also is to deal with the issue of *justification*. And it seems that our task is the same; just we are supposed to focus on economic aspects. Such concentration on "justification" is just normal at a congress the overall theme of which may be paraphrased also in this way: "Is the protection of copyright [still] justified?"

The answer to this question depends, to a great extent, on who is playing the role of Hamlet appearing in the logo of the congress looking at the scull with the letter "C" and a circle around it; that is, who asks the question, in what context and with what purpose.

1. Honorary President of the Hungarian ALAI Group, former Assistant Director General of WIPO.

If we are faithful to the objectives and principles reflected in the Statutes of ALAI, our answer should be given from the viewpoint of human creators – authors and performers – and it should be not just affirmative but we may also have to add that the very fact this question emerges at all is quite alarming. After all, according to our principles (which happen to be in accordance with Article 27(2) of the Universal Declaration of Human Rights), when we speak about copyright, we mean human rights – moral and economic rights – of authors and performers. At an ALAI congress, this is supposed to be *the basic* "traditional justification" or just *the* justification. Thus, in a way, after the first panel we could have just stopped and proceeded directly to the closing session of the congress.

But we cannot. For quite weighty reasons; one of which being that – as the word "justifications" in plural in the title of the first panel indicates and as it has been discussed in that panel – the natural-law and human-rights-rooted justification is not the only one; the "instrumentalist", social-deal-based justification is in strong competition with it. In fact, it is in ever stronger competition because it has very powerful supporters. Many of them even tend to ask the question in this way: "what may be the justification of the protection of copyright, *if any*?" And probably they prefer looking at the scull (the scull!) with the letter C and the circle around it as a symbol of a dying or defunct legal system.

The other reason for which we cannot answer the "to be or not to be" question just from the traditional ALAI viewpoint – that of the interests of authors and performers as human creators (duly balanced with basic public interests) – is reflected in the detailed description of the topic of our panel. Reference is made to a number of different stakeholders with competing interests which we also have to take into account. The more so because some of them have become quite powerful and they demand to have a more decisive say about the future of copyright, "if any".

The first such group is that of publishers and producers. They are, of course, in favor of effective protection of copyright and related rights – but preferably in their own hands; either as original owners or as transferees. In certain cases, the transfer of rights is inevitable

and is also a good choice for human creators; such as, for example, in the case of audiovisual works or "collective" works. The concentration of ownership may also increase the chance to fight infringements, in particular on the Internet, against those who also proudly use the symbol of a scull to indicate their attitude to copyright – just along with two crossbones under it. Individual creators might hardly have the economic, technical and legal potentials to fight online pirates and to counterbalance the ever more dominant power of real and false intermediaries. At the same time, with publishers and producers becoming parts of multinational conglomerates, the original justification of copyright – at least the way we in ALAI are supposed to see it – may fade away. For the executives and shareholders of those big companies, the economic aspects – costs and benefits, investments, figures of shares, trade, market and competition categories, etc. – are decisive. However, all categories of copyright owners lose if, in the eyes of the members of the public and policymakers, copyright does not work anymore "as advertised"; if it is made use by the "copyright *industries*" as another branch of *industrial* property, rather than as a legal system to promote creativity through recognizing and protecting the rights of human creators. Therefore, for the fate of copyright, it is necessary that they may be able (in many cases, they certainly may) to prove in a transparent and persuasive manner that, through the filters of their own interests, the interests of authors and performers also duly prevail.

Publishers and producers are both users of the creations of authors and – as transferees – holders of copyright and/or related rights; that is, both potential allies for human creators and negotiating parties sitting at the other side of the table with potential conflicting interests. In contrast, the second group of stakeholders – other than the authors and performers – consists of users only with such big subcategories as commercial users, public-interest-related institutional users, and "end-users" among them the huge and ever more active internet population. For this group, copyright may – and it seems quite frequently does – appear as a burden, a nuisance, a cost to pay or to try and avoid, and as an "unnecessary" obstacle to be dismantled as much as possible. For them, "free access" is certainly an

attractive slogan (forgetting about the potential collateral damage that there may be less and less qualitative cultural productions and services to be accessed).

Along with this big group of users, we should mention immediately the third group of stakeholders which is ever more powerful both economically and politically: online intermediaries. They should be mentioned together with this second category of users at least for two reasons. First, because there are important overlaps between the two groups; some influential big companies trying to enjoy the overly beneficial status of intermediaries are in fact users of works and objects of related rights. Second, because there is a strong alliance between them and the previously mentioned category of users. The economic calculation of such intermediaries – frequently just false "intermediaries" and real users – is quite simple. The freer the access of their customers to valuable and attractive works and other protected materials through their systems, the greater number of them visit, and click on, their websites – and, as a consequence, the bigger amounts of money they receive from advertisers. Therefore, these intermediaries tend to be generous distributors of other people's creations and productions, they are champions of "free access", enthusiastic advocates for weakening the protection of rights, and ferocious fighters against any obligation to apply more effective measures against infringements (which may reduce "free access"; that is the number of clicks; that is their income) and against the idea of sharing the profit they obtain through the use of works and other protected materials with the creators and producers thereof. They use their easily obtained money for robust lobbying campaigns, for establishing or financing "NGOs" to protect their sheer financial interests and for buying the services of academics and researchers (directly – or indirectly by financing their institutions and research projects). In fact, it seems that they have reached already a kind of "immunity level" against any pro-copyright measures that may endanger their business. If some brave legislators or governments commit a political miscalculation by trying to reestablish the balance of interests and reduce the widening value gap to the detriment of rightholders, they use their de facto monopoly position for blackmail; they say: we sus-

pend our services if our interests are menaced and we invite our customers that, if they want to continue enjoying free access offered by us, they should persuade their "stupid" politicians not to do so.

The attitude of the fourth group – academics and researchers – has become mixed towards copyright. The atmosphere is not everywhere as favorable or at least well-balanced as at ALAI meetings. Skepticism about the justification of special treatment for copyright and the support of theories to suggest the need for reducing the level of protection have become fashionable among many of them.

Let us consider policymakers as the fifth group. This is another mixed group with a trend that sincere and warm supporters of creators' rights are ever rarer among them. The attitude of many politicians seems to be determined by simple mathematical calculations: from which stakeholders they may expect more political and financial support (or just the contrary, dangerous opposition) and, at elections, from whom they may get more votes: whether from rightholders or from users, including "end-user" consumers (and the answer seems obvious).

This is the complex network of conflicting interests in the light of which, according to the detailed description of our topic in the program, we have to discuss the "economic aspects of copyright and related rights". The description refers to the proliferating studies on the "economic impact of copyright" which is made on the basis of a common methodology in a number of countries and then poses the question of "what significance [those studies] have for maintaining the system of copyright and related rights?".

Speaking about significance and impact of the big number of studies about the "economic importance of copyright", let me mention something that happened at a copyright workshop held in one of the Eastern European countries recently. A speaker was making a powerpoint presentation when I heard that the man on my side was snoring quite loudly. I shook his hand a little bit. When, as a result, he woke up and found where he is, he made brave efforts not to fall asleep again and look at the slides on the screen full of figures, diagrams and charts; but then his head dropped again, although fortunately he did not resume snoring. The presentation happened to be a

detailed report on the results of studies carried out in various countries on the economic aspects of copyright, and it had turned out that my neighbor enjoying that intensive siesta was a quite well-known author and a member of the board of a local collective management organization.

Of course, this does not mean that these studies do not deserve more attention and interest than this. The answer to the question of how much importance may be attributed to them depends on what kind of data they include, and for whom and for what purpose they serve.

The studies now are, in general, prepared in accordance with a common methodology developed under the aegis of WIPO. The 2015 revised edition of the WIPO "Guide on Surveying the Economic Contribution of the Copyright Industries" is freely available on the Organization's website. This common methodology greatly contributes to the credibility of these studies and facilitates meaningful comparative analysis. However, at a congress of ALAI, an organization to promote the cause of human creators, it should strike our eyes that reference is made to contribution of copyright *industries*. And this is not by chance since all the basic aspects of the methodology were worked out in studies commissioned by the International Intellectual Property Alliance (IIPA), the umbrella organization of the associations of the most important US copyright industries (of which the MPAA for the film industry, the RIAA for the phonographic industry, the AAP for the publishing industry and the ESA for the electronic game industry are the core members, but in the past the BSA for the software industry was also a member of the alliance). The study on the "*Copyright Industries in the U.S. Economy: The 2016 Report*" (by Stephen E. Siwek) is already the sixteenth such report since 1990. It is published, in general, every second year. The latest figures in the 2016 report – based on 2015 data – are truly impressive: the contribution of the core copyright industries to the US economy was more than 1.2 trillion dollars accounting for 6.88% of the GDP, and these industries – I quote the summary of the report – "employed over 5.5 million *workers* in 2015, accounting for 3.87% of the entire U.S. *workforce*, and 4.57% of total private *employment* in the United States"

(emphasis added). The study – as also the WIPO methodology having taken over these aspects – operates with the concept of "total copyright industries" ("partial copyright, non-dedicated support, and interdependent industries") in the case of which the relevance of copyright is more indirect but along with which the figures are even bigger: 2.1 trillion dollars, 11,69% of the GDP, 11.4 million "workers", 7.95% of employment and 9.39% of private employment.

One may easily understand the objectives of these studies in the US. These figures are useful for those industries since they are suitable to show to policymakers that it is in the economic interest of the country to provide for a high level and effective copyright protection and to promote the same at the international level (the more so because the studies show also important positive trade balance due to the contribution of US copyright industries).

However, it may emerge as a question what may be the objectives of such studies where the figures are less attractive for the economy of a country and its trade balance. Does this justify better protection of copyright in the hope of improving the economic data or, to the contrary, does it suggest to the politicians to allow free access and to neglect enforcement of rights (because their "trade balance" in the cultural market is negative and, thus, a higher level protection system would rather serve foreign interests)? It is, of course, an argument against such kind of negative protectionism that it may lead to deterioration of domestic cultural activities, to reducing creativity and to endanger cultural diversity and national identity.

And these are the aspects – creativity, national culture, cultural diversity – which are somehow lost if copyright policy is based just on mere economic, trade and market aspects. In this way, there is a danger, as mentioned above, that – with too much attention on *industrial* activity and on these aspects – copyright is transformed into just another branch of industrial property rights. This would hardly be the interests of the copyright industries – companies and other industrial entities – either since in this way copyright might lose justification for its specific features and its current level of protection.

It is, therefore, a welcome element of the program – reflected in the detailed description of the topic of this panel – that it draws

attention to, and emphasizes the importance of, studies of qualitative aspects of copyright. There are a lot of possible issues to be covered by such studies. Some of these are of a nature that the interests of the copyright industries and authors and performers as human creators are the same in their respect. For example, studies to show how big the "value gap" is between, on the one hand, the big income of certain online intermediaries that are *de facto* (and, on the basis of a correct interpretation of the relevant norms, also very much *de iure*) users of works and objects of related rights and, on the other hand, the extremely little, or non-existent, share from that income for rightholders. In connection with the heavy use of works and object of related rights by those online intermediaries coupled with their (and not the rightholders') big income obtained from their advertisers, it might also be the object of an economic study to assess the limit to which the advertisement money might still take care of supporting the use of cultural productions and services. This may be revealing in view of the fact that, in contrast with the past where advertisement was only connected with some specific forms of uses of certain categories of works (such as in newspapers or in television and radio programs), now on the internet they are supposed to extend to the use by the broadest possible public of all kinds of works and objects of related rights. And, of course, from the viewpoint of the interests of authors and performers, the most important and most desirable studies would be those which would show what kind of share they may get from the income that the copyright industries obtain as a result of the use of works and performances. These studies would truly show whether copyright still works "as advertised" or it is already in the above-mentioned process of becoming a category of industrial property rights having lost much of the justification of its specific features.

I hope that the presentations of the outstanding copyright experts of this panel will provide a complete review of both the qualitative and the quantitative sides of the economic aspects of copyright in this way.

10

Is Copyright an Incentive to the Creation and Distribution of Literary and Artistic Works?

Paul Goldstein[1]

10.1. Is copyright an incentive –

Copyright and author's right raise a great many empirical and policy questions. Of these, I propose to address one perennial – and some would say central – issue*: Is copyright an incentive to the creation and distribution of literary and artistic works?* The answer differs between incentives to firms and incentives to authors.

a. For firms

The limited empirical literature on the question of copyright's incentive to firms to invest in the production and distribution of literary and artistic works commonly observes that the incentive effect is mixed. It is probably more accurate to say that copyright's incentive effect is *complicated*. There is, for example, a robust, but ultimately

1. Professor, Stanford University, Stanford, California.

unresolved, empirical literature on the question whether unlicensed music file sharing has reduced the production of recorded music. But, to put the magnitude of the question in context, there is nothing in the serious empirical literature to suggest that the outright elimination of copyright tomorrow would not substantially reduce industry capacity to finance or distribute literary or artistic works, or to pass a part of their revenues on to authors. Rather, it is at the margins of copyright policy – the economic impact of the next increment of uncontrolled piracy, or of the next carve-out from copyright's exclusive rights – that the effect of copyright on firm incentives to produce and distribute literary and artistic works becomes complicated.

b. For authors

By contrast, the evidence on copyright as an incentive to authors and other creators is far less mixed – or complicated – than it is for firms, and the evidence decidedly inclines in the direction of a negative answer, at least for the great number of authors. Ask an author – as qualitative studies have – what economic incentive it takes to get him to the writing table, and he will answer, "I write because I cannot *not* write." Substitute "composing," "painting," or "choreographing" for "writing," and you get the picture.

Even the best empirical work makes only the smallest dent in this general picture of authorial indifference to economic incentive. The recent work of Michele Giorcelli and Petra Moser on Italian operas between 1770 and 1900 concludes that basic copyright protection increased creative output by composers in the Italian states that adopted copyright laws over those that did not, but even this study – which in my view is the gold standard for this kind of work – ultimately demonstrates only correlation, not causation, between copyright and incentives, and any event is historically bounded in a way that may limit its lessons for the twenty-first century.

Similarly, Stefan Bechtold and Christoph Engel's 2017 field study on the economic valuation of the non-economic moral rights tells us only what amount of money, if any, authors will require before giving up their moral rights, not whether moral rights stimulated their productivity in the first place.

Finally, there is evidence that other than among the fortunate few, most authors continue over their lifetime to produce writing for less than poverty level wages. According to data gathered by the Authors Guild in the US, between 2009–2015 full-time authors on average saw a decrease in annual income from $25,000 – below the national poverty level – to $17,500, even further below, and part-time authors saw a decrease in income from their writing activities from $7,250 to $4,500. Yet, over the same period, the production of titles in the US increased (or decreased) only modestly.

In short, on the question of author incentives, it is time to retire Samuel Johnson's much-cited declaration that "No man but a blockhead ever wrote except for money."

10.2. Why incentive is the wrong question—at least for authors.

Turning from the descriptive to the prescriptive, and focusing exclusively on the plight of authors, I would emphasize that copyright's questionable status as an incentive to authorship is *not* a policy prescription for weakening copyright. Copyright does after all secure revenues for publishers, and through them for authors as well, and although writers may keep writing even if those revenues continue to fall, that is not a good reason to impoverish them.

However, the contested role of copyright as an incentive for authors means that advocates who care about authorship and the conditions under which authors work should drop advocacy based on copyright as an incentive to authorship, and to do so for three reasons:

a) The case for copyright as an incentive to authorship is sufficiently weak to be counterproductive, and actually undermines the case for author's copyright.
b) The incentives case for author's copyright is a distraction from the argument that authors and their advocates *should* be making—that authorship no more requires an economic case in its favor than does any other fundamental human right, such as

privacy or speech. Article 27 of the foundational 1948 Universal Declaration of Human Rights nowhere conditions its prescription that "[e]veryone has the right to the protection of the moral and material interests arising from any scientific, literary or artistic production of which he is the author" on a showing that the benefits of these productions exceed their economic costs.

As the questionnaire responses gathered for this year's ALAI Congress demonstrate, there is ample support for a non-utilitarian case for protection of authors, not only in the author's rights tradition of the civil law countries, but also in the common law countries, including the US and Britain where foundational documents – for example, the 1977 Whitford Committee Report – posit that authors have a natural right to protection for their works.

c) Finally, reliance on the contested case for authorial incentives also distracts from copyright's demonstrated capacity to affect the *direction*, as contrasted to the *level*, of investment in creative work, with distinct consequences for the *quality* of the works produced. This topic is too complex to address in the time allotted, but is one to which I hope we can return following the coffee break.

11

IP as a Promotor of Growth

Jan Rosén[1]

Thank you, chair, and many thanks for allowing me to be part of this distinguished panel.

I would like to add a bit to what Alain Strowel and Paul Goldstein just conveyed to us by relating to a very recent research project pursued in Sweden, focusing on intellectual property as a promotor of economic growth on a national level, commissioned by the Swedish government. Indeed, there are many research programmes running in this field aiming at seeking out the connection between intellectual property and economy growth. Still, the Swedish government has decided to do that anew and on a rather large scale, scheduled for a line of separate studies to be produced during the next 12 to 18 months. Of specific interest right now might be a report produced and published only a couple of weeks ago. The overall idea behind it was to explore the sources for a demonstration of such a connection between IP assets and economic growth. The result of it comes out as we, in German language, would call Lesefrüchte; thus a collection

1. Professor of Private Law, Stockholm University.

and presentation of materials ready to form a basis for a more profound and detailed study.

However, the materials collected are based on world-wide sources, thus not something merely emanating from the Swedish territory, hence also from sources of other comparable countries. The report doesn't tell the full story, but some elements of it are quite interesting, I think.

As you can see from my power point slides the basic question is whether there is at all a connection, possibly merely a single one, between economic growth and the existence of IP rights. If the answer is yes – and it definitely is – then the next issue would be to explore how to *manage* IP Rights generally, in order to enhance such potential economic growth. What kind of management would be needed in order to reap the fruits of IP rights? Further still, to some extent this report also deals with the importance of piracy in economic terms, in particular the cost of piracy on a national level. On the national level the answer of the report, as piracy is concerned, is a very firm one, demonstrating excessive national losses from piracy. Mostly, to put it short, because pirates don't pay taxes at all! Further, pirates simply don't add anything to the economic growth of the society.

The complex nature of this investigation comes from the fact that there are so many financial factors and parameters involved, thus adding to the complex nature of the whole investigation. This mainly because copyright is present in very different markets, greatly differing among them as to structures, types of active parties, values, payment and financing forms, etc. Accordingly, it is indeed difficult to pursue a study only for one country or for one single market. It is all the more so as copyright markets often comprise trans-border markets or world-wide uses. Indeed, a coherent overall picture is, for the said reasons, hard to get, this report concludes.

It seems we should recognise four major and very complex markets, differently financed, very contextually different, though still somewhat overlapping each other. Surely, the main imminent factor is the use of copyright, although this investigation, as a matter of principle, tests all kinds of intellectual property. Thus, it is actually

comparing differences between patent protection and copyright protection as applied in the market. We may note, for example, that entertainment is recognized as a specific area, somewhat separate from the area of information, where database presentations, public authority information, etc. are specific phenomena. A third grouping is that of teaching and research, thus means of producing cultural educational materials, scientific results, etc.

A fourth grouping, aside of or parallel to entertainment, information and teaching & research, which is also a significant copyright area to recognise in financial terms, would be technology and, as we may call it, technical standards. Copyright can indeed work as a technological standard and this is of a major importance worldwide. A typical and prominent example would be source code, with its obvious prominent effects in major consumer and producer groupings. Creation, distribution and, eventually, consumer usage of works and related, or neighbouring, rights in various markets come in sight here.

We should note that there is no single market figure available, though the financial impact of those differentiated markets, just mentioned, is obvious. Empirically, you can say that there is no *counterfactual* at hand, that is, no situation is quite comparable to that, which would exist if there were no copyright existing at all. We simply don't have the possibility of comparing, now that copyright actually does exist, what would it be if there was no copyright.

Copyright lasts for a long time, approximately for a hundred years, and then it elapses. Does something of importance happen, of a financial nature, at the time when the period of protection comes to an end for a specific work? This report gives a firm answer: no, not much is happening at all at that point or time, not economically and certainly not more availability from a consumer perspective. But during the period of protection, things are happening all the time of at least some economic significance. Still, we must recognize that mostly marginal effects are possible to measure with precision. On the macro-level, we are indeed offered a pretty clear answer. Yes, there is considerable economic growth worked up due to copyright protection. Not very surprising – this is not rocket science. And you know

the definition of a researcher, right? It's a person who gets to know something last of all.

So even if you all probably already knew this, before I said it, I think it is noteworthy to observe that the answer given by the report is very affirmative in those respects mentioned. Although this is in the terrain of professional economists, not in the land of lawyers, the affirmative answers just indicated may surely be understood by us all.

Further, it seems pretty sure that at least 5 percent of the national GDP is based on copyright. Probably, the value today is somewhere between 5 to 10 percent! That is quite something! In fact, a tremendous value! And this figure seems constantly to be rising, a reflexion of the progress of the information society. To a great extent also due to the fact that source code and software are copyright protected – strong elements for progress and wealth.

There is also another market element in copyright of interest. It demonstrates the market's trust in investment in copyright goods and projects. Markets for knowledge or information, they usually differ from ordinary product markets by so-called mere information. Namely, a symmetry between seller and buyer. Copyright already seems to help out in a very useful way as it fairly easily defines a specific ownership – investors like that! Front money becomes available, licensing is triggered, transactions are supported.

So, the mere existence of a well-defined copyright seems to trigger a sound and thriving market. Though a somewhat blunt conclusion, it may be said that the more effectively protected copyright works are, the more profound and dynamic economics we seem to get. The more effective protection of works, the more works are created, the more licensing and public availability there is and, accordingly, dynamic economic growth.

Something that is very clear in patent law, but also in copyright, is, again, the importance of effective management of those protected inventions and works, thus driving economic growth. The report underlines the need to find and explore manners for the boosting of copyright (and patent) licensing. Further still, as Paul Goldstein mentioned before me, although it's a different topic, copyright seems to

ease not only the creative process but also to boost the publication of results of creative work.

We may note here, though just *en passant*, that the creative process surely costs! To produce something, to be creative, is normally and basically involved in some sort of industrial process, be it at a large scale or a minor one. That creative process depends on investors. Typically, creation and exploitation occur in separate sectors, what we may call a situation of vertical integration. However, thereby copyright makes it easier to transfer the results of creative work, and possibly to transfer it all to the one user who evaluates it the highest. Thus, effective copyright, that is, reliable protection and effective sanctions, attracts investors who would then be inclined to invest in creative products and follow up on subsequent investment in updating processes.

Again, in short, this report demonstrates the positive connection between a strong copyright proper, more creation and more creativity, and the imminently important investment factor.

Finally, almost, I'd like to stress that there's no indication whatsoever that copyright as such is used for blocking measures on the market, meaning total blocking of a work from being used at all on a market, leaving efforts to block outright misuse aside. Certainly, the rightowner must have a possibility to be selective about who's going to be the publisher, the first user etc. But unlike in patents, as a comparison, by which type of intellectual property you can pretty often say that they are used as a sort of blocking measure, to hinder any use of a certain technology or a type of use, that doesn't really happen in copyright! Almost all protected works, worldwide, can be lawfully available for use, one way or the other. Total market blocking is very rare, when based on copyright! This is connected also to the fact that in copyright, there is almost always a substitute available! If you cannot get a certain film for your planned specific commercial use, there is always another film available. And, anyway, the public may usually have an opportunity to watch the first film somewhere else. In this sense, we simply don't have the same market structure as for example in the world of patents.

My last conclusion, based on the said report, would be that the prominent problem in copyright management seems to be inactivity, non-use of those protected works that you can control. Ultimately, copyright should be activated on the market, it should form a basis for licensing, thereby adding to economic growth. Copyright seems indeed to support the public offer and further communication. It does something to pre-utilisation costs as well as fair remuneration. Those are reasons why the long period of protection is needed. The endorsement of the author and financing of creation is a start for the whole chain leading to public address and rich diversity for users and, eventually, to economic growth.

I thank you for your kind attention!

12

A New Copyright Economics Research Program at WIPO

Alexander Cuntz[1]

I am the new copyright economist working at WIPO's Chief Economist office and it is a pleasure to be on this panel today. Dear conference organizers, dear moderator, thank you for the invitation.

I want to explain in a few sentences what this new function and role at WIPO is about, why we think it is important and how we actually plan to fill it with "flesh and blood".

Main items on the agenda today

1. What do we consider the most important challenges?
2. What will we mainly work on?
3. How will we work?

1. Copyright economist, World Intellectual Property Organization (WIPO), Geneva.

What do we [as economists at WIPO, not as lawyers] **consider the most important challenges?**

- First Challenge: *data scarcity* is the main issue in copyright related empirical work, on top of credibly establishing *cause and effect*
- we will seek to *gather internationally comparable data* and *make these data available* to academic and policy-maker communities
  - such data could come from official sources (for example on employment or national account statistics/ouput), but also digging into commercial datasets, original survey data and big data from online sources etc.
  - there may be limits to making data publicly available when it comes to collaboration with private stakeholders that consider their data as an important business asset, but we will try
- Second Challenge: from our perspective, empirical work on copyright should not just/only be there to *legitimize* and *raise awareness* and then stop
- but sound evidence on the *effectiveness of specific copyright rules and institutions* can provide great *learning opportunities* and even help orientate reform efforts.

What will we mainly work on? [It is too early to expect results and tangible outcomes, but let me outline current plans]

- Our new research program will advance WIPO's existing agenda in this way and will give particular focus on the effectiveness of specific copyright rules and institutions and, importantly, *we invite others to join in and collaborate with us*
  - We strongly believe the best ideas on scope and design of meaningful research will not rest with us but will be somewhere out there in academic and policy communities
- *in terms of content of our work program*, we aim to provide evidence and new insight on *value chains in specific sectors for the creative economy and across sectors*

- in a nutshell, here are the four guiding questions
  - *where in the value chain do cost decreases, if applicable, accrue due to digital technologies?* For example, benefits and gains from lower cost in the generation, distribution and consumption of copyrighted works as well as decreases in costs of collaboration and transactions – many of the these gains will be conducive to market entry of innovators and entrepreneurs
  - given plausible changes in the levels of competition, *does this, and if so how, change bargaining positions and the way revenues are shared among stakeholders along the value chain?*
  - who actually takes *the risk to invest in future talent* and content? This may have shifted as well
  - lastly, given the changes we observe, some of the rules outlined in copyright frameworks may or may not have been rendered ineffective; others may not be in place so far but could become effective legal instruments to support creative economy market's functioning and flourishing
- for example, as a first concrete project, we will ask:
- *how/has the income distribution of creators (authors, performers and the alike) changed in the past 2 decades*?
  - Arguably, several issues emerge at first sight: It can be difficult to identify creators in the first place and may be even harder to spot relevant control groups when comparing time trends, not to speak of analytical work on what actually triggered these changes in income (ie, identifying determinants and establishing causal effects).
  - But: we will proceed step by step and, at least, try to solve some of these issues.

How we will work?

What does sound evidence really mean (main criteria in order to achieve transparency and replicability)? A good example of a standard/benchmark for rigorous research is *the Guide to Evidence for Policy published by UK IPO.* Four main points

- Be transparent about assumptions and explain methodological choices
- Exercise care in processing and combining data in the beginning, and when interpreting results at later stages
- do robustness and sensitivity checks for empirical findings and engage in peer review
- Publish underlying datasets.

13

How Copyright Works in the Audiovisual Sector

Ted Shapiro[1]

Thank you very much to the organisers of the conference for having me.

In keeping with the Shakespearean motif: "Friends, Danes and copyright lovers, I come not to bury copyright but to praise it."

I am honoured to be on this panel with such a very distinguished coterie of academics. I am one of those on the panel who is not an economist but rather a legal practitioner working for a UK media, technology and IP law firm. I am going to try to bring a bit of practical perspective to the discussion by talking a bit about how copyright works in the audio-visual sector. I did do a bunch of research. However, I probably did not read nearly as many studies as Paul Goldstein.

One client of mine, this in the category of my study is bigger than your study, sent me two long lists of studies each one of the studies proving, it is a "very copyright-loving" client, that copyright

1. Wiggin LLP, Brussels. Redacted from the transcript of the oral presentation.

is great, it has value and these studies rebut all the studies that say otherwise.

The client also sent me a long list of studies about all the employment in the copyright supported sectors and which rebut all the studies that say copyright should be weakened, that it should be shortened, etc. The conclusion is still, as Paul put it, "complicated". In my view though, and I will make some references to the audio-visual sector, copyright is beneficial and vital to society as a whole.

We have learned from several speakers that copyright is recognised as a fundamental right by international human rights treaties, the EU Charter of Fundamental Rights, and of course some national constitutions. It is not an absolute right. It must be balanced against other rights, but it is certainly far more than a Band-Aid over a market failure. And we know that since it is a right, not a privilege, but a right, unlike for our Florentine friend[2] at the time, it should be protected regardless of whether it has economic value. But clearly it does.

It is an incentive to create, finance, produce and distribute a wide variety of content and in doing so it ensures that users and the general public may benefit. The remark about the difference as to who is incentivized by copyright, authors versus firms, is very interesting. There was a suggestion that it is more often companies than individuals that are incentivised. In the audio-visual sector, this might entail production companies versus individual creators (directors, screenwriters). The nature of the film industry is that it produces "collective" works with many different rightholders involved. This makes the question of who is incentivized by the prospect of copyright protection harder to analyse. Sometimes a producer will have an idea for a film and go out to find a director or a writer. Sometimes a director or writer will have an idea and go look for a producer. These things can happen together instead of just an author sitting there going, "oh, should I compose or not, I am not incentivized". It is a different thing of course from what we learned in Brussels a few years ago at

2. Reference to the "The 1593 Antonio Tempesta Map of Rome" presentation by Jane Ginsburg.

the 2014 ALAI Conference on moral rights. Another thing that drives this desire to create is ego recognition.

There is another big issue that is being debated in Brussels, apart from the territoriality one[3] that I will get to in a minute, and that is the value gap.[4] It is clear that copyright has value to many big internet platforms. They need it so that they can give it away for free, to generate traffic, to sell ads. Another thing that we have to remember is that copyright is not a one-size-fits-all solution. This is often forgotten. It is not a monolithic thing. It regulates the different content sectors differently.

We see that for example in the way that rules of authorship and term of protection may be different for different types of content. The extent of exclusive rights, there may be more remuneration rights for some content than others, like music versus film. Exceptions will sometimes apply in different ways to different exclusive rights and different content. The degree of contractual freedom may vary. The role of collective management is greater in some content sectors than in others.

Copyright oozes, swarms and sweeps. It ebbs and it flows, it waxes and it wanes in very different ways for different things. It surges where it is needed, it retreats from places where it is inappropriate. Yes, it can create anomalies, sometimes it creates situations that should not happen. How can it be that you cannot use the speech of Martin Luther King[5] in this movie? How could that be? However, we can rely on the courts and ultimately the legislator to deal with these "exceptions and limitations" to copyright. And sure, it

3. See the Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM/2016/0594 final – 2016/0284 (COD), 14 September 2016.
4. See Article 13 and Recitals 37–39 of the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593 final – 2016/0280 (COD), 14 September 2016.
5. 53 years later, you still have to pay to use Martin Luther King Jr.'s famous 'I Have a Dream' speech, Washington Post, 17 January 2017.

has gotten complex. Thank God for lawyers but the internet is densely populated with "experts" to help out on this.

Disruptors have always argued that copyright should change for them. The copyright industries have always argued that they need more protection. Piracy has always been a factor and always will be. The content sector has changed, it has adopted new business models, but it already sells t-shirts.

In the audio-visual sector, copyright is the driving force. It is the currency of every facet of the sector for making, financing and distributing content; the creative process, the business process and everything in between. Yesterday the film festival in Cannes started and millions of Euros will change hands in the film market and there is a huge really interesting fight going on between the film festival organisers and Netflix that encapsulates a lot of the things that we have been talking about. The New York Times[6] had a very interesting article on the issue of a requirement that films have to be theatrically released in order to qualify for the festival competition.

The audio-visual sector employs about a million people across the EU and generates about 100 billion Euros a year and it is growing at a clip of 2% per annum. Every film is a prototype. Sure, they can be substituted to a certain extent. It is a very, very risky business. There are many misses for every hit. The hits fund the misses which would not get made otherwise. How does the financing work? And this is where we see how financing and copyright are intertwined in the film industry. Pre-sales agreements are contracts between producers and distributors whereby the distributor gives money up front for certain rights, for certain territories and for certain forms of exploitation. It is a kind of a guarantee. This happens before the camera starts to roll. Self-funding is where many big studios or foolish people will fund movies with their own money. Co-production is where producers in different countries will put the money together and obtain different territories in return. Where you manage to do a lot of pre-sales but you still are missing some territories, private equity and banks

6. "Why the Netflix-Cannes Clash Couldn't Be Avoided", *NY Times*, 16 May 2017.

may step in with gap financing. Finally, there is a certain level, particularly in Europe, of soft money in the form subsidies and tax incentives. In some countries, the former need to be paid back. And, across the EU, subsidies are subject to caps because of EU State Aid rules such that they do not fund the whole movie.

Production lawyers, and I see a couple in the audience including a very famous Danish one in the back there, Katrine Schlüter, have to put together these deals. I also see a famous Italian one, Stephanie Rotelli, hiding over there. The risk is always there, the future is uncertain and the end is always near. Now the end is being discussed in Brussels where there are proposals that are framed as enhancements to cross-border access to content but described, on the flip side, as undermining the territoriality of copyright. Exclusive territorial licensing is the way, as just explained, that producers secure the money to make films and to recoup their investment.

According to a "self-serving" study,[7] put together by "biased" economic consultancies because the matter is complicated, producers will lose 8 billion Euros per year with an output reduction of up to 50% of TV and nearly 40% for film; and, consumer welfare losses in the long-term of over 9 billion per year. It is unclear when the industry will recover from that. In Europe, the bigger guys will fare better than the smaller guys. The smaller guys, for example, the innovative Danish producers that punch above their weight class and sell their drama all over the world are going to get hit harder by this than Paramount or Disney. So who will benefit? It is not clear that even big Internet companies will benefit.

In conclusion, copyright is often misunderstood and much maligned. Is this because powerful Internet platforms have been able to dominate the public debate, equating their interests with the public interest and, when they do not get their way, turning off the Internet? It is ironic because they need content too. Certainly in the film sector, copyright is vital for production not only of high quality content, but yes of schlock as well. Copyright works are created and pro-

7. <https://www.oxera.com/getmedia/5c575114-e2de-4387-a2de-1ca64d793b19/Cross-border-report-(final).pdf.aspx>.

duced by people who invest their time, talent and capital and therefore they are entitled to the opportunity to secure a return on their work and their investment and for the recognition that they so often crave.

What is the value of copyright and who does it benefit? It is society as a whole because it benefits from having all of these works created and disseminated. How do you measure that? The economists will be able to say better once the planned WIPO economic activities are up and running. But, we have to be mindful when we think about this issue that we do not forget the practical aspects of how the system functions in the marketplace on a day-to-day basis.

And finally, how you measure the value of reading a good book, picking through a scientific research paper, enjoying a thought-provoking movie, destroying aliens with a video game or moshing to your favourite punk band. Those are things that are hard to measure but we have to be careful about jeopardising copyright to generate more traffic on the internet and with that I would just say: "peace, love and copyright to you all"

14

Modern Copyright Reform and the Challenges of Evidence-Based Policymaking

Stef van Gompel[1]

14.1. Introduction[2]

In an ideal world, copyright law is based on sound, reliable and impartial evidence that thoughtfully and meticulously balances the full breath of often diverging or competing interests of all stakeholders involved.[3] This suggests that any new legislation must be carefully prepared by assessing and taking into account all the different – legal, social and economic – dimensions of the proposed measure, including all relevant empirical facts. Additionally, the legislative process must be clear and open to public scrutiny, so as to ensure the

1. Institute for Information Law (IViR), University of Amsterdam.
2. The research for this paper was conducted within the framework of the research programme Veni with project number 451-14-033 ('The challenge of evidence-based intellectual property law reform: Legal pragmatism meets doctrinal legal reasoning'), which is partly financed by the Netherlands Organisation for Scientific Research (NWO).
3. E. Derclaye, 'Today's Utopia Is Tomorrow's Reality', *IIC* 2017, pp. 1–3.

legitimacy and public acceptability of the law. This requires adequate transparency about all the evidence considered, including how much it has weighed into the norm-setting, which information gaps nonetheless existed and how these gaps have been filled or dealt with. Moreover, it must be clear how different interests of relevant stakeholders are balanced and eventually reflected in the law as adopted.

Despite best efforts and good intentions of law and policy makers, such an 'ideal' norm-setting scenario hardly ever materializes in practice.[4] Often, it is difficult for legislators to draw up a full-framed picture of all relevant data that sheds light on the issue under consideration.[5] Information may be scarce or unavailable and the reliability and validity of sources is not necessarily easy to establish,[6] which renders it hard to make informed and balanced policy decisions.[7] Moreover, even if legislators manage to gather sufficient evidence, they may face difficulties to bring it on a par with the doctrinal underpinnings of the law at issue. Especially in a domain such as copyright, which traditionally rests strongly on doctrinal foundations, it cannot be automatically presumed that evidence brought forward neatly fits the existing legal framework. In the current digital era, in particular, traditional copyright principles have increasingly come under attack due to the changes in the way people produce, disseminate, share and

4. See B.H. Mitra-Kahn, 'Copyright, Evidence and Lobbynomics: The World after the UK's Hargreaves Review', *Review of Economic Research on Copyright Issues* 2011 (vol. 8, no. 2), p. 65-100, giving a number of reasons why policy makers are struggling to adequately ground copyright policy in evidence. See also I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (London: IPO 2011), p. 19, giving examples of copyright measures that lawmakers have adopted, notwithstanding the availability of evidence opposing these measures.
5. J. de Beer, 'Evidence-Based Intellectual Property Policy Making: An Integrated Review of Methods and Conclusions', *The Journal of World Intellectual Property* 2016 (vol. 19, no. 5-6), pp. 150–177.
6. In the field of copyright, in particular, a serious knowledge asymmetry may exist as a result of information not being publicly controlled but privately owned by stakeholders, including copyright industries, collective rights management organisations, internet intermediaries, online platforms or other entities.
7. See M. Kretschmer & R. Towse (eds), 'What Constitutes Evidence for Copyright Policy?', Digital proceedings of ESRC symposium, CREATe Working Paper, no. 1 (January 2013).

consume works. For legislators, this raises the arduous question of what to do with evidence that does not sit well with or even contradicts the legal-theoretical foundations on which copyright law is built.

This paper explores ways in which the current evidence-based policy approach can be reconciled with the traditional doctrinal approach to copyright lawmaking. To that end, the paper first juxtaposes the two approaches and examines their relative strengths and weaknesses. Next, it gives a number of concrete recommendations that aim to facilitate the current shift in copyright lawmaking from a classic doctrinal approach towards a more evidence-based approach. By enabling legislators to adopt evidence-based policy without requiring them to abandon doctrinal principles altogether, this paper aims to contribute to improving the quality of lawmaking in the field of copyright.

14.2. Doctrinal versus evidence-based approaches to lawmaking

In copyright law, there is a growing trend to base new legislation on empirical evidence.[8] To remain a key instrument of innovation, cultural and growth policies, copyright law constantly needs to adapt to societal changes caused by the emergence of new digital technologies. This requires a careful balancing of the interests of creators, rightholders, users and end-consumers. Policymakers around the world increasingly acknowledge that, for reasons of sound policy and 'better lawmaking', copyright policies and their elaboration into effective legal norms should be based on empirical evidence that allows measurable economic objectives to be balanced against social goals.[9]

To give a few examples, at the international level, WIPO has been integrating economic research in its work program to enable evi-

8. See P. Samuelson, 'Should Economics Play a Role in Copyright Law and Policy?', 1 *U. Ottawa L. & Tech. J.* 1 (2003–2004), at 21, already predicting 'that economic analysis will have greater impact on copyright in the future.'
9. See e.g. the recommendation in Hargreaves 2011, op. cit., p. 8 and 20.

dence-based policymaking by monitoring the effectiveness and managing the accountability of treaty norms.[10] In the EU, law and policy initiatives, including on intellectual property, are preceded by impact assessments that aim to provide transparent, comprehensive and balanced evidence on the nature of the problem to be addressed.[11] National governments typically demand the same. Probably the best example is the UK, where the Intellectual Property Office has adopted rules on good evidence for policy,[12] following recommendations by the Hargreaves report.[13] All this shows a shift towards a more evidence-based lawmaking approach.

Today's copyright law, however, is clearly the result of a more doctrinal approach. In continental Europe, in particular, the justification of copyright law is traditionally based in a potent mixture of personality-based arguments and private property doctrine.[14] The narrative has been – and still is – to emancipate authors from patrons and publishers by granting them exclusive rights to protect their economic and moral interests. Illustrative of the strength of the property rights rhetoric is the Charter of Fundamental Rights of the EU, which in its section on private property explicitly sets out: 'Intellectual property shall be protected'.[15] Such a narrative reflects the doctrinal roots of copyright lawmaking that is dominant in continental Europe, but also elsewhere in the world.

10. WIPO, The Economics of IP, <http://www.wipo.int/econ_stat/en/economics/> (last visited: 14 July 2017).
11. European Commission, Impact assessments, <https://ec.europa.eu/info/law-making-process/planning-and-proposing-law/impact-assessments_en> (last visited: 14 July 2017).
12. UK Intellectual Property Office, *Guide to Evidence for Policy*, Newport: Concept House 2014. For a critical comment on the approach taken by the UK Intellectual Property Office, see T. Dillon, 'Evidence, policy and "evidence for policy"', *Journal of Intellectual Property Law & Practice* 2016 (vol. 11, no. 2), pp. 92–114.
13. Hargreaves 2011, op. cit., p. 8 and 20.
14. M. Buydens, *La propriété intellectuelle: évolution historique et philosophique*, Bruxelles: Bruylant 2012.
15. Art. 17(2) Charter of Fundamental Rights of the EU, *OJ EU* C 364/1, 18 December 2000.

14.2.1. Relative strengths and weaknesses

The shift towards evidence-based lawmaking, although it may certainly complement the current doctrinal approach, does require a change of attitude and a new way of thinking about copyright reform. Under a doctrinal approach, the lawmaker's primary concern in reform initiatives is to maintain normative coherence and formal consistency with legal-theoretical and ideological underpinnings of established rights. A doctrinal approach thus invites systematic legal reasoning aimed at logically sound laws.[16] In its ultimate manifestation, this may result in overly legalistic and formalistic law and might even establish tunnel vision in legislative efforts.[17] A strong advantage of a doctrinal approach is, however, that it creates legal certainty.[18] Generally speaking, reform decisions based on established reasoning and principles tend to be foreseeable and require less explicit balancing of interests, thus making them politically easier to achieve.[19]

By contrast, an evidence-based lawmaking approach expects the legal implementation of copyright policies to be based on testable assumptions and instrumental impacts in the future. Rather than focusing chiefly on coherence and formal consistency of norms with legal-theoretical foundations, legislators must apply practical reason to make rational policy-decisions within the confines of the best evidence available.[20] In its ultimate manifestation, an evidence-based

16. See e.g. J. Bengoetxea, 'Legal System as a Regulative Ideal', in: H.J. Koch & U. Neumann (eds.), *Praktische Vernunft und Rechtsanwendung/Legal System and Practical Reason*, ARSP-Beiheft 53, 1994, p. 65-80, at 70 et seq., discussing some of the systematizing features of legal doctrine in creating norm-propositions in law.
17. Compare the criticism voiced against overly-formalistic law by proponents of legal realism in the United States in the early twentieth century. See e.g. M. White, *Social Thought in America: The Revolt Against Formalism* (rev. ed.), Boston: Beacon Press 1957, p. 15–17.
18. This function of the law is also recurrently emphasized by proponents of legal positivism. See e.g. H.L.A. Hart, *The Concept of Law* (2nd ed.), Oxford: Clarendon Press 1961, p. 127; S.J. Shapiro, 'On Hart's Way Out', *Legal Theory* 1998 (vol. 4, no. 4), p. 469–507, at 494, speaking about the 'essential guidance function of law'.
19. A. Peczenik, *On Law and Reason*, Dordrecht: Springer Science + Business Media 1989, pp. 177–178.
20. In this manifestation, evidence-based lawmaking bears some resemblance to the-

lawmaking approach may potentially lead to more ad hoc and unprincipled decision-making and thus to less predictable law.[21] Yet, it also has the advantage of better accommodating the law to a societal context than an approach that largely rests upon untested and essentialist doctrinal assumptions.

14.3. Reconciling evidence-based lawmaking with copyright's doctrinal foundation

The above comparison between doctrinal and evidence-based lawmaking approaches suggests that, in order to create better law in the field of copyright, the two approaches somehow need be reconciled. Ideally, a practice emerges that enables legislators to build on the strengths while curtailing the weaknesses of both approaches. This would require a shift in mindset and practices on different levels. On the one hand, lawmakers need to create adequate room for evidence-based copyright reform by removing any doctrinal constellations that are unnecessary and unproven and by preventing 'political capture' by norms contained in the international copyright framework. On the other hand, they must also accept that certain doctrinal principles based on fairness rationales ought to be considered, which may sometimes even prevail over economic evidence if there is a clear need to protect specific interests of authors. In the end, the purpose of copyright law is to create an effective and balanced system of protection addressing the interests of creators, rightholders, users and the general public in a manner that reflects empirical reality, while taking account of specific needs that may exist on the different sides of the copyright spectrum.

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ories of legal pragmatism that also strongly adhere to empiricism. See T.F. Cotter, 'Legal pragmatism and Intellectual Property Law', in: S. Balganesh (ed.), *Intellectual Property and the Common Law*, Cambridge: Cambridge University Press 2013, pp. 211–229.

21. Peczenik 1989, op. cit., p. 178.

14.3.1. Remove unnecessary and unproven doctrinal constellations

If law and policy makers in the area of copyright want to give evidence-based lawmaking a fair chance, they must first eliminate all doctrinal constellations based on untested or unproven assumptions, which may unwillingly frame their mindsets towards a specific predetermined position. A clear example of such unnecessary and undesirable doctrinal constellations can be found in various EU directives on copyright, including the InfoSoc Directive.[22] Taking as the starting point that copyright fosters creativity and innovation, recital 9 proclaims that '[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.' In the same way, recital 11 assumes that '[a] rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.'

Such direct references to a 'high level of protection' and a 'rigorous, effective system' of copyright and related rights unmistakably focuses the legislative intention too one-sidedly on protecting creators and rightholders.[23] This also has effects on the interpretation of the copyright framework by the Court of Justice of the EU (CJEU), which has consistently confirmed that the InfoSoc Directive grants to authors and rightholders a set of broadly defined exclusive rights,[24]

22. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ EU* L 167/10 of 22 June 2001.
23. T. Dreier, 'Thoughts on revising the limitations on copyright under Directive 2001/29', *Journal of Intellectual Property Law & Practice* 2016 (vol. 11, no. 2), pp. 138–146, at 139.
24. See, e.g., on the reproduction right: CJEU 1 December 2011, C-145/10, ECLI:EU:C:2011:798 (*Painer*), par. 96; on the right of communication to the public: CJEU 14 June 2017, C-610/15, ECLI:EU:C:2017:456 (Stichting Brein/Ziggo), par. 22; and on the distribution right CJEU 13 May 2015, C-516/13, ECLI:EU:C:2015:315 (*Dimensione/Knoll*).

from which only the exhaustively listed and strictly defined exceptions or limitations may derogate.[25] Such doctrinal logic does not help to preserve the delicate balance between protecting authors and rightholders and safeguarding the interests of users and it certainly does not aid evidence-based decision-making.

Generally speaking, aiming for a high level of copyright protection must never be a goal in itself, as it does not necessarily contribute to enhanced creativity and innovation. In reality, too little protection may have a negative impact on creativity and innovation, but so does an overly strong protection.[26] What the optimal level of protection is, by which sufficient incentives are provided to authors, while innovation and creation by users and subsequent creators is not suppressed, is practically impossible to determine.[27] In effect, rather than striving for a 'high level of protection', the starting point of any copyright lawmaking effort should always be the equilibrium that needs to be maintained between the interests of creators, rightholders, users

25. For the strict observation of the exhaustive list of exceptions and limitations in art. 5 InfoSoc Directive, see CJEU 27 February 2014, C-351/12, ECLI:EU:C:2014:110 (*OSA*), par. 22-41; CJEU 1 March 2017, C-275/15, ECLI:EU:C:2017:144 (*ITV/TVCatchup II*); CJEU 16 March 2017, C-138/16, ECLI:EU:C:2017:218 (*AKM/Zürs.net*), par. 31-43. In general, the copyright exceptions and limitations must be interpreted strictly (see CJEU 16 July 2009, C-5/08, ECLI:EU:C:2009:465 (*Infopaq I*)), whilst securing their effectiveness and permitting observance of their purpose (see CJEU 3 September 2014, C-201/13, ECLI:EU:C:2014:2132 (*Deckmyn*); CJEU 11 September 2014, C-117/13, ECLI:EU:C:2014:2196 (*TU Darmstadt/Ulmer*); CJEU 10 November 2016, C-174/15, ECLI:EU:C:2016:856 (*VOB/Stichting Leenrecht*)).
26. Dreier 2016, op. cit., pp. 139–140.
27. See e.g. N. Elkin-Koren & E.M. Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analysis*, London & New York: Routledge 2013.

and the public at large,[28] however uncertain and delicate that equilibrium might be and however difficult it is to situate it.

14.3.2. Prevent 'political capture' by international copyright norms

In a similar vein, to enable lawmakers to adapt copyright law to new economic, societal and technological challenges, it must be ensured that they are not needlessly bound by age-old rules that are bedrocked in the international copyright framework. Simply stated, an argument that contends that a copyright rule cannot be changed because it is a norm laid down in international treaties cannot convince and must certainly not serve as an excuse for ignoring evidence. This is not to say that the framework of international copyright law is in need of a complete overhaul, but it certainly is time for a critical and structural rethink of some of the key elements of which it is comprised.[29]

The Berne Convention indeed does not consist of unchangeable 'cast-in-stone' copyright norms and was never meant to be understood as such. In the end, just like any other law or treaty, it is a man-made political compromise that ought to be subject to change over time. In fact, the Berne Convention was always meant to be revised as needs arose,[30] on condition that such a revision has the objective of introducing amendments designed to improve the system of the

28. Admittedly, in the framework of the EU InfoSoc Directive, recital 31 also asserts that '[a] fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded'. However, because recitals 9 and 11 put the objectives of creating a high level of protection and a rigorous, effective copyright system first, they provide an imbalance to begin with, as they suggest that ultimately the rights and interests of authors and rightholders must prevail.

29. See e.g. D.J. Gervais, *(Re)structuring Copyright: A Comprehensive Path to International Copyright Reform*, Cheltenham, UK & Northampton, USA: Edward Elgar 2017.

30. C. Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Paris Act, 1971), Geneva: WIPO 1978, p. 121.

Berne Union.[31] This arguably can be understood in a broad sense,[32] as long as the revised convention keeps protecting 'in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.'[33]

In reality, however, a revision of the Berne Convention is a next to impossible task, as it requires unanimity of all contracting parties.[34] This virtually gives any of the (presently 174)[35] Berne Union countries the power to veto a change to the convention. Moreover, since the key provisions of the Berne Convention are incorporated by reference into the TRIPS Agreement and the WIPO Copyright Treaty,[36] these treaties would also need to be revised in parallel with each other in order to be able to effectuate any change of international copyright norms. This in turn renders international copyright reform hard to accomplish.

However difficult it may be to change international copyright law, policymakers should not abandon constructive attempts to improve the existing treaties. Any future revision should of course be subject to careful deliberation and supported by sufficient evidence that takes full account of the equilibrium that copyright law seeks to establish.

31. Art. 27(1) Berne Convention (Paris Act, 1971).
32. See e.g. *Records of the intellectual property conference of Stockholm (June 11 to July 14, 1967)*, vol. 1, Geneva: WIPO 1971, p. 80, indicating that improvements to the system of the Berne Union 'should include not only the enlargement of the protection granted to authors by the creation of new rights or by the extension of rights which are already recognized, but also the general development of copyright by reforms intended to make the rules relating to it easier to apply and to adapt them to the social, technical and economic conditions of contemporary society.'
33. Preamble of the Berne Convention (Paris Act, 1971).
34. Art. 27(3) Berne Convention (Paris Act, 1971).
35. See the full list at: <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf> (last visited: 18 July 2017).
36. Art. 9(1) TRIPS Agreement; art. 1(4) WIPO Copyright Treaty.

14.3.3. Include doctrinal principles among the evidence to be considered

Other than providing leeway in the doctrinal domain to accommodate evidence-based copyright reform, there is also need to liberate evidence-inspired policymakers from adopting a too narrow economic approach.[37] For one thing, merely relying on economic evidence entails the risk that reform initiatives are rendered futile in cases where such evidence is unavailable or hard to obtain, while giving a strategic advantage to persons and organizations that possess relevant economic data to disclose or conceal such data according to their own interests and needs.[38] As importantly, lawmakers also need to recognize that certain doctrinal principles are simply part of the copyright framework and therefore ought to be taken into consideration in reform decisions.

This becomes especially clear when looking at the rationales for copyright protection, which are not merely economic by nature, but are also comprised of personality-based justifications. Indeed, copyright not only aims at encouraging innovation and creativity by providing incentives to create, thus contributing to the dissemination of knowledge and the advancement of culture, or at regulating trade by providing legal instruments to prevent counterfeiting and unfair competition (economic and cultural arguments based on incentive rationales). It also aims to give authors a 'fair' reward for their creative efforts and to protect the personality or individuality of authors by granting them moral rights (social and justice arguments based on fairness rationales).[39]

This suggests that lawmakers must be receptive to including more than just economic evidence in their deliberations when initia-

37. Dillon 2016, op cit., p. 96 et seq.
38. See the introduction of this paper and the sources mentioned there.
39. See e.g. F.W. Grosheide, *Auteursrecht op maat: beschouwingen over de grondslagen van het auteursrecht in een rechtspolitieke context* (Deventer: Kluwer 1986), pp. 127–143; J.-L. Piotraut, 'An Author's Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared', 24 *Cardozo Arts & Entertainment Law Review* 549 (2006); J.C. Fromer, 'Expressive Incentives in Intellectual Property', 98 *Virginia Law Review* 1745 (2012).

tives for copyright reform touch upon social and fairness principles. There may be reason, for example, to give particular attention to moral rights considerations when introducing new copyright limitations or to recognize the position of the author as a weaker party in contract negotiations with publishers and producers when introducing new rules on authors' contract law. Take the introduction of a right that entitles authors to receive 'fair' compensation in return for a transfer of rights in exploitation contracts. Although, economically speaking, such a right might be regarded as an empty shell, since the fairness of compensation cannot straightforwardly be determined,[40] doctrinally speaking, such a right can nonetheless serve as a necessary stick for authors to defend themselves if they are offered an unfair deal.[41] In such a case, doctrinal observations may ultimately prevail over a well-reasoned economic position.[42]

If and to what degree there is need to give social and fairness principles priority in other areas is much more contentious. One example is the 'value gap' proposal,[43] which builds on the claim that, to ensure a just economic balance in the digital marketplace, it would be 'fair' if authors and performers would get a share of the income that online services make through the sale of advertisements that accompany the content that users upload on their platforms,[44] a nar-

40. See J.P. Poort, 'Billijke vergoeding in recht en economie', AMI 2015, pp. 157–161; J.P. Poort & J.J.M. Theeuwes, 'Prova d'Orchestra: een economische analyse van het voorontwerp auteurscontractenrecht', *AMI* 2010, pp. 137–145, at 143–144.
41. P.B. Hugenholtz, 'Dirk en Pippi', *NJB* 2015/1143.
42. J.P. Poort, *Empirical Evidence for Policy in Telecommunication, Copyright & Broadcasting* (dissertation), Vossiuspers UvA – Amsterdam University Press 2015, p. 269: 'This leads to a paradoxical observation: an economist would not just have to take a normative position, but a paternalistic one as well, to object to legislation aimed at protecting authors and creators and advocated by a majority of them. Here, an economist should rest his case […].'
43. European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14 September 2016, COM(2016) 593 final, art. 13.
44. ALAI, Resolution on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected material are made available by electronic means, Paris, 18 February 2017, available at: <http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf> (last visited:

rative that others claim to be somewhat misleading.[45] Another example is calls for making copyright protection conditional on formalities, for which there may be good economic reasons,[46] but which is often opposed by the argument that it is 'unfair' if authors lose protection due to a failure to complete formalities.[47]

How much weight such fairness arguments hold, depends of course on the position that one takes in the debate and, for lawmaking purposes, on the objectives to be achieved. Generally speaking, lawmakers should refrain from prioritizing any type of evidence in advance, but carefully weigh and balance all the evidence available, including economic evidence and doctrinal arguments in favour or against a reform proposal.[48]

As a matter of principle, legislators must however be cautious that fairness arguments are not 'misused', where in fact interests other than those of authors prevail. In practice, it is often not the creators that benefit mostly from copyright protection, but publishers and producers to which copyright exploitation rights have been trans-

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18 July 2017).

45. 'EU Copyright Reform Proposals Unfit for the Digital Age', Open Letter from European Research Centres to Members of the European Parliament and the European Council, 24 February 2017, available at: <http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf> (last visited: 18 July 2017), p. 6, arguing that '[t]he idea that the creation of value should lead automatically to transfer or compensation payments has no scientific basis'.

46. See e.g. W.M. Landes & R.A. Posner, 'Indefinitely renewable Copyright', 70 *University of Chicago Law Review* 471 (2003); and H. Varian, 'Copying and Copyright', *Journal of Economic Perspectives* 2005 (vol. 19, no. 2), pp. 121–138, at 128, arguing that: 'Given today's technology, the creation of a "universal" copyright registry, perhaps in exchange for some incremental benefits to authors, would be highly attractive.'

47. See e.g. J.C. Ginsburg, 'The US Experience with Copyright Formalities: A Love-Hate Relationship', 33 *Columbia Journal of Law and the Arts* 311 (2010), at 342. See also O. Alter, 'Reconceptualizing Copyright Registration', 98 *Journal of the Patent and Trademark Office Society* 930 (2016), supporting this with an analysis in behaviour economics.

48. Dillon 2016, op cit., arguing that the challenges in accommodating evidence-based policy in lawmaking efforts are not necessarily situated in the types of evidence to be considered, but rather in facilitating due process.

ferred.[49] This has to be taken into account whenever fairness claims are made in the legislative process. A plain example where the lawmaker failed to recognize this is the EU directive extending the term of protection of related rights in sound recordings.[50] Despite the availability of evidence that a term extension would chiefly benefit the recording industry and not the position of performers,[51] the directive was still adopted with the aim of improving the performers' income at the end of their lifetime.[52] There probably is no better example of a lawmaking exercise that disregarded economic evidence without reason.[53]

As a final point, if lawmakers on the basis of all evidence considered nevertheless come to decide that doctrinal principles must prevail over economic evidence, then they must be fully transparent about such a decision and the reasons behind it, in order to ensure

49. See M. Kretschmer & P. Hardwick, *Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers*, Poole, UK: Centre for Intellectual Property Policy & Management 2007; Europe Economics, L. Guibault, O. Salamanca & S. van Gompel, *Remuneration of authors and performers for the use of their works and the fixations of their performances*, Brussels: European Commission – DG Connect 2015, available at: <http://www.ivir.nl/publicaties/download/1593.pdf> (last visited: 18 July 2017); Europe Economics, L. Guibault & O. Salamanca, *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works*, Brussels: European Commission – DG Connect 2016, available at: <http://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf> (last visited: 18 July 2017).
50. Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, *OJ EU* L 265/1 of 11 October 2011.
51. See e.g. N. Helberger, N. Dufft, S.J. van Gompel & P.B. Hugenholtz, 'Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea', *European Intellectual Property Review* 2008 (vol. 30, no. 5), pp. 174–181; and M. Kretschmer et al., '"Creativity stifled?" A joint academic statement on the proposed copyright term extension for sound recordings', *European Intellectual Property Review* 2008 (vol. 30, no. 9), pp. 341–374.
52. See recital 5 of Directive 2011/77/EU.
53. Hargreaves 2011, op. cit., p. 19; A. Vetulani-Cęgiel, 'EU Copyright Law, Lobbying and Transparency of Policy-Making: The cases of sound recordings term extension and orphan works provisions', *JIPITEC* 2015 (vol. 6, no. 2), pp. 146–162.

democratic accountability and to secure the social legitimacy of copyright law.

14.4. Conclusion

In order to create an environment that allows for evidence-based reform, while keeping up with some of the guiding doctrinal underpinnings of copyright law, it is essential that lawmakers adopt a sufficiently open approach that allows them to be receptive of both economic and doctrinal evidence. This requires a change of mentality on the part of the legislator. For one thing, they must abandon certain doctrinal assumptions that guided copyright lawmaking previously, but find no support in empirical evidence, such as the idea that copyright requires a high level of protection. Moreover, the international copyright norms should not be treated as incontestable 'sacred' rights, but subjected to change (however difficult that is) if new circumstances so dictate. At the same time, it must be acknowledged that, in copyright lawmaking, pure economic reasoning may not always be agreeable either, especially where legitimate fairness claims are in question.

Transformations in lawmaking practice, as the ones described here, require a stepwise and gradual approach. They do not happen overnight. In the end, any modernisation of copyright must begin with a clear vision on where the law should be heading, including specific objectives to be achieved. These can vary from short to mid-term objectives for national legislators to long-term objectives for international policymakers. To keep in line with evidence-based policy, it would be desirable if these objectives were inspired by empirical facts and reflected a balanced approach between creators, rightholders, users and the public at large, without *ex ante* privileging one particular position over another.

15

Does Copyright Lead to Greater Output of Creative Works?

Ruth Towse[1]

The economic hypothesis that copyright leads to greater output of creative works has to be tested. Copyright is very difficult to research empirically. As copyright is automatically conferred on the author, there is no registration so no comprehensive data source. As the term is long, there is no source of data on the whole span even with CMOs; eg some WW1 Songs are still in copyright but no data exist on total royalties.

The research that has been done on the creative industries provides *data* on the contribution to National Income and growth of the list of industries which produce copyrightable goods and services but it does not provide *evidence* on the incentive copyright played in their production. Facts do not speak for themselves; they need interpretation to become evidence. We cannot say from that data that greater protection would increase output. For that you need to investigate

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the effect of changes in copyright eg extension of term of scope on output. Research measuring piracy has basically done that. Surveys of firms asking them how they use copyright have been done as well with no clear result (and by the way, the same is true of patents and innovation).

The policy objective of copyright as a vehicle for innovation/ creativity and economic growth is relatively recent (though patents have always been viewed in that light). It is a political choice. Copyright is always a trade-off between incentive and access and policy should be based on evidence – not evidence based on policy.

The bugbear of being an economist is that the perception of economics research is that it is all about providing data. Economists are interested in the structure of markets for creative goods and services and their regulation. Copyright is an aspect of market regulation. Markets have changed due to digitization and internet distribution and with it the need for regulation and that is the current work that I am interested in.

I got interested in copyright because I have worked on artists' labour markets – earnings, employment, careers and so on. I believe that copyright is needed but the evidence shows it typically only provides a peripheral source of earnings to authors and performers. Surveys of artists (authors and performers, craftspeople and so on) have shown they value moral rights and copyright as the confirmation of their professional status often more than the expectation of financial reward. Moreover, copyright is not the only policy for promoting creativity eg grants, prizes etc. This needs to be taken into account in understanding the role of copyright as a financial reward as well as how cultural markets differ eg subsidy, state involvement in production.

The big question from my standpoint is: does copyright act as an incentive to primary cultural production? We don't know. It takes behavioural research to find out how creators use copyright and respond to any changes. There is some behavioural/ experimental research on the microeconomic impact of copyright on creative behaviour. What we do know that copyright has become built into

the business models of intermediaries and they feel challenged by changes to copyright law.

Through my own research I have become convinced that changing the contracts that creators are mostly forced to make because of market conditions is more important than altering copyright law. I question if copyright law is the best vehicle for that (eg in the Digital Single Market Directive). The bargaining power of most primary creators and performers is relatively low due mostly to excess supply. The ability to self-publish has improved their bargaining position for those with some success. Having a track record of self-publishing solves the information problem (risk) of the intermediary to some extent so they are willing to offer better terms. Digitization also has lowered costs of production and especially of marketing and distribution. It has led to an increase in the output of books, films and music. This, however, reduces the case for the copyright incentive (to cover sunk costs).

10 questions economists have asked about copyright

1. Is copyright necessary ('a necessary evil') as an incentive to producing works of art, music and literature et al? (Plant to Boldrin and Levine).
2. There are alternative incentives: lead time as a temporary monopoly; contracting; enforcement of social norms; indirect appropriability; DRM; prizes and awards; grants by Arts Councils and Foundations.
3. What is the optimal term (or protection) for copyright?
4. Does copyright increase net social welfare?
5. Does copyright conflict with competition (law)?
6. Does copying/piracy damage the economic incentive? If so, by how much empirically?
7. Has copyright led to concentration in creative industries? It is a creator of assets.
8. What is an optimal contract between author and publisher? Royalty/flat fee; information asymmetries.

9. Is the distribution of copyright incomes of authors and performers efficient and fair?
10. Are copyright collectives good or bad monopolies? Can they survive competition from private data companies?

There is still much work to be done to answer these questions.

INDIVIDUAL AND COLLECTIVE LICENSING AS A MEANS OF IMPROVING THE FUNCTIONING AND ACCEPTANCE OF COPYRIGHT AND RELATED RIGHTS

LES LICENCES INDIVIDUELLES ET COLLECTIVES COMME MOYEN D'AMÉLIORATION DU FONCTIONNEMENT ET DE LA TRANSPARENCE DU DROIT D'AUTEUR ET DES DROITS VOISINS

CONCESIÓN DE LICENCIAS INDIVIDUALES Y COLECTIVAS COMO MEDIO PARA MEJORAR EL FUNCIONAMIENTO Y LA ACEPTACIÓN DE LOS DERECHOS DE AUTOR Y LOS DERECHOS RELACIONADOS

Moderator/Modérateur/Moderador:
Mr. Peter Schønning, Copenhagen

Certain copyrights and related rights are increasingly managed collectively, while others are predominantly managed individually. New licensing models are developing, such as extended collective licensing; *license globale*; compulsory collective management. At the same time, other forms of payment than direct from consumer/user to rights holder are being developed or used in new contexts, such as advertising; linking with other purchases; tracking the consumers' behavior on the net; subscription to streaming services. Will such new models improve the functioning and general acceptance of copyright and related rights? Is the smooth functioning of the system impeded by obstacles such as heirs, trolls, orphans and non-responsive rights owners?

Certains droits d'auteur et droits voisins sont de plus en plus gérés par des collectivités, tandis que d'autres sont encore largement gérés par des individus. De nouvelles licences sont en cours d'établissement, comme la licence collective étendue, la licence globale, la gestion collective obligatoire. Parallèlement, d'autres formes de payement que le payement direct de clients/d'usagers aux titulaires des droits sont en cours de développement ou déjà utilisés dans de nouveaux contextes, notamment dans la publicité, l'association à d'autres achats, le suivi des comportements des usagers de l'internet, l'inscription à des services de diffusion en continu. Ces nouveaux modèles amélioreront-ils le fonctionnement et l'acceptation générale du droit d'auteur et des droits voisins ? Le fonctionnement harmonieux du système est-il compromis par des obstacles tels que les héritiers, les trolls, les orphelins et des titulaires de droits qui ne repondrent pas ?

Cada vez más, determinados derechos de autor y derechos relacionados son gestionados colectivamente, mientras que otros son predominantemente administrados individualmente. Se están desarrollando nuevos modelos de licencias, tales como licencias colectivas ampliadas; licencias globales; gestión colectiva obligatoria. Al mismo tiempo, se están desarrollando o utilizando en nuevos contextos otras formas de pago diferentes de las directas por parte del consumidor/

usuario a los titulares de los derechos, como la publicidad; la vinculación con otras compras; el seguimiento del comportamiento de los consumidores en la red; suscripción a servicios de streaming. ¿Estos nuevos modelos mejorarán la aceptación general y el funcionamiento de los derechos de autor y los derechos relacionados? ¿El buen funcionamiento del sistema está siendo difiultado con obstáculos tales como herederos, trolls, huérfanos y titulares de derechos no admisibles?

16

General Report

Daniel J. Gervais[1]

16.1. Question A

> *Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.*

In their responses to this first Question on collective management, the national reports illustrate the definitional difficulties that form part of any comprehensive discussion of collective management. First among those is a simple question: what is a Collective Management Organization (CMO)? A glossary might tell us that a CMO is an entity that performs collective management. In turn, that glossary might define *collective management* as licensing performed on behalf of a plurality of rights holders. It might then define *licensing* as the [contractual] grant of an authorization to use a work protected by copyright given by the owner of copyright or related rights (licensor) to a person or legal entity (licensee) to perform a certain act in respect of

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the work or object of related rights concerned where such use is not otherwise allowed by an applicable exception or limitation.[2] All of this seems to imply that only CMOs perform collective management. However, at least if one reads the National Reports, other types of entities perform this function. So how should one proceed to define CMOs?

Let us begin in familiar territory. CMOs typically belong to one of the two main "families" of CMOs, namely the International Confederation of Societies of Authors and Composers ("CISAC"), the largest and oldest association of CMOs, or to the International Federation of Reproduction Rights Organizations ("IFRRO"), or both.[3] The national reports list organizations that, as members of CISAC or IFRRO, most likely would qualify as CMOs in any nomenclature. As just alluded to, however, some national reports mention other types of entities. The US report mentions Creative Commons and iCopyright for example, though not identifying them as CMOs *per se*. The French report notes that there are "societies of societies", perhaps a more modern instantiation of the older concept of one-stop-shop that made the rounds in the 1990s.

As just noted, entities that are not CMOs – at least not in the traditional sense – sometimes perform functions that one could call collective management, therefore: does it matter? Yes, if only because a number of countries regulate CMOs or "collective management." Hence, not being able to answer with precision what is or isn't a CMO directly impacts the regulatory regime in terms of its design, implementation and application. The US report mentions stock photo agencies, for example. One could mention other entities that license on behalf of several authors or right holders. For example, a

2. Derived from the definition contained in the *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (Geneva; WIPO, 2003 at 294).
3. Given the growing importance of sound recording royalties administered collectively, perhaps the International Federation of the Phonographic Industry (IFPI) should be added to this list. See the comment by Ang Kwee Tiang during the panel discussion. The same could be said of performers rights and, say, the International Federation of Musicians.

music publisher licenses use of works by several authors. However, a publisher is not typically considered a CMO. Why?

Can statutory definitions help? Not much. There are few national statutes that define the term "collective management." Very few national reports mention any kind of official inventory. Such an inventory was made available in France for example (April 2017) by the *Commission de contrôle*. It counted 25 Collective Management Organizations (*organismes*). The Canadian *Copyright Act* defines "collective society" as a "society, association or corporation that carries on the business of collective administration of copyright [...] for the benefit of those who, by assignment, grant of licence, appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration", and operates a licensing scheme" and/or "carries on the business of collecting and distributing royalties or levies payable pursuant to this Act." The US *Copyright Act* defines "performing rights society" as an "association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works." A number of national laws require that an entity be approved before operating as a CMO, which then requires an administrative decision that the entity is in fact a CMO even absent a formal statutory definition.

WIPO is more helpful in this regard. It proposes a definition:

> "Collective management of copyright and related rights: A way of exercising copyright and related rights *where the exercise of rights is impossible or highly impracticable on an individual basis*. The owners of rights concerned authorize an organization to exercise their rights on their behalf; more particularly, to grant licenses, to monitor uses, to collect the corresponding remuneration, and to distribute and transfer that remuneration to those to whom it is due. The *traditional concept* of this term also implies that actual collectives of authors, performers and owners of rights administer the rights concerned through appropriate bodies and administrative units established by them. In the case of such collective management, usually blanket licenses are granted to users, uniform tariffs and distribution rules are established, and deductions are made from the remuneration collected not only for administration costs but also for cultural and social purposes. *The term is also frequently*

> *used, however, to cover all joint forms of exercising rights where licenses are available from a single source (rather than being granted on an individual basis).*"[4]

This definition is interesting in that it makes collective management a solution to a problem, (individual licensing must be impossible or highly impracticable) thus seemingly suggesting (a) that individual licensing is preferable wherever it is practically possible; and (b) that there is a *traditional model* of collective management but that this model is non-exclusive, which accords with the national reports that take a broad view of the topic.

If one were to limit the analysis to the WIPO definition or to those contained in the statutes quoted above, many types of entities could qualify as CMOs, including book and music publishers. Yet, as just mentioned, they are not considered CMOs. This is, I suggest, because the best way to define a CMO is operationally or functionally, that is, to use definitional elements of the two statutory definitions above as only one side of the definitional coin. CMOs are undoubtedly in the business of licensing a *repertoire* of copyright rights, whether they license the whole repertoire or works within that repertoire, or both. There is, however, another side to the definition, which is that a CMO is *not in the business of commercially exploiting* the works or objects of related rights. It only *licenses* users, including those who will commercially exploit the works. This explains why publishers and stock photo agencies, for example, are not CMOs, even though they manage a repertoire.

While this negative aspect of the definition is not present (at least not expressly) in the statutory texts quoted above, it is reflected in the definition contained in the 2014 EU Directive on collective management.[5] The Directive defines a CMO as an organization that manages "copyright or rights related to copyright on behalf of more

4. Ibid,. at 274–5. Emphasis added.
5. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

than one right holder, for the collective benefit of those right holders, *as its sole or main purpose*. Hence, a publisher is not a CMO because it main purpose is not licensing *per se* but broader commercialization.

The two sides of the coin (positive/negative) are not structural; they are functional in nature. Are there structural components to the definition as well? The EU Directive suggests that there are – at least in the EU context. The definition contained in the directive also requires that a CMO be (a) owned or controlled by its members and (b) organized on a not-for-profit basis. This rule is not observed uniformly worldwide, however. Hence, it seems better from a global perspective to focus primarily on *functions rather than structure* to define collective management.

Structurally, one could also classify CMOs according to features they have in common. In his 1993 book on the topic, for example, David Sinacore-Guinn had suggested dividing CMOs into five categories.[6] There is certainly analytical value in such categorizations. In the case of the United States, the vastly different regulatory oversight of the various CMOs clearly justifies making such distinctions. However, as collective management grows around the world, each would have to be classified according to a series of criteria which makes developing a stable taxonomy particularly difficult. The principal comparators that l used to categorize CMOs in my book on collective management[7] are:

— Legal structure
— Mode of rights acquisition
— Mode of price-setting
— Mode of licensing
— Mode of distribution

6. Namely, Agency Collective Organizations (ACO), Collective Licensing Organizations (CLO), Collective Rights Organizations (CRO), Collective Distribution Organization (CDO) and Social Collectives (SC). D. Sinacore-Guinn, *Collective Administration of Copyrights and Neighboring Rights* (Boston, London: Little, Brown and Company, 1993), at 10–12.
7. Daniel Gervais, *Collective Management of Copyright and Related Rights* (3rd ed, Kluwer, 2012). See ch. 1.

The first comparator is heavily dependent of the legal regime and practices within each jurisdiction. By contrast, the four other comparators, which can be combined in myriad ways for different rights and types of uses, are fairly linear when it comes to the modus operandi of CMOs.[8] They are, not surprisingly, functional rather than structural.

Indeed, the need to emphasize function rather than structure is amply demonstrated by reading the national reports. CMOs are organized in a variety of ways. Some, though relatively few, CMOs are mere agents of a group of rights holders who voluntarily entrust to a CMO the licensing of one or more uses of their works. This is the case in the United States with ASCAP and BMI for example. Other CMOs are assignees of copyright. In fact, rights holders sometimes transfer at least some rights to all present and future works to a CMO – as they often do to CMOs that license music rights (to which all so-called small rights are often transferred, making it impossible for the author to license directly). In most cases, authors and other right holders can choose the individual works or objects that the CMO will administer on their behalf. Then some CMOs license work-by-work (e.g., mechanical right), others offer users a whole 'repertory' of works; and others do both.

The national reports pose a more specific subset of questions, namely whether *licensing for free* as a model, as Creative Commons does, or licensing for profit, as iCopyright does, exclude these entities from the definition of a CMO. The answer to this question, if one takes a broad approach, is: not necessarily. Some "traditional" CMOs license for free, either as a "business" or political decision or because they are forced to do so by the regulator. The Copyright Board of Canada for example has openly discussed whether a fair price for certain uses of protected material might be zero, and this was not because the use was clearly covered by an exception.[9] As to *for-profit*

8. See ibid.
9. See e.g. Statement Of Royalties To Be Collected For The Performance In Public Or The Communication To The Public By Telecommunication, In Canada, Of Published Sound Recordings Embodying Musical Works And Performers' Performances Of Such Works, 6 July 2012, para. 48, online: <http://bit.ly/2rbSV

licensing, most CMOs are described in national reports as non-profit (or not-for-profit) but this is rarely mentioned as a legal requirement. As noted above, however, it is a requirement mentioned in the 2014 EU Directive.

At bottom, the question to answer is: when does an entity cross the threshold to become a CMO and then becomes regulated as such? As the above analysis demonstrates, this remains a matter of considerable definitional uncertainty. The EU Directive is a welcome step forward because of its vast cultural and geographic coverage.

Perhaps one should ask whether identifying CMOs among a constellation of entities that perform collective licensing is an attempt to make a distinction without a difference? Even if one must know what a CMO is in order to regulate it, is it the case that in each country this is a non-question because entities that somehow "behave as CMOs" are considered as such? This begs another question: what does it mean to behave like a CMO?

As Dr. Ficsor noted in the book on collective management he authored for the World Intellectual Property organization (WIPO): while licensing and royalty payment are obviously important functions, they are not the only preoccupation of CMOs. Their behavior is multi-facetted. Over time the role of CMOs has evolved to oversee copyright compliance, fight piracy and perform various social and cultural functions.[10] In my own account of the functions of CMOs, for example, I discuss their role as *both economic and cultural agents*. Many – indeed perhaps most – CMOs are a good reflection of this dual (business and cultural) purpose. They see themselves as champions of the rights of the authors or right holders they represent and often recognize the value of administering a right, namely copyright or a related right, that can be justified as a human or natural right. They have a cultural function but they also operate as 'businesses' handling large sums of money.

5b>.

10. M. Ficsor, *Collective Management of Copyright and Related Rights* (World Intellectual Property Organization, 2002), at 99–106.

The EU Directive on collective management supports this dualist behavioral approach. On the first side of the coin, it provides that

> [I]nvestments made and held by the collective management organisation should be managed in accordance with criteria which would oblige the organisation to act prudently, while allowing it to decide on the most secure and efficient investment policy.[11]

But then also this:

> CMOs play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.[12]

The *non-distributional* functions that CMOs perform – that is, uses of funds not meant to pay (distribute to) their members or other represented parties – can be grouped into two categories. The first is *direct cultural functions*, including

- Grants, scholarship and award programs and related ceremonies;
- Classes and workshops for represented parties (eg musical composition); and
- Promotion of works by represented parties, including festivals or other special events.

CMOs also perform *indirect cultural functions*, such as

11. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ 20 March 2014 L 84/72, recitals 26 and 27.
12. *Ibid.*, recital 3. Interestingly, the word "efficient" or variants thereof appears nine times in the text of the Directive and the word 'cultural' 21 times.

— Informational and educational function (about copyright, licensing etc.), including publications, social media presence, conferences, etc.,[13] and
— Lobbying.

There is also a historical angle to consider in any discussion of collective management. Some rights in the copyright bundle have a long history of collective management and some countries have a much longer and well-established tradition than others. Most European national reports describe a long history and tradition of collective management going back to Beaumarchais. France has had theatrical rights (SACD) and musical rights collective management for more than two centuries. France is not the only country with a long tradition of collective management, however. In Italy collective management planted its first roots in 1882, and Hungary had its first CMOs in 1907. Nor does Europe have a monopoly on collective management history. Argentina saw *Argentores* emerge in 1910 and Japan had its first collective in 1934.

Other national reports note a much more recent connection to collective management. In the Egyptian report, for example, we see that not only in Egypt but in the entire Arab world collective management is much less prevalent than in most other regions. To answer the first question posed by the organizers thoroughly, therefore, one should consider all those aspects, and then combine it with the history and culture of each country or region.

Finally, the first question also asks authors of national reports to discuss whether collective management is *widespread* in their country. What does 'widespread' mean in that context? Does the number of rights covered by one or more CMOs make that collective management widespread? Or is it the number of percentage of major (or total) users or uses licensed by CMOs? Is it the number of CMOs? One can answer with relative certainty that the last indicator is of very little relevance. First of all, the number of CMOs varies enormously – from 1 (Egypt) to more than 30 (Canada). It can be rela-

13. This may include 'anti-piracy' campaigns.

tively low in countries with a long and well-implanted tradition of collective management such as Denmark (4),[14] Germany (10), Sweden (6) and the UK (10). Turkey has 27 CMOs, all operating in the music sector. The answer to the question whether collective management is *widespread* does not correlate with the number of CMOs. In fact, one could argue that in smaller markets or markets where collective management is less developed, a plurality of CMOs in the same market is counterproductive because the advantage of pooling rights to license a repertoire is less apparent to users when that repertoire is highly fragmented. In a large territory like the United States – where according to the national report, four performance rights organizations compete for repertory (namely ASCAP, BMI, Global Music Rights (GMR) and SESAC) – this is arguably less of an issue because major users can more easily afford the transaction costs of four licensing transactions and can also search the database of each organization online if they only require rights to specific works.

16.2. Question B

> *Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.*

The national reports show very little uniformity in the way CMOs are regulated. Nor is the very existence of specific regulation of CMOs itself uniform. Those who favour more regulatory uniformity in this space will most likely welcome the efforts to harmonize (up to a point) based on the 2014 EU Directive.[15]

14. This the number of CMOs in existence as extracted from the national report. All mistakes are mine as very few national reports actually mentioned the number of CMOs in existence in their territory.
15. For a more complete overview, see Lucie Guibault and Stef van Gompel, "Collective Management in the European Union", in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (Second Edition, Alphen aan den Rijn: Kluwer Law International, 2010), pp. 135–167.

Let us just take a few examples to illustrate the lack of uniformity. The Argentinean report describes the recognition of CMOs by decree. In Croatia, new CMOs must be authorized by the State Intellectual Property Office; in Spain, it is the Ministry of Culture that performs this function; in Turkey the Ministry of Culture and Tourism. Some national laws mention CMOs by name, sometimes to establish them as in Italy (SIAE) but not always with a view to establishing or authorizing establishment (e.g., in the United States, section 101 of the Copyright Act contains a non-exhaustive list of PROs). Some national reports mention special board or tribunals (Canada, New Zealand, the Netherlands (CvTA), UK, United States) to set tariffs or settle differences with users, and some refer to Article 35 of the Directive in this regard. Some reports also mention arbitration (Portugal, Spain).

Having painted this somewhat discombobulated portrait of regulatory regimes, one can nonetheless infer from the Reports that relevant legislation, where it exists, performs a number of identifiable functions.[16] Based on the national reports, the major tasks accomplished by legislation at present can be summarized as follows:

1. Authorize the establishment of a CMO (Argentina, Spain, Turkey) or authorize it to operate, sometimes in a certain area where collective management is compulsory (eg Switzerland and the United States for SoundExchange);
2. Create a presumption of transfer of rights to the CMO (Portugal) or authority to license (Croatia, Germany, Greece[17]) or other mechanism such as extended collective licensing or some functional equivalent thereof (Croatia, Czech Republic, Denmark, Hungary, Italy, Spain and Sweden);
3. Provides a mechanism to settle disputes between rights holders and users; and
4. Provides requirements for transparency (reporting etc.)

16. Here again the EU Directive may bring more uniformity at least within the EU.
17. It seems that the German Act on the Management of Copyright und Related Rights has inspired other legislators.

The second Question emphasized the role of *extended collective licensing* (ECL).[18] This is not surprisingly since we are in Denmark. The British report was a bit critical of ECL. Fortunately, however, it did not, unlike a previous British text, mention that something was rotten in the state of Denmark. But the Report did note this:

> In particular, the development of extended collective licensing in Scandinavia over the last half a century seems to have depended on the fact that the communities of rights owners were and are relatively small and relatively cohesive, neither of which adjectives would be very apt as qualifiers of potential licensors in the United Kingdom.

This led me to ponder whether legislation can somehow compensate or lead the way in the establishment of more efficient CMOs, and then whether in doing so it should use ECL or a "functional equivalent thereof" as mentioned in the Croatian and Spanish reports, for example.

A desire by the legislator to increase transparency and efficiency are certainly valid normative objectives. Picking who should regulate CMOs is also critically important. Should it be the part of the government responsible for culture, intellectual property, or a tribunal like structure? If a tribunal or board is appointed, should it be specialized? We find no uniformity in the national reports on this question. Having said that, as a normative matter some degree of independence of the regulator seems desirable. Both actual transparency and the appearance of transparency is presumably important to both users and the public.

The use of (normal) civil courts to perform this supervisory function is risky in an area where law often yields to complex econometric analyses. Yet creating a specialized board or tribunal comes at a cost. As the Canadian report notes:

18. See Tarja Koskinen-Olsson and Vigdis Sigurdardóttir, "Collective Management in the Nordic Countries", in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (Second Edition, Alphen aan den Rijn: Kluwer Law International, 2010), pp. 243–262.

> Le processus à la fois administratif et judiciaire de la Commission, qui requiert avocats, savantes études et témoins experts reconnus, conjugué à l'absence de ressources suffisantes actuellement constatée à la Commission, font en sorte que le processus demeure lourd et coûteux, plusieurs années pouvant s'écouler avant que la Commission rende une décision.

There is no obvious universal optimal solution here. Smaller or less developed collective management markets may require more direct intervention primarily designed to limit inefficiencies while in larger or more established markets more robust adversarial processes may function better. In comparing regulatory structures and mechanisms, one should not forget that CMOs represent vastly different categories of right holders. Although some work for major record labels or film studios, a high proportion of CMOs work for individual music authors or performers facing giant users such as Apple or Goggle (including YouTube). Shackling CMOs to face those sophisticated users should not be a primary function or effect of regulatory regimes. This is in fact implied in the phrasing of the second question chosen by the organizers targeting provisions meant to *facilitate* collective management.

16.3. Question C

> *Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.*

There are two main models for limitations and exceptions (L&Es). The first is the "closed" model (referred to as such in the reports by Croatia, Germany, and Spain for example), which provides an exhaustive list of L&Es and is ostensibly in keeping with the InfoSoc Directive's approach (the Directive is mentioned as a basis for designing L&Es in the reports by Croatia, Denmark and Portugal). Common law jurisdictions use a different approach. Their law contains open fair dealing or fair use provisions, that is, non-specific permitted

uses based on tests, sometimes contained in the legislation (US section 107) itself and sometimes in court decisions.[19] Fair dealing is mentioned in New Zealand and United Kingdom Reports; it also applies in Canada, and Israel follows a similar approach.

As I read this third Question, however, it did not necessarily ask for a comprehensive inventory of all L&Es in each country; it mostly targeted whether *L&Es were linked in each country to some form of collective management*. Full exceptions require neither a license nor payment and they are, therefore, much less relevant in this context. Where national law provides a compulsory license or similar system, however, then it almost by necessity must entrust the task of collecting and distributing the monies collected to a CMO. This is also the case for compensatory regimes such as public lending and private copying.

Not all compulsory licensing leads to collective management. In Argentina, a compulsory license is provided due to the inaction of heirs and beneficiaries (art. 6. Of Law 11.723/3). As the report notes: "The heirs or successors may not oppose that third parties re-publish the works of the author when they leave more than ten years without their publication. Neither can oppose the heirs or successors to third parties to translate the works of the author after ten years of his death. In these cases, if there is no agreement between the publisher and the heirs or successors in respect of printing conditions or pecuniary remuneration, both shall be fixed by arbitrators." In Canada, a regime for unlocatable right owners provides for individual licenses issued by the Copyright Board. In Croatia, there is a "statutory licence regulated in favor of employer of an author of a computer program where he or she acquires all the economic rights if not agreed otherwise. Also, there is statutory licence regulated in favor of a film producer where the contract on audiovisual production is concluded with the author of the contribution to the audiovisual work. He or she acquires all economic rights necessary for the performance

19. Even when a test is contained in national law it is in normal in a common law jurisdiction such as the United States that it would be interpreted, refined and arguably even "modified" in its application by courts.

of the purpose of the contract." Yet in most cases compulsory licenses are tied to a CMO.

In Belgium, a number of compulsory licenses are contained in the law. Indeed, as that National Report notes, "l'instauration de « licences légales » a constitué l'une des principales innovations de la loi du 30 juin 1994 relative au droit d'auteur et les droits voisins." The Report provides a detailed review of each one. A compulsory license sometimes is used in the educational sector as in Egypt and Germany for example.

A central notion that distinguishes full exceptions from limitations with compensation is that of *equitable remuneration*, which we find in several national reports: Belgium, Czech Republic, Denmark, France, Germany, Greece, Israel, Italy, Portugal, and Switzerland). A common thread is Article 12 of the Rome Convention which in respect of the broadcasting or any communication to the public of commercial phonograms, allows countries to replace the exclusive right with a right to a "single equitable remuneration."

Collective management is sometimes mandatory when a compulsory license is in place. There are a number of examples in national reports. While this is often the case for cable retransmissions (e.g., Germany, Art. 20b of the Copyright Act) or private copying (E.g. Italy), some national reports mention much more extensive lists of mandatory collective management. The Czech Republic's report notes the following:

a) The right to remuneration for:
    1. the use of an artistic performance fixed on a phonogram published for commercial purposes by (radio or television) broadcasting or by rebroadcasting and retransmission of the (radio or television) broadcast,
    2. the use of a phonogram published for commercial purposes by (radio or television) broadcasting or by rebroadcasting and by retransmission of the (radio or television) broadcast,
    3. the making of a reproduction for personal use on the basis of an audio or audiovisual fixation or any other fixa-

tion by the transfer of its content by means of a technical device to a blank carrier of such fixation,

4. the making of a reproduction for a natural person's personal use or for a legal person's or sole trader's own internal use by means of a technical device for making printed reproductions on paper or any other carrier material, also through a third party,
5. resale of the original of a work of art,
6. the lending of the original or reproduction of a published work in accordance with Art. 37 para. 2;

b) the right to an equitable remuneration for the rental of the original or a copy of the work, or of a performer's performance fixed in an audio or audiovisual fixation;

c) the right to the use – by cable retransmission – of works, live performances and performances fixed on phonogram or in an audiovisual fixation [...], and

d) the right to the additional annual remuneration pursuant to Art. 71(4).[20]

The Turkish report notes that its draft revision of the Copyright Act includes "compulsory licensing system in terms of some right categories." This suggests a trend towards expansion in that country.

20. This provision reads as follows: "The right of the performer shall be also infringed by anybody who has been forbidden by the relevant collective rights manager to further use of the performance in the manner referred to in Paragraph (1) for being in delay with the payment of the remuneration for such a way of use and for failing to pay the remuneration even in the thirty-day grace period provided by the collective rights manager for this purpose. Unless the collective rights manager limits such a ban to a shorter period, the ban shall be in effect until such time as the liability to pay the remuneration is met or expires in any other way; however, should the ban be violated, the duration of the ban shall not be ended without the consent of the collective rights manager before the claims arising from such violation will be settled as well." Source: WIPOLex

The national reports suggest that there is a trend towards more repertory licensing and thus a possible expansion of collective management. The increasing number of countries adopting ECLs or functional equivalents therefor, or a presumption of authority of a CMO to license (as Germany has had for years) signal a desire by at least some legislators to encourage licensing and, hopefully, revenue streams to authors, performers and other right holders.

This is verified empirically. Revenues of CMOs on a global scale have been on the increase. This does not come as a surprise: mass online uses and other permitted but paid uses (to use the expression coined by Jane Ginsburg) seem to lead "naturally" to this type of licensing as music, text and video should be available on multiple platforms and preferably without delay, lest piratical providers provide an alternative source. Efforts to curb illegal content have been less than thoroughly successful. Efficient licensing is the best way forward and CMOs, old and new, can play a key role in that challenging environment. The theme chosen for this Congress is "Copyright: To Be or Not To Be". For CMOs, To Be is the answer.

17

Rapport général

Daniel J. Gervais[1]

17.1. Question A

> *Existe-t-il une culture largement répandue de gestion collective du droit d'auteur et des droits voisins dans votre pays, ou est-elle limitée aux domaines « fondamentaux » des droits d'exécution musicale et des droits de reprographie ? Veuillez décrire les domaines dans lesquels la gestion collective est utilisée.*

Dans leurs réponses à cette première question axée sur la gestion collective, les rapports nationaux démontrent les difficultés de définition qui font partie de toute discussion globale de la gestion collective. La première d'entre elles est une question simple: qu'est-ce qu'un organisme de la gestion collective (OGC) ? Un glossaire peut nous indiquer qu'un OGC est une entité qui effectue une gestion de droits. À son tour, ce glossaire pourrait définir *la gestion collective* comme l'octroi de licences pour le compte d'une pluralité de titulaires de droits. Il pourrait alors définir la *concession de licence* comme l'octroi [contractuel] d'une autorisation d'utilisation d'une œuvre protégée par le

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droit d'auteur du titulaire du droit d'auteur ou des droits voisins (donneur de licence) à une personne physique ou morale (preneur de licence) d'accomplir un certain acte à l'égard de l'œuvre ou de l'objet de droits connexes concernés lorsqu'une telle exception n'est pas autorisée par une exception ou une limitation applicable.[2] Tout cela semble impliquer que seuls les OGC exercent dans le domaine de la gestion collective. Cependant, si l'on s'en tient aux rapports nationaux, d'autres types d'entités exercent cette fonction. Alors, comment devrait-on procéder pour définir les OGC ?

Commençons en territoire familier. Les organismes de la gestion collective appartiennent en général à l'une des deux principales « familles » d'organismes de gestion collective, à savoir la Confédération internationale des sociétés d'auteurs et compositeurs (« CISAC »), la plus grande et la plus ancienne association des OGC, ou à la Fédération internationale des organisations de droits de reproduction (« IFRRO »), ou aux deux.[3] Les rapports nationaux répertorient les organismes qui, en tant que membres de la CISAC ou de l'IFRRO, seraient très probablement qualifiées d'OGC dans n'importe quelle nomenclature. Toutefois, comme cela a été mentionné, certains rapports nationaux mentionnent d'autres types d'entités. Le rapport américain mentionne Creative Commons et iCopyright par exemple, quoiqu'elles ne soient pas identifiées comme OGC en tant que telle. Le rapport français note qu'il existe des « sociétés de sociétés », peut-être une version plus moderne de l'ancien concept de guichet unique qui a beaucoup circulé dans les années 1990.

Comme nous venons de le voir, les entités qui ne sont pas des OGC – du moins pas dans le sens traditionnel – exercent parfois des fonctions que l'on pourrait appeler gestion collective: Est-ce impor-

2. Dérivé de la définition contenue dans le OMPI GUIDE DES TRAITÉS SUR LE DROIT D'AUTEUR ET LES DROITS CONNEXES ADMINISTRÉS PAR OMPI, Genève, OMPI, 2003, page 292.
3. Au regard de l'importance croissante des redevances d'enregistrement sonore administrées collectivement, peut-être que la fédération internationale de l'industrie phonographique (IFPI) devrait être ajoutée à cette liste. Voir le commentaire par Ang Kwee Tiang lors du panel de discussion. On pourrait en dire autant des droits des artistes et, disons, de la fédération internationale des musiciens.

tant ? Oui, parce qu'un certain nombre de pays réglementent les OGC ou la « gestion collective ». Par conséquent, ne pas être en mesure de répondre avec précision à ce qui est ou non un OGC regorge un impact direct sur le régime de réglementation en termes de conception, de mise en œuvre et d'application. Le rapport américain mentionne les agences de photos en ligne, par exemple. On pourrait citer d'autres entités qui accordent des licences au nom de plusieurs auteurs ou ayants droit. Par exemple, un éditeur de musique autorise l'utilisation d'œuvres par plusieurs auteurs. Toutefois, un éditeur n'est généralement pas considéré comme un OGC. Pourquoi ?

Les définitions legislatives peuvent-elles aider ? Pas vraiment. Il existe peu de lois nationales qui définissent le terme « gestion collective ». Très peu de rapports nationaux mentionnent un quelconque inventaire officiel. Un tel inventaire a été mis à disposition en France par exemple (avril 2017) par la *commission de contrôle*. Il comptait 25 organisations de gestion collective (*Organismes*). La loi canadienne sur le droit d'auteur (R.S.C., c. C-42 L.R.C. (1985), ch. C-42) définit la « société de gestion » comme une

> « Association, société ou personne morale autorisée — notamment par voie de cession, licence ou mandat — à se livrer à la gestion collective du droit d'auteur ... pour ... l'administration d'un système d'octroi de licences portant sur un répertoire d'œuvres, de prestations, d'enregistrements sonores ou de signaux de communication de plusieurs auteurs, artistes-interprètes, producteurs d'enregistrements sonores ou radiodiffuseurs et en vertu duquel elle établit les catégories d'utilisation qu'elle autorise au titre de la présente loi ainsi que les redevances et modalités afférentes » et/ou « exerce l'activité de collecte et de distribution des redevances ou prélèvements payables conformément à la présente loi. »

La loi américaine sur le droit d'auteur définit la « société de droits d'exécution » comme une « association, société ou autre entité qui concède sous licence l'exécution publique d'œuvres musicales non dramatiques pour le compte des titulaires de ces œuvres ». Un certain nombre de législations nationales exigent qu'une entité soit agréée

avant d'exercer en tant qu'OGC, ce qui nécessite alors une décision administrative selon laquelle l'entité est en fait un OGC, même en l'absence d'une définition légale officielle.

L'OMPI est plus utile à cet égard. Elle propose une définition:

> « Gestion collective du droit d'auteur et des droits connexes:
> Mécanisme permettant l'exercice du droit d'auteur et des droits connexes lorsque ce dernier est impossible ou extrêmement difficile à titre individuel. Il consiste, pour le titulaire de droits, à autoriser un organisme à exercer ces derniers en son nom, et notamment à accorder des autorisations, contrôler l'utilisation de son œuvre, percevoir la rémunération correspondante et en assurer la répartition et le versement aux personnes qui y ont droit. Dans son acception traditionnelle, ce terme suppose aussi que la gestion des droits est assurée par des organes et unités administratives établis à cet effet par des collectifs d'auteurs, d'artistes interprètes ou exécutants et de titulaires de droits. D'une manière générale, les organismes de gestion collective octroient des licences globales, établissent des barèmes uniformes et des règles de répartition et opèrent des déductions sur les rémunérations perçues, non seulement pour couvrir leurs frais d'administration, mais aussi à des fins culturelles et sociales. Ce terme est toutefois fréquemment utilisé, aussi, à l'égard de tous les systèmes communs d'exercice des droits dans lesquels les licences sont octroyées de manière collective (plutôt qu'à titre individuel). »[4]

Cette définition est intéressante en ce qu'elle fait de la gestion collective une solution à un problème (l'octroi de licences individuelles doit être impossible ou très impraticable), suggérant ainsi (a) que la concession individuelle de licence est préférable partout où cela est possible et (b) qu'il existe un *modèle traditionnel* de gestion collective, mais que ce modèle est non exclusif, ce qui est conforme aux rapports nationaux qui adoptent une vision large du sujet.

Si l'on devait limiter l'analyse à la définition de l'OMPI ou à celles contenues dans les lois citées ci-dessus, de nombreux types d'entités pourraient être considérés comme des OGC, y compris les

4. Ibid. à 291. Je souligne.

éditeurs de livres et de musique. Pourtant, comme nous venons de le mentionner, ceux-ci ne sont pas considérés comme des OGC. A mon sens, la meilleure façon de définir un OGC prend en compte l'aspect opérationnel ou fonctionnel, c'est-à-dire l'utilisation des éléments de définition des deux définitions statutaires ci-dessus comme étant un seul côté de la médaille. Les OGC octroient sans aucun doute des licences concernant un *répertoire* de droits d'auteur, soit pour l'ensemble du répertoire ou des œuvres de ce répertoire. Il y a cependant, un autre aspect de la définition, à savoir que l'OGC n'a *pas* p*our objet d'exploiter commercialement* les œuvres ou les objets de droits voisins. Elle délivre des autorisations d'utilisation, y compris à ceux qui exploiteront commercialement les œuvres. Cela explique la raison pour laquelle les éditeurs et les banques d'images, par exemple, ne sont pas des OGC, même s'ils gèrent un répertoire.

Cet aspect négatif de la définition n'est pas présent (du moins pas expressément) dans les textes statutaires cités ci-dessus, mais il se reflète dans la définition contenue dans la directive de l'Union européenne de 2014 sur la gestion collective.[5] La directive définit un OGC comme une organisation qui gère « le droit d'auteur ou les droits liés au droit d'auteur pour le compte de plus d'un détenteur de droits, au profit collectif de ces détenteurs de droits, *à titre principal ou unique*. Par conséquent, un éditeur n'est pas un OGC parce que son objectif principal n'est pas la concession de licence *en tant que telle* mais une commercialisation plus large.

Les deux côtés de la médaille (positif/négatif) ne sont pas structurels; ils sont fonctionnels dans la nature. Y a-t-il aussi des composants structurels à la définition ? La directive de l'UE suggère qu'il y en a – au moins dans le contexte de l'UE. La définition contenue dans la directive exige également qu'un OGC soit (a) détenue ou contrôlée par ses membres et (b) organisée sur une base sans but lucratif. Toutefois, cette règle n'est pas observée uniformément dans le monde entier. Par conséquent, il semble préférable dans une pers-

5. La directive 2014/26/UE du parlement européen et du conseil du 26 février 2014 sur la gestion collective du droit d'auteur et des droits voisins et la concession de licences multi-territoriales de droits sur des œuvres musicales en vue d'une utilisation en ligne dans le marché intérieur.

pective globale de se concentrer principalement sur *les fonctions plutôt que sur la structure* pour définir la gestion collective.

Sur le plan structurel, on pourrait également classer les OGC en fonction des caractéristiques qu'elles ont en commun. Dans son livre de 1993 sur le sujet, David Sinacore-Guinn avait suggéré de diviser les OGC en cinq catégories.[6] Il y a certainement une valeur analytique à proposer de telles catégorisations. Dans le cas des États-Unis, la surveillance réglementaire très différente des divers OGC justifie clairement de telles distinctions. Toutefois, à mesure que la gestion collective se développe à travers le monde, chacune de ces catégories devrait être classée selon une série de critères qui rendent le développement d'une taxonomie stable particulièrement difficile. Les principaux comparateurs que j'ai utilisés pour classer les OGC dans mon livre sur la gestion collective[7] sont:

— Structure juridique
— Mode d'acquisition des droits
— Mode de fixation des prix
— Mode d'octroi de licence
— Mode de distribution

Le premier comparateur est fortement dépendant du régime juridique et des pratiques dans chaque juridiction. En revanche, les quatre autres comparateurs, qui peuvent être combinés de multiples façons pour différents droits et types d'utilisations, sont assez linéaires en ce qui concerne le mode opératoire des OGC.[8] Elles sont, sans surprise, fonctionnelles plutôt que structurelles.

En effet, la nécessité de mettre l'accent sur la fonction plutôt que sur la structure est amplement démontrée dans les rapports natio-

6. DIRECTIVE 2014/26/UE DU PARLEMENT EUROPÉEN ET DU CONSEIL du 26 février 2014 concernant la gestion collective du droit d'auteur et des droits voisins et l'octroi de licences multiterritoriales de droits sur des œuvres musicales en vue de leur utilisation en ligne dans le marché intérieur.
7. Daniel Gervais, *Gestion collective du droit d'auteur et des droits voisins* (3e éd., Kluwer, 2012). Voir ch. 1.
8. Voir ibid.

naux. Les OGC sont organisés de diverses manières. Certaines, bien que relativement peu nombreuses, sont de simples agents d'un groupe de titulaires de droits qui confient volontairement à un OGC l'autorisation de gérer une ou plusieurs utilisations de leurs œuvres. C'est le cas aux États-Unis avec l'ASCAP et la BMI par exemple. D'autres OGC sont des cessionnaires de droits d'auteur. En fait, les détenteurs de droits transfèrent parfois au moins certains droits sur leurs œuvres présentes et futures à un OGC – comme c'est souvent le cas pour les OGC dans le domaine des droits musicaux (auxquels sont souvent transférés tous les « petits droits », ce qui empêche l'auteur d'octroyer directement une licence à un utilisateur). Dans la plupart des cas, les auteurs et autres détenteurs de droits peuvent choisir les œuvres ou objets individuels que l'OGC administrera en leur nom. Certaines licences d'OGC sont octroyées œuvre par œuvre (par exemple, pour le droit de reproduction mécanique). D'autres offrent aux utilisateurs un « répertoire » complet d'œuvres; et d'autres font les deux.

Les rapports nationaux posent un sous-ensemble plus spécifique de questions, à savoir si *l'octroi de licences à titre gratuit*, comme le fait Creative Commons, ou la concession de licences par un organisme à but lucratif, comme iCopyright, exclut ces entités de la définition d'un OGC. La réponse à cette question, si l'on adopte une approche large, est: pas nécessairement. Certains OGC « traditionnels » délivrent des licences gratuitement, soit en tant que décision « commerciale » ou politique, soit parce qu'elles sont obligées de le faire par le régulateur. Par exemple, la commission canadienne du droit d'auteur a ouvertement débattu de la question de savoir si un prix juste pour certaines utilisations du matériel protégé pouvait être nul.[9] En ce qui concerne *les licences à but lucratif*, la plupart des OGC sont décrits dans les rapports nationaux comme étant à but non lucratif (ou sans but lucratif), mais cela est rarement mentionné comme une

9. Voir par exemple l'état des redevances à percevoir pour la représentation en public ou la communication au public par télécommunication au Canada, des enregistrements sonores publiés contenant des œuvres musicales et des interprétations de ces œuvres par des artistes interprètes ou exécutants, 6 juillet 2012, para. 48, en ligne: <http://bit.ly/2rbSV5b>.

obligation légale. Comme indiqué ci-dessus, il s'agit d'une exigence mentionnée dans la directive de l'Union européenne de 2014.

Au fond, la question à laquelle il faut répondre est la suivante: quand est-ce qu'une entité franchit le seuil pour devenir un OGC et devient alors réglementée en tant que telle ? Comme le présente l'analyse ci-dessus, cela reste une question d'incertitude définitionnelle considérable. La directive de l'UE est un pas en avant en raison de sa vaste couverture culturelle et géographique.

Peut-être devrions-nous nous demander si l'identification des OGC parmi une constellation d'entités qui octroient des licences collectives est une tentative de faire une distinction sans qu'il y ait une réelle différence. Même si l'on doit savoir ce qu'est une OGC afin de la réglementer, est ce vraiment une question car les entités qui se comportent en quelque sorte comme des OGC sont considérés comme tels ? Cela soulève une autre question: qu'est-ce que cela signifie de se comporter comme un OGC ?

Comme Mihály Ficsor l'a noté dans son livre sur la gestion collective pour l'Organisation Mondiale de la Propriété Intellectuelle (OMPI): si les licences et les redevances sont évidemment des fonctions importantes, elles ne sont pas la seule préoccupation des OGC. Leur comportement est à multiples facettes. Au fil du temps, le rôle des OGC a évolué vers la supervision du respect des droits d'auteur, la lutte contre la piraterie et l'exécution de diverses fonctions sociales et culturelles.[10] Pou ma part, les OGC doivent être considerés comme *agents économiques et culturels*. De nombreu – en fait peut-être la plupart – organismes de gestion collective reflètent bien ce double objectif (commercial et culturel). Ils se considèrent comme les champions des droits des auteurs ou des titulaires de droits qu'ils représentent et reconnaissent souvent la valeur d'administrer un droit, à savoir le droit d'auteur ou un droit voisin, pouvant être justifié comme droit naturel ou humain. Ils ont une fonction culturelle mais elles fonctionnent également comme des « entreprises » qui manipulent de grosses sommes d'argent.

10. M. Ficsor, *Gestion collective du droit d'auteur et des droits voisins* (Organisation mondiale de la propriété intellectuelle, 2002), p. 99-106.

La directive de l'Union européenne sur la gestion collective soutient cette approche comportementale dualiste. Sur un côté de la médaille, il est prévu que

> Les investissements opérés et détenus par l'organisme de gestion collective devraient être gérés conformément à des critères obligeant l'organisme à agir avec prudence, tout en lui permettant de décider de la politique d'investissement la plus sûre et la plus efficace.[11]

Mais alors aussi ceci:

> Les organismes de gestion collective jouent, et devraient continuer de jouer, un rôle important de promotion de la diversité des expressions culturelles, à la fois en permettant aux répertoires les moins volumineux et moins populaires d'accéder au marché et en fournissant des services sociaux, culturels et éducatifs dans l'intérêt de leurs titulaires de droits et du public.[12]

Les fonctions *non distributives* que les OGC exercent – c'est-à-dire les utilisations de fonds non destinés à payer (distribuer à) leurs membres ou d'autres parties représentées – peuvent être regroupées en deux catégories. La première représente les *fonctions culturelles* directes, y compris

- Subventions, bourses d'études et programmes de récompenses et cérémonies connexes;
- Classes et ateliers pour les parties représentées (par exemple, la composition musicale); et
- Promotion d'œuvres par des parties représentées, y compris des festivals ou d'autres événements spéciaux.

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11. DIRECTIVE 2014/26/UE DU PARLEMENT EUROPÉEN ET DU CONSEIL du 26 février 2014 concernant la gestion collective du droit d'auteur et des droits voisins et l'octroi de licences multiterritoriales de droits sur des œuvres musicales en vue de leur utilisation en ligne dans le marché intérieur, récits 26 et 27.
12. Ibid, récit 3. Il est intéressant de noter que le mot « efficace » ou des variantes de celui-ci apparaissent neuf fois dans le texte de la directive et le mot « culturel » 21 fois.

Les OGC exercent également des *fonctions culturelles indirectes*, telles que

— Fonction d'information et d'éducation (sur les droits d'auteur, l'octroi des licences, etc.), y compris les publications, la présence des médias sociaux, les conférences, etc.,[13] et
— Lobbying.

Il existe aussi un angle historique à considérer dans toute discussion sur la gestion collective. Certains droits dans le faisceau du droit d'auteur ont une longue histoire de gestion collective et certains pays ont une tradition bien plus longue et mieux établie que d'autres. La plupart des rapports nationaux européens décrivent une longue histoire et une tradition de gestion collective remontant à Beaumarchais. La France a un OGC pour les droits théâtraux (SACD) et une gestion collective des droits musicaux depuis plus de deux siècles. Toutefois, la France n'est pas le seul pays ayant une longue tradition de gestion collective. En Italie, la gestion collective a planté ses racines en 1882 et la Hongrie a eu ses premiers OGC en 1907. L'Europe n'a pas non plus le monopole de l'histoire de la gestion collective. L'Argentine a vu émerger *Argentores* en 1910 et le Japon a eu son premier OGC en 1934.

D'autres rapports nationaux notent un lien beaucoup plus récent avec la gestion collective. Dans le rapport égyptien, par exemple, nous remarquons que non seulement en Égypte mais dans tout le monde arabe, la gestion collective est beaucoup moins répandue que dans la plupart des autres régions. Pour répondre à la première question posée par les organisateurs, il faut donc considérer tous ces aspects, puis les combiner avec l'histoire et la culture de chaque pays ou région.

Enfin, la première question demande également aux auteurs des rapports nationaux de discuter si la gestion collective est *répandue* dans leur pays. Que signifie « répandue » dans ce contexte ? Le nombre de droits couverts par un ou plusieurs OGC rend-il cette ges-

13. Cela peut inclure des campagnes « anti-piraterie ».

tion collective très répandue ? Ou s'agit-il du nombre de pourcentages d'utilisateurs principaux (ou totaux) ou des utilisations autorisés par l'OGC ? S'agit-il du nombre d'OGC ? On peut répondre avec une certitude relative que le dernier indicateur est très peu utile. Tout d'abord, le nombre d'OGC varie énormément – de 1 (Égypte) à plus de 30 (Canada). Il peut être relativement faible dans les pays où la gestion collective est ancienne et bien implantée, comme le Danemark (4),[14] l'Allemagne (10), la Suède (6) et le Royaume-Uni (10). La Turquie compte 27 OGC, opérant toutes dans le secteur de la musique. La réponse à la question de savoir si la gestion collective est *répandue* ne correspond donc pas au nombre d'OGC. En fait, on pourrait soutenir que dans les petits marchés ou les marchés dont la gestion collective est moins développée, une pluralité d'OGC sur le même marché est contreproductive parce que l'avantage de regrouper les droits de licence d'un répertoire est moins évident pour les utilisateurs quand ce répertoire est très fragmenté. Dans un grand territoire comme les États-Unis – où selon le rapport national, quatre organisations de droits d'exécution se disputent le répertoire (à savoir ASCAP, BMI, Global Music Rights (GMR) et SESAC), – cela est sans doute moins un problème parce que les utilisateurs principaux peuvent plus facilement se permettre les coûts de transaction de quatre transactions de licences et peuvent également rechercher la base de données de chaque organisation en ligne si elles ont seulement besoin de droits pour des travaux spécifiques.

17.2. Question B

> *Y a-t-il dans votre législation nationale des dispositions législatives visant à faciliter la gestion du droit d'auteur et des droits voisins ? Si oui, bien vouloir les résumer.*

Les rapports nationaux présentent très peu d'uniformité dans la manière dont les OGC sont réglementées. L'existence même d'une

14. C'est le nombre d'OGC déjà existant comme extrait du rapport national. Toutes les erreurs sont les miennes, car très peu de rapports nationaux mentionnent effectivement le nombre d'OGC sur leur territoire.

réglementation spécifique des OGC n'est pas non plus uniforme. Ceux qui préconisent une plus grande uniformité réglementaire dans ce domaine se féliciteront probablement des efforts d'harmonisation (jusqu'à un certain point) basés sur la directive de l'Union européenne de 2014.[15]

Prenons simplement quelques exemples pour illustrer le manque d'uniformité. Le rapport argentin décrit la reconnaissance des OGC par décret. En Croatie, les nouvelles OGC doivent être autorisés par l'office national de la propriété intellectuelle; en Espagne, c'est le ministère de la culture qui exerce cette fonction; en Turquie, le ministère de la culture et du tourisme. Certaines lois nationales mentionnent nommément les OGC, parfois pour les établir comme en Italie (SIAE), mais pas toujours en vue d'en établir ou d'en autoriser l'établissement (Par exemple, aux États-Unis, l'article 101 de la loi sur le droit d'auteur contient une liste non exhaustive de PRO). Certains rapports nationaux mentionnent des tribunaux spéciaux (le Canada, la Nouvelle-Zélande, les Pays-Bas, (CvTA) le Royaume-Uni, les États-Unis) pour fixer les tarifs ou régler les différends avec les utilisateurs, et certains se réfèrent à l'article 35 de la directive à cet égard. Certains rapports mentionnent également l'arbitrage (Portugal, Espagne).

Ayant brossé ce portrait un peu déconcertant des régimes réglementaires, on peut néanmoins déduire des rapports que la législation pertinente, lorsqu'elle existe, exerce un certain nombre de fonctions identifiables.[16] Sur la base des rapports nationaux, les principales tâches accomplies par la législation à l'heure actuelle peuvent être résumées comme suit:

— Autoriser la création d'un OGC (l'Argentine, l'Espagne, la Turquie) ou l'autoriser à fonctionner, parfois dans une zone où la

15. Pour un aperçu plus complet, voir Lucie Guibault et Stef van Gompel, "Collective Management in the European Union" dans Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (deuxiéme edition, Alphen aan den Rijn: Kluwer Law International, 2010), 135–167.
16. Là encore, la directive de l'UE peut apporter plus d'uniformité au moins au sein de l'UE.

gestion collective est obligatoire (par exemple en Suisse et aux États-Unis pour l'échange sonore);
— Créer une présomption de transfert de droits à l'OGM (Portugal) ou à l'autorité de la licence (la Croatie, l'Allemagne, la Grèce[17]) ou d'autres mécanismes tels que les licences collectives étendues ou certains de leurs équivalents fonctionnels (la Croatie, la République tchèque, le Danemark, la Hongrie, l'Italie, l'Espagne et la Suède);
— Mettre en place un mécanisme pour régler les différends entre les détenteurs de droits et les utilisateurs; et
— Prévoir des exigences pour les mécanismes de transparence (rapports, etc.)

La deuxième question met l'accent sur le rôle des *licences collectives étendues* (LCE).[18] Ce n'est pas surprenant puisque nous sommes au Danemark. Le rapport britannique était un peu critique sur la LCE. Heureusement, cependant, contrairement à un texte britannique antérieur, il ne mentionnait pas que quelque chose était pourri dans l'État danois. Mais le rapport a toutefois noté ceci:

> Notamment, le développement des licences collectives étendues en Scandinavie au cours du dernier demi-siècle semble être venu du fait que les communautés de titulaires de droits étaient et sont relativement petites et relativement cohérentes, aucun de ces adjectifs ne serait très approprié en tant que qualificatifs de donneurs de licence potentiels au Royaume-Uni.

Cela m'a conduit à me demander si la législation peut compenser ou ouvrir la voie à la mise en place d'OGC plus efficaces, ou ensuite si, ce faisant, elle devrait utiliser la LCE ou un « équivalent fonctionnel »

17. Il semble que la loi allemande sur la gestion du droit d'auteur et des droits voisins ait inspiré d'autres législateurs.
18. Voir Tarja Koskinen-Olsson et Vigdis Sigurdardóttir, "Collective Management in the Nordic Countries" dans Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (Deuxiéme edition, Alphen aan den Rijn: Kluwer Law International, 2010), 243–262.

tel que mentionné dans les rapports croates et espagnols, par exemple.

Le désir du législateur d'accroître la transparence et l'efficacité sont certainement des objectifs normatifs valables. Choisir qui devrait réglementer les OGC est également important. Devrait-il s'agir de la partie du gouvernement responsable de la culture, de la propriété intellectuelle ou d'une structure semblable à un tribunal ? Si un tribunal ou un conseil est nommé, devrait-il être spécialisé ? Nous ne trouvons pas d'uniformité dans les rapports nationaux sur cette question. Cela dit, sur le plan normatif, un certain degré d'indépendance du régulateur semble souhaitable. Tant la transparence réelle que l'apparence de la transparence sont vraisemblablement importants pour les utilisateurs et le public.

Le recours aux tribunaux civils (normaux) pour exercer cette fonction de surveillance est risqué dans un domaine où le droit cède souvent le pas à des analyses économétriques complexes. Pourtant, la création d'un conseil ou d'un tribunal spécialisé a un coût. Comme l'indique le rapport canadien:

> Le processus à la fois administratif et judiciaire de la Commission, qui requiert les avocats, les savantes études et témoins experts reconnus, conjugué à l'absence de ressources suffisantes actuellement constatées à la Commission, font en sorte que le processus demeure lourd et coûteux, plusieurs années pouvant s'écouler avant que la Commission rende une décision.

Il n'y a pas de solution universelle optimale évidente ici. Les marchés de gestion collective plus petits ou moins développés peuvent nécessiter une intervention plus directe, principalement conçue pour limiter les inefficiences, tandis que dans des marchés plus importants ou mieux établis, des processus contradictoires plus solides peuvent mieux fonctionner. En comparant les structures et les mécanismes de régulation, il ne faut pas oublier que les OGC représentent des catégories très différentes de détenteurs de droits. Bien que certains travaillent pour de grandes maisons de disques ou des studios de cinéma, une forte proportion d'OGC travaille pour des auteurs de musique individuels ou des interprètes faisant face à des utilisateurs

géants tels que Apple ou Goggle (y compris YouTube). Maîtriser les OGC pour faire face à ces utilisateurs sophistiqués ne devrait pas être la première cible des régimes réglementaires. Ceci est en effet impliqué dans le libellé de la deuxième question choisie par les organisateurs ciblant des dispositions destinées à *faciliter* la gestion collective.

17.3. Question C

> *Quels modèles de limitations et d'exceptions ont été mis en œuvre dans votre législation nationale ? Tels que l'utilisation gratuite, les licences légales, les licences obligatoires, la gestion collective obligatoire, la gestion collective étendue, d'autres modèles ? Veuillez fournir un aperçu général.*

Il existe deux modèles principaux pour les limitations et exceptions (L et Es). Le premier est le modèle « fermé » (mentionné comme tel dans les rapports de la Croatie, de l'Allemagne et de l'Espagne par exemple), qui fournit une liste exhaustive des L et Es et est ostensiblement conforme à l'approche de la directive InfoSoc (la directive est mentionnée comme base pour la conception des L et Es dans les rapports de la Croatie, du Danemark et du Portugal). juridictions de droit commun utilisent une approche différente. Leur loi contient les dispositions ouvertes d'utilisation équitable ou juste, c'est-à-dire des utilisations autorisées non spécifiques basées sur des tests, parfois contenues dans la législation (Section américaine 107) et parfois dans des décisions de justice.[19] L'utilisation équitable est mentionnée dans les rapports de la Nouvelle-Zélande et du Royaume-Uni; cela s'applique également au Canada et Israël suit une approche similaire.

En lisant cette troisième question, je n'ai toutefois pas nécessairement demandé un inventaire complet de tous les L et Es dans chaque pays; elle visait surtout à savoir si les *L et Es étaient liées dans chaque pays à une forme de gestion collective.* Les exceptions complètes ne nécessitent ni licence ni paiement et sont donc beaucoup moins pertinentes dans ce contexte. Toutefois, lorsque la législation nationale

19. Même lorsqu'un test est contenu dans le droit national, il est normal dans une juridiction de droit commun comme les États-Unis qu'il soit interprété, affiné et même « modifié » dans son application par les tribunaux.

prévoit une licence obligatoire ou un système similaire, elle doit presque toujours confier la tâche de collecte et de distribution des sommes collectées à un OGC. C'est également le cas pour les régimes compensatoires tels que le prêt public et la reproduction privée.

Toutes les licences obligatoires ne mènent pas à la gestion collective. En Argentine, une licence obligatoire est fournie en raison de l'inaction des héritiers et des bénéficiaires (art. 6. De la loi 11.723/3). Comme l'indique le rapport: « Les héritiers ou les successeurs ne peuvent pas s'opposer à ce que des tiers rééditent les œuvres de l'auteur quand ils laissent plus de dix ans sans leur publication. Rien ne peut opposer les héritiers ou les successeurs à des tiers pour traduire les œuvres de l'auteur dix ans après sa mort. Dans ces cas, s'il n'y a pas d'accord entre l'éditeur et les héritiers ou successeurs en ce qui concerne les conditions d'impression ou la rémunération pécuniaire, les deux seront fixés par des arbitres. » Au Canada, un régime pour les titulaires de droits introuvables prévoit des licences individuelles délivrées par la Commission du droit d'auteur. En Croatie, il existe une « licence légale réglementée en faveur de l'employeur d'un auteur d'un programme d'ordinateur où il acquiert tous les droits patrimoniaux s'il n'en est pas convenu autrement. En outre, il existe une licence légale réglementée en faveur d'un producteur de films où le contrat de production audiovisuelle est conclu avec l'auteur de la contribution à l'œuvre audiovisuelle. Il ou elle acquiert tous les droits économiques nécessaires à l'accomplissement de l'objet du contrat. » Pourtant, dans la plupart des cas, les licences obligatoires sont liées à un OGC.

En Belgique, un certain nombre de licences obligatoires sont contenues dans la loi. En effet, comme l'indique ce rapport national, « l'instauration des « licences légales » a constitué l'une des principales innovations de la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins. » Le rapport fournit un examen détaillé de chacun d'entre eux. Une licence obligatoire est parfois utilisée dans le secteur de l'éducation comme en Égypte et en Allemagne par exemple.

Une notion centrale qui distingue les exceptions complètes des limitations avec compensation est celle de la *rémunération équitable*, que nous retrouvons dans plusieurs rapports nationaux: La Belgique,

la République tchèque, le Danemark, la France, l'Allemagne, la Grèce, l'Israël, l'Italie, le Portugal et la Suisse). Un point commun est l'article 12 de la Convention de Rome qui, en ce qui concerne la radiodiffusion ou toute communication au public de phonogrammes commerciaux, permet aux pays de remplacer le droit exclusif par un droit à une « rémunération unique équitable ».

La gestion collective est parfois obligatoire lorsqu'une licence obligatoire est en place. Il existe un certain nombre d'exemples dans les rapports nationaux. Bien que cela soit souvent le cas pour les retransmissions par câble (par exemple, l'Allemagne, art. 20 b de la loi sur le droit d'auteur) ou la reproduction privée (par ex. l'Italie), certains rapports nationaux mentionnent des listes beaucoup plus détaillées de gestion collective obligatoire. Le rapport de la république tchèque indique ce qui suit:

a) Le droit à une rémunération pour:
   1. l'utilisation d'une prestation artistique fixée sur un phonogramme publié à des fins commerciales par la radiodiffusion (radio ou télévision) ou par réémission et retransmission de l'émission (radio ou télévision),
   2. l'utilisation d'une prestation artistique fixée sur un phonogramme publié à des fins commerciales par la radiodiffusion (radio ou télévision) ou par réémission et retransmission de l'émission (radio ou télévision),
   3. la réalisation d'une reproduction pour usage personnel sur la base d'une fixation audio ou audiovisuelle ou de toute autre fixation par le transfert de son contenu au moyen d'un dispositif technique à un support vierge de cette fixation,
   4. la réalisation d'une reproduction pour l'usage personnel d'une personne physique ou pour son propre usage interne au moyen d'un dispositif technique permettant de réaliser des reproductions imprimées sur papier ou tout autre support, également par l'intermédiaire d'un tiers,
   5. la revente de l'original d'une œuvre d'art,

6. le prêt de l'original ou la reproduction d'une œuvre publiée conformément à l'art. 37 para. 2;

b) le droit à une rémunération équitable pour la location de l'original ou d'une reproduction de l'œuvre ou de l'exécution d'un interprète fixée dans une fixation audio ou audiovisuelle;

c) le droit d'utiliser – par retransmission par câble – des œuvres, des prestations en direct et des interprétations ou les exécutions fixées sur phonogramme ou sur une fixation audiovisuelle [...], et

d) le droit à la rémunération annuelle supplémentaire conformément à l'art. 71(4).[20]

Le rapport turc fait remarquer que son projet de révision de la loi sur le droit d'auteur comprend « un système de licences obligatoires en ce qui concerne certaines catégories de droite. » Cela suggère une tendance à l'expansion dans ce pays.

En effet, il y a une tendance vers plus de licences de répertoire et donc une expansion possible de la gestion collective. Le nombre croissant de pays adoptant les LCE ou les équivalents fonctionnels à cet effet, ou une présomption d'autorité d'une OGC à octroyer des licenses (comme l'Allemagne l'a fait pendant des années) signalent le désir au moins de certains législateurs d'encourager les licences et,

20. Cette disposition se lit comme suit: « Le droit de l'artiste interprète ou exécutant est également violé par quiconque a été empêché par le gestionnaire des droits collectifs concerné d'utiliser l'interprétation de la manière décrite au paragraphe (1) pour avoir retardé le paiement de la rémunération d'un tel mode d'utilisation et pour avoir omis de payer la rémunération même dans le délai de trente jours accordé par le gestionnaire des droits collectifs à cette fin. À moins que le gestionnaire des droits collectifs ne limite cette interdiction à une période plus courte, l'interdiction sera en vigueur jusqu'à ce que l'obligation de payer la rémunération soit remplie ou expire de toute autre manière; toutefois, si l'interdiction est violée, la durée de l'interdiction ne sera pas levée sans le consentement du gestionnaire des droits collectifs avant que les réclamations découlant de cette violation ne soient également réglées.» Source: WIPOLex

espérons-le, les sources de revenus pour les auteurs, les artistes interprètes ou exécutants et les autres détenteurs de droits.

Ceci est vérifié de façon empirique. Les revenus des OGC à l'échelle mondiale ont augmenté. Cela n'est pas une surprise: les utilisations en ligne massives les autres utilisations permises mais payantes (pour utiliser l'expression inventée par Jane Ginsburg) semblent conduire « naturellement » à ce type de licence, car la musique, le texte et la vidéo devraient être disponibles sur de multiples plateformes et de préférence sans délai, par crainte que autrement les fournisseurs de piraterie ne fournissent une source alternative. Les efforts visants à limiter le contenu illégal ont été moins que complètement réussis. L'octroi efficace de licences est la meilleure voie à suivre et les OGC, anciens et nouvaux, peuvent jouer un rôle clé dans cet environnement difficile. Le thème choisi pour ce congrès est le droit d'auteur: Être ou ne pas être. Pour les OGC, être est la réponse.

18

Informe general

Daniel J. Gervais[1]

18.1. Pregunta A

> *¿Hay una cultura generalizada de la gestión colectiva de derechos de autor y derechos conexos en su país, o está limitada a las áreas de derechos de ejecución musical y reprografía? Por favor describa las áreas donde se usa la gestión colectiva.*

En sus respuestas a esta primera pregunta sobre gestión colectiva, los informes nacionales ilustran las dificultades de definición que forman parte de cualquier discusión integral de la gestión colectiva. En primer lugar entre todas hay una pregunta simple: ¿Qué es una Organización de Gestión Colectiva (OGC)? Un glosario nos podría decir que una OGC es una entidad que realiza la gestión colectiva. A su vez, este glosario puede definir *gestión colectiva* como licencias realizadas en nombre de una pluralidad de titulares de derechos. Entonces se podría definir la *concesión de licencias* como el [contrato] de concesión de autorización para usar una obra protegida por derechos de autor otorgada por el propietario de los derechos de autor y

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derechos conexos (otorgante) a una persona natural o jurídica (licenciatario) para realizar un determinado acto con respecto a la obra o el objeto de los derechos conexos en cuestión donde lo contrario a tal uso no está permitido por una excepción o limitación aplicable.[2] Todo esto parece implicar que sólo las OGC realizan gestión colectiva. Sin embargo, al menos si se leen los informes nacionales, otros tipos de entidades realizan esta función. Entonces, ¿cómo debe uno proceder para definir las OGC?

Comencemos en territorio conocido. Las OGC por lo general pertenecen a uno de las dos principales «familias» de OGCs, es decir, la Confederación Internacional de Sociedades de Autores y Compositores (CISAC), la asociación más grande y antigua entre las OGC, o a la Federación Internacional de Organizaciones de Derechos de Reproducción (IFRRO), o ambas.[3] Los informes nacionales enumeran organizaciones que, como miembros de la CISAC o IFRRO, probablemente podrían considerarse como OGCs en cualquier nomenclatura. Sin embargo, como ya se ha mencionado, algunos informes nacionales mencionan otros tipos de entidades. El informe de los Estados Unidos menciona por ejemplo a Creative Commons y iCopyright, aunque no las identifica como OGCs *per se*. El informe francés destaca que hay «sociedades de sociedades», tal vez una instancia más moderna del antiguo concepto de one-stop-shop (servicio completo) muy popular en la década de los 90's.

Como se ha señalado, las entidades que no son OGCs, al menos no en el sentido tradicional, a veces realizan funciones que se podrían llamar de gestión colectiva, por lo tanto: ¿importa? Sí, porque varios países regulan las OGCs o «gestión colectiva». Por lo tanto, no ser capaz de responder con precisión a lo que es o no es una OGC incide

2. Derivado de la definición contenida en la *Guía de los derechos de autor y tratados de derechos conexos administrados por la OMPI y Glosario de términos de derechos de autor y derechos conexos* (Ginebra; OMPI, 2003 en el 294).
3. Dado la creciente importancia de los derechos de grabación de sonido administrado colectivamente, tal vez la Federación Internacional de la industria fonográfica (IFPI) debería ser agregada a esta lista. Ver el comentario de Ang Kwee Tiang durante el debate. Lo mismo podría decirse de los derechos de artistas intérpretes o ejecutantes y, digamos, la Federación Internacional de músicos.

directamente en el régimen normativo en términos de su diseño, implementación y aplicación. El informe de Estados Unidos menciona, por ejemplo, agencias de fotos de archivo. Se puede mencionar otras entidades que conceden licencias en nombre de varios autores o titulares de derechos. Por ejemplo, un editor de música concede licencias al uso de obras de varios autores. Sin embargo, un editor no es considerado normalmente una OGC. ¿Por qué?

¿Pueden ayudar las definiciones estatutarias? No demasiado. Hay pocos estatutos nacionales que definan el término «gestión colectiva». Muy pocos informes nacionales mencionan cualquier tipo de inventario oficial. Tal inventario fue puesto a disposición recientemente en Francia por ejemplo (abril de 2017) por la *Commission de contrôle*. Incluía 25 Organizaciones Colectivas de Gestión (*organismes*). La ley canadiense de *derechos de autor* define «sociedad colectiva» como una «sociedad, asociación o corporación que lleva el negocio de la gestión colectiva de derechos de autor [.] en beneficio de quienes, por asignación, concesión de la licencia, nombramiento de él como su agente o de lo contrario, lo autorice para actuar en su nombre en relación a esa gestión colectiva», y opera un sistema de concesión de licencia» y/o «continúa llevando el negocio de recoger y distribuir regalías o impuestos por pagar en conformidad con esta ley». La *ley de derechos de autor* de Estados Unidos define la «sociedad de derechos autorales» como una «asociación, corporación u otra entidad que autoriza la ejecución pública de obras musicales no dramáticas en nombre de los dueños de derechos de autor de dichas obras». Un número de leyes nacionales requiere que una entidad sea aprobada antes de operar como una OGC, que entonces requiere de una decisión administrativa de que la entidad sea en realidad una OGC incluso ausente de una definición legal formal.

La OMPI es más útil en este sentido. Propone una definición:

> «Gestión colectiva de derechos de autor y derechos conexos: Una forma de ejercer derechos de autor y derechos conexos *donde el ejercicio de los derechos es imposible o es altamente viable sobre una base individual.* Los titulares de derechos interesados autorizan a una organización a ejercer sus derechos en su nombre; más particular-

> mente, a conceder licencias, monitorizar usos, recoger la remuneración correspondiente y distribuir y transferir esa remuneración a aquellos a quien se deba. El *concepto tradicional* de este término también implica que colectivos de autores, artistas intérpretes o ejecutantes y los propietarios de los derechos administren los derechos afectados a través de órganos y unidades administrativas establecidas por ellos. En el caso de esta gestión colectiva, generalmente se conceden licencias globales a los usuarios, se establecen aranceles uniformes y reglas de distribución y las deducciones se hacen de la remuneración no sólo para los gastos de administración sino también para fines culturales y sociales. *El término es también frecuentemente utilizado, sin embargo, para cubrir todas las formas comunes de ejercer los derechos donde las licencias están disponibles desde una fuente única (en lugar de ser concedida de manera individual).*»[4]

Esta definición es interesante en cuanto a que hace que la gestión colectiva sea una solución a un problema, (la concesión de licencias individuales deben ser imposibles o altamente impracticables) así que aparentemente sugiere (a) que sea preferible una concesión de licencia individual, donde sea prácticamente posible y (b) que hay un *modelo tradicional* de gestión colectiva pero que este modelo es no exclusivo, conforme con los informes nacionales que cuentan con una visión general sobre el tema.

Si se tuviera que limitar el análisis a la definición de la OMPI o a las contenidas en los estatutos citados anteriormente, muchos tipos de entidades podrían considerarse como OGCs, incluyendo editores de libros y música. Sin embargo, como se ha mencionado, no son considerados. Esto es, creo yo, porque la mejor manera de definir una OGC es operacionalmente o funcionalmente, es decir, se utiliza elementos definitorios de las dos definiciones legales sobre en lugar de sólo una de las definiciones. Las OGCs están, sin duda, en el negocio de licenciatión de un *repertorio* de derechos de autor, ya sea si licencian el repertorio entero o si trabaja dentro de ese repertorio, o ambos. Sin embargo, hay otra parte de la definición, que es que una OGC *no está en el negocio de explotar comercialmente* las obras u objetos

4. Ibid en 274-5. Énfasis añadido.

de derechos conexos. Licencia a los usuarios, incluyendo aquellos que exploten comercialmente las obras. Esto explica porqué las editoriales y las agencias de fotos de archivo, por ejemplo, no se consiederen OGCs, aunque gestionen un repertorio.

Mientras este aspecto negativo de la definición no está presente (al menos no expresamente) en los textos legales citados anteriormente, está reflejado en la definición contenida en la Directiva Europea sobre gestión colectiva de 2014.[5] La Directiva define una OGC como una organización que gestiona «los derechos de autor o los derechos afines a los derechos de autor en nombre de varios titulares de derechos, en beneficio colectivo de esos titulares de derechos, como único o principal objeto». Por lo tanto, una editorial no es una OGC, dado que su propósito principal no es licenciar *per se* sino una comercialización más amplia.

Las dos caras de la moneda (positiva/negativa) no son estructurales; son de naturaleza funcional. ¿Existen también componentes estructurales para la definición? La Directiva de la UE sugiere que existen, al menos en el contexto de la UE. La definición incluida en la Directiva también requiere que un OGC sea (a) propiedad o sea controlado por sus miembros y (b) esté organizada sin fines de lucro. Sin embargo, esta regla no se sigue uniformemente en todo el mundo. Por lo tanto, desde una perspectiva global parece mejor centrarse principalmente en *funciones más que en una estructura* para definir la gestión colectiva.

Estructuralmente, se podría clasificar también a las OGC según características que tienen en común. En su libro de 1993 sobre el tema, David Sinacore-Guinn sugería dividir los OGCs en cinco categorías.[6] Sin duda existe valor analítico en esas categorizaciones.

5. DIRECTIVA 2014/26/UE DEL PARLAMENTO EUROPEO Y DEL CONSEJO de 26 de febrero de 2014 relativa a la gestión colectiva de los derechos de autor y derechos afines y a la concesión de licencias multiterritoriales de derechos sobre obras musicales para su utilización en línea en el mercado interior.
6. En concreto, organizaciones colectivas (ACO), organizaciones de licencias colectivas (CLO), organizaciones de derechos colectivos (CRO), distribución colectiva de organización (CDO) y licencias colectivas sociales (SC). D. Sinacore-Guinn, *Collective Administration of Copyrights and Neighboring Rights* (Gestión colectiva de derechos de autor y derechos conexos) (Boston, London: Little, Brown y

En el caso de los Estados Unidos, la muy diferente supervisión reguladora de los OGCs, justifica claramente hacer tales distinciones. Sin embargo, mientras la gestión colectiva crece globalmente, cada una tendría que clasificarse de acuerdo una serie de criterios que hacen especialmente difícil desarrollar una taxonomía estable. Los principales comparadores que utilicé para categorizar las OGCs en mi libro sobre gestión colectiva[7] son:

— Estructura legal
— Modo de derechos de adquisición
— Modo de establecimiento de precio
— Modo de concesión de licencias
— Modo de distribución

El primer comparador es dependiente en gran medida del régimen jurídico y las prácticas dentro de cada jurisdicción. En contraste, los otros cuatro comparadores, que pueden combinarse en infinidad de formas para diferentes derechos y tipos de usos, son, bastante lineales cuando se trata del modus operandi de las OGCs.[8] No es sorprendente que sean más funcionales que estructurales.

De hecho, la necesidad de enfatizar la función en lugar de la estructura está ampliamente demostrada por la lectura de los informes nacionales. Las OGCs se organizan de diferentes maneras. Algunas OGCs, aunque relativamente pocas, son meros agentes de un grupo de titulares de derechos que voluntariamente encomiendan a una OGC la concesión de licencias de uno o más usos de sus obras. Este es por ejemplo el caso en los Estados Unidos con ASCAP y BMI. Otras OGCs son cesionarios de derechos de autor. De hecho, algunas veces los titulares de derechos a transfieren al menos algunos derechos sobre todas sus obras presentes y futuras a una OGC, lo que ocurre a menudo con OGCs que licencian derechos de música (a los

Company, 1993), en 10-12.

7. Daniel Gervais, *Collective Management of Copyright and Related Rights* (Gestión colectiva de derechos de autor y derechos conexos) (3rd ed., Kluwer, 2012). Véase cáp. 1.
8. Véase ibíd.

que todos los derechos llamados menores, son a menudo transferidos, imposibilitando al autor de licenciar directamente). En la mayoría de los casos, autores y otros titulares de derechos pueden elegir las obras individuales o los objetos que la OCC administre en su nombre. Entonces algunas OGCs licencian trabajo-por-trabajo (p. ej., derecho mecánico), otras ofrecen a los usuarios un conjunto de 'repertorio' de obras; y otra ambos.

Los informes nacionales originan un subconjunto más específico de preguntas, es decir *licenciar gratis* como modelo, como hace Creative Commons, o licenciar con fines de lucro, como hace iCopyright, lo que excluye a estas entidades de una definición como OGC. La respuesta a esta pregunta, si uno adopta un enfoque amplio, es: no necesariamente. Algunas OGC «tradicionales» licencian gratuitamente, ya sea como un «negocio», o por decisión política o porque el regulador las obliga a hacerlo. La Junta de Derechos de Autor de Canadá, por ejemplo, ha discutido abiertamente si un precio justo para ciertos usos de material protegido podría ser cero, y esto no se debía a que el uso estaba claramente cubierto por una excepción.[9] En cuanto a *licenciar con fines de lucro*, la mayoría de las OGCs son descritas en los informes nacionales como sin fines de lucro (o no para lucrarse) pero esto rara vez se menciona como un requisito legal. Como se señaló anteriormente, es un requisito citado en la Directiva Europea de 2014.

En el fondo, la pregunta a responder es: ¿cuándo cruza una entidad el umbral para convertirse en una OGC y por esto es regulada como tal? Como se demuestra en el análisis anterior, este sigue siendo un tema de considerable incertidumbre en cuanto a su definición. La Directiva de la UE es un paso positivo hacia adelante debido a su amplia cobertura geográfica y cultural.

Quizás uno debe preguntar, si identificar las OGC entre una constelación de entidades que licencian colectivamente, es un intento de hacer una distinción sin diferencia ¿Aunque uno debe saber lo que

9. Véase p.ej. Declaración de royalties a ser recogidos por el rendimiento en público o la comunicación al público por telecomunicación, en Canadá, de grabaciones de sonido publicadas que incorporen obras musicales y actuaciones de artistas de esas obras, 6 de julio de 2012, parra. 48, en línea: <http://bit.ly/2rbSV5b>.

es una OGC para regularla, es cierto que en cada país esta no se considera una pregunta, porque las entidades que de alguna manera «se comportan como una OGC» ¿son consideradas como tal? Esto nos lleva a otra pregunta: ¿Qué significa comportarse como una OGC?

Como el Dr. Ficsor señaló en el libro sobre gestión colectiva del cual fue autor para la Organización Mundial de propiedad intelectual (OMPI): mientras el pago de licencias y regalías son obviamente funciones importantes, no son sólo la única preocupación de las OGCs. Su comportamiento es multifacético. Con el tiempo el papel de las OGCs ha evolucionado para supervisar el cumplimiento de los derechos de autor, luchar contra la piratería y realizar diversas funciones sociales y culturales.[10] En mi propio listado de las funciones de las OGCs, por ejemplo, discuto su papel como *agentes económicos y culturales*. Mucha, de hecho quizás la mayoría de las OGCs son un buen reflejo de este propósito doble (empresarial y cultural). Se ven a sí mismos como defensores de los derechos de los autores o titulares de los derechos que representan y a menudo reconocen el valor de la gestión de un derecho, tanto, derechos de autor como un derecho conexo, que puede justificarse como un derecho humano o natural. Tienen una función cultural pero también funcionan como 'empresas' que gestionan grandes sumas de dinero.

La Directiva Europea sobre gestión colectiva apoya este enfoque dualista de conducta. Por un lado, establece que

> [i]nversiones realizadas y mantenidas por las entidades de gestión colectiva de derechos deben gestionarse con arreglo a criterios que obliguen a la entidad a actuar con prudencia, permitiéndole al mismo tiempo decidir sobre la política de inversión más segura y eficiente.[11]

10. M. Ficsor, *Collective Management of Copyright and Related Rights* (Administración colectiva de derechos de autor y derechos conexos (Organización Mundial de la propiedad intelectual, 2002), en 99-106.
11. DIRECTIVA 2014/26/UE DEL PARLAMENTO EUROPEO Y DEL CONSEJO de 26 de febrero de 2014 relativa a la gestión colectiva de los derechos de autor y derechos afines y a la concesión de licencias multiterritoriales de derechos sobre obras musicales para su utilización en línea en el mercado interior

Pero entonces también esto:

> Las organizaciones de gestión colectiva desempeñan y deben seguir desempeñando un papel importante como promotoras de la diversidad de la expresión cultural, tanto al permitir a los repertorios de menor volumen y menos populares el acceso al mercado como mediante la prestación de servicios sociales, culturales y educativos en beneficio de sus titulares y del público.[12]

Las funciones *no-distributivas* que llevan a cabo las OGCs, es decir, los usos de fondos no destinados a pagar (distribuir a) sus miembros u otras partes mencionadas aquí, se pueden agrupar en dos categorías. La primera son *funciones culturales directas*, incluyendo

— Subvenciones, programas de becas y premios y ceremonias relacionadas;
— Clases y talleres para fiestas mencionadas aquí (p. ej., composición musical); y
— Promoción de las obras por partes representadas, incluyendo festivales u otros eventos especiales.

Las OGCs también llevan a cabo *funciones culturales indirectas*, tales como

— Función informativa y educativa (sobre derechos de autor, licencias etc.), incluyendo publicaciones, presencia en los medios sociales, conferencias, etc.,[13] y
— Cabildeo.

También hay un ángulo histórico a tener en cuenta en cualquier discusión sobre la gestión colectiva. Algunos derechos en el paquete de derechos de autor tienen una larga historia de gestión colectiva y algunos países tienen una tradición mucho más larga y bien estab-

12. *Ibid.*, considerando 3. Curiosamente, la palabra «eficiente» o sus variantes aparece nueve veces en el texto de la Directiva y la palabra 'cultural' 21 veces.
13. Este puede incluir campañas de lucha contra la piratería.

lecida que otros. La mayoría de los informes nacionales europeos describen una larga historia y tradición de gestión colectiva que se remonta a Beaumarchais. Francia ha tenido derechos teatrales (SACD) y la gestión colectiva de los derechos musicales desde hace más de dos siglos. Sin embargo, Francia no es el único país con una larga tradición de gestión colectiva. En Italia, la gestión colectiva plantó sus primeras raíces en 1882 y Hungría tuvo sus primeras OGCs en 1907. Tampoco Europa tiene un monopolio sobre la historia de la gestión colectiva. Argentina vio el nacimiento de *Argentores* en 1910 y Japón tuvo su primera organización colectiva en 1934.

Otros informes nacionales indican una conexión mucho más reciente con la gestión colectiva. En el informe egipcio, por ejemplo, vemos que no sólo en Egipto sino en toda la gestión colectiva del mundo árabe es mucho menos frecuente que en la mayoría de las otras regiones. Para responder totalmente a la primera pregunta planteada por los organizadores, se deben considerar por eso todos los aspectos y después combinarlos con la historia y la cultura de cada país o región.

Por último, la primera pregunta pide también a los autores de los informes nacionales que discutan si la gestión colectiva está muy *generalizada* en su país. ¿Qué significa «generalizada» en este contexto? ¿El número de los derechos cubiertos por una o más OGCs hace que la gestión colectiva esté generalizada? ¿O lo es el número de porcentaje de usuarios principales (o total) o usos autorizados por las OGCs? ¿Es el número OGCs? Se puede responder con una relativa certeza de que el último indicador tiene muy poca relevancia. En primer lugar, el número de OGCs varía enormemente, desde 1 (Egipto) a más de 30 (Canadá). En países con una larga tradición y gestión colectiva bien implementada, puede ser relativamente bajo, como en Dinamarca (4),[14] Alemania (10), Suecia (6) o el Reino Unido (10). Turquía tiene 27 OGCs, todas funcionando en el sector de la música. La respuesta a la pregunta de si la gestión colectiva está *generalizada*

14. Este es el número de OGC existentes según lo extraído del informe nacional. Todos los errores son míos porqué muy pocos informes nacionales mencionaron realmente el número de OGC existentes en su territorio.

no está relacionada al número de OGCs. De hecho, se podría argumentar que en mercados más pequeños o los mercados donde la gestión colectiva está menos desarrollada, una pluralidad de OGCs en el mismo mercado es contraproducente, dado que la ventaja de la agrupación de derechos de licenciar un repertorio es menos evidente para los usuarios cuando el repertorio está altamente fragmentado. En un territorio vasto como los Estados Unidos, donde según el informe nacional, cuatro organizaciones de derechos de actuación compiten por el repertorio (estas son, ASCAP, BMI, Global Music Rights (GMR) y SESAC), esto probablemente supone un problema menor puesto que los usuarios principales pueden costear más fácilmente los gastos de transacción de cuatro operaciones de concesión de licencias, mientras que pueden también consultar la base de datos de cada organización en línea si sólo requieren derechos por trabajos específicos.

18.2. Pregunta B

> *¿Existen disposiciones legislativas en su legislación nacional con el objetivo de facilitar la gestión de derechos de autor y los derechos conexos? En caso afirmativo, por favor resumir.*

Los informes nacionales muestran muy poca uniformidad en la manera en que las OGCs son reguladas. Tampoco la existencia de una regulación específica de las propias OGCs es en sí misma uniforme. Quienes favorecen una mayor uniformidad reguladora en este espacio probablemente darán la bienvenida a esfuerzos para armonizar (hasta cierto punto) basándose en la Directiva Europea de 2014.[15]

Veamos sólo algunos ejemplos para ilustrar la falta de uniformidad. El informe argentino describe el reconocimiento de las OGCs por decreto. En Croacia, nuevas OGCs deben ser autorizadas por la Oficina Estatal de Propiedad Intelectual; en España, es el Ministerio

15. Para una visión más completa, ver Lucie Guibault y Stef van Gompel, "Collective Management in the European Union", en Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (segundo edición, Alphen aan den Rijn: Kluwer Law International, 2010), 135–167.

de Cultura el que lleva a cabo esta función; en Turquía el Ministerio de Cultura y Turismo. Algunas legislaciones nacionales mencionan las OGCs por su nombre, a veces para establecerlas como en Italia (SIAE) pero no siempre con el fin de establecer o autorizar el establecimiento (p. ej., en los Estados Unidos, Artículo 101 de la Ley de Derechos de Autor contiene una lista no exhaustiva de organizaciones de derechos de emisión «PRO»). Algunos informes nacionales mencionan juntas especiales o tribunales (Canadá, Nueva Zelanda, los Países Bajos (CvTA), Reino Unido, Estados Unidos) para establecer las tarifas o resolver diferencias con los usuarios, y algunas se refieren al artículo 35 de la Directiva en este sentido. Algunos informes también mencionan arbitraje (Portugal, España).

Habiendo pintado este retrato de regímenes regulatorios algo desconcertante, se puede sin embargo deducir de los informes que la legislación pertinente, donde existe, realiza una serie de funciones identificables.[16] Basándose en los informes nacionales, las tareas principales que se logran por la legislación en la actualidad se pueden resumir del modo siguiente:

1. Autorizar la creación de una OGC (Argentina, España, Turquía) o autorizarla a operar, a veces en cierta área donde es obligatoria la gestión colectiva (p. ej., Suiza y los Estados Unidos para SoundExchange);
2. Crear una presunción de cesión de derechos a la OGC (Portugal) o la autoridad que licencia (Croacia, Alemania, Grecia[17]) u otro mecanismo como la concesión de licencias colectivas extendidas o algún equivalente funcional de la misma (Croacia, República Checa, Dinamarca, Hungría, Italia, España y Suecia);
3. Proporciona un mecanismo para establecer disputas entre titulares de derechos y usuarios; y

16. Aquí otra vez la Directiva de la UE pueden aportar una mayor uniformidad al menos dentro de la UE.
17. Parece ser que la ley alemana de gestión de derechos de autor y derechos conexos ha inspirado a otros legisladores.

4. Proporciona requisitos para mecanismos de transparencia (presentación de informes, etc.)

La segunda pregunta destacó el papel de la *concesión de licencias colectivas extendidas* (ECL).[18] Esto no es sorprendente ya que estamos en Dinamarca. El informe británico fue un poco crítico con la ECL. Afortunadamente no mencionó, a diferencia de un texto británico anterior, que algo olía mal en el estado de Dinamarca. Pero el informe indicó lo siguiente:

> En particular, el desarrollo en Escandinavia de la concesión de licencias colectivas *extendidas* durante el último medio siglo parece haber dependido de que las comunidades de propietarios de derechos eran y son relativamente pequeñas y están relativamente cohesionadas, adjetivos que en ningún caso serían muy convenientes como calificadores de los potenciales licenciantes en el Reino Unido.

Esto me llevó a reflexionar sobre si la legislación puede compensar de alguna manera o liderar el camino al establecimiento de unas OGC más eficiente, y al hacerlo debería utilizar la ECL o un «equivalente funcional de esta» tal y como se menciona, entre otros, en los informes croatas y españoles.

Un deseo del legislador de aumentar la transparencia y la eficiencia son sin duda objetivos normativos válidos. Escoger quién debe regular las OGCs, es también de suma importancia. ¿Debe ser la parte del gobierno responsable de la cultura, la propiedad intelectual o una estructura tipo tribunal? Si se designa un tribunal o una junta, ¿debe ser especializada? No encontramos ninguna uniformidad en los informes nacionales sobre esta cuestión. Habiendo dicho esto, parece deseable un cierto grado de independencia por parte del regulador como cuestión normativa. Tanto la transparencia real como la

18. Véase Tarja Koskinen-Olsson y Vigdis Sigurdardóttir, "Collective Management in the Nordic Countries", en Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (segundo edición, Alphen aan den Rijn: Kluwer Law International, 2010), 243–262.

apariencia de transparencia es probablemente importante tanto para los usuarios como para el público.

El uso de tribunales civiles (normales) para llevar a cabo esta función supervisoria es arriesgado en un área donde la ley conlleva a menudo a complejos análisis econométricos. Sin embargo crear un consejo o un tribunal especializado tiene un precio. Como señala el informe canadiense:

> Le processus à la fois administratif et judiciaire de la Commission, qui requiert avocats, savantes études et témoins experts reconnus, conjugué à l'absence de ressources suffisantes actuellement constatée à la Commission, font en sorte que le processus demeure lourd et coûteux, plusieurs années pouvant s'écouler avant que la Commission rende une décision.

Aquí no hay ninguna solución obvia óptima universal. Los mercados de gestión colectiva más pequeños o menos desarrollados pueden requerir más intervención directa diseñada principalmente para limitar ineficiencias mientras que en mercados más amplios o más establecidos pueden funcionar mejor procesos adversariales más robustos. Al comparar los mecanismos y estructuras reguladoras, no se debe olvidar que las OGCs representan categorías muy diferentes de titulares de derechos. Aunque algunas trabajan para importantes discográficas o estudios de cine, una alta proporción de las OGCs funciona para autores de música individual o intérpretes frente a usuarios gigantes como Apple o Google (incluido YouTube). Entrenar a las OGC para hacer frente a usuarios sofisticados como estos, no debe ser el primer objetivo de los régimenes normativos. Esto está de hecho implícito en la formulación de la segunda pregunta elegida por los organizadores que se centran en disposiciones destinadas a *facilitar* la gestión colectiva.

18.3. Pregunta C

> *¿Qué modelos han sido implementados para las limitaciones y excepciones en su legislación nacional? ¿Como el uso gratuito, licencias legales, licencias obligatorias, gestión colectiva obligatoria, gestión colectiva*

extendida, otros modelos? Por favor, proporcione una descripción general.

Existen dos modelos principales para limitaciones y excepciones (L&Es). El primero es el modelo «cerrado» (al que se refiere como tal en los informes de Croacia, Alemania y España, por ejemplo), que proporciona una lista exhaustiva de L&Es y está claramente a favor de mantener el enfoque de la Directiva InfoSoc (la Directiva se menciona como base para el diseño de L&Es en los informes de Croacia, Dinamarca y Portugal). Las jurisdicciones del derecho común utilizan un enfoque diferente. Su ley contiene disposiciones de trato justo o uso justo, lo que significa, usos no específicos basados en pruebas, algunas veces son incluido en la propia legislación (EEUU sección 107) y algunas veces en decisiones tribunales.[19] El trato justo se menciona en los informes de Nueva Zelanda y el Reino Unido; también es aplicable en Canadá e Israel siguiendo un enfoque similar.

Al leer esta tercera pregunta, sin embargo, no necesariamente pide un inventario de todas las L&Es en cada país; más bien va dirigida a si las *L&Es en cada país estaban vinculadas a alguna forma de gestión colectiva*. Excepciones completas no requieren ni licencia ni pago y son por lo tanto mucho menos relevantes en este contexto. No obstante, allí donde la ley nacional estipula una licencia obligatoria o sistema similar, casi por necesidad debe confiar la tarea de recoger y distribuir el dinero recogido a una OGC. Es el caso de regímenes compensatorios como el préstamo público y la copia privada.

Sin embargo no toda la conceción de licencias obligatorias conduce a la gestión colectiva. En Argentina, se proporciona una licencia obligatoria debido a la inacción de los herederos y los beneficiarios (art. 6. de la Ley 11.723/3). Como señala el informe: «Los herederos o sucesores no podrán oponerse a que terceros vuelvan a publicar las obras del autor cuando hayan pasado más de diez años sin ser publicadas. Los herederos o sucesores tampoco pueden opo-

19. Incluso cuando una prueba está incluida en la legislación nacional es normal en la jurisdicción del derecho común como en los Estados Unidos que pueda ser interpretada, refinada y probablemente incluso «modificada» en su aplicación por los tribunales.

nerse a que terceras personas traduzcan las obras del autor después de diez años de su muerte. En estos casos, si no hay acuerdo entre el editor y los herederos o sucesores respecto de las condiciones de impresión o la retribución pecuniaria, ambas serán determinadas por mediadores». En Canadá, un régimen para los titulares de derechos ilocalizables prevé licencias individuales expedidas por la Junta de Derechos de Autor. En Croacia, hay una «licencia legal regulada a favor del empleador de un creador de un programa de ordenador, donde él o ella adquieren todos los derechos patrimoniales si no se acuerda otra cosa. También, hay una licencia legal a favor de los productores de cine, donde el contrato sobre la producción audiovisual incluye al autor de la contribución para la obra audiovisual. Él o ella adquiere todos los derechos económicos necesarios por el cumplimiento de la finalidad del contrato». Sin embargo en la mayoría de los casos las licencias obligatorias están vinculadas a una OGC.

En Bélgica, una serie de licencias obligatorias están incluidas en la ley. De hecho, como el informe nacional indica, «l'instauration de 'licences légales' a constitué l'une des principales innovations de la loi du 30 juin 1994 relative au droit d'auteur et les droits voisins.» El informe proporciona una revisión detallada de cada una. A veces se utiliza una licencia obligatoria en el sector educativo como sucede en Egipto y Alemania, por ejemplo.

Una noción central que distingue excepciones completas de limitaciones con compensación, es una *remuneración equitativa*, la cual encontramos en varios informes nacionales: Bélgica, República Checa, Dinamarca, Francia, Alemania, Grecia, Israel, Italia, Portugal y Suiza. Un elemento común es el artículo 12 de la Convención de Roma, que en relación con la radiodifusión o comunicación al público de fonogramas comerciales, permite a los países reemplazar el derecho exclusivo con un derecho a una «remuneración equitativa única».

Algunas veces, la gestión colectiva es obligatoria cuando se ha implementado una licencia obligatoria. Existen una serie de ejemplos en los informes nacionales. Mientras que a menudo este es el caso de las retransmisiones por cable (por ejemplo, Alemania, Art. 20b de la Ley de Derechos de Autor) o copiado privado (p.ej. Italia), algunos

informes nacionales mencionan listas más extensas de gestión colectiva obligatoria. El informe de la República Checa señala lo siguiente:

a) El derecho a remuneración por:
    1. el uso de una representación artística, fijada en un fonograma publicado con fines comerciales mediante la difusión (radio o televisión) o redifusión y retransmisión de la difusión (radio o televisión),
    2. el uso de una representación artística, fijada en un fonograma publicado con fines comerciales mediante la difusión (radio o televisión) o redifusión y retransmisión de la difusión (radio o televisión),
    3. la elaboración de una reproducción para uso personal a partir de un audio o fijación audiovisual o cualquier otra fijación a través de la transferencia de su contenido por medio de un dispositivo técnico a un medio portador en blanco de dicha fijación,
    4. la elaboración de una reproducción para uso personal de una persona natural o para el propio uso interno de una persona jurídica o comerciante individual, por medio de un dispositivo técnico para la fabricación de reproducciones impresas en papel o en cualquier otro material portador, también a través de un tercero,
    5. reventa del original de una obra de arte,
    6. el préstamo del original y la reproducción de un trabajo publicado de acuerdo con el art. 37 párr. 2;

b) el derecho a una remuneración equitativa por el alquiler del original o una copia de la obra, o de una interpretación del interprete fijada audiovisualmente o en audio;

c) el derecho a la utilización, por retransmisión por cable, de obras, representaciones en directo y actuaciones fijadas en fonogramas o en una fijación audiovisual [...], y

d) el derecho a la remuneración anual adicional en virtud del art. 71(4).[20]

El informe turco destaca que su proyecto de revisión de la Ley de Derechos de Autor incluye «sistema de licencias obligatorias en términos de ciertas categorías de derechos». Esto sugiere una tendencia hacia la expansión en ese país.

De hecho, hay una tendencia hacia más licencias de repertorio, y así una posible ampliación de la gestión colectiva. El creciente número de países que adoptan las ECL, o equivalentes funcionales, o una presunción de autoridad de una OGC para concesión de licencias (como Alemania ha tenido desde hace años) señala un deseo de por lo menos algunos legisladores a animar a licenciar y, esperamos, fuentes de ingresos a autores, artistas intérpretes o ejecutantes y otros titulares de derechos.

Esto se verifica empíricamente. Los ingresos de las OGC a escala mundial han ido aumentando. Esto no es una sorpresa: los usos en masa de campañas en línea y otros usos permitidos pero de pago (para usar la expresión acuñada por Jane Ginsburg) parecen llevar «naturalmente» a esta manera de licenciar ya que música, texto y vídeo deben estar disponibles en múltiples plataformas y preferiblemente sin demora, no vaya a ser que proveedores piratas proporcionen una fuente alternativa. Los esfuerzos para reducir contenidos ilegales han sido menos que completamente exitoso. La conce-

20. Esta disposición dice lo siguiente: «El derecho del intérprete puede ser también infringido por cualquiera que haya sido prohibido por el administrador de derechos colectivos pertinentes a un uso adicional de la actuación de la manera mencionada en el apartado (1) por estar en retraso con el pago de la remuneración para tal forma de uso y por no haber pagado la remuneración incluso en el período de gracia de treinta días previsto por el administrador de los derechos colectivos para ese propósito. A menos que el administrador de los derechos colectivos limite esta prohibición a un período más corto, la prohibición estará en vigor hasta el momento en que la responsabilidad de pagar la remuneración se cumpla o expire en cualquier otra forma; sin embargo, si se infringiera la prohibición, la duración de la prohibición no debería ser terminada sin el consentimiento del administrador de los derechos colectivos antes de que las reclamaciones derivadas de tal infracción fuera también resuelta». Fuente: WIPOLex.

sión eficiente de licencias es el mejor camino a seguir y las OGCs, antiguas y nuevas, pueden jugar un papel clave en ese entorno desafiante. El tema elegido para este congreso es los Derechos de Autor: Ser o no Ser. Para las OGCs, Ser es la respuesta.

19

Gestion colectiva obligatoria

Fernando Zapata López[1]

19.1. Introducción

Gran parte de mi ejercicio profesional en el derecho de autor ha transcurrido en estrecha relación con la gestión colectiva, no solo en Colombia sino también en América Latina, contribuyendo, incluso, a su regulación legal en algunos países, siempre del lado de la inspección y vigilancia que se ejerce desde el gobierno a las sociedades de derecho de autor y de derechos conexos, por lo que, igualmente, puedo dar fe de cómo se está viendo la gestión colectiva desde la perspectiva gubernamental.

El relator de nuestro grupo, Daniel Gervais, ha hecho una excelente presentación de los Informes Nacionales, provenientes de 23 países, mayoritariamente de Europa y otros países desarrollados, con una ausencia muy marcada de África y de América Latina, por lo que la respuesta a la pregunta de *¿Si efectivamente existe una cultura de la gestión colectiva?*, no logra comprender la situación de los países en desarrollo en general.

1. Abogado. Profesor de derecho de autor en la Facultad de Derecho de la Universidad Nacional de Colombia, y en Derecho de las Telecomunicaciones de la Universidad Externado de Colombia.

La gestión colectiva, cuya vigencia ha permitido que los autores defiendan el derecho de autor sobre sus obras, no solo en sus territorios sino más allá de ellos a través de los contratos de representación reciproca que firman entre las sociedades de gestión colectiva, es el instrumento más idóneo para la defensa del derecho de autor. Desde la CISAC, se procura que sus Reglas Profesionales sean asumidas y adoptadas por el conjunto de las sociedades miembros de dicha organización (230 sociedades de autores en 120 países); tales principios, en consecuencia, son adoptados y llevadas a la práctica tanto por sociedades de gestión colectiva de países desarrollados como de aquellos que no lo son, pues no son prácticas que se impulsen en función del nivel de desarrollo del país en donde la sociedad se ubique.

Las practicas societarias, independientemente del grado de desarrollo del país en donde estas se encuentren, es un aspecto muy importante por cuanto ayudan a homogenizar sus comportamientos y a facilitar la aplicación del trato nacional. Ello contribuye, a que la mirada desde el sector privado, vale decir de los usuarios o clientes de las obras sea igualmente uniforme tanto en los países desarrollados como en los que no lo son, pues se comportan igual estén en Europa, Asia o América latina, mucho más hoy con el desarrollo de los medios de explotación y disfrute de las obras a través de la tecnología digital.

En donde si hay una marcada diferencia entre un grupo y otro de países, en particular en la manera como se trata y se regula la gestión colectiva, es en los ámbitos gubernamentales.

La mirada desde los gobiernos es muy diferente, y dista mucho, por ejemplo, de ser igual entre los países en desarrollo y los países desarrollados, por eso hablar de una cultura de gestión colectiva en términos de universalidad es sumamente difícil.

No sucede lo mismo en ambos grupos de países cuando se trata de conjurar crisis, por ejemplo, en el sector bancario o financiero en donde los remedios y soluciones han sido prácticamente los mismos en aras de garantizarle al ciudadano la seguridad de sus ahorros, y el Estado actúa en un país desarrollado o no, en aras de ponerles medios y brindarle recursos, lo que permite reestablecer la confianza en el ahorro público.

¿Por qué traigo esto a colación? Pues, porque aun cuando los Informes Nacionales no lo mencionan de manera exprofesa, como ya lo ha mencionado el relator, la conclusión que se puede sacar de tales informes respecto de sí lo que se está regulando en la gestión colectiva es la función o la estructura, es la de que mayoritariamente las legislaciones nacionales han puesto el énfasis en el control a los gestores y no en el apoyo a la gestión misma, vale decir, que la mirada desde lo público, tanto en países desarrollados como en los que no, la han dirigido al comportamiento de los gestores de las sociedades de gestión colectiva y no a la gestión misma, dejando de lado el examen, la reflexión y la discusión sobre la necesidad de regular la gestión colectiva como un *propósito nacional* que ayude a la preservación de la identidad cultural de los países, y a dotarla de mayores y mejores instrumentos para que pueda cumplir adecuadamente su papel en el entorno digital de hoy.

19.2. La OMPI y los Tratados de 1996

En la madrugada del 20 de diciembre del año 1996, conforme nos lo recordaba Mihaly Ficsor el día de ayer, se dejaron una serie de constancias en los últimos momentos de la Conferencia Diplomática que adoptó los Tratados de la OMPI sobre Derecho de Autor (WCT) y sobre Interpretación o Ejecución y Fonogramas (WPPT), como parte de las consideraciones finales que hicieron las delegaciones allí presentes. De ellas, vale poner de relieve dos cuestiones que sin duda alguna debieron marcar el camino a seguir en las discusiones futuras en el marco de la organización mundial, una era el tema de los contratos en materia de derecho de autor y la otra el de la gestión colectiva; recuerdo que el de la gestión colectiva se reivindicaba como el asunto más importante a plantear para darle garantía y seguridad al ejercicio de los derechos que recién se creaban o se interpretaban en esos tratados internacionales.

Al cabo de 20 años de vigencia de estos tratados, bautizados por los medios de comunicación desde el inicio como los «Tratados Internet», hay que señalar que la OMPI tiene allí un hándicap, pues acusa un vacío total en la discusión y examen de la capacidad contractual de los autores y de los artistas intérpretes como condición y aptitud

para garantizar el control sobre sus obras y sus interpretaciones -salvaguardia del goce y ejercicio de sus derechos- y de la gestión colectiva como mecanismo para un pleno ejercicio de sus derechos. Pero este señalamiento no acusa directamente a la OMPI como Secretaria, sino a los países miembros de la OMPI que integran el Comité Permanente de Derecho de Autor y Derechos Conexos -el SCCR, en donde ha habido una insistencia en abordar y discutir cuestiones como las limitaciones y excepciones al derecho de autor cuando no planteamientos encaminados a disminuir el derecho de los autores, de los artistas intérpretes y de los productores de bienes culturales, en tanto que ningún interés ni insistencia alguna ha habido en discutir el tema de los contratos o de la gestión colectiva; por ello mi reflexión respecto de los Informes Nacionales como del entorno actual, en el sentido de que el foco de la legislación actual, con algunas excepciones, está centrado en las actividades y responsabilidades del gestor de la gestión colectiva y no en facilitar la gestión del derecho de autor y los derechos conexos.

19.3. La gestión colectiva y su administración

Por consiguiente, distinguir o diferenciar entre la administración de la gestión y la importancia de la gestión colectiva es imprescindible, pero pareciera que tal distinción es clara en los cuestionarios y, en especial, en la manera como se formularon las preguntas, mas no en las respuestas que se recibieron, y ello porque las legislaciones nacionales no abundan en favor de la gestión colectiva en los términos en que se plantearon las preguntas, con la satisfactoria excepción de la ley de Hungría sobre gestión colectiva del derecho de autor y los derechos conexos de 2016.

Permítanme señalar, que la revisión de la legislación de los países de donde provinieron los Informes Nacionales, así como de otras tantas legislaciones examinadas, nos procuró algunas legislaciones en donde se dispone que la regulación de la competencia no cubre la actividad de las sociedades de gestión colectiva de derecho de autor, lo cual, sin duda, es un aspecto importante ya que las excluye de la jurisdicción de las autoridades de la competencia, que como bien es sabido generan una intervención signada desde lo económico pero

sin el contraste de la vigencia de la ley de gestión colectiva, vale decir, que las decisiones son tomadas únicamente con el supuesto de salvaguardar un mercado, pero sin detenerse en aspectos bastantes sensibles, como examinar cuanto aporta la gestión colectiva a la identidad cultural de un país y a la salvaguardia de las expresiones culturales de la uniformidad cultural que se pretende imponer hoy en día por parte de los múltiples y variados intermediarios culturales.

19.4. La Unión Europea y la gestión colectiva

La Directiva 26 de 2014 de la Unión Europea relativa a la gestión colectiva de los derechos de autor y derechos afines y a la concesión de licencias multiterritoriales, fundada en preocupaciones reales o no, regulo la gestión colectiva tomando, como *leitmotiv* la necesidad de garantizar un mercado interior.

Dicha directiva, con su decidida intención de impedir que la competencia no esté falseada y de introducir en la gestión colectiva criterios de trato igual, no discriminación y transparencia, remarca un aspecto propio de la autonomía de la libertad de quien es titular de un derecho privado como es la capacidad del titular del derecho de autor o de los derechos conexos de elegir entre la gestión individual y la gestión colectiva de sus derechos; aspecto o cuestión que a mi humilde juicio no sería necesario insistir, y menos en una norma de esta naturaleza, por cuanto tal posibilidad es de suyo tratándose de derechos privados con alcance constitucional que reservan para sus titulares la capacidad de excluir a terceros que no han adquirido previa y expresamente la autorización para realizar un acto de uso o explotación de las obras o prestaciones concernidas. Luego es propio de este tipo de derechos su ejercicio individual, y de hecho se da por conveniencia para cierto tipo de obras o de derechos, pero igualmente es bien sabido, que cuando se trata de obras cuya utilización tiene una amplia base de usuarios y un largo espectro de utilizaciones -gracias al desarrollo de la tecnología digital-, lo mejor y más conveniente para los autores de dichas obras es el ejercicio colectivo que los libera del ejercicio cotidiano de labores de control, actividad distante del ejercicio diario del autor que es crear.

Propicio es señalar, y un poco al margen del propósito de esta presentación, que muchos autores y artistas quisieran hoy realizar actos de gestión individual pretendiendo con ellos controlar el uso de las obras en el torrente de plataformas que ofrece Internet para distribuir, transportar y promover contenidos, seguramente movidos por quienes, conscientemente o inconscientemente, impulsan la idea de que la gestión individual de obras y producciones se puede hacer con más índices de eficiencia que la gestión colectiva, que está respaldada por una extensa red de sociedades establecidas en los diferentes países de mundo y que asociadas en la CISAC se comportan como un sistema para producir un positivo impacto en el control de las obras y producciones artísticas a nivel universal.

Como corolario de estos apartados referidos a la gestión individual, puede decirse que, con las facilidades brindadas por la Directiva del 2014 para que un titular de derechos pueda retirar fácilmente de la entidad de gestión colectiva de la que es miembro derechos, categorías de derechos o tipos de obras y otras prestaciones, se le infiere un fuerte golpe a la gestión colectiva, poniéndola en aprietos para el cumplimiento de otros cometidos, igualmente considerados en la Directiva 26 de 2014, como son los referidos a la promoción de la diversidad cultural y a la prestación de servicios sociales; pues esos titulares que se pretendan retirar muy seguramente lo serán los grandes editores que representan grandes volúmenes de contenido – en virtud de contratos en virtud de los cuales tienen de los autores e intérpretes la mayoría cuando no la totalidad de los derechos -, desplazando a creadores y artistas del control del sus obras y prestaciones y representando, obviamente, importantes cantidades de ingreso de recursos para las entidades de gestión colectiva.

De otra parte, y en relación con las obligaciones del gestor colectivo, la Directiva insiste en una igualdad de trato para todos los titulares de derechos; en un reparto equitativo; en una necesidad de informar a los usuarios sobre tarifas y repertorios; en rendición periódica de cuentas; en representación equitativa en los órganos de gobierno de los titulares de derechos; en la resolución de litigios, todas ellas preocupaciones externadas desde siempre, con razón o sin ella, por los usuarios de las obras.

También es cierto, que los usuarios de las obras apoyados por los gobiernos, han insistido siempre en que las entidades de gestión colectiva no tracen una línea distinta a las responsabilidades que ya tienen definidas otro tipo de organizaciones que igual actúan en el mercado, puesto que sí otras organizaciones civiles o comerciales tienen la obligación legal o estatutaria de tener adecuadamente informados a sus clientes o usuarios, o de entregar debida y oportunamente cuentas a sus propietarios o al gobierno mismo, porqué las entidades de gestión colectiva no tendría la obligación de hacer lo mismo.

La directiva del 2014 es evidencia del interés de llevar a una norma de mayor jerarquía política las regulaciones del funcionamiento de las entidades de gestión colectiva, en particular a lo que respecta a la transparencia, la obligación de rendir cuentas y gobernanza en general, tanto más, que como bien lo considera la misma Directiva, en algunos países estaba largamente cubierta la actividad de este tipo de organizaciones mientras que en otros no se referencia nada en la ley o la regulación es mínima.

19.5. La jurisprudencia de las altas cortes

Lo cierto del caso, es que parece existir desde la acción legislativa una tendencia a la regulación de la actividad del gestor colectivo, y no un esperado y necesitado fortalecimiento de la gestión colectiva que facilite la gestión de obras y producciones artísticas en un entorno digital con usuarios cada vez más hiperconectados que aprecian el bajo precio o la gratuidad.

En la jurisprudencia de las altas cortes tampoco parece existir hoy el talante que tanto benefició a las entidades de gestión colectiva casi que desde su formación, tal es el caso de recientes sentencias -de países geográficamente en extremos- que han introducido rupturas en la gestión colectiva obligatoria, como Turquía en donde la ley requería la gestión colectiva obligatoria, pero una decisión de la Corte Constitucional del año 2010 revoco esa norma bajo el argumento de que estaba en contra del derecho de la competencia, hoy además de la gestión colectiva la gestión individual también es posible. En tanto que, en Colombia, la Corte Constitucional ha dictado desde 2004

cuatro sentencias fundadas, algunas de ellas, en la libertad de expresión que declaran que cuando la sociedad de gestión colectiva tiene un monopolio, de hecho o de derecho, lo que esta es limitando al gestor individual para ejercer sus derechos, por lo cual sentencia que en Colombia es válida la gestión individual tanto como la colectiva u a través de otras formas de asociación distintas a la gestión colectiva. Con los mismos argumentos de la libertad de expresión, la Corte Constitucional en el año 2005 sentencia que los artistas intérpretes o ejecutantes no están obligados a asociarse a una sociedad de gestión colectiva para hacer efectivo el derecho de remuneración como lo preveía la Ley 23 de 1982, sobre derecho de autor, con lo cual igualmente se le irroga a la gestión colectiva obligatoria un contundente golpe.

La consecuencia de estas sentencias en Colombia en el ejercicio de la gestión colectiva, además del nuevo entendido de que no puede haber gestión colectiva obligatoria, ha sido el de que la Superintendencia de Industria y Comercio, quien funge como autoridad de la competencia, decidió -con fundamento en la gestión individual del derecho- en fallo de marzo de 2017 confirmar una sanción contra la Sociedad de Autores y Compositores, SAYCO y contra su representante legal de entonces, por haber negado a los editores -miembros de la sociedad y de su consejo de administración- el retiro parcial de derechos de comunicación pública que han pretendido a los efectos de gestionar por fuera de la entidad de gestión colectiva los derechos de comunicación pública en televisión abierta y cerrada y de puesta a disposición e Internet dejando a SAYCO la gestión de los derechos de comunicación pública en vivo y en establecimientos abiertos al público. Ello, a pesar de que, si bien es cierto, los autores pactan con lo editores la cesión de todos los derechos a favor de estos últimos, también es cierto que igualmente convienen que el derecho de comunicación pública en todas sus formas sea recaudado por la sociedad a la cual pertenece el autor. Esta negativa de SAYCO a permitir el fraccionamiento de los derechos de comunicación pública, ha originado esta sanción pecuniaria y la orden para que en un término perentorio SAYCO proceda unilateralmente a modificar los contratos de mandato que ha recibido de los autores. Esta decisión, por supuesto, se encuentra apelada ante la jurisdicción contenciosa

administrativa, confiando en que desde esta instancia judicial se escriba una pagina menos invasiva y dolorosa contra la gestión colectiva en Colombia.

El Informe Nacional de España, nos da cuenta de un caso en relación con la Sociedad General de Autores y Editores, SGAE en donde el Tribunal Supremo en un caso seguido contra un Ayuntamiento municipal dictamino en el año 2014 «...que la acción ejercitada por la SGAE debía prosperar respecto de todas las obras que fueron objeto de comunicación en los espectáculos descritos en el primer fundamento jurídico, salvo aquellas obras que por haber sido interpretadas por los respectivos titulares exclusivos de los derechos afectados debe presumirse la autorización». La cuestión es que esos autores habían confiado el derecho de comunicación al público a la Sociedad General de Autores y Editores, luego con un fallo de esta naturaleza, sin duda alguna, se perturba la solidez de la gestión colectiva.

19.6. La respuesta de las entidades de gestión colectiva en Iberoamérica

En América Latina existe actualmente una plataforma que integra 16 entidades de gestión colectiva de Iberoamérica que se han organizado como una «ventanilla única» bajo el nombre de LATINAUTOR,[2] allí han acordado unir sus repertorios y han conformado una base de datos de 36 millones de registros, que ha facilitado un punto de encuentro entre los proveedores de servicios digitales y los titulares de derecho de autor en Iberoamérica, desde donde se están nego-

2. LATINAUTOR , la Organización Iberoamericana de Derecho de Autor, es un proyecto regional de cooperación entre sociedades de gestión colectiva de obras musicales y dramático musicales iberoamericanas, que comprende la gran mayoría de las sociedades latinoamericanas, además de las de España (SGAE) y Portugal (SPA). LATINAUTOR es una Agencia Regional que procura integrar todo el riquísimo repertorio musical de Iberoamérica, con miras a asegurar su cabal identificación y reforzar su protección. Entre sus objetivos fundamentales está la promoción de un sistema común para la protección del derecho de autor en América Latina, para de este modo fortalecer la gestión colectiva en el continente. <http://www.gestioncultural.org/ong_cooperacion_internacional.php?id_institucion_empresa=1753>.

ciando con las grandes plataformas como Spotify, sin perjuicio de que las sociedades que conforman la plataforma preserven su capacidad para negocias con los usuarios nacionales.

19.7. Corolario

Cerrando esta intervención, bien podríamos señalar que existen enormes diferencias entre Europa y América latina en la forma como se regula y se perciben las entidades de gestión colectiva; pues de Europa podríamos decir que no obstante haberse regulado la gestión colectiva de la manera que se hizo en virtud de la Directiva 26 de 2014 de la Unión Europea, allí aun subsiste la gestión colectiva obligatoria en algunos países para unos usos específicos, y en otros para la copia privada y para la reprografía, mientras que en América latina la conjunción de la reafirmación de la gestión individual como posibilidad cierta y posible del ejercicio de los derechos, con el no reconocimiento de los derechos de remuneración como irrenunciables y con el abatimiento de la gestión colectiva obligatoria, acompañada de una sistemática campaña en contra de todo el sistema de gestión colectiva, molestan esta institución, la que con sus debilidades e imperfecciones, debería ser considerada en cada uno de nuestros países como un *propósito nacional*, que cada país debería empeñarse en alcanzar, todo lo cual nos lleva a afirmar que al menos en nuestra región no existe una cultura de la gestión colectiva.

De todo lo señalado, quizá lo mas dañino para la gestión colectiva no es el ejercicio individual de un derecho privado -posibilidad propia de este tipo de derechos-, sino el doble ejercicio por parte de un titular de derechos miembro de una entidad de gestión colectiva de un derecho de manera individual y colectiva, introduciendo incertidumbre en el trabajo de este tipo de entidades, y haciendo trizas principios tutelares de la asociación en general como el de la imposibilidad de disponer por parte de los titulares de los derechos aportados a una sociedad. O, el ejercicio es individual o es colectivo, sin lugar a que la distinción de mercados por parte del titular determine qué derecho o que obra se queda en la entidad de gestión colectiva y cuales no, tanto más que los operadores judiciales no resuelven el fenómeno que se origina después.

Dado que ya tenemos el análisis, que tenemos el diagnóstico, que sabemos lo que esta pasando, debemos coadyuvar en el fortalecimiento de la gestión colectiva, prodigándola de beneficios e insistiendo en el imaginario de todos que le debemos su respeto, su apoyo y nuestra contribución para que ella sea cada vez mejor.

20

Mandatory Collective Management

Fernando Zapata López[1]

20.1. Introduction

Much of my professional practice in copyright has been closely related with collective management, not only in Colombia but also in Latin America. I have even contributed to its legal regulation in some countries, always on the side of the inspection and surveillance that is exercised by the government on copyright and related rights societies. Therefore, I can attest to how collective management is seen from the government perspective.

The rapporteur of our group, Daniel Gervais, has made an excellent presentation of the National Reports from 23 countries, mostly from Europe and other developed countries, with a very notable absence of Africa and Latin America. So, the answer to the question *Is there indeed a culture of collective management?* fails to understand the situation of developing countries in general.

1. Fernando Zapata López. Lawyer. Professor of Copyright at the School of Law, Universidad Nacional de Colombia, and Professor of Telecommunications Law at the Universidad Externado de Colombia.

Collective management, whose validity has allowed authors to defend copyright over their works, not only in their territories but beyond them through reciprocal representation agreements signed between collective management societies, is the most suitable instrument for the defense of copyright. The CISAC has sought that its Professional Rules are accepted and adopted by all the member societies of said organization (230 societies of authors in 120 countries). Consequently, such principles are adopted and put into practice by collective management societies of both developed and developing countries, because these practices are not to be promoted according to the development level of the country where the society is located.

Society practices, regardless of the degree of development of the country where they are located, are very important as they help to homogenize their behavior and facilitate the application of national treatment. This contributes to a view from the private sector (i.e. users or clients of works) that is uniform in both developed and developing countries, since they behave the same whether in Europe, Asia or Latin America, particularly today with the development of means of exploitation and enjoyment of works through digital technology.

Where there is a marked difference between one group of countries and another, especially in the way in which collective management is treated and regulated, is in the governmental sphere.

The view from the governments is very different and distant, for example, from being equal between developing and developed countries. Thus, speaking of a culture of collective management in terms of universality is extremely difficult.

This does not happen in any of those groups of countries when it comes to overcoming crises. For example, in the banking or financial sector, remedies and solutions have been practically the same to guarantee the security of citizens' savings, and the State, whether in a developed country or not, will act to provide means and resources, in order to reestablish confidence in public savings.

Why do I bring this up? Well, because even though the National Reports do not mention it explicitly, as the rapporteur has already mentioned, the conclusion that can be drawn from such reports

regarding whether collective management regulates function or structure is that most of the national legislations have focused on controlling managers, not on supporting management itself. In other words, the view from the public sector, both in developed and developing countries, has been directed towards the behavior of managers of collective management societies and not towards management itself. This leaves aside the examination, reflection and discussion of the need to regulate collective management as a *national purpose* that helps preserve the cultural identity of countries, and provides it with more and better instruments so that it can adequately play its role in today's digital environment.

20.2. WIPO and the 1996 Treaties

At the break of dawn of December 20, 1996, as Mihaly Ficsor reminded us yesterday, a series of records were made in the last moments of the Diplomatic Conference that adopted the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), as part of the final considerations by the delegations there. Of these, it is worth highlighting two issues that undoubtedly should have marked the way forward in future discussions within the framework of the world organization: copyright agreements and collective management. I remember that collective management was claimed as the most important issue to be discussed in order to guarantee and safeguard the exercise of the rights that had just been created or interpreted in those international treaties.

After 20 years of these treaties being in force, baptized by the media from the beginning as the "Internet Treaties", it should be noted that WIPO has a handicap, because they reveal a gap in the discussion and examination of the contractual capacity of authors and performers as a condition and aptitude to guarantee control over their works and performances – safeguarding the enjoyment and exercise of their rights – and collective management as a mechanism for the full exercise of their rights. But this statement does not directly accuse WIPO as the Secretariat, but rather the member countries of WIPO that make up the Standing Committee on Copyright and Related Rights (SCCR), which has insisted on addressing and

discussing issues such as limitations and exceptions to copyright, in addition to proposals aimed at diminishing the rights of authors, performers, and producers of cultural goods, while there has been no interest in discussing collective management agreements. Therefore, my reflection on the National Reports and the current environment is that current legislation, with some exceptions, is focused on the activities and responsibilities of the collective manager and not on the facilitation of the management of copyright and related rights.

20.3. Collective Management and its Administration

Then, distinguishing or differentiating between the administration of management and the importance of collective management is essential. Yet it seems that such distinction is clear in the questionnaires and, in particular, in the way in which the questions were drafted, but not in the answers that were received. This is because there is a lack of national legislation in favor of collective management in the terms in which questions were drafted, with the pleasant exception of the Hungarian Collective Management Act in 2016.

Let me point out that, in reviewing the legislation of the countries from which the National Reports came, as well as other legislations, we found that sometimes the regulation of competition does not cover the activity of copyright collective management societies. This is, undoubtedly, an important aspect since it excludes them from the jurisdiction of competition authorities, which, as it is widely known, generate a distinct intervention from the economic point of view but without the hallmark of the enforcement of collective management law. It should be mentioned that decisions are made only under the assumption of safeguarding a market, but without dwelling on quite sensitive aspects, such as examining how collective management contributes to the cultural identity of a country and safeguarding cultural expressions from cultural uniformity intended to be imposed these days by many and various cultural intermediaries.

20.4. The European Union and Collective Management

Directive 2014/26/EU on the collective management of copyright and related rights and the granting of multi-territorial licenses, based on real concerns or not, regulates collective management taking as a leitmotiv the need to guarantee an internal market.

This Directive, with its determined intention to prevent competition from being distorted and to introduce equal treatment, non-discrimination and transparency criteria into collective management, highlights an aspect of the autonomous freedom of those holding a private right: The capacity of the holder of copyright or related rights to choose between individual management and collective management of their rights. In my humble opinion, this issue should not be over-emphasized, let alone in a regulation of this nature, since such possibility relates to private rights with a constitutional dimension that reserve for their holders the capacity to exclude third parties who have not been previously and expressly authorized to use or exploit the works, performances, recordings or broadcasts concerned.

Typically, this type of right is exercised individually, and is in fact granted because of the desirability of certain types of works or rights. However, it is also well known that when it comes to works that have a broad user base and a wide range of uses – due to the development of digital technology – the best and most convenient thing for their authors is collective management which frees them from undertaking daily control tasks, which are far from the author's creative activity.

A bit beyond the purpose of this presentation, but still noteworthy, is the fact that today many authors and artists want to undertake individual management intending to control the use of works on the wealth of platforms offered by the Internet to distribute, transport, and promote contents. They are probably moved by those who, consciously or unconsciously, promote the idea that the individual management of works and productions can be more efficient than the collective management which is supported by an extensive network of societies established in different countries around the world which in

association with CISAC acts as a system for producing a positive impact on the global control of artistic works and productions.

As a corollary of these remarks regarding individual management, one may say that the possibilities granted by Directive 2014/26/EU for a right holder to easily withdraw rights, categories of rights, or types of works, and other benefits from the collective management entity of which he or she is a member, deals a hard blow to collective management. It jeopardizes the performance of other duties, also considered in said Directive, such as those related to the promotion of cultural diversity and the provision of social services. So, those right holders who want to withdraw will most certainly be the great publishers who represent large volumes of content – under contracts through which they hold the majority, if not all, of the rights of authors and performers. They will oust creators and artists from the control of their works and benefits which represent, obviously, important amounts of income for collective management entities.

Furthermore, in relation to the obligations of the collective manager, the Directive insists on equal treatment for all rights holders, equitable distribution, the need to inform users about rates and repertoires, regular accounting, equitable representation of right holders in the governing bodies, and in the resolution of litigation. All these concerns have always been raised, rightly or wrongly, by the users of works.

It is also true that the users of works, supported by governments, have always insisted that collective management entities should not deviate from the responsibilities that already have been defined for other organizations that also operate in the market. In other words, if other civil or trading organizations have a legal or statutory obligation to inform adequately their clients or users, or to deliver due and timely accountability reports to the right holders or the government itself, why would collective management entities not have the obligation to do so as well?

Directive 2014/26/ EU highlights the interest in taking to a higher political standard the regulation of the operation of collective management entities, particularly regarding transparency, accountability and general governance. This is even more so when, as consid-

ered by the Directive itself, the activity of these organizations was largely covered in some countries, while in others there was no reference to them in the law or the regulation was minimal.

20.5. The High Courts' Case Law

The truth is that since this legislative action there seems to have been a tendency to regulate the activity of the collective manager, and not to strengthen collective management. The latter was expected and needed in order to facilitate the management of artistic works and productions in a digital environment with increasingly hyper-connected users who appreciate low priced, or free, artistic works.

In the high courts' case law, the disposition that almost since its formation used to benefit collective management does not seem to exist today. This is the case of recent rulings – in countries geographically remote from each other – that have ruptured mandatory collective management, like in Turkey where the law prescribed mandatory collective management, but a decision from the Constitutional Court in 2010 reversed that regulation on the grounds that it was against the law on competition. At present, in addition to collective management, individual management is also possible. Furthermore, in Colombia, the Constitutional Court has issued four rulings since 2004. Some of them state, based on freedom of speech, that when a collective management society has a *de facto* or *de jure* monopoly, it is curtailing the individual manager's exercise of the rights. Therefore, both individual and collective management, as well as different forms of association other than collective management, are admissible in Colombia. Using the same freedom of speech arguments, in 2005 the Constitutional Court ruled that performers are not obliged to join a collective management society in order to enforce the right of remuneration, as provided by Law 23/1982 on copyright, which also deals a sharp blow to mandatory collective management.

In addition to this new understanding that mandatory collective management cannot be accepted, in Colombia the consequence of these rulings on the exercise of collective management has been that the Superintendence of Industry and Commerce, which serves as the competition authority, in a ruling dated March 2017 – based on the

individual management of rights – decided to confirm a sanction against the Society of Authors and Composers (SAYCO) and against its legal representative at the time. This sanction was imposed because SAYCO denied the publishers – who were members of the society and its board of directors – the partial withdrawal of public communication rights in open and closed television and on the Internet, in order to manage these outside the collective management entity, leaving SAYCO the management of the rights of live public performance and performance in public establishments. While it is true that authors enter into contracts with publishers assigning all rights to the latter, it is also true that they agree as well that the right of public communication in all its forms be collected by the society to which the author belongs. This refusal of SAYCO to allow the fractioning of public communication rights has given rise to the sanction and the order that SAYCO should unilaterally and promptly amend the contractual mandates received from the authors. This decision, of course, has been appealed to the administrative justice system, in the hope that this judicial authority will write a less invasive and painful page against collective management in Colombia.

The National Report of Spain discusses a case related to the General Society of Authors and Publishers (SGAE) where the Supreme Court ruled against a municipal council in 2014 "[...] that the action initiated by SGAE should be ratified with respect to all works that were subject to communication in the shows described in the first legal authority, except for those works where an authorization of the performance by the respective exclusive holders of the rights affected must be presumed." The issue is that those authors had entrusted the public communication right to the General Society of Authors and Publishers; now, with a ruling of this nature, the soundness of collective management is undoubtedly disturbed.

20.6. The Response of Collective Management Entities in Latin America

There is currently a platform in Latin America which integrates 16 collective management entities that has been organized as a "one stop

shop" under the name of LATINAUTOR[2]. They have agreed to unite their repertoires and set up a database of 36 million records. This has facilitated a meeting point between digital service providers and copyright holders in Latin America, from which they are negotiating with large platforms such as Spotify, notwithstanding the capacity of the societies that compose the platform to negotiate with national users.

20.7. Corollary

To conclude this speech, we could point out that there are huge differences between Europe and Latin America in the way that collective management entities are regulated and perceived. Regarding Europe, we could say that although collective management has been regulated under Directive 2014/26/EU, mandatory collective management still exists in some countries for specific uses, and in others for private copying and reprography. While in Latin America, the combination of individual management being reaffirmed as a possibility to exercise rights; the non-recognition of remuneration rights as inalienable; and the discouragement of mandatory collective management, accompanied by a systematic campaign against the entire collective management system, upsets this institution which, with its weaknesses and imperfections, by each of our countries should be considered as a *national purpose* to be fulfilled. All of this leads us to affirm that at least in our region there is no culture of collective management.

Of all the above, what is perhaps most harmful to collective management is not the individual exercise of a private right – a possibility regarding this type of rights – but the individual and collective

2. LATINAUTOR, the Latin American Copyright Organization, is a regional project of cooperation among collective management societies for Latin American musical and dramatic works, comprising most of the Latin American societies, in addition to those from Spain (SGAE) and Portugal (SPA). LATINAUTOR is a regional agency that seeks to integrate all the rich musical repertoire of Latin America, in order to ensure its full identification and strengthen its protection. One of its fundamental objectives is to promote a common system for the protection of copyright in Latin America, in order to strengthen collective management in the continent. <http://www.gestioncultural.org/ong_cooperacion_internacional.php?id_institucion_ empresa=1753>.

exercise of a right by a member of a collective management entity. This brings uncertainty to the work of these entities and tears apart the general protective principles of the association, such as the right holder's inability to dispose of the rights which have been consigned to a society. The exercise of rights is either individual or collective, and the holder cannot designate which right or which work should remain in the collective management entity, based on a differentiation of markets, even less so when the judicial operators have not solved the phenomenon which has come about later.

Given that we now have the analysis, we have the diagnosis and we know what is happening, we must contribute to the strengthening of collective management, bolster it with benefits and insist on a conception of everybody that we owe it respect and support and we must contribute to its further improvement.

21

The Regulation of Individual Licence Terms as a Means of Improving the Functioning and Acceptance of Copyright: a View From the South

Coenraad Visser[1]

Let us assume that worldwide the predominant economic system is the (capitalist) market system (admittedly with national differences (modifications) to a larger or lesser extent). The economic problem at the heart of the market system is scarcity. Scarcity is defined as "continuing situations of lack of means relative to human wants and needs

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to be satisfied".[2] Note that scarcity is by definition relative – relative to a varying set of conditions.[3]

It is almost banal to assert that we live in the age of the knowledge-based economy:

> "A knowledge-based economy relies primarily on the use of ideas rather than physical abilities and on the application of technology rather than the transformation of raw materials or the exploitation of cheap labor. It is an economy in which knowledge is created, acquired, transmitted, and used more effectively by individuals, enterprises, organizations, and communities to promote economic and social development."[4]

One of the four pillars on which the knowledge-based economy rests is a dynamic information infrastructure to facilitate the effective communication, dissemination, and processing of information.[5] Generally, perhaps the most pressing need of developing countries is the wider dissemination of knowledge. Ultimately, their educational, cultural, and technical development turns on such dissemination. To avoid the evolution of a knowledge divide between developed and developing countries, this scarcity should be addressed by the rapid transfer of knowledge from developed countries to developing countries. And the range of the solution should match the extent of the scarcity – hence the notion of "bulk access" ("access to multiple copies of a copyrighted work at affordable prices").[6]

It is cumbersome, to the point of it being prohibitive, physically and economically, to produce tangible copies in the developed coun-

2. Detlev Krause, "From Old to New Monism: An Approach to An Economic Theory of the 'Constitution' of the Firm", in Terrence Daintith & Gunther Teubner (eds), *Contract and Organisation: Legal Analysis in the Light of Economic and Social Theory* 219 (1986).
3. Ibid.
4. World Bank, Lifelong Learning in the Global Knowledge Economy: Challenges for Developing Countries 1 (2003).
5. Ibid. at 2.
6. Ruth L. Okedidji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries", *UNCTAD – ICTSD Project on IPRs and Sustainable Development, Issue Paper* No. 15, 15 (2006).

tries and then transport them to developing countries, in sufficient quantities to meet local demand. The obvious alternative is to use a broad copyright licensing system to permit the local production of these tangible copies in the developing countries to meet local demand.

A licensing system of this nature assumes two existing conditions.

The first condition is that developing countries recognize the rights of foreign authors to their literary and artistic property, and that these countries thus adhere to the international copyright conventions.[7] While, on a formal accession level, this assumption holds true for developing country membership of the Berne Convention for the Protection of Literary and Artistic Works,[8] it does not hold true for developing country accession to the WIPO Copyright Treaty (WCT),[9] for example. Twelve African countries have ratified the WCT, the vast majority of them francophone.[10] Twenty years after signing the WCT, South Africa, for example, has still not ratified the WCT.[11]

A significant contributing factor to this reticence is economic. The balance of payments on the trade account of developing countries today is typically unfavorable, so that the conservation of foreign exchange is a major factor in the formulation of their economic development plans.[12] Faced with the necessity of importing a large

7. Irwin A. Olian Jr., "International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris", 7 *Cornell Int'l L.J.* 91 (1974).
8. Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. For a list of the 175 contracting parties, see <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15>.
9. Dec. 20, 1996, WIPO Doc. CRNR/DC/94. For a list of the 96 contracting parties, see <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id =16>.
10. Algeria, Benin, Botswana, Burkina Faso, Burundi, Gabon, Ghana, Madagascar, Mali, Morocco, Senegal, and Togo.
11. The same applies to Kenya and Namibia.
12. On the rather unique measures taken by Nigeria in respect of imported books to preserve its foreign currency, see B.U. Nwafor, "Problems of Acquisition of Local and Overseas Materials", in Anthony J. Loveday & Günther Gattermann (eds), *University Libraries in Developing Countries: Structure and Function in Regard to Infor-*

part of their basic requirements for furthering industrial growth, these countries are hard pushed to expend their limited foreign exchange reserves on purchasing from abroad physical copies of copyright works that could be more cheaply printed at home.[13] Early studies have shown that of new books distributed in developing countries, sometimes as many as 95 per cent are translations of foreign works, the majority of which are imported rather than published in the developing country.[14] Also, many books published in the United States and Europe sell up to 80 per cent of a particular edition in developing countries.[15] There is no reason to assume that the current position in developing countries would be significantly different from that found in these early studies. Indeed, the balance of payments likewise remains of serious concern to the governments of these countries. In South Africa, for example, the official position has been that the country will accede to any further WIPO treaties only once impact assessment studies predict a favourable foreign currency (in)flow.[16]

Secondly, a broad licensing system of this kind presupposes the existence of local manufacturing capacity to produce (actually, reproduce) the works under licence. The promotion of local production industries in developing countries has been a concern of the international copyright community for quite some time. At first it was thought to be a necessary stimulant for the emergence of a local community of authors with a stake in the international copyright system.

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mation Transfer for Science and Technology 61 (1985).

13. See Olian, supra note 5, at 89.
14. Ibid. at 90.
15. Ibid.
16. On August 25, 2017, South Africa published a Draft Intellectual Property Law Policy of the Republic of South Africa Phase 1 (Government Notice 636 in *Government Gazette* No. 41064) for comment. It states a softer position: "[...] the Inter-Ministerial Committee on Intellectual Property (IMCIP) will analyse WIPO treaties to which South Africa is not currently party to in order to determine whether they present opportunities that could benefit the country, including as they relate to both vulnerable populations and economically productive sections of society" (§ 7.2.1.2).

With time it was realised that the existence of these local industries is a pre-condition for the viability of a licensing system.

An example of such a broad licensing system can be found in the Appendix to the Berne Convention. Just briefly, the Appendix establishes a complex non-voluntary licensing scheme in respect of authors' reproduction and translation rights. The restrictions imposed by the Appendix include:[17] a three-year waiting period from the date of first publication of the work before issuing a licence for translation;[18] a five-year waiting period, generally, for a reproduction licence (for works of poetry, fiction, music, and drama the waiting period is seven years; for scientific works, the waiting period is three years);[19] the developing country must have a "competent authority" in place to issue such licences;[20] and the translation licence can be granted only for teaching, scholarship, and research purposes.[21] The Appendix then gives a "grace period" (beyond the waiting period) to authors: if during this grace period the work is distributed in the developing country at a reasonable price (relative to the country), then a compulsory licence for translation or reproduction cannot be issued.[22] If an author chooses to withdraw the work from circulation, then no compulsory licence can issue either for translation or for reproduction.[23]

The Appendix has hardly been a success.[24] Fewer than 20 countries had expressed an interest to WIPO. African countries, in particular, do not use the Appendix system.[25] South Africa, belatedly, in its

17. See Okedidji, supra note 5, at 15.
18. See Berne Convention, supra note 7, Appendix art. II(2)(a).
19. Ibid. art. III(3).
20. Ibid. arts II and III.
21. Ibid. art. II(5).
22. Ibid. arts II(6) and III(6), respectively.
23. Ibid. arts II(8) and III(4)(d), respectively.
24. See, e.g., Peter Drahos, "Developing Countries and International Standard-Setting", *World Intell. Prop. J.* 779 (2002).
25. See Joseph Fometeu, "Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa", *WIPO Standing Committee on Copyright and Related Rights*, SCCR/19/5, 42 (2009). The same seems true of most Arab countries: see Victor Nabhan, "Study on Limitations and Exceptions for Copyright for Educational Purposes in the Arab Countries", *WIPO Standing Committee on*

current revision of its Copyright Act,[26] proposes to take advantage of the Appendix.[27]

The Appendix shows its age, of course, in its application to physical copies – it allows the translation or reproduction of a work "in printed or analogous forms of reproduction".[28] Whether the phrase "analogous forms of reproduction" can be interpreted extensively to include digital works, is a matter of debate.[29] The weight of opinion indicates that it cannot, which is a further factor to render the Appendix of little current relevance.

Against this background, then, I would like to look at individual licensing[30] as a means for improving the acceptance of copyright in developing countries. More particularly, I would like to look at an emerging trend to regulate licence terms. To illustrate this trend I will look at South African copyright law, and especially some of the recent proposals for amending its copyright law – its first comprehensive review of its copyright law in 40 years. This review is important in the African context, as quite a few African countries have indicated that they intend to use the amended law as a prototype for their own copyright law reform.

Individual licensing operates on two levels, both of which fit the standard intervention template – a small prospective contracting party pitted against a large commercial party. The first level is where the small author or performer contracts with a publisher or record label, say, to assign or licence some or all of his or her exclusive rights

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Copyright and Related Rights, SCCR/19/6 56-57 (2009) (even though some Arab countries have introduced Appendix-style licensing systems in their law, the results have been "scant or even non-existent").

26. No. 98 of 1978 as amended.
27. Copyright Amendment Bill [B 13-2017], as introduced in the National Assembly (explanatory summary of the Bill published in Government Gazette No. 40121 of July 5, 2016), clause 34 proposing to add Schedule 2 to the Copyright Act.
28. See Berne Convention, supra note 7, Appendix arts II(1), II(2)(a), and III(7).
29. For a concise summary of the various voices in this debate, see Alberto Cerda Silva, "Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright", *PIJIP Research Paper* no. 2012-08 American University Washington College of Law, Washington, D.C., 26–31 (2012).
30. I use the term "licence" here broadly to include also "assignment".

of authorization for purposes of commercial exploitation. The second level is where a prospective user contracts with a publisher or record label, for example, to reproduce the work for the user's purposes.

A system of individual copyright licensing should be evaluated on two levels – procedure and content.

As far as procedure is concerned, the experience with the Berne Appendix shows that transaction costs for a licensing process should be low (this translates into the assertion that formalities and prerequisites should be few), and that the transacting process should be brief.

An example of a licensing process that will drown in its red tape can be found in the current South African legislative proposal in respect of orphan works.[31]

A person who wishes to obtain a licence to exercise one of the exclusive rights of authorisation in respect of an orphan work must lodge an application with the Copyright Commission.[32] But before the application can be lodged, the applicant must *(a)* conduct a search of the database of the register of copyright maintained by the Commission; *(b)* conduct a search of reasonably available sources of copyright authorship and authorship information and where appropriate, licensor information; *(c)* conduct a search using appropriate technology tools, printed publications and enlisted, where reasonable, internal or external expert assistance; *(d)* conduct a search using any other database available to the public, including any database that is available to the public through the internet; *(e)* undertake actions that are reasonable and appropriate in terms of the facts relevant to the search; and *(f)* review any records not available to the public through the internet that are known to be useful in identifying and locating the copyright author. Then the applicant must publish his or her intention to make such application by notice in the *Govern-*

31. An "orphan work" is "a work in which copyright still subsists but none of the rights holders in that work is identified or, even if one or more of them are identified, none is located' (clause 1, proposing to insert a definition of "orphan work" into section 1 of the Copyright Act).
32. See Copyright Amendment Bill, supra note 26, clause 22, proposing to insert clause 22A into the Copyright Act.

ment Gazette, and in English and any other official language in two daily newspapers with a general circulation throughout South Africa.

There are other problems, too, with the proposed regime for the use of orphan works that I will not deal with here. Suffice to say that this is a blueprint for how not to regulate the use of orphan works.

As far as licence content is concerned, in Africa, the "Mbube" saga is always used as the textbook illustration for the need for government intervention in the terms of individual copyright contracts freely entered into by the parties.[33]

In 1939, Solomon Linda, a Zulu migrant worker and entertainer, recorded the most famous melody ever to emerge from Africa. Sometimes called "Wimoweh", the English-speaking world knows it as the central theme from the song "Mbube – the Lion Sleeps Tonight". There are versions in many other languages. More than 150 artists have recorded it, and it features in at least fifteen movies and musicals. Some estimate that it has earned more than $15 million in composer royalties.

Linda had assigned his worldwide copyright in "Mbube" to the Gallo Record Company for 10 shillings. He died a pauper in 1962. He left a wife and four children. In 1983, an American music publisher, which had gained control of the song, obtained for a fee of one dollar an assignment of Linda's wife's rights (as his legal heir) to the renewal term of the song under American copyright law. The assignment also related to her worldwide rights to the song, such as they may have been. She died in 1990. In 1992, the music publisher obtained a further assignment of the worldwide rights to the song from the Linda daughters. Again for a fee of a dollar.

The inequality of bargaining power between the Lindas and the recording company and music publishers was clear. It illustrates, in developing countries, especially in the music and arts industries generally, the authors' poor or low literacy levels, limited skills, and resi-

33. See Owen Dean, "Copyright in the Courts: The Return of the Lion, WIPO Magazine" (April 2006), available at <http://www.wipo.int/wipo_magazine/en/2006/02/article_0006.html> (accessed May 15, 2017). For a fuller account of the litigation and the back story, see Owen Dean, *Awakening the Lion: The Case of The Lion Sleeps Tonight* (2013).

dency in unsophisticated rural areas. Add to this the fact that many authors have limited resources and enter into contracts without reading them. Although authors are bound to contracts which they have signed even if they did not familiarise themselves with the provisions, authors' actions can be attributed to the fact that contracts are often written in language that is difficult to understand, and that authors have little resources and few options to negotiate the terms.

In South Africa, the Copyright Review Commission concluded:[34]

> "There is general recognition in the industry that many of the contracts between record companies and artists and between music publishers and artists signed in earlier decades were unfair to the artists concerned. This is attributed to the inequitable industrial relations environment of the past. As a result, certain artists are still bound by unfair agreements that were negotiated many years ago, a major cause of the acrimony, mistrust and polarisation that plagues the industry today."

The problem of unequal bargaining power is, of course, exacerbated in the case of a standard-term contract (also known as a contract of adhesion). In this situation the liberal notion of self-determination, which finds expression here in terms such as "party autonomy" and "freedom of contract" breaks down.

At the same time, though, one should remember that the transactional cost of entering into a standard-form contract is substantially lower than for an individually negotiated contract. Often the main reason why parties resign themselves to accept standard terms is that it simply takes too much time and effort to read long, complex lists of standard terms every time one enters into a transaction, even for a relatively well-informed, sophisticated person in a competitive market. It takes even more time and effort to think through and find out the implications or meaning of the standard terms, and to suggest alternative terms and negotiate them. The transaction costs of doing any

34. Department: Trade and Industry, Copyright Review Commission Report 173 (2011).

of the above are out of proportion to the dangers apparent to the average "weaker" party at the conclusion of the contract.

There are a number of existing mechanisms of legislative intervention in the terms of individual copyright licences.

In the first instance, the licence term may be limited. Sometimes this is achieved by a system of reversion of rights. To return to "Mbube" (and a happy ending): at the time of his assignment of his copyright to the recording company, the Imperial Copyright Act 1911[35] applied in South Africa.[36] In terms of the proviso to section 5(2) of the 1911 statute, where an author assigned his copyright during his lifetime, 25 years after his death the copyright reverted to the executor of his estate, as an asset in that estate, despite any other assignments of copyright which might have taken place in the meantime. This "reversionary copyright" provision was tailor-made for the facts of the "Mbube" case. The only snag was that first Linda's wife and then his daughters had already assigned their claim to the copyright to the music publisher. It was reasoned, however, that the reversionary copyright had been vested in the executor since 1987 (25 years after Linda's death) and did not become the property of either his wife or his daughters until his executor transferred it to them. As such a transfer had never been effected, the assignments by his wife and daughters had no force or effect.

In South Africa, the Copyright Review Commission recommended the introduction into Copyright Act of a reversion provision along the lines of that in the 1911 Act.[37] Instead, the drafters of the

35. 1 & 2 Geo. 5 c. 46.
36. By virtue of the Patents, Designs, Trade Marks and Copyright Act No. 9 of 1916, section 143.
37. See Copyright Review Report, supra note 33, at 102: "The Copyright Act must be amended to include a section modelled on that in the US Copyright Act providing for the reversion of assigned rights 25 years after the copyright came into existence. (The drafters of the section must have regard for proposals currently under discussion in the US for an amendment of the section to overcome difficulties encountered in practice.) [...] The period proposed is shorter, based on the fact that the local copyright duration is shorter than the American one." This view is, of course, based on a gross oversimplification of the complex provisions of the American Copyright Act. On the latter, see further Lionel Bently & Jane

proposed amendment opted for a uniform term for all assignments: the proposal states bluntly that an "assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment".[38]

Secondly, a licence term may contain an evaluation criterion that could be the basis for judicial review. For example, the proposed Berne Appendix provisions in the South African amendment proposal draft refer to "the price reasonably related to that normally charged" in the country.[39]

Thirdly, legislation may provide directly for a contract adjustment mechanism. A recent example is article 15 of the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market:[40]

> "Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances."

Fourthly, legislation may strike at contract terms that seek to restrict so-called user rights:[41]

C. Ginsburg "The Sole Right [...] Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright, 25 *Berkeley Tech. L.J.* 1475 (2010).

38. See Copyright Amendment Bill, supra note 26, clause 21, proposing to amend section 22(3) of the Copyright Act.
39. Ibid., clause 12, proposing to insert section 13B(6)(c) into the Copyright Act; clause 34, proposing to add Schedule 2 to the Copyright Act (see the proposed section 4(6)(b) of Part A of the Schedule; and the proposed section 3(1)(a), 4(1)(b), and 4(5)(a) of Part B of the Schedule).
40. COM(2016) 593 final, published on September 14, 2016.
41. See, e.g. Copyright Amendment Bill, supra note 26, clause 33, proposing to insert section 39B(1) into the Copyright Act. This is subject to a proposed proviso: "This section does not prohibit or otherwise interfere with public and open licences to do any act which is subject to copyright or moral rights, settlement agreements, terms of service licences and the voluntary dedication of a work to

> "To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable."

Fifthly, an administrative authority may impose compulsory and standard terms. The South African amendment proposal states that the Minister of Trade and Industry may prescribe compulsory and standard contractual terms to be included in agreements to be entered in terms of the Copyright Act.[42] These terms would then become implied terms in the relevant contracts (licences).

Earlier, one of the speakers noted an unease at the emerging human rights discourse that raises the specter of copyright being cut down by a multitude of fair use type claims underpinned by a reliance on human rights such as the freedom of expression. It is not an unfounded reservation. In South Africa, for example, the Constitutional Court created a parody defence in trademark law on the basis of the constitutional protection of freedom of expression.[43] Likewise, the regulation of copyright licence terms brings principles of consumer protection law and protection against unfair contract terms into play in the copyright context. The consequences may be similarly unpredictable and undesirable.

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the public domain" (proposed section 39B(2)).

42. Ibid., clause 32, proposing to insert section 39(cG) into the Copyright Act.
43. See Laugh It Off Promotions C.C. v. South African Breweries International (Finance) BV t/a Sabmark International & Another, (CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (27 May 2005). Freedom of expression is protected by section 16(1) of the Constitution of the Republic of South Africa, 1996.

22

Eyeing the Need for Licensing Using the Orphan Works Lens

Dr. Uma Suthersanen[1]

Modern copyright systems are constructed on three functional stages, irrespective of the genesis of the law, the legal families or provenance of the law, and the justifications. These stages can be framed as the following basic queries: (i) what type of works do we wish our copyright systems to protect? (ii) what type of activities do we wish to allow or prevent? (ii) how are works used and exploited? The last question is vital in enabling law and policy makers to determine what type of behaviour we want to allow. Does public interest dictate that we allow some types of usages of copyright protected works? If so, should the law give such third parties a royalty-free mandate or should some sort of licensing scheme be instituted? The third query can only be resolved by rationalising the approaches adopted by legislation in relation to the first two queries. This paper employs the orphan works phenomenon as a conceptual legal tool to review this triadic-based view of copyright. Is there a need for licensing for the

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copyright system to function effectively? Additionally, the orphan works problem has instigated a close analysis of how cultural heritage institutions are deploying their collections.

22.1. The "pre-problem" era

This paper adopts the EU definition of an orphan work: an orphan work is a work which is presumed to be a protected work because rightholders of that work either cannot be identified or located.[2] Orphan works have always been present though it has become perceived as a global problem in the last few decades, with much discussion as to the correct solution to the "problem".[3] It is submitted that the main reason for the orphan works problem has been the failure to recognize how our nascent and rather idiosyncratic copyright rules on unpublished works in libraries and archives have delivered a copyright dystopia. Take for example unpublished works which are governed under national norms, including rules which recognise almost-perpetual moral and economic rights in unpublished works. Thus, under UK law, unpublished works in the National Archive will not go into the public domain until 2039; prior to the current UK copyright law which came into effect in 1989, unpublished works enjoyed perpetual copyright. These rules were effective in the past despite the fact that a corpus of orphan works has always existed within library and archival collections since the low usage of such works guaranteed the perpetuation of such problematic rules.

Furthermore, following from Prof. Gillian Davies's talk yesterday morning, she is very correct to note that one means of rationalising modern copyright systems is that they reflect international

2. Article 2, Art. 3, EU Orphan Works Directive 2012/28/EU, OJ L299/5. For a commentary, see Uma Suthersanen and Maria Mercedes Frabboni, 'The EU Directive on Orphan Works' in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law* (Edward Elgar, 2015). See also Daniela Simone 'Unlocking Orphan Works: A New Licensing Scheme' (2014) XIX *Art Antiquity and Law* 315.
3. United States Copyright Office, *Orphan Works and Mass Digitization*, June 2015; U. Suthersanen, "Who Owns the Orphans? Property in digital cultural heritage assets", in *Research Handbook on Copyright Law*, Editor Paul Torremans (Edward Elgar, 2017) pp. 359–390.

treaties and conventions. First, because of the open-ended nature of international rules, the parameters of protected expressions under national laws have changed over the last two centuries from oral, visual and textual works, grounded in the physical and analogue world (such as books, photographs, films), to digital manifestations of works (such as computer programs, electronic databases, and computer-generated works).[4] The list of protectable works also includes an expansive list of entrepreneurial works such as performances, phonograms or sound recordings, broadcasts, non-creative photographs, published editions of previously unpublished works, new critical editions of public domain works or technical writings, as well as databases.[5] Subsequent national jurisprudence has allowed works with questionable levels of creativity to enjoy copyright protection, employing notions such as "labour" or "sweat of the brow", or "Kleine Münze"), or the "catalogue rule". The same is also true of photographs where a modicum of creativity was expected in older jurisprudence within civil law countries, but has become increasingly unwarranted.[6]

Secondly, the current international norm is that copyright protection arises automatically, without the need for compliance with formalities such as registration, placement of notices, and the like. Indeed, the registration of copyright works has not been a universal norm since the inclusion of Article 5(2) within the Berne Convention in 1908 which states that the "enjoyment and the exercise" of copyright "shall not be subject to any formality". The recordation of ownership has possibly been much worse in the early parts of the twentieth century than in the last few decades, including the recordation of

4. Articles 1, 2(1) Berne Convention; Arts 9-10, TRIPS Agreement 1996; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 OJ (L77) 20; s. 9, UK Copyright, Designs and Patents Act 1988.
5. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961; TRIPs Agreement 1994, WIPO Copyright Treaty 1996, WIPO Performances and Phonograms Treaty, Beijing Treaty on Audiovisual Performances, for example.
6. P. Goldstein and B. Hugenholtz, *International Copyright* (OUP), para. 6.1.1. et seq.

licences and transfers of copyright goods as part of the business assets. The widening of the copyright umbrella has progressed in correlation to the lengthening of the copyright duration.[7]

In recognising the growing orphan works phenomenon, we are perhaps also anguishing, in retrospect, over archaic rules regarding unpublished works and archival materials. Should we pursue our current course of widening copyright protection or should we adopt a different policy in relation to museum, library and archival collections? In the case of the UK rules on archived unpublished works for instance, despite consultations and lobbying regarding the growing orphan works problem, the 2039 rule still remains with the UK Government exhorting third parties to resort to licensing solutions. This is discussed in detail below. A more fundamental query is whether we really wish to protect anything and everything that has been recorded in society.

22.2. Reviewing institutional behaviour through the "orphan works problem"

The impetus to digitise the cultural assets and memories within the EU and the United States led to the current orphan works problem as the social, cultural and economic value of orphan works grew, in terms of preservation, access, data mining research and monetisation opportunities. This issue was exacerbated by several further factors including, *inter alia*, the following: the lack of detailed bibliography and documentation as to ownership of copyright in individual works within collections; the improved search and processor technologies enabling researchers to access large amounts of information and to discover (or re-discover) materials (i.e., text- and data-mining activities); the need to shift permanent collections comprising paper, photographs, films, sound recordings and images into uniform digital objects in order to perform the dual function of preserving and accessing works in old media formats, and to monetise such collections so as to alleviate the growing financial pressures being faced by

7. See, for instance, Art. 17, WPPT, Art. 14, Beijing Audiovisual Treaty, and Art. 1, Directive 2011/77/EU on extending performers' rights to 70 years.

cultural heritage institutions. In respect of the latter, cultural heritage institutions have instituted new business models such as print on demand facilities as well as collaborations with third party commercial developers to harness their existing, static digitised collections to create content within an interactive environment.

Thus, we return to our basic queries again. Do we protect everything that is within an institutional collection, including scraps of paper, random letters and pamphlets, historical or family photographs, etc? What sort of behaviour do we wish to control under the copyright rubric? Do we re-shape our copyright policies in light of the new uses of copyright-protected cultural works such as digital displays and access? An added conundrum is that if licensing is the way forward for third parties, who owns these digital collections? Copyright may vest in an individual artistic work residing within the museum's collection, where the ownership of copyright in the work may be readily identified, or where the work is classified as an orphan work. Upon digitisation, the institution may also assert property rights in the physical work itself, and in the subsequent digitised work. This is a current practice within museums i.e. the work itself is out of copyright and is then rendered into a digital format by the museum, and subsequently transformed into a commodity for sale in the museum shop. In these cases, the museum's "surrogate" property rights are asserted in the digitised versions of the artefact. The wider concern is that the lack of modern copyright rules to stem these growing problems is effectually creating a serious hindrance to mass digitisation of collections, which, in turn, is obstructing greater public and scholarly access and use of cultural heritage assets, including data and text mining activities. Conversely, we have these institutions digitising and utilising their heritage assets, irrespective of the underlying property rights in such assets, but nevertheless asserting surrogate intellectual property rights in such works.[8]

8. The term "surrogate" derives from the Getty Museum's open content image policy which classifies its open content images as "digital surrogates of works of art that are in the Getty's collections". The British Museum exercises surrogate copyright in digital images of public domain works – see for example the museum asserting copyright in a digital image of Michelangelo's Studies for a

22.3. Licensing as a regulatory tool[9]

What behaviour do we wish to control? There are several stakeholders in this situation including authors and owners of copyright in the original work, or orphan works with unidentified/ untraceable owners, public institutions (such as libraries and museums), archives, third party users, collecting management organisations and publishers. Several proposals have been suggested. Institutions wish a clear mandate (in the form of an exception or limitation) allowing them to utilise their collections as they wish at little or no cost. Conversely, rights holders and collective management organizations (who have taken up the vanguard for authors, lost authors and rights owners) argue that the mass digitisation of institutional collections will inevitably involve unauthorised exploitation of protected works – this can only be solved through a licensing mechanism such as an exclusive licensing system, a voluntary system, a compulsory licensing exclusive system, or extended collective licensing. A third option is to investigate the possibility of incorporating the concept of abandoned/unclaimed property within copyright law – the *bona vacantia* concept as it exists under common law. This option questions the viability of licensing schemes in relation to orphan works in that it is a legal fiction to claim that collecting societies and/or governments have a mandate to collect royalties in the absence of owners. Incorporating abandoned property concepts into copyright law shifts the responsibility and burden of property claims back to authors and rightsholders. This route also presages a discourse on the feasibility of registration and recordation.

The current UK model is, I believe, a holistically honest approach which admits that all options are feasible and thus both the

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Virgin and Child", at <https://www.bmimages.com/results.asp?image=00018195001&imagex=6&searchnum= 0003>.

For usage of the term surrogate intellectual property rights and cultural heritage institutional policies, see <http://displayatyourownrisk.org/digital-surrogates/>.

9. This section is a summary of discussion in U. Suthersanen, "Who Owns the Orphans? Property in digital cultural heritage assets", in *Research Handbook on Copyright Law*, Editor Paul Torremans (Edward Elgar, 2017) pp. 359–390.

exceptions and licensing routes are employed. First, the orphan works Directive establishes the limited cultural heritage exception permitting the use of orphan works. Only a limited class of beneficiaries is allowed to avail themselves of the exception, namely publicly accessible cultural heritage institutions, established within the EU, and with a public interest mission. The directive applies to five types of orphan works: writings, films, sound recordings, broadcasts, and embedded protected works/subject matter. Intriguingly, artistic works, especially stand-alone photographs and visual images, are specifically excluded – national laws are free to extend the exception to embrace all types of orphan works.[10]

To this extent, the UK adjusted its national laws to enable extended collective licensing schemes, to be exercised by those approved collective management organisations, with provision allowing opt-outs by both members and non-members. It is surprising that no organisation has applied to implement this licensing scheme, considering the popularity of this solution with the rights holder; it can be that organisations are awaiting the implementation of the 2014 Collective Management Directive in terms of transparency.[11] It remains to be seen whether the extended collective licensing scheme can really work efficiently outside a small country with a limited number of works in circulation. In the case of the UK, it is submitted that giving organisations an ECL licence may be akin to awarding a monopoly.

In addition to this, the UK has also set out a central licensing operation in relation to orphan works, which is operated by the national intellectual property office. Under the central licensing scheme, third party users must show that a diligent search is done, and upon payment of a very reasonable fee, a 7 year licence is conferred, replete with an indemnity provision. Empirical research shows that the average diligent search time was 30 minutes to three and a half hours; for non-commercial usage, the UK Intellectual Property

10. Arts. 1, 10 of Directive 2012/28/EU on orphan works.
11. The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 (UK).

Office charges €0.10 a work for non-commercial use, and €18–20 for commercial usage. The due diligent search is recorded officially, and the work is registered as an orphan work.

It is this last aspect, perhaps, that is the best aspect of the entire licensing scheme in relation to orphan works. And it may also inadvertently solve anomalies within copyright law. National solutions on mass-digitisation of collections, orphan works and out-of-commerce works are circumscribed by the fact that they are not capable of addressing cross-border issues posed by the online environment, and are therefore ignoring the cultural and educational potential offered by cross-border access of content.

22.4. Re-engaging with Art. 2(5), Berne Convention

A pan-EU, and even a global, mandatory exception may be more effective than trying to enforce national licensing schemes across EU and non-EU borders; on the other hand, licensing schemes can be just as effective as long as there is recordation of the licence and a 'mutual recognition' principle – once a work is declared as having orphan status, it should have this status globally, thus enabling institutions to proceed with their digitisation and dissemination activities, with a minimal risk of liability. Whether this approach can work on a global scale is doubtful unless this is sanctioned under an international treaty. In the absence of international or national registries of protected works (except for the United States), the argument is that the uncertain status of copyright duration has been increasingly heightened by the fact that the duration of copyright has been steadily increasing in the last 25 years. Legislation which forces institutions and sectoral groups to share their bibliographic information, as well as the costly diligent search results, can only help in conclusively establishing whether a copyright work is in-copyright, in the public domain, or somewhere in between.

It is arguable, of course, that mandatory registration of orphan works may conflict with the non-formalities requirement under Article 5(2) of the Berne Convention. The irony is that a public domain/orphan works registry will not invoke protection, but will shield two groups of actors:

— indemnity is given to potential users, who do not have to duplicate the diligent searches;
— non-abandonment of the work by the authors or rightsholders, who can periodically check whether their works have been wrongly categorised, and can seek to reassert their rights.

To this end, perhaps the World Intellectual Property Organization should re-engage with the Berne Convention 1971 and conduct a survey as to feasibility of the continued existence of Article 5(2) in current times.

23

Extended Collective Licensing from an Economic Perspective

Thomas Riis[1]

23.1. Introduction

This panel discussion is about models that can improve the functioning and general acceptance of copyright and related rights. For that purpose, licensing models are essential. I'm going to talk about one type of licensing model which we in this country consider to be a Scandinavian legal speciality and that is the Extended Collective License (ECL).

ECLs have been part of Nordic copyright law for the last 50 years. They were introduced in the beginning of the 1960s to deal with broadcasting rights. Then it was expanded to photocopying in schools and business enterprises. Today, in the Scandinavian countries, ECLs can be applied in all areas of copyright law, provided that collective agreements underlying the ECL grant rights to users within "a specified field" – which shall probably be understood in such a

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way that the collective agreement and the ECL should be relatively limited in scope.

From a practical perspective, nowadays, ECLs cover a broad variety of situations where right holders are numerous, dispersed, and difficult to find. Another way to describe the functionality of ECLs is to say that in many situations where it is tempting to introduce a compulsory license, normally, a ECL will work quite as well. Common to compulsory licenses and ECLs is that they can solve the outsider problem in collective licensing which means that these legal instruments can clear rights owned by non-represented right holders (see *infra*, on the outsider problem).[2]

23.2. Dissemination of ECL schemes

It is a widespread understanding that ECLs have worked very well in the Scandinavian countries in regards to mass uses of copyrightable works, and as such they have contributed to the smooth functioning of copyrights. Despite the local success of ECLs, for many years, this particular licensing model did not spread to other jurisdiction, though the Scandinavian governments have pushed for that.

This is not to say that the EU legislator has been particularly hostile to ECLs. Firstly, ECL has long been accepted as being compatible with EU law. Article 3(2) of the Satellite and Cable Directive[3] (1993) allowed for ECL in respect of broadcasting rights. It is thus stated that Member States

2. In general, on ECL see e.g. Thomas Riis, Ole-Andreas Rognstad & Jens Schovsbo, "Collective agreements for the clearance of copyrights – the case of collective management and extended collective licenses" in Thomas Riis (ed), *User Generated Law* (Edward Elgar 2016), pp. 55–76; Thomas Riis & Jens Schovsbo, "Extended Collective licenses in action", *International Review of Intellectual Property and Competition Law*, 2012, pp. 930–950; and Thomas Riis & Jens Schovsbo, "Extended Collective Licenses and the Nordic Experience – It's a Hybrid but is It a Volvo or a Lemon?", 33 *Columbia Journal of Law and the Arts*, Iss. IV, 2010, pp. 471–498.
3. Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

> "may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to right holders of the same category who are not represented by the collecting society".

Moreover, recital 18 in the Preamble of the Infosoc Directive (2001)[4] states that the Directive

> "is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses".

The Orphan Works Directive,[5] which was adopted in 2012, reiterates the statement from the Infosoc Directive that the Directive is without prejudice to ECL and, accordingly that ECLs are accepted as a national solution. It is thus stated in recital 24 in the Preamble of the Directive that:

> "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses".

In addition, Art. 1(5) of the Directive confirms that the Directive "does not interfere with any arrangements concerning the management of rights at national level".

Most recently, as part of the newly introduced Digital Single Market strategy, an ECL model has been proposed. According to Article 7 of the proposal for a Directive on copyright in the Digital Single Market[6] of 14 September 2016, member states shall provide for an ECL to deal with rights in out-of-commerce works used by cultural heritage institutions. Article 7 of the Directive specifies the

4. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
5. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.
6. COM(2016) 593 final.

requirements for such an ECL scheme including safeguards for unrepresented right holders. For quite a long time, ECLs have been accepted under EU law and now it seems that an ECL model is about to be integrated into EU-law, provided that the proposal for a directive on copyright in the digital single market is adopted in its present wording.

Besides what is going on at the level of EU law, ECLs have also been adopted or discussed in various individual countries. In the United Kingdom, a general ECL scheme was introduced in 2014. It is a general and flexible ECL scheme that allows copyright management organizations to operate ECLs for many different purposes, as long as they can prove to the government that the societies are sufficiently representative of the sector they operate in. In the Czech Republic, extended collective licensing covers a broad range of different uses – particularly in respect of performances and reproduction. The introduction of an ECL scheme has also been discussed in the Netherlands in order to facilitate mass-digitisation projects.

Outside the EU, Malawi has introduced an ECL scheme to be used for certain educational purposes, and an ECL system has also been proposed in China in connection with the use of musical and audio visual works for karaoke bars. In Canada, the ECL model has been a subject of prolonged interest and consideration, however, this far the discussion has not resulted in any Canadian legislation on ECL. Recently, the US Copyright Office has recommended legislation establishing an ECL option initially taking the form of a limited pilot program for mass digitization in the US.

23.3. Hybrid of exclusive rights/collective management & compulsory licensing

The ECL is a distinct regulatory licensing model. It can be described as a hybrid between traditional voluntary collective management of copyrights and compulsory licenses. Looking into the actual functioning of the ECL, the licensing model takes the best from compulsory license, which is access. In cases of mass uses of works it is usually very difficult to have all relevant rights cleared. Normally, exclu-

sive rights for mass uses are managed collectively – and then the problem is how to clear the rights of the right holders who are not members of the copyright management organization (the non-represented right holders). In principle, the rights of non-represented right holders must be cleared individually which is very burdensome and often impossible. Compulsory license solves the outsider problem by clearing the rights of all right holders and to the same effect ECLs clear the rights of non-represented right holders.

The alternative, traditional collective management of exclusive rights by means of collective agreements, cannot solve the outsider problem. However, traditional collective management has another very good feature and that is the way in which the royalty for granting the license is settled. The royalty is settled by way of negotiations which means that the market forces determine the price. From a theoretical economic perspective, the market price is the right price if the market is functioning well.

The ECL reintroduces free negotiation in setting the license rate since there is no element of compulsion in the negotiation, contrary to compulsory licensing where negotiation in reality is precluded. The major drawback of compulsory licenses is that negotiation is distorted by the fact that the right holders cannot refuse to license. Due to this fact, usually a court or tribunal must determine the royalty. However, the court or tribunal does not have access to the market evaluation to guide the determination of the 'right price' and there is a substantial risk of reaching a sub-optimal level.

The collective agreement between a copyright management organization and a user or a group of users of copyrightable works is the voluntary part of ECL. The parties can agree whatever they like. This is no different than traditional collective management of copyright.

The part of the ECL that resembles compulsory licenses relates to the right holders who are not members of the organization that has entered into the collective agreement. To those persons the ECL works as a compulsory license. In some ECL schemes such unrepresented right holders may opt out – and in this way escape the effect of compulsory license. However, that might not be a real practical

solution for the unrepresented right holder if the right holder does not know that his or her work is licensed under an ECL.

23.4. Success and criticism

All parties in the Nordic copyright-based industries are happy about ECLs, in particular, the users of copyrightable works and the organizations of copyright holders. There is thus no real criticism of ECLs in the Nordic countries.

There can be several reasons for that. One reason may be that the conditions and circumstances for ECLs to work particularly well are present in the Nordic countries. The essential condition for a well-functioning ECL system is primarily that representative organizations exist and that, overall, they cover a broad variety of right holders.

An alternative explanation of the lacking criticism of ECL could be that the ones who might be harmed by ECLs are the unrepresented copyright holders who are mostly foreign right holders. The foreign right holders may for practical reasons not know that their works are licensed under an ECL, which obviously prevents them from raising criticism. In respect of the unrepresented right holders, who still mostly are the foreign right holders, it should be added that they neither have any influence on the collective agreement that underlies the ECL nor on the way in which the copyright management organization manage the ECL.

23.5. Representativity

Representativity is a key word when it comes to the functioning and economic efficiency of ECLs. If the group of unrepresented right holders is very big, representativity is confined and that is a problem for the functioning of ECLs. The requirement of representativity is crucial because without representativity there would be a risk that the copyright management organization that enters into the collective agreement on behalf of the right holders, is not in conformity with the preferences of the majority of the affected right holders. If the majority of right holders were not represented by the copyright management organization, the copyright management organization may

e.g. enter into an agreement that the majority of right holders would not have accepted if they were asked individually. Furthermore, at a more general level, representativity ensures the legitimacy of ECLs.

It appears obvious that 100% representativity cannot be ensured. The essential question is then, what degree of representativity should be required for accepting the extension effect of ECLs in relation to unrepresented right holders.

Pursuant to the Danish Copyright Act, the copyright management organization entering into the collective agreement must represent a "substantial amount of right holders" for the collective agreement to have effect also for right holders who are not members of the organization. In the Danish Act "a substantial amount" is not necessarily equivalent to a majority of right holders. In Norway, the Cable Dispute Tribunal found that "a substantial amount" means approximately 50%.[7]

23.6. Safeguards

In the ECL schemes, there are safeguards of the right holders and, particularly, of the un-represented right holders. In some schemes but not in all, it is possible to opt out of the collective agreement and of the ECL. If a right holder decides to do this, the right holder can manage the rights freely and on an individual basis and thus exercise the rights as exclusive rights.

Often in literature, the possibility of opting out is described as an inherent feature of ECLs.[8] That is not correct. Actually, in most of the ECLs in force in the Nordic countries, right holders cannot opt out and rely on their exclusivity.

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7. Decision of the Norwegian Kabeltvistnemda (The Cable Dispute Tribunal) of 28 June 2011, Case No. 1/2010 and case No. 4/2010.
8. E.g. Stef Van Gompel, "Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?", 38 *I.I.C.* 669, 688 (2007), UK Intellectual Property Office, "©the way ahead: A Strategy for Copyright in the Digital Age" (2009), p. 38, and Daniel J. Gervais & Alana Maurushat, "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management", 2 *Can. J. L. & Tech.* 15 (2003), p. 23.

If opting out is possible, the unrepresented right holder can simply contact the copyright management organization and demand that her work shall no longer be distributed under the ECL. In practice, however, it is not necessarily so because the right holder might not know that her works are being used under an ECL agreement. Consequently, the right holder is entitled to prohibit the use of her work under the ECL agreement but she may not have the necessary information to do so. The point here is that we need to evaluate ECLs in light of practicalities and consequences.

There is no system to notify right holders that their works are being used under an ECL agreement. If the copyright management organization has decided that right holders are entitled to individual remuneration, the organization will try to track down unrepresented right holders and inform them that they are entitled to remuneration, provided that is possible within reason. Often it is not possible or it is unreasonably troublesome to track them down, and in that case it won't happen. The risk that a right holder will not know that her works are being used under an ECL agreement is larger for foreign right holders because they are more difficult for the organization to track down.

23.7. Conclusion

ECL is not an unambiguous term that signifies a specific licensing model. ECLs can be designed in many different ways and therefore they can also function in very different ways, depending on requirements of representativity, procedures for distribution of remuneration etc. It is important to have this in mind when evaluating the performance and the prospects of extending ECLs to new areas.

Overall, it can be concluded that ECLs perform well, provided that two important conditions are satisfied. Firstly, that effective institutions/organizations are in place and secondly, that representativity is insured. The two conditions are satisfied in the Nordic countries, and arguably, this is the reason why ECLs have not been met with substantial criticism in these countries. Now, ECLs seem to be introduced as a common legal instrument to license rights in the EU in relation to out-of-commerce works. Whether ECLs will perform quite

as well in other EU countries than the Nordic has to be seen and depends basically on the two essential conditions for the optimal performance of ECLs.

GENERAL TENDENCIES AND FUTURE DEVELOPMENTS

TENDANCES GÉNÉRALES ET DÉVELOPPEMENTS À VENIR

TENDENCIAS GENERALES Y DESARROLLOS FUTUROS

Moderator/Modérateur/Moderador:
Professor Morten Rosenmeier, Copenhagen

Concluding panel/plenary discussion: should copyright 'be' or not, and what do we need to do? Ways of improving the general acceptance of and respect for copyright; enforcement on the Internet; education and promotion of the general understanding of and respect for copyright.

Panel de conclusion/discussion plénière: le droit d'auteur doit-il « être » ou « ne pas être », et que faut-il faire ? Moyens d'amélioration de l'acceptation générale du droit d'auteur et la demande de son application sur l'internet, l'éduction et la promotion de la compréhension générale du droit d'auteur et son respect.

Panel de conclusión/sesión plenaria: ¿los derechos de autor deben «ser» o no ser, y que tenemos que hacer? Formas de mejorar la aceptación general y el respeto a los derechos de autor; aplicación en

Internet; educación y promoción de la comprensión general y el respeto por los derechos de autor.

24

A Future Proof Copyright System

Jacqueline Seignette[1]

The very fundamental right that limits the scope of copyright is also a major justification for copyright protection: freedom of expression.

The recent developments around the world make us realize how important freedom of expression is. Expression is curtailed in many places and on many levels. Not only in countries with a traditionally totalitarian system, but also in countries we used to think of as democratic societies. Journalists are fired and put in prison. Websites and social media are blocked by governments. Networks are banned from presidential press meetings. Etcetera.

Independent news services, artists, journalists, photographers and filmmakers in the meantime have to compete with an overload of social media and fake news.

In this environment, it is particularly important to safeguard and promote independent creation. Without independent creation, there is no certainty that we will have access to verified information,

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to cultural expressions and to new ideas. And without such access, we are likely to understand each other even less than we already do.

Copyright has an important role to play here. It enables creators and businesses to undertake independent creation. It allows them to invest in the development of new works, without being dependent on government programs.

Now, of course, this only works if the creator actually gets paid and if the public is actually given access to the work. In theory, copyright should do both: by making the work available to the public, the author can license the work and be remunerated. Payment in return for access. In practice, however, there are all sorts of obstacles that may leave the author without payment, or the end user without access. Or both.

Many obstacles have been discussed during this conference. I will briefly discuss the following obstacles that I think need to be addressed:

- Consumer perception; lack of respect for copyright
- Consumer liability vs. liability exemptions for network operators
- Users could not find right holders if they wanted to
- Authors do not share in licensing income

To make copyright future proof, we should concentrate on removing these obstacles. If we succeed in doing that, copyright law will be better equipped to do what it is supposed to do: enable authors to create works and end users to access these works. This will enhance acceptance by the public at large. And it will probably reduce the tendency to put forward new exceptions and limitations.

24.1. Consumer perception; lack of respect for copyright

Ever since the internet became available to the public at large, there has been a tremendous resource of illegal content. As a result, a whole generation has grown up thinking that it is stupid to pay for creative content. For a long time, young people have spent all their

money on cell phones, computers and internet connections. Content was downloaded for free from bit torrent or other illegal networks.

Luckily things are changing for the better. Legal content is now available online in abundance. Slowly but surely young people are warming up to the idea of paying for creative content.

Ease of use is the key: unlimited access on all devices from every location. Automatic monthly payment or micro payments.

Rightholders and distributors are adapting to this model. Licensing however is still largely territorial as a result of which consumers may not be able to get online access to content wherever they are. If you are traveling, it is annoying to get a screen saying the content you want to see is not available from the country you are in for copyright reasons. This does not help to increase consumer acceptance.

The EU legislator has acted on this. As from 2018, an EU regulation will make content portable so that consumers can access the music, movies, e-books and games they paid for from whereever they are.[2]

In addition to this, education will remain necessary. Young people should be educated to understand that the abundance and diversity of content that is available, is actually there because creators are able to retrieve payments for it. And that copyright is necessary to bring these payments about.

24.2. Consumer liability vs. liability exemption for network operators

Another reason why copyright is not doing what it is supposed to do is the allocation of liability for content.

Rightholders over the past twenty years have had a hard time fighting piracy on the internet. Courts have long held that the operators of the bit torrent and other networks are not liable because the content is not actually stored on their servers but on the computers of

2. Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

the consumers that use their networks. In other words, courts said: you cannot catch the spider in the web, but you may be able to get the consumer. In some countries, rightholders and law enforcement did revert to holding consumers liable for uploading content to these illegal networks. We all remember the three-strikes-and-you-are-out actions. This may work on a micro level but does not particularly benefit the reputation of copyright. More recently, we see ECJ decisions that transpire the notion that the liability should actually be on the spider in the web, the one that provides access by operating a network and profits from it.[3]

Young people in the meantime increasingly revert to social media platforms such as Facebook and YouTube to find content. Here too, the allocation of liability is off. Courts in many countries have held that the uploading consumer is directly liable while the networks are exempted under the safe harbour provisions for hosting providers. The fact that consumers are liable has given copyright a bad name and has spurred many to lobby for an exception for user-generated content.

Rightholders however do not want to enforce their rights against consumers. They want social networks to thrive. Rightholders want to license the operator of the network. And this makes sense: licensing the party who controls the distribution channel and who makes money by doing so. This is how copyright is supposed to work. Courts and legislators should remember this when allocating liability. The European Commission, in its Digital Single Market Initiative, has made an important first step. The draft Digital Single Market Directive requires active network operators to take out licenses. And all operators, also those who benefit from safe harbour, have to work with rightholders to install technological measures to control the use of copyright content. This will leave rightholders better equipped to procure payment. And consumers will have full access without even noticing that copyright is being exercised. And that is how it should be.

3. Most recently ECJ 14 June 2017, C-610/15, *Brein v. Ziggo, XS4all*.

24.3. Users could not find right holders if they wanted to

This issue has already been discussed this morning. Libraries, museums and archives need to be able to work with copyright content, but have a hard time dealing with the rights. Money obviously is an issue, especially where governments cut down on funding. Another issue is that museums and archives may be willing to take out a license, but are not able to find the parties who can license the thousands or millions of works used. Several legislative initiatives have been undertaken to introduce mandatory collective management for orphan works and out of commerce works.[4] The problem is that these are piecemeal solutions that do not meet the needs of the libraries, museums and archives. The collection may be part orphan, part out of commerce and part in commerce. The museum or archive furthermore may want to use the works in ways that are not covered by mandatory collective management. To facilitate this, CMOs should either be able to license all works (ECL) or individual licenses should be easily available (in lieu of or in combination with collective licenses). We are nowhere near that situation. Could the solution lie in the publication of accurate licensing data? Or perhaps in blockchain? It is clear that one of the challenges for the near future lies in finding a workable balance between individual and collective licensing. We should bear in mind that if the market does not find the balance, the call for outright exceptions will re-emerge.

24.4. Authors do not share in licensing income

Finally, an important obstacle for a future-proof copyright is the fact that licences are often being paid without the author benefiting from it at the end of the day. Publishers, record companies and film producers are adapting to new, online business models. In this hard and fast world, authors tend to get left behind. Deals are struck with Internet platforms without authors participating. This is in particular

4. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works. Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016) 593 final).

true for writers, photographers and film makers. In a level playing field, they would be able to negotiate a remuneration for digital uses in their contract with the publisher or producer, requiring the publisher or producer to allocate a share of the licensing income to them. In reality most authors are not in a position to do so. This undermines the primary justification for copyright: enabling creators to retrieve income from their works so that they can continue creating.

To compensate for the lack of negotiation position on the individual level, authors should be positioned to negotiate for remunerations collectively, either through collective bargaining or collective management. The law does not always accommodate this. Competition laws in many countries preclude independent creators from negotiating collectively. Authors' CMO's furthermore have difficulties under the law to establish mandate for digital uses and as a result have a hard time securing fees for TV catch-up services, video on demand, online press services, etcetera.

In several countries, legislators have acted to improve the position of authors, however the scope and modalities differ from country to country. In the Netherlands, the legislator in 2015 introduced a statutory right for authors CMO's to collect fees from TV distributors.[5] The director and screenwriter transfers their rights to the producer and in return the TV distributor has a statutory duty to pay a fee to the CMO directly. A similar solution could work for video on demand and for on demand uses of literary works. This would ensure that authors continue to receive income as the traditional markets for films, books and news are gradually being replaced by on-demand services.

In summary, I believe that if we can tackle these issues, copyright will function better and should do what it is supposed to do: make sure that authors can create and that the public is guaranteed

5. Article 45d (2) Act of 30 June 2015 to amend the Copyright Act and the Act on Neighbouring Rights to enhance the author's and performer's position in respect of copyright and neighbouring rights contracts (Act on Author's Contracts). Translation available at <file:///C:/Users/seignette/Downloads/Dutch%20Copyright%20Contract%20Act_2%20(1).pdf>.

access to independent information and diverse culture expressions. As such, copyright does have an important role to play in the future.

25

Un système de droit d'auteur de preuve de l'avenir

Jacqueline Seignette[1]

Le droit fondamental qui limite la portée du droit d'auteur est également une justification majeure de la protection du droit d'auteur: la liberté d'expression.

Les développements récents dans le monde nous font prendre conscience de l'importance de la liberté d'expression. L'expression est restreinte dans de nombreux endroits et à plusieurs niveaux. Non seulement dans les pays ayant un système traditionnellement totalitaire, mais aussi dans les pays que nous considérions comme des sociétés démocratiques. Les journalistes sont licenciés et mis en prison. Les sites Web et les médias sociaux sont bloqués par les gouvernements. Les réseaux sont interdits de réunions de presse présidentielle. Etcetera.

Entre-temps, les services de presse indépendants, les artistes, les journalistes, les photographes et les cinéastes doivent faire face à une surcharge de médias sociaux et de fausses informations.

1. Partenaire chez Höcker advocaten, Amsterdam, Pays-Bas.

Dans ce contexte, il est particulièrement important de sauvegarder et de promouvoir la création indépendante. Sans création indépendante, il n'y a aucune certitude que nous aurons accès à des informations vérifiées, à des expressions culturelles et à de nouvelles idées. Et sans un tel accès, nous sommes susceptibles de nous comprendre encore moins que nous le faisons déjà.

Le droit d'auteur a un rôle important à jouer ici. Il permet aux créateurs et aux entreprises d'entreprendre une création indépendante. Cela leur permet d'investir dans le développement de nouvelles œuvres, sans dépendre des programmes gouvernementaux.

Maintenant, bien sûr, cela ne fonctionne que si le créateur est effectivement payé et si le public a effectivement accès au travail. En théorie, le droit d'auteur devrait faire les deux: en mettant l'œuvre à la disposition du public, l'auteur peut autoriser l'œuvre et être rémunéré. Paiement en échange d'un accès. Dans la pratique, cependant, il existe toutes sortes d'obstacles qui peuvent laisser l'auteur sans paiement, ou l'utilisateur final sans accès. Ou les deux.

De nombreux obstacles ont été discutés au cours de cette conférence. Je discuterai brièvement des obstacles suivants qui, selon moi, doivent être abordés:

— Perception des consommateurs; manque de respect pour le droit d'auteur
— la responsabilité des consommateurs par rapport à des exonérations de responsabilité pour les opérateurs de réseaux
— Les utilisateurs ne pouvaient pas trouver les titulaires de droits s'ils le souhaitent
— Les auteurs ne partagent pas les revenus des licences

Pour que le droit d'auteur devienne une preuve à l'avenir, nous devrions nous concentrer sur l'élimination de ces obstacles. Si nous réussissons à faire cela, le droit d'auteur sera mieux armé pour faire ce qu'il est supposé faire: permettre aux auteurs de créer des œuvres et aux utilisateurs finaux d'accéder à ces œuvres. Cela permettra d'améliorer l'acceptation par le grand public. Et cela réduira probablement la tendance à mettre en avant de nouvelles exceptions et limitations.

25.1. Perception des consommateurs; manque de respect pour le droit d'auteur

Depuis qu'Internet est devenu accessible au grand public, il y a eu une énorme source de contenu illégal. En conséquence, toute une génération a grandi en pensant qu'il est stupide de payer pour du contenu créatif. Pendant longtemps, les jeunes ont dépensé tout leur argent sur les téléphones cellulaires, les ordinateurs et les connexions Internet. Le contenu a été téléchargé gratuitement à partir de bit torrent ou d'autres réseaux illégaux.

Heureusement les choses s'améliorent. Le contenu légal est maintenant disponible en ligne en abondance. Lentement mais sûrement, les jeunes s'habituent à l'idée de payer pour du contenu créatif.

La facilité d'utilisation est la clé: un accès illimité sur tous les appareils à partir de n'importe quel endroit. Paiement mensuel automatique ou micro-paiements.

Les titulaires de droits et les distributeurs s'adaptent à ce modèle. La concession de licences est cependant encore largement territoriale, ce qui fait que les consommateurs ne sont pas en mesure d'accéder au contenu en ligne, où qu'ils se trouvent. Si vous êtes en voyage, il est ennuyeux d'avoir un écran indiquant que le contenu que vous voulez voir n'est pas disponible dans le pays où vous séjournez pour des raisons de droits d'auteur. Cela ne contribue pas à accroître l'acceptation des consommateurs.

Le législateur de l'UE a agi à ce sujet. À partir de 2018, un règlement de l'UE rendra le contenu portable afin que les consommateurs puissent accéder à la musique, aux films, aux livres électroniques et aux jeux pour lesquels ils ont payé, où qu'ils soient.[2]

De plus, l'éducation restera nécessaire. Les jeunes devraient être éduqués pour comprendre que l'abondance et la diversité du contenu disponible sont réellement là parce que les créateurs sont capables d'en récupérer les paiements. Et ce droit d'auteur est nécessaire pour que ces paiements soient versés.

2. Règlement (UE) 2017/1128 du Parlement européen et du Conseil du 14 Juin 2017, relatif à la portabilité transfrontalière des services de contenu en ligne dans le marché intérieur.

25.2. La responsabilité des consommateurs par rapport à l'exonération de responsabilité pour les opérateurs de réseaux

Une autre raison pour laquelle le droit d'auteur ne fait pas ce qu'il est censé faire est l'attribution de la responsabilité pour le contenu.

Au cours des vingt dernières années, les titulaires de droits ont eu du mal à lutter contre la piraterie sur Internet. Les tribunaux ont longtemps soutenu que les opérateurs du bit torrent et d'autres réseaux ne sont pas responsables parce que le contenu n'est pas réellement sauvegardé sur leurs serveurs mais sur les ordinateurs des consommateurs qui utilisent leurs réseaux. En d'autres termes, les tribunaux ont déclaré: vous ne pouvez pas attraper l'araignée dans la toile du Web, mais vous pouvez être en mesure de toucher le consommateur. Dans certains pays, les titulaires de droits et les forces de l'ordre ont fait en sorte que les consommateurs soient tenus responsables du téléchargement de contenu sur ces réseaux illégaux. Nous avons tous le souvenir du système des « trois infractions et c'est fini ». Cela peut fonctionner à un niveau micro, mais ne bénéficie pas particulièrement à la réputation du droit d'auteur. Plus récemment, nous avons vu des décisions de la CJE qui indiquent que la responsabilité revient à l'araignée sur la toile du Web, c'est elle qui fournit l'accès en exploitant un réseau et en tire profit.[3]

Entre-temps, les jeunes se tournent de plus en plus vers les plateformes de médias sociaux telles que Facebook et YouTube pour trouver du contenu. Ici aussi, l'attribution de la responsabilité est désactivée. Dans de nombreux pays, les tribunaux ont jugé que le consommateur qui télécharge est directement responsable alors que les réseaux sont exemptés en vertu des dispositions relatives à la sphère de sécurité pour les hébergeurs. Le fait que les consommateurs soient responsables a donné une mauvaise réputation au droit d'auteur et a incité beaucoup de personnes à faire pression pour obtenir une exception pour le contenu généré par l'utilisateur.

3. Plus récemment, CJCE 14 juin 2017, C-610/15, *Brein v. Ziggo, XS4all*.

Les titulaires de droits ne veulent toutefois pas faire valoir leurs droits contre les consommateurs. Ils veulent que les réseaux sociaux prospèrent. Les titulaires de droits veulent accorder une licence à l'opérateur du réseau. Et cela a du sens: accorder une licence à la partie qui contrôle le canal de distribution et qui gagne de l'argent en le faisant. Voici comment le droit d'auteur est censé fonctionner. Les tribunaux et les législateurs devraient s'en souvenir lors de l'attribution de la responsabilité. Dans son initiative pour le marché unique numérique, la Commission européenne a fait un premier pas important. Le projet de directive sur le marché unique numérique exige que les opérateurs de réseaux actifs prennent des licences. Et tous les opérateurs, y compris ceux qui bénéficient de la sécurité, doivent travailler avec les titulaires de droits pour installer des mesures technologiques afin de contrôler l'utilisation du contenu protégé par le droit d'auteur. Cela permettra aux titulaires de droits d'être mieux armés pour obtenir des paiements. Et les consommateurs auront un accès complet sans même remarquer que le droit d'auteur est exercé. Et c'est ainsi qu'il devrait être.

25.3. Les utilisateurs ne pouvaient pas trouver les titulaires de droits s'ils le souhaitaient

Cette question a déjà été discutée ce matin. Les bibliothèques, les musées et les archives doivent être en mesure de fonctionner avec du contenu protégé par le droit d'auteur, mais ils ont du mal à traiter avec les droits. L'argent est évidemment un problème, en particulier lorsque les gouvernements réduisent le financement. Un autre problème est que les musées et les archives peuvent être disposés à souscrire une licence, mais ne sont pas en mesure de trouver les parties qui peuvent accorder une licence pour les milliers ou les millions d'œuvres utilisées. Plusieurs initiatives législatives ont été prises pour introduire une gestion collective obligatoire des œuvres orphelines et des œuvres hors commerce.[4] Le problème est que ce sont des solu-

4. Directive 2012/28/UE du parlement européen et du conseil du 25 octobre 2012 relative à certaines utilisations autorisées d'œuvres orphelines. Proposition de la directive du parlement européen et du conseil sur le droit d'auteur dans le mar-

tions fragmentaires qui ne répondent pas aux besoins des bibliothèques, des musées et des archives. La collection peut être une partie orpheline, une partie hors du commerce et une partie dans le commerce. Le musée ou les archives peuvent en outre vouloir utiliser les œuvres d'une manière qui n'est pas couverte par une gestion collective obligatoire. Afin de faciliter cela, les OGC devraient être en mesure d'accorder une licence pour toutes les œuvres (ECL) ou des licences individuelles devraient être facilement disponibles (à la place ou en combinaison avec les licences collectives). Nous sommes loin de cette situation. La solution pourrait-elle résider dans la publication de données précises sur les licences ? Ou peut-être dans la chaîne de bloc ? Il est clair que l'un des défis dans un proche avenir réside dans la recherche d'un équilibre réalisable entre les licences individuelles et collectives. Nous devons garder à l'esprit que si le marché ne parvient pas à trouver l'équilibre, l'appel à des exceptions directes réapparaîtra.

25.4. Les auteurs ne partagent pas les revenus des licences

Enfin, un obstacle important pour un droit d'auteur à l'épreuve de l'avenir est le fait que les licences sont souvent payées sans que l'auteur en bénéficie au final. Les éditeurs, les maisons de disques et les producteurs de films s'adaptent aux nouveaux modèles économiques en ligne. Dans ce monde difficile et rapide, les auteurs ont tendance à être laissés pour compte. Les accords sont conclus avec des plates-formes Internet sans la participation des auteurs. Ceci est particulièrement vrai pour les écrivains, les photographes et les cinéastes. Dans des conditions équitables, ils seraient en mesure de négocier une rémunération pour les utilisations numériques dans leur contrat avec l'éditeur ou le producteur, exigeant que l'éditeur ou le producteur leur attribue une part du revenu de la licence. En réalité, la plupart des auteurs ne sont pas en mesure de le faire. Cela porte atteinte à la principale justification du droit d'auteur : permettre aux créateurs de

ché unique numérique (COM (2016) 593 final).

récupérer des revenus de leurs œuvres afin qu'ils puissent continuer à créer.

Pour compenser l'absence de position de négociation au niveau individuel, les auteurs devraient être en mesure de négocier des rémunérations collectivement, soit par la négociation collective, soit par la gestion collective. La loi ne prend pas toujours en compte cela. Les lois sur la concurrence dans de nombreux pays n'autorisent pas les créateurs indépendants à négocier collectivement. Les OGC des auteurs ont en outre des difficultés en vertu de la loi à établir un mandat pour les utilisations numériques et ont donc du mal à obtenir des frais pour les services de télévision de rattrapage, la vidéo à la demande, les services de presse en ligne, etc.

Dans plusieurs pays, les législateurs ont pris des mesures pour améliorer la situation des auteurs, mais la portée et les modalités diffèrent d'un pays à l'autre. Aux Pays-Bas, le législateur a introduit en 2015 le droit statutaire pour les OGC d'auteurs à percevoir des redevances auprès des distributeurs de télévision.[5] Le réalisateur et le scénariste transfèrent leurs droits au producteur et, en retour, le distributeur de télévision a l'obligation légale de payer des frais à l'OGC directement. Une solution similaire pourrait fonctionner pour la vidéo à la demande et pour les utilisations à la demande d'œuvres littéraires. Cela permettrait aux auteurs de continuer à percevoir des revenus étant donné que les marchés traditionnels des films, des livres et des nouvelles sont progressivement remplacés par des services à la demande.

En résumé, je crois que si nous pouvons nous attaquer à ces problèmes, le droit d'auteur fonctionnera mieux et fera ce qu'il est censé faire: s'assurer que les auteurs puissent créer et que le public ait accès à des informations indépendantes et à des expressions culturelles diverses. En tant que tel, le droit d'auteur a un rôle important à jouer dans l'avenir.

5. Article 45d (2) loi du 30 juin 2015 modifiant la loi sur le droit d'auteur et la loi sur les droits voisins pour renforcer la position de l'auteur et de l'interprète en matière de droit d'auteur et de droits voisins (loi sur les contrats d'auteur). Traduction disponible à <file:///C:/Utilisateurs/seignette/Téléchargements/Dutch%20Copyright%20Contract%20Act_2% 20(1).pdf>.

26

Un Sistema de Derechos de Autor a Prueba de Futuro

Jacqueline Seignette[1]

El derecho fundamental que limita el alcance del derecho de autor, es también una justificación importante para la protección de derechos de autor: libertad de expresión.

Los recientes sucesos en el mundo, nos hacen darnos cuenta de lo importante que es la libertad de expresión. La expresión es restringida en muchos lugares y en muchos niveles. No sólo en países con un sistema totalitario tradicional, sino también en países que solíamos pensar que eran sociedades democráticas. Los periodistas son despedidos y metidos en la cárcel. Los sitios web y las redes sociales son bloqueadas por los gobiernos. Se prohibe la presencia de redes en las reuniones de prensa presidenciales. Etcétera.

Servicios de noticias independientes nuevos, mientras tanto, con artistas, periodistas, fotógrafos y productores de películas tienen que competir con una sobrecarga de redes sociales y noticias falsas.

En este contexto, es particularmente importante salvaguardar y promover la creación independiente. Sin creación independiente, no

1. Socio en Höcker advocaten, Ámsterdam, Países Bajos.

existe certeza de que se tenga acceso a información verificada, a expresiones culturales y a nuevas ideas. Y sin tal acceso, es probable que nos entendamos unos a otros incluso menos de lo que ya lo hacemos.

Los derechos de autor tienen un papel importante que desempeñar aquí. Permite a creadores y empresa emprender la creación independiente. Les permite invertir en el desarrollo de nuevos trabajos, sin depender de programas gubernamentales.

Ahora, por supuesto, esto sólo funciona si el creador es pagado y si el público realmente recibe acceso a la obra. En teoría, los derechos de autor debería hacer ambas cosas: poniendo a disposición la obra al público, el autor puede licenciar el trabajo y ser remunerado. Pago a cambio de acceso. No obstante, en la práctica hay todo tipo de obstáculos que pueden dejar el autor sin pago, o al usuario final sin acceso. O ambas cosas.

Durante esta conferencia se han discutido muchos obstáculos. Discutiré brevemente los siguientes obstáculos que creo que deben abordarse:

— Percepción del consumidor; falta de respeto por los derechos de autor
— Responsabilidad del consumidor frente a exenciones de responsabilidad para operadores de redes
— Los usuarios no podían encontrar titulares de derechos aunque querían
— Los autores no participan en ingresos de licencia

Para hacer de los derechos de autor, unos a prueba de futuro, debemos concentrarnos en eliminar estos obstáculos. Si tenemos éxito, la legislación alrededor de los derechos de autor estará mejor equipada para hacer lo que se supone que debería hacer: permitir a los autores la creación de obras, y a los usuarios el acceso a las mismas. Esto mejorará la aceptación público a largo plazo. Mientras que probablemente reducirá la tendencia a proponer nuevas excepciones y limitaciones.

26.1. Percepción del Consumidor; falta de Respeto por los Derechos de Autor

Desde que internet llegó a estar disponible para el público en general, ha sido un recurso enorme de contenidos ilegales. Como resultado, una generación entera ha crecido pensando que es estúpido pagar por contenidos creativos. Durante mucho tiempo, la gente joven ha gastado todo su dinero en teléfonos celulares, ordenadores y conexiones a internet. El contenido fue descargado gratuitamente para bit torrent u otras redes ilegales.

Afortunadamente las cosas están cambiando para mejor. El contenido jurídico está ahora disponible en abundancia en línea. Lento pero seguro, los jóvenes se están haciendo a la idea de pagar por contenido creativo.

La facilidad de uso es la clave: acceso ilimitado en todos los dispositivos desde cualquier ubicación. Pago mensual automático o micropagos.

Los titulares de derechos y los distribuidores se están adaptando a este modelo. Sin embargo se sigue licenciando en gran parte territorialmente resultando esto en una limitación geográfica que impide a los usuarios el obtener acceso a contenido en línea desde dondequiera que estén. Si uno está viajando, es molesto ver una pantalla que diga que el contenido que desea ver no está disponible desde el país en el que se encuentra motivos de derechos de autor. Esto no ayuda a aumentar la aceptación del consumidor.

El legislador de la UE ha actuado en esto. A partir de 2018, un reglamento de la UE hará el contenido portátil considerablemente más accesible para que los consumidores puedan acceder a música, películas, libros electrónicos y juegos por los que pagaron desde donde quiera que estén.[2]

Además de esto, la educación seguirá siendo necesaria. Los jóvenes deben ser formados para entender que la abundancia y la diversidad de contenido que está disponible, está realmente allí porque los

2. Reglamento (UE) 2017/1128 del Parlamento europeo y del consejo, de 14 de junio de 2017 sobre la portabilidad transfronteriza de servicios de contenido en línea en el mercado interior.

creadores son capaces de recuperar pagos por ello. Y que los derechos de autor son necesarios para lograr estos pagos.

26.2. La Responsabilidad del Consumidor frente a la Exención de Responsabilidad para Operadores de Redes

Otra razón por la qué los derechos de autor no están haciendo lo que se supone que deberían hacer, es la asignación de responsabilidad por contenido.

Los titulares de derechos lo han pasado muy mal en los últimos veinte años luchando contra la piratería en internet. Los tribunales han sostenido durante mucho tiempo que los operadores de bit torrent y otras redes no son responsables porque el contenido no está realmente almacenado en sus servidores, sino en los ordenadores de los consumidores que usan sus redes. En otras palabras, los tribunales dicen: no puedes atrapara a la araña en la red, pero podrías ser capaz de llegar al consumidor. En algunos países, los titulares de derechos y la aplicación de la ley se volvió contra los consumidores haciéndolos responsables de subir contenido a esas redes ilegales. Todos recordamos las acciones «tres avisos y estás fuera». Esto puede funcionar a un micro nivel pero no beneficia particularmente a la reputación de los derechos de autor. Más recientemente, vemos decisiones del TJCE? Desarrollando la noción de que la responsabilidad realmente le corresponde a la araña en la red, la que proporciona acceso operando una red y se beneficia de ella.[3]

Mientras tanto los jóvenes cada vez más vuelven a plataformas de medios sociales como Facebook y YouTube para encontrar contenido. Aquí tampoco hay asignación de responsabilidad. En muchos países los tribunales han sostenido que el consumidor que sube contenido es directamente responsable, mientras que las redes están exentas bajo las disposiciones de puerto seguro para los proveedores de hosting. El hecho de que los consumidores sean responsabbilizados, ha dado a los derechos de autor un mal nombre y ha estimulado a muchos a presionar por una excepción de contenido generado por el usuario.

3. Recientemente el TJCE 14 de junio de 2017, C-610/15, *Brein v. Ziggo, XS4all*.

Los titulares de derechos de autor sin embargo, no quieren hacer valer sus derechos contra los consumidores. Quieren que las redes sociales prosperen. Los titulares de derechos quieren licenciar al operador de la red. Y esto tiene sentido: licenciar la parte que controla el canal de distribución y que gana dinero por hacerlo. Así es cómo se supone que los derechos de autor deberán funcionar. Los tribunales y los legisladores deberían recordar esto al asignar responsabilidad. La Comisión Europea, en su Iniciativa de Mercado Único Digital, ha dado un primer paso importante. El borrador para una Directiva de Mercado Único Digital requiere que los operadores de red activos saquen licencias. Y todos los operadores, también aquellos que se benefician de puerto seguro, tienen que trabajar con los titulares de derechos para instalar medidas tecnológicas de control del uso del contenido protegido por los derechos de autor. Esto dejará a los titulares mejor equipados para procurar el pago. Y los consumidores tendrán acceso completo sin ni siquiera darse cuenta de que se están ejerciendo derechos de autor. Y así es como debería ser.

26.3. Los Usuarios no pudieron encontrar Titulares de Derechos si querían

Este tema ya ha sido discutido esta mañana. Las bibliotecas, museos y archivos necesitan ser capaces de trabajar con contenido protegido por los derechos de autor, pero les es sumamente difícil lidiar con estos derechos. El dinero es obviamente un problema, especialmente donde los gobiernos reducen el financiamiento. Otro problema es que los museos y los archivos pueden estar dispuestos a sacar una licencia, pero no son capaces de encontrar las partes que pueden licenciar los miles o millones de obras utilizadas. Se han realizado varias iniciativas legislativas para introducir una gestión colectiva obligatoria para las obras huérfanas y aquellas fuera del mercado.[4] El

4. Directiva 2012/28/CE del Parlamento europeo y del consejo, del 25 de octubre de 2012 en ciertos usos permitidos de obras huérfanas. Propuesta para una Directiva del parlamento europeo y del consejo sobre derechos de autor en el mercado único digital (COM(2016) 593 final).

problema es que estas son soluciones parciales que no cumplen las necesidades de las bibliotecas, museos y archivos. La colección puede ser huérfana en parte, parte fuera del mercado y parte en el mercado. El museo o archivo además puede querer utilizar las obras de maneras que no están cubiertas por una gestión colectiva obligatoria. Para facilitar esto, las OGCs deberían ser capaces de licenciar todas las obras (ECL) o las licencias individuales deberían estar fácilmente disponibles (en lugar de o en combinación con licencias colectivas). No estamos ni siquiera cerca de este escenario. ¿Podría la solución residir en la publicación de datos de licenciación precisos? ¿O tal vez en cadena de bloques? Está claro que uno de los retos en un futuro cercano se encuentra en la búsqueda de un equilibrio viable entre licencias individuales y licencias colectivas. Debemos tener en cuenta que si el mercado no encuentra el equilibrio, la llamada a excepciones absolutas resurgirá.

26.4. Los Autores no participan en Ingresos de Licencia

Finalmente, un obstáculo importante para derechos de autor a prueba de futuro, es el hecho de que a menudo se pagen licencias sin que el autor se beneficie de estos pagos al final del día. Editoriales, discográficas y productoras de cine se están adaptando a nuevos modelos de negocio en línea. En este mundo difícil y rápido, los autores tienden a ser dejados atrás. Se llega a acuerdos con las plataformas de Internet sin la participación de los autores. Esto es en particular cierto para escritores, fotógrafos y productores de películas. En igualdad de condiciones, serían capaces de negociar una remuneración para los usos digitales en su contrato con el editor o productor, exigiendo la asignación de una parte de los ingresos de las licencias para sí mismos. En la realidad, la mayoría de los autores no están en posición de hacerlo. Esto socava la justificación primaria para el derecho de autor: permitir a los creadores recuperar los ingresos por sus obras para que puedan seguir creando.

Para compensar la falta de posición de negociación a nivel individual, los autores deben posicionarse colectivamente al momento de negociar remuneraciones, ya sea a través de la negociación colectiva o la gestión colectiva. La ley no siempre facilita esto. Las leyes de

competencia en muchos países impiden la negociación colectiva de creadores independientes. Además las OGCs de autores tienen dificultades bajo la ley para establecer mandatos de usos digitales y, en consecuencia, tienen dificultades para asegurar tarifas para servicios de Catch-Up TV, video a demanda, servicios de prensa en línea, etcétera.

En varios países, los legisladores han actuado para mejorar la posición de los autores, sin embargo, el alcance y las modalidades difieren de país a país. En los Países Bajos, el legislador en el año 2015 introdujo un derecho legal para que las OGCs de autores cobraran tasas de distribuidores de TV.[5] El director y guionista transfieren sus derechos al productor y a cambio el distribuidor de TV tiene la obligación legal de pagar una cuota directamente a la OGC. Una solución similar podría funcionar para video a demanda y para usos a demanda de obras literarias. Esto garantizaría que los autores continúan recibiendo ingresos en un contexto donde los mercados tradicionales para películas, libros y noticias están siendo poco a poco sustituidos por servicios a demanda.

En resumen, creo que si podemos abordar estos temas, los derechos de autor funcionarán mejor, haciendo lo que deberían hacer: asegurarse de que los autores pueden crear y que se garantiza el acceso al público a la información independiente y a las diversas expresiones culturales. Como tal, los derechos de autor tienen un papel importante que desempeñar en el futuro.

5. El artículo 45 d (2) Ley del 30 de junio de 2015 para enmendar la Ley de Derecho de Autor y la Ley sobre los derechos conexos para mejorar la posición del autor y del intérprete con respecto a los derechos de autor y los contratos de derechos conexos (Ley de los Contratos de los Autores). Traducción disponible en <file:///C:/Users/seignette/Downloads/Dutch%20Copyright%20Contract%20Act_2 %20(1).pdf>.

27

The Future of Collective Rights Management – General tendencies and future developments

Stefania Ercolani[1]

27.1. Introduction

According to our Roman ancestors "Historia magistra vitae[2]", the study of the past should serve as a lesson for the future. Initially, I was tempted to follow this literally and start with a summary of the developments that, during more than a century, have characterized

1. President of ALAI Italia and Director of the Multimedia Department of the Italian Society of Authors and Publishers (SIAE). This paper was prepared by the author in her personal capacity. All opinions expressed in this article are those of the author and do not reflect the view of SIAE. All Internet references in this paper were last visited on August 20, 2017.
2. Cicero, De oratore II,9, *Historia vero testis temporum*, *lux veritatis*, *vita memoriae*, *magistra vitae*, *nuntia vetustatis* "By what other voice, too, than that of the orator, is history, the witness of time, the light of truth, the life of memory, the directress of life, the herald of antiquity, committed to immortality?".

the creation and the growth of authors' societies, i.e. the entities that are now commonly denominated collective rights management organizations or, briefly, CMOs. But do not worry, I will not.

Despite several remarkable differences depending on the country where a CMO is located[3] or on the type of rights or works a CMO administers, collective management happens to be quite vocally criticized by a wide range of players, including various categories of users (which may be expected, because users are the "counterparts" of CMOs who enforce rights and collect copyright fees), and potential or actual competitors of the established collective management framework (not too surprisingly, either); it may be more interesting to note that collective management is criticized also by different groupings of rightowners and members and by apparently neutral organizations of consumers and cultural entities, like libraries, as well as by specialized academics.[4]

Moreover rights collective management appears to be under scrutiny also by public authorities in the US[5] as well as in the Euro-

3. Wenqi Liu, "Models for Collective Management of Copyright from an International Perspective; Potential Changes for Enhancing Performance", *Journal of Intellectual Property Rights*, vol. 17, 2012, pp. 46–54.
4. Neil Weinstock Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing", 17 *HARV. J.L. & TECH.* 1 (2003); for a more nuanced approach: Giuseppe Mazziotti, "New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management (April 1, 2011)". *Columbia Public Law Research Paper* No. 11-269, available at <http://dx.doi.org/10.2139/ssrn.1814264>; Lucie Guibault, Stef van Gompel, "Collective Management in the European Union (January 12, 2012)", *Amsterdam Law School Research Paper* No. 2012-08, Institute for Information Law Research Paper No. 2012-08. Available at SSRN: <https://ssrn.com/abstract=1984015>.
5. As it is summarized at page 1 of the document *Copyright and the Music Marketplace – a report of the Register of Copyrights* published in February 2015: "While there is general consensus that the system needs attention, there is less agreement as to what should be done. In this report, after reviewing the existing framework and stakeholders' views, the Copyright Office offers a series of guiding principles and preliminary recommendations for change. The Office's proposals are meant to be contemplated together, rather than individually. With this approach, the Office seeks to present a series of balanced tradeoffs among the interested parties to create a fairer, more efficient, and more rational system for all.", <https://www.copyright.govpolicy/musiclicensingstudy/copyright-and-the-

pean Union.[6]

Such brief hints may contribute to explain why today, collective rights management is facing an encompassing transformation. Borrowing Voltaire's words: "The present is pregnant with the future" collective rights management is passing through a stage where one can discern what is taking form and yet one can only try to imagine what the final scenario will be.

27.2. Definitions and scope

For the notion of collective rights management, I am referring to the two seminal WIPO books on the subject of collective management of copyright and neighboring rights.[7] The first book was published in

music-marketplace.pdf>.

6. The attitude of the EU is formalized in recital 55 of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, where it clarifies that "the objectives of this Directive, namely to improve the ability of their members to exercise control over the activities of collective management organizations, to guarantee sufficient transparency by collective management organizations and to improve the multi-territorial licensing of authors' rights in musical works for online use, cannot be sufficiently achieved by Member States but can rather, by reason of their scale and effects, be better achieved at Union level". The same Directive, at article 41, establishes the creation of an expert group, composed of representatives of the competent authorities of the Member States. The group is in charge: "(a) to examine the impact of the transposition of this Directive on the functioning of collective management organizations and independent management entities in the internal market, and to highlight any difficulties; (b) to organise consultations on all questions arising from the application of this Directive; (c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments, especially in relation to the digital market in works and other subject-matter.", <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026>.
7. Mihaly Ficsor, *Collective Management of Copyright and Related Right* (Geneva, 1990), originally presented in English, French and Spanish, and then, with the authorization of WIPO, translated into a number of other languages, including Russian. The 2001 edition is avalaible at: <https://books.google.it/books>.

1990 and an updated version of the book was published by WIPO in 2002.[8]

The legal literature on this theme is wide and steadily increasing, especially concerning the relation between copyright and digital usages. The scope of this report is circumscribed to the aspects that, in my opinion, can highlight the trends more likely to develop in future. My observations are therefore selective and subject to some necessary simplifications.

First of all, although collective management applies to different categories of rights and types of works, the scope is limited to musical works, where collective management of performing and mechanical rights is more widespread and, more importantly, some remarkable changes are already visible. Secondly, unless specified otherwise, the scope does not cover related rights, a sector where copyright management is limited mostly to rights traditionally considered secondary, covering usually rights to remuneration granted to producers and performers by national laws.[9] Thirdly, I do not consider specifically the differences in the approach to exclusive rights compared to the various types of remuneration rights, existing in national copyright laws distinctly for author's rights and related rights, despite the fact that they influence the rightowners' choice between individual and collective management.

27.3. The existing models of Music Rights Collective Management

Traditional music rights management is assuming new shapes. As a starting point, we can take the two main approaches to collective rights management, the US model and the European/Latin American model.

8. Both versions of the book describe the main areas and typical forms of collective management of copyright and related rights, while analyzing the basic conditions and requirements for the establishment and operations of CMOs.
9. Exclusive related rights pertaining to phonographic products are normally exercised by the individual producers, inclusive of performers' rights, assigned to them.

The distinct features of the two models can be analysed taking into consideration two main aspects: the first one refers to the institutional/legal framework in general and the second one refers to the concept of copyright itself.[10] These two aspects are closely related, to the point that it would be hard to understand the collective management evolution without taking their interaction into consideration.

As to the legal framework, historically, the major difference between US and continental Europe refers to the weight of competition, prevailing in the US, while in Europe and Latin America, national monopolies have been the rule (with the notable exception of Brazil), supported by the general acceptance of the principles of solidarity among rightowners.

A meaningful divergence concerns also the second aspect quoted above, since in continental Europe the concept of "droit d'auteur" (author's right) stresses the objective to remunerate authors for their creative effort and the respect for the author's personality and freedom of expression. The legal protection is oriented, in principle, to the "favor auctoris", since the author is considered as the weaker party in the intellectual work exploitation chain.

The concept of "copyright" in the USA, as in some other common law countries, is more focused, in principle, on the incentive to the creation of works "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.".[11] Rules and practices under the copyright "label" are concerned more with industrial and economic aspects, than with author's personality. The export of copyright products is supported for economic reasons, without forgetting, however, that it represents also a form of soft power[12] through the successful dissemination of cultural models.

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10. For a historical perspective of these differences, see: Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press, 2015).
11. Article I, Section 8, Clause 8, of the United States Constitution.
12. The term has become common to describe forms of "cultural diplomacy" outside the political environment where it was firstly introduced by Joseph Nye, *Bound to Lead: The Changing Nature of American Power* (New York: Basic Books, 1990), and further expanded in *Soft Power: The Means To Success In World Politics* (Public

Accordingly, there are various circumstances where a legal person (e.g. the producer or the employer, etc.) is deemed to be the original copyright owner in the common law framework while, on the contrary, in continental Europe, copyright and authorship are always originally granted to a natural person and only in some exceptional cases, the economic rights are automatically vested in the producer or the employer, without prejudice to the right of attribution to the natural person who created the work.

While originally limited to certain author's rights, in the final part of 20th century, collective management has been extended to a number of related rights in music performances and phonograms. Consequently, the influence of the phonographic industry in music rights collective management is increasing, affecting also operational and commercial practices of this sector. This trend is common to Europe and US, even though with different features.

Three main factors – working together or separately – have impacted collective rights management in the last twenty years; these same factors are pushing the US and European models toward less differentiated positions; they are Globalization, Competition and Digital Innovation. I will try to outline how these factors are influencing copyright management and determining the evolution of CMOs.

27.4. Globalization

Even before the elimination of the barriers to international trade and its worldwide increase, several generations have enjoyed the global dissemination of music and films all over the (mostly western) world and have shared the audiovisual habitat. The intermingling of cultures has increased thanks to the development of mass tourism as well as because of the growing importance of mass media, while regional Trade Agreements[13] have facilitated the growth of commercial exchanges. On one hand, this trend has influenced also intellectual

Affairs, 2005).

13. GATT, EFTA, EEA, NAFTA and other Regional treaties are in place, establishing a necessary level of cooperation among the countries involved including in the field of Intellectual Property.

property and copyright, paving the ground for multilateral agreements covering specifically copyright.[14]

On the other hand, international instruments in the field of culture have introduced caveats as to the consideration of cultural matters as simple goods. In particular, the UNESCO Convention of 2005 on the Protection and Promotion of the Diversity of Cultural Expressions[15] emphasizes the importance of preserving national sovereignty in the adoption of norms and measures for the protection of cultural diversity considered as a key "vector" of national identity. (Articles 5(1) and 6(1)).[16]

As to cultural diversity, especially when declined as "exception culturelle", the policies of the EU and its member States are mainly focused on audiovisual market and media;[17] this notwithstanding, the EU Commission's current strategy for the realization of the Digital

14. For a longsighted analysis of the displacement of national norms through multilateral instruments such as the Berne Convention, the TRIPs Agreement (Trade Related Aspects of Intellectual Property rights), and the WIPO Treaties WCT and WPPT, as well as by harmonization measures within the European Union, see Jane C. Ginsburg, "International Copyright: From a 'Bundle' of National Copyright Laws to a Supranational Code?", *The Journal of the Copyright Society of the United States*, Millennium Volume, June 2000.
15. EU and several of its members, most Latin American and Asia-Pacific countries (China included) have accessed or ratified the Convention; USA are not present in the list published by Unesco in its web site, visited May 5, 2017. <http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html>.
16. This convention has been considered as a cultural counterbalance to the World Trade Organization (WTO) in future conflicts between trade and culture, but has also been criticized as an instrument of disguised protectionism, Christoph Beat Graber, "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?", *Journal of International Economic Law* Vol. 9 No. 3; (Rachael Craufurd Smith, "The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?", *International Journal of Communication* 1/2006, 48, available at: <http://ijoc.org/>.
17. Francisco Javier Cabrera Blázquez, Maja Cappello, Christian Grece, Sophie Valais, *Territoriality and its impact on the financing of audiovisual works, Iris-Plus, European Audiovisual Observatory*, available at: <http://www.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en2.pdf/ad5c5a8f-4e85-4e3c-b763-9c763895da1e>.

Single Market,[18] pursuing the country of origin principle (implying the elimination of territorial exclusivity), raises further tensions[19] as to the success and even the survival of European audiovisual industry.[20]

The European Parliament did not fail to highlight[21] that the 2005 Commission's Recommendation favoured, more or less intentionally, the concentration of rights in the hands of bigger CMOs; the Parliament observed also that the "impact of any initiative for the introduction of competition between rights managers in attracting the most profitable right-holders must be examined and weighed against the adverse effects of such an approach on smaller right-holders, small and medium-sized CMOs and cultural diversity" (Whereas L), while "the Commission should assess suitable initiatives to ensure continued broad public access to repertoires, including smaller or local ones, in compliance with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, given the particularity of the digital era but also taking into account the

18. <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-594-EN-F1-1.PDF>.
19. Charles A. Weiss, *Available To All, Produced By Few: The Economic And Cultural Impact Of Europe's Digital Single Market Strategy Within The Audiovisual Industry*, "a single market European licensing zone would open doors for broader offerings to dominate markets. The consequence is that it will be much more difficult for smaller platforms in local languages to survive." 2016, *Columbia Business Law Review*, 918, available at: <https://cblr.columbia.edu/wp-content/uploads/2017/04/5_2016.3_Weiss_Final.pdf>.
20. Audiovisual authors, producers, professional trade unions and industry associations addressed an open letter to the Presidents of the EU Commission and of the EU Parliament on May 2, 2017, opposing the Proposal of Regulation on country-of-origin licensing of certain online services by broadcasters, and urging to preserve the integrity of absolute territorial exclusivity and maintain the indispensable market incentives for the film, TV, and sports sectors to create, finance, produce, market and distribute audiovisual content across Europe, <http://www.apt.it/wp-content/uploads/2011/03/AV-sector-411-signatory-call-to-action-on-territoriality-.pdf>.
21. European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0064+0+DOC+XML+V0//EN>.

direct and indirect impacts this will have on the overall position of authors and cultural diversity" (Whereas Y).

Social trends too affect cultural exchanges, directly impacting also copyright management. In fact, cultural exports had limited economic impact when the music exploitation was essentially oriented to live performances, which has continued to be true for some time after the end of the Second World War. Consequently, the economic exchanges among CMOs, normally regulated through reciprocal representation contracts, were balanced. The basic criterium for reciprocal representation agreements is the "national treatment" applied to legal and operating aspects, allowing each CMO to apply the same rules to all rightowners and repertoires (including members and repertoires of foreign CMOs). In reciprocal representation contracts, the national treatment rules concern tariffs and the relationship with users, but also royalty distribution rules, administration charges and deductions for cultural and social purposes.

Traditionally, most of the songs exploited in a certain country belonged to the members of the national CMO or, in some cases, of the CMOs of the same linguistic area. Then it was normally accepted that a CMO's internal rules focused on the so-called local repertoire. Starting from the '60s, the increasing success of Anglo-American music and rock culture has had a direct impact on the relationships among CMOs.

For tariffs, there is a shared interest to apply uniformly the most favourable market conditions to all the music exploited in a certain country; on the contrary, the just described application of the national treatment to local and foreign repertoires can raise questions as to social deductions and their allocation in favour of members. This allocation creates a potential conflict between the national CMO and foreign CMOs, where the revenues (and therefore the financing of social initiatives) derive largely from the exploitation of foreign works. The dramatic change in music consumption patterns – when the audience's favour shifts to the so-called Anglo-American repertoire – has highlighted an inherent conflict of interest that grows in parallel with the unbalance of the royalty payments exchanged between CMOs. The CMOs' social deductions and, in some cases,

the distribution rules have been criticized by Anglo-American rightowners and their CMOs because of the national treatment implementation.

The social and cultural functions of CMOs have played a fundamental role in the creation and development of collective management[22] and the conflict goes beyond the purely economic issue; in fact, the said criticisms target two of the traditional pillars of collective management, the national treatment of foreign repertoires (closely linked also to the territoriality principle) and the solidarity among members.

The European Directive 2014/26/EU on collective management of copyright and related rights (the so-called CMO directive)[23] does not take a direct position on this issue, but proposes a compromise: the administration expenses shall be charged to foreign rightowners on a non-discriminatory basis, while social and cultural deductions can apply only provided that they are accepted by the CMOs party of a representation agreement, meaning that the express consent of both of them is needed (art. 15.1).

27.5. Competition

There is a naturally inherent tension[24] between the exclusivity of copyright and competition, which impacts on the two mentioned

22. The relevance of cultural and social funds for collective management is indicated by the amount published in the study by KEA European Affairs commissioned by the European Parliament in 2016: *The Collective Management of Rights in Europe: The quest for efficiency*, available at: <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/study-collective-management-rights-/study-collective-management-rights-en.pdf>.
23. Supra fn 4, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri= CELEX:32014L0026&from=IT>.
24. "The respect of original ownership, the occasional need for collective management of IP Rights, the idiosyncrasies of co-ownership of rights and the ever-present tension to be found in encounters between exploitation of IP Rights and Competition Law were all well dealt with in the arena of the scientific programme of the 2010 ATRIP Congress" Jan Rosen (ed) *Individualism and Collectiveness in Intellectual Property Law* (Edward Elgar Publishing Ltd., 2012), Preface.

models of collective management with deeply different results and solutions.

27.5.1. USA

As mentioned, antitrust rules have shaped CMOs in the US from an early stage. US CMOs (more usually known as PROs, Performing Right Organizations, since collective management concerns mainly music public performance) are controlled mostly under judicial decrees of the consent decrees[25] issued by the Department of Justice (DOJ) to cover different tariffs and rules to be applied by ASCAP and extended normally to BMI.[26] Not surprisingly, antitrust law paints CMOs with purely economic tones and focuses on financial flows and prices paid by users.

Another fundamental feature imposed for antitrust reasons is the non-exclusivity of the members' mandate or assignment. By giving previous notice to his/her CMO, each member can license directly a certain use for a certain period of time. This option is non-existent or very strictly limited in European societies' articles of association.

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25. The BMI consent decree has its origins as far back as 1941, with virtually all its modern provisions adopted in 1966 (Since then, the only addition was the compulsory license/rate court mechanism in 1994).
26. The ASCAP and BMI consent decrees were last reviewed and amended well after Congress adopted the 1976 Copyright Act – BMI's was most recently amended in 1994 and ASCAP's in 2001 <https://www.copyright.gov/policy/pro-licensing.pdf>.

    In June 2016, DOJ has reviewed BMI and ASCAP's consent decrees changing the consolidated interpretation on the way the PROs license music co-written by writers from different PROs. Specifically, the DOJ requires that the long-established industry practice of dealing fractionally with split works (fractional licensing for co-written songs) is abandoned in favor of a mandatory 100% licensing model. In September 2016 Judge Louis Stanton of the U.S. Southern District of New York ruled against the DOJ's controversial interpretation of the consent decree. In May 2017, the DOJ has appealed for the reversal of the District Court's declaratory judgment that BMI consent decree neither bars fractional licensing nor requires full-works licensing. <http://www.billboard.com/articles/business/7800937/department-justice-appeals-consent-decree-bmi-comment>.

Historically, the US PRO more easily comparable to the European CMOs is ASCAP. Since 1939, there has been a second society, BMI Broadcast Music Inc, created after a tariff dispute between ASCAP and broadcasters and operating on a non-profit-making basis.

The third organization operating in the US, SESAC[27] would not qualify as a CMO under current EU rules, since it is neither owned nor controlled by members and it is a for-profit organization. SESAC has existed in the USA since 1930 and has recently acquired the Harry Fox Agency, the mechanical licensing subsidiary of National Music Publishers' Association (NMPA), in a move to turn its traditional PRO business into a broader music rights and data mining clearing house.[28]

Beside these societies, there has been for years another privately owned organization operating in the US on behalf of a limited number of selected rightowners, the American Mechanical Rights Agency Inc (AMRA), renamed American Music Rights Association, after it was acquired by Kobalt.[29]

The new entry in this increasingly crowded field is GMR (<http://globalmusicrights.com/>).

In addition to antitrust controls, the Copyright Act provides for tariff hearings administered by the Copyright Office and compulsory

27. The Society of European Stage Authors and Composers was founded by Paul Heinecke, a German immigrant, in New York in 1930. SESAC supported underrepresented European stage authors and composers with their American performance royalties, hence the original name. The business evolved during the 1940s, and in the 1950s SESAC serviced radios with recordings of its repertoire. Since the 1960s, SESAC has represented a wider range of writers and genres, shifted progressively toward more mainstream music. In 2013, Rizvi Traverse Management acquired a majority stake in SESAC. In 2017, The Blackstone Group acquired SESAC.
28. <http://ostrowesq.com/whats-next-for-ascap-and-bmi-as-sesac-buys-the-harry-fox-agency/>.
29. AMRA was bought by Kobalt Music Publishing in 2014. Having in mind the inherent conflict of interest between Kobalt Publishing and the Collective management by AMRA, PwC Consultancy was entrusted with the analysis identification of key business separation recommendations to protect AMRA sensitive data and tools from unauthorized access by the wider Kobalt Group.

licenses in which the fees are determined and regularly reviewed by the Copyright Royalty Board.[30]

Even the relationship between publishers and phonogram producers has developed differently from Europe. Thanks also to the provisions ensuring the producers a statutory license for their record products, collective management has not been the rule for mechanical rights, where transactions between record producers and publishers (representing also authors) are settled bilaterally, according to the conditions established in the Copyright Act. Moreover, Section 115 of US copyright Act has been amended, expanding the statutory license for mechanical right into digital download service exploitation.[31]

After the enactment of the Digital Performance Right in Sound Recordings Act of 1995 (DPRA), amended by the Digital Millennium Copyright Act (DMCA) of 1998,[32] record producers' and performers' related rights to remuneration (not covered by exclusive related rights) are administered by the specialized organization SoundExchange, under a statutory license for non-interactive streaming.[33]

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30. The Copyright Royalty Board was established and empowered by the Copyright Royalty and Distribution Reform Act of 2004 to determine rates and terms for copyright statutory licenses.
31. Engaging in an authorized Digital Phonorecord Delivery (commercial download) requires the payment the sound recording copyright holder (through a voluntary license) and to the musical work copyright holder (pursuant to the mechanical compulsory license to be obtained under section 115 of the Copyright Act, and the corresponding regulations promulgated by Register of the United States Copyright Office).
32. The DPRA vests in the owner of the sound recording the exclusive right to control the digital performance of the sound recordings over cable and satellite. The DMCA applies the same exclusive right to the owner of the sound recording with respect to webcasting over the Internet or wirelessly. See: Edward R. Hearn, "Digital Downloads and Streaming: Copyright and Distribution Issues", available at: <http://www.internetmedialaw.com/digi tal-downloads-and-stream ing-copyright-and-distribution-issues-new/>.
33. SoundExchange is the independent nonprofit performance rights organization that has been appointed under federal law to administer the statutory license, which allows services to stream artistic content while paying a fixed rate for each play on a non-interactive digital source. SoundExchange collects and distributes royalties according to the law, 50% of the performance royalties are paid to the rights owner of the sound recording; 45% directly to the featured artists on a

In recent times, not least due to the impact of globalization, the growth of rights management entities that are for profit and not controlled by rightowners is posing new challenges to "traditional" CMOs in the offer of their services, not least because the US entities are expanding their activity to other continents following the worldwide development of online digital services. These entities can be owned by investment funds or private equity and can select their principals according to criteria they are free to determine;[34] very simply, they are not bound to non-discrimination principle that is the pillar of collective management, as we have known it in Europe.

27.5.2. Europe

Theory and practice differ in regional areas, namely Europe and Latin America, with national monopolies rooted in one country and created originally by authors, often with the active participation of publishers. The ground and vision on which European and Latin American CMOs were founded make solidarity among members a necessary element of rights collective management, together with the economy of scale and operational efficiency of the services offered to right owners by the organization.

The monopolistic position of European CMOs is based on the recognized value of solidarity as the unifying purpose shared by members, on the one hand, and on the economic convenience of collective management for both the rightowner members and the users of protected works, on the other. The main advantage for copyright users resides, in fact, in the possibility of obtaining in one place the

recording (a featured artist is an artist that is prominently featured on a track or album and 5% are paid to a fund for non-featured artists (a non-featured artist is a session musician or a back-up vocalist, etc.) Royalties for non-featured artists are allocated to organizations such as AFM, American Federation of Musicians, and SAG-AFTRA, Screen Actors Guild and American Federation of Television and Radio Artists.

34. For example, in the home page of its website, GMR states that it "serves a select, invitation-only client base, creating customized solutions in a rapidly evolving music rights marketplace and offering personalized service with a 4-to-1 employee client ratio" at <http://globalmusicrights.com/about>; in its website, SESAC specifies that "non-solicited affiliation are not accepted".

license for all musical works, generally known as blanket license, coupled with the lack of *excludability* meaning that, "since a CMO manages a right on behalf of a plurality of rights holders, excludability of users and/or uses becomes difficult.".[35]

The dominant position of the CMO involves also that non-discriminatory tariffs apply to equivalent usages, which implies for the users the convenience of tariff predictability and affordable transaction costs.

Initially, in presence of national *de facto* or *de iure* monopolies in all its Member States, the European Union has introduced antitrust elements on a case by case basis, by means of judgments of the European Court of Justice and decisions of the European Commission acting as Antitrust Authority, that have established principles to be applied by all authors' societies. The early interventions focused on the relationship between societies and their members.

In its judgments, the European Court of Justice outlined the fundamental distinction between "copyright" and "the exercise of copyright", confirming the "monopolistic" core of copyright, on the one hand, while stating that the exercise of protected rights is subject to antitrust rules.[36]

On the other hand, the European Commission has established some important principles on the scope of the assignment of rights[37]

35. "The Landscape of Collective Management Schemes", Daniel Gervais, *Columbia Journal of Law & the Arts*, 2011, 596.

36. Significant basic principles are stated in the decisions of the European Court of Justice ECJ on collective management, and are now included in the European Directive 2014/26/EU. Very briefly: Case 127-73, *Belgische Radio en Televisie v SV SABAM v. NV Fonior*, 30 January 1974, states that it constitutes an abuse of a dominant position to impose on members any obligation that is not absolutely necessary to manage the rights; Case 7/82, *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v. Commission of the European Communities*, 2 March 1983, stating that a CMO may not limit its services to artists whose rights are governed by national law; a CMO is abusing its dominant position if, by refusing to manage such rights, it is in fact preventing those artists from being paid the royalties to which they are entitled.

37. In its Decision of 2 June 1971, 71/224/CEE, (GEMA decision 1971), the European Commission considered the imposition by GEMA of a minimum period of affiliation of 6 years on its members to be abusive. The Commission also considered

and the conditions for withdrawal/carve out of one or some rights or categories of rights.[38]

The European Commission expanded its scrutiny to other specific aspects such as central licensing of sound carriers[39] and the online rights collective management[40] and, more in general, the representation agreements between CMOs.[41]

The objective of the Commission's policy seemed to be the substitution of national CMOs by a small number of all-European orga-

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that members must be allowed to withdraw separately distinct rights or category of rights pertaining to different forms of exploitation; moreover, the withdrawal does not affect the validity of contracts of assignment previously concluded by the withdrawing member. Such categories are (decision in French): 1. le droit général d'exécution; 2. le droit de radiodiffusion, y compris le droit de transmission; 3. le droit de représentation cinématographique; 4. le droit de reproduction et de diffusion mécaniques, y compris le droit de transmission; 5. le droit de production cinématographique; 6. le droit de produire, reproduire, diffuser et transmettre sur des supports pour magnétoscopes; 7. les droits d'exploitation résultant du développement technique ou d'une modification de la législation dans l'avenir.

In its decision of 6 July 1972, 72/268/CEE (GEMA decision 1972), the Commission accepted that a minimum period of affiliation of 3 years is justifiable on economic grounds to protect the members against the pressures which could be put on them by exploiters, such as broadcasting and recording companies, provided that members are allowed to withdraw different forms of exploitation separately. In such a case, the categories are e.g. (decision in French): a) le droit général d'exécution; b) le droit de radiodiffusion; c) le droit d'exécution publique d'oeuvres radiodiffusées; d) le droit de télédiffusion, e) le droit d'exécution publique d'oeuvres télédiffusées; f) le droit de représentation cinématographique; g) le droit de reproduction et de diffusion mécaniques; h) le droit d'exécution publique d'oeuvres reproduites mécaniquement; i) le droit de production cinématographique; j) le droit de produire, reproduire et diffuser sur des supports pour magnétoscopes; k) le droit d'exécution publique d'oeuvres reproduites pour magnétoscopes; l) les droits d'exploitation résultant du développement technique ou d'une modification de la législation dans l'avenir. After the Commission Decisions, GEMA's statutes were amended on a number of occasions. Following these amendments, the Commission adopted a negative clearance decision on 4 December 1981 (82/204).

38. COMP/C2/37.219 Banghalter & Homem Christo v SACEM, 12-8-2002, concerning the obligation that members leaving the French Society SACEM should entrust the withdrawn rights to another collective management organization. The condition was deleted from SACEM Articles of Association. Available at

nizations competing with each other, as made explicit in the Recommendation of October 18, 2005.[42]

The "major" music publishers have successfully pushed to obtain the support of the EU Commission and to enlarge their role in licensing digital music providers. They have withdrawn the rights they control from national CMOs and have become "direct licensors", either creating a licensing "special vehicle" or mandating one of the existing societies on special non-disclosed terms to manage a publish-

<http://ec.europa.eu/competition/antitrust/cases/dec_docs/37219/37219_11_3.pdf>.

39. Commission Decision of 4 October 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty and 53 of the EEA Agreement (Case COMP/C2/38.681 – The Cannes Extension Agreement). The Cannes Extension Agreement is an agreement between the major music publishers and the collective management societies regarding the administration and licensing of mechanical copyright of music works for the reproduction of sound recordings on physical carriers, especially in the context of Central Licensing Agreements. <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38681/38681_216_1.pdf>.
40. The European Commission was called to scrutinize the rules applicable to Internet licenses agreed in the framework of International organizations after the notification of the so-called Simulcasting Agreement concerning related rights in 2002 (Case No COMP/C2/38.014 — IFPI "Simulcasting"). In the Simulcasting Decision of 8 October 2002, the European Commission has granted to the International Federation of Phonographic Industries (IFPI) and its national agencies an antitrust exemption on the grounds that the proposed unified multiterritorial license fee introduced more competition for European broadcasters, which simultaneously broadcast music shows on the Internet. Under the cleared rules, broadcasters can get a single "one-stop shop" licence from royalty collecting agencies to cover Internet broadcasts across most of the 18-nation European Economic Area (EEA) replacing the old system where they needed to secure a license from each national collecting society. <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003D0300&from=EN>. In 2001, the Commission was notified of the Santiago Agreement (COMP/C2/38.126) and in 2002 the BIEM Barcelona agreement (COMP/C2/38.377), concerning copyright. Said agreements, were meant to integrate reciprocal representation contracts for performing rights and mechanical rights for Internet licensing and provided for collecting societies to issue multi-territorial licences. These notifications had very different results. The Commission issued a Statement of Objections in 2004 taking issue with the customer allocation clause, under which collecting societies undertook to issue worldwide licences only to users located in their domestic (i.e. national) territory. The Santiago Agreement expired at the end of 2004 and

ing repertoire separately from the members' works. The fragmentation of repertoires has replaced territorial segmentation in licensing on line music services, with the active encouragement of the EU pushing for the Digital Single Market. In simplified words, after the 2005 Recommendation, major publishers have progressively become the "competitors" of national CMOs in the field of multiterritorial licenses to online music services. Finally the mentioned European Directive EU/26/2014 has defined and regulated this development in its Title III, devoted to "Multi-Territorial Licensing of Online Rights in Musical Works by Collective Management Organisations".

The influence of the US model is visible also in the CMO directive, where for the first time we find a definition of the so called independent management entities:[43]

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the parties did not renew it (See Commission press release IP/04/586 of 3 May 2004). BIEM Barcelona agreement followed the same path.

41. On 16 July 2008, the European Commission adopted a decision prohibiting 24 European collecting societies from restricting competition as regards the conditions for the management and licensing of authors' public performance rights for musical works (Case COMP/C2/38.698 — CISAC – International Confederation of Societies of Authors and Composers). The European Commission deemed that CMOs had applied territory segmentation to restrict the services they offer to authors and commercial users and unduly limit competition in their domestic territory. Commission Decision C(2008) 3435 final of 16 July 2008 was annulled in so far as it concerns CISAC by the EU Court of Justice decision of in Case T-442/08 (joined cases T-414/08, T-415/08, T-416/08, T-417/08, T-418/08, T-419/08, T-420/08, T-442/08) available at: <curia.europa.eu/juris/document/document.jsf?text=&docid=138493&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1035815>.
42. Recommendation of 18 October 2005 of the European Commission on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC). The Recommendation was criticized by the European Parliament it in its resolution of 13 March 2007, available at: <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2006/2008(INI)>.
43. Recital 25 states: "Rightholders should be free to entrust the management of their rights to independent management entities. Such independent management entities are commercial entities which differ from collective management organizations, inter alia, because they are not owned or controlled by rightholders. However, to the extent that such independent management entities carry out

> "'independent management entity' means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis."[44]

It should be noted that, with the exception of certain provisions on information duties and personal data protection, the Directive does not apply to the independent management entities, despite the fact that these entities represent approximately two-thirds of the European online music rights market, providing rights management for at least the repertoires of the three major publishers.[45]

Moreover, the effects of the Directive are likely to be felt also by extra EU CMOs, since its Preamble addresses the way in which non-EU CMOs, if active in the EU, may be regulated by Member State, establishing the these are not precluded from applying the same or

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the same activities as collective management organizations, they should be obliged to provide certain information to the rightholders they represent, collective management organizations, users and the public."

44. The transposition into Italian Law diverges from the classification made by the Directive, where the implementing decreee 15 March 2017, n. 35 states that audiovisual producers, and videogram producers, in charge of the distribution of the remuneration for private reproduction of phonograms and videograms are not considered as CMOs and therefore not subject to rules deriving from the directive (Article 3, paragraph 4). Apparently, the scope of collective management may vary from one member state to another, despite the harmonization.

45. Comments like the following circulated in specialized circles when the directive came into force: "Critics claim that the Directive will not simplify multi-territorial licensing, as it lacks incentives for major repertoire rights holders (Universal, EMI, Warner and Sony/ATV), as well as other publishers (e.g., Kobalt), to refrain from removing repertoire from collection societies. As a consequence of this fragmentation of the music rights market, an online music service is currently required to negotiate license agreements with one or more collection societies and at least seven independent management entities representing the repertoire of a specific publisher (e.g., CELAS, PAECOL and ARESA)." <http://www.klgates.com/european-council-adopts-directive-on-the-collective-management-of-copyright-and-multi-territorial-licensing-of-online-music-05-20-2014/>.

similar provisions to CMOs established outside the EU operating in their territory.[46]

To describe in brief the effect of this trend I am borrowing the words of M. Ficsor, who is the author of the mentioned WIPO books on collective management:

> "With the increase of the number of CMOs to manage the same right for the same category of rightholders, the advantages of collective management are decreasing. The costs of management are becoming higher not only because parallel structures should be established but also because additional burdens are emerging to monitor uses and proving that the specific repertoire of a given CMO is used (in contrast with the situation where a CMO in a de jure or de facto monopoly position may grant a blanket license for the active world repertoire). It goes without saying that the administrative costs of lawful users also increase, and that legal certainty and law abidance discipline may also suffer setbacks".[47]

It is also doubtful that the so-called independent management entities or privately owned US societies shall comply with the mentioned non-excludability and non-discrimination criteria that have created favorable conditions for the users of music repertoire.

Step by step, online rights collective management has rapidly become a kind of workshop for the future of collective management, since it is affected at the highest degree by the three factors of globalization, competition and digital innovation.

27.6. Digital innovation

Copyright collective management is called to cope with a complex scenario. Internet and all the related evolutions in telecommunications, networking and social behaviors interact with globalization

46. <http://www.cisac.org/Newsroom/Articles/CISAC-Releases-Guide-to-the-EU-Directive-on-Collective-Rights-Management>: CISAC publication available on request.
47. Mihály Ficsor, "Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU 'Acquis'" in *Collective Management of Copyright and Related Rights*, ed. Daniel Gervais (Wolters & Kluwer, 2015).

and competition; this interaction has the effect, among others, of amplifying the changes in the patterns of production/ consumption and demand/supply of copyright products. The availability of creative works in digital format has increased hugely the transborder circulation of music and movies,[48] posing new challenges to the copyright territoriality principle and to the territorial scope of collective management; together with the unprecedented evolution in reproduction technology, all these phenomena have also changed the consumers' behavior. Final users more and more often abandon their passive role of mere "consumers" and act as digital content distributors through User Generated Content platforms or P2P distribution, as well as through Social Networks.

The increased, unhindered dissemination of works and copyright material in digital networks has many positive implications, but it has often induced negative attitudes to creative industries. In the words of Jane C. Ginsburg,[49]

> "Corporate greed and consumer greed. Copyright owners, generally perceived to be large, impersonal and unlovable corporations [...] have eyed enhanced prospects for global earnings in an increasingly international copyright market [...] Consumers, for their part, have exhibited an increasing rapacity in acquiring and "sharing" unauthorized copies of music, and more recently, motion pictures."

48. Recently, further actions have been initiated to increase the transborder circulation of audiovisual works in the EU: following the Proposal for a Directive of the European Parliament and of The Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016) 287 final). Moreover, the European Commission has presented a Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programmes (COM(2016)594).
49. Jane C. Ginsburg, Essay—How Copyright Got a Bad Name for Itself, 26 COLUM. J.L. & ARTS 61, 61–62 (2002).

In Europe, the three interacting factors – globalization, competition and innovation – affect rights management in the most visible way, possibly because of the traditional features of CMOs in the "author's right" environment, where their success has been closely correlated to political and cultural scenarios.[50] Being at the forefront of digital innovation, the US can be seen as the "globalizing" power in the contemporary world, and their companies and businesses are historically used to competition; even US CMOs are involved, however, in the process of diversification and experience the "modernization" pressure that affect deeply the European CMOs.

Low barriers to the dissemination of copyright works in digital channels, transborder demand of music and audiovisual products in global markets: these trends are at odds with one of the basic principles of copyright, i.e. territoriality.[51] This principle, enshrined in the international copyright treaties as well as in several national copyright laws, is also the ground on which CMOs have been operating for more than a century.[52]

In the end, digital innovation has raised the fundamental question that collective management is facing today: *Will CMOs be critical intermediaries in the knowledge economy?*

The necessity of CMOs for right holders in the digital environment is challenged by the perspective or promise for the authors to gain more direct control on the exploitation of their works. The first reason given to argument in favor of the so-called "disintermedia-

50. Davide Sarti, "Gestione collettiva e modelli associativi", in Paolo Spada (ed) *Gestione collettiva dell'offerta e della domanda di prodotti culturali* (Giuffré, 2006), 45 ff.

51. As to the multiple implications of territoriality in Internet work dissemination, see Jane C. Ginsburg, "The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World", 15 *Santa Clara High Tech. L.J.* 347 (1999). Available at: <http://digitalcommons.law.scu.edu/chtlj/vol15/iss2/3>.

52. P. Bernt Hugenholtz, *Copyright Territoriality In The European Union* 2, PE 419.621, European Parliament Directorate Gen. for Internal Policies, Policy Dep't C: Citizens' Rights and Constitutional Affairs ed., 2010, <https://perma.cc/GT7X-5Z2M>: "The territorial nature of copyright, and the fragmentation of the Internal Market that it fosters, affect the emerging 'knowledge economy' in the EU in various ways – both negative and positive. In addition, territoriality in copyright has certain cultural ramifications", 11.

tion" is linked to the introduction of Technological Protection Measures and Digital Rights Management systems (DRMs)[53] that could support and enable individual rights management. It should be reminded, however, that the relation between individual and collective management does not represent a zero sum game, because historically collective rights management has not expanded its scope at the expenses of, but rather as a complement to the individual exercise of rights.[54] The precedents and their relevant reasons may suggest doubts on the actual feasibility to replace collective management through DRM systems.

On a more general level, in the Internet, disintermediation itself is illusory where the digital platforms hosting UGC, social networks and search engines have an essential role for the digital content to be accessed by the public; in practice they are intermediaries, whose economic and commercial roles have often been underestimated. Disintermediation in copyright law does not necessarily lead to its expected outcome in terms of cultural diversity, decentralization and authors' welfare.[55] Only in the last few years, a certain awareness has grown in respect of the so-called Value Gap existing between the revenues generated thanks to the dissemination and access provision of

53. The main legal references for DRM are contained in the well-known WIPO treaties WCT and WPPT of 1996, in the US DMCA of 1998 and in the EU Directive on copyright and related rights in in the information Society of 2001.

54. Marco Ricolfi, "Individual and Collective Rights Management in a Digital Environment", in *Copyright Law: A Handbook of Contemporary Research*, ed. Paul Torremans (Edward Elgar Publishing 2007).

The perspectives of the substitution of collective management individual management by technological means are discussed in *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, Ed. E. Becker, W. Buhse, D. Guennewig, N. Ramp (Springer, 2007).

55. Guy Pessach, "Deconstructing Disintermediation – A Skeptical Copyright Perspective" p. 19, "the bargaining position of originating authors and creators, versus a handful of Internet intermediaries, may be weaker than it was for traditional distributors and corporate media. The more concentrated the layer of effective networked distribution is, the weaker the bargaining position and economic welfare of authors and creators becomes." 31, *Cardozo Arts & Ent. L.J.* 833 (2013). Available at: <http://www.cardozoaelj.com/wp-content/uploads/2013/08/Pessach-31.3.pdf>.

copyright content and the remuneration recognised to the creators and the rightowners in general.[56] Content distribution is a major asset for the mentioned intermediaries' business models, but they operate and cash in revenues without taking any responsibility for the content they distribute and exploit. The safe harbour provisions exempt them from liability, and – under certain circumstances – leave the "burden" of liability on the shoulders of users, which is making actual enforcement of copyright a "mission impossible" indeed.

Another technological challenge is approaching CMOs: Big Data.[57] The Big Data paradigm focuses on converting digital information, merged from an indefinite number or sources in structured and non-structured form, into knowledge that informs intelligent decisions[58]. Big Data services are available in outsourcing or by means of hybrid in–house and outsourcing solutions, that both use on-demand cloud resources, to avoid the extremely high fixed costs. For Big Data Analytics, therefore, the main issue at stake is the availability of and/or the access to the database.

The change in music consumption supported by online multiterritorial streaming services have made it necessary for CMOs to operate information infrastructures able to analyse and process huge

56. The legal aspects are highlighted by Silke von Lewinski, "Comments on the 'value gap' provisions in the European Commission's Proposal for a Directive on Copyright in the Digital Single Market (Article 13 and Recital 38)", *Kluwer Copyright Blog*, 10 April 2017; consulted August 10, 2017 at: <http://copyrightblog.kluweriplaw.com/2017/04/10/comments-value-gap-provisions-european-commissions-proposal-directive-copyright-digital-single-market-article-13-recital-38/>. For an economic assessment, see: Cultural content in the online environment: Analyzing the value transfer in Europe, Paris, November 2015, available at: <https://www.rolandberger.com/gallery/pdf/Report_for_GESAC_Online_Intermediaries_2015_Nov_EUR.pdf>.
57. Big Data is the Information asset characterized by such a high Volume, Velocity and Variety to require specific Technology and Analytical Methods for its transformation into Value." Andrea De Mauro, Marco Greco, Michele Grimaldi, "A formal definition of Big Data based on its essential features", *Library Review*, Vol. 65 Issue: 3, pp. 122–135, <https://doi.org/10.1108/LR-06-2015-0061>.
58. Martin Hilbert, "Big Data for Development: A Review of Promises and Challenges", *Development Policy Review*, 2016, 34(1), pp. 135–174. <http://doi.org/10.1111/dpr.12142>.

amount of data, trillions of lines detailing the stream content amounting to constantly increasing terabytes. It is not easy to reconcile this need with the fragmentation of national CMOs. Even more challenging (if not impossible), is to manage Big Data usage for individual rightowners.

Together with the temptation to consider Digital Rights Management systems as alternative to collective management, Big Data computing is fuelling also the discussion on BlockChain technology. This technology may help tackle some of the concerns raised by rightowners, as to the lack of visibility into the use of their works online, whether they intend to monetize, or even just release their works for unrestricted use by the public. In general, creators are interested in knowing when their works are used, particularly in a new context, or what derivative works have emerged from it. Many want to engage interactively with consumers, either for commercial or collaborative purposes.[59]

In future, as to the correlated functions of usage data processing, information transparency and data availability and access, the role of CMOs may be challenged by digital platforms and service providers, or even by public authorities, supported by said providers. We have already clear examples of this trend in current or proposed legislation. In addition to the focus on transparency and accuracy in the circulation of information to members, evident in the mentioned CMO Directive of 2014, in the recent Directive proposal on Copyright in the Digital Single Market[60] we find specific provisions on the "use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users" (Article 13)[61] and on "Trans-

59. *How blockchain can support complement or supplement Intellectual Property* (version 1.0), Paper of COALA (Coalition Of Automated Legal Application), <https://www.intgovforum.org/multilingual/index.php?q=filedepot_download/4307/529>.
60. COM(2016) 593 final Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, available at: <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>.
61. 1. Information society service providers that store and provide to the public

parency obligation" imposed on rights licensees and assignees (Article 14).[62]

In the US, there are lively discussions on the bill *Transparency in Music Licensing Ownership Act,* presented by Rep. Sensenbrenner "To amend title 17, United States Code, to establish a database of nondramatic musical works and sound recordings to help entities that wish to publicly perform such works and recordings to identify and compensate the owners of rights in such works and recordings, and for other purposes".[63] The critics of the bill see it as an attempt to amplify the effects of the controversial safe harbour provisions of DMCA and possibly extend them to a wide range of offline usage,

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access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.

2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.

3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

See also recitals 37–39 of the proposal.

62. Art. 14(1): "Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due."

63. <https://www.congress.gov/115/bills/hr3350/BILLS-115hr3350ih.pdf>. A summary of the bill is available at: <http://www.djcounsel.com/wp-content/uploads/2017/08/SENSEN_034_xml.pdf>.

rather than a tool to render rights management more transparent and effective.[64]

Developments of this kind raise, on the one hand, the issue of accuracy and reliability of data, and of their update; on the other they have notable implications for the treatment of personal data, privacy and confidentiality; a steady balance does not seem to be in sight yet.

27.7. Technology and Innovation: the challenge and the solution

Here is how W.F. Patry, IP Lawyer and Senior Copyright Counsel for Google Inc. for years, describes the present scenario, profoundly affected by technology, global communications and social networking:

> "The new markets created by the Internet and digital tools are the greatest ever: Barriers to entry are low, costs of production and distribution are low, the reach is global, and large sums of money can be made off of a multitude of small transactions. Along with these new technologies and markets comes the democratization of creation; digital abundance is replacing analog artificial scarcity. The task of policymakers is to remake our copyright laws to fit our times: our copyright laws, based on the eighteenth century concept of physical copies, gatekeepers, and artificial scarcity, must be replaced with laws based on access not ownership of physical goods, creation by the masses and not by the few, and global rather than regional markets."[65]

One does not need to agree with the proposals of W.F. Patry on "how to fix copyright" (actually, I do not), but one should admit that the landscape he outlines reflects today's reality of the dissemination of digital content, and it can suggest a road map that CMOs could take into consideration when they reconcile their most valuable tradition and nature with the future of collective management.

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64. David Newhoff, "Let's Be Sure To Kill the Songwriters", available at: <http://illusionofmore.com/lets-be-sure-to-kill-the-songwriters/>.
65. William F. Patry, *How to fix copyright* (Oxford University Press, 2011).

It is premature to forecast the final effects of the massive doses of competition, globalization and digital innovation that CMOs are ingesting, but I am inclined to think, like Voltaire, that the present contains the seeds of the future. It is already visible that collective management is getting closer to the US model, with the active support of the European Union, which seems to privilege competition in comparison to solidarity. The foreseeable consequence is that the solidarity among members will cease to be the fundamental pillar of collective management, historically rooted at the national level, while efficiency and global competition are going to prevail. In fact, this is not completely new; not only for-profit agencies have existed for a long time, but also the tariff standardization and the non-excludability criteria – so valuable for users – can be mitigated, for example in the collective management of theatrical or artistic works,[66] or for specific kinds of music usage.[67]

This is visible in particular in the licensing of international online music services, due to the push of major and medium size music publishers to administer their own repertoire on multiterritorial basis, supported by the European Union's vision of the digital single market.

European national CMOs have referred to cultural diversity and to the defence of small repertoires as one of the reasons for the territorial dimension of their activity. Cultural diversity is mainly a European concept and the quest for it will continue to be included in EU

66. "But not all copyright managers operate in the same way, notably with regard to the level of standardisation of conditions. Where solidarity among members is low, copyright managers appear as "agents" of rights holders. Their main task is to collect and transfer royalties as quickly and as precisely as possible, and at the lowest cost. In extreme cases, this can lead to individualised tariffs and licensing conditions depending on the identity of the member." Violaine Dehin, "The Future of Legal Online Music Services in the European Union: A Review of the EU Commission's Recent Initiatives in Cross-Border Copyright Management", *European Intellectual Property Review* 220, 224 (2010).
67. Specialized agencies may offer their services to performing artists for the personalized collection of live concert fees, where their CMO's Articles of Association allow the temporary "re-assignment" of the relevant performing right (see art. 7.g) of the Articles of Association of the British CMO PRSforMusic).

documents on culture, creativity and intellectual property but, whenever rights collective management contradicts the paradigm of competition, this latter is likely to prevail. Moreover, it should be reminded that, according to Article 167 of the TFEU, the Union only has merely 'supportive competence' in the field of culture, without any power as to harmonization. Nonetheless, it would be unfortunate if the reference of European authorities and legislation to cultural diversity should become a mere "window-dressing formality".[68]

While solidarity is being left in the background, CMOs are pushed to learn how to operate in a more and more competitive environment, due to the current legal framework and, even more impressively, due to business conditions. This implies also that the support to cultural diversity and social initiatives in favour of authors should be financed normally by means other than CMOs' cultural and social deductions.[69]

Truth is that globalization and competition require an in-depth re-thinking to the consolidated business practices, above all in the adoption of innovative technologies. CMOs are turning less similar to trade unions, focused on solidarity, and closer to act as specialized management service providers, able to diversify their offers from their competitors and customize their services according to the needs of their members.

Are all the current challenges reasons to be pessimistic for the future of rights collective management? Not necessarily.

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68. Mihaly Ficsor, "Collective Management and Multi-Territorial Licensing: Key Issues of the Transposition of Directive 2014/26/EU", in *New Developments in EU and International Copyright Law*, Ed. Irini A. Stamatoudi (Kluwer Law International, 2016).
69. Historically, collective rights management societies have been able to funnel a share of the copyright exploitation proceeds to cultural and social funds. According to Hugenholtz, "societies thus play an important role in fostering 'cultural diversity' in the EU. Removing the territorial aspect of performance and communication rights would not only affect these de facto cultural subsidies, but also undermine the societies' very existence, except for a handful of societies that are large enough, or sufficiently efficient, to compete at the European level." Id. fn. 52 supra, 12.

By virtue of their longstanding knowledge of the copyright management business, CMOs can ensure rights management economic sustainability in the digital environment while pursuing at the same time high degrees of effectiveness and equal fairness in the service to all right owners. For these purposes, advanced processing tools and business intelligence are key for the collective management future.[70]

In the past, collective management was the solution to make transaction costs sustainable for dispersed uses of limited value; nowadays, Digital Rights Management systems might be available to authors and rightowners for the same purpose. However, economies of scale remain indispensable to ensure management sustainability and this confirms the "division of labour" between individual and collective management. Technology requires huge investments that authors could not afford individually or in small groupings, due to the costs and the technicalities involved in rights management. Currently, would music industries opt for individual rights management, they should divert resources and investments from their core business, which would possibly be detrimental to them and to the public in general.

Digital innovation is more and more necessary to make collective rights management more effective and, therefore, attractive for members in various situations. Copyright management processes are heavily dependent on employment and enhancement of IT tools but, even though the necessary IT services could be supplied, in theory, by technology partners or by digital service providers, it should be recalled that these are necessary but not sufficient to carry out effective rights management. The accurate continuous maintenance and updating of work documentation require large efforts and direct relationship with the rightowners.

70. "[CMOs] Their expertise and knowledge of copyright law and management will be essential to make copyright work in the digital age. To play that role fully and efficiently, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks." Daniel J. Gervais (ed.) *Collective Management of Copyright and Related Rights* (Kluwer Law International, 2010).

Moreover, a mere technology service provider does not have the know-how, consolidated expertise and professional skills necessary for negotiating, licensing, market monitoring and right enforcement, which is what CMOs do on a daily basis in the interest of all rightowners. Collective management offers the added value of a 360° service, while balancing (at least, partially) the huge bargaining power of global content providers.

The future of collective management depend on two concurring factors, the first one consists in its attractiveness for rightowners, linked to licensing and collecting effectiveness, fair royalty distribution, tariff standardization and data transparency. Moreover, in a globalized world, the economic sustainability of modern collective management must be pursued also through strategic alliances or joint ventures.[71]

71. This trend is already visible, when some entities have been created to manage online music rights. Two types are already in place. A European Interest Grouping named Armonia GIE (www. Armoniaonline.com) has been officially created by the French Sacem, the Italian SIAE and the Spanish SGAE in 2014 and includes today also AKM (Austria), Artisjus (Hungary), SABAM (Belgium), SPA (Portugal).

    The main alternative offer is ICE (International Copyright Enterprise), a jointly owned Company for copyright licensing and back office services. Following an in-depth investigation, in June 2015, the European Commission has approved under the EU Merger Regulation the proposed creation of a joint venture for multi-territorial online music licensing and copyright administration services by three music collecting societies. They are PRS for Music of UK, STIM of Sweden and GEMA of Germany. The approval is conditional upon the proposed joint venture implementing commitments that will enable other players to compete with the joint venture in the provision of copyright administration services. The joint venture has accepted, among other commitments, to offer key copyright administration services to other collecting societies on terms that are fair, reasonable and non-discriminatory when compared to the terms offered to its parents PRSfM, STIM and GEMA. The joint venture is also committed to facilitate the switching of collecting societies relying on the joint venture's copyright database to another provider of database services. Decision available at: <http://ec.europa.eu/competition/mergers/cases/decisions/m6800_20150616_20600_4523168_EN.pdf>.

    Mint, the transatlantic joint venture of the American SESAC Holdings Inc. and the Swiss CMO Suisa, was launched in March 2016, and is active in online music licensing and back office (<www.mintservices.com>) see: <http://globe

The second factor is technological innovation. As made evident by the discussions on Big Data and BlockChain, the accuracy and reliability of data, and of their update are crucial. Digital Service Providers also can be seen as potential competitors likely to offer alternative to collective management, as they try to present themselves not only as content distributors, but as information sources and rights "clearing houses",[72] with acquisitions of companies specialized in licensing, royalty accounting, reporting and payment services for right owners and their collecting societies.[73]

CMOs have on their prospective competitors one advantage: historically they defend the authors and rightowners, and are subject to regulations and controls that make them a trusted and trustworthy party. Now they are called to exploit this situation to their advantage, interpreting their role as intermediary in technologically advanced and commercially flexible manner, while keeping the fairness and trustworthiness of traditional collective management. Big Data Analytics can be key, because the huge data bases available to CMOs are knowledge asset necessary to offer extremely valuable business intelligence, which must be grounded on extensive reliable data bases (both heritage and current) possessed only by well-established entities.

It is up to CMOs to exploit the unique opportunity to confirm their role thanks to their documentation and royalty collection data and their consolidated expertise. Collection effectiveness, distribu-

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newswire.com/news-release/2016/08/03/861298/10164400/en/SESAC-Holdings-and-SUISA-Launch-Mint-Digital-Licensing.html>.

Also in Latin America, CMOs have established a common infrastructure for online rights collection and distribution, called BackOffice Music Services (<www.backoffice-ms.com>).

72. <http://www.billboard.com/biz/articles/news/publishing/1178724/rightsflow-builds-a-business-around-clearing-song-rights>.
73. As to Facebook's content monetization tools, the implementation of Video Rights Manager is described at: <https://techcrunch.com/2016/04/12/content-fb/>. About different views on the tech start-up Source3 acquisition by Facebook see: <https://techcrunch.com/2017/07/24/facebook-source3/> and <http://variety.com/2017/digital/news/facebook-acquires-source3-piracy-1202505740/>.

tion accuracy and real time business intelligence are the passwords for the future of collective management

CLOSING SESSION

SÉANCE DE CLÔTURE

SESIÓN DE CLAUSURA

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Closing speech

Frank Gotzen

Let's be very brief for the closing session. We will have, still, the opportunity tonight to thank you very much for the beautiful reception we received, for the magnificent surroundings, the very efficient organization. We surely should also say a word of thanks to our translators, who had a difficult task to try to follow our speed. [*applause*] They worked, indeed, in three languages: our three working languages, English, French and Spanish. I understood our Spanish interpreters had to take a plane, and will leave us for the last part, but nevertheless, we will continue afterwards in the two official languages, English and French, for ending our working sessions, which is something that is very important from the legal viewpoint for our organization, and that is the ALAI General Assembly, which will take place immediately after the closing session. Why is it important? It is very important, because we have also to approve our financial statements, and this is of course, essential for our working.

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Closing Speech

Jørgen Blomqvist

Dear and learned moderators, speakers, panelists and participants, ladies and gentlemen,

These have been exciting days of erudite and insightful presentations and comments from colleagues with both academic and practical approaches to the subject matter. I would very much like to warmly thank the moderators, speakers, rapporteurs and panelists for their valuable contributions. They are the ones who have delivered the essence of these two fantastic days. Already now, I will also ask for their forgiveness, because I am going to pester them in the coming months as I shall be collecting written versions of all statements for the book which always is prepared to document ALAI congresses.

They have not done their magnificent work on a clean slate. As a basis for their preparations has served a large number of national reports: responses to the Questionnaire which was sent out to the national groups of ALAI in advance of the Congress. The colleagues who prepared the national responses have made a large and substantial contribution, for which we owe them our warm thanks. In your conference bags, you all received a pen. If you pull it apart, you will have a USB key, on which you will find all the national answers to the Questionnaire. They are also posted on the Congress website.

These contributions to the Congress have been *sine qua non*. Without them, no Congress. The same goes for the generous support we have received from the sponsors who have contributed to the financial feasibility of this arrangement. In the early stages of the preparations, frankly speaking, we were very uncertain as to whether we would be able to raise the necessary support, but our fears turned out to be totally unfounded. On behalf of the organizers, I warmly thank all our sponsors for their exceptional generosity. Without that, this Congress would not have materialized.

In the preparation and execution of the arrangement we have state of the art support and help from our friends at the Conference organizing bureau CAP-Partner, not least from Hanne Kvalheim and her able staff. They have done a great job and we thank them warmly. I would also like to thank the interpreters who have had a very difficult task and have done an excellent work – as well as the technicians who have helped us with the smooth running of the sessions.

Tonight we shall meet again at the closing dinner, and then each of us will go home and continue our daily work with copyright and other things. I hope that the discussions we have had will rise the enthusiasm and energy in us all. Even if working with and promoting copyright and related rights often seems like an uphill battle, there are good reasons for doing it. I very much look forward to presenting the conference book, where the presentations and discussions will be documented, and I trust that you will all make good use of it. I wish you all good luck and a safe journey home.

Thank you.

APPENDIX

ANNEXE

APÉNDICE

Questionnaire

The traditional justifications for copyright and related rights

In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?

Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?

Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?

Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?

Economic aspects of copyright and related rights

Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.

Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?

Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.

Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights

Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.

Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.

Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.

Questionnaire

Les justifications traditionnelles du droit d'auteur et des droits voisins

Dans votre pays, quelles justifications du droit d'auteur ont été présentées dans le cadre de votre législation nationale, par exemple dans le préambule ou l'exposé des motifs de la loi ou dans d'autres documents officiels ?

Existe-t-il des justifications semblables pour les droits voisins ? Les arguments sont-ils les mêmes que pour le droit d'auteur sur les œuvres littéraires et artistiques ou des justifications différentes ou supplémentaires sont-elles présentées ?

Peut-on identifier avec certitude l'incidence qu'ont eue ces justifications sur les dispositions de la loi, ou leur influence s'exerce-t-elle sur un plan plus général (philosophique) ?

Des justifications du droit d'auteur et des droits voisins semblables, différentes ou supplémentaires sont-elles présentées par la doctrine ?

Aspects économiques du droit d'auteur et des droits voisins

A-t-on mené dans votre pays des recherches sur le poids économique des industries fondées sur le droit d'auteur ? Si oui, veuillez en résumer les résultats.

Les recherches ont-elles été menées selon une méthodologie généralement acceptée et décrite afin qu'elles soient comparables à des recherches similaires menées à l'étranger ?

Y a-t-il eu dans votre pays des recherches empiriques montrant à qui profite économiquement la protection du droit d'auteur et des droits voisins ? Si oui, veuillez en résumer les résultats et la méthodologie utilisée.

Les licences individuelles et collectives comme moyen d'améliorer le fonctionnement et l'acceptation du droit d'auteur et des droits voisins

Existe-t-il dans votre pays une culture généralisée de la gestion collective du droit d'auteur et des droits voisins ou cette gestion est-elle limitée aux domaines « clés » des droits d'exécution des œuvres musicales et des droits de reprographie ? Veuillez décrire les domaines où la gestion collective est utilisée.

Existe-t-il dans votre législation nationale des dispositions visant à faciliter la gestion du droit d'auteur et des droits voisins ? Si oui, veuillez les résumer.

Quels modèles ont été appliqués par votre législation nationale pour la mise en œuvre des limitations et exceptions ? Libre utilisation, licence légale, licence obligatoire, gestion collective obligatoire, gestion collective étendue, autres modèles ? Veuillez en donner un aperçu général.

Cuestionario

Las Justificaciones tradicionales al Derecho de Autor y los Derechos conexos

En su país, ¿qué justificaciones al Derecho de autor se han utilizado en la normativa nacional, por ejemplo en la exposición de motivos de la Ley de Propiedad Intelectual, notas explicativas u otros documentos oficiales?

¿Existe una justificación similar para los derechos conexos? ¿Sirven en este caso los argumentos utilizados para la protección por derecho de autor de obras artísticas y literarias o hay alguna justificación distinta o adicional?

¿Es posible identificar con alguna certeza el impacto de tales justificaciones en los preceptos legales o se trata de una influencia a nivel general (filosófico)?

¿Existen justificaciones parecidas, diferentes, adicionales o complementarias en la doctrina jurídica?

Aspectos económicos del Derecho de Autor y de los Derechos Conexos

¿Se ha llevado a cabo en su país algún estudio acerca del peso económico de las industrias relacionadas con el Derecho de autor? En caso afirmativo, exponga brevemente cuáles fueron los resultados.

Tal/es estudio/s, en caso de existir, ¿han sido llevados a cabo de acuerdo a una metodología estandarizada y previamente acordada de tal modo que sea posible compararlos con estudios similares realizados en otros países?

¿Se ha llevado a cabo en su país algún estudio empírico que muestre quien se beneficia económicamente de la protección que otorga el Derecho de autor y los derechos conexos? En caso afirmativo, explique brevemente cuáles han sido los resultados y la metodología utilizada.

Licencias colectivas e individuales como Medio para mejorar el Funcionamiento y la Aceptación del Derecho de Autor y los Derechos Conexos

¿Está extendida en su país la cultura de la gestión colectiva de derechos de autor y derechos conexos o se limita únicamente al ámbito esencial de la comunicación pública de música y de la reprografía? Describa las áreas en las que se encuentra implantada la gestión colectiva.

¿Existen preceptos en su legislación nacional dirigidos a facilitar la gestión colectiva de derechos de autor y derechos conexos? En caso afirmativo, explique brevemente en qué consisten.

En relación a los límites y excepciones al Derecho de autor, ¿cuál ha sido la fórmula implementada en su país (uso libre, licencias legales,

licencias obligatorias, gestión colectiva obligatoria, gestión colectiva ampliada u otras)? Describa el panorama general.