

## CAUTIONARY TALES ABOUT COLLECTIVE RIGHTS ORGANIZATIONS<sup>1</sup>

Collective licensing has been suggested as a possible solution for the obstacle copyright law places in the path of new uses of works enabled by innovative technologies. Collective licensing does have the potential to reduce transaction costs when a large number of works are licensed to a large number of users, thereby benefiting both rights holders and users. However, the actual track record of collective rights organizations (CROs),<sup>2</sup> the entities that manage collective licenses, reveals that they often fail to live up to that potential. Although there are a wide variety of CROs operating under divergent legal frameworks, many unfortunately share the characteristic of serving their own interests at the expense of artists and the public.

The CROs are well-funded and well-organized, and have succeeded in promoting themselves and the collective licensing model. The objective of this compilation is to tell the other side of the story – to provide balance to any policy discussion that addresses collective licensing and CROs. The episodes collected below reveal a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, CROs have often aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system. While properly regulated CROs in some circumstances enhance efficiency and advance the interests of rights holders and users, policymakers must be aware of this history as they consider the appropriateness of CROs as a possible solution to a specific copyright issue.

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<sup>2</sup> CROs are also referred to as copyright management organizations or collecting societies.

## **I. BAD FOR ARTISTS**

### **A. Corruption**

#### **1. ECAD**

In April 2012, fifteen officials of ECAD, the Brazilian CRO responsible for the collection of licensing fees for music, faced indictment after a Senate investigation of charges of embezzlement, fraud, and price-fixing. The Senate panel described ECAD's collection system as a "black box" where only 76 percent of the fees collected were paid to artists. The ECAD directors paid themselves large bonuses even though the CRO was losing money. In response, amendments to the copyright law to increase government oversight are under discussion.

Timothy Lee, *Not just the pirates: Brazilian rights holders indicted for ripping off artists*, Ars Technica, May 1, 2012, <http://arstechnica.com/tech-policy/2012/05/copyright-cops-behaving-badly/>; Attilio Gorini, *Brazilian collection society under scrutiny*, ENT. L. BRAZ., May 2, 2012, <http://entertainmentlawbrazil.com.br/2012/05/02/brazilian-collection-society-under-scrutiny/>.

#### **2. SGAE**

In 2011, government raids on Spanish music CRO SGAE uncovered the embezzlement of close to \$550 million. This money was meant to go to artists whose rights the organization was managing. The theft allegedly was perpetrated by leaders of the organization, including president Teddy Bautista. Teddy Bautista has since stepped down from his position and other members of the organization are still under investigation.

*Detuvieron a los beneficiarios del "canon digital" español*, PERFIL, Jan. 7, 2011, [http://www.perfil.com.ar/contenidos/2011/07/01/noticia\\_0024.html](http://www.perfil.com.ar/contenidos/2011/07/01/noticia_0024.html); enigmax, *Music Rights Groups Raided By Police, Bosses Arrested For Fraud*, TorrentFreak, Jul. 3, 2011, <http://torrentfreak.com/music-rights-group-raided-by-police-bosses-arrested-for-fraud-110702/>.

### **3. Italian Collection Society Corruption Investigation**

The Italian government investigated its mandatory CRO, IMAIE, in 2009. The investigation was based on allegations of the funneling of \$24-30 million into nonexistent projects.

Mark Worden, *The Royal Scam? Italian Fraud Investigation Targets Members of Collection Society IMAIE*, BILLBOARD, Nov. 29, 2008, at 14.

### **4. Swedish CRO CEO Removed For Misappropriation of Funds**

In 2007, Hans Lindström, chief executive of Swedish music performance CRO SAMI, was removed from office because of charges of corruption. Lindström subsequently became the object of a large-scale criminal investigation regarding the misuse of SAMI funds. After Lindström's removal, a new chief executive was appointed in secret without consultation of the CRO's members.

Per Gulbrandsen, *Detta är SAMI-härvan*, Sverige Radio, Oct. 18, 2007, <http://sverigesradio.se/sida/artikel.aspx?programid=1012&artikel=1664918>.

### **5. Allegations of Corruption in Ghana**

Musicians in Ghana “have claimed that the officials of the Copyright Society of Ghana and government copyright officials have corruptly diverted the royalties they do collect.”

Mark Schultz and Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 Ky. L. J. 79, 132 (2008-09).

### **6. Structural Incentives for Corruption and Mismanagement**

Professor Ariel Katz explains that

...in many cases copyright collectives may demonstrate some of the worst forms of corporate governance. If copyright owners are indeed numerous and dispersed, then we may assume that Canadian collectives will exhibit the classic problems associated with the separation of ownership and control. Collective action problems would prevent the individual members from exercising their right of control to the benefit of insiders (either members with greater representation or influence or managers).

While such problems associated with dispersed ownership are pervasive in the corporate world (and have generated a voluminous corporate governance literature), the Canadian collectives' situation is quite unique among Canadian corporations because not only do they not face market discipline, they also do not have to respond to other disciplinary threats: the threat of exit by their members, or the threat of takeover. Under such conditions, productive inefficiency seems almost inevitable.

Ariel Katz, *Is Collective Administration of Copyrights Justified by the Economic Literature?*, U. Toronto Legal Stud. Res. Paper No. 1001954, Competition Pol'y & Intell. Prop., Jul. 20, 2007.

## **B. Mismanagement, Excessive Overhead, and Unfair Distribution**

### **1. Poor Investments**

In 2009, Dutch CRO Buma/Stemra lost a substantial amount of the money it collected for artists in the stock market. These losses resulted in the society withholding 10.4% of each artist's payout.

*Music rights society loses on investments*, Dutch News, May 26, 2009, [http://www.dutchnews.nl/news/archives/2009/05/music\\_rights\\_society\\_loses\\_on.php](http://www.dutchnews.nl/news/archives/2009/05/music_rights_society_loses_on.php).

### **2. Access Copyright Economics**

In 2011, Professor Michael Geist attempted to untangle the notoriously obfuscated financials of the Canadian CRO for authors and publishers, Access Copyright. In 2011 its revenue was \$33.7 million, of which \$8.7 million directly went to administrative costs, largely salary for lawyers and administrators. Beyond this, Access Copyright spends \$6.7 million compensating foreign CROs, \$10 million is deferred due to ongoing legal battles (much of which would go to rights holders if court cases go Access Copyright's way), and \$491,000 is paid towards the Access Copyright Foundation, which collects fees for unlocatable copyright owners.

After that, \$7.8 million is left to distribute to rights holders. The split here is estimated to a 60/40 split in favor of publishers. In the end, only \$3.1 million, less than 10%

of its revenue, goes to the creators of creative work. Geist estimates that the average distribution to authors based on this licensing was \$319.

Michael Geist, *The Economics Behind Access Copyright*, May 26, 2011, <http://www.michaelgeist.ca/content/view/5819/125/>.

### **3. High Legal Fees in Canada**

In 2006 and 2007, Access Copyright spent \$2.5 million on Copyright Board filings.

Howard Knopf, *Auditing Access Copyright?*, *Excess Copyright*, Oct. 16, 2008, <http://excesscopyright.blogspot.ca/2008/10/auditing-access-copyright.html>.

### **4. CCC Litigation Against Georgia State University**

The Copyright Clearance Center, a U.S. CRO for publishers, used the copyright license fees it collected to underwrite half the expense of litigation brought by three publishers against Georgia State University for its electronic reserves system. After several years of litigation, the publishers were able to prove that out of the thousands of excerpts used by GSU, only five exceeded fair use. The court subsequently found that GSU was the “prevailing party,” and ordered the plaintiffs to pay GSU’s attorneys’ fees. Funders of the lawsuit stated publicly that they had spent millions of dollars for their own legal fees; in the end the court found only \$750 in lost licensing revenue across three representative semesters.

### **5. CAL Economics**

The Australian CRO, CAL, paid its staff \$9.4 million and only distributed \$9.1 million directly to content creators.

Luke Slattery, *Copyright staff get more than they give to authors and artists*, *AUSTRALIAN*, Feb. 18, 2010, <http://www.theaustralian.com.au/arts/copyright-staff-get-more-than-they-give-to-authors-and-artists/story-e6frg8n6-1225831556653>.

## **6. High Administrative Costs in Kenya**

The high administrative costs of the Music Copyright Society of Kenya (MCSK), the CRO that acts on behalf of music composers, prompted the Kenya Copyright Board (KECOBO) in 2011 to deregister MCSK. KECOBO found that MCSK had expenses of Sh137 million against revenues of Sh185 million, leaving it with only Sh48 million to distribute in royalties to the rights holders. Under KECOBO guidelines, only 30% of monies collected by CROs can be spent on administrative costs, with the remaining 70% distributed to rights holders. MCSK, however, had the opposite ratio; 70% of collections went to administrative costs, and only 30% reached the rights holders.

vnzomo, *The Fate of Music Copyright Society of Kenya (MCSK)*, Jan. 9, 2012, <http://ipkenya.wordpress.com/2012/01/09/the-fate-of-music-copyright-society-of-kenya-mcsk/>.

## **7. Lack of Accountability in African CROs**

Because African CROs are managed by the local government or are government-sanctioned monopolies, they are not accountable to their members. “Restricting competition provides little incentive for collecting agencies to respond to artists' concern. According to the Africa Music Project, ‘distribution [of royalties], when it takes place, is a political process rather than an objective one.’” Additionally, “government involvement with collective rights organizations can also threaten the independence of musicians. In fact, artists in Ghana have accused the Chairman of the Ministry of Culture-controlled Copyrights Office of withholding payments from artists in an attempt to influence the content of their music.”

Mark Schultz and Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 Ky. L. J. 79, 132 (2008-09).

## **8. South African Copyright Review Commission Report**

The Copyright Review Commission (CRC), established by the South Africa Ministry of Trade and Industry, identified serious problems with the operation of CROs in South Africa. A major focus of the CRC was determining why, nine years after the enactment of performance rights in sounds recordings, “not a cent had been paid in royalties to musicians and record companies.” Among the many problems identified were multiple collecting societies operating within the same set of rights, inadequate statutory protection for the interests of rights holders, disputes between the Registrar of Copyrights and the CROs, and the CROs’ failure to comply with applicable regulations. For example, one CRO’s administrative cost ratio was 30%, significantly higher than the 20% ratio allowed by regulation. The South African Music Performing Rights Association (SAMPRO), the CRO that represented the record industry, engaged in protracted litigation with the Registrar of Copyrights over the record labels refusal to equitably share royalties with performers.

The CRC report also discusses in detail the collapse of SARRAL, the CRO for the mechanical rights of composers. Many composers lost “huge amounts of monies” after the liquidation of SARRAL because of insolvency. External auditors could not verify receipts and distributions for a three-year period: “The amounts involved are significant and warranted a formal investigation. Based on the investigations carried out, the members were never provided with satisfactory answers as to what happened to the money.” Furthermore, the CRC stated that SARRAL’s change of business model and accounting practices constituted a breach of contract with its members. The CRC noted that “SARRAL’s collapse was preceded by corporate governance failure.” Similar governance failures exist at other South Africa CROs: lack of independent directors, lack of internal audits, limited disclosure

of executive director's remuneration, lack of annual reports, outdated constitutive documents.

Republic of S. Afr. Dep't of Trade & Industry, *Copyright Review Commission Report* (2011), available at <http://www.info.gov.za/view/DownloadFileAction?id=173384>.

### **9. Bahamian CRO Makes No Distributions**

According to the *Bahama Tribune*, the Copyright Royalty Tribunal has collected license fees for eleven years but has never made any payments to copyright owners. It appears that the U.S. Trade Representative has complained to the Bahamian government about Copyright Royalty Tribunals' failure to distribute funds.

Michael Geist, *Copyright Holders Receive 'Not One Cent' In 11 Years*, Jan. 6, 2012, <http://www.michaelgeist.ca/tags/bahamas/>; Candia Dames, *Copyright Blacklist Threat*, Dennis Dames Online, Apr. 3, 2004, <http://dennisdamesonline.net/Copyright.html>.

### **10. Romanian CROs Suspended For Mismanagement**

In Romania, the government office responsible for supervising the functioning of CROs is the Office for Author Rights (ORDA). Since 2010, the activities of three CROs have been suspended for various periods of time due to mismanagement, lack of transparency, and abuses. These measures were taken after complaints from rights holders, mostly independent writers, performers or other types of artists.

COPYRO, a CRO that manages rights in literary works, lost its operating permit in 2011 because the fees for managing the collection and distribution of rights were not in accordance with legal provisions. COPYPRO retained 60% of the collected amounts, while ORDA allows a maximum fee of 15%. COPYPRO's operating permit was reinstated after changes in the CRO statute, but rights holders continue to express concerns with its activities.



Robert Bucur, ORDA Director General, ORDA Notice for Compliance, Sept. 27, 2011,  
<http://www.orda.ro/fisiere/Toate%20OGC%20date%20control%20pt%202010/COPYRO/Decizia%20260%20COPYRO%20intrare%20in%20legalitate.pdf>.

ORDA Findings, Sept. 9, 2011,  
<http://www.orda.ro/fisiere/Toate%20OGC%20date%20control%20pt%202010/COPYRO/PV%202011%20COPYRO.pdf>.

At the beginning of 2012, ORDA suspended CREDIDAM, a CRO that manages rights for performing artists, for not respecting the legal requirement that it start negotiations concerning the distribution of collected license fees. Artists had identified irregularities in the way the amounts were distributed. Currently, the CRO's activities have resumed on the basis of a court order, but the main issues are still under debate.

ORDA Announcement, Oficial Roman pentru Drepturile de Autor, Jan. 31, 2012, <http://www.orda.ro/default.aspx?pagina=749>.

CREDIDAM was also investigated by the European Commission's Competition Unit due to a complaint by the UK-based Right Agency that CREDIDAM and EJI (a Hungarian CRO) were imposing discriminatory administrative requirements on foreign performers. The investigation ended after the accused parties modified their administrative requirements and the UK company withdrew its complaint.

Press Release, Eur. Comm'n, *Antitrust: Commission welcomes steps taken by collective rights management bodies in Hungary and Romania to improve competition* (Mar. 11, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/284&type=HTML>.

UCMR-ADA, a CRO that manages the rights of composers, was suspended by ORDA in 2011 because of irregularities in the way royalties were distributed resulting from a lack of an integrated IT system. The distribution was temporarily resumed by court order, but the main issues remain unsolved.

Robert Bucur, ORDA Director General, ORDA decision, Sept. 28, 2011, [http://ucmr-ada.ro/fisiere/decizia\\_259.pdf](http://ucmr-ada.ro/fisiere/decizia_259.pdf).

### **11. High Administrative Fees in Senegal**

Artists in Senegal accuse the Bureau Senegalaise du Droits d'Auteurs (BSDA) of over-charging for its services and inconsistent royalty payments.

Mark Schultz and Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 Ky. L. J. 79, 131 (2008-09).

### **12. Turf Wars in Nigeria**

A long-running dispute between the Copyright Society of Nigeria and the Music Copyright Society of Nigeria concerning how to manage the collection of license fees resulted in the Attorney General suspending the authority of both CROs to collect license fees. This in turn caused rights holders to lose significant amounts of revenue.

*COSON illegal until...*, Vanguard, Mar. 10, 2011, <http://www.vanguardngr.com/2011/03/coson-illegal-until/>.

### **13. Turf Wars in China**

The China Audio-Visual Copyright Association (CAVCA), the CRO representing the performers of music, collected fees that should have been paid to the Music Copyright Society of China, the CRO representing the composers. This led to litigation.

Luo Yanije, *Will Collective Management Organization Be Liable For Its Unauthorised License?*, Bridge IP Law Commentary, May 10, 2012, <http://www.chinaiplawyer.com/collective-management-organization-liable-unauthorised-license/>.

### **14. Mismanagement in Columbia**

The National Directorate of Copyrights under the Ministry of the Interior provisionally suspended the governing board of the Society of Authors and Composers of Columbia (Sayco), after the resignation of the Sayco chief executive because of allegations of mismanagement and two days of protests by music composers. The Directorate noted that

Sayco does not have transparent rules to ensure the fair distribution of the funds it collects. The Directorate also hinted that there was evidence of corruption and excessive spending on entertainment and the remodeling of Sayco's headquarters.

*Gobierno suspende provisionalmente al Consejo Directivo de Sayco*, LA REPUBLICA, Aug. 10, 2012, [http://www.larepublica.com.co/asuntos-legales/gobierno-suspende-provisionalmente-al-consejo-directivo-de-sayco\\_17887](http://www.larepublica.com.co/asuntos-legales/gobierno-suspende-provisionalmente-al-consejo-directivo-de-sayco_17887).

### **15. Mismanagement in Brazil**

The Brazilian Senate investigation of ECAD in the wake of the corruption scandal described above revealed that ECAD had a policy of “retaining” royalties whenever it had difficulty identifying rights holders. In 2004, ECAD used approximately \$500,000 in retained royalties to cover operating deficits – an unauthorized use of rights holder funds. (After a five-year waiting period, the royalties should have been distributed to the other rights holders represented by ECAD.)

Comissão Parlamentar de Inquérito destinada a investigar supostas irregularidades praticadas pelo Escritório Central de Arrecadação e Distribuição – ECAD, Relatório Final, Apr. 2012, <http://www.senado.gov.br/atividade/materia/getPDF.asp?t=106951&tp=1>.

### **16. High CRO Salaries in Australia**

The Australian reprographic CRO Copyright Agency Limited spent more in 2009 on staff salaries than on distributions to authors. The CRO spent \$9.4 million on salaries, including \$350,000 for its chief executive, while allocating only \$9.1 million to authors. CAL also paid \$76 million in license fees to publishers, but the Australian Society of Authors questioned whether the publishers “carry out their legal obligation to pass on money” to authors. Of the \$114 million collected by CAL in 2009, more than \$80 million came from schools, libraries, and universities.

Luke Slattery, *Copyright staff get more than they give to authors and artists*, AUSTRALIAN, Feb. 18, 2010, <http://www.theaustralian.com.au/arts/copyright-staff-get-more-than-they-give-to-authors-and-artists/story-e6frg8n6-1225831556653>.

### **17. Legal Loopholes in Russia**

Under the Russian Copyright Statute of 1993 an unlimited number of CROs were allowed to represent authors in absentia, without specific contracts to do so. “The situation allowed for extensive gaming and abuse. In several cases, publishers and distributors registered as [CROs] and began publishing and distributing work—often without the consent of the rights holders. Nonpayment of fees and royalties was a recurring problem in this context....” AllofMP3 was one exploiter of these loopholes. The Russian web portal obtained licenses from two legally licensed Russian CROs and sold music online to international audiences at prices far below international norms, realizing a profit. The legitimacy of these licenses was challenged, but the owner of AllofMP3, Denis Kvasov, was acquitted for lack of evidence of actual illegal activity.

Reform in 2008 introduced a process of state accreditation of CROs; only the accredited CROs would be able to represent authors and rights holders without formal contracts. The law was not retroactive, however, and several of the CROs in existence before 2008 continued to operate.

Joe Karaganis, *MEDIA PIRACY IN EMERGING ECONOMIES*, at 164 (2011).

### **18. Competing CROs in Russia**

The accreditation process in Russia has introduced a new set of problems. “In 2008, RAO [Russian Authors Society] affiliates launched the Russian Organization for Intellectual Property (VOIS) in a bid to become the accredited organization for ‘neighboring rights,’ such as those granted to broadcasters or producers. Concerns about the VOIS’s lack of

transparency regarding royalties and governance, however, led many producers to back a separate group in the accreditation process, the Equal Rights Phonographic Alliance (RFA). By all accounts, the political jockeying for accreditation was intense. The RFA's general director, Vadim Botnaruk, was assassinated during this period, although clear motives for the crime were never established. Ultimately, the VOIS won accreditation in 2009. The RFA continues to operate, however, grandfathered under the 2008 law, and is still the preferred organization of many foreign CRM societies.”

Joe Karaganis, *MEDIA PIRACY IN EMERGING ECONOMIES*, at 164 (2011).

### **19. BREIN and Buma/Stemra**

In 2011, Dutch anti-piracy group BREIN used a song by Melchoir Rieveldt in millions of anti-piracy videos. As it turns out, Rieveldt had only given it permission to use the song in very limited circumstances. Rieveldt contacted the CRO that represented him, Buma/Stemra, which said it would be happy to collect the estimated \$1.3 million he was owed. However, the CRO said that it would keep a third of that revenue.

Ernesto, *Copyright Corruption Scandal Surrounds Anti-Piracy Campaign*, *TorrentFreak*, Dec. 1, 2011, <http://torrentfreak.com/copyright-corruption-scandal-surrounds-anti-piracy-campaign-111201/>.

### **20. SABAM Pranked**

The satirical television show *Basta* in Belgium decided to see if it could successfully prank Belgian CRO SABAM. *Basta* made up a list of bands and songs and called SABAM to see how much it would charge for these fictional songs. Since the songs did not exist, SABAM should not have been able to claim any fees. Five days later, a representative called back to claim that all the songs were “100% protected.” After paying the fee, *Basta* attempted to register to collect any funds SABAM took on their behalf. At this point,

SABAM refused to pay out, happy to collect money for a band that it never heard of, but unwilling to distribute those funds.

enigmax, *Music Royalty Society Collects Money For Fake Artists, Bathroom Equipment and Food*, TorrentFreak, Feb. 8, 2011, <http://torrentfreak.com/music-royalty-society-collects-money-for-fake-artists-bathroom-equipment-and-food-110308/>.

## **21. Disregard of Other Rights Holders**

Several photographers sued the Copyright Clearance Center for copyright infringement and false advertising because the CCC implied that its licenses for books gave a “green light” for licensees to reproduce photographs contained in the books, without regard for the rights of photographers whose works are not covered by CCC licenses. Although the CCC prevailed on technical grounds, the case demonstrates a CRO overstating its authority and ignoring interests of other rights holders.

*Resnick v. Copyright Clearance Center, Inc.*, 422 F. Supp. 2d 252 (D. Mass. 2006).

## **22. Access Copyright Steers Royalties Away from Authors**

In 2011, The Writers Union of Canada moved for investigation and reform in Access Copyright. Among their concerns was the following: “key differences in the copyright interests of publishers and creators will always prevent Access Copyright from fully and effectively representing creators’ copyright interests.”

Michael Geist, *The Access Copyright Backlash: Writers Union of Canada Calls for Collective Licensing Reform*, May 29, 2011, <http://www.michaelgeist.ca/content/view/5821/125/>.

In 2008, the League of Canadian Poets accused Access Copyright of failing to fulfill its mandate. The League stated that “only a handful of large publishers are receiving significant benefits,” while “the writers and small presses that publish most Canadian culture receive virtually nothing from the system.”

Howard Knopf, *Creators v. Access Copyright*, Excess Copyright, Oct. 15, 2008, <http://excesscopyright.blogspot.com/2008/10/creators-v-access-copyright.html>.

Access Copyright refuses to distribute to authors income from works older than twenty years, yet it continues to collect that income in their name. Access Copyright also continues to pay publishers the income for works whose rights have reverted totally to the authors.

Howard Knopf, *Leading Writer Brian Brett “breaks the ‘cone of silence’ that has obscured for too long some of the ugly practices of Access Copyright,”* Excess Copyright, June 27, 2012, <http://excesscopyright.blogspot.ca/search?q=%22access+copyright%22>.

### **23. CROs Use Variations in International Law to Retain Funds**

Because of the complicated interaction between international copyright laws, foreign CROs collect license fees for digital music downloads of songs written by American songwriters to which the CROs are not entitled. The CROs might distribute some of these fees to local affiliates of record labels or to American CROs such as ASCAP, BMI, or SESAC, but little of the money ever reaches the copyright owner.

Jeff Price, *The Global Songwriter Shell Game: Why The Major Music Companies Are Getting Your Royalties*, tuneCORE BLOG, Mar. 1, 2012, <http://blog.tunecore.com/2012/03/the-global-songwriter-shell-game.html>.

### **24. CRO Lag Time**

CROs often create substantial lag times between a licensee paying and an artist receiving his money. This is especially true in international markets, where royalties are customarily paid to a publisher’s local representative in a given country. Months can pass as the royalty earnings migrate from these international, to regional, and finally home offices of CROs.

Glenn Peoples, *Accounts Viewable: Music Publishing Moves Toward Greater Transparency and Accountability*, BILLBOARD, Jan. 28, 2012, at 21.

## **C. Lack of Transparency and Choice**

### **1. European Commission Proposed Directive**

In July 2012, the European Commission proposed a new directive to address the many problems of CROs. These problems include difficulty in adapting to online environments, operating internationally, lack of transparency in their financials, and lack of right holder input on rights management. In the explanatory memorandum justifying the Directive, the Commission stated that “concerns have been expressed with regard to the accountability of certain societies to their members in general, and to the management of their finances in particular.” It remains to be seen whether the Directive, if adopted, will actually alleviate the problems that prompted its drafting; indeed, artists are already expressing concern about the proposal (see below).

Press Release, Eur. Comm’n, *Copyright: Commission proposes easier music licensing in the Single Market* (July 11, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/772&format=HTML&aged=0&language=en&guiLanguage=EN>.

### **2. Rights Holder Complaints**

Rights holders voiced complaints about CROs at the public hearing the European Commission held when developing the Directive mentioned above. The Motion Picture Association observed that rights holders became “unintended victims” when disputes with CROs concerning accounting for collections or distributions were not subject to third party resolution. The RTL Group, a European broadcaster and television producer, stated: “Let’s be clear: collecting societies are not owners of the rights that they represent but fiduciaries to the right owners—nothing more and nothing less. Collecting societies have the obligation to put in motion what is in the interest of the members and right holders represented. Collecting societies are not a licensee in the traditional sense and may therefore not confuse



their fiduciary remit with their own organizational interests.” Concerns were raised about CROs’ discriminatory practices, lack of transparency, and monopolistic leveraging. CROs collect “large quantities of black-box monies that are withheld for national purposes, thereby avoiding transparency and distribution.”

Management of Copyright and Related Rights, Eur. Comm’n, [ec.europa.eu/internal\\_market/copyright/management/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/management/index_en.htm) (last visited Aug. 30, 2012).

### **3. But is it Good for Artists?**

Some artists are already expressing concern over the proposed Directive. Bands like Radiohead and Pink Floyd list as chief among their concerns the CROs’ ability to inappropriately retain money that should be distributed to artists. They stated that the Directive does not address this problem, and may even make it worse by allowing for a five-year grace period for difficult-to-attribute royalties.

Claire Davenport, *EU copyright law plan angers Radiohead, Pink Floyd*, REUTERS, July 11, 2012, <http://in.reuters.com/article/2012/07/11/eu-copyright-idINL6E8IB3QK20120711>.

### **4. Criticism of Transparency of Access Copyright’s Distribution System**

In 2007, Professor Martin Friedland conducted a study of Canadian CRO Access Copyright’s distribution policy and methodology at the request of its board of directors. He found that

The present distribution scheme is extremely complicated and I found it surprisingly difficult to understand how the system worked. I have undertaken a number of other public policy studies over the years, including such reasonably complex topics as pension reform, securities regulation, and national security, and have never encountered anything quite as complex as the Access Copyright distribution system. It is far from transparent. Very little is written down in a consolidated, cohesive, comprehensive, or comprehensible manner. There is no manual describing in detail how the distribution system operates. There is a one-page description on the web site, but it is less than the bare bones of the system. The policy that contracts between the publisher and the creator may override the splits established by the board is not mentioned in that description, but is mentioned in the affiliation

agreement available through the web site. The staff has produced very brief descriptions of the models used for distributing the money, but they do not go into the type of detail that is necessary to develop a good understanding of the policies and procedures, and none of what is written is readily available to affiliates.

After describing the many flaws of the electronic rights management system, Professor Friedland observed that “Members of the present board are the first to admit that they do not have a good grasp of how the system operates.” He added that “there is little institutional memory and very little has been properly documented either on paper or electronically.” He explains that

The principal reason for this complexity is that the details for distribution have been worked out over the past 20 years or so as a series of compromises, accommodations and adjustments. It is not just publishers against creators, but also compromises, accommodations and adjustments within the creator community as well as within the group of publishers. There is not always uniformity of interest within each community. What might help one genre financially will ordinarily harm another.

Professor Friedland bluntly stated that “power politics has also played a significant role in the development of the distribution scheme.”

Martin Friedland, *Report to Access Copyright on Distribution of Royalties*, Feb. 15, 2007, available at [http://www.accesscopyright.ca/media/8359/access\\_copyright\\_report\\_-\\_february\\_15\\_2007.pdf](http://www.accesscopyright.ca/media/8359/access_copyright_report_-_february_15_2007.pdf).

## **5. Limiting Author Choices**

CROs use a number of different methods of managing and licensing the rights under their care. Many organizations will only license authors for their entire body of work.

Access Copyright in Canada has proposed a non-voluntary licensing method that would make it the only entity able to collect royalties on behalf of a category of work, forcing creators to choose between it and no royalties. Even less voluntary are statutory licensing schemes.

Author Russell McOrmond raised this concern: “Where an author wishes to use alternative business models (such as the model I use, which is charge once for material that is then released royalty-free under a public license), that choice should be respected. Respect for the choices of authors necessitates a rejection of non-voluntary licensing systems.”

Russell McOrmond, Digital Copyright Canada, Mar. 5, 2006,  
<http://www.digital-copyright.ca/node/1979>.

## **6. Copyright Grab**

Recent Canadian copyright legislation transfers to Access Copyright the rights to authorize digital reproduction of the works of its members even when the members never authorized Access Copyright to grant such licenses on their behalf.

Ariel Katz, *Bill C-11 and the Big Access Copyright Grab*, Mar. 10, 2012,  
<http://arielkatz.org/archives/1347>.

## **7. ECAD’s Lack of Transparency**

In 2009, Brazilian CRO ECAD retained BDO Trevisian Audites Independentes to audit its books. After initiating the audit, Trevisian asked ECAD for a number of documents, including contracts between ECAD and other companies. Trevisian also asked for a detailed description of ECAD’s systems for collecting and distributing royalties. ECAD’s board of directors refused to deliver the requested information. Instead, it retained another firm, Martinelli Auditores, to perform a much more limited audit.

Comissão Parlamentar de Inquérito destinada a investigar supostas irregularidades praticadas pelo Escritório Central de Arrecadação e Distribuição – ECAD, Relatório Final, Apr. 2012,  
<http://www.senado.gov.br/atividade/materia/getPDF.asp?t=106951&tp=1>.

## **8. Indian CRO’s Lack of Transparency**

Concerns have been raised regarding the transparency of the operations of the Phonographic Performance Ltd, a sound recording CRO registered under the Indian

copyright law. PPL's authority to collect fees for foreign-owned sound recordings is unclear.

Furthermore, it does not publicly specify its license rates.

Shamnad Basheer, *Indian Copyright Collecting Societies and Foreign Royalties: Whither Transparency?*, Spicy IP India, Nov. 18, 2008, <http://spicyipindia.blogspot.ch/2008/11/indian-copyright-collecting-societies.html>.

### **9. Chinese CROs' Lack of Transparency**

Chinese rights holders have long complained about their CROs' lack of transparency on financial matters. They also object to the lack of input on rights management. Some rights holders even considered bringing antitrust claims against the CROs. Nonetheless, the draft revision of the Chinese copyright law expands the role of CROs through extended collective licensing.

CHINA PEOPLE'S DAILY ONLINE,  
<http://ip.people.com.cn/n/2012/0828/c136655-18849170.html>.

### **10. RAO's Lack of Transparency**

The Russian Authors' Society (RAO) has been repeatedly criticized for a lack of transparency and for failure to deliver collected funds to musicians. The organization keeps 30% of its gross licensing revenues.

### **11. SACEM Confiscates Daft Punk Royalties**

In 1998, French CRO SACEM entered into a lengthy conflict with the band Daft Punk, which wanted to transfer only some of its rights to the CRO. In response, the CRO claimed that this was impossible and refused to pay out royalties collected on behalf of the band.

Rémi Bouton, *SACEM Decides Not to Pay Daft Punk*, BILLBOARD, Oct. 17, 1998, at 10, available at <http://books.google.com/books?id=JwoEAAAAMBAJ&lpg=PA18&ots=9M62cj8Rtw&dq=daft%20punk%20sacem&pg=PA12#v=onepage&q&f=false>.

## **12. Government Censors Concerns about CROs**

The United Kingdom recently collected and published responses to the Hargreaves Review of intellectual property in the digital age. A number of contributors have come forward and said that significant portions of their comments were removed. One contributor, Andrew Norton, stated that a list he had provided of news stories about CROs pursuing small businesses for minor offenses was removed entirely.

Andrew Norton, *UK IPO Redacts Responses Critical of Rights Societies, Politics & P2P*, July 26, 2012, <http://www.ktetch.co.uk/2012/07/uk-ipo-redacts-responses-critical-of.html>.

### **D. Bad for Songwriters**

#### **1. Blanket Licenses Limit Airtime for New Artists**

Professor Ivan Reidel has demonstrated that the blanket licenses offered by CROs such as ASCAP and BMI to broadcasters harm most songwriters in two respects: 1) the supracompetitive cartel pricing of the blanket license requires broadcasters to devote more time to advertising, which in turn allows less airtime for the performance of songs by lesser-known artists; and 2) the blanket licenses eliminate price competition between songwriters, thereby encouraging broadcasters to play the most popular songs, and royalties to flow to the most popular songwriters. “Unlike a traditional monopolist, who is capable of reducing its output to increase profits, when PROs increase prices and force broadcasters to air more ads, the output that the PRO is restricting is both individual songs and songwriters. Those songwriters that are excluded from the market, importantly, don’t get to participate in the larger royalty pie they helped generate by colluding, because all PROs distribute royalties based on actual air-time. Therefore, only songwriters whose songs are played receive the benefit of supracompetitive prices that all colluding songwriters helped create.” Reidel argues that “online transactional platforms can allow markets to vastly outperform blanket

licenses – quantitatively and qualitatively – by allowing different songwriters to employ several different pricing strategies simultaneously (e.g. auctions or any arbitrarily set prices).”

Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 N.Y.U. J.L. & BUS. 731 (2011).

## **2. ASCAP Transfers Royalties Away From Less-Established Composers**

“ASCAP allowed entrenched composers aligned with industry powerbrokers to essentially garner the royalties of less-established composers, whose compositions were often being performed more frequently. For example, in 1933 a member of the ASCAP directorate received \$3,417 for 1,020 performances, whereas Cole Porter was only paid \$1,174 for 24,476 performances.”

Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?*, 21 HARV. J.L. & TECH. 233 (2007) (citing *How ASCAP Cuts a Melon: Songwriters' Payoff for '33*, VARIETY, Dec. 4, 1935, at 37).

## **3. CROs Abuse Their Power Against Marginalized Groups**

An Israeli CRO of record producers refused to accept independent producers of Middle-Eastern music. In France, SACEM stopped distributing royalties to its Jewish members during the Vichy regime. ASCAP discriminated against African-American songwriters.

Ariel Katz, *Monopoly and Competition in the Collective Administration of Public Performance Rights*, 2 HAIFA L. REV. 551 (2006).

## **E. Bad for Performers**

### **1. Richard Phillips**

Richard Phillips is an independent folk musician who performs his own original songs and arrangements of traditional Irish folk songs. In the early 2000’s, he convinced a

restaurant with no other musicians to give him a regular performance slot. The restaurant stopped hosting the performances when it received a letter from BMI which indicated that “whatever music you perform to benefit your business, its public performance requires a license.”

Richard Phillips directly contacted BMI, and attempted to explain that he was the only performer who played at the restaurant and he did not play any songs to which BMI had rights. BMI claimed there was no way he could know that. When he asked them for “a statement, in writing, that I am at liberty to perform my own songs, copyrighted in my name, and traditional folk songs, in the public domain, anywhere I want to, whether or not the venue has a license from BMI,” the BMI representative replied “we’re not going to give you that.”

Richard Hayes Phillips, *How One Independent Musician Defeated BMI*, Woodpecker, 2003,  
<http://www.woodpecker.com/writing/essays/phillips.html>.

## **2. Zoe Keating**

Zoe Keating is a cellist and songwriter who tours regularly in many countries. When performing at a U.S. venue, she saw that the venue deducted an \$86 dollar ASCAP fee. Zoe contacted ASCAP to ask how she could go about claiming her portion of that fee, since it is meant to support songwriters of the songs performed -- in this case, her. The ASCAP representative informed Zoe that it only pays royalties to the top 200 grossing concert tours, live symphonic and recital concerts, and winners of the ambiguous “ASCAP Plus Award” which has no clear criteria.

In Zoe’s own words: “Every day, thousands of venues are required to pay a percentage of their gross ticket sales to ASCAP who then gives that money to...let’s look

here on Pollstar and find the highest-grossing concerts for 2011....U2, Taylor Swift, Kenny Chesney, Lady Gaga, Bon Jovi, etc.”

Zoe Keating, *Another post where I attempt to understand the performance royalty system*, Mar. 2012, <http://zoekeating.tumblr.com/post/19796519069/another-post-where-i-attempt-to-understand-the>.

### **3. Arbitrary Statistical Methods Favor Top Percentage of Artists**

CROs generally cannot keep track of each use and distribution of the works under their care. Journalist and academic Andrew Dubber observed that there is a fundamental data problem with PRS Music in Britain, in that statistical methods designed to determine how much money members deserve inevitably favor more popular artists. He gives the example, “if your music gets played on the radio five times, but only one of those times are counted, the collection society will assume, based on statistical probability, that it was not your song but, let’s say, Elton John’s that got played those other four times.”

Andrew Dubber, *How to solve Royalty Collection Societies*, music think tank, June 13, 2010, <http://www.musicthinktank.com/blog/how-to-solve-royalty-collection-societies.html>.

### **4. Bruce Springsteen**

In 2010, ASCAP filed suit against Connolly’s Pub and Restaurant for failure to properly license music performances. It filed suit in the name of one of its affected artists, Bruce Springsteen. He was not involved in the decision to sue this restaurant and was so uncomfortable with ASCAP’s behavior that he demanded that his name be removed from the complaint.

Press Release, Bruce Springsteen (Feb. 4, 2010), *available at* <http://www.shorefire.com/index.php?a=pressrelease&o=3650>.

### **5. John’s Curry Restaurant**

In the restaurant owner’s own words:



“At the restaurant, we wanted to support local artists and decided to start having live music on Friday nights. It was a big success. Our customers enjoyed the music and the band was happy to have a steady gig. Several months later a female lawyer came into our restaurant during lunch and demanded we buy a public performance license from BMI. She wanted \$3000!”

“Even though we only played original music, she said we should buy the license anyway. Apparently, even if the band members use something as minor as a Led Zeppelin riff while they tune-up their instruments – that’s a violation.”

“I said the hell with it! We only have music on Friday nights. It’s not worth \$3000. How is a neighborhood restaurant running on a razor-thin margin in this economy supposed to afford an extra \$3000? So I cancelled the band. Net result? Our customers suffered, local music suffered. A complete lose-lose situation.”

Allan Gregory, *Music Copyright Police Ruin Artists’ Gigs (and Coconut Curry)*, TorrentFreak, Oct. 8, 2011, <http://torrentfreak.com/music-copyright-police-ruin-artists-gigs-and-coconut-curry-111008/>.

## **6. Somethin’s Brewin’**

Somethin’s Brewin’ was a café bookstore that had weekly lunchtime sets by a local musician and monthly open mic nights. Neither had an admission charge. Eventually ASCAP and SESAC got wind of this and demanded their cut. Owner Lorraine Carboni offered to have performers agree to perform only their own works or works that are in the public domain. This did not satisfy the CROs, and Ms. Carboni was forced to post the following sign: “Due to concerns with music license companies we are forced to take all music entertainment off line until all concerns can be addressed ... this includes our Friday Night Entertainment Series [and] Thursday Lunch with Tom.”

Cindy Dow, *Copyright issue brings an end to music at cafe*, SO. COAST TODAY, Apr. 29, 2010, <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20100429/PUB04/4290397/-1/pub04>.

## **7. Howie Newman**

Musician Howie Newman, a long time BMI member, left the organization due to growing frustration that small venues were cancelling performances because they could not afford the licensing fees demanded by the CROs. In his own words, “It seems like this is set up for the rich to get richer, it’s not set up to protect the little guy. I don’t feel the intent of this policy and the regulations fit the small venues. It seems like they are closing down these little places, where people can go and enjoy the music for short money. Do they have any awareness that this is decimating the small organizations?”

Cindy Dow, *Copyright issue brings an end to music at cafe*, SO. COAST TODAY, Apr. 29, 2010, <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20100429/PUB04/4290397/-1/pub04>.

## **8. RAO**

Russian CRO RAO has fined promoters for Deep Purple and Beyonce when both artists held concerts in which they performed only their original compositions.

Vladimir Kozlov, *Russian Collecting Society Sues Over Beyonce Concert*, BILLBOARD, Feb. 19, 2010, *available at* [http://www.billboard.biz/bbbiz/content\\_display/industry/news/e3ie935cc06a40350225de22dad90da3da7](http://www.billboard.biz/bbbiz/content_display/industry/news/e3ie935cc06a40350225de22dad90da3da7).

## **9. Irish Blogs**

In 2010, IMRO, an Irish CRO, decided to make music bloggers who failed to pay an Online Exploitation License a priority. Many of these blogs were small amateur websites with no commercial revenue. Additionally, many of the MP3s they used were provided gratis by bands and their labels for promotional purposes. Blogger Nialler9 summarized the

situation as follows, “Like many I thought that MP3s which were cleared by bands and labels for promo were provided as is – gratis and without any attachments or additional requirements other than to promote the band and song. Y’know, the same way an entire music blogosphere and a digital PR industry has been allowed to grow up over the course of the last 10 years thinking the same.”

Rossa McMahon, *IMRO vs. The Blogs: collective licensing of music*, A Clatter of the Law, Apr. 29, 2010, <http://aclatterofthelaw.com/2010/04/29/imro-vs-the-blogs-collective-licensing-of-music/>.

## **10. Kråkesølv v. TONO**

Kråkesølv is a Norwegian band that recently released an album for free on a torrent site as a means of promoting itself. TONO is a CRO that administers copyrights for music in Norway. According to TONO, it is owned and governed by its members. However, TONO forced the band to remove its album from the site, claiming “The management contract in TONO means that we can not allow the TONO members post things on your own at some commercial sites.”

Carl Kristian Johansen, *Usedvanlig holdningsløst*, ballade, Nov. 17, 2009, <http://www.ballade.no/nmi.nsf/doc/art2009111712471383988555>.

## **F. Slow To Adapt to Digital Technologies**

### **1. Sony v. GEMA**

Even major labels can be frustrated with CROs acting against their interests. Edgar Berger, a Sony Music executive, spoke publicly about his frustration with German CRO GEMA’s refusal to license to YouTube. He believed that the refusal to license was preventing artists from making money from the lucrative ContentID system.

Ernesto, *Sony Music Boss: Censored YouTube Videos Cost Us Millions*, TorrentFreak, Feb. 24, 2012, <http://torrentfreak.com/sony-music-boss-censored-youtube-videos-cost-us-millions-120224/>.

## **2. EMI Backs off ASCAP**

In an effort to innovate in the field of digital licensing, record company EMI decided to leave ASCAP. EMI released ASCAP from their relationship, taking back all rights that had been previously handled by ASCAP.

Ed Miller, *EMI releases ASCAP in rights reshuffle*, Music Week, May 9, 2011, <http://www.musicweek.com/news/read/emi-releases-ascap-in-rights-reshuffle/045640>.

## **II. BAD FOR USERS**

### **A. Monopolistic Conduct**

#### **1. Access Copyright 1300% Price Increase**

Canadian CRO Access Copyright increased prices by 1300%, then tried to mute objections by changing its complaint reporting system.

Howard Knopf, *Access Copyright Strikes Back re Status of 99 of 101 Objectors*, Excess Copyright, Sept. 30, 2010, <http://excesscopyright.blogspot.com/2010/09/access-copyright-strikes-back-at-99-of.html>.

#### **2. 2012 Access Copyright Agreement**

In 2012, the Association of Universities and Colleges of Canada (AUCC) and Access Copyright negotiated a new agreement that increased their annual per student licensing cost from \$3.38 to \$26. Because of this, and Access Copyright's refusal to disclose whose rights it protected, professors at the University of Ottawa encouraged the university to end their relationship.

Letter from Christian Rouillard, President, Ass'n of Professors of the University of Ottawa, to Jean-Yves Leduc and Leslie Weir, University of Ottawa (May 30, 2012), available at [http://www.apuo.uottawa.ca/info/2012-05-30\\_APUO\\_Position\\_Copyright.pdf](http://www.apuo.uottawa.ca/info/2012-05-30_APUO_Position_Copyright.pdf).

The new \$26 per student fee is significantly higher than the \$3.56 per student fee the CCC sought from Georgia State University (and the \$0.06 per student fees actually paid by GSU to the CCC).

Howard Knopf, *AUCC Settlement with Access Copyright – Questions and Answers – or Still More Questions?*, Excess Copyright, May 2, 2012, <http://excesscopyright.blogspot.ca/2012/05/aucc-settlement-with-access-copyright.html>.

### **3. Licensing Fair Use**

The Access Copyright license includes rights that have already been granted through the Canadian copyright law. “The licence attempts to subsume non-infringing activity such as fair dealing (which allows copying for research and private study), interlibrary loans, copies made for preservation, and alternate format material for people with perceptual disabilities.” Other problems with the license include substantial annual price increases without substantiation or negotiation; the burdensome administrative task of reporting all copies; and the exclusions list.

Victoria Owen, *DeBunking Myths About Authors’ and Publishers’ Collecting Societies – ‘the Good, the Bad, and the Ugly’: The Librarian’s Perspective*, Nov. 10, 2007, <http://archive.ifla.org/IV/ifla73/papers/153-Owen-en.pdf>.

### **4. Canadian Dancing Tax**

The Copyright Board of Canada approved Re:Sound, the music performance CRO, doubling its fee for the performance of recorded music at events -- such as weddings -- that include dancing.

Ariel Katz, *Copyright Taxation Without Representation*, June 21, 2012, <http://arielkatz.org/archives/1882>.

## 5. CAL v. Schools

Copyright Agency Limited, the Australian reprographic CRO, collects license fees from schools for their use of freely available Internet content. Most of these fees are then distributed to foreign website operators who do not expect payment.

Kim Arlington, *Schools pay millions for material free on net*, Sydney Morning Herald, July 23, 2012,  
<http://www.smh.com.au/technology/technology-news/schools-pay-millions-for-material-free-on-net-20120722-22ibg.html>.

## 6. ASCAP and BMI Operate Pursuant to Antitrust Consent Decrees

ASCAP and BMI have been operating pursuant to antitrust consent decrees with the U.S. Department of Justice since 1941 and 1966 respectively. The Department of Justice brought the actions in response to ASCAP and BMI requiring broadcasters and other licensees to obtain a blanket license covering all performances of their entire catalogue. Under the consent decrees, the broadcaster can obtain a license for a program as opposed to a blanket license for all programs. Additionally, the U.S. District Court for the Southern District of New York maintains a rate court to ensure the rates imposed by ASCAP and BMI are fair. The consent decree also requires transparency regarding the titles in their catalogue.

Noel Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733 (2006).

## 7. Antitrust Probe of GEMA

The German government in the early 1960s investigated GEMA, the German CRO, for price-fixing with other organizations including the International Federation of the Phonographic Industry (IFPI) and Bureau International de L'Édition Mécanique (BIEM).

Omer Anderson, *German Govt. Mulls Probe of GEMA*, BILLBOARD, May 8, 1961 at 3, available at  
<http://books.google.com/books?id=ACEEAAAAMBAJ&pg=PA3&lpg=PA3&dq=ifpi+price->

[fixing&source=bl&ots=vj5KwOWswX&sig=mY8mjRJ4oGbRgObevPwfz\\_2qE3Q&hl=en#v=onepage&q=ifpi%20price-fixing&f=false](http://books.google.com/books?id=ZwgEAAAAMBAJ&pg=PA107&lpg=PA107&dq=ifpi+price-fixing&source=bl&ots=vj5KwOWswX&sig=mY8mjRJ4oGbRgObevPwfz_2qE3Q&hl=en#v=onepage&q=ifpi%20price-fixing&f=false).

## **8. MTV Europe Sues IFPI For Price-Fixing**

In 1993, MTV Europe sued IFPI and the major record labels for price fixing and abuse of a dominant market position.

Roger Pearson, *MTV Europe Vs. Majors Goes To Trial*, BILLBOARD, Dec. 3, 1994 at 107, available at [http://books.google.com/books?id=ZwgEAAAAMBAJ&pg=PA107&lpg=PA107&dq=ifpi+price-fixing&source=bl&ots=MhsIIRoDTH&sig=TS\\_1cScMrISNBW2lDd2L1dt04DA&hl=en#v=onepage&q=ifpi%20price-fixing&f=false](http://books.google.com/books?id=ZwgEAAAAMBAJ&pg=PA107&lpg=PA107&dq=ifpi+price-fixing&source=bl&ots=MhsIIRoDTH&sig=TS_1cScMrISNBW2lDd2L1dt04DA&hl=en#v=onepage&q=ifpi%20price-fixing&f=false).

## **9. Sirius XM Files Antitrust Complaint Against SoundExchange**

In 2012, Sirius XM filed an antitrust suit against SoundExchange, the U.S. digital performance rights CRO, claiming that Sound Exchange is preventing its independent label members from negotiating directly with Sirius for performance licenses.

Ed Christman, *Sirius XM Files Lawsuit Against SoundExchange and A2IM, Alleging Licensing Interference*, BILLBOARD, Mar. 28, 2012, available at <http://www.billboard.biz/bbbiz/industry/legal-and-management/siriusxm-files-lawsuit-against-soundexchange-1006591952.story>.

## **10. ASCAP Sought to Treat Digital Downloads as Performances**

Not content with receiving royalties for performances, ASCAP sought to collect license fees for digital downloads from Yahoo! and RealNetworks. The Second Circuit rejected ASCAP's argument that digital downloads implicated the public performance right.

*United States v. ASCAP*, 627 F.3d 64 (2d Cir. 2010).

## **11. ASCAP Sought Fees For the Public Performance of Ringtones**

ASCAP sought to collect fees for "public performance" of ringtones. (The user already pays for the reproduction right for copying the ringtone in his phone.) The court ruled that the playing of a ringtone in public does not implicate the public performance right.

*In re Application of Cellco Partnership*, 92 U.S.P.Q.2d 1811 (S.D.N.Y. 2009).

## **12. CCC loses nonprofit, tax-exempt status**

In 1982, the U.S. Tax Court affirmed the revocation of CCC's tax exempt status by the Internal Revenue Service. The court quoted that IRS Commissioner's statement that

Any public benefits from your activity are subordinate to your primary purpose of furthering the economic interest of publishers and copyright owners. The fact that your activities support a business purpose serving publishers and copyright owners is a strong indication that your activities are not charitable as required by the Code and regulations."

The court further stated that

We are not faced here with a truly joint undertaking of all parties—publishers, copyright owners, users, and governmental agency—concerned with proper enforcement of the copyright laws, in which efforts are focused on meeting the needs and objectives of all involved. Instead, petitioner was organized by a segment of a publishers' trade group, the Technical, Scientific, and Medical division of the AAP, and there is little persuasive evidence that petitioner's founders had interests of any substance beyond the creation of a device to protect their copyright ownership and collect license fees.

*Copyright Clearance Center v. Commissioner of Internal Revenue*, 79 T.C. 793 (U.S. Tax Court 1982).

## **13. SGAE**

SGAE, a Spanish CRO, was fined 1.8 million Euros for abusing its monopoly position in the Spanish market. The specific concerns raised were “discriminatory and non-transparent application of discounts” and a “so-called replacement fee, which is unfair and discriminatory.”

Mike Palmedo, *BNA reports two stories on collecting societies in Europe*, info justice, July 21, 2012, <http://infojustice.org/archives/26695>.



## **B. Aggressive Actions**

### **1. ASCAP Seeks Licenses For Campfire Singing**

In 1995, ASCAP demanded that each of the 2,300 camps represented by the American Camping Association (including the Girl Scout camps), obtain a blanket license for the public singing of songs. Many of the camps paid the \$250 per camp fee. In 1996, ASCAP sent a demand letter to 6,000 other camps in the United States, demanding a fee of up to \$1,439 per camp. Many Girl Scout camps refused to pay the fee, but instructed the counselors to refrain from the singing of songs not owned by the Girl Scouts. This led to a public relations nightmare for ASCAP, which caused it to retreat.

Elisabeth Bumiller, *Ascap Asks Royalties From Girl Scouts, and Regrets It*, The New York Times, Dec. 17, 1996, <http://www.nytimes.com/1996/12/17/nyregion/ascap-asks-royalties-from-girl-scouts-and-regrets-it.html?pagewanted=all&src=pm>.

### **2. SOZA v. Singing on Mothers Day**

Soza, a Slovakian CRO, has sought money from villages when their children sing. One case involved children singing to their mothers on Mothers' Day. Another involved singing public domain folk songs about the village.

John Boyd, *Villages Furious about Copyright Fees for Folk Songs*, The Daily, June 5, 2012, <http://www.thedaily.sk/villages-furious-about-copyright-fees-for-folk-songs/>.

### **3. SABAM v. Reading to Children**

SABAM, a Belgian CRO, sought expanded protection for readings of copyrighted works. One consequence of their action was that it would require librarians to pay a license to read books to children in a children's library. Since libraries do not accept payment for these readings, they were not able to budget for licensing, and the result was that SABAM put a stop to the nefarious practice of reading to children.

Robin Wauters, *Belgian rightsholders group wants to charge libraries for READING BOOKS TO KIDS*, The Next Web, Mar. 13, 2012, <http://thenextweb.com/media/2012/03/13/belgian-rightsholders-group-wants-to-charge-libraries-for-reading-books-to-kids/>.

#### **4. SABAM v. Truck Drivers**

SABAM sought a licensing fee from truck drivers who listened to the radio alone in their trucks.

Ernesto, *Copyright Police Want Truck Drivers to Have Licensed Cab Music*, TorrentFreak, Mar. 27, 2011, <http://torrentfreak.com/copyright-police-want-truck-drivers-to-have-licensed-cab-music-110327/>.

#### **5. PPL v. Hardware Store**

British CRO PPL sought a fee from a hardware store owner who listened to the radio in his store while cleaning it after he had closed. When the hardware store owner hired lawyers to challenge the charge, PPL initially offered to reduce the fee. A few days later, with public pressure from a newspaper story, PPL withdrew the charge.

*Hardware store wins fight against music licence body*, DIY Week, Oct. 18, 2011, <http://www.diyweek.net/news/news.asp?id=15084&title=Hardware+store+wins+fight+against+music+licence+body>.

#### **6. PRS v. Horses**

Performing Rights Society (UK) (PRS) sought performance licensing fees from a woman who played classical music to her horses.

John Bingham, *Woman who plays classical music to soothe horses told to get license*, TELEGRAPH, Mar. 27, 2009, <http://www.telegraph.co.uk/news/newstoppers/howaboutthat/5061004/Woman-who-plays-classical-music-to-soothe-horses-told-to-get-licence.html>.

#### **7. PRS v. Auto Mechanics**

PRS sought a performance license from mechanics who listened to the radio while working if the volume was high enough that it could be heard through the walls in the waiting room.

*Kwik-Fit sued over staff radios*, BBC NEWS, Oct. 5, 2007, [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/edinburgh\\_and\\_east/7029892.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/edinburgh_and_east/7029892.stm).

## **8. PRS v. Police**

PRS sought a performance license from police officers who listened to the radio in police cars.

enigmax, *Police Chief Faces High Court Anti-Piracy Action*, TorrentFreak, June 12, 2008, <http://torrentfreak.com/police-chief-faces-high-court-anti-piracy-action-120608/>.

## **9. PRS v. Home Businesses**

PRS sought performance licenses from small, home-based businesses if customers could hear the music over the phone.

Mike Masnick, *Performance Rights Society Calls Small Business & Threatens Them Over Music Heard In The Background*, Techdirt, Feb. 2, 2009, <http://www.techdirt.com/articles/20090202/0128383597.shtml>.

## **10. GEMA License Fee Increases**

GEMA, a German CRO, is planning on changing its fee structure to charge solely based on size of venue and price of admissions. Some estimate this could result in a 500% to 1000% fee increase. Furthermore, GEMA continues to place the onus on club owners to prove that material they played wasn't owned by GEMA artists.

## **11. GEMA v. Jamendo**

GEMA has refused to recognize the validity of a Creative Commons license, even when set up by the artist. Startup company Jamendo created a website to offer artists a location to distribute Creative Commons licensed music (or similar sharing friendly licenses.) GEMA insisted that it must be consulted on every use, based on a legal ruling that states: "Because of the large and comprehensive repertoire GEMA manages, at

performances of national and international dance and entertainment music there is an actual assumption militating in favour of the existence of a liability fee.”

Wolfgang Senges, *GEMA vs. Jamendo et al. – Get Money for Nothing*, ContentSphere, Apr. 6, 2009, <http://www.contentsphere.de/serendipity/archives/22-GEMA-vs.-Jamendo-et-al.-Get-Money-for-Nothing.html> - extended.

## **12. GEMA v. Music Festival**

After a free music festival in November 2011, GEMA demanded royalties for performances of music for which it controlled no rights. The organizer of the festival had asked all disk jockeys to only play music under Creative Commons or other free licenses, and had announced the concept to GEMA. GEMA demanded the list of all artists whose music would be performed, including their full names, place of residence, and date of birth. The organizer provided the information to GEMA. Nonetheless, GEMA presented him with a bill, claiming that it wasn't certain that everyone on the list wasn't a GEMA artist because some of the artists had pseudonyms. As noted above, in Germany, the burden of proof that a rights holder is not represented by a CRO falls on the user, not the CRO. Relatedly, GEMA is now being sued for attempting to collect personal information concerning non-GEMA members.

BSOD, *Copyright Group Tries To Collect From Creative Commons Event*, Active Politic, Nov. 13, 2011, [http://activepolitic.com:82/News/2011-11-13e/Copyright\\_Group\\_Tries\\_To\\_Collect\\_From\\_Creative\\_Commons\\_Event.html](http://activepolitic.com:82/News/2011-11-13e/Copyright_Group_Tries_To_Collect_From_Creative_Commons_Event.html).

## **13. GEMA v. Music Contest**

In 2011, GEMA tried to claim a fee from a nonprofit organization for releasing a compilation CD featuring the winners of its Creative Commons competition “Free! Music! Contest.” After receiving an invoice from GEMA, the contest organizers filed a complaint for fraud.

Ernesto, *Music Royalty Collectors Accused of Copyfraud*, TorrentFreak, Oct. 2, 2011, <https://torrentfreak.com/music-royalty-collectors-accused-of-copyfraud-111002/>.

#### **14. GEMA v. Musikpiraten**

The Musikpiraten published a CD featuring only music under a Creative Commons license. However, GEMA asked them to pay a royalty since some of the artists published songs under pseudonyms. GEMA claimed that since the Musikpiraten did not provide their real names, the so-called “GEMA-Vermutung” should be applied, presuming that these artists are represented by GEMA.

Torsten Klein, *Gericht bestätigt “GEMA-Vermutung,”* Heise Online, Aug. 27, 2012, <http://www.heise.de/newsticker/meldung/Gericht-bestaetigt-GEMA-Vermutung-1676570.html>.

#### **15. GEMA v. Turkey**

GEMA attempted to claim licensing fees for the performance of the Turkish National Anthem, leading Turkey to pursue copyrighting this work that had intentionally been left in the public domain.

*Turkey Scrambles to Protect National Anthem*, Spiegel Online, Dec. 8, 2010, <http://www.spiegel.de/international/world/copyright-unclear-turkey-scrambles-to-protect-national-anthem-a-733515.html>.

#### **16. GEMA v. Kindergarten Kids**

GEMA sought a license from a kindergarten using sheet music in music class.

Catherine Bolsover, *Kindergartens ordered to pay copyright for songs*, DEUTSCHE WELLE, Dec. 28, 2010, <http://www.dw.de/dw/article/0,,14741186,00.html?maca=en-rss-en-all-1573-rdf>.

### **17. ECAD v. Bloggers**

Brazil's performance rights CRO ECAD demands license fees from bloggers that embed YouTube video, even though YouTube Brasil already pays license fees for those videos.

Ricardo Geromel, *Scandal! In Brazil, Blogs with Embedded Youtube Videos are Charged Monthly Fees*, FORBES, Mar. 9, 2012, <http://www.forbes.com/sites/ricardogeromel/2012/03/09/scandal-in-brazil-blogs-with-embedded-youtube-videos-are-charged-monthly-fees/>.

### **18. RAO v. World War II Veterans**

In March 2010, Russian CRO RAO sued a World War II veterans' choir for performing patriotic Soviet songs at a free concert in Samara without signing a licensing agreement.

Joe Karaganis, *MEDIA PIRACY IN EMERGING ECONOMIES*, at 165 (2011).

### **19. JASRAC v. Twitter**

A Japanese CRO seriously considered enforcing copyright licensing actions against people tweeting lyrics.

David Meerman Scott, *JASRAC wants to charge YOU for tweeting song lyrics!*, WebInkNow, Mar. 2, 2010, <http://www.webinknow.com/2010/03/jasrac-wants-to-charge-you-for-tweeting-song-lyrics-.html>.

September 19, 2012