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Extended Collective Licensing as Rights Clearance Mechanism for Online Music Streaming Services in Canada

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1. INTRODUCTION

According to the statistics compiled by the International Federation of the Phonographic Industry (IFPI), online paid streaming is currently the fastest growing segment of the recorded music market, with a 33% global revenue

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increase in 2018.[1] Subscription-based services offering legal online paid streaming of music have now reached all corners of the planet. Among the most well-known services are Apple Music, Amazon Prime, Deezer, Google Play, Soundcloud, and Spotify.[2] The creation and continued functioning of such services are contingent on the capacity of the service exploiters to clear all copyrights in the offered music repertoire, for the territory of operation. In practice, rights clearance for online streaming services proves incredibly complex and cumbersome, because every musical work available for streaming on a service is likely to have several right holders: an author, a performer, a record producer, and a music publisher.[3] The number of rights owners entitled to claim rights on a musical work may even be much larger where that musical work was composed by multiple authors or performed by a group of artists, each potentially bound by separate agreements with publishers and record producers.[4] For streaming services wishing to offer a global repertoire, it can be a daunting task to obtain permission for every single musical work, with respect to every territory. In view of the complexity of the music industry, fears of copyright infringement claims are not surprising.

To reduce the risks of infringement, the rights clearance of online music streaming services could potentially be achieved through a system of 'extended collective licensing' (ECL). The ECL system was first developed in Scandinavia in the 1960s and has since then become an important copyright licensing mechanism in the Nordic countries. Over time ECLs have been put in place in these countries and elsewhere in Europe to enable the lawful use of copyright protected works for educational purposes, private copying purposes, library uses, etc. Recently the European Union adopted the ECL model for the licensing of certain uses of copyright protected works by cultural heritage institutions.[5] Under this model, the effects of a freely negotiated collective licensing agreement between a collective rights management organization (CMO) and a user pertaining to a specific form of exploitation of works is extended by law to non-members of the CMO. The agreement which is given the 'extended' effect is referred to as an ECL-agreement. Once an ECL agreement has been concluded, the licensee may use the works covered by the agreement and does not run the risk of getting a claim, either legal or financial, from a non-represented right

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1 IFPI, 'Engagement with streaming drives growth of global music market', see: https://www.ifpi.org/our-industry/industry-data/.

2 For a list of legal services available in Canada, see: < https://musiccanada.com/digital-music/ > .

3 Heritiana Ravaison, Maria Iglesias, and Anna Vondraceck, "The Costs Of Licensing For Online Music Services: An Exploratory Analysis For European Services"(2013) 21:3 Michigan State International Law Review 666 at 671.

4 Ruth Towse, "Dealing with Digital: Economic Organisation of Streamed Music" (2020) Centre for Intellectual Property Policy and Management of Bournemouth University.

5 Directive 2019/790/EU on Copyright in the Digital Single Market, OJ L 130, 17.5.2019, 92 at 115 [*Directive 2019/790*].

holder, otherwise referred to as 'non-member'. A licensee who enters into an ECL agreement with a representative organization is thus assured that the organization will meet all claims from those affected by the extension.[6] The establishment of an ECL system was recently discussed in favourable terms in Canada, inside two government reports published at the close of the public consultation on the Statutory Review of the Copyright Act.[7]

Even if it is widespread in the Nordic countries and beyond, this licensing model has never been used in relation to the licensing of online, interactive, music streaming services. If the ECL system has so many advantages, why has it not been put in place anywhere for this purpose? The question that this article aims to answer is whether the ECL model can offer a feasible solution to the problem of rights clearance for online music streaming services in Canada. An ECL mechanism will be deemed feasible for the licensing of online music streaming services, if all the necessary and sufficient conditions of such a system can be met. Among necessary conditions, probably the most important is the requirement that the CMO(s) be representative of a 'substantial' number of rights owners in the category of rights that it usually administers. The right of non-members to receive individual remuneration for the use of their work and to opt-out from the ECL arrangement are two additional essential conditions for a valid ECL system.[8] The main obstacle to the use of ECLs in the context of online music streaming services most likely does not lie on the side of the online music streaming services. As long as the relevant CMO(s) hold(s) the necessary rights, there is in principle no impediment to the negotiation of an agreement with an online streaming service. The problem probably lies on the side of the rights owners, more specifically with respect to the representativeness of CMOs. The complexity of the music industry plays a key role in the capacity of CMOs to acquire all the rights necessary to negotiate and grant licenses that can legitimately be extended to non-members of the CMO.

The article is further divided into four parts. Section 2 describes the legal framework underlying the online music streaming services in the European Union, the United States, and Canada, where we examine the current licensing practices for online streaming services in the same three jurisdictions. Section 3 describes what are ECLs, first giving an overview of the main characteristics of the ECL model and second, discussing how certain countries have implemented

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6 Johan Axhamn, and Lucie Guibault, "Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?" (2011) *Amsterdam: Institute for Information Law* at 4 [*Axhamn and Guibault*]. Research carried out for EuropeanaConnect.

7 House of Commons of Canada, Standing Committee on Industry, Science and Technology, "Statutory Review of the Copyright Act", (3 June 2019), recommendations 21 and 36; House of Commons of Canada, Standing Committee Canadian Heritage, *Shifting Paradigms,* (19 May 2019), recommendation 19.

8 Thomas Riis, "Extended Collective Licensing from an Economic Perspective", in J. Blomquist (ed.), Copyright, To Be or Not to Be, Ex Tuto Publishing (2019) at 256 [*Riis*].

ECLs in practice. Section 4 discusses the challenges posed to Canadian CMOs in meeting the requirements of a legitimate ECL model. The most salient challenge concerns the requirement of representativeness of an ECL granting CMO, but section 4 also examines the safeguards that must be implemented to protect the interests of non-members, the role that the Copyright Board of Canada could be asked to play in the implementation of an ECL regime, and the compliance of ECLs with international obligations in the area of copyright law. Section 5 draws conclusions on the feasibility of using an ECL model for the licensing of online streaming of musical works.

2. LICENSING PRACTICES FOR ONLINE MUSIC STREAMING SERVICES

Online streaming services aim to offer the most comprehensive, worldwide repertoire to their subscribers. In order to achieve this, they must be able to clear the rights from whichever entity holds these rights. While most musical works are likely to have similar rights holders (an author, a performer, a record producer, and a music publisher), the exclusive rights conferred by law to each of them and the ensuing licensing practice differs per country. For an online music streaming service to take place, musical worsk must first be copied on a server before they can be accessed by the public. In all jurisdictions, these acts affect two categories of rights holders: the authors, who enjoy *copyright* protection on their original musical composition or lyrics; and the performing artist and the sound recording company, who benefit from *related rights* with respect to the fixation of the performance of the work on a commercial recording.[9]

From a copyright perspective, the online streaming of musical works involves two generic rights: the right of reproduction and the right of communication to the public.[10] This latter right, also known as 'making available right', encompasses the interactive communication of the work to the public from a place and at a time individually chosen by the member of the public.[11] The reproduction right is also known as the mechanical reproduction right; it covers the right to mechanically reproduce the work on any format, including digitally. From a related rights perspective, the online streaming engages the right of making the sound recording available to the public. These

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[9] Note that this section is strongly inspired from Europe Economics, Lucie Guibault, Stef van Gompel, and Olivia. Salamanca, *Study on the remuneration of authors and performers for the use of their works and fixations of performances* (final report) [*Europe Economics*]. Study prepared for the European Commission, DG Internal Market, MARKT/2013/080/D, Luxembourg, Publications Office of the European Union, 2015, at 258. ISBN 978-92-79-47162-9/ DOI:10.2759/834167.

[10] Canadian Copyright Act, R.S.C. 1985, C. 42, ss. 3, 15 and 18 [*Copyright Act*]; Directive 2001/29/EC on the harmonisation of copyright and related rights in the information society, OJ L 167, 22.6.2001, at 10, art. 2 and 3; US Copyright Act, USC Title 17, S. 106.

[11] *Copyright Act, supra* note 10 s. 2(4)(1.1); Directive 2001/29/EC on the harmonisation of copyright and related rights in the information society, art. 3(2).

rights are all transferable, but licensing practices differ widely between countries. Digital providers need to ensure that they clear all rights in an appropriate manner which will depend on both the territorial distribution of the work and the origin of the repertoire. This section first describes the law and licensing practices relating to copyright in the musical works, before turning to the law and licensing practices relating to the related rights in the sound recordings in the European Union, the United States, and Canada.

At the outset, it is important to point out that the fragmentation of rights and the geographical division of markets have given rise to an almost inextricable web of contractual relations between rights owners themselves and with CMOs. To complicate matters further, it is not uncommon to see some of the big players cumulate different roles in the music industry, e.g. acting as music publisher and recording company, whereby they also cumulate rights. In the absence of any existing comprehensive overview, the result is a highly opaque market where it is extremely difficult, as an outsider, to ascertain the 'who is who', 'who owns what', and 'who does what' in relation to the licensing of rights for online interactive uses. The explanation below is given to the best of my knowledge, on the basis of extensive cross-checking of publicly available information.

(a) Licensing of Copyright for Online Music Streaming Services

As mentioned above, online music streaming services must obtain a license on the mechanical right and the making available right of the author and his/her assignee, in order to offer a lawful service. In the best case, a license will be available from a CMO. In the music sector, membership in a copyright CMO is purely voluntary. Both authors (composers and lyricists) and publishers may become members of a CMO. A proportion of them chooses not to join a CMO. However, depending on the jurisdiction concerned, the mechanical and making available rights may be exercised either through a CMO, individually or through a for-profit organisation that carries on the business of licensing of rights, otherwise known in Europe as an 'independent management entity'.

i. European Union

The regulation of licensing practices around online music services has changed dramatically in Europe since the adoption of Directive 2014/26/EU on collective rights management.[12] Title III of this Directive sets out a legal framework promoting the development of multi-territory and multi-repertoire licensing by CMOs in the field of musical works. Pursuant to the provisions in the Directive, CMOs have the choice whether to carry out the multi-territorial licensing of their repertoire themselves or to entrust other CMOs with it.[13]

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[12] Directive 2014/26/EC of 26 February 2014 of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, 2014/26/EC O.J. L 84/72, 20.03.2014.

[13] Directive 2014/26/EU on collective rights management, art. 29 and 30.

Directive 2014/26/EU further sets out functional, technical and operational requirements and additional standards of good governance with which CMOs granting multi-territorial licenses for online rights in musical works must comply.

The two definitions contained in article 3 of Directive 2014/26/EU of collective management organisation (CMO) and independent management entity (IME) are worth reproducing in full:

(a) 'collective management organisation' 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 fulfils one or both of the following criteria:

(i) it is owned or controlled by its members;

(ii) it is organised on a not-for-profit basis;

(b) '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.

For decades the right of mechanical reproduction and the right of communication to the public were licensed for analogue uses through one, or two closely related, CMOs in each territory of the member states of the European Union. Examples of CMOs that manage both categories of rights on behalf of their members are SABAM (Belgium), SGAE (Spain), SIAE (Italy). Examples of such closely cooperating CMOs are KODA (performing rights) and NCB (mechanical rights) in Denmark; Buma (performing rights) and Stemra (mechanical rights) in the Netherlands; and *PRS for Music* is the home of the Performing Right Society (PRS) and the Mechanical-Copyright Protection Society (MCPS) in the UK. All these CMOs in principle represent the rights of authors and publishers.

The long-standing practice of CMOs holds that the payments made by the CMOs to the individual authors and their publisher are dependent on the contractual terms binding both of these parties. Most often, where a writer has assigned their rights to a publisher, these rights are governed by the terms of both:

- the writer's publishing agreement
- the writer's and/or publisher's arrangements with collecting societies.

CMO members who are published typically assign 100% of the mechanical rights and the right to receive 50% of income from the performing rights to their publisher, whilst the remaining 50% is distributed to the writer through the

CMO. In other words, if an author has signed a music publishing deal, they receive no royalties for the mechanical rights and 50% of the royalties for the public performance of their work. The publisher's mechanical rights may be exercised through a CMO or individually, while the author's performance right is virtually always exercised through a CMO.

The European copyright licensing landscape has increased in complexity in the past decade, especially as it relates to the licensing of online music services. Traditional CMOs are still active but the market has exploded. Not only have some CMOs reorganised their reciprocal arrangements with a view to granting multi-territorial licenses more easily; but some rights owners have withdrawn their repertoire from small CMOs to concentrate them with a consortium of big CMOs. Moreover, new players, known as independent management entities, have emerged on the market.

A first change was marked by the introduction through Directive 2014/26/EU of the **'passport' regime**,[14] which enables any CMO that is not willing or not able to grant multi-territorial licenses directly in its own music repertoire to request another CMO to represent its repertoire on a multi-territorial basis. This legal regime has been introduced to reduce the number of licenses that an online music provider needs to operate a multi-territory/multi-repertoire music service. By facilitating the voluntary aggregation of music repertoire and rights that online music providers require, the passport system aims to foster the development of new online services and reduce the transaction costs that ultimately may be passed on to consumers.[15] The passport construction consists in one CMO granting a non-exclusive mandate of representation to another CMO that is indeed capable of fulfilling the criteria for CMOs offering multi-territorial licenses.[16] This non-exclusive mandate should ensure that CMOs can join different hubs for the multi-territorial licensing of their repertoire and that users seeking multi-territorial licenses have the choice to obtain licenses from several licensing hubs.[17] Any CMO that has mandated another CMO to grant multi-territorial licenses is explicitly allowed to continue to grant licenses in its own music repertoire and in any other music repertoire which it is authorised to represent in its own territory.[18]

The most visible outcome of the Directive's passport option is the creation of **ICE** (International Copyright Enterprise), a joint venture between *PRS for Music*, STIM, and GEMA with the collective aim of developing the world's first integrated music copyright, licensing, and processing hub, encouraging copyright

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[14] Directive 2014/26/EC, art. 29-31; *See* J.P. Quintais, 'Proposal for a Directive on collective rights management and (some) multi-territorial licensing'(2013) *European Intellectual Property Review* 35, no. 2, 65 at 70.

[15] *Ibid*, Recital 44.

[16] *Ibid*, Art. 29(1).

[17] *Ibid*, Recital 44.

[18] *Ibid*, Recital 46.

data accuracy, aggregation of repertoires for multi-territory licences, and the elimination of parallel processing against incompatible works databases. In 2016, Buma/Stemra reported to have been the first European CMO to sign an agreement with ICE, an initiative of the collecting societies from Sweden and the UK to jointly manage data. This construction enables Buma/Stemra to obtain a position in a competing market that will contribute to an optimal collection, accurate distribution of revenues and a very efficient cost structure due to economies of scale.[19] The Irish Music Rights Organisation (IMRO) became a direct customer of ICE's Core Licence in June 2019. Under the terms of the new agreement, ICE will provide a full suite of licensing and administration services for online usage. ICE also represents the rights of Sabam and Polaris Nordic (Koda, Teosto, TONO).[20] The ICE licence includes the mechanical and performing rights in the ICE Core repertoire.[21] The ICE Core repertoire is the repertoire ICE licenses directly on a multi-territory basis, as an agent for several rightsholders. In general, this includes the repertoire of PRS, GEMA, STIM, IMRO, MCPS, independent publishers that have joined up with PRS' multi-territory initiative, as well as additional publishers directly affiliated with ICE (Peer, Downtown and Concord). Authors published by independent music publishers (IMPEL) are also represented through the intermediary of ICE. Note that the multi-territorial licenses granted by ICE cover the European Economic Area (EEA) and additional territories.

A second important change in the European collective management market is that major American music **publishers** have withdrawn their repertoire from the administration of most European CMOs. These major publishers decided to either concentrate their rights in the hands of a small number of big CMOs or to exercise their rights individually. A prime example of an organization that concentrates rights in one hand is SOLAR Music Rights Management,[22] which administers the combined Anglo-American catalogues of Sony/ATV and EMI Music Publishing for online and mobile licensing across the EU and other regions. SOLAR is a jointly-owned subsidiary of *PRS for Music* and GEMA and the administration of the licences is carried out in partnership with ICE.[23]

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[19] Buma/Stemra, "Annual Report 2016" (2017), online: *BumaStemra* <https://www.bumastemra.nl/en/bumastemra-distributes-over-147-million-euros/>; this follows also from a legal dispute opposing Buma and PRS: Court of Appeal of Amsterdam, decision of 19 January 2010 (*Buma v PRS*), ECLI:NL:GHAMS:2010:BL4289; affirms District Court of Haarlem, decision of 19 August 2008, (*PRS v Buma*), ECLI:NL:RBHAA:2008:BE8765.

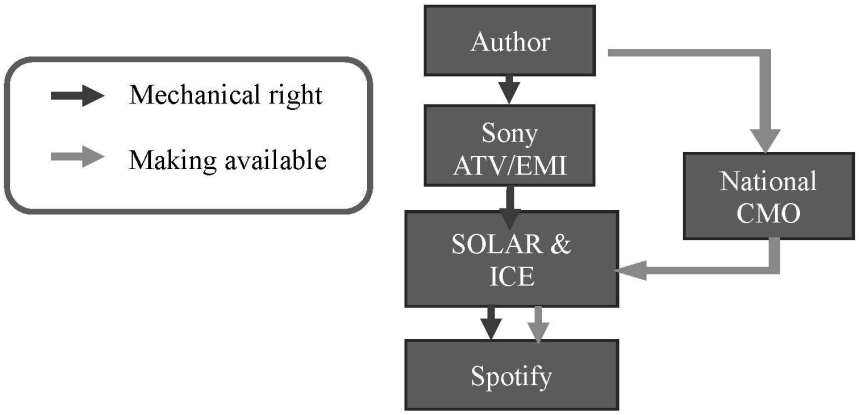
[20] Ice Services, "Copyright", online: *Ice Services* <https://www.iceservices.com/services/copyright/>.

[21] Ice Services "Frequently Asked Questions", online: *Ice Services* <https://www.iceservices.com/licensr/faq/>.

[22] SOLAR Music, "Privacy", online: *SOLAR Music Rights Management Ltd*.

[23] PRS for Music, "Sony/ATV and SOLAR extend Pan-European Digital Licence Administration Agreement" (30 October 2018), online: *PRS for Music* <https://

The figure below illustrates how authors and publishers would license their rights through SOLAR and ICE for Spotify's European market. We see that authors generally license their performing right to the national CMO - or any CMO of their choice, while the mechanical right is first transferred to the publisher who then licenses the right to SOLAR & ICE for further licensing to services like Spotify.



Similarly to Sony/ATV who established SOLAR Music Rights Management, Warner/Chappell operates via its PEDL (Pan European Digital Licensing) initiative which in practice means they may choose a different administrator for each licence and thereby rights may flow differently under individual licensing deals. In most instances, the *performing rights* are administered by ICE regardless of the PEDL partner chosen by Warner/Chappell. With respect to the *mechanical rights*, however, Warner/Chappell has opted to bring its repertoire under the administration of the French SACEM, rather than ICE.[24] By contrast, Universal Music Publishing[25] has signed a representation agreement with SACEM for the administration of the online rights, which covers both Universal's performing rights and mechanical rights. BMG, or the Bertelsman Group, has also created its own initiative called ARESA (Anglo-American Rights European Service Agency), and ICE represents the performing right and mechanical rights in the Anglo-American repertoire of BMG for online and mobile distribution within the European Economic Area (EEA) and additional territories.

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www.prsformusic.com/press/2018/sonyatv-solar-extend-pan-european-digital-licence-administration-agreement > .

[24] PRS for Music, "Who Administers my Online Royalties?", online: *PRS for Music* < https://www.prsformusic.com/royalties/online-royalties/online-royalty-administration > [*Online Royalties*].

[25] Universal Music Publishing Group, "License Quote Request", online: *Universal Music Publishing Group* < https://www.umusicpub.com/us/license-request > .

A summary of the different relations is provided in Table 1 below.

Table 1 - Music publishers' licensing strategy[26]

Publisher	Management initiative	Performing right licensing entity	Mechanical right licensing entity
Sony/ATV	SOLAR	ICE	SOLAR/ ICE
Warner/Chappell	PEDL	SACEM	varying
Universal		SACEM	SACEM
BMG	ARESA	ICE	ICE
Independent	IMPEL	ICE	ICE or SACEM (for Spotify and iTunes)
Kobalt	AMRA	ICE	AMRA

A third, observable change in the European rights management landscape is the appearance of new **independent management entities** on the market. Among them are AMRA Music[27], Songtrust[28], Songs, Kobalt, Olé, Royalty Exchange, Audiam, TuneRegistry, Rumblefish, Syntax Creative, and Sentric music. These entities describe themselves in different ways, sometimes as publishers, others as royalty collection services, others as digital registries. Those organizations acting as publishers pursue a broad mission of encouraging the creation, production, management, and distribution of music. Part of this mission is to collect royalties from leading streaming services like Spotify, Apple Music, Pandora, SoundCloud, and YouTube/Google Music. Typically, creators retain the rights to their songs; therefore, these entities act as intermediaries between the author or publisher they represent and the online platform where the music is exploited. If the rights owners have registered their performing rights with a CMO, these entities will collect the moneys from those CMOs on behalf of their clients. Other arrangements may exist with respect to the mechanical rights, which may involve direct licensing to the platforms.[29] For example, Kobalt has signed a deal with ICE to collect the performing rights. Administration of the mechanical rights is undertaken by AMRA on behalf of Kobalt.

ii. United States

While the collective management of rights has been the object of antitrust control by the Department of Justice for decades[30], CMOs are not as such regulated under the US Copyright Act other than being mentioned in a definition

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[26] *Online Royalties, supra* note 24.

[27] AMRA, "ARMA Homepage", online: *AMRA* < https://www.amra.com/ > [*AMRA*].

[28] Songtrust, "Songtrust Homepage", online: *Songtrust* < https://www.songtrust.com/ > .

[29] See for example: *AMRA, supra* note 27.

in section 101. Traditionally, *performance rights* are administered in the United States by the three long established PROs (performance rights organizations), e.g. ASCAP, BMI, and SESAC; *mechanical rights* are licensed either by agreement with HFA (Harry Fox Agency), other selected agents, or directly by music publishers. On-demand platforms require performance and mechanical licenses from both the composer and sound recording copyright owners; they must therefore negotiate licensing deals with the major music publishers, record labels, and the three PROs.[31] If any artist or song is not covered by any of these deals, a platform that makes it available for streaming will be liable for infringement. While the licensing practice of the three PROs has remained relatively unaffected, the last five years have seen important changes take place in the area of mechanical rights management. The licensing of the rights on sound recordings is discussed in the following section.

First, HFA acquired SESAC in 2015, and launched Mint Digital Services, in 2017, a joint venture between SESAC and Swiss collection society, SUISA. It was the first transatlantic collaboration between organizations that represent musical works on behalf of publishers and songwriters and is the only company to span both U.S. and European copyright laws. Today, Mint is providing services to major publishers such as Warner Chappell and BMG, along with a number of independent publishers through the HFA Affiliate Program. With HFA being the main mechanical rights agency in the United States, if Universal Music Publishing and Sony/ATV are not listed among their clients, this means that they presumably license their mechanical rights individually to the online music streaming services operating on the American territory. As part of Mint Digital Services, SESAC offers to license the *performance rights* and *mechanical rights* on the works in its repertoire, as well as the performing rights of a few collecting societies, on a multi-territorial basis, to digital service providers.[32]

Second, the American copyright music licensing market saw first the emergence of independent management agencies or third-party distributors, before they blew over to Europe. The most prominent are Kobalt Music and Rightsflow (Google), but there are many others. These entities vary in size, shape, and purpose, similar to those described in the previous section. Kobalt offers royalty collection services as well as publishing and recording services. It licenses mechanical and performance rights to digital streaming providers on the US territory, but has representation agreements with ICE, the PRS, and other European CMOs. CD Baby explains on its website that it collects the publisher's share of performance and mechanical royalties for compositions on behalf of

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[30] Michelle E. Arnold, "A Matter of (Anti) Trust: The Harry Fox Agency, the Performance Rights Societies, and Antitrust Litigation" (2008) 81:4 Temp. L. Rev. 1169.

[31] Daniel S. Hess, "The waiting is the hardest part: the Music Modernization Act's attempt to fix music licensing" (2019) U. Ill. J.L. Tech. & Pol'y 187 at 194 [*Hess*].

[32] Mint Digital Services, "Who We Are", online: *Mint Digital Services* <https://www.suisa.ch/en/suisa/mint/mint-digital-services.html>.

songwriters. They collect these from the US and abroad via Performing Rights Organizations and other collection agencies.

Third and most importantly, Congress adopted the *Music Modernization Act* (MMA) on October 11, 2018.[33] The Act creates a compulsory licensing regime for *mechanical rights* administered through a newly established Mechanical Licensing Collective Inc. (MLC). MLC's purpose is to allow interactive streaming platforms to be granted blanket mechanical licenses so that they no longer have to negotiate with each individual songwriter/publisher.[34] Before the enactment of the MMA, streaming services, like Apple, Amazon, Spotify, and Google must seek to obtain a license directly from publishers, which was costly and burdensome.[35] The MLC serves as a one-stop-shop to license the mechanical rights from the HFA repertoire and all self-administered songwriters and music publishers that register with it. A key provision introduced in the MMA is the immunity provision at section § 115 (d)(10)(A), which guards online streaming services from copyright infringement liability for any failure to obtain a license after the date of January 1, 2018.

The Copyright Alliance summarizes the role of the MLC in these words:

> The MLC will (i) collect, distribute, and audit the royalties generated from these licenses to and for the respective musical work owners; (ii) create and maintain a public database that identifies musical works with their owners along with ownership share information; (iii) provide information to help with and engage in matching musical works with their respective sound recordings; and (iv) hold unclaimed royalties for at least 3 years before distributing them on a market-share basis to copyright owners as reflected by royalty payments made by digital music providers for the covered activities in question. The MLC will be funded by administrative assessment fees paid out by blanket licensees and by "significant nonblanket licensees".[36]

It is our understanding that online music streaming services still obtain a license on the performance rights from the PROs.

iii. Canada

Pursuant to section 2 of the Canadian *Copyright Act*, CMOs are defined as:

". . .a society, association or corporation that carries on the business of collective administration of copyright or of the remuneration right conferred by section 19 or 81 for the benefit of those who, by assignment, grant of licence,

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[33] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Public Law No 115-264, Oct. 11, 2018.

[34] 17 U.S.C. § 115(d) (2018). [*U.S.C.*]

[35] *Hess, supra* note 31 at 197.

[36] Copyright Alliance, "Summary of H.R. 1551, the Music Modernization Act (MMA)", online: *Copyright Alliance* <https://copyrightalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary_CLEAN.pdf>.

appointment of it as their agent or otherwise, authorize it to act on their behalf in relation to that collective administration, and

(a) operates a licensing scheme, applicable in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster, pursuant to which the society, association or corporation sets out classes of uses that it agrees to authorize under this Act, and the royalties and terms and conditions on which it agrees to authorize those classes of uses, or

(b) carries on the business of collecting and distributing royalties or levies payable under this Act in relation to a repertoire of works, performer's performances, sound recordings or communication signals of more than one author, performer, sound recording maker or broadcaster;"

Collective societies are further regulated under the *Copyright Act* only in relation to the approval of their tariffs by the Copyright Board.

SOCAN (Society of Composers, Authors, and Music Publishers of Canada) was established in 1990 by the merging of two former Canadian performing rights societies: CAPAC (Composers, Authors and Publishers Association of Canada Limited), founded in 1925 as CPRS-Canadian Performing Rights Society; and PROCAN (Performing Rights Organization of Canada Limited), founded in 1940 as BMI Canada Limited. SOCAN administers *performing rights* on behalf of its members — Canadian composers, songwriters, lyricists, and their publishers.

Until 2018, the *mechanical reproduction right* was administered either via the CMRRA (Canadian Musical Reproduction Rights Agency), or SODRAC (Society for Reproduction Rights of Authors, Composers & Publishers in Canada). In 2018, SOCAN acquired SODRAC, and added mechanical rights administration to its collection and distribution services. Today, rights owners can choose to assign both the performing and mechanical rights to SOCAN, or they can still choose to assign their mechanical right to the CMRRA. SODRAC signed an agreement with Music Canada, which is a non-profit trade organization founded in 1964 that promotes the interests of its members as well as their partners, the artists. Music Canada's members are Sony Music Entertainment Canada Inc., Universal Music Canada Inc., and Warner Music Canada Co.[37] SODRAC also has direct agreements with individuals.

CMRRA-SODRAC Inc. (CSI) is a joint venture of the Canadian Musical Reproduction Rights Agency Ltd. (CMRRA) and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC). Together, CMRRA and SODRAC represent the vast majority of songwriters and music publishers whose songs are used in the Canadian marketplace. CSI was incorporated in 2002, initially as a vehicle to collect the royalties derived from CMRRA and SODRAC's distinct Commercial Radio Tariffs. Since then, CSI

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[37] Music Canada, "About", online: *Music Canada* < https://musiccanada.com/about/ > .

has applied for a series of other tariffs certified by the Copyright Board of Canada, including the Online Music Services Tariff and the Multi-Channel Subscription Radio Services Tariff.

CSI's role is to provide a convenient one-stop licensing shop to access a worldwide music repertoire for use in Canada. CSI licenses its repertoire by way of tariffs certified by the Copyright Board of Canada or by way of privately negotiated agreements. Prior to 2019 CSI licensed the reproduction rights in the joint repertoire of CMRRA and SODRAC to various music users, including radio stations, background music services, and online music services.[38]

According to CSI's website, CSI issues licenses for the reproduction right to online music services making available musical content represented by CSI in Canada. CSI administers the Online Music Service Tariff certified by the Canadian Copyright Board and, to be duly licensed, online music services wishing to operate in Canada must report content and sales activity to CSI in accordance to the Tariff's provisions.

Under the current tariff, an Online Music Service is defined as a service that delivers streams or limited downloads to subscribers or permanent downloads to consumers, *other than a service that offers only streams in which the file is selected by the service, which can only be listened to at a time chosen by the service and for which no advanced play list is published'* (emphasis added). Indeed, the currently applicable Certified CMRRA/SODRAC Online Music Services Tariff includes limited and permanent download services, interactive webcast services, hybrid webcast services, non-interactive webcast services, and online music services (defined as including all previously mentioned services).[39] This Tariff does not seem to cover online, interactive, music streaming services like those offered by Spotify, Deezer, and others.

This is summarized in Table 2 below.

Table 2 - Role of CMOs in Canada

CMO	Rights owner represented	Rights managed
SOCAN	Music authors (composers & lyricists) Music publishers	Public performance right
CSI = SODRAC/ CMRRA	Music authors (composers & lyricists) Music publishers	(Mechanical) Reproduction right

[38] CSI Music Services, "Welcome to CSI Music Services", online: *CSI Music Services* < http://www.cmrrasodrac.ca/en/welcome-bienvenue/ > .

[39] Copyright Board of Canada, "Statement of Royalties to be Collected for the Communication to the Public by Telecommunication or the Reproduction, in Canada, of Musical Works", Online Music Services (CSI: 2011-2013; SOCAN: 2011-2013; SODRAC: 2011-2013), Erratum - Supplement to the Canada Gazette, vol. 151, No. 42, October 21, 2017.

As it is the case in the European Union and the USA, the Canadian copyright music licensing market has witnessed the emergence of independent management agencies that offer various services to self-administered or unpublished authors, including licensing services. An unknown number of the previously described entities are active globally, including on the Canadian market. Kobalt, for example, is also active on the Canadian market. It is unclear from how many entities besides SOCAN and CMRRA, online streaming services would need to secure licenses to cover the entire repertoire that they wish to exploit. However, it is our impression that CSI's combined repertoire, which includes the Canadian daughter companies of the three major music publishers (Sony Music Entertainment Canada Inc., Universal Music Canada Inc., and Warner Music Canada Co.) and a number of smaller Canadian music publishers, is likely to cover the vast majority of Canadian works that could be offered through online streaming services. Whether CSI's repertoire would cover foreign works, so as to meet the online streaming services' ambition of offering a global repertoire, depends on CSI's arrangements with sister organizations abroad.

(b) Licensing of Related Rights for Online Music Streaming Services

As in the case of copyrights, the online streaming of music involves both the right of mechanical reproduction and the right of making available to the public, if and where these rights are granted by law to the performer and the record producer. The related rights of performing artists and record producers can be exercised either collectively through a CMO, or individually. In the latter case, the record producer usually has obtained the rights from the performing artists so as to be the one entitled to grant licences to online music streaming services. The result is that the exercise of related rights is also highly fragmented, as explained below.

i. European Union

In Europe, both performing artists and record producers enjoy an exclusive right of reproduction and communication to the public, including the right of making available in a place and at a time individually chosen by the members of the public, pursuant to articles 2 and 3 of Directive 2001/29/EC.[40] These are the rights involved in online streaming, and for which an online service provider would need to obtain a licence from the rights owner. As will be further explained below, the licensing of these rights is less straightforward than for copyrights, first because the CMOs who normally represent performing artists do not administer the online interactive rights, and second, because record producers usually hold all rights on commercial music records.

Before the adoption of Directive 2001/29/EC in 2001, both categories of rights owners were granted a right to equitable remuneration for the

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[40] 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 L167, 2001-06-22, at 10.

communication to the public of commercial phonograms, pursuant to article 8(2) of Directive 92/100/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property.[41] On the basis of this statutory right to equitable remuneration, every time a commercial phonogram is communicated to the public in a member state of the European Union, a fee must be paid to the rights owner. Where they did not exist prior to the adoption of Directive 92/100/EC, CMOs were established in each and every member state to collect and distribute the equitable remuneration owed to the rights owners. CMOs, like SPEDIDAM (France), SENA (The Netherlands), PPL (UK) and GVL (Germany), fulfill this role. Over time and with the development of technology, equitable remuneration has been perceived for acts of communication to the public by wire or wireless means, including for diverse online radio offerings, like webcasting. Since article 8(2) of Directive 92/100/EC is not applicable to the making available of a fixation of a performance, no fee is collected for any type of interactive, on-demand, acts of making available. As these CMOs draw their mandate from a statutory provision, it would require a legislative amendment to allow them to expand their activities to the collection of royalties for interactive, on-demand, acts of making available.

As a result, the CMOs that collect the equitable remuneration flowing from the communication to the public of commercial phonograms have no legal mandate to act with respect to the right of making available on-demand. This exclusive right in principle rests with the performer and the record producer. However, by virtue of agreeing to the fixation of their performance in a commercial phonogram, the performer's making available right is automatically transferred to the producer, along with the rights of fixation and physical distribution of the sound recording. Apart from a single fixed fee for the transfer of the latter rights, performers receive no specific remuneration in return for the transfer of their rights for on demand uses of their recorded performances.[42]

If CMOs are not legally entitled to collect royalties on behalf of performing artists for online streaming, then performing artists have one of three options at their disposal: either they produce their own records and manage their own rights, which may entail high transaction costs to get their music played on streaming services like Apple, Amazon, Deezer, Google, or Spotify; or they leave the exploitation of their rights to their record producer, the benefits of which depend entirely on their bargaining position vis-à-vis the producer; or finally, they entrust the administration of their online rights to one of the many

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[41] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) OJ L 376, 27.12.2006, 28—35 - codifying Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, at 61.

[42] *Europe Economics, supra* note 9 at 77. Study prepared for the European Commission, DG Internal Market, MARKT/2013/080/D, Luxembourg, Publications Office of the European Union, 2015.

distributors that have emerged to fill the gap on the European and worldwide market.

Besides the three major record producers (Sony Music, Universal Music, and Warner Music) that operate across Europe, each member state counts a varying number of independent record labels whose mission is to promote local artists.[43] Especially big and powerful record labels, like the three majors, tend to require a full transfer of rights from the artists they sign up. Even smaller record labels will expect the transfer of the mechanical and performance rights in their favour, so that they can license them to the online streaming platforms themselves and distribute royalties to performing artists according to the terms of their contract. The level of remuneration paid to the artists varies of course in function of their negotiating skills, but this is not essential for this article.

Performing artists can also elect to distribute their catalogue using a third-party distributor. These companies handle the licensing, distribution and administration of an artist's music. Among these are Tunecore, DistroKid, Record Union, CDBaby, Emubands, iGroove, and numerous others. Record Union, for example, pursues the mission of enabling and supporting the full potential of every music maker in the world by making the music industry more democratic, accessible and transparent for the many. Record Union is a distributor of performing artists' audio recordings. The terms and conditions to which artists must agree before uploading their recordings on the website state that the rights granted in the Agreement include, but are not limited to, the sale of recordings, permanent digital downloads, temporary digital downloads, **interactive streaming**, non-interactive streaming, cloud services, and streaming-on-demand services. The grant of rights does not constitute a transfer of ownership of the recordings, as artists retain ownership of their related rights.[44]

ii. United States

Contrary to the law in force in the European Union and Canada, American Federal Copyright law does not provide for a general right of equitable remuneration of performers or recording producers when their recordings are publicly performed,[45] except for a limited digital public performance right for sound recordings.[46] This specific right was introduced in American law through the *Digital Performance Right in Sound Recordings Act* of 1995.[47] The right

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[43] For a non-exhaustive list of record labels present in different markets, see: https://www.ifpi.org/our-members.php.

[44] Record Union, "Terms and Conditions", online: *Record Union* <https://www.recordunion.com/terms-and-conditions.html>.

[45] *NRCC Statement of Royalties 1998-2002 (Tariff 1.A), Re*, 1999 CarswellNat 3247, 3 C.P.R. (4th) 350, [1999] C.B.D. No. 3 (Copyright Bd.) at para 7.

[46] Glynn S. Lunney, "Copyright Collectives and Collecting Societies: The United States Experience", in D. Gervais (ed.), Collective Management of Rights, 3ed., Kluwer Law International, 2016, 319-366 at 344 [*Lunney*].

[47] 104 Pub. L. No. 39, 109 Stat. 336 (1995).

applies only to a limited category of non-subscription and subscription transmissions, such as certain webcasters, or to interactive transmissions that enable a member of the public to receive, on request, a transmission of a particular sound recording or a programme specially created for the recipient.[48] But as Lunney explains, with respect to the first category of acts, the digital public performance right for sound recordings was further narrowed by subjecting it to a compulsory license.[49] SoundExchange is the CMO designated by Congress to administer the digital performance royalties for the use of sound recordings on non-interactive platforms. SoundExchange represents recording artists and small, medium and large record companies. Recording artists and sound recording owners must be registered with SoundExchange in order to receive digital performance royalties for the use of their sound recordings on non-interactive platforms like SiriusXM, Pandora, and iHeart Radio.

With respect to interactive transmissions, however, a CMO has yet to be created to license the performing artists and record companies' rights to online streaming services. Whereas the *Music Modernization Act* created a blanket license on the songwriters' and publishers' mechanical rights for interactive streaming and digital downloads of musical works, it brought no change to the licensing situation of performing artists and record companies. Interactive services like Spotify, Apple, and all the others, are therefore left to negotiate licences with each individual copyright owner.[50] From the information available on the internet, it would appear that the interactive digital performance royalties are essentially left unlicensed. Even third-party distributors, like CD Baby, seem to only collect the label portion of any unclaimed non-interactive digital performance royalties for sound recordings from SoundExchange.[51]

The waters of the interactive streaming service licensing are particularly murky for performing artists, but also for small record companies in the United States. Those waters are presumably less so for the three major record labels, Sony Music, Universal Music, and Warner Music. This is because the three major record labels are also major music publishers, e.g. each record label is closely associated with a corresponding music publisher. They hold all the relevant rights in one hand and license them to online streaming services accordingly. A singer-songwriter who signs a deal with one of the three majors will receive from the company an annual sum that represents the author's share of remuneration for the entire bundle of rights, unless the author has assigned the performance right to a PRO. A performing artist who only holds related rights and no copyright will receive only the share of the royalties that represent the online interactive performance of the fixation of the performance on the record.

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48 *U.S.C.*, *supra* note 43 § 114(d)(3).

49 See 37 C.F.R. § 262.4.

50 *Lunney, supra* note 46 at 345.

51 CD Baby, "What Types of Royalties do you Collect?" (July 2020), online*: CD Baby* < https://support.cdbaby.com/hc/en-us/articles/203823219-What-types-of-royalties-do-you-collect- > .

This depends of course on the terms of the record contract and the payment structure of the online streaming service. Small record companies that hold no copyright on the music they exploit will most likely encounter very high transaction costs in their dealings with streaming services and they may do well to appoint a third-party distributor to do so. However, if the licensing of related rights in the United States is uncommon, they have an uphill battle there as well.

iii. Canada

Related rights were introduced in the Canadian legal system in 1997,[52] when the *Copyright Act* was amended to allow musicians, vocalists, and record companies to collect royalties for the exploitation of their performances or sound recordings. As it is the case in Europe, Canadian performing artists and makers of sound recordings enjoy a right of equitable remuneration for the communication to the public of performances fixed on sound recordings. Re:Sound is the CMO that was created to collect and distribute the equitable remuneration;[53] it falls under the second prong of the definition of collecting society in the *Copyright Act*, since it 'carries on the business of collecting and distributing royalties or levies payable under this Act in relation to a repertoire of works, performer's performances, sound recordings'.[54]

The founding members of Re:Sound were the ACTRA Performers' Rights Society (ACTRA PRS, now ACTRA RACS), the American Federation of Musicians (AFM, now MROC), La Société de gestion collective de l'Union des artistes (Artisti), Audio-Video Licensing Agency (AVLA, now Connect Music Licensing), and La société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec (SOPROQ). Re:Sound membership has since expanded to include Sony Music Entertainment Canada, Warner Music Canada Co., and Universal Music Canada Inc.

Re:Sound collects remuneration for musicians and vocalists as well as for sound recording makers under tariffs certified by the Copyright Board of Canada. It then forwards the share of the royalties to MROC for distribution among the musicians and vocalists that it represents and to CONNECT for distribution among the record labels. Re:Sound currently licenses businesses under tariffs for commercial radio, CBC radio, pay audio, background music, satellite radio, live events, dance, and fitness activities. It licenses music streaming services, but **non-interactive and semi-interactive services only**, which excludes downloads and on-demand streaming.[55]

As in the case of the United States, it would seem that the related rights owner's interactive, online performance right is essentially left unlicensed in

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[52] S.C. 1997, c. 24.

[53] M. Bouchard, "Collective Management in Canada", (2016) in D. Gervais (ed.), Collective Management of Rights, 3ed., Kluwer Law International, 265-287 at 269.

[54] *Copyright Act, supra* note 10 s. 2.

[55] Musician's Rights Organization of Canada, "Royalties" online: *Musician's Rights Organization of Canada* <https://musiciansrights.ca/en/royalties/>.

Canada. This means that, just like in the United States and unless they have assigned the performance right to SOCAN, Canadian singer-songwriters will receive their royalties from their publishers, payment which represents their share of remuneration for the entire bundle of rights.

In conclusion, the licensing of the necessary rights for the legitimate offer of online, interactive, music streaming services is highly fragmented and incomplete in the three jurisdictions considered. As described in Table 3 below, CMOs play a clear role for the management of the authors' and publishers' right of public performance in all jurisdiction. CMOs play some role in the management of the mechanical right of authors and publishers, but no role at all in the management of related rights.

Table 3 - Summary of Licensing Parties for Online Interactive Streaming Services

	Author/Publisher performing right	Author/Publisher mechanical right	Performer/Record producer Performing right	Performer/Record producer Master Reproduction
Europe	ICE, SACEM or other CMO	ICE, SACEM, other CMO, IME or direct from publisher	Direct from record producer or IME	Direct from record producer or IME
United States	ASCAP, BMI, SESAC	MLC - compulsory licence	Direct from record producer, IME or *unclear or unlicensed*	Direct from record producer, IME or *unclear or unlicensed*
Canada	SOCAN	CSI [SOCAN + CMRRA], IME or direct from publisher	Direct from record producer, IME or *unclear or unlicensed*	Direct from record producer, IME or *unclear or unlicensed*

3. EXTENDED COLLECTIVE LICENSING MECHANISMS

It appears from the above that in most jurisdictions, including Canada, clearing rights for online, interactive, music streaming services involves multiple rights owners and entities, which is extremely burdensome and inefficient. Rights clearance counts as one of the major obstacles to the deployment of new services in a territory. This explains why the idea of establishing a system of extended collective licensing (ECL) was put forward as a possible solution for the

clearance of online copyrights and related rights. This section explores whether the ECL system would indeed be feasible in such a fragmented rights landscape to cure the most salient transaction costs arising from rights clearance. To answer this question, the first subsection describes the main characteristics of ECLs. This leads to an examination of where, how, and to which end such licensing mechanisms have been put in place in practice in three jurisdictions, the Nordic countries, the United Kingdom, and the European Union.

(a) Main Characteristics of ECLs

Extended Collective Licensing (ECL) is a form of collective rights management whereby the application of a freely negotiated copyright licensing agreement between a user and a CMO, is extended by law to non-members of the organisation. ECLs function in a two-tiered manner: first, the law recognises the 'extended' application of agreements concluded between a CMO and a user to non-members of the CMO; and second, the parties freely negotiate the content of the agreement, including the level of remuneration. The ECL model differs from the European statutory licence model in that, under the latter model, the rights owner cannot oppose the use of the work as long as such use is done in accordance with the conditions laid down in the law and provided that remuneration is paid. The level of remuneration of a statutory license is usually set by a government body or authority, rather than the parties themselves.[56] The ECL model also differs from the American compulsory license model in that, under the latter, the conditions of use are laid down in the act rather than negotiated. Only the level of remuneration is negotiated between the parties, or in case no agreement can be reached, by the competent tribunal.

Apart from the need to implement a legislative provision that recognizes the binding character of a freely negotiated agreement between a CMO and a user on non-represented rights holders, ECLs are characterized by a number of key features. Primarily to the benefit of the licensee, ECLs are meant to ensure that all materials can be used without fear of meeting individual claims by outsiders and criminal sanctions. The legislative provisions establishing the ECL framework will often provide for a mediation mechanism, or other mode of alternative dispute resolution, in case the negotiating parties cannot reach an agreement. Since, in our opinion, the biggest challenge to the application of an ECL mechanism to the licensing of online, interactive, music streaming services rests on the relationship between creators and CMOs we focus in the pages below on two key characteristics: first, the representativeness of the CMO, both in terms of membership and mandate, and second, the safeguards in place for non-members.[57]

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[56] *Axhamn and Guibault, supra* note 6 at 4.

[57] Tarja Koskinen-Olsson and Vigdís Sigurdardottir, "Collective Management in the Nordic Countries" (2016) D. Gervais (ed.), Collective Management of Rights, 3ed., Kluwer Law International, 243 at 251 [*Koskinen-Olsson and Sigurdardottir*].

i. Representativeness of CMO

Arguably, the most crucial requirement of the entire ECL system is that the CMO that grants a licence to use the material be sufficiently representative of the rights holders in their sector of operation.[58] The representative character of the CMO is a question of legitimacy towards the non-members and of legal certainty towards the users: 1) a representative CMO will speak on behalf of a large enough number of rights holders to legitimize the application of the agreement to all rights owners, including non-members; 2) a representative CMO will be able to grant a licence with broad coverage of the repertoire, which increases the legal certainty for the users. A CMO with a low representation rate cannot pretend to negotiate a legitimate agreement with users on behalf of all rights holders, nor can it give any assurance to the user that the repertoire covered is sufficiently important to reduce the risk of having a large number of non-members opt-out of the agreement.[59]

The determination of what constitutes an acceptable level of representativeness varies. The representative character of a CMO is generally assessed in relation to the '**number of authors** of a certain type of works which are **used in a country** within the **specified field**'. Three factors play a role in the assessment: 1) the number of authors, whose 2) works are covered by the license and 3) whose rights are administered by the CMO. To be representative, an ECL granting CMO needs to represent a sufficient number of authors or their assignees, e.g. either publishers or heirs. What constitutes a sufficient number of represented authors is not fixed and is generally determined on a case-by-case basis by the government authority in charge of the supervision of CMOs. In the Nordic countries' experience, the number of authors must be 'substantial', which realistically is not 100%, but it should be somewhere between numerous and considerable. A Norwegian court had determined that the representation of approximately 50% of authors would be sufficient.[60]

The second aspect of a CMO's representativeness consists in defining which authors contribute to it. The answer depends on the breadth of the repertoire licensed under the ECL. The broader the repertoire, the greater the required representativeness. If the ECL license is meant to cover as many, or more, foreign works than local works, then a national CMO will not be deemed representative only on the basis of its national membership. Alen-Savikko and Knapstad suggest that foreign rights holders are on the whole non-members.[61] This is

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[58] *Riis, supra* note 8 at 256.

[59] Lucie Guibault and Simone Schroff, "Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy vis-à-vis Rights Holders" (2018) International Review of Intellectual Property and Competition Law, IIC 49: 916 [*Guibault and Schroff*].

[60] Decision of the Norwegian Kabeltvistnemda (The Cable Dispute Tribunal) of 28 June 2011, Case No. 1/2010 and case No. 4/2010 discussed in Riis (2019) at 259.

[61] Anette Katariina Alen-Savikko, and Tone Scerresdotter Knapstad, "Extended collective licensing and online distribution - prospects for extending the Nordic solution to the

debatable. A CMO can be called upon to demonstrate its representativeness in relation to the foreign repertoire as well. This will be achieved by establishing the existence of reciprocal representation agreements between the national CMO and the foreign sister CMOs.

The third aspect of the representativeness requirement concerns not the number of rights owners represented, but the rights included in the mandate. This criterion derives from the wording of the legislative provision enabling the grant of an ECL, according to which the user obtains 'the right to exploit works of the same nature'. This directly concerns the CMO's mandate and its capacity to grant licences with respect to the rights it administers. This aspect of the representative character of the CMO must be neither overlooked or underestimated, because it is at the core of the ECL system: to be entitled to grant licences in the first place, whether on behalf of non-members or not, the CMO must be entrusted by its members with an explicit mandate to represent specific rights. The issue of the mandate of a CMO is as crucial for the good functioning of an ECL scheme, as the number of authors represented.

ii. Safeguards for Non-Members

A key element of a legitimate ECL regime is the possibility for non-member rights holders to withdraw from the scheme at will. In other words, a right holder may veto the use of their work under the ECL agreement, e.g. to prohibit the said use completely or an individual agreement with a user.[62] Not all existing ECL schemes in Scandinavia offer this option to rights owners. In particular cases, such as broadcasting and cable retransmission, the legislator considered that it would be unwise to give non-members a right of withdrawal as it would create important holes in the repertoire of the CMO and hinder the operations of the cable distributors.[63] Nevertheless, together with the free negotiation of ECL agreements between the CMO and the user(s), the opt-out option is nowadays recognised as the element that makes the difference between a mandatory licence and an ECL system. Without the possibility to withdraw from the regime, non-members would lose control over the use of their works, meaning that they would no longer be able to exercise their exclusive rights. An ECL system without the possibility to opt-out would be akin to a mandatory licence.

To safeguard the authors' interests, should they be dissatisfied with the agreed level of remuneration or with the internal remuneration scheme of the organization, they enjoy the right to claim individual remuneration for the demonstrated exploitation of their work by the licensee. This right applies regardless of any decision made by the licensee and is without prejudice to the

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digital realm" (2019) In T. Pihlajarinne, J. Vesala, and O. Honkkila (Eds.), *Online Distribution of Content in the EU*, Edward Elgar, 2019, 79 at 89 [*Alen-Savikko and Knapstad*].

62 *Riis, supra* note 8 at 259.

63 *Axhamn and Guibault, supra* note 6 at 28.

right of equal treatment vis-à-vis the members.[64] In this sense, the non-member is in a better position than the members of the CMO. However, in practice it can be difficult for the non-member to prove the extent of use of their work(s) and there is no obligation on the part of the user or the CMO to keep track of the use of individual works.

Alen-Savikko and Knapstad add that to ensure that the right of withdrawal and individual remuneration constitute legitimate and effective safeguards, non-members should be made aware of them.[65] ECL granting CMOs should therefore take all measures necessary and reasonable to implement internal rules of notification to bring the ECL regime to the attention of all authors covered by the freely negotiated licence. This includes not only national members of the CMO, but foreign authors as well, if they are covered by the licence.

(b) Foreign Experience with ECLs

ECL regimes have a long track record in all Nordic countries, e.g. Denmark, Norway, Sweden, and Finland, but other countries increasingly see the appeal of this type of licensing system. Focusing on the issue of CMO representativeness and the safeguard for non-members, the following subsections give a brief portrait of the experience with ECL in the Nordic countries, in the United Kingdom, and at the European Union level.

i. Nordic Countries

The Nordic countries introduced the first ECL provision in their respective national copyright acts at the beginning of the 1960s to solve the problem of rights clearance in regard to the broadcasting of literary and musical works.[66] Considering the vast number of works involved, it was deemed overly burdensome to require from broadcasting organizations that they find and sign a contract with every single author whose works were being used. The administrative effort of finding non-members and negotiating a licence with them were considered to give rise to considerable transaction costs. The primary rationale behind the introduction of the ECL model was to reach a balance between the respective interests of users and right holders. The ECL model was considered to offer a middle ground between voluntary collective management and compulsory licensing.[67] From the initial use in the field of music

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[64] Although the wording of the statutory provisions differs slightly, this is the denotation of section 51 second paragraph of the Danish Copyright Act; section 37 second paragraph of the Norwegian Copyright Act; section 26 fifth paragraph of the Finnish Copyright Act; and section 42a third paragraph of the Swedish Copyright Act.

[65] *Alen-Savikko and Knapstad, supra* note 61 at 88.

[66] The Nordic ECL model has been analysed mainly in the Nordic the legal literature, but for English language contributions, see e.g. *Koskinen-Olsso and Sigurdardottir, supra* note 57 at 253 ff.

[67] *Ibid.*

broadcasting, ECLs were expanded to cover various other types of uses, including for private copying, educational uses, library uses, etc.

The main avenue followed in the Nordic countries to implement ECLs in the various sectors has been to identify specific areas of use for which the extended collective license confers to the user the right to exploit works of the kind referred to in the agreement, despite the fact that the authors of those works are not represented by the organization. Sweden and Denmark have more recently broadened the possibility of adopting ECLs, by enacting a 'General ECL' provision that allows the parties to define the area of application of an ECL agreement. The Swedish generic provision states for example that "[e]xtended collective license may also be invoked by users who, within a specified field, have made an agreement on the exploitation of works with an organization comprising a substantial number of authors of a certain type of works which are used in [the country] within the specified field".[68] The Swedish and Danish general ECL provisions have been used sparingly since their adoption and in very specific areas.

Representativeness of CMOs is an important aspect of ECL regimes in Scandinavia, where the CMOs must represent a "significant" (Sweden)[69] or "substantial part of the authors" (Norway) or even "numerous authors" (Finland)[70], "of a certain type of works which are used in [the country] within the specified field".[71] The law does not further specify what "substantial number" means in practice. The degree of representativeness is going to vary by sector and country. Existing schemes assess the representativeness in terms of membership always in combination with the second criterion: mandate. For example, the Danish Ministry of Culture assesses the representativeness of the CMO as a combination of membership size and the specific use (exclusive right) in question. In other words, while the absolute size of the membership matters, it can only be understood in respect to the specific right in question.[72] In this context, the CMO's statutes and therefore membership contracts form part of this examination.

The safeguards to the non-members have not always been guaranteed across the board of the several ECL regimes in place in the Nordic countries. For certain types of uses, like secondary broadcasting of musical works, there was fear that allowing rights owners to withdraw would create a hold up on the broadcast repertoire, which would defy the purpose of the whole endeavour.[73]

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[68] Swedish Copyright Act 2014, art. 42(h).

[69] *Ibid* art. 42a.

[70] Article 26 of the Finnish Copyright Act requires that the organisation 'represents, in a given field, numerous authors of works used in Finland'.

[71] Tryggvadottir 'Digital Libraries, the Nordic system of extended collective licensing and cross-border use' (2014/15) Auteurs & Media at 318.

[72] *Guibault and Schroff, supra* note 59 at 930.

[73] *Riis, supra* note 8 at 259.

Nevertheless the two safeguards for non-members, e.g. the right to withdraw and the right to receive individual remuneration, have emerged as basic pillars of the ECL system.

ii. United Kingdom

The advantages of the ECL regime for the clearance of rights in sectors where transaction costs are too high to ensure effective licensing have not gone unnoticed to other countries in Europe. The United Kingdom adopted an ECL provision in the *Enterprise and Regulatory Act 2013*,[74] which was completed by the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014.[75] The Regulations establish a system of government approval of ECL licences. The Secretary of State may, if he considers it reasonable in the circumstances to do so, authorise a relevant licensing body to operate an ECL Scheme after receiving an application made in accordance with the Regulations. The Secretary of State may only grant an authorization if he is satisfied that the relevant licensing body's representation in the type of relevant works which are to be the subject of the proposed Extended Collective Licensing Scheme is significant. 'Representation' is defined as the extent to which the relevant licensing body currently acts on behalf of, and holds the rights of, right holders in relevant works of the type which will be the subject of the proposed ECL Scheme.

In relation to the criterion of representativeness, the UK government agreed with the generally held opinion of the stakeholders that the representativeness test should be flexible, since requiring absolute thresholds could prevent ECL schemes from emerging where they are needed most.[76] In its *Guidance For Relevant Licensing Bodies Applying to run ECL Schemes*, the UK government writes:

> To be significantly representative, the collective management organisation is expected to represent a very sizeable number of affected rights holders. Conclusions about a collective management organisation's representation are unlikely to be reached if the collective management organisation is unaware of the numbers of non-member rights holders in the extended portion. Collective management organisations may therefore wish to provide as evidence the total numbers of rights holders affected by the ECL scheme, and demonstrate a transparent methodology for how they arrived at that figure. A poor understanding of total numbers may result in an incomplete publicity campaign, which

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[74] Eleonora Rosati, "The orphan works provisions of the ERR Act: are they compatible with UK and EU laws?" (2013) E.I.P.R. 35(12) 724-740.

[75] The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, No. 2588, available at: <http://www.legislation.gov.uk/ukdsi/2014/9780111116890>> [*Copyright Board*].

[76] Lucie Guibault, 'Cultural Heritage Online? Settle It in the Country of Origin of the Work', 6 (2015) JIPITEC 3, 173-191.

> in turn could mean that rights holders who want to opt out may not be able to do so.[77]

According to the Regulations, the CMO must also show that it has the support of a significant proportion of its members for the application ECL scheme.

The UK legislator foresaw the possible occurrence of doubt regarding the mandate of a CMO and this is why the (Extended Collective Licensing) Regulations 2014 demand that the CMO has obtained the required consent from its members to the proposed Extended Collective Licensing Scheme.[78]

The *UK Enterprise and Regulatory Reform Act 2013* confers on the copyright owner the right to limit or exclude the grant of licences by virtue of the regulations. The (Extended Collective Licensing) Regulations 2014 defines "opt out arrangements" as the steps to be followed by a right holder to limit or exclude the grant of licences under an Extended Collective Licensing Scheme. This statement is completed by two provisions in the Regulations: article 5 (1)(g), which requires evidence that arrangements have been made to allow non-members to opt-out of an ECL scheme as well as the steps that are required to actually opt out; and article 16 of the same regulations, which sets out in great detail when and how a copyright owner may opt-out of an ECL scheme.

The regulations require that an ECL granting CMO take appropriate measures to publicise the ECL scheme both before the introduction of the scheme and during its life. The rationale behind this requirement is that all efforts should be made to take adequate account of the interests of the non-members. This translates in practice by publicising the scheme so as to locate non-members and inform them of the possibility to either opt-out or receive individual remuneration. The appropriateness of a scheme's publicity arrangements will be considered within the context of whether or not those arrangements are proportionate. Appropriate measures may involve publicising the scheme in countries where non-members are expected to be found. For the UK government, this means that CMOs may have more targeted publicity campaigns in territories where they are most active, whether or not there is a reciprocal agreement with a collective management organisation in that territory.[79]

Remarkably, only one CMO applied to the Secretary of State for approval of a proposed ECL scheme, since the adoption of the Regulations in 2014. The Copyright Licensing Agency (CLA) applied in December 2017 for authorisation to operate an ECL scheme with the full support of its members, the Authors'

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[77] Intellectual Property Office (UK), "Extended Collective Licensing (ECL): Guidance for relevant licensing bodies applying to run ECL schemes" (2016), *UK Government*, at 3 [*ECL Guidance*].

[78] *Copyright Board, supra* note 75 art. 4(4)f).

[79] Intellectual Property Office, "Guidance for relevant licensing bodies applying to run ECL schemes" (2016), 14.

Licensing and Collecting Scheme (ALCS), Publishers' Licensing Services (PLS), the Design and Artists Copyright Society (DACS), and the Picture Industry Collecting Society for Effective Licensing (PICSEL).[80] The essential idea of this proposed ECL scheme was to authorize the CLA and its members to license and collect payments for copying, scanning, distributing, or other uses of copyrighted works, regardless of whether the creators are members of the organization or have given their permission. The Secretary of State opened a public consultation on the adequacy of the proposed arrangement.[81] The National Writers Union strongly opposed the plan, arguing that the scope of the ECL scheme was too broad and would potentially deprive members from the possibility to license their digital rights individually.[82] The proposed scheme did not receive approval and no other application has been filed since then.

iii. Directive 2019/790 on Copyright in the Digital Single Market

The European copyright law framework expressly recognized the continued existence of ECL regimes in several member states[83], before introducing two ECL related provisions in Directive (EU) 2019/790 on Copyright in the Digital Single Market.[84] A first provision, article 8, deals with the licensing of out-of-commerce works to cultural heritage institutions and a second provision, article 12, allows member states to implement a general ECL mechanism. The European legislator has always shown a marked preference for licensing arrangements

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[80] Copyright Licensing Agency, (CLA) "ALC Applies for Extended Collective Licensing" (7 December 2017) online: *Copyright Licensing Agency* < https://www.cla.co.uk/news-cla-application-extended-collective-licensing > .

[81] Intellectual Property Office, "Extended Collective Licensing (ECL): A consultation on an application by the Copyright Licensing Agency (CLA) to operate an Extended Collective Licensing (ECL) scheme" (2017) online:

< https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665679/extended-collective-license.pdf > .(LINK IS BROKEN)**

[82] Edward Hasbrouck, "NWU Opposes UK Scheme for 'Extended Collective Licensing' for Digital Rights", *National Writers Union* (5 February 2018), online: < https://nwu.org/nwu-opposes-uk-scheme-for-extended-collective-licensing-for-digital-rights/ > .

[83] 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, OJ L 248, 6.10.1993, 15—21, art. 3; Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of copyright and related rights in the information society, OJ L. 167/10, 22.6.2001, recital 18; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5—12, recital 24; 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 L 84, 20.3.2014, 72—98, recital 12.

[84] *Directive 2019/790*, *supra* note 5 and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1OJ L 130, 17.5.2019, 92—125, art. 8 and 12.

above the recognition of exceptions and limitations for granting permission to make certain uses of copyright protected works.

In the case of out-of-commerce works, an ECL solution for the use of these works by cultural heritage institutions was widely supported by all stakeholders, from authors, to publishers and to the cultural heritage institutions themselves.[85] Nevertheless, in the last phase of negotiating the directive, an exception was inserted in the text to provide for the possibility to use certain types of works or other subject matter for which no CMO that fulfils the condition set out in the directive exists. Article 8 requires that member states establish an ECL mechanism for the licensing of out-of-commerce works. The basic characteristics of an ECL are immediately apparent in the provision, namely the requirement of representativeness and equal treatment of all rights owners. Article 8(4) codifies the right of withdrawal for all rights holders. Article 10 of the Directive lays publicity obligations on cultural heritage institutions, CMOs or relevant public authorities for the purposes of the identification of the out-of-commerce works licensed under the ECL, as well as information about the options available to rights holders under article 8(4), and information about the licences themselves.

More interesting for the purposes of this article is article 12 of Directive (EU) 2019/790, which generally allows member states to provide, as far as the use on their territory is concerned, that a collective licensing agreement for the exploitation of works be extended to non-members, subject to the safeguards provided for in the article. The extended licensing mechanism can only be applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works concerned, and shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders. Such mechanisms should be based on objective, transparent and non-discriminatory criteria as regards the treatment of rightholders, including rightholders who are not members of the CMO.[86] The conditions for a legitimate ECL regime are laid down in paragraph 3, as follows:

(a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights which are the subject of the licence, for the relevant Member State;
(b) all rightholders are guaranteed equal treatment, including in relation to the terms of the licence;
(c) rightholders who have not authorised the organisation granting the licence may at any time easily and effectively exclude their works or other

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[85] See Lucie Guibault, 'Cultural Heritage Online? Settle It in the Country of Origin of the Work', 6 (2015) JIPITEC 3, 173-191.

[86] *Directive 2019/790*, *supra* note 5 recital 47.

subject matter from the licensing mechanism established in accordance with this Article; and

(d) appropriate publicity measures are taken, starting from a reasonable period before the works or other subject matter are used under the licence, to inform rightholders about the ability of the collective management organisation to license works or other subject matter, about the licensing taking place in accordance with this Article and about the options available to rightholders as referred to in point (c). Publicity measures shall be effective without the need to inform each rightholder individually.

Recitals 44 to 50 provide additional insight into the intention of the European legislator with respect to the establishment of ECL schemes. Worth pointing out in the context of online music streaming services, is recital 45 which emphasises that:

> [e]xtended collective licensing by collective management organisations and similar mechanisms can make it possible to conclude agreements in those areas where collective licensing based on an authorisation by rightholders does not provide an exhaustive solution for covering all works or other subject matter to be used. Such mechanisms complement collective management of rights based on individual authorisation by rightholders, by providing full legal certainty to users in certain cases. At the same time, they provide an opportunity to rightholders to benefit from the legitimate use of their works.

With respect to the criterion of representativeness, recital 48 specifies that:

> Member States should determine the requirements to be satisfied for those organisations to be considered sufficiently representative, taking into account the category of rights managed by the organisation, the ability of the organisation to manage the rights effectively, the creative sector in which it operates, and whether the organisation covers a significant number of rightholders in the relevant type of works or other subject matter who have given a mandate allowing the licensing of the relevant type of use.

Through recital 49 of Directive 2019/790 the European lawmaker puts a limit on the ability to operate a licence under an ECL mechanisms, namely that the CMO be subject to national law implementing Directive 2014/26/EU. Although recital 49 does not explain the reason for this restriction, it is arguably to avoid that a foreign CMO that is not bound by the obligations of good governance set out in Directive 2014/26/EC operate on the same market. A competing foreign CMO in a single market could have a negative impact on the representativeness of the local CMO and would make the administration of the conditions for a legitimate ECL more burdensome for all parties.

The deadline for the implementation of the provisions of the Directive in the national law of the member states is June 7th, 2021.

4. APPLYING ECLs TO ONLINE MUSIC STREAMING SERVICES

Based on the survey of the licensing of copyright and related rights for online music streaming services in Section 2 and on the description of the key elements and criteria of an ECL regime as put in place in countries of Europe in Section 3, this section analyses the hurdles that the establishment of an ECL regime for the licensing of online streaming services might encounter in Canada. The first challenge, and probably the biggest, revolves around the issue of the representativeness of CMOs; the second deals with the safeguards to be guaranteed to non-members; the third concerns the potential role of the Copyright Board of Canada; and the last and possibly the least pressing, relates to the compliance of ECL regimes with international obligations.

(a) Representativeness of CMO

In order to be able to legitimately extend the application of a license agreement to non-members, a CMO must demonstrate that it represents the rights on a 'substantial' or 'significant' portion of the repertoire it licenses. For an online music streaming service that aims to make a worldwide repertoire available to its subscribers, the legitimacy of the ECL system must therefore account for both the national and foreign repertoire. There is no clear criterion or measure for the assessment of the representative character of a CMO. In our opinion, the representativeness of the CMO granting the ECL must therefore be determined by three essential cumulative factors: 1) the number of rights owners directly represented by the national CMO granting the streaming license; 2) the number of agreements with foreign CMOs representing rights owners in the same category; and 3) the correspondence of legal mandates between CMOs, e.g. whether CMOs bound by reciprocal agreements do in fact manage the same categories of rights. Each factor is examined in turn below.

Dealing first with the third factor on the legal mandate given to the CMOs, certified *Tariff 22.A - Internet - Online Music Services* applies to services like Spotify and others. We assume on this basis that the SOCAN is entrusted by its members with the administration of the right of communication to the public by telecommunication, which includes in this case on-demand music streaming.[87] CSI (e.g. SODRAC and CMRRA) has applied for the approval of a Tariff for online music services which would cover interactive services.[88] While this Tariff application is still pending, we infer from it that CSI does hold the necessary rights from its members to license these on to users.

The issue of the legal mandate of CMOs is the thorniest in relation to the rights of performing artists. Is Re:Sound entitled to license any rights of the performing artists or record producers for the online, interactive, music

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[87] SOCAN Tariff 22.A (Online Music Services), 2007-2010 online: < https://cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2012/Tarif-SOCAN22A.pdf > .

[88] CSI Commercial Radio Tariff 2018, online: < https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2017/TAR-20170526.pdf > .

streaming services? From the information available on the website of the Copyright Board, we see that the Quebec counterpart to Re:Sound, Artisti, had applied, but later withdrew, a demand for the approval of a Tariff for the *Making Available to the Public, Communication to the Public by Telecommunication and Reproduction of Performances Fixed in a Sound Recording by Online Music Services* (2019-2021).[89] No comparable Tariff application was made by Re:Sound or by any other member (MROC or CONNECT). Re:Sound's legal mandate is in all likelihood limited to non-interactive acts of communication to the public by telecommunication. This situation is not unique: no other related rights society elsewhere in Europe or the USA has, to our knowledge, acquired the necessary rights to grant licences for the making available of sound recordings to the public. For this reason, it is our opinion that an ECL mechanism for the licensing of **related rights** for online, interactive, streaming services is simply impossible at this time. The first step that Re:Sound would need to take, would be to acquire the mandate to act in this area.

With respect to the copyrights in musical works, the national CMO must be representative of a 'substantial' number of rights owners holding rights on the types of works covered by the extended licence. In the Canadian context, there is little doubt that SOCAN is representative of music authors and publishers, at least with respect to the administration of the right of public performance. SOCAN states that over 150,000 songwriters, composers, and music publishers are its direct members. SODRAC, by contrast, represents more than 9,000 authors, composers, and publishers in Canada. SODRAC's membership can appear quite low in comparison to SOCAN's, but this is not surprising if we consider that the vast majority of published authors transfer their mechanical rights to a music publisher. The proportion of individual composers who are members of SODRAC is correspondingly much lower. This by no means suggests that SODRAC is not representative at the national level. By contrast, t is unclear how many members have joined the CMRRA. Also unclear is the number of non-represented music publishers there are in Canada. As the UK *Guidance for relevant licensing bodies applying to run ECL* points out, the CMO should be aware of the numbers of non-member rights holders there are in the extended portion.[90]

On the national CMO market, the representative character of a CMO could be affected **if more than one** organization is authorized to conclude ECL agreements within a certain field on a particular territory.[91] If more than one organization were eligible, this could create confusion on the part of non-members as to where to claim remuneration as well as confusion on part of the

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[89] Online Music Services Tariff (ARTISTI 2019-2021), online: <https://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2018/ARTISTI-19052018.pdf>.

[90] *ECL Guidance, supra* note 77.

[91] Daniel Gervais, "Application of an Extended Collective Licensing Regimee in Canada: Principles and Issues Related to Implementations"(2003) Department of Canadian Heritage at 35 [*Gervais*].

users as to which works each organization administers.[92] The Nordic countries generally admit that more than one organization can be eligible, but in such a case, the organizations are presumed to cooperate. Legal certainty and predictability are created to some extent by the fact that any representative organization must be approved by the Ministry responsible for the *Copyright Act* before they can be eligible to conclude an ECL. In addition, the Ministry responsible for approving a CMO may lay down rules on good governance and transparency of the organization.[93] When several organizations are approved to grant a license for a given use of works, the terms of the approved decisions shall ensure, where needed, that the licenses are granted simultaneously and on compatible terms. With respect to the licensing of mechanical rights, the Canadian collective rights management market is occupied primarily by CSI, which is a joint venture of the CMRRA and the SODRAC. The potential issue of having two CMOs in the area of mechanical rights in Canada should not create a problem, since they clearly cooperate with each other.

Especially with respect to services using a worldwide repertoire, like Spotify, Apple, Amazon, or Deezer, it is essential that the ECL granting CMO be also representative of foreign rights holders whose works are licensed on the Canadian territory. A CMO will need to show that it has signed reciprocal agreements with foreign entities that represent the rights on the works covered by the ECL. SOCAN is a member of the *Confédération Internationale des Sociétés d'Auteurs, Compositeurs et Éditeurs de Musique* (CISAC). Although this list is not available on its website, SOCAN boasts of having reciprocal agreements with over 90 different performing rights organizations (PROs) around the world.[94] SOCAN's representativeness vis-à-vis foreign rights holders is undeniable. Rather, the question here is whether SOCAN experiences such difficulty in licensing the digital performing right to online streaming services that an ECL model would bring benefits above the current voluntary licensing mechanism.

SODRAC is a member of the *Bureau International de l'édition mécanique* (BIEM). Figure 1 below is a screenshot taken from SODRAC's website which shows a portion of the foreign partners with whom SODRAC has concluded an agreement. A sharp eye will notice that not all agreements with sister organisations are of the same nature: some are reciprocal, meaning that both CMOs represent each other's repertoires on their respective territories. Others carry the mention 'Represents SODRAC's repertoire' (presumably on the foreign territory of that CMO), and yet others state that the organisation is 'represented by SODRAC' (presumably on the Canadian territory). Remarkably, SODRAC's agreements with the organisations representing the Anglo-

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[92] Thomas Riis and Jens Schovsbo, "Extended Collective Licenses and the Nordic Experiences — It's a Hybrid but is It a Volvo or a Lemon?" (2010) 33:4 Columbia J. Law Arts at 493. [*Riis and Schovsbo*].

[93] *Axhamn and Guibault, supra* note 6 at 34.

[94] The Toolbox, "What is a Reciprocal Agreement", online: *SOCAN* < https://www.socan.com/wp-content/uploads/2017/12/socan-reciprocal-agreements-en-2017.pdf > .

Australian-American repertoire (APRA-AMCOS, Harry Fox Agency, and PRS for Music) are not reciprocal: the foreign organisations have the mandate to represent the Canadian repertoire on their territory, but not the other way around. In other words, SODRAC's agreement with these organisations do not entitle it to represent the foreign repertoire on the Canadian territory.

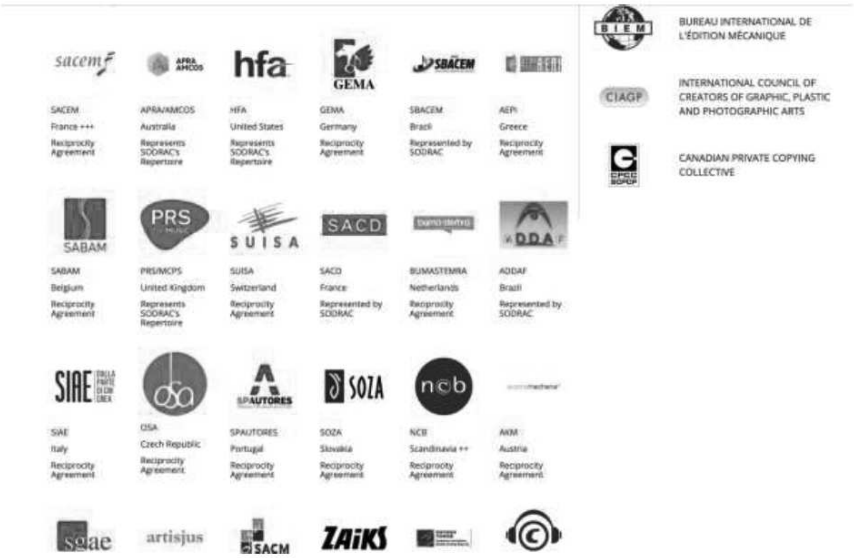

Figure 1 - Reciprocal agreements between SODRAC and sister CMO's - https://sodrac.ca/en/partners-music

Does this affect SODRAC's representativeness? Quite possibly, yes. If SODRAC is not entrusted by the foreign CMOs to represent on the Canadian territory the mechanical rights on the Australian, English or American repertoire, it cannot grant a licence with respect to those works. Presumably, the rights are licensed in Canada directly by the music publishers.

With respect to mechanical rights, there is no information available regarding the foreign reciprocal representation arrangements that the CMRRA might have concluded. Consequently, CMRRA's representativeness is a mystery. Knowing how the management market has exploded in recent years, with the emergence of third-party distributors and independent publishers, it is also unclear how many national and foreign music authors and publishers exist, who are not members of either SODRAC or CMRRA.

For a legitimate ECL to be set up for the licensing of mechanical rights for online, interactive, music streaming services, more information would be required regarding the representative character of CSI vis-à-vis nonpublished

authors in Canada and all types of rights owners in other countries. If research shows that there is an important proportion of non-represented authors and music publishers, this may prevent the creation of a legitimate ECL system. Not only would this affect the representativeness of the CMO, but it would affect the strength of the licence for the user, like Deezer, Spotify, and others, as it would raise the risk that too many rights owners would want to exercise the right of withdrawal or claim a separate remuneration.

(b) Safeguards for Non-Members

The implementation of a proper ECL regime would demand that the Canadian *Copyright Act* be amended not only to make the freely negotiated agreement between the CMO and the user binding on all non-represented rights owners in the same category, but also to recognize certain safeguards for non-members.[95] As discussed in Section 2 above, two key safeguards that should be put in place are the right of non-members to withdraw from the specific scheme and to receive separate remuneration for the proven use of their works. These two rights would be stronger if they were indeed introduced in the legislation, rather than left at the discretion of the parties to the agreement.

In practice, provisions would need to be made regarding the withdrawal method. Withdrawal is in theory only open to the actual rights owner. Knowing that most published authors have transferred their mechanical rights to the publisher/producer, they would clearly not be entitled to withdraw their songs from Spotify, Deezer, or the rest. The authorization of the publisher/producer would be required. On the other hand, the withdrawal method should allow nonpublished authors to easily opt-out of the ECL scheme without undue burden. Any ongoing use should be terminated within a reasonable period. Following the model of the UK (Extended Collective Licensing) Regulations 2014, the law could require that when a non-member rights holder withdraws their works, the CMO must inform licensees of (i) the names of those works, and (ii) when the works will be removed from the ECL scheme. CMOs are required to update a list of opted out rights holders and works.

Unrepresented right holders should be given the possibility to claim individual remuneration for the proven use of their music work, by advancing a claim against the CMO. Here also, rules should be laid down to determine within which deadline a claim can be made and what evidence must be adduced to obtain separate payment.

These rights should be accompanied by an obligation on all parties to take appropriate measures to publicize the ECL regime in every country where a non-negligible proportion of non-members is expected to exist. The (Extended Collective Licensing) Regulations 2014, and article 12(3) of the Directive (EU) 2019/790 provide a good illustration of how safeguards can be enacted in the law to protect the interests of the non-members. Article 12 (3)(d) of the Directive

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[95] *Gervais, supra* note 91 at 29.

requires for instance that appropriate publicity measures be taken, starting from a reasonable period before the works are used under the licence, to inform rightholders about the ability of the CMO to license works about the licensing taking place and about the options available to rightholders to obtain separate remuneration. Publicity measures must be effective without the need to inform each rightholder individually.

(c) Role of Copyright Board of Canada

One of the major benefits of the ECL model, in comparison with a compulsory license, is that it is based on free negotiations and thus presupposes mutual consent from the CMO and the user. However, the advantage of ECL over a compulsory license rests on the assumption that the market of collective agreements functions well in practice. In other words, it is based on the assumption that the users and the CMO are prepared to conclude agreements so that the intended use can be carried out. The underlying premise to a legitimate ECL regime rests on the capacity of CMOs to function well, be accountable and transparent, and act on a non-discriminatory basis. In the Nordic countries, there is a strong tradition of cooperation between CMOs and other parties. In Europe, rules on the good governance of CMOs have been introduced through the adoption of Directive 2014/26/EU on the Collective Management of Rights.[96]

In Canada, the oversight of CMOs and their tariffs occurs through the Copyright Board. The Board could, in principle, play a role at different levels with regards to the implementation of ECLs in the Canadian licensing landscape. For one thing, since the Canadian copyright system does not require any approval from a public body for the creation of a collective society, the Copyright Board could be called upon to verify the **representativeness** of a CMO before it begins issuing extended collective licences.[97]

The Board could of course play a role in approving tariffs, setting conditions to the ECL or arbitrating disputes between the CMO and the users about the conditions of use. Such a task would fall squarely within the Board's remit, as the Board sees itself as an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of copyrighted works, when the administration of such copyright is entrusted to a collective administration society.

But the Board could also be called upon to supervise the relationship between the CMO and the non-members. The Board could intervene where a non-member wishes to exercise **their right to individual remuneration**. Such remuneration would have to be negotiated between the rights holders and the

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[96] 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 L 84, 20.3.2014, at 72—98.

[97] *Gervais, supra* note 91 at 33.

CMO. If the CMO and the non-member fail to agree on an acceptable level of remuneration, they would presumably turn to the Copyright Board to mediate the dispute.[98] Finally, the Board could also oversee the efforts undertaken to publicize the ECL scheme among non-members.

These last two tasks may not fall within the normal ambit of the Board's activities, as they concern the relationship between the CMO and a rights owner. To give effective support in this respect, the mandate of the Board would probably need to be broadened to cover this side of the CMOs' activities.

(d) Compliance with International Obligations

As long as ECLs have existed, the issue of the compliance of ECL schemes with international obligations in the area of copyright law have shed a lot of ink. There is now a convincing body of literature that examines the question of whether an ECL scheme encroaches upon the minimum requirements of the Berne Convention, namely the prohibition on formalities and the three-step-test.[99] The general opinion has evolved over time towards the non-controversiality of this issue. This subsection will therefore very briefly summarize the issues and assess whether ECLs risk being found non-compliant.

i. Prohibition on Formalities

Article 5(2) of the Berne Convention prohibits contracting parties to subject the enjoyment and exercise of copyright to any formality. According to the legal literature, clearly prohibited examples of formalities include obligations to deposit works with state institutions (such as libraries), the requirement of a notice of authorship on the work, or the registration of the work with a public body and the renewal thereof, as a pre-condition for obtaining protection.[100] A rule of copyright law that made protection dependent on membership in certain organizations would also be considered a violation of the Berne Convention. The question is whether the act of withdrawal from the application of an ECL agreement by a non-member violates the prohibition in Article 5(2) because the opting out might constitute a 'formality' for the exercise of copyright.

Ficsor reviews the literature on the subject and concludes as follows:

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[98] *Gervais, supra* note 91 at 30.

[99] *Alen-Savikko and Knapstad, supra* note 61 at 90; Mihaly Ficsor, "Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU '*Acquis*'" (2016) in D. Gervais (ed.), 3rd ed., Kluwer Law International 31 [*Ficsor*]; Jane C. Ginsburg, "Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation" (2017) Columbia Public Law Research Paper No. 14-564 [*Ginsburg*]; *Axhamn and Guibault, supra* note 6 at 47; *Riis and Schovsbo, supra* note 92 at 483; *Gervais, supra* note 91 at 19.

[100] *Ibid.* For a thorough analysis of the prohibitions on formalities in relation to the "opt out" requirement in some ECL provisions, see Stef van Gompel, *Formalities in Copyright Law. An Analysis of Their History, Rationales and Possible Future,* Kluwer Law International, 2011, at 188 ff.

> A duly established extended collective management - fulfilling the four above-discussed conditions - is an *enabler* of due application of certain rights for the exercise of which collective management is indispensable or highly desirable. Rightholders do enjoy the right involved which is exercised in their interest by the CMO in accordance with the legislator's presumption that it is the only practicable way to enjoy it. If certain rightholders still try to exercise the right individually and opt out, it is a kind of 'rebuttal', in their case, of the presumption on which the legislators have provided for an extended effect.[101]

We are satisfied that if an ECL were to be set up in Canada for the licensing of mechanical rights for the online, interactive, streaming of music works, the right of withdrawal would not amount to a prohibited formality, as we know that the Canadian legislator would take all measures necessary to ensure that the key elements of a legitimate ECL scheme would be fulfilled.

ii. Compliance with the Three-Step Test

The question of whether an ECL provision is an exception on the non-member's copyright has also been discussed in the legal literature.[102] From the perspective of the non-member, an ECL could be construed under certain circumstances as an exception, akin to a non-voluntary licence, where the rights owner cannot oppose the use of their work. In relation to this, the most important restriction on the adoption of an exception is the so-called three-step test. The test is laid down in article 9(2) of the Berne Convention, article 10 of WIPO Copyright Treaty, and article 13 of TRIPS.[103] The wording of these three international instruments differs slightly, but generally the three-step test holds that a contracting state must confine limitations or exceptions of the exclusive rights to i) certain special cases, ii) which do not conflict with a normal exploitation of the work, and iii) do not unreasonably prejudice the legitimate interests of the right holder. As the test only applies to limitations and exceptions, the question is whether an ECL provision qualifies as either one of them.

As Gervais points out in his 2003 study, the ECL system is not a non-voluntary licence, for two obvious reasons:

> 1. The CMOs that benefit from the extended collective license are those that have asked for (and obtained) it from the competent administrative authority, which leads to the assumption that the CMO has consulted its members (or the rights holders that it represents) and has obtained their agreement and that they are of the opinion that an extension of the collective licence is in the interest of all rights holders in the category concerned.

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[101] *Ficsor*, *supra* note 99 at 77 [emphasis in original].

[102] *Riis and Schovsbo*, *supra* note 92 at 487 ff.

[103] At EU level it is enshrined in article 5(5) of Directive 2001/29/EC.

> 2. All non-member (or non-represented) rights holders can easily exclude themselves. Excluded rights holders can even benefit from an improved plan, as explained below.[104]

For the same reason and subject to the same conditions as given in relation to the prohibition on formalities, Ficsor rejects the statement that ECLs qualify as exceptions.[105] Ficsor sees ECLs as enabling systems serving the fullest possible enjoyment of a right in situations where transaction costs would make individual licensing impossible or undesirable. Of course, as Gervais[106] and Ginsburg[107] highlight in their publications, the implementation of proper safeguards for the non-members, e.g. the principle of equal treatment, the recognition of a separate right to remuneration and the possibility to withdraw, are the necessary conditions to make ECL regimes compliant with international norms. In such circumstances, there is therefore no need to submit the licensing regime to the conditions of the three-step test of article 10 of the WIPO Copyright Treaty.

5. CONCLUSION

The purpose of this study was to investigate whether a system of ECL could be feasible in Canada for the licensing of performing rights and mechanical rights to online, interactive, music streaming services like Spotify, Deezer, Amazon, and Apple. To answer this question, we first examined how rights are currently being licensed to such services by CMOs and other entities in the European Union, the United States, and Canada. This revealed an interesting portrait of the role of CMOs in the three jurisdictions. One important observation to make from this survey is that the digital licensing market in these jurisdictions is highly fragmented, especially with respect to mechanical copyright and related rights, as it counts various new forms of licensing entities. We also found that the CMOs representing related rights owners probably do not have a mandate to license digital, interactive rights on the sound recordings.

Next, we described the main features of an ECL scheme, which include the following:

1) The CMO and the user conclude an agreement on the basis of free negotiations;

2) The CMO is representative of a substantial number of rights holders in the field of activity;

3) The agreement is made legally binding on non-represented rights holders;

4) The user obtains a blanket licence to use all materials without fear of facing individual claims or criminal sanctions;

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[104] *Gervais, supra* note 91 at 17.

[105] *Ficsor*, *supra* note 99 at 74-75.

[106] *Gervais, supra* note 91 at 17.

[107] *Ginsburg*, *supra* note 99 at 9.

5) Non-represented rights holders have a right to separate, individual remuneration; and

6) Non-represented rights holders have a right to withdraw their repertoire from the application of the ECL.

To get a concrete idea of how ECLs work in reality, we discussed the practical experience with this licensing model of the Nordic countries, the United Kingdom, and the European Union. For this part, we focused primarily on the criterion of representativeness of the CMOs and on the safeguards for non-members. This is because we felt that if there is any doubt about the feasibility of this system, it would be in relation to these factors.

Combining the findings of the two first parts of this study, we then assessed whether a system of extended collective licensing (ECL) would be feasible in Canada for the licensing of performing rights and mechanical rights to online, interactive, music streaming services. With respect to related rights, the answer is simple: no. This is because to our understanding CMOs in this field do not hold the necessary rights. By contrast, an ECL for the copyright owner's right of communication to the public by telecommunication would most definitely be feasible, since the SOCAN is representative in its field. There, the question might be whether such a model would bring any advantage above the current situation. With respect to the copyright owner's mechanical rights administered by CSI, the answer is not unequivocal: for a legitimate ECL to be set up for the licensing of mechanical rights for online, interactive, music streaming services, more information would be required regarding the representative character of CSI vis-à-vis non published authors in Canada and all types of rights owners in other countries. Finally, we also considered what safeguards should be implemented to protect the interests of the non-members and what role the Copyright Board of Canada could be called to play in relation to an ECL scheme.

As a last thought, it may be worth pointing out the alternatives to ECLs proposed by Koskinen-Olsson and Sigurdardottir to facilitate the licensing of works that could be considered for online, interactive, music streaming services. A first option is to incorporate into a license granted by a CMO an indemnity clause by which the organization assumes the liability for the payment of remuneration to a non-member. The authors point out that this option does not enable the use of non-represented works. While it does eliminate financial liability under civil law, it does not take away possible liability under criminal law. A second option is to enact a provision in the *Copyright Act* by which a CMO is given a general authorization to represent all right holders for the category of rights that they normally administer or that creates a presumption to that effect. The effect of this solution is similar to the ECL but offers less safeguards to the rights holders. A third option is to set up a compulsory collective licensing system, as the American's have through the *Music Modernization Act* of 2018. In such a case, the collective management of an

exclusive right remains voluntary, but once the right holders choose to join, they cannot make claims on an individual basis.[108]

[108] *Koskinen-Olsso and Knapstad, supra* note 57 at 253.