

The Cultural Role(s) of Collective Management Organizations

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Introduction

Collective Management Organizations (CMOs) face a permanent dilemma. They are at once expected to operate as efficient financial institutions *and* as ‘culture-promoting organizations’. Whilst their role in media and entertainment is basically seen as one of licensing--mostly music in the form of musical works, performances and sound recordings—CMOs are complex actors, often proactive in increasing or modifying the substance of media and entertainment offerings. . The term ‘dual obligation’ has been used to describe their work.¹

The 2014 EU directive on collective management demonstrates this. On the first side of what one might call the policy coin, it provides that

[I]nvestments made and held by the collective management organisation should be managed in accordance with criteria which would oblige the organisation to act prudently, while allowing it to decide on the most secure and efficient investment policy.²

But then also this, as it flips the coin:

Collective management organisations play, and should continue to play, an important role as *promoters of the diversity of cultural expression*, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.³

Are these functions contradictory or complementary? Is it a binary choice--that CMOs must solve, therefore, by opting to favor one side--or can they be seen as *credibly* performing a dual function? The German CMO GEMA is among those who believes it can do so. At least it did in

¹ Josephine Liholm, ‘GEMA and IFPI’, E.I.P.R. 2002, 24(3), 112-125, at 113.

² Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ 20 March 2014 L 84/72, recitals 26 and 27.

³ *Ibid*, recital 3. Interestingly, the word “efficient” or variants thereof appears nine times in the text of the Directive and the word ‘cultural’ 21 times. Emphasis added.

its 1997 promotional literature where it stated that its aim was ‘nothing less than securing the economic, social and cultural existence of all creators’.⁴

This debate has not often been examined in legal literature, but it is not new. Deductions (typically of up to 10% of receipts) to perform ‘cultural functions’--allowing CMOs to play a proactive role in influencing cultural offerings--date back to at least 1897.⁵ In his review of the history of Dutch CMOs, Kamiel Koelman narrates how the French *Société des Auteurs, Compositeurs et Editeurs de Musique* (SACEM) tried to occupy the Dutch music licensing market in the early part of the twentieth century, as it had done in Belgium and Switzerland. This led to a 20-year battle with the then fledgling *Bureau voor Muziekauteursrecht* (BUMA).⁶ In BUMA’s lobbying efforts with Dutch legislators, the finance v. culture dilemma emerged with particular clarity. As Koelman explains:

Some [legislators] found that copyrights were mere commodities and that, therefore, there could be no objections against competition between a foreign and a local collecting society. Others, however, felt that copyright also had a ‘cultural purpose’ and feared that competition would undermine that cultural aim.⁷

The latter view, which favored having only one, *local* CMO, eventually prevailed: A 1933 decree recognized BUMA’s authority to license and gave SACEM one year to wrap up its Dutch activities.⁸ There is a degree in irony perhaps in the fact that some eighty years later the regulation of collective management in the European Union might allow (some might say compel) CMOs to ‘compete’ within the European Single Market. This raises once again the same dilemma, but perhaps in a new light: can this competition take place while CMOS are still expected to perform special cultural or social functions? In the Dutch case at least, it seems that legislators saw the dilemma as *opposing* business and protection or promotion of local cultural needs.

Even prior to this competition-based challenge to their de facto (and in some cases de jure) monopolies, social and cultural deductions had been heavily criticized. Another Dutch scholar, Professor Herman Cohen Jehoram, took the view that using CMO funds for cultural and social purposes could amount to expropriation, especially of payments due to foreign authors and

⁴ H. H. Geyer, ‘GEMA-Kommunikation’, in Rolf Moser and Andreas Scheuermann (eds), *Handbuch der Musikwirtschaft* (Starnberg : J. Keller, 1997) pp. 647-648: “Sein Zeil ist nichts Geringeres als die Sicherung der wirtschaftlichen, soziale und kulturellen Existenz aller kreativen Menschen.”

⁵ Ferdinand Melichar, ‘Deductions Made by Collecting Societies for Social and Cultural Purposes in the Light of International Copyright Law’, (1991) 22 IIC 47, at 48 (describing this situation at the Austrian Music Collecting Society AKM).

⁶ Kamiel Koelman, ‘Regulation of Collecting Societies’, in B. Hugenholtz et al. eds, *A Century of Dutch Copyright Law* (deLex 2012) at 478. As part of its battle against SACEM, BUMA published a booklet entitled “A Serious Accusation,” reportedly accusing SACEM of fraudulent practices. *Ibid.* at 479.

⁷ *Ibid.*

⁸ *Ibid.* at 481. Decree of the Minister of Justice of 24 March 1933, *Stcrt.* 1933, no. 60.

publishers. He suggested it could be seen as allowing the State to spend less on cultural promotion:

Noble or not so noble social or cultural destinations for expropriated copyright royalties, especially from foreigners, are no excuse. Those funds have to be supported by the respective welfare states, *i.e.* all the taxpayers, and not by only a few successful artists, with their royalties [...]. The only real beneficiary here is the state, which in this way can alleviate its social and cultural budgets and which therefore often *imposes* these practices on not unwilling societies.⁹

Deductions from income owed foreign represented parties have also been described as plain unlawful.¹⁰ In response, others have argued that such deductions can be defended as a facet of a principle of solidarity, both among CMOs and among represented parties.¹¹

Let us examine these claims in greater detail. We begin by taking a deeper look at the cultural functions that CMOs perform, and the ways in which the performance of such functions is structured. The Article suggests concrete ways to solve the above-mentioned dilemma or at least ameliorate the way in which CMOs can achieve what may well be conflictual goals.

The Cultural Function(s) of CMOs

CMOs perform various cultural functions. Some also perform *social* functions. For example, Germany's GEMA runs a pension scheme for its members, as required under German law.¹² GEMA's example was used to argue that social and cultural functions are part of a CMO's natural functions--at least in the European Union. In the words of Professor Dietz:

The obligation of collecting societies to establish cultural and social funds under German law demonstrates that even *de lege lata* a social and cultural dimension is not foreign to traditional copyright rules. [...] [C]opyright law does not simply and exclusively serve individual interests but 'that their protection ensures the maintenance and development of

⁹ Cohen Jehoram, Herman, 'The Future of Copyright Collecting Societies' (2001), 23 EIPR 134, 138. A similar view had been expressed by Walter Dillenz. See Walter Dillenz, 'Functions and Recent Developments of Continental Copyright Societies', [1990] E.I.P.R. 191.

¹⁰ A. Harcourt, "The Unlawful Deduction Levied upon U.K. Composers' Performing Rights Income" (1996) 64 *Copyright World* 15.

¹¹ See Liholm, n. 1, at 114-115 (describing solidarity as one principle; the other being reciprocity).

¹² Reinbothe, 'Collective Management in Germany', in D. Gervais (ed), *Collective Management of Copyright and Related Rights*, 2nd edn (Kluwer, 2010), 215, 230. For a critical view of this scheme, see Christian Hauptmann, "Die Vergesellschaftung des Urheberrechts", [1994] *Archiv für Urheber- und Medienrecht (UFITA)* 149.

creativity in the interest of authors, cultural industries, consumers and society as a whole'.¹³

He argues that such functions form an integral part of the 'sociological' role of CMOs as cultural intermediaries, a matter on which the recent Directive seems to agree with him:

Another typical feature of Continental European collecting societies law, in addition to the element of distribution justice as explained, are the rules concerning cultural and solidarity aspects. They seem to recognize the sociological function of collecting societies representing or integrating *groups of creative people* who do not act in a more or less neutral field of activity but whose activities are mostly directly related to the *cultural sphere*.¹⁴

Whether cultural or social, one could group all such functions as *non-distributional*, that is, these are use of funds not meant to pay (distribute to) represented parties.

A brief taxonomy of the cultural functions that CMOs may perform might look like as follows. First, in what one might call *direct cultural functions*, CMOs might fund and/or organize

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

In a broader category of what one might call *indirect cultural functions*, one might include

- Informational and educational function (about copyright, licensing etc.), including publications, social media presence, conferences, etc.¹⁵, and
- Lobbying .

While these activities are non-distribution related, they are different in nature.

The indirect category is an easier case. It seems eminently defensible for an organization administering rights and licensing schemes to provide information. There are useful examples of CMOs providing this service.¹⁶ In an era where legislative changes affecting CMOs and their represented parties are frequent and driven in significant part by lobbying, it is not only understandable that CMOs would spend some of their resources to lobby. Indeed, it would seem

¹³ Adolf Dietz, 'Term of protection in copyright law and paying public domain: a new German initiative', E.I.P.R. 2000, 22(11), 506-511, 510, quoting recital 10 of Council Directive 93/98 of October 29, 1993 harmonising the term of protection of copyright and certain related rights [1993] O.J. L290/9.

¹⁴ Adolf Dietz, 'Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe', (2002) 49 *Journal of the Copyright Society of the U.S.A.* 897, 912. On the directive's language on the cultural role of CMOs, see n. 3 above.

¹⁵ This may include 'anti-piracy' campaigns, a matter to which the Article returns below.

¹⁶ Naturally, one would want such information to be accurate etc.

negligent for them *not* to do so, especially in the face of efforts by record companies and Internet giants who use similar tools to seek their demise.¹⁷ The key here is to ensure proper administrative approvals by governing bodies within the CMOs and, more importantly, to focus such efforts so as to avoid unproductive overlaps with trade associations representing, for example, a subgroup of represented parties within the CMO.

The harder question is the funding of direct cultural activities. A CMO may easily justify small amounts of spending on, eg, annual awards, without raising too many eyebrows. Taking 10% “off the top” is, however, another matter, at least quantitatively. There is also a qualitative difference. The indirect activities described above form part of a CMO’s institutional function. They directly relate to its core mission. By Direct cultural activities may be performed by others, in particular state or state-funded entities, including the government itself. This was the critique raised by Professor Cohen Jehoram, and it has merit. In its 1989 reform of the *Copyright Act*, for example, the Swiss government took the view that the “material needs of creators” ought to be satisfied not through copyright legislation but direct subsidies.¹⁸ This recognizes the fact that few represented parties make sufficient income from CMOs. It does not necessarily follow, however, that cultural functions of CMOs are undesirable.

There are important differences among the activities included in the list of direct functions above. Would a CMO’s spending on, say, an arts festival not be a disincentive for the government to subsidize the event? Possibly. Although in some cases there may be insufficient government funding, so that the analysis might be difficult to generalize. Would an award program create a disincentive to create or maintain official (state awarded) recognition of cultural valor? That seems much less likely.

Direct cultural activities performed by CMOs may thus be further split into two categories, namely those that are mere good ‘institutional citizenship’ (e.g. creator awards) and are private in nature (within the CMO), and those that may seem to be of a more general or public nature, including funding of public events in cooperation with or instead of government. The latter can overlap with other non-distributional activities, such as, the creation of a pension fund (as in GEMA’s case), which does seem to be a function traditionally exercised or at least regulated by the state.

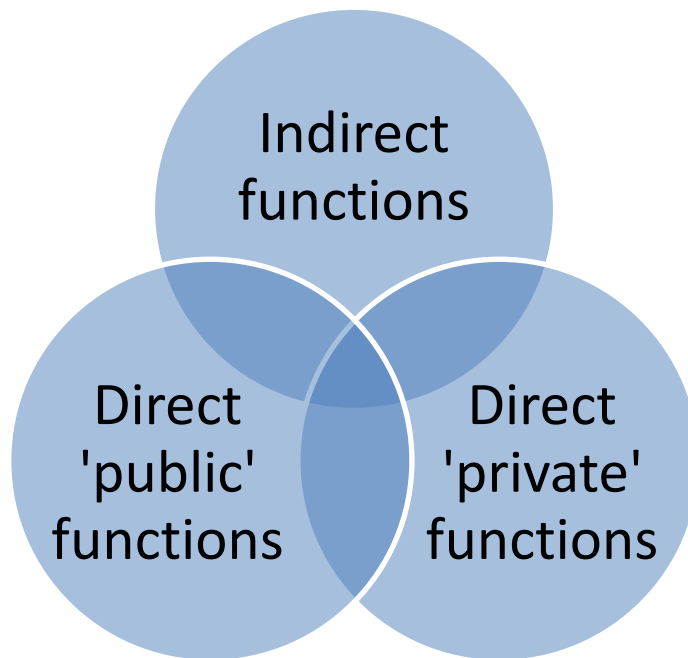
This analysis does not lead to the inescapable conclusion that the sub-category of ‘public’ direct cultural activities must necessarily be reduced in scope as a normative matter. Such activities should, however, be subject to a higher degree of scrutiny. A CMO might argue that there is a

¹⁷ See Tim Ingham, ‘Martin Bandier: Why current BMI and ASCAP deal isn't good enough for songwriters’, *Music Week*, 11 July 2014, <http://bit.ly/1DFdlV5>. Apparently, the songwriters are not buying it. See ‘Songwriters' United Response to NMPA’, 27 March 2015, <http://songwriters.ca/news/366/150327openletter.aspx>.

¹⁸ Martin Kretschmer, “Die Mythen des Urhebers: Geistiges Eigentum in der Musik--eine historische Übersicht und Kritik“/” Le Mythe de L’Auteur--La propriété intellectuelle dans la musique: aperçu historique et critique” (1998) 57 *Dissonanz* 4-13.

public perception benefit in funding a public event which may in turn make licensing easier. Many for-profit corporations perform “public” functions of this nature to improve their image. Being associated with governmental in co-funding an event might provide similar benefits, at least in some contexts.¹⁹ Finally, assisting a cash-strapped governmental authority in funding an event may generate goodwill with the CMO and thus become a form of ‘lobbying’ in addition to helping generate the creation of public goods.

In light of the above, the picture of cultural functions thus takes the form of a Venn diagram, with overlaps between the categories:



The Legal / Normative Context

In its study on collective management of copyright, the World Intellectual Property Organization (WIPO) noted that copyright is a right given to individual right owners. Consequently, it suggested that funds collected by a CMO ‘should be distributed to those individual right owners whose rights have been used.’²⁰ Even if in some cases ‘individual uses cannot fully, and with absolute precision, be identified’ the funds should still be fairly distributed using a ‘rough

¹⁹ It may be seen as creating confusion as to the legal status of the CMO.

²⁰ WIPO, *Collective Administration of Copyright and Neighboring Rights*, (1989) 25 Copyright 309, at 347. The study was republished in 1990 as a WIPO publication.

justice' system, unless the costs of distribution would be prohibitive.²¹ That the funds collected by CMOs belong to the right holders they represent is a long standing principle.²²

By and large, CMOs require a contract to be signed by those they represent. Often, the domestic represented parties will sign directly with the (local) CMO while the authority to administer foreign rights will be transferred by a contract signed between CMOs, usually referred to as a Reciprocal Representation Agreement (RRA). Is the RRA sufficient authority to use foreign funds for local cultural purposes? Legally, the foreign CMO may transfer the authority to use the funds that would otherwise be payable to the right holders it represents. However, beyond or in spite of strict legal congruity, there may be a legitimacy issue. As WIPO noted, funding cultural functions in such cases 'should not be admissible even where such practice is based on 'reciprocity' between the various societies, or on any method of decision-making in which the foreign right owners or their duly authorized representative do not *really* participate and do not know *exactly* how much less money they would receive.'²³ This excludes the option of providing for deductions *in national law*, at least for 'rights covered by the Berne Convention and the Rome Convention.'²⁴

The largest association of CMOs, the International Confederation of Societies of Authors and Composers (CISAC) provides (since after World War II) in its model RRA that up to 10% of funds collected including those that correspond to uses of foreign works or other material may be used for collective (including cultural) purposes.²⁵ This ostensibly provides CMOs with the dual pillars of legal authority they need to fund and perform such functions: direct contracts with domestic represented parties and RRAs for foreign parties.²⁶ One should add that law may mandate or at least create expectations that a CMO will fulfill cultural or other non-distributional purposes.²⁷ As suggested in the WIPO study mentioned above, however, a measure of legal authority does not provide the full picture; normative questions must also be answered.

²¹ *Ibid.*

²² The term 'represent' is used here in the broadest sense, as some CMOs obtain a transfer of rights, others operate as agents, and others administer a compulsory license or remuneration scheme. See Gervais, 'Collective management of Copyright: Theory and Practice in the Digital Age', in D. Gervais (ed), *Collective Management of Copyright and Related Rights*, 2nd edn (Kluwer, 2010), 1, at 6-7.

²³ WIPO, n. 20, at 147. Emphasis in original.

²⁴ *Ibid.*, at 348.

²⁵ Melichar, n. 5, at 48.

²⁶ See David Sinacore-Guinn, *Collective Administration of Copyright and Neighboring Rights* at 490-491 (Boston: Little, Brown & Co, 1993).

²⁷ This was mentioned by the European Commission when proposing to regulate collective management in the European Union, which happened in 2014, when the directive on collective management was adopted (see n.2 above). For a discussion, of the 'economic, cultural and social functions' of CMOs in the Union, see Péter Gyertyánfy, 'Why Is a European Directive on Collective Management Necessary? A Perspective from A New Member State of the EU', 53 *Journal of the Copyright Society of the U.S.A.* 71, 73 (2006).

Three remarks are in order. First, the fact that the 10% deduction is a form of cultural cross-subsidization is apparently not controversial within CISAC. In an official 1958 document explaining the model RRA, the Confederation explained that:

This measure, (i.e. the deduction of 10 % at the maximum) is in effect a voluntary waiver by the more important societies that is to allow other societies to fill their pension, relief, cultural promotion, and other funds which they could otherwise hardly afford. In a certain respect, this waiver is a recompense for the services rendered by the latter societies to societies in countries with a copious musical production.²⁸

In 1983, the WIPO model CMO statutes provided for social and cultural deductions, prompting claims that if WIPO did it, the practice must be compatible with the Berne Convention.²⁹ A few years later, WIPO published a study suggesting that 10% should be considered not as a target but as a cap.³⁰

Second, in some cases, funds are collected not for licensing but as a form of levy ‘administered’ by a CMO as mandated by law. In such cases, the link between collected funds and specific represented parties is looser. This may be used to argue against such schemes, but it also provides more (some might say too much) flexibility in the use of such funds.³¹ As Professor Ginsburg noted:

For example, in France twenty-five percent of the blank tape levy must, by law, be used for collective purposes. In Norway, where recording equipment is taxed, the entire revenue is used for collective purposes and, significantly, foreign rights holders receive none of the benefits. The collective destination of these revenues raises Berne-compliance questions.³²

Third, developing countries may be in a special situation. In countries with less robust cultural industries, where the need to set up new systems and educational programs to implement copyright in a fair way is essential, the CMO can and perhaps should play a more active role. Indeed, several normative groundings for cultural deductions in developing countries have been offered. Cultural activities may increase visibility and legitimacy and be a genuinely useful

²⁸ Quoted in Melichar, n. 5, at 49.

²⁹ See *ibid.*

³⁰ WIPO study on collective management, 7 December 1989, published in [1989] *Copyright* 348.

³¹ See Paul Edward Geller, Reprography and Other Processes of Mass Use, 38 *Journal of the Copyright Society of the U.S.A.* 21, 38 (1990).

³² Jane C. Ginsburg, Reproduction of Protected Works for University Research or Teaching, 39 *Journal of the Copyright Society of the U.S.A.* 181, 220 (1992)

source of support from within a creative community, perhaps even more acutely in newer ‘markets’³³

The status of a parastatal organization, which is often the situation in developing countries, is seen as necessary or at least useful. It may increase a new CMO’s ability to function legitimately. That said, CMOs should be organizations run by the right holders they represent, even in the case of a mixed (public/private) organization. Mihály Ficsor has argued that in some developing countries, a public CMO may be advantageous because of the relatively small number of local represented parties and the need for a governmental contribution to fund starting expenses.³⁴ This seems to be supported also by the fact that if a new CMO uses 100% of collected funds to set up its operations for several years, it will lose legitimacy in the eyes of represented parties and potential partners, both domestically and internationally. Input from *users*, whether on the board if the CMO or otherwise is also useful as it may increase responsiveness of licensing programs and practices.³⁵

One should not overlook the fact that cultural activities burden a CMOs’ budget and resources, however. It is, in other words, a carefully crafted balance that each CMO must seek in its domestic cultural, political and economic context. In the case of antipiracy activities specifically, a CMO should thread especially carefully. If seen as a mere antipiracy agent for (powerful) right holders, the CMO is not fulfilling its primary mission, which is to make copyright work for represented parties and users. Any major departure from this primary mission risks sending mixed messages and ultimately reduce the efficiency of the CMO. In blunt terms, a CMO should not use collected funds to allow right holder organizations to offload their antipiracy efforts onto a CMO. The word piracy should also be used with caution. There are true pirates whose business is to make available copyrighted material by deliberately circumventing copyright rules. A CMO may certainly assist in that regard but in most cases that should be exceptional use of funds. Right holders and police are typically in a better position. In the case of legitimate disagreements (as to the exact scope of exceptions and limitations), it may be preferable for a CMO to step back and let other parties, including courts in disputes between represented parties and users, fulfill this function.³⁶

Whatever the source and use of funds, actual use of the funds should be decided according to fair and democratic processes and principles. A Board’s credibility in managing the CMO depends

³³ See Paul Kuruk, ‘Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States’, 48 *American University Law Review* 769, 800-01 (1999) (footnotes omitted).

³⁴ Mihály Ficsor, *Collective Management of Copyright and Related Rights* (Geneva, WIPO: 2002), at 136-137.

³⁵ Two US CMOs have users on their board. Copyright Clearance Center, Inc. (CCC) and Broadcast Music, Inc. (BMI). The latter has a board essentially composed of broadcasters.

³⁶ In cases that are crucial to the efficient operation of a licensing program (including its possible abandonment), a CMO may opt to fund a ‘test case’ in jurisdictions where this may be helpful to clarify applicable rules.

on it. If all members are called upon to make the decision, or at least voice an opinion, then that process should be managed transparently, but as a matter of balance without sacrificing the need for efficiency. There is, for example, a significant difference in that regard between a decision to set up a new, major annual award program and making a time-sensitive executive decision to lobby for or against legislation introduced with little advance notice

Specific regulation of CMOs is desirable, given that they operate in a critical role in making certain markets work for cultural and informational goods³⁷, assuming of course that one wants to create or maintain financial flows to creates whose living depends on providing access to (by download, selling copies, streaming or otherwise) to their creations. Such regulations may take various forms, but often provide for:

- Registration of CMOs (this should not unduly restrict the right of association)
- Governance (board composition, election, conflicts within the CMO);
- Setting up of prices and tariffs in absence of agreement between represented parties and users;
- Transparency and reports to be provided publicly or (for sensitive financial information) privately to governmental authorities, especially in the case of newer CMOs; and
- Provisions facilitating the recovery of payments owed but also limiting a user's liability when payment is tendered.³⁸

Oversight is an indispensable element of this list. A specialized commission with sufficient powers and safeguards to prevent structural bias towards represented parties or users seems the ideal regulator.

Is a local CMO preferable?

Why would a local CMO be preferable? As with the dilemma presented in the introductory paragraphs, one could present a set of simple business efficiency. A local CMO would normally find it easier to communicate in the local language(s), including in providing information on its website and in reports sent to represented parties; it might know and understand the local licensing markets and practices better than a foreign counterpart. It may find it easier to 'sell' licenses and talk to policy makers as a local player. Some of these advantages can be 'bought' by a foreign CMO, which could for example hire local staff and have a local presence.

³⁷ In the words of Mihály Ficsor, even private CMOs have 'semi-public characteristics'. See Ficsor, n. 34 above, at 137.

³⁸ Two examples include the Decree of the State Council of the People's Republic China No.429 (Regulations on Copyright Collective Administration), adopted on 22 December 2004 and promulgated as of 1 March 2005; and the *Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market*, OJ 20 March 2014 L 84/72.

Riis and Schovsbo have argued, for example, that extended collective licensing is easier to apply and use in the cultural context of the Nordic countries³⁹. By contrast, United States CMOs tend to do very little in terms of direct cultural functions, in part because the largest CMOs, the two principal performing rights organizations (ASCAP and BMI) are operating under constant antitrust scrutiny as reflected in their ‘consent decrees’. While European CMOs are often seen as part of the cultural fabric in their territory, US CMOs operate much more as business entities, tolerated as ‘monopolies’ and often described as ‘necessary evils’⁴⁰. This prompted a well-known expert on US collectives to note that to ‘the non-US observer, the institutions and methods by which music performing rights are defined and licensed and by which the license fees are collected in the United States of America may seem very strange.’⁴¹

At bottom, this is perhaps where the true normative distinction lies. For a represented party, using a CMO implies if not collectivization at least some degree of ‘centralization’⁴². Represented parties agree to work on the same terms to license their works.⁴³ In the case of ASCAP, for example, every ‘member-writer or publisher-signs the identical membership agreement, which, in conjunction with the Articles of Association defines his relationship with ASCAP.’⁴⁴ This is quite typical. The underlying cultural context may dictate or at least point to a higher degree of collectivization, which in turn might lead to a greater propensity to spend some of the funds for collective purposes. In a less collectivist system, using funds to promote, say, up-and-coming authors, might be frowned upon as a form of income redistribution. A CMO licensing across borders will have to face the fact that different cultures bring different challenges. But then again, even the French eat lunch at McDonald’s.

Not all represented parties, even domestic ones, will see eye-to-eye. Major music publishers might see the collectivization equation differently than smaller publishers and individual songwriters and composers. Major publishers might ponder the fact that using the services of a CMO implies transparency. They might prefer to control information flows to songwriters. They might also prefer to license uses directly as US consent decrees allow. The efficiency in doing such direct deals is considerably smaller for smaller represented parties. By taking ‘low-hanging fruit’ away from CMOs, they cause an increase in the CMOs fees to collect harder to reach license fees, which then negatively impacts all represented parties. A major publisher adding

³⁹ Thomas Riis & Jens Schovsbo, ‘Extended Collective Licenses and the Nordic Experience: It’s A Hybrid but Is It A Volvo or A Lemon?’ (2010), 33 *Columbia Journal of Law & Arts* 471, at 497-498 (2010).

⁴⁰ Glynn S. Lunney, “Copyright Collectives and Collecting Societies: The United States Experience” in D. Gervais (ed) *Collective Management of Copyright and Related Rights*, 2nd edn (Kluwer, 2010), 339, at 340.

⁴¹ John M. Kernochan, “Music Performing Rights Organizations in the United States of America: Special Characteristics; Restraints; and Public Attitudes”, [1985] *Copyright* 389.

⁴² See Sinacore Guinn, n. 26, at 17-23.

⁴³ In a few cases (CCC), the price for each work is set by each represented party but that is the exception, not the rule.

⁴⁴ Korman, Bernard & I. Fred Koenigsberg, ‘Performance Rights in Music and Performing Rights Societies’ (1986), 33 *Journal of the Copyright Society of the USA* 332, at 353.

direct licensing of easy uses and subtracting additional fees on uses that require more work to license shares losses with others, not the gains. Recent attempts by international publishers to direct license services such as Pandora may have backfired, however, partly because of the need to be either ‘in or out’ not half-way in at the expense of other represented parties.⁴⁵ Major publishers—basically subsidiaries of major record labels—⁴⁶would probably not regard the resulting systemic weakening of the CMO as a negative. In the same vein, they, and financial markets, may resist letting CMOs spend any of ‘their’ money on collective purposes and thus negatively affect their bottom-line. For them the dilemma does not really exist.

Individual and smaller represented parties face their own issues. A small group of CMO members usually collect the lion’s share of distributed income. Solidarity with represented parties who receive lower payments but benefit from cultural functions, both direct and indirect, may not appeal equally to all.

Normatively, a local CMO may better understand and defend the interests of local represented parties. The flip coin of course is that foreign represented parties might feel differently. For example, while American and British pop music dominates that market in many countries, the interests of those songwriters and publishers are not always represented on the boards of local CMOs and the staff of local CMOs may not be as familiar with that repertoire. Naturally, a foreign CMO can hire experts in local music etc. in the same way that it can hire experts in local licensing practices, and technology is now widely used to identify musical works and recordings.

The next question is whether striving for efficiency and transparency is compatible with cultural functions. Here, as with licensing and represented parties, even a foreign CMO might be able to gauge the best way to promote ‘culture’ in the local scene. This requires a willingness to do so (both devoting funding and hiring the right ‘talent’ to find appropriate targets to spend it on). The legitimacy of the spending may be questioned, an issue I return to in the next section.

As a business matter, a case may be made that having larger CMOs perhaps working in multiple territories (subject to the caveats in the previous paragraphs) could lead to efficiency gains in systems development for example. A single ‘back-office’ to process data, maintain websites etc. may be less expensive. It is also possible for CMOs to cooperate to share this service, however.

⁴⁵ See Todd Brabec, *The Performance Right A World in Transition*, *Entertainment & Sports Law*, Winter 2015, at 1, 38 (‘[I]n September 2013, Judge Cote, the ASCAP judge, ruled that a selective withdrawal of new media rights by publisher members could not be implemented without violating the consent decree.’)

⁴⁶ A good example is in the skew visible in financial flows. In 2013, Pandora paid \$290 million to record companies and artists, with all three PROs collecting a total of less than \$25 million for songwriters and publishers. Assuming songwriters and publishers shared 50/50, the songwriters got \$12.5 million, and the corporate right holders pocketed \$302.5 million minus an unknown *net* amount (that is, not repaid to the company) paid to and retained by artists. See Brabec, *ibid.*, at 39. For interactive streaming services (such as Spotify) the splits in the United States approach 98:2. See Eddie Schwartz, ‘Fair Trade Music: Letting the Light Shine In’, in S. Frankel and D. Gervais, eds., *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge Univ. Press, 2014), at 314.

In other words, the efficiency argument can be used to justify cooperation and competition among CMOs.

Way Forward

The first task of CMOs is to license media and entertainment services to offer various services to the public, including broadcasting, internet-based services and live events. They often play a dual role, however, making them proactive stakeholders in the process and possibly influencing the quantity and quality of cultural offerings. This creates a ‘business vs culture’ dilemma.

Solutions exist. Martin Kretschmer suggested two major options, representing the two sides of the dilemma. On the first side, ‘cultural aims and the reward of creativity should not be pursued within the framework of rights management’⁴⁷. He then suggested that an ‘alternative solution would re-focus collecting societies on a different rationale for copyright under a principle that, wherever commerce is generated through the use of creative content, a share of revenues should flow back into creative production.’⁴⁸

Three relevant good governance principles see relevant. First, there should be transparency both in decision-making processes about use of funds, as noted earlier, and in disclosing all necessary financial details to represented parties. Second, one could look at the Court of Justice’s decision in *Amazon v. Austro-Mechana* for additional guidance.⁴⁹ The CJEU noted that half of the funds from private copying levies in Austria were used for ‘social and cultural institutions set up for the benefit of those entitled’ was acceptable ‘provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory, which it is for the national court to verify.’⁵⁰ Third, efficiency-derived arguments can be used in appropriate contexts to justify the cultural role of CMO not as surrogate for the state but as truly benefiting the CMO’s legitimacy and/or assisting represented parties. This does not mean that social and cultural functions should necessarily be limited to such cases. Instead, it suggests that, using the taxonomy proposed above, at least *direct* funding of cultural functions should be subject to strict limits along the lines of the three governance principles just mentioned.

⁴⁷ Martin Kretschmer, ‘The failure of property rules in collective administration: rethinking copyright societies as regulatory instruments’, *E.I.P.R.* 2002, 24(3), 126, at 135.

⁴⁸ *Ibid.*

⁴⁹ *Amazon.com International Sales Inc. v. Austro-Mechana GmbH*, C521/11, 11 July 2013. This litigation has now produced a second referral by the Austrian Supreme Court (Oberster Gerichtshof) on 18 November 2014 on the nature of the right to fair compensation in Article 5(2)(b) of the 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, also known as the Information Society Directive (InfoSoc Directive).

⁵⁰ *Ibid.*, para 55.