

# **Collective Management of Copyrights between Competition, Regulation, and Monopolism**

A Comparison of European  
and U.S. Approaches to  
Collective Management Organizations

by

**Dr. Martin Miernicki**

Vienna 2017



**Nomos**

**facultas**

# Table of Contents

<b>Vorwort des Herausgebers .....</b>	<b>7</b>
<b>Preface and Acknowledgements .....</b>	<b>9</b>
<b>Table of Contents .....</b>	<b>11</b>
<b>Abbreviations .....</b>	<b>17</b>
<b>I. INTRODUCTION .....</b>	<b>23</b>
<b>1. Collective Rights Management – Rationales and Functions .....</b>	<b>24</b>
<b>2. Purpose and Structure of the Research .....</b>	<b>28</b>
<b>3. Terminological Remarks .....</b>	<b>29</b>
3.1. Joint, Collective, and Centralized Management .....	30
3.2. Collecting Societies and Copyright Collectives .....	31
3.3. PROs and RROs .....	32
<b>4. Introduction to EU and U.S. Copyright Law .....</b>	<b>33</b>
4.1. Constitutional Background .....	33
4.2. Overview of Copyright-Related Legislation .....	35
4.3. Communication to the Public and Performance Rights .....	36
4.4. Performers' Rights .....	39
<b>5. Emergence of Collective Management Organizations .....</b>	<b>40</b>
5.1. Emergence of Collective Management in France .....	40
5.2. Emergence of Collective Management in Germany .....	41
5.3. Emergence of Collective Management in the United States .....	43
5.4. Common Developments .....	44
<b>II. THE REGULATION OF COLLECTIVE MANAGEMENT ORGANIZATIONS .....</b>	<b>45</b>
<b>1. Regulatory Frameworks .....</b>	<b>46</b>
1.1. EU Regulation .....	46
1.1.1. Primary Law .....	46
1.1.2. The Services Directive .....	47
1.1.3. General Copyright-Related Directives .....	51
1.1.4. Sector-Specific Regulation: Collective Management Directive .....	52
a) Background and Development .....	52
b) The Role of the Commission .....	58

c) The Emergence of New Licensing Models After 2005 .....	60
d) The Union's competence to regulate collective management .....	64
e) Scope of the Collective Management Directive .....	66
f) Main features of the Collective Management Directive .....	69
1.1.5. Implications for the National Regulation of EU Member States .....	74
1.2. U.S. Regulation .....	76
1.2.1. Antitrust Law .....	76
1.2.2. Regulation by Consent Decrees: Background and Development .....	78
1.2.3. Main Features of the ASCAP and BMI Consent Decrees ..	80
1.2.4. CMOs and Statutory Licenses .....	81
1.3. Comments on the Regulatory Frameworks and their Development .....	82
<b>2. Applicability of Antitrust Laws to CMOs .....</b>	<b>83</b>
2.1. Treaty on the Functioning of the European Union .....	84
2.1.1. Preliminary Question: The Relationship of EU Competition Law and the Collective Management Directive .....	84
2.1.2. Undertakings .....	85
2.1.3. Article 101 TFEU .....	86
2.1.4. Article 102 TFEU .....	89
2.1.5. Cross-Border Element .....	91
2.1.6. Article 106 TFEU .....	93
2.2. Sherman Act .....	94
2.2.1. Persons .....	94
2.2.2. Section 1 Sherman Act .....	95
2.2.3. Section 2 Sherman Act .....	97
2.2.4. Interstate Commerce .....	99
2.3. Comments on the Applicability of Antitrust Laws to CMOs .....	99
2.3.1. General Remarks .....	99
2.3.2. What are the Relevant Markets and What is their Nature? ..	100
2.3.3. CMOs as Unlawful Combinations .....	103
2.3.4. New Licensing Models and Competition Law .....	109
<b>3. The Regulation of the Different Relations of CMOs:</b> <b>Right Holders, Users, Sister Organizations .....</b>	<b>110</b>
3.1. CMOs and Right Holders .....	110
3.1.1. General Remarks .....	110
3.1.2. Access to Collective Management Services .....	113

---

3.1.3. Acquisition of Membership .....	115
a) Nationality Requirement .....	115
b) (Global) Assignment Requirement .....	118
c) Individual/Direct Management .....	123
3.1.4. Modification and Termination of Membership Agreements and Assignment Contracts .....	127
a) Withdrawal and Termination .....	127
b) Coordination of Membership Agreement and Rights Grant .....	130
3.1.5. Governance Structure .....	132
a) General Policies .....	132
b) Membership Rights .....	133
c) Administration and Supervision .....	136
d) Transparency and Reporting Obligation .....	137
e) Dispute Resolution .....	139
3.1.6. Financial Flows between Right Holders and CMOs .....	140
a) Collection, Use, and Distribution of the Income .....	140
b) Management Fees .....	146
3.1.7. Comments on the Relationship between CMOs and Right Holders .....	148
a) General Remarks .....	148
b) Obligation to Represent .....	149
c) Exclusivity of the Rights Grant .....	150
d) The (Partial) Withdrawal Issue .....	151
e) Of Right Holders, Publishers, and Composers .....	155
3.2. CMOs and Users .....	156
3.2.1. General Remarks .....	156
a) Principles of European Case Law .....	156
b) The Collective Management Directive .....	159
c) Principles of U.S. Law .....	162
3.2.2. Blanket Licenses .....	168
3.2.3. Refusal to Issue Cross-Border Licenses .....	176
3.2.4. License Fees and Royalties .....	178
a) General Remarks .....	179
b) Calculation Methods .....	184
c) Level of License Fees .....	195
3.2.5. Excursus: Statutory Licensing of Musical Rights .....	204
a) Overview .....	206
b) Rate-Setting Standards .....	208
3.2.6. Comments on the Relationship between CMOs and Users .....	215
a) General Remarks .....	215
b) Obligation to License .....	216
c) The 100 percent Licensing Issue .....	216

d) Defining and Applying Rate-Setting Standards .....	217
e) Approaches to Blanket Licensing .....	223
f) Of Users, Discotheques, and Streaming Services .....	229
3.3. CMOs and Other CMOs .....	230
3.3.1. The Relationship Between CMOs as a Form of Cooperation .....	231
3.3.2. The European Approach to Representation Agreements .....	233
3.3.3. Restrictions Relating to the Representation of Right Holders .....	235
3.3.4. Tariffs, Rebates, and Deductions .....	238
a) The Coordination of Tariff Systems .....	238
b) Rebates and Deductions from License Fees .....	242
3.3.5. Exclusivity Clauses Relating to the Rights Grant .....	243
a) General Remarks .....	243
b) Restrictions as to Users (Customer Allocation) .....	244
c) Restrictions as to Other CMOs (Territorial Allocation) .....	246
d) Direct Legal Observations of the CISAC Litigation ....	250
3.3.6. The Problem of Union-Wide Licensing and the Solution of the Collective Management Directive .....	253
a) The Need for MTL Options and the Traditional European Licensing Structure .....	253
b) The MTL Regime of the Collective Management Directive .....	255
c) The MTL Regime of the Collective Management Directive and New Licensing Models .....	257
3.3.7. The U.S. Experience .....	259
a) National Cooperation .....	259
b) International Cooperation .....	260
3.3.8. Comments on the relationship between CMOs and other CMOs .....	261
a) Representation Agreements: Rationales and Legal Status .....	261
b) The Future of Reciprocal Representation .....	264
c) Feasibility of MTL under the Collective Management Directive .....	266
<b>III. CONCLUDING REMARKS AND OBSERVATIONS .....</b>	267
<b>1. Orientation and Focus of the Regulation of Collective Management of Copyrights in the European Union and the United States .....</b>	267
1.1. Structural Differences and Common Problems .....	267

1.2. Balancing the Interests of Users and Right Holders – A Matter of Perspective .....	268
1.3. The Tale of the Author .....	270
1.4. The Reduced Principle of Equal Treatment .....	272
<b>2. The Diverging Image of CMOs:     Legitimate Functions and Limited Justifications .....</b>	<b>272</b>
2.1. Skepticism to the Traditional CMO Model from a Competition Law Perspective .....	272
2.2. Cultural Functions and the Solidarity Principle .....	273
<b>3. Regulatory Models: Competition, Monopolies and Minimum     Standards Against the Background of Copyright Law .....</b>	<b>277</b>
3.1. The Competition-Monopolism Dichotomy .....	277
3.2. Creating Requirements for Competition .....	281
3.3. Collective Management as a Reflection of Underlying Copyright Systems .....	283
<b>IV. SUMMARY OF THE MOST IMPORTANT RESULTS .....</b>	<b>286</b>
<b>REFERENCES .....</b>	<b>289</b>
<b>1. Books and Journal Articles .....</b>	<b>289</b>
<b>2. European Commission Official Documents .....</b>	<b>303</b>
<b>3. European Parliament Official Documents .....</b>	<b>305</b>
<b>4. United States Copyright Royalty Board Official Documents .....</b>	<b>306</b>
<b>5. United States Copyright Office Official Documents .....</b>	<b>306</b>
<b>6. United States Department of Justice Official Documents .....</b>	<b>306</b>
<b>7. ASCAP Official Documents .....</b>	<b>306</b>
<b>8. BMI Official Documents .....</b>	<b>307</b>
<b>9. PRS Official Documents .....</b>	<b>307</b>
<b>10. Press Releases .....</b>	<b>308</b>
<b>11. Further Electronic Sources and Webpages .....</b>	<b>308</b>
<b>12. Table of Cases .....</b>	<b>310</b>
12.1. European Union .....	310
12.2. United States .....	315
12.3. National Courts .....	318
<b>Zusammenfassung der wesentlichen Aussagen .....</b>	<b>321</b>
<b>Index .....</b>	<b>327</b>