Module 9: Collective management of rights

Objectives

When you complete this module, you should be able to

- describe, in about 200 words, the notion and role of collective management organizations (hereinafter abbreviated as CMOs);
- describe, in about 200 words, how a CMO collects royalties through licensing schemes;
- outline how the arrival of the digital era has affected the collective management of rights;
- explain, in around 250 words, the interaction between collective management and competition law; and
- explain, in 50 words, the relationship of the WIPO Development Agenda with CMOs.

Study note

This module should take you about five hours to study.

1.0 Collective management organizations

The role of collective management organizations in copyright and related rights

For authors, performers and producers of sound recordings, getting a financial reward for the use of their works, performances and sound recordings is probably one of the most important aspects of copyright and related rights. Some of the exclusive rights that can bring an economic return can be grouped into the following main categories:

- right of reproduction
- right of communication to the public
- right to make translations and adaptations

As we have noticed in the case of related rights, in some situations, the right holders only have a right to equitable remuneration, instead of exclusive rights. The normal way of exploiting copyright or related rights involves the granting of a license for certain uses of such works, performances or sound recordings. For example, in the case of a song, a license would need to be granted every time the song is performed or broadcast. However, it is probably not materially possible for the copyright owner to monitor the use of each of their works on every occasion in a given country, let alone in foreign territories. They would not, in practice, be able to license and collect from each user, bearing in mind the large number of potential uses that need to be licensed in a given country, if not around the world.

The user of the songs is in a similar position. If a restaurant owner, for example, wants to play background music in their restaurant, or if a broadcast station wants to transmit music, in the absence of a collective management framework, a separate license would be required for each work played or transmitted. In the case of a broadcast station, thousands of songs are transmitted on air every year. The major entertainment industries involved in the commercial exploitation of both copyright and related rights include music and sound recordings, film and audiovisual, print and publishing, visual arts and photography, dramatic works and broadcasting and the Internet. It would be very difficult, if not impossible, for such users to find all of the right holders and negotiate a separate license for the use of the desired work with each of them.

These issues are properly addressed by collective management organizations (CMOs). CMOs simplify the negotiation process by managing the rights of their members and acting as a single contact point for licensees.

There is normally one CMO per category of works in each country, although this is not always the case. In the United States of America, for example, there is more than one CMO for music. Either through assignments or mandates of rights, right holders become members of such organizations, which, in turn, become responsible for monitoring the use of works, negotiating terms and conditions with major users, giving licenses to users on behalf of the right holders and collecting royalties accordingly. They then distribute these royalties among their members after the deduction of administration costs. Some CMOs apply a deduction for social or cultural purposes. CMOs are generally managed by their members on a not-for-profit basis. There are different CMOs for managing the works used by different entertainment industries. In addition, in some countries agents who work for profit are also treated as CMOs.

This system of management of rights is advantageous to right holders, as well as to users. Right holders, such as composers, would be able to devote their time to their creative activity

and focus on it, without having to be concerned about managing and administering their rights. In parallel, the users would engage with only one body instead of having to seek authorization from each right holder, thereby saving time and resources. For example, 'blanket licenses' could be delivered allowing users to use any work in the repertoire administered by the CMO.

Depending on the use, a blanket license could prove more effective than a license to play specific works only because it would cut down on overhead costs. In this case, the CMO no longer has to check which works and performances are used on each occasion and whether or not these are covered by the license. Instead, the CMO can simply check whether or not a blanket license has been applied. In certain cases, other types of licenses (for example "per program licenses") are delivered.

Following the collection of royalties under the various licenses, the CMO further distributes the earnings to members on the basis of the uses made of their works. Different methods could be applied in order to determine the exact amount of money to which each member is entitled. One such method is sampling what is used and calculating the royalties for each member based on statistical evidence of the uses.

CMOs operate on a national level. However, through reciprocal representation agreements with "sister organizations" abroad, they could also administer the rights of foreign right holders. The amounts collected in this way are then transferred to the foreign CMO, which will, in turn, ensure that each right holder concerned receives the amounts due to them. These reciprocal representation agreements are often concluded in the context of international coordinating bodies, which CMOs working in a certain field have set up among themselves. Two excellent examples are the International Confederation of Societies of Authors and Composers (CISAC) and the International Federation of Reproduction Rights Organisations. Among their other functions, which we will return to later, these organizations play a role in ensuring good governance within CMOs, the importance of which should not be underestimated.

In the digital era, a push towards cross-border licensing has emerged and individual CMOs or groups of CMOs have started to operate across borders.

It is generally admitted that CMOs act in the interests of both right holders and users. However, potential abuses may result from their double monopoly situation. In order to avoid the possible negative effects of such situations, government authorities or national legislators have established safeguard measures to ensure that the interests of all parties, including the public, are well protected. For example, monitoring measures are put in place to ensure that CMOs are not charging exorbitant rates and that they are treating different categories of right holders in a fair and objective manner.

Transparency is also a key goal for CMOs. The European Union Directive on collective management (Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014, hereinafter CRM Directive), for example, has set out clear operating guidelines for CMOs on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ([2014] OJ L/84/72), placing the emphasis on transparency and accountability (see: https://ec.europa.eu/digital-single-market/en/collective-rights-management-directive).

In fact, the specific objectives of the Directive as set out by the European Union are to:

- improve the way in which CMOs established in the European Union are managed by establishing common governance, transparency and financial management standards;
- set common standards for the multi-territorial licensing by authors' CMOs of rights in musical works for the provision of online services; and

- create conditions that can expand the legal offer of online music.

The notion of a collective management organization

Although CMOs may have different legal forms in different states, the European Union has adopted a uniform definition of CMOs by taking into account their usual form, which is either a non-profit model or a model that allows control by their members. More specifically, according to Article 3 of the CRM Directive

> "'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;"

Other bodies that do not possess these characteristics can also administer rights collectively. In the context of the European Union, these are usually known as independent management entities (IMEs). However, IMEs do not usually deliver the increased safety standards for their members provided by the CRM Directive. According to that Directive, IMEs are defined as:

> "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".

In numeral 16 of the Preamble of the CRM Directive, it is clarified that:

> "[a]udiovisual producers, record producers and broadcasters license their own rights, in certain cases alongside rights that have been transferred to them by, for instance, performers, on the basis of individually negotiated agreements, and act in their own interest. Book, music or newspaper publishers license rights that have been transferred to them on the basis of individually negotiated agreements and act in their own interest. Therefore, audiovisual producers, record producers, broadcasters and publishers should not be regarded as 'independent management entities'. Furthermore, authors' and performers' managers and agents acting as intermediaries and representing rightholders in their relations with collective management organisations should not be regarded as 'independent management entities' since they do not manage rights in the sense of setting tariffs, granting licences or collecting money from users".

SAQ 1

What is the purpose of a CMO?

Type your answer here

2.0 Licensing schemes

There are several possible schemes or models that could be used to authorize the use of protected material contained in a given repertoire managed by a CMO.

In the field of music, for instance, the CMO itself negotiates with the user (or groups of users, such as hotel or restaurant associations) the terms and conditions under which the contents of the repertoire may be used. When an agreement is reached, a contract is signed under which the user is authorized, or licensed, to exploit the repertoire. The CMO will grant, for instance, a **"**blanket license**"** allowing a restaurant to use all of the works that form part of its repertoire. The terms and conditions may vary according to different criteria. For example, in the case of music performed in restaurants, the tariff (the price that should be paid by a given restaurant in return for the use of music on its premises) would take into account elements such as the duration of the performance of the music, the surface area of the restaurant, the number of potential consumers and beverage prices.

In the field of dramatic works, the CMO operates differently: it usually negotiates a framework agreement (general contract), with the association of theaters. Under this agreement, the minimum terms and conditions for using the plays are specified, and, in particular, the basic royalty rate. However, individual members (authors of plays) may require more than the minimum conditions fixed in the general contract so that when a theater wishes to obtain authorization to perform a play in public, it usually obtains an **"**individual license**"** from the CMO (or sometimes directly from the author). Such a license would refer to the minimum conditions set out in the general contract but may also elaborate on other special conditions (for example a better royalty rate) that the CMO, acting as a representative or an agent of the relevant author, has additionally negotiated.

In both situations described above, the CMO is entrusted with collecting the royalties that are due and, subsequently, with distributing the monies to the rights owners.

Both examples analyzed above refer to cases where the licenses have been freely negotiated between the CMO and the user on a voluntary basis. These "voluntary licenses" are granted on the basis of the exclusive rights that the authors enjoy in accordance with the national legislation of the relevant country.

There are, however, cases where certain types of exploitation of a work, performance or sound recording do not require prior authorization from the right holders. In these cases, access to the protected material through so-called **"**compulsory licenses**"** entails only the payment of a remuneration. For example, in the area of related rights, in many countries, performers and sound recording or phonograms producers enjoy a right of equitable remuneration for the broadcasting and communication to the public of their phonograms and performances recorded therein. Such a remuneration right is usually exercised by a CMO on behalf of performers and producers. Under these circumstances, the role of the CMO consists mainly of negotiating the tariff, collecting the amount and distributing it to the relevant rights holders.

There are also so-called extended collective licensing schemes. In certain countries, voluntary collective licensing schemes have been expanded by law to those copyright owners who did not become members of the CMO. These CMOs then represent all owners and can offer all works. It is vital that this happens in situations where collective management is the normal way of exercising the right concerned, where the repertoire of the CMO is already sufficiently representative (only a marginal part of the repertoire is not covered on a voluntary basis) and where the owners of the right can opt out (of the extended collective management).

SAQ 2

Provide a short description of the use of licensing schemes.

Type your answer here

3.0 Distribution of royalties

The ultimate aim of the collective management of rights is to remunerate right holders through the distribution of royalties. As a general rule, the amount distributed to each of the right holders should correspond to the exact exploitation made of their works, performances or sound recordings. For this purpose, the rules of distribution are established by CMOs. In recent practice, such distribution is facilitated by the extensive use of computers and relevant applications.

The rules of distribution take into account a number of parameters, such as the number of right holders who have contributed to the work (author, co-author, composer, publisher, sub-publisher, arranger, etc.), the type of works and the frequency of use. The rules of distribution are agreed by the members of the CMOs, usually through internal mechanisms (such as a special distribution committee) and then endorsed by the general assembly of the members of the CMO.

The accuracy of the distribution depends on the preciseness of the documentation, which consists of the relevant data pertaining to each right holder and their protected material (name, pseudonyms, date of birth, bank account number, titles and duration of the works, etc.). Furthermore, additional information related to the use of works (for example, in the field of music, a list of works used in radio programs) are transmitted to the CMO, which incorporates them into the system. With the help of computerization, it is possible to determine the exact amount of royalties due to each right holder and thus the distribution of such amounts among the different right holders.

The collective management of copyright and related rights does not stop at the borders of the national territory. The network set up by the CMO at the international level may extend to worldwide coverage. Furthermore, reciprocal representation agreements between CMOs operating in different countries allow the distribution of royalties on the basis of the exploitation of the protected material abroad. International databases have been developed to facilitate the identification of works, performances and sound recordings and thus improve the accurate distribution of royalties.

In practice, various computerized tools have been created to assist CMOs in fulfilling their tasks. The World Intellectual Property Organization (WIPO) has created WIPOCOS (WIPO Software for Collective Management of Copyright and Related Rights, see: https://www.wipo.int/copyright/en/initiatives/wipocos.html), which is a multi-purpose, multi-user client-server application. It is intended for CMOs that require a modern and reliable computerized system that will enable them to perform, with full accountability, the main operations involved in collective management of copyright and related rights.

It is a demand-driven tool that addresses the challenges of the transfer of technology in the ever-evolving, intricate and globalizing field that collective management has become. WIPOCOS is developed, owned and maintained by WIPO. In many instances, the software is offered free of charge with professional maintenance and support. WIPOCOS is developed in close co-operation with individual CMOs, as well as the international trade associations uniting these CMOs.

WIPOCOS was designed to help stakeholders in developing countries to overcome the expense and complexity of information technology (IT) systems. It aims to

- offer a modern and reliable computerized system capable of performing the main operations of CMOs;
- enable developing CMOs to apply the highest international standards;
- provide CMOs with a digital tool that is simple and customized to their level of development; and
- ensure a timely, transparent and autonomous distribution of royalties.

While initially the main focus of WIPOCOS has been on rights in musical works, new software modules should be developed to apply to other types of rights, such as audiovisual works and performances, drama and choreography, literary works and reprography, and to provide enhanced functionalities in the field of licensing.

The CMOs themselves have also developed international tools to assist their work. It is, for example, essential to identify the (copy) right holders when some musical works are copied or performed. Some years ago, under the auspices of the CISAC, the music copyright societies decided to use the CAE list, which was created and developed by SUISA, for this purpose. This has now evolved into the Interested Parties Information (IPI) scheme. This is now run by SUISA for the benefit of all societies on their servers. The purpose of the IPI system is the global unique identification of a right holder acting across multiple creative classes (musical

work, literary work, work of art, etc.), assuming different roles (musical creator, film director, author of fine art, etc.) and owning all rights (performing right, reproduction right, radio broadcast right, etc.), as determined by each creative class the right holder deals with. This is related to the exchange of data not only within copyright societies, but also in worldwide transaction processing with third parties, such as user organizations including radio and television stations, sound carrier producers and so on. The IPI system contains the real and artistic names of the right holders, as well as their nationalities and place of birth (natural persons) or foundation (legal entities), including their territory, time and share dimensioned agreements with the corresponding copyright societies. Around 452 million right holders are currently included in the IPI system.

A second tool developed under the auspices of CISAC is the Worldwide Works List, drawn up and updated by the American Society of Composers, Authors and Publishers, which is currently known as the Works Information Database. It is the online repository for data about musical works that enables CISAC societies to identify musical works. It is a global system for the management of information regarding works and their creators and owners.

These tools are particularly important in facilitating the identification of the owners of rights and their works in order to carry out an international distribution of royalties.

Further, there is also the Common Information System, a method for administering authors' rights using a set of linked databases. These databases enable works and their right holders to be identified precisely and they result in improved monitoring of the various uses made of the works.

SAQ 3

Which of the following factors are necessary for the accurate distribution of royalties?

a) The establishment of documentation on rights holders and their protected material.

b) The conclusion of reciprocal representation agreements between CMOs.

c) The international databases.

d) The fact that authors and performers should be alive.

Type your answer here

4.0 Collective management of rights in a digital environment

How has the arrival of the digital era improved the collective management of rights?

The arrival of the digital era has had a significant impact on the collective management of rights. Digital technology makes it easier to use a multitude of works and to do so across borders through use of the Internet, for instance. New ways of distributing works, performances and sound recordings have also been created in the digital environment. As a result, there has been an increase in the demand for authorization to use works, performances and sound recordings.

This evolution has led CMOs to adapt their practices for collecting royalties and to put in place effective licensing and monitoring systems, which more readily enable the identification of each work, performance or sound recording and their use. In certain cases, data can be collected in an automated way. In theory, this development makes it possible to leave the so-called "blanket license" system behind and replace it with a system where the user pays for each individual use of each individual work. In principle, such a system can be administered directly by the right holder without the intervention of a CMO. However, in practice, the process is more complicated. Famous and wealthy right holders may be able to put such an individual licensing system in place under certain specific circumstances, and users who are interested in their works, performances or sound recordings may be able to find them individually. However, this is not the case for all right holders. As a result, users will still see an increase in the burden imposed on them if they have to deal with a multiplicity of individual right holders, rather than with one centralized CMO.

Collective management is increasingly a technology-driven operation that involves vast amounts of data. Collecting and treating these vast amounts of data is a complex and an onerous task that, owing to its scale and complexity, can only be carried out efficiently and effectively by CMOs.

Increasingly, works of different types, such as literary works, musical works, photographs and audiovisual works, as well as performances and sound recordings, are used in a digital environment to create a new work, such as, for example, a multimedia production. In fact, the advent of multimedia productions has affected the conditions of protection, the exercise and management of copyright and related rights and the enforcement of these rights. Traditionally, each type of work has been managed by a separate CMO. Online access, which makes available to the public all sorts of works and productions through digital networks (such as the Internet), has led to the establishment of new forms of joint management (coalition-type organizations). These aim at licensing such multimedia productions and the online use of different protected material of copyright and related rights.

In this context, the control of uses and collection of the remuneration is performed either by the new management structures established for that purpose or by one of the members of the coalition-type structure. Each member organization in the coalition receives the share of the collected remuneration as agreed among them, and each proceeds to distribute the amounts to its members.

Digital technology has also opened new opportunities for the management of copyright and related rights in devising new tools intended to facilitate interoperability between different existing systems. These include solutions for systems of unique identification numbers to

identify all works and rights owners in the world. Such systems will certainly contribute to improving the collective management of copyright and related rights.

In a digital environment dominated by the Internet, copyright works are increasingly exploited on a cross-border basis. Rights in copyright works are, on the other hand, still cleared on a national basis, despite the assistance of reciprocal agreements. Users and providers of online services, in particular (e.g. online music distribution services, such as iTunes, or online music streaming services, such as Spotify), increasingly object to the burden of country-by-country licenses and demand a one-stop solution. The competition authorities also favor a system whereby, for example, in Europe a number of CMOs could compete with each other on the market for a Europe-wide one-stop licenses. This evolution is a challenge to the traditional copyright and collective management systems and it will be interesting to see how matters will evolve. This is clearly an ongoing evolution and new initiatives emerge at an ever-faster pace.

The CRM Directive has established special rules in the European Union for the licensing of rights for online uses of musical works on a multi-territorial basis. More specifically, CMOs managing authors' rights in musical works, for the multi-territorial licensing of those rights for online uses, are subject to several requirements adapted to the digital era, which exist to ensure that their members are provided with increased security as to their capacity to manage those rights effectively in such a demanding environment. In this context, CMOs need to have an enhanced capability to process large amounts of data, to provide an accurate identification of the works used by the service providers, fast invoicing to service providers and timely payment to right holders.

SAQ 4

Discuss the main effects of digital technology on the collective management of rights.

Type your answer here

5.0 Collective management and competition law

Collective management is almost always carried out by a single collecting society in each country for certain types of works. This inevitably creates a monopoly. The authors can only work with one society and so can the users. The society occupies a unique monopolistic position that is virtually unavoidable, but that can also be abused. It is therefore by no means surprising to see that collective management has attracted a lot of attention from the side of the competition authorities. We will look at this in more detail from the point of view of the European Union, as the problem was particularly present there and there have been numerous relevant cases.

The European Court of Justice has indicated that there is nothing intrinsically objectionable about the establishment of CMOs, which may be necessary in order for individual artists to obtain a reasonable return for their endeavor. However, usually, these CMOs occupy a

dominant position because they operate as a de facto monopoly in the member states, that is, in relation to a substantial part of the single market. Trade between member states is affected by the fact that the creation of a single market for copyright services is prevented. As a result, the way in which these CMOs exploit their dominant position will be closely examined and improper exploitation will be an infringement of Article 82 (now Article 102) of the Treaty on the Functioning of the European Union.

These competition law-related issues arise, of course, to a lesser extent in countries such as the United States of America where more than one CMO can administer a certain category of rights. In the United States, prices are fixed and, with the shift from competition law to competition, competition is seen in terms of services offered by the CMOs instead of price competition.

SAQ 5

Why do CMOs occupy an inherent dual monopoly?

Type your answer here

The early cases

The internal rules of CMOs have to take into account all of the relevant interests and the result must be a balance between 'the requirement of maximum freedom for authors, composers, and publishers to dispose of their works and that of the effective management of their rights'. Every shift towards one side can imply an abuse of a dominant position. This abuse takes the form of discrimination against nationals of other countries and among members, or the binding of members with excessive obligations.

There is no doubt that any discrimination on grounds of nationality is an abuse of a dominant position. The European Commission made that clear in its decision in the case of *GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, v. Commission of the European Communities* [case 125/78 (1979)]**.** Membership cannot be made dependent on the establishment of a tax domicile in the member state in which the CMO operates and special forms of membership, or membership of the organs of the society, cannot be denied to persons or companies that have the nationality of a different member state from that of the CMO. Account should also be taken of income received from other CMOs in order to determine whether a member qualifies for a special form of membership. GEMA did not appeal to the European Court of Justice, but the Court approved of the European Commission's point of view by giving judgment against GEMA when it refused to represent anyone not resident in Germany, because secondary exploitation rights in other member states were generally less comprehensive and more difficult to assert.

Discrimination among members in relation to the distribution of income is also an abuse. Every classification procedure has to be cost-justified and, without cost-justification, an undertaking in a dominant position cannot pay loyalty bonuses, especially not to certain members with funds coming from all members. The European Commission found that GEMA was infringing these principles. However, if royalty income from all sources is taken into account, a CMO is still permitted to set a reasonable level of royalty income as a condition of membership. It was stated:

> "The abuse also lies in the fact that GEMA binds its members by obligations which are not objectively justified and which, in particular, unfairly complicate the movement of its members to another society."

It cannot be accepted that members are required to assign their rights for all categories of works and for the entire world to the CMO, especially not if the assignment period and the waiting period for the acquisition of certain benefits are excessive and if future works also have to be assigned. The two latter points are already abuses when considered on their own. The European Commission held that members should be free to assign all, or part, of their rights for countries in which the CMO does not operate directly to other societies, and that they should be equally free to assign only certain categories of rights to the CMO and to withdraw from it the administration of certain categories at the end of a three-year period.

Members must have the opportunity to choose another CMO to represent them outside the European Union. An abuse that relates only to a performance outside the European Union remains an infringement of Article 82 (now Article 102) of the Treaty on the Functioning of the European Union, if parties within the jurisdiction of one of the member states concluded the contract in the Union.

The relationship between CMOs and third parties can also be problematic, and raises certain issues in relation to Article 82 (now Article 102) of the Treaty on the Functioning of the European Union. The first abuses to be found in this area were the imposition of a higher royalty on imported tape and video recorders than that levied on equipment produced in the member state in which the CMO is established and the contractual extension of royalty payments to works that are no longer protected.

The more recent cases provide more details

A series of cases in the mid-1980s allowed the European Court of Justice to work out a more detailed point of view. In the case of *Basset v. Société des auteurs, compositeurs et éditeurs de musique (SACEM)* [case 402/85 (1987)], the Court ruled that it is no abuse, in the sense of Article 82 (now Article 102) of the Treaty on the Functioning of the European Union, if a collecting society charges a royalty called a 'supplementary mechanical reproduction fee', in addition to a performance royalty, on the public performance of sound recordings. This only amounted to a normal copyright exploitation and neither an act of arbitrary discrimination, nor a disguised restriction on trade between member states could be seen in it because the fee was charged for all sound recordings, regardless of their origin. The fact that such a fee did not exist in the member state in which the sounds recorded were lawfully placed on the market did not influence this conclusion.

Even more important in that case was the following *obiter dictum*: "It is not impossible, however, that the amount of the royalty, or of the combined royalties, charged by the copyright-management society may be such that Article [82] applies." The Court elaborated this *obiter dictum* further by laying the burden of proving that an appreciably higher scale of royalty fees

is justified by a better copyright protection on the CMO. If such proof is not brought, the imposition of the higher fees forms an abuse of a dominant position.

In the subsequent *François Lucazeau and others v. Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* cases [joined cases 110/88, 241/88 and 242/88 (1989)], the Court ruled:

> "When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other member states and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the member state concerned and the situation prevailing in all the other Member States."

The Court had reached the same conclusion some weeks earlier in the case of *Ministère public v. Jean-LouisTournier* [case 395/87 (1989)]. However, in that case, the Court had also ruled that a CMO that refuses to grant the users of recorded music access only to its foreign repertoire does not abuse its dominant position, in the sense of Article 82 (now Article 102) of the Treaty on the Functioning of the European Union, unless access to a part of the protected repertoire could entirely safeguard the interests of the authors, composers and publishers of music without thereby increasing the costs of managing contracts and monitoring the use of protected musical works.

SAQ 6

Can a CMO in the European Union justify the fact that it charges higher fees than its comparable counterpart in another country?

Type your answer here

The move to the online environment

The flood of cases seemed to die down and, by the mid-1990s, the main issues with an interest in the European Union and European Community in relation to CMOs seemed to have been addressed. The cases of *Bureau Européen des Médias de l'Industrie Musicale v. Commission of the European Communities* [case T-114/92 (1995)] and of *RogerTremblay v. Commission of the European Communities* [case C-91/95 P (1996)] showed that the outstanding issues lacked a Community interest and therefore fell under the jurisdiction of the national courts. One had the impression that this suited the European Union well because it became clear that it would need the cooperation of CMOs (also called collecting

societies in all cases that preceded the CRM Directive) if they were to be increasingly involved in collecting royalties for the exploitation of copyright works in the information society.

Online developments are, however, by definition, European Union/Community-wide and national CMOs/collecting societies do not operate at that level. They have agreements to represent each other, but they do compete with each other on price as there is no real one-stop-shop for, for example, an Internet radio station that wants a license for the whole of the European Union. The competition authorities therefore started to object to the representation agreements concluded by CMOs. In this context, the European Union now promotes one-stop-shops, whereby each user can acquire a single license for Europe from a single CMO. On the market for these licenses, the various CMOs would compete with each other. There are, however, serious concerns that this highly competitive approach will be detrimental to authors who will receive lower remunerations if their society has to compete on price at the other end. It may also unduly favor larger societies who only deal with mainstream works in widely spoken languages. That may put smaller societies out of business and the larger societies will find it too costly to invest in material in smaller languages and non-mainstream material.

Against that background of a more aggressive approach by the competition authorities, it is interesting to see that the Court of Justice, when again presented with the issue, refused to change its line (its Advocate General had even made suggestions that went in this direction). Instead it reconfirmed its *Basset-Tournier-Lucazeau* approach in the *Kanal 5 Ltd and TV 4 AB v. Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa* case [case C-52/07 European Court of Justice (2008)], which is included in your case studies.

A further indication that the harsh line of the recommendation will not be carried through is found in the CRM Directive (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 [2014] OJ L84/72), the emphasis of which is entirely on streamlining and improving the procedures and governance of CMOs in the European Union. That same line is also found in the 2019 copyright directives (Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92, and Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC [2019] OJ L130/82). The specific aspects of copyright and collective management of copyright are more clearly taken into account and the emphasis is on the balancing of rights, including those of other interested parties, within copyright.

The Court of Justice of the European Union went down the same path and ruled that the balance with other fundamental rights, such as the right to freedom of expression and the right to run a business, also needs to be struck inside copyright by interpreting existing limitations and exceptions to the exclusive rights (see: case C-469/17 *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* ECLI:EU:C:2019:623 and case C-516/17 *Spiegel Online GmbH v. Volker Beck* ECLI:EU:C:2019:625).

6.0 Relationship of the WIPO Development Agenda with collective management organizations

CMOs are one of the best examples of ensuring the development goals of ensuring a proper economic return for creators and facilitating easy and quick access to works to the public. There is no international mandate regarding the functioning of the CMOs. As a result, countries have the freedom to design the law to ensure that there is a proper balance of the interests of different stakeholders. Provisions for transparency in the working of the CMOs with the active participation of the right holders and preventing anticompetitive behavior will ensure the achievement of some of the Development Agenda goals through CMOs.

7.0 Summary of the collective management of rights

In this module, we have seen that, for authors, performers and producers, getting a financial reward for the use of their works, performances or sound recordings is probably one of the most important aspects of copyright and related rights. The normal way of exploiting copyright or related rights by way of licenses involves the grant of a license for every use that is made of the work, performance or sound recording. For example, if we consider the case of a song, that would involve a license every time the song is performed or broadcast. It is probably not materially possible for the copyright owner to monitor the use of each of their works on every occasion in a given country, let alone in foreign countries. The user of these works is in a similar position. If, for example, a restaurant owner wants to play background music in their restaurant, or if a broadcast station wants to transmit music, in the absence of a collective management infrastructure, a separate license would be required for every work that is played or transmitted. These difficulties may be settled by setting up CMOs. These organizations will collectively manage the rights of their members and form a single contact point for users or licensees.

Different models of licensing schemes are available. All such schemes involve negotiations between the CMO and the users, which lead to agreements spelling out the terms and conditions under which works, performances or sound recordings may be used.

The arrival of digital technology offers several opportunities for collective rights management, but there are also challenges. More rights are to be administered on more occasions, as identification and tracing become easier.

It has also become increasingly clear that the inherent monopoly of CMOs raises serious concerns for the competition authorities and that detailed guidelines have emerged in this respect from the case law.

Further reading

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9. For a full list of WIPO publications see here: https://www.wipo.int/publications/en/search.jsp?cat1=56&set4=133.