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# Collective Management of Copyright and Related Rights

Third edition



WIPO

# Table of contents

Foreword	7
About the author	8
Acknowledgments	9
Preface	10
<b>Chapter 1 Raison d'être, core functions and various models of collective management</b>	<b>13</b>
Introductory remarks	13
Establishing the first authors' societies and the emergence of a fully fledged collective management system	15
Broadening the scope of and diversifying collective management	18
Determining the constituting features of – and the difficulty of defining – CMOs	21
<b>Chapter 2 WIPO activities in the field of collective management</b>	<b>28</b>
Introductory remarks	28
Model statutes for CMOs	29
Intensive analysis of the issues of collective management	30
Publication of a book on <i>Collective Administration of Copyright and Neighboring Rights</i>	31
Proposals for treaty provisions on collective management during the preparation of the WIPO Internet Treaties	32
Seville International Forum on exercise and management of rights in the digital environment	33
Publication of the book on <i>Collective Management of Copyright and Related Rights</i>	34
WIPO's Copyright Management Division: ambitions, projects and growing scope of activities	34
Rich resources for capacity building and training	35
WIPO's <i>Good Practice Toolkit for CMOs</i>	36
Collective management infrastructure solutions	37
<b>Chapter 3 Collective management and the international treaties on copyright and related rights, and the role of governments</b>	<b>40</b>
Introductory remarks	40
General obligations to undertake measures for the application, and to give effect to the provisions, of the treaties on copyright and related rights	41
Suggested "dos" and "don'ts"	42
Mandatory, presumption-based and extended collective management	44
Collective management and the obligation to grant national treatment	44
<b>Chapter 4 Structural issues of collective management: monopoly and competition, mono- and multi-repertoires, cooperation and coalitions</b>	<b>49</b>
Introductory remarks	49
CMOs as natural monopolies	49
Collective management and competition: an overview	51
How may CMOs compete with each other?	52
Applicability of competition rules to the collective management of exclusive rights	53
International copyright norms related to competition aspects of collective management	54
Competition and national laws recognizing CMOs as natural monopolies	56
Conditions to be fulfilled in a natural monopoly situation, the impact of uncontrolled competition and the management of rights in the absence of a natural monopoly	60
Prohibition of concerted practices and collective management	62

One organization or separate organizations to manage different rights?	66
Cooperation and “coalitions” between CMOs	66
Managing the right of performers and producers of phonograms to a single equitable remuneration	69
<b>Chapter 5 Voluntary, presumption-based, extended and mandatory collective management</b>	<b>82</b>
Introductory remarks	82
“Individual exercise” vs. non-collective management of rights?	82
Voluntary collective management	85
Limited scope of exclusive rights for which mandatory collective management may be applied under the international treaties	85
Mandatory collective management of the rights of broadcasting and cable retransmission (with “ancillary services” and “direct injection”)	88
Mandatory collective management of “mechanical rights” in musical works	90
Theories about the general applicability of mandatory collective management of exclusive rights	90
Mandatory collective management as a normal way of exercising rights to remuneration	96
Mandatory collective management of rights to remuneration provided for as such in the international treaties	97
Mandatory collective management of rights to remuneration when authors and performers transfer their rights to producers	98
Mandatory collective management of the right to remuneration for private copying	99
Mandatory, extended and voluntary collective management of reprographic reproduction rights	100
Extended (and presumption-based) collective management from the viewpoint of the international treaties	104
National laws on extended collective management before the adoption of the E.U. Digital Single Market Directive	108
Provisions in EU directives on extended collective management adopted before the Digital Single Market Directive	110
<i>Soulier and Doko</i> : regulating the extended collective management of out-of-commerce works	111
General regulation of the requirements of extended collective management	113
<b>Chapter 6 Independent management entities</b>	<b>117</b>
Introductory remarks	117
“Independent management entities”, CMOs and “joint management organizations”	118
Contradictions – and unjustified competitive advantages – that emerge when entities other than CMOs carry out the same activities	119
Inclusion of IMEs in the CRM Directive as a kind of afterthought – and the resulting incomprehension	121
Provisions granting IMEs competitive advantage over CMOs	124
Different types of IME and their fields of operation	127
Legal disputes concerning the status and activities of IMEs	128
Blockchain technology used by IMEs – and also by CMOs	132
IMEs as RME “clients” of CISAC	135
<b>Chapter 7 Collective management in countries in transition from a centrally planned economy to a market economy</b>	<b>136</b>
Introductory remarks	136
Shared and different features of the copyright laws of the CEE countries	137
Typical features of the copyright laws of the CEE countries	138
Collective management in the CEE countries in their pre-transition period	141
Transformation of the collective management system in the “transition” period	141
CMOs in a <i>de jure</i> or <i>de facto</i> monopoly position, and specific competition questions in the CEE countries	142
Mandatory and extended collective management in the CEE countries	143
Problems specific to CEE CMOs attempting to enforce the rights they represent	145

<b>Chapter 8 Proper functioning of CMOs – from the perspective of rightholders and partner organizations</b>	<b>147</b>
Introductory remarks	147
Providing information about the CMO and its operations	149
Membership: information adherence and withdrawal	150
Members’ rights to fair treatment; their position in the CMO	154
Particular issues concerning the CMO – member relationship	154
Governance	155
Financial administration, distribution of revenue and deductions	157
Relationship between CMOs	159
Processing of members’ and users’ data, importance of IT infrastructure, and development of staff skills and awareness	160
Complaints and dispute resolution procedures	161
Supervision and monitoring of CMOs	162
<b>Chapter 9 Relationship between CMOs and users</b>	<b>167</b>
Introductory remarks	167
CMO’s information to users/licensees	168
Principles and criteria of licensing conditions and tariff setting	171
Negotiations and establishment of tariffs; dispute settlement systems	180
Obligations of users; their status in the application of tariffs	181
<b>Chapter 10 Collective management in the online digital environment</b>	<b>184</b>
Introductory remarks	184
Assessing the impact of online digital technologies on the exercise and collective management of copyright at the 1997 Seville Forum	184
Debating the legal characterization of acts of interactive making available to the public; the “umbrella solution” and its application in Article 8 of the WCT	185
Theories according to which, for an act of making available a work to the public to take place, the making available of the work to the public is not sufficient	188
Impact of legal characterization on collective management of the right of making available to the public	193
Licensing copyright in the online digital environment – from integration to fragmentation and back to partial integration: the European experience	199
Licensing copyright in the online digital environment – from fragmentation to integration: the U.S. experience	207
“The answer to the machine in the machine”: CMOs and digital rights management	210
Repertoire databases of musical works for online uses	213
Private international aspects of collective management	216
<b>Chapter 11 Cultural and social aspects of collective management</b>	<b>219</b>
Introductory remarks	219
Dual nature of cultural productions and services: international instruments on the protection and promotion of cultural diversity	219
Basic provisions in E.U. law concerning the protection of cultural diversity	220
Joint application of the basic provisions of the TFEU, the CRM Directive and the UNESCO Convention for the protection of cultural diversity	221
Rejection of the application of the Services Directive to collective management and the protection of cultural diversity	223
Use of remuneration collected for cultural and social purposes	225
<b>Chapter 12 Collective management in developing countries and LDCs</b>	<b>229</b>
Introductory remarks	229
Preferential treatment, access to knowledge and collective management	229
Economic contribution of copyright industries, creativity and collective management	233
Protection and use of expressions of folklore (traditional cultural expressions) and collective management	236

<b>The WIPO Development Agenda and collective management; recommendations with special attention to Africa and LDCs</b>	<b>244</b>
<b>Special aspects of deductions for cultural and social purposes in developing countries</b>	<b>246</b>
<b>Benefits of regional cooperation – facilitated by online digital technologies</b>	<b>246</b>

# Foreword

I met Dr. Mihály Ficsor many years ago. I have not only an immense respect for him but also a long-standing friendship. I am very proud to be one of Dr. Ficsor's successors at WIPO in charge of copyright and creative industries.

Everybody knows the decisive role he played in the preparation, negotiation and adoption of the so-called "Internet Treaties": the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

Those many years of international exposure have been enriched by Dr. Ficsor's practical experience of collective management while heading ARTISJUS, the Hungarian collective management organization (CMO), and his many assignments during his third career after retiring from WIPO.

We are honored that Dr. Ficsor accepted to author the third edition of this major publication. Dr. Ficsor has added to the first edition, published in 1990 and updated in 2002, very sound information reflecting the different systems, legislative options and best practices of CMOs worldwide.

This edition has shed the light on many recent developments that are fundamental to the development and operation of CMOs, including how CMO ecosystems are impacted by (to mention just a few...):

- online digital technologies;
- new business models, such as streaming;
- introduction of new categories of works, such as orphan or out of commerce works;
- new rights management solutions, such as extended collective management; and
- recent jurisprudence in this field.

I wish to thank Dr. Ficsor for sharing with us all his knowledge and insights. This publication provides Dr. Ficsor's views on key legal foundations underpinning collective management systems and will unquestionably serve as a rich source of information for copyright and related rights management practitioners worldwide.

**Sylvie Forbin**

Deputy Director General, WIPO

# About the author

Between 1977 and 1985, Dr. Mihály Ficsor was Director General of the Hungarian Bureau for the Protection of Authors Rights (Artisjus), a member of the International Confederation of Societies of Authors and Composers (CISAC). From 1982 to 1985, he was Vice President of the Executive Bureau.

Dr. Ficsor is a former Director (1985–92) and Assistant Director General (1992–98) of copyright and related rights with the World Intellectual Property Organization (WIPO), during which time he played a decisive role in the preparation, negotiation and adoption in 1996 of the so-called WIPO Internet Treaties (i.e., the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (or WPPT)).

Dr. Ficsor is currently a member of the Hungarian Copyright Experts Council.

Dr. Ficsor regularly acts as a consultant to WIPO and the European Union, and he frequently speaks at copyright conferences, seminars and workshops. He is the author of numerous articles and books on a range of copyright issues – most commonly, on the protection and exercise of copyright in the online digital environment, and on the collective management of copyright – including the first two editions of this book.

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The views expressed are those of the author and are not intended to reflect the views of WIPO Member States or the WIPO Secretariat.



# Preface

This is the third edition of a book published by WIPO on collective management of copyright and related rights.

The first edition emerged when, in 1989, the competent assemblies of the World Intellectual Property Organization (WIPO) submitted a request to the International Bureau of WIPO for a study to offer guidance to governments on what at that time was referred to as the “collective administration” of copyright and “neighboring” rights.

Published in 1990, that study appeared under the title *Collective Administration of Copyright and Neighboring Rights*.<sup>1</sup>

Before its publication, the study was discussed and approved, with some minor comments, by a WIPO Group of Governmental Consultants on Collective Administration of Copyright and Neighboring Rights (in Geneva, March 19–23, 1990). It was published by WIPO first in English, and later in French<sup>2</sup> and Spanish.<sup>3</sup> It went on to be published under license in further languages by WIPO Member States. In 2002, at WIPO’s invitation, a second edition of the book was drafted to reflect technological and business-method developments and the adoption of new international norms – in particular, the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) and the so-called WIPO Internet Treaties (namely, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT)).

In its second edition, the book’s main principles did not change significantly, but it took a new title, *Collective Management of Copyright and Related Rights*.<sup>4</sup> It was again published first in English, then in French<sup>5</sup> and Spanish,<sup>6</sup> and later translated and published in certain other languages by Member States.” Since 2002, further technological and business-method developments have emerged, in response to which new copyright and related rights norms have been adopted around the world. When WIPO conceived of a third edition, the Organization highlighted, among other changes, that:

- the Digital Single Market Directive (DSM Directive)<sup>7</sup>, which sets out detailed provisions on extended collective management, has been adopted in the European Union;
- the Santiago and Barcelona Agreements, which were discussed in the second edition, are no longer applicable;
- streaming has considerably changed the copyright and collective management landscape;
- the role of collective management of orphan works and out-of-commerce works has developed further;
- mandatory and, in particular, extended collective management is an area of debate in many countries;
- the U.S. Music Modernization Act of 2018 has revolutionized the exercise of collective management;
- the E.U. Collective Rights Management Directive<sup>8</sup> (CRM Directive) has been adopted; and

1 WIPO (1990). *Collective Administration of Copyright and Related Rights*, Publication No. 688 (E). Geneva: WIPO.

2 WIPO (1990). *Gestion collective du droit d’auteur et des droits voisins*, Publication No. 688 (F). Geneva: WIPO.

3 WIPO (1991). *Administración Colectiva del Derecho de Autor y los Derechos Conexos*, Publication No. 688 (S). Geneva: WIPO.

4 WIPO (2002). *Collective Management of Copyright and Related Rights*, Publication No. 855 (E). Geneva: WIPO.

5 WIPO (2002). *La gestion collective du droit d’auteur et des droits connexes*, Publication No. 855 (F). Geneva: WIPO.

6 WIPO (2002). *La gestión colectiva del derecho de autor y de derechos conexos*, Publication No. 855 (S). Geneva: WIPO.

7 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, OJ L 130/92, May 17, 2019.

8 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 84/72, March 20, 2014.

- the *CISAC*<sup>9</sup> and *OSA*<sup>10</sup> judgments of the Court of Justice of the European Union (CJEU) have had acute impact on the practice of collective management organizations (CMOs) worldwide.

This third edition has changed in style and structure, to some extent. The approach is more analytic and certain issues – such as aspects of competition, national treatment or the triangle of voluntary, mandatory and extended management – are discussed in more detail. Footnotes, which were absent in the first two editions, have been included, pointing toward more detailed information and offering alternative views. Nevertheless, the objective of this third edition remains the same as that of the first two: not to deliver a monograph, written in a fully fledged academic style, but rather a handbook intended to be accessible to a wide audience – with a special focus on those questions that may emerge for governments as they prepare, adopt and apply collective management norms and regulations.

A number of new WIPO publications have facilitated the analytic discussion of questions of collective management, and certain descriptive elements covered in the first and second editions are, in the third, reserved to those publications. For example, it was only one year after publication of the second edition that the *WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO* and *Glossary of Copyright and Related Rights Terms* appeared. Readers seeking definition and description of certain details concerning the rights exercised through collective management are directed there for more guidance; likewise, they will find in Chapter 2 reference to a wide range of WIPO publications that set out the more detailed methods and technological means of rights management.

Nevertheless, and despite the fact that it is more extensive than both the second and first editions, the third edition includes no separate chapter headed “Conclusions”; rather, the findings of the various analytic chapters are set out clearly therein.

This third edition of WIPO’s *Collective Management of Copyright and Related Rights* comprises 12 chapters:

In Chapter 1 the objectives, functions and different models of collective management are explored. Looking at how the first authors’ societies were established, how a fully fledged collective management system emerged, and how the scope of collective management was broadened and diversified. An attempt is made to conceptualize “collective management” and define “collective management organizations”.

In Chapter 2 the ways in which WIPO’s activities became ever more intensive in the field of collective management of copyright are explored in response to its increasing importance – such activities extending to legislative guidance (when the governments of the Member States require it), publications, capacity building and training, and infrastructure solutions.

In Chapter 3, there is analysis of the international norms from the viewpoint of their relevance, if any, for the establishment and operation of CMOs. We discuss the role of regulation in Contracting Parties’ fulfilment of their obligations to ensure the enjoyment, due exercise and protection of certain rights of authors and beneficiaries of related rights.

Four chapters then follow that deal with the basic organizational aspects of collective management.

Chapter 4 presents the key thesis of a natural monopoly situation for the management of certain rights of certain categories of rightsholder. There is consideration of the frequent *de facto*, or even *de jure*, monopoly position of CMOs, in which cases it is not advisable to introduce competition artificially but adequate measures are needed to prevent its possible abuse.

Chapter 5 points out that the exclusive nature of rights may truly prevail only if they are exercised individually and that mandatory collective management is therefore a limitation of such rights. In

9 Judgment of the General Court (Sixth Chamber) of April 12, 2013, *International Confederation of Societies of Authors and Composers (CISAC) v European Commission*, Case T-442/08, ECLI:EU:T:2013:188.

10 Judgment of the Court (Fourth Chamber) of February 14, 2014, *OSA – Ochranný svaz autorský pro práva k dílům hudebním a.s. v Léčebné lázně Mariánské Lázně a.s.*, Case C-351/12, ECLI:EU:C:2014:110.

contrast, extended (or presumption-based) collective management is an enabling system that is advantageous to both rightholders and lawful users.

Chapter 6 introduces independent management entities (IMEs). The legislation governing IMEs in the European Union is reviewed and there is discussion that they have been granted some unjustified advantages in relation to CMOs. This has led to some conflicts, mainly in the traditional fields of collective management, some of which have been solved in the courts and others through cooperative agreement.

Chapter 7 tells the history of the former centrally planned economies of Central and Eastern European countries, during which period governmental or semi-governmental bodies took care of the collective management of copyright, within a heavily regulated framework of contractual rules and tariffs. There is a review of how these organizations have been transformed within new market economies into private CMOs – smoothly, in some places, and with difficulty, in others – and the kinds of problems that remain where the transition is not yet complete.

In the next two chapters, there is analysis of the activities of CMOs in detail in the light of regional norms, national legislation, professional rules and codes of conduct. In this, the chapters draw richly from WIPO's *Good Practice Toolkit for CMOs* (the Toolkit).

Chapter 8 opens with an outline of the nature, objective and structure of the Toolkit. It goes on to discuss such topics as rightholders' adherence to and withdrawal from CMOs, their membership rights, the governance and financial administration of CMOs, the distribution of revenues and relationships between CMOs.

Chapter 9 expands on the relationships between CMOs and is structured similarly to Chapter 8, covering issues such as the contractual aspects, licensing, tariffs, users' obligations and dispute settlement.

In Chapter 10, there is a review of the exclusive right of (interactive) making available to the public, which is not provided in the same way in the WCT as it is in the WPPT and the Beijing Treaty on Audiovisual Performances (BTAP). There is an exploration of the problems of interpretation that have emerged from this difference and the impact it may have on collective management of copyright. The chapter models licensing download and streaming services, paying special attention to the use of musical works, and it outlines how digital rights management systems (i.e., technological measures and electronic rights management information systems) can be used for the protection and exercise of rights in the online digital environment. Since they are particularly relevant for the transborder multi-territorial use of works in the online digital environment, there is also a review in this chapter of the private international law aspects of collective management.

The final two chapters of the book have characteristics in common in that they explore issues that go beyond the merely economic aspects of copyright and collective management of rights.

Chapter 11 spotlights the twofold role of cultural productions and services, including the part played by CMOs in the protection of cultural diversity and the rules of the deductions for cultural and social purposes.

Chapter 12 reviews the specific needs of developing and the least-developed countries, taking into account the relevant recommendations of WIPO's Development Agenda. There is analysis of the results of the various studies on the economic contribution of copyright and a look at the role of CMOs in the protection and exploitation of expressions of folklore/traditional cultural expressions. Finally, there is a review of how online digital technology is used in technical cooperation programs in the field of copyright management.

Each chapter opens with introductory remarks that add detail to the outline given here.