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APPLICATION OF AN EXTENDED COLLECTIVE LICENSING REGIME IN CANADA: PRINCIPLES AND ISSUES RELATED TO IMPLEMENTATION

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APPLICATION OF AN EXTENDED COLLECTIVE LICENSING REGIME IN CANADA: PRINCIPLES AND ISSUES RELATED TO IMPLEMENTATION

Study Prepared for the Department of Canadian Heritage

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1. Introduction

Note: This report follows up on a prior study entitled "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective",[1] prepared by the same author in 2001 *(*hereinafter referred to as ***"the first report")***. The goal of this paper is to analyze the principles and some of the issues related to one of the recommendations of the first report: implementing an extended collective licence regime within a Canadian context. For a better understanding of the proposals made in the present study, it is recommended that the reader consult the first study. Even though certain factual elements are briefly mentioned in the first pages of this report, the first study contained a much more detailed analysis of those elements.

The extended collective licence system is an institution that currently is unique to Nordic countries.[2] There were two reasons for initiating the system: to offer certain categories of users, including the education sector, the opportunity to use needed (published) material and to ensure the remuneration of rights holders. This system can be considered particularly useful in a cohesive society in which some of the material used is foreign (and for which it is *a priori* more difficult and cumbersome to obtain authorizations), a situation that seems to describe the Canadian context. The advantage of the extended collective licence system in Canada would be to place small collective management organizations (CMOs) on the same footing as large CMOs (presently found mainly in the music sector) that manage worldwide repertoires. Collective management by these large CMOs is already accomplishing both above-mentioned tasks by offering an extensive repertoire to users while ensuring equitable remuneration for rights holders.

[1] Available at http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/collective/index_e.cfm.

[2] These countries' legislation and practices will be mentioned in this report for information purposes. The appendix contains detailed explanations of how the extended collective licence works in each of these countries and the respective legislative contexts. I also describe a CMO in each country to show how the extended collective licence is applied in practice.

The extended collective licence system would facilitate the acquisition of an adequate repertoire by small CMOs for a given type of authorization. In principle, an "adequate repertoire" is one that meets the needs of users because it represents an attractively sized repertoire (of works and rights). Consequently, users access the CMO's services, and authors and other rights holders are then remunerated for the use of their works.

The mechanism of the extended collective licence can be summarized as follows: as soon as a CMO is able to show, among other things, that it represents a substantial number[3] of those authors or other relevant rights holders whose rights one would anticipate it to administer for the type of use needed, that collective would have the right under the law to apply to represent all relevant rights holders in that category on a non-exclusive basis,[4] except for those who expressly decline to be represented. In other words, unlike the classic collective management system that follows an "opt-in" formula in which rights holders must choose to participate, the extended collective licence system is based on the opposite principle: an "opt-out" formula.

[3] This substantial number is not equivalent to the adequate repertoire described above. A substantial number is the minimum number of relevant rights holders a CMO needs to be considered for the granting of the extension of a licence. In certain cases, such as that of a new organization, this number may be relatively low.

[4] Nothing keeps a CMO from requiring that its members grant it an exclusive mandate or even an assignment of rights.

As explained in the first report, one of the main obstacles facing CMOs is the acquisition of the rights (by assignment or licence/authorization) necessary to authorize the requested uses by users of traditional works and other subject matter. This problem affects primarily the newer CMOs, but it also applies to new forms of use that could require established CMOs to acquire new rights. The absence of an adequate repertoire is a frustrating problem for all involved. It shortchanges those rights holders who wish to authorize the use of their works, performances, or sound recordings, and it also plagues users who find themselves unable to obtain lawfully the permission to use material that is increasingly accessible (for example via the Internet). Last but not least, this problem hamstrings CMOs because without an adequate repertoire (as defined above), they cannot play their role.

It is in this type of situation that the extended collective licence comes into play: it encourages the CMO to convince a substantial number of rights holders that it is the most appropriate vehicle to authorize a particular use. However, once this recruitment task is accomplished, a presumption that the CMO represents all relevant rights holders could be said to apply. It is important, nevertheless, to distinguish the extended collective licence from a full legal presumption, which does not require the CMO to "recruit" a substantial number of rights holders. Consequently, the CMO that benefits from a legal presumption does not have to justify itself to its rights holders, which might affect its credibility and legitimacy.

I argue that the extended collective licence is the mechanism most apt to ensure the success of copyright management in the digital age. The Internet has greatly facilitated access to and distribution of works. One of the most obvious problems in this context is the fractionalizing of rights. Economic rights – that is, rights to reproduction, public communication, public performance, adaptation, and rental – have traditionally corresponded to specific uses. This relationship does not necessarily hold on the Internet: most uses require multiple authorizations (for example, the rights of communication and of reproduction), and it is up to the user to obtain these authorizations. The frustration of users is often perceptible under these circumstances, and it may drive them to demand new exceptions to copyright. In the shorter term, some users may decide not to obtain the necessary authorizations and will simply use the protected material (thus with neither payment nor permission). This leads to a reduction in the value of copyright, not to mention financial losses for authors and other rights holders, and this is obviously in no one's interest. In other words, the relevance and, possibly, the survival of copyright depend on efficient and organized rights management.

In the field of education, the extended collective licence is probably the most rapid path to the establishment of tariffs for use (within limits that remain to be defined in many cases) of the printed, audiovisual, and digital materials to which educators want access. One possible scenario is the following: CMOs working in this area that do not yet have an adequate repertoire could ask to broaden their repertoire. Once all the needed repertoires are combined in the hands of a certain number of CMOs, a global agreement could be concluded with educational institutions, especially at the university level. The Copyright Board could even encourage a merger of tariffs so that students pay a single fee.[5]

[5] If, for discussion purposes, we take the Nordic countries as an example, we see that educational institutions pay roughly $30 to $40 per student per year. A solution of this type in Canada would have a relatively low impact on student fees currently collected by Canadian universities. Here are a few examples of fees charged in Ontario in 2002-03: University of Ottawa, $83.79; McMaster University, $228.08; University of Waterloo, $367.98; Queen's University, $568.50.

2. The Role of Collective Management

CMOs were created to act as representatives of rights holders, on whose behalf they manage the various types of rights contained in the *Copyright Act*. From public performance of music to reprography, CMOs operate in a number of fields.

In his seminal work *Collective Administration of Copyright and Neighboring Rights,* Dr. Mihály Ficsor, former Assistant Director General of the World Intellectual Property Organization (WIPO), defines collective management as follows:

> In the framework of a collective administration system, owners of rights authorize collective administration organizations to administer their rights, that is, to monitor the use of the works concerned, negotiate with prospective users, give them licences against appropriate fees and, under appropriate conditions, collect such fees and distribute them among the owners of rights. This can be considered as the definition of collective administration.[6]

One of the shared characteristics of CMOs is that they operate as *de facto* monopolies in numerous countries. State supervision, which varies in level from country to country, seems to be justified by this "monopolistic" position. Most often, this translates into a control on tariffs, as is the case in Canada with the Copyright Board. Sometimes, the state also controls and oversees the creation of CMOs and/or certain aspects of their activities.[7]

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[6] Dr. Mihály Ficsor, *Collective Administration of Copyright and Neighboring Rights* (Geneva: WIPO, 1990), p. 6. This quotation is taken from the first edition, but Ficsor went into more detail on the subject in the second edition of this work (2002), pp. 15-17. All subsequent references in this report are to the second edition.

[7] See P. Katzenberger, "Les divers systèmes du droit de contrôle de la gestion collective de droits d'auteur dans les États européens," in R. Hilty, ed., *La gestion collective du droit d'auteur en Europe* (Berlin: Carl Heymanns Verlag, 1995), pp. 19-23. See also the first report, section II(C)(4).

To meet the objective of collective management of the rights of rights holders, two types of licences are generally negotiated: blanket licences and specific licences.[8] Blanket licences allow users to use, for a specific period of time, all works contained in the repertoire of the CMO with which the licence is negotiated. Specific licences deal with specific uses of a particular work, in a defined context, for a specified time. Specific licences are also known as "transactional licences" or "individual licences," since individual transactions are generally needed for each authorization.

All parties benefit from a collective management system. Rights that are difficult to protect on an individual basis may be exercised by rights holders more profitably on a collective basis. Currently, only a small minority of rights holders are able to negotiate contracts with users directly.[9] In spite of technological progress, it is still almost impossible for authors and other individual rights holders to manage the use of their works by individual users, notably authorizations for the use of their works or performances. For a duly published work placed at the public's disposal on the Internet to be used and for this use to be paid for (if this is the wish of the author or other rights holder), users must be able to find, through the Internet or otherwise, the material they want (content), then the corresponding rights holder. Finally, users must efficiently inform the rights holder of their intention of using the material, obtain a response, and if necessary, a license, and then pay for this use. This involved process leads almost inevitably to the pooling of certain resources to facilitate clearances, if only by creating a repertoire of works and rights.

[8] See Lesley Ellen Harris, *Canadian Copyright Law* (Toronto: McGraw-Hill Ryerson, 1995), p. 157. See also the first report, Introduction.

[9] That being said, the Internet may provide individual rights holders with ways to manage not only the distribution of their own works but also to grant authorizations thanks to Internet-based electronic copyright management systems (ECMSs) and, in the near future, intelligent agents (bots).

In addition, the use of a common online licensing collective management system is economically justified. Of course, it is not necessary that this system be managed or made accessible by a CMO in the traditional sense of the term, especially where content delivery is involved.[10] The principal role of CMOs is the management of *rights*. They derive their strength from their understanding of copyright, from its importance, and from their expertise in its practical application. Canadian CMOs have a duty to prove their added value regarding rights management to both users and rights holders. I believe that an extended collective licence system would be very useful in this regard.

Collective management offers rights holders many benefits by giving them greater influence in negotiations with potential users. In some instances, it gives authors the opportunity to entrust an organization that they control (the collective) with the responsibility of managing their rights, instead of relying on a publisher or producer. "Professional rights holders" may also need collective management to manage certain types of uses, which even large multinational corporations (let alone small publishing houses or production companies) are incapable of managing efficiently on their own. The distribution of musical works and sound recordings to thousands of radio stations throughout the world and the photocopying that takes place in schools and universities are good examples. In addition, the growing importance of collective management was emphasized recently by the sound recording industry.[11]

[10] As an example, a group of U.S. professional photographers formed a cooperative and an online photography agency. See www.mira.com.

[11] At the annual conference at Fordham University in New York, on April 24-25, 2003, Allen Dixon, general council and executive director of IFPI, stated, "The collective management system offered by collecting societies enables rights holders to commercially exploit their rights to a multitude of users even in circumstances where it is difficult for users to obtain individual clearance. For large-scale users of musical works, having to seek individual clearance from each rights holder would be hardly feasible in most circumstances. Furthermore, it is often difficult to obtain all the relevant clearances with respect to a certain work given the need to clear rights between different co-rights holders. Collecting societies provide users with a 'one-stop-shop' for the clearance of certain rights…."

Users who choose to deal with a CMO also reap benefits.[12] It is much easier to obtain the right to use one or more works through a collective management system. Furthermore, users have access to a large repertoire of works, which eliminates the need to find individual rights holders, and then to negotiate and sign individual licensing agreements.

Collective management is not perfect, nor is it a panacea. However, the fact remains that it is nearly impossible for individual rights holders to manage their rights themselves, as rights management is highly complex and involves a significant investment of both time and money. Sound, open, and efficient collective management is thus often the best way to ensure an optimal administration of rights – that is, to maximize the number of times that users are able to obtain, from the rights holder, an authorization at a reasonable price (for both sides) and in an acceptable amount of time.

In this study, I suggest implementing a mechanism, accessible to users, rights holders, and CMOs alike, that would ease and accelerate the management of new rights, such as the ones stemming from the 1997 amendments ("Phase II"), or new types of uses. This mechanism, the extended collective licence, would prove very useful for the newest CMOs. It might also lead to a rationalization of collective management in certain sectors, although this is not its primary goal.

Before studying the extended collective licence in greater detail, it is useful to examine the current Canadian context.

[12] Ficsor underlines the fact that collective management is a mechanism as useful for users as for rights holders. See Mihály Ficsor, *Collective Administration of Copyright and Neighbouring Rights*, 2nd ed. (Geneva: WIPO, 2002), p. 131.

3. Overview of the History of Collective Management in Canada

In the first Canadian copyright legislation, the *Copyright Act,* adopted by Parliament in 1921,[13] economic rights were granted to authors regarding certain uses of their works. This piece of legislation, combined with the emergence of broadcasting, led to the development of CMOs for the management of Canadian and foreign rights holders' interests, originally those related to the public performance of their musical works. The state intervened in the operations of CMOs through regulatory mechanisms. The first collective management society for performances was bound by law to submit to a copyright office the repertoire of the musical and dramatic musical works that could be licenced, together with any plan for a tariff.[14] The Governor-in-Council, upon the advice of the Minister, had the power to review or set the tariffs.[15]

The Copyright Appeal Board,[16] created in 1936, was the first body of its kind in the world.[17] It was charged with reviewing and approving the tariff proposals of CMOs involved in the administration of public performances of musical works. CMOs were also required to submit lists of the works that their repertoires contained.[18] The proposals were then submitted to an appeal tribunal for review.

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[13] P. Trudel and S. Latour, "Les mécanismes de la gestion collective des droits d'auteur au Canada," in ALAI, *Actes du colloque sur la gestion collective du droit d'auteur* (Montréal: École des Hautes Études Commerciales, 1994), p. 33.

[14] *Ibid.*

[15] *Ibid.*

[16] Until 1950, it was called the Copyright Appeal Tribunal.

[17] Trudel and Latour, *supra* note 13.

[18] *Ibid.*

The *Copyright Act* of 1988 brought major changes. Among the modifications to the existing system was the implementation of an arbitration mechanism. The amended *Act* also provided protection against potential lawsuits by the Commissioner of Competition.[19]

The mandate of the Board might be described as follows:

> [It] deals mainly with regulation of the mechanisms of copyright management, but it may also grant non-exclusive licences for the use of published works for which the rights holder cannot be found. It has the power to establish tariffs for the public performance of music and for the retransmission of remote television and radio signals, and to arbitrate certain disputes between management collectives representing certain rights holders and the users of their works bearing upon the amount of monies to be paid.[20]

Since 1997, Copyright Board tariff proposals have been regulated to a greater degree by the *Act*.[21]

[19] *Ibid*.

[20] Trudel and Latour, *supra* note 13 at 35 (our translation).

[21] Similar rules have been in place since 1989 for retransmission and since 1997 for private copying and "educational" rights holders.

4. The Principle of the Extended Collective Licence

As Dr. Mihály Ficsor explains, collective management as a system would collapse if a CMO were unable to offer a blanket licence, and instead had to identify each work and each right contained in its repertoire, and then prove that it held them.[22] In such a case, the advantages of the collective management system are less apparent.[23] Ficsor adds that the two ways for a CMO to attain the objective of a complete repertoire are through a legal presumption, discussed in the first report, or an extended licence.[24]

The former legal counsel of KODA, the Danish music performing rights CMO, explained it as follows:

> The extended collective licence is a solution […] for rights clearance in certain cases of mass uses of protected works, in particular photocopying. It has existed in the Nordic copyright laws since the early 1960s, first in the field of broadcasting.[25]

[22] Ficsor, *supra* note 12 at 139-140.

[23] Nevertheless, there are market situations in which established practices allow profit to be drawn from such situations.

[24] Ficsor, *supra* note 12 at 140-141.

[25] Peter Schønning, "Chronique des pays nordiques," (July 1997) 173 *R.I.D.A*. 136, p. 168.

CMOs are responsible only for the management of rights of those rights holders who have given them the mandate to represent them. It is often impossible for a CMO to obtain a mandate to represent all rights holders, both domestic and foreign. Indeed, apart from SOCAN and perhaps the two mechanical rights collectives (CMRRA and SODRAC), very few CMOs can boast of having a complete repertoire. Despite the efforts of both CMOs and the government to inform rights holders, some cannot be located and others are unaware of the existence of collective management options. Legislative tools can thus be used to include such rights holders' works in the repertoire, thereby ensuring protection of their rights and providing a guarantee to the users that the works are being used legitimately.[26] The best tool to achieve this objective is the extended collective licence.

In place in all Nordic countries, the extended collective licence combines a voluntary assignment with a *legal extension of the repertoire* to encompass non-represented rights holders, thus accelerating the acquisition of rights. Some call it a backup legal licence, but this term may be misleading since the rights holder can choose to opt out of the system. This is not possible under a compulsory (also known as a legal) licence.

The extended collective licence works as follows: as soon as a substantial (or "considerable") number of rights holders in a given category agree to join forces in a collective, the repertoire of the appropriate CMO is extended (by the competent authority and on request) not only to other domestic rights holders of works in the same category, but also to all relevant foreign rights holders. The licence also extends to deceased rights holders, particularly in cases where the estates have yet to be properly organized.[27]

[26] See *IFRRO Detailed Papers – Different Models of RRO Operation in Practice*, online: http://www.ifrro.org/papers/operat.html

[27] Ficsor, *supra* note 12 at 72, 140-141.

An almost identical result may be obtained in cases where the administrative entity in charge of supervising the tariffs or operations of the CMO (in Canada, the Copyright Board) hands over to one CMO the mandate to act in a given field because it already represents a considerable number of the rights holders concerned. For private copying, for example, a single CMO was authorized to collect royalties, even though several management/distribution collectives existed.

The extended collective licence is an interesting model for countries such as Canada, where rights holders are well organized and informed, and where much of the material that is the object of licences comes from foreign countries, for which it is often more difficult and time-consuming to obtain an authorization for use. The extended collective licence provides a legal solution to this situation, as the agreements struck between users and rights holders will include all non-excluded domestic and foreign rights holders.

Finally, by accelerating the acquisition of rights, the extended collective licence also increases the efficiency and promptness of royalty collection. The monies redistributed to rights holders are thereby increased.

An extended collective licence system therefore has the following characteristics:[28]

1. The CMO must represent a substantial number of rights holders.
2. The legislation provides that an agreement binds all rights holders not represented by the law.
3. The user is granted permission to use all the material contained in the CMO's repertoire, as well as the material of non-represented rights holders, without fear of repercussions, except from rights holders who have expressly chosen not to participate.
4. Non-represented rights holders (who have not chosen to be excluded from the system) have the right to royalties on an individual basis and as a function of the applicable tariff (set by the Copyright Board or based on an agreement).
5. In general, rights holders have the right to withdraw from the system, thus forbidding the use of their works.

It bears repeating that the extended collective licence is not a non-voluntary licence, for two obvious reasons:

1. The CMOs that benefit from the extended collective license are those that have asked for (and obtained) it from the competent administrative authority, which leads to the assumption that the CMO has consulted its members (or the rights holders that it represents) and has obtained their agreement and that they are of the opinion that an extension of the collective licence is in the interest of all rights holders in the category concerned.

2. All non-member (or non-represented) rights holders can easily exclude themselves. Excluded rights holders can even benefit from an improved plan, as explained below.

[28] *IFRRO Detailed Papers*, *supra* note 26.

In fact, the only "burden" imposed on rights holders by the extended collective licence is that of excluding themselves if they do not wish to be represented by the CMO that is seeking an extension. At a time when the Internet and digital technology allow for a multitude of new uses, this does not seem excessive. As soon as material is made available on the Internet, the question of permitted uses arises. It is certain that the rights holder who has placed material on a site accessible to the public is allowing those using the Web to consult this material, which generally involves temporary reproduction. There is thus an implicit authorization (licence). How far does this authorization go? Does it allow for printing? For distribution? For a hyperlink from another Web site? The rights holder may, of course, place a copyright notice that lists permitted authorizations. However, does this mean that the rights holder permits no other use or, on the contrary, that he or she wishes to be informed and paid? In the latter case, is it reasonable to hope that this rights holder will respond to a request from a user, and what are the consequences of a refusal to enter a transaction?

In light of these questions, it seems reasonable to assert that if this rights holder does not respond to a CMO's attempt to contact him or her and is then represented by this CMO as part of an extended collective licence, the rights holder would not be prejudiced. Moreover, the rights holder in question would retain his or her right in its entirety and the potential to exercise that right since the CMO's mandate is non-exclusive for non-member rights holders.

The extended collective licence conforms fully with article 5 of the Berne Convention, which forbids mandatory formalities. Firstly, it should be stressed that it has not been definitively established that having to respond to correspondence from a CMO (a private organization) to exclude oneself from an extended licence regime is a formality in the sense of the Convention, which applies to state-required formalities such as the obligation to affix a copyright symbol or make a legal deposit under penalty of losing rights. Secondly, the non-member rights holder will be protected on the basis of national treatment and, in the formula for extended management proposed here, will have the right to individual remuneration, the amount of which will have been decided, negotiated, or debated (before the Board) by the holders of rights to the same type of works and for the same type of use – that is, the members of the CMO in question.[29] If there is a "formality" in the sense intended by the Convention, it is thus, as Ficsor underlines elsewhere, conditional and not obligatory.[30]

Royalties collected through the extended collective licence system may be redistributed in different ways, using different methods. In the Nordic countries, royalties are more often than not redistributed in accordance with a collective spirit and objective, through a method to which the rights holders in any given category, or their associations, have agreed. Non-represented rights holders usually have the right, guaranteed by law, to remuneration on an individual basis.[31] This collectivist tradition (that is, the use of monies collected for collective purposes rather than for distribution to individuals) is not part of the Canadian copyright experience, and distribution of royalties on an individual basis is therefore preferable.[32] I shall cover this aspect in greater detail later in this study.

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[29] Ficsor, *supra* note 12.

[30] *IFRRO Detailed Papers, supra* note 26.

[31] *Ibid.*

[32] Except in some cases, when a small percentage (often around 10%) is kept to fund social and cultural activities. This practice is fairly common among members of the International Confederation of Societies of Authors and Composers (CISAC).

5. Issues

The digital age has brought with it an increase in the risk of copyright violations. Many technologies, especially the Internet, make it easier for anyone to reproduce and widely disseminate protected works. Most professional users, including those in the business, education, and government sectors, claim the right to use many different types of protected works. Some educational institutions have asked for a legal exemption for certain uses;[33] other categories of users have asked that it be made easier – considerably easier in some cases – to obtain authorizations. Effective and optimized collective administration of rights may be the best solution for them. Without examining the political validity of such measures,[34] there is no doubt that the creation of new exceptions or compulsory licences may come into conflict with the provisions of the international treaties that regulate copyright protection.[35] For instance, some groups of educators have recently claimed the right to use, for educational purposes, all material made available on a Web site without the obligation to obtain authorization from rights holders. This constitutes an exception that probably contravenes the conditions imposed by Article 13 of the TRIPS Agreement, as interpreted in the case concerning article 110(5) of the United States *Copyright Act.*[36]

The extended collective licence has proved to be effective in Nordic countries faced with such a dilemma. Students in these countries pay a small annual fee (small compared not only to school fees and the cost of books that they must purchase, but also compared to student fees and other costs, such as renting their lockers) so that educational institutions may use all the (published) material for their needs within certain limits.

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[33] A compulsory licence is a form of exemption, except that a royalty, set by tariff, must be paid to the rights holder. In either case, however, the exclusive nature of the right disappears.

[34] A more detailed analysis of these issues may be found in the first report, *supra* note 1.

[35] See the first report for fuller explanation of this point, *supra* note 1. It contains a list of Canadian CMOs divided by category.

[36] United States – Section 110(5) of US Copyright Act – Report of the Panel. Document WT/DS150/R of June 15, 2000.

Users wishing to use (or reuse) a certain work must often go through a maze in order to obtain authorization. First, the user must find the rights holder and the CMO that may represent the rights holder.[37] To accomplish this, the user must learn about the existing CMOs to find out which one is competent in the field concerned and contact it to see whether it has the power to grant the necessary authorization – that is, whether this CMO represents the rights holder concerned for the work concerned and has the authorization to grant the licence for the type of use to which it will be put. If no tariff exists, the user must negotiate either directly with the rights holder (assuming that the user can find the rights holder, as no "universal register of authors" exists) or through the CMO. The high cost and considerable amount of time involved in this operation often surpasses the economic value that use of the work might represent to the potential user. If the rights holder happens to be a foreigner, the degree of complexity is often increased substantially.

If the rights holder is willing to grant an authorization to the user but simply cannot be located, everybody loses. As explained in the introduction, authors win if they can authorize the use of published works and receive royalties for this use. It is not unreasonable to think that lowering the level of frustration felt by some groups of users and a higher level of respect for the rule of law is also in their interest. This being said, the goal of the extended collective licence is not to put constraints on the exclusive rights of authors and other rights holders. Holders of an exclusive right can, of course, choose not to grant an authorization. Rather, the objective is to ensure that in most cases, rights holders (or their representatives, or the CMO representing them) who want to respond to users' requests for authorizations are given the opportunity to do so.

[37] See note 33.

It is important to bear in mind that negotiating permissions is not always easy. Even though formulas for agreements do exist in some sectors, many of those models do not provide for all possibilities that might arise in any given situation. In all cases, contractual freedom exists. In addition, copyright law is an increasingly complex field in part because copyright is in reality a bundle of rights (reproduction, communication, adaptation, moral rights, etc.), and each and every one of these rights may be divided according to the type of use, user, market, and territory concerned, and may vary over time. Furthermore, many of these rights may be joint rights, or rights licensed in part, licensed exclusively, and so on.

The high degree of complexity and difficulty in establishing a direct relationship between a user and a rights holder explains the importance of collective management. If efficient, such management is, for many types of uses, the only coherent way to manage copyright. As Gunnar W. G. Karnell, former president of the Swedish Copyright Society, explained it:

> More than others they [rights holders] can be presumed not to have the means, knowledge, etc, necessary to make their rights respected abroad, be they exclusive or limited in one respect or another; if for no other reason because of lack of information about uses of their works. Also, they may lack the necessary organizational backing in their own country, be they all organized there, for claims to be carried through in other countries.[38]

Yet the challenge for many CMOs, notably in Canada, where they are very numerous,[39] is to acquire an adequate repertoire so that they can respond to the requests of users and gain the credibility and relevance necessary for them to thrive. The extended collective licence would be particularly useful for smaller and newer CMOs – those created to manage new rights or rights that were previously managed on an individual basis – on the condition, however, that such collectives are able to recruit a substantial number of rights holders.

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[38] G.W.G. Karnell, "Outsiders' Rights: A Dilemma for Collective Administration of Authors' Rights in a Present and Enlarged European Community," *E.I.P.R.* 13, No. 9 (1991): 431.

[39] The first report*, supra* note 1 at section II(C).

Canadian CMOs, especially new ones, must also make an effort to become better known. In some cases, more than one CMO operates in a given field, which may lead to confusion among less experienced users. Solutions to this problem were outlined in the first report.

One key recommendation made in the first report, discussed here in greater detail, involves establishing an extended collective licence system that could be used by CMOs, as needed, when granting blanket licences (encompassing the repertoire as a whole) or specific licences (one work at a time).

6. Questions on Implementing an Extended Collective Licence System in Canada

A number of questions must be answered before putting such a system into practice in Canada.

6.1 Which Collectives Would Benefit from the Extended Collective Licence?

Since the major advantage of an extended collective licence system is the fact that it accelerates the acquisition of rights (and, therefore, the power to grant authorizations), smaller and newer CMOs would likely benefit most from it. These CMOs find themselves in a catch-22 situation: not being large enough, they do not have the means to recruit members. Without recruitment, there is no repertoire; without a repertoire, there is little credibility, and, more importantly, very few royalties are collected. Furthermore, the lack of a well-established repertoire leads to a lack of interest by users, thus making recruitment even more challenging.

The need for an extended collective licence system is no doubt less useful in the field of musical works, because SOCAN and the CMOs involved in the management of mechanical rights already have a nearly complete repertoire at both the national and international levels. Similar CMOs exist in foreign countries, and Canadian CMOs often have signed so-called reciprocal agreements. This is explained, in part, by the long history of collective management in this sector. Although the preceding comment is directly applicable to publishers, the vast majority of which are aware of the existence of collective management, there are probably many authors who could be targeted under an extended licence.

In the reprography sector, the implementation of an extended collective licence in Canada would ensure that all non-excluded Canadian and foreign rights holders are covered by the system; many countries do not yet have CMOs operating in this field. The extended collective licence system in Canada would also empower Access Copyright and COPIBEC to fill the gap left by foreign CMOs that have not completed their recruitment and perhaps help those CMOs to increase their own repertoires, since the extension of the licence is global in scope. The royalties collected for foreign works would be sent to the CMOs in the respective countries, which could, in turn, use them as part of a recruitment campaign (the offer to join the CMO might be better received if accompanied by a cheque). In practice, the funds collected would be paid out to individual foreign rights holders who claim them. Unclaimed funds would be kept[40] and paid out, if necessary, to a newly formed CMO in the country concerned. This is the practice followed by KOPINOR in Norway.

Some of the monies collected (up to a limit of 10% according to the practice of many CMOs around the world) could be used for collective purposes, on the strict condition that the same rule applies to monies due to rights holders who are members of the concerned CMO and have given their express consent.

Finally, it should be mentioned that according the Copyright Board the power to grant such an extension is likely to resolve certain existing problems. For instance, a CMO could have conditions of efficacy or transparency imposed on it before it is granted an extension.

[40] As explained below, I am not in favour of a sunset date and suggest that the funds be kept (on an actuarial basis) for future claims. Nevertheless, it seems that the time limits provided in provincial legislations could apply.

6.2 Categories of Rights Appropriate for an Extension of the Repertoire

From a practical point of view, how can one determine the appropriate categories of rights holders for an extension when introducing an extended licensing regime? As a corollary, what proportion or percentage of rights holders must have joined the CMO for it to be able to use the extended collective licence? And finally, who will have the power to determine when this proportion or percentage has been reached?

As far as the structure of the licence is concerned, it would be risky to forbid rights holders to opt out of the extended licence system, as the system would then resemble a compulsory licence. Rights holders would lose their exclusive rights and then have a right to remuneration according to the recognized tariff. One might point out that the exclusive right exists and that it may be exercised by the CMO. This, however, seems to be quite theoretical, as a CMO in a monopolistic situation (factual or legal) making use of a right to prohibit use could be accused of hindering competition. The possibility of not allowing rights holders to opt out thus exists only where international conventions allow the implementation of a compulsory licence, as is the case with cable retransmission.

One must also be careful to distinguish the collective management of rights from remuneration for private copying. The extended collective licence does not apply in cases such as when royalties are collected for private copying of musical works.[41] Indeed, an exclusive right is an intellectual *property* right, which, in our situation, is managed by a CMO because of the complexity, high cost, and/or impracticability of individual management. The right to remuneration for private copying is not a property right stemming from the creation of a work or from a specific neighbouring right. In other words, the extended collective licence system facilitates only the *acquisition* of rights[42] (which are originally the property of the rights holders) by a CMO to allow that CMO to grant authorizations more easily, benefiting both users and rights holders. However, where private copying is concerned, the CMO obtains its right to collect royalties directly from Parliament.[43]

[41] *Copyright Act,* R.S.C. 1985, c. C-42, ss. 79-80.

[42] That is, the acquisition of the right to authorize use in the name of the rights holder, whether this is by assignment of the right (as for SOCAN and COPIBEC) or by licence (exclusive or non-exclusive – for example, Access Copyright and CMRRA).

[43] See Martin Kretschmer, "The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments," *E.I.P.R.* (2002): 126.

Parliament could decide to limit (in the *Act* itself or through regulation) the field(s) in which the extended collective licence could be applied. In my view, a strict legal limit is risky because any change in this sector would require a change in the legislation. Copyright law is complex in its own right, and any attempt to make amendments could lead to an avalanche of requests for more changes. Even though the regulatory route offers more flexibility, it should not be considered the most appropriate way to effect such changes. The decision to implement the extended collective licence in a particular case should not be political but administrative. It should thus be based on a technical and economic analysis of the benefits that authors and users might reap from the application of such a system in any given field. Such an analysis would require collecting a considerable amount of data.[44] Proof usually means hearings, analysis of evidence, and a decision cast in light of evidence (and counter-evidence). I feel that this work must be undertaken by the Copyright Board, which already has the necessary infrastructure in place[45] and the benefit of years of experience in the field.

[44] It is reasonable to think that the CMO(s) wishing to benefit from the extended collective licence would bear a certain burden of proof.

[45] It is not my role to recommend an increase in the funding available to the Board. However, adopting the extended collective licensing model would reduce substantially the system for rights holders that cannot be located and thus free up resources now used by the Board on this matter. Although, in practice, this work is quite limited at the moment, its volume might increase as use of works available on the Internet grows. (When I consulted the Board's Web site on May 23, 2003, it listed 115 files pending over the last 12 years.)

In this context, I argue that it is insufficient for the *Act* to grant the Copyright Board the power to extend the appropriate repertoire – that is, it is not enough to empower the Board to extend a CMO's capacity to grant licences applying to rights holders who are not expressly excluded. The *Act* can also specify certain conditions. The *Act* should also enable the Board to properly accomplish its functions and take the public interest into account. Consequently, the *Act* should give the Board the power to attach a tariff and other reasonable conditions to the extension of a licence to non-represented rights holders, including foreigners, taking into account the interests of the rights holders, the users, and the public. One such condition could relate to procedures for rights holders wishing to withdraw from the system or to be excluded from it prior to its institution. Another reasonable condition might pertain to the distribution of royalties to rights holders who did not choose to participate in a collective but who did not exclude themselves from the extended collective licensing regime, for example, the publication (on the Web or elsewhere) of the names of non-member rights holders for whom monies have been set aside for distribution. The Board should also have the power to require that a CMO provide information regarding the operation of its extended licence, and even, in extreme cases, the right to require an external audit. The *Act* or related regulations could contain guidelines regarding the imposition of such conditions in order to ensure that the system is efficient and transparent.

In addition, the extended collective licence system should not be applied to works that are unpublished, due to certain specific rights, notably those contained in international treaties, that apply to those works.

6.3 Distribution of Royalties to Non-participating but Non-excluded Rights Holders

Distribution of royalties must follow a two-step process. All CMOs benefiting from the extended collective licence that receive monies (directly or through a sister CMO) for non-participating (non-member) but non-excluded Canadian or foreign rights holders should make reasonable efforts to find and pay such rights holders. The Copyright Board should be able to judge whether these efforts are reasonable, impose rules of conduct, or encourage CMOs to adopt a voluntary code of conduct.

If the foreign rights holder is from a country in which a recognized CMO operates, the royalties could be sent to that CMO along with the usual data, as though they were being sent to a rights holder member of this foreign CMO. The Canadian CMO could verify beforehand if the foreign CMO in fact represents the concerned rights holder before sending the funds. If the foreign rights holder hails from a country where there is no such CMO, the usual search techniques (catalogues, repertoires, Internet) should be used. [46]

[46] For example, directories of authors, etc.

Once this phase is completed, the collected amounts should be put aside for rights holders who cannot be located,[47] as occurs under the current situation. The *Act* provides that these monies must be kept for five years.[48] I do not favour such a legislative constraint; I suggest that an actuarial formula is more appropriate for the extended collective licence system. CMOs would manage a fund, established according to set actuarial guidelines, to be able to pay rights holders requesting their share, even if they show up ten years following the authorization that led to the payment. It must also be said that new CMOs are being created in many countries and in many sectors. Monies payable to unlocatable rights holders, kept aside as indicated above, might be paid to a new sister CMO once a reciprocal agreement is signed. The retroactivity period could then be negotiated. The names of foreign rights holders to whom royalties are due could also be published, for example, on a Web site.

It must also be added that the licensing system for unlocatable rights holders would have no role at all in situations in which an extended licence exists, except ultimately for an excluded rights holder who later became unlocatable. The implementation of a publicity plan could make this type of case a rare one.

6.4 Conditions Applied to Rights Holders Who Withdraw from the System

This important question is not dealt with in the copyright laws of the Nordic countries. Rather, it is left to the discretion of the entity in charge of overseeing the management and the administration of the respective CMOs. Therefore, the criteria may change from one CMO to another in accordance with their functions and the specific needs of the represented rights holders and users with whom they deal.

[47] *Copyright Act,* R.S.C. 1985, c. C-42, s.77.
[48] *Copyright Act,* R.S.C. 1985, c. C-42, s. 77(3).

The experience of Denmark shows that the licensing of a rights holder's rights comes to an end three months after the rights holder has indicated his or her intention to withdraw from the CMO.[49]

The rules of STIM in Sweden stipulate that a rights holder must sign an affiliation contract with the CMO for at least five years (§ 6).[50] To terminate the contract, written notice must be submitted to the CMO's Council (§ 10).[51] However, a rights holder must wait at least two years after joining STIM before presenting such a request (§ 10).[52]

In my opinion, a notice period of three (or maximum six) months would be appropriate. This allows enough time for the parties involved to be informed, study the request, and organize themselves accordingly. A practical solution is proposed further on in this study.

It might also be possible to limit the monies that an excluded rights holder can collect as damages to the applicable tariff or to a multiple of this tariff.

6.5 Number of Rights Holders Necessary to Extend the Repertoire

All Nordic laws provide that a "substantial", "considerable", or "important" number of rights holders must be members of a CMO before it is authorized to negotiate an agreement with potential users on their behalf. This important or substantial number is not, however, defined in the law.

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[49] See http://www.senat.fr/lc/lc30/lc301.html. This link is in French only.

[50] See "Statutes of the Swedish Performing Rights Society STIM": http://www.stim.se/stim/prod/stimsajt.nsf/AllDocuments/7B50AA91A42ABD53C1256BF30030C393. Please note that the statutes are currently unavailable in English.

[51] *Ibid*., section 10.

[52] *Ibid.*

The prevailing practice in the Nordic countries is that the Minister of Culture or Education must approve the existence of a new CMO. The Minister sets out the criteria that the CMO must meet before it is granted official status. In practice, this power is delegated to the administrative authority in charge of supervising the CMO and resolving disputes in tariff matters.

It may be dangerous to determine, by legal or regulatory means, the exact number. The *Act* should include an adequate term (I suggest "substantial") and grant the Copyright Board the power to determine when this number has been reached in each situation. Case law will develop not only from the Copyright Board, but also through the Federal Court of Appeal. However, in my opinion, the number will have to be substantial in both quantity and "quality," a term I use here in an objective and non-pejorative way to designate rights holders who have a greater number of works or works that are very popular.

In the case of a well-established CMO, the substantial number (for example, in a case of a new right granted to rights holders who are already members of a CMO) should be quite high since the rights holders can be contacted easily – at least a simple majority of listed Canadian rights holders. At the other end of the spectrum, smaller or newer CMOs often face an impossible challenge: recruiting without adequate means. This prevents them from collecting sufficient royalties (due to their small repertoire) and distributing these royalties effectively (since almost all the monies collected fund their administrative expenses). In these cases, the substantial number could be substantially less than a (theoretical) majority.

It should be remembered that an adequate repertoire is, in theory, very large, since, from the user's point of view, the ideal repertoire would contain all relevant works (thus, the "ideal" CMO would represent all relevant rights holders). The "substantial number" will almost always be lower than the "adequate repertoire" since these two standards serve different purposes. The substantial number would be used by a CMO to prove that it has the capacity and the justification to apply for an extension after making reasonable efforts to contact the relevant rights holders and receiving a sufficient number of positive responses (or, at least, a minimum number of negative responses). An adequate repertoire measures a CMO's capacity to grant authorization for a sufficient number of works to make it worthwhile to users.

It is not possible, at this point, to suggest a set percentage, as, on the one hand, the total exact number of potential rights holders is rarely known, and the determination of a percentage of that total is thus uncertain, and on the other hand, the appropriate percentage varies according to whether the sector (and CMO) is well-established or not. The general rule should be the following: the regulatory administrative authority should at least consider the amount and quality of the CMO's effort to contact all known (thus, in principle, listed) rights holders, the response rate of the contacted rights holders who have agreed to join and those who declined, as well as the reasons for their refusal. Essentially, the extended collective licence should not enable a CMO to override the refusal of a rights holder to join its ranks, or empower a CMO to manage a new right. Rather, the extended collective licence exists to offset the complexities and costs necessary to find these rights holders in order to consult them in cases where it is reasonable to think that a majority would agree to participate in the CMO's efforts.

To sum up, the substantial number is measured as a function of:

(a) the presumed number of rights holders concerned;

(b) the ease of finding and contacting them (which depends, in large part, on how well organized they are in terms of belonging to associations);

(c) the efforts made by the CMO; and

(d) the responses obtained.

6.6 Issues Related to the Coexistence of Two (or More) CMOs

The main objective of the extended collective licence is not to put an end to extant conflicts between CMOs but to facilitate the acquisition of a larger repertoire. When two (or more) CMOs coexist, the entity responsible for granting licence extensions could quite simply refuse to grant the extension when a conflict exists, if the interest of rights holders and the public could thereby be compromised. Hypothetically, if two CMOs are founded upon very different perspectives regarding the management of rights or the nature of the right concerned, and if a substantial number of rights holders have joined each one, it is reasonable to think that both groups of rights holders had a reason for doing so. One would therefore not be justified in granting an extension to one CMO to allow that CMO to take over the other's repertoire. A key motivating factor behind my proposal is to give the regulatory administrative authority a certain flexibility precisely to enable it to impose appropriate conditions in this type of situation. For example, nothing prevents one CMO from obtaining the extension without the other one losing its power to grant authorizations, because the extended collective licence is not exclusive (i.e., non-member but non-excluded rights holders would retain the possibility of granting a licence on their own). The CMO not benefiting from the extension could also "notify" the other CMO of its list of rights holders and thus exclude them from the scope of the extended licence.

Two CMOs can benefit concurrently from an extended collective licence: they both (on a non-exclusive basis) represent rights holders who are not members (in either CMO) but who are not excluded from the system. Thus, an extension could be accorded to COPIBEC and Access Copyright for the entire repertoire of rights holders who are members neither of these CMOs nor of the sister organizations with which reciprocal agreements have been signed.

That being said, while several solutions are theoretically possible, we cannot draw on the experience of the Nordic countries. The coexistence of multiple CMOs in the same field is theoretically possible in Norway, but the administrative authority is extremely reluctant to grant an extended collective licence to two CMOs in the same field. In fact, users in these countries consider one of the main advantages of the extended collective licence to reside precisely in the fact that they can obtain licences from a single source.[53] This benefit disappears, at least in part, when two or more CMOs are competing.

The only reliable example is in Sweden, where two organizations operate in the field of visual arts – more specifically, *droit de suite*.[54] Both CMOs have spent a great amount of time and money in court. Each has won a few rounds but no one has yet claimed victory. However, according to my information,[55] BUS is now the main operating CMO.

[53] Information obtained from John-Willy Rudolph. (See Acknowledgments.)

[54] One is a traditional CMO called Bildkonst Upphovsrätt I Sverige, or BUS.

[55] Information obtained from Mats Lindberg (see Acknowledgments).

There seem to be six solutions to the problem raised by the coexistence of multiple CMOs.

1. The regulatory administrative authority (in my suggested model, the Copyright Board) could quite simply refuse to extend a collective licence when an open conflict exists between two CMOs. This reinforces the need for the Board to have some discretion in setting conditions other than simply determining what constitutes a "substantial" number of rights holders. However, as this may not represent the best solution, it should be used only as a last resort.

2. The legislation (or the Copyright Board) could require that the substantial number correspond to the majority of relevant rights holders. This would mathematically prevent two CMOs from meeting the set threshold and probably would cause the "defeated" CMO to vanish. This solution is also far from ideal. Since it is very difficult, if not impossible, to pinpoint the number of relevant rights holders, a "majority" cannot be established. Furthermore, the need for a CMO to meet this 50% + 1 criterion would almost inevitably lead to recruitment wars. Even though this practice is prevalent in the labour world, it might not be entirely appropriate to import it into the field of the collective management of rights.

3. Two CMOs might very well decide to coexist, as is presently the case with Access Copyright and COPIBEC. Under such circumstances, the regulatory administrative authority could choose to grant the licence extension providing that the coexistence and cooperation last.

4. The regulatory administrative authority might also choose to grant the licence extension to one CMO only, stripping the other one of the option to use this tool. The regulatory authority would essentially be taking sides in the name of the collective interest. For the decision to hold – that is, for one CMO to be preferred over another – it must be founded on strong objective data and very clear reasons. As mentioned at the beginning of this section, there may be cases where the rights holders actually prefer the coexistence of two CMOs if it does not compromise the efficiency of the system. This choice between two CMOs by the regulator authority is not a solution that I recommend, as it would likely lead to protracted legal battles. It should thus be used only, if ever, in cases in which the efficiency of the management system is seriously compromised.

5. An extension could be granted to two competing CMOs. The Swedish experience in this regard has not been very positive, but conceptually nothing bars the way to this solution. After all, the extension of the licence is aimed only at the rights holders who did not choose to be part of either CMO and who are not excluded from the system. It is therefore very predictable that the CMOs would compete to recruit as many rights holders as possible, leaving little room for a legal extension of the system. The concrete problem that they would face resides in the increase in publicity and advertising. For an extended collective system involving two (or more) players to work, it is crucial that each CMO be completely transparent and accountable as far as its list of members is concerned. This might generate certain practical difficulties.

6. Finally, the regulatory authority could grant an extension by dividing the scope of the extension (for example, by province or country). This type of partial extension diminishes the benefits of the licence discussed above.

Even though one might choose to extend the licence in a system where two or more CMOs are in competition, I submit that it is more appropriate to apply this solution to CMOs operating alone, or to multiple CMOs that have reached a cooperative agreement.

Finally, the Copyright Board should have the power to revoke the extension of the licence if circumstances justify this action. This might arise in a situation where a CMO benefiting from the extension ceases to respect the conditions that were set out.

In this regard, the *Act* should provide for an automatic review of each decision to grant an extension. The review should take place at regular intervals (for example, every five years) and permit any person (rights holder or user) to file a complaint or comments with the Copyright Board, notably in cases where the conditions relating to the extension of the licence were not respected.

6.7 What Happens When Rights Holders Wish to Withdraw from the System?

In principle, collective management of rights should not be compulsory.[56] This means that rights holders, both Canadian and foreign, must be able to choose to be involved or not. The extended collective licence is therefore meant to apply not to those who choose to exclude themselves from the system, but to those who, for any given reason, have not made their choice known. In addition, imposing the collective management of an exclusive right may be the equivalent of a compulsory licence, which may be a violation of Canada's international obligations, in particular those contained in the Berne Convention and the WTO's TRIPS Agreement.[57] A *compulsory* extended collective licence can exist only in situations in which a non-voluntary licence can be used (for example, cable retransmission). Nevertheless, these licences already exist in Canadian law, and there does not seem to be any obvious reason to replace them with an extended collective licence.

In other cases, the extended collective licence would remain optional. This, however, may create problems for rights holders wishing to exclude themselves from the system. I recommend that a "publicity" system be set up. It could take the form of a Web site where the names of excluded rights holders are listed (preferably with their contact information, which would be especially useful for users who wish to negotiate an agreement directly with them). Dr. Mihály Ficsor also emphasizes the role that an obligatory arbitration system, a system that is already in place in some Nordic countries, might play.[58] CMOs having been granted the use of the extended collective licence could also, as a condition for the extension of their repertoire to be enforced, be asked to open a Web site containing information concerning excluded rights holders or a link to a relevant Web site.

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[56] This point is explored in greater detail in the first report, *supra* note 1.

[57] The first report, *supra* note 1.

[58] Ficsor, *supra* note 12 at 72.

6.8 Changes to the *Copyright Act*

To ensure that the extended collective licence system is viable and respected, it is necessary amend the Canadian *Copyright Act*.

A first step would be to include in the *Act* a general provision creating the extended collective licence system and establishing its modalities. Section 50 of the Danish law,[59] s. 36 of Norway's law,[60] and s. 26i of the Swedish law[61] are all good examples of such a provision.

The components of an extended collective licence should be listed in such a provision, including that (a) the licence must stem from an agreement reached through negotiations between a CMO and users;[62] (b) this CMO must represent a substantial number of rights holders as determined by the regulatory administrative authority; (c) the extended collective licence grants the user the right to use all the published works included in the field concerned, as well as the works of non-represented rights holders; (d) non-represented rights holders have a right to individual remuneration; (e) rights holders have an individual right to withdraw.

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[59] See Denmark's *Act on Copyright,* Act. No. 395, June 14, 1995, came into force July 1, 1995. http://www.unesco.org/culture/copy/copyright/denmark/fr_sommaire.html

[60] See Norway's *Act Relating to Copyright in Literary, Scientific and Artistic Works, etc.,* of May 12, 1961, amended by Law No. 27, June 2, 1995. http://www.unesco.org/culture/copy/copyright/norway/fr_sommaire.html

[61] See Sweden's *Act on Copyright in Literary and Artistic Works*, Law No. 729 of December 30, 1960, amended by Law No. 1274 of December 7, 1995. http://www.unesco.org/culture/copy/copyright/sweden/fr_sommaire.html

[62] In Canada, it could be a tariff set by the Board or the result of an agreement.

As far as Canadian law is concerned, such changes could be made to s. 70.1 of the *Act*.[63] It might be useful to include a formula similar to that in the Nordic laws mentioned above. The regulatory administrative authority (in my scenario, the Copyright Board) should also have the power to enforce appropriate conditions in granting the licence extension, and should have some discretion in the determination of the substantial number of rights holders in a specific case, taking the public interest into account. These conditions could include those mentioned above, such as publication (on the Web or elsewhere) of the names of non-member rights holders for whom monies have been distributed and names of excluded rights holders. This site could be made available by the Board but be financed by the CMOs benefiting from the licence extension. The Board should also have the power to gather the information that it requires regarding operation of the extended licence in a CMO and even, in extreme cases, the right to require an external audit.

Thus, the *Act* could be amended to take into account the following for CMOs under the blanket regime (it could be a new section 70.7):

1. Upon request, the Copyright Board could grant to a collective management organization, for a renewable period of at most three years, a non-exclusive mandate to represent non-member rights holders for the purpose of applying a type of authorization offered by that collective management organization. An extension of the mandate would be granted only after the Board determines that a substantial number of Canadian rights holders concerned have given the collective management organization a mandate to represent them for the type of authorization in question. The Board will impose any conditions that it deems appropriate on such an extension in the interest of the rights holders and the public interest and obtain all pertinent information from the collective making the application.

[63] Trudel and Latour, *supra* note 13.

2. The collective management organization that collects monies due to a licence extension as provided in the previous paragraph will have to make reasonable efforts to find the non-member rights holders for whom monies could be distributed. The monies that cannot be distributed following such efforts will be held by the collective management organization, using an actuarial method, until they are duly claimed. The collective management organization concerned will also make reasonable efforts to publicize the fact that the monies are available. The Copyright Board will ensure that the present paragraph is respected.

3. All rights holders targeted by an extension as laid out in paragraph 1 may exclude themselves from the extended mandate by sending a notice to this effect to the collective management organization concerned. This notice will take effect, at the latest, 60 days after it is received by the collective concerned.[64]

The *Act* could also provide for an obligatory arbitration mechanism if there is a dispute.[65]

[64] For more on this topic see also Ficsor, *supra* note 12 at 141.
[65] *Ibid*., p. 72.

7. Conclusion

To sum up, the extended collective licence system, based on the model of the Nordic countries, offers many benefits. Users gain peace of mind, as they sign a contract giving them unrestricted access to a CMO's repertoire apart from specified exclusions. In other words, they will not have to face a lawsuit from a rights holder who turns up after the contract is signed and was neither represented nor expressly excluded from the system. Rights holders have the advantage of better protection of their rights, and by presenting a united front they increase their clout in negotiations with users. Finally, non-represented rights holders also have their rights protected and can benefit from the remuneration they deserve, since their works are being used for the benefit of the general public.

Related avenues of research may include more in-depth study of the specific needs of certain sectors (for example, the educational sector), gathering data from certain groups of rights holders or users or from certain CMOs, and a study of the links (if any) to establish between the extended collective licence and the *Status of the Artist Act*.[66]

[66] R.S.C. 1985, c. S-19.6.

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About the Author

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APPENDIX

Implementation of the Extended Collective Licence in the Nordic Countries

In the 1970s, Denmark, Finland, Iceland, Norway, and Sweden adopted legislative tools in the field of extended collective licences. Such a system is likely to encourage agreements between users and CMOs that represent a substantial number of rights holders in a defined category of works. These agreements are then extended to encompass all rights holders in that specific category, domestic or foreign, even if they are not members of the CMO in question.

Here is a closer look at the situation and practices that prevail in Denmark, Finland, Iceland, Norway, and Sweden.

Denmark

The law relating to copyright on literary and artistic works[67] was adopted on May 31, 1961, and subsequent reforms were planned. Denmark joined the other Nordic countries in 1970 to form the Nordic Commission on Copyright.[68]

[67] M.-M. Krust, *Danemark – Sommaire*. http://www.aidaa.org/matin/krust/danemark.html. This is in French only.
[68] *Ibid.*

Legislative Context

Section 50 of the Danish law provides that the extended collective licence "may be invoked by users who have made an agreement on the particular exploitation of the work with an organization comprising a substantial number of Danish authors of a certain type of work."[69] Such a licence, negotiated and granted by a CMO, is automatically extended to encompass all rights holders, even the ones not represented by the CMO.[70]

Where cable retransmission is concerned, the compulsory licence system that had existed since 1985 was overhauled by the law of 1996.[71] In its new form, s. 30 permits radio or television retransmission of a performance inasmuch as it respects the conditions of an extended collective licence as set out by s. 50.[72] The extended collective licence is also used in the fields of reprography and visual arts.[73]

Collective Management Organizations

Only a CMO whose existence has been approved by the Minister of Culture can be mandated to manage and redistribute royalties for the use of sound recordings in broadcasts on radio and television (s. 68). This is the case with GRAMEX. The monies collected are distributed to the rights holders. However, a portion of these royalties, as well as the monies that have not been claimed for five years, are channelled into special programs that benefit the general good.[74]

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[69] *Ibid.*

[70] *Ibid*.

[71] *Ibid.*

[72] Denmark's *Act on Copyright,* Act. No. 395, June 14, 1995, came into force July 1, 1995. http://www.unesco.org/culture/copy/copyright/denmark/fr_sommaire.html

[73] *Ibid*., s. 23(2).

[74] Krust, *supra* note 67.

A similar practice exists for private copying. Currently, s. 39 of the law stipulates that a CMO approved by the Minister of Culture is in charge of collecting, managing, and redistributing the monies collected as royalties.[75] This CMO must represent the interests of a "considerable" number of performers, producers, and photographers. The sums are then distributed to broadcasters, authors, performers, and producers, but one third of the total is invested in special funds geared toward general activities.

Denmark has a large number of CMOs, among them **Radiokassen,** which, since 1925, has overseen the administration of authors' rights for television and radio broadcasts on the national Danish public broadcasting corporation, Danmarks Radio.[76] **KODA** was created in 1926 and was approved by the Minister of Culture in 1935.[77] It manages the rights for public performances and radio broadcasts of musical works.[78] **KODA Dramatik** operates in the field of the collective administration of performance rights of musical and dramatic works.[79] **GRAMEX**, mentioned above, came into existence in 1963. This mixed CMO manages the rights of performers and sound-recording producers.[80] **Drama-ret,** founded in 1938, works to guarantee and protect rights in the field of performance of dramatic works.[81] **COPY-DAN**, created in 1977, groups together seven CMOs operating in the field of private copying and reprography. We shall examine this CMO's profile in greater detail.

[75] *Ibid.*

[76] http://www.senat.fr/lc/lc30/lc301.html. This is in French only.

[77] Krust, *supra* note 67.

[78] http://www.senat.fr/lc/lc30/lc301.html. This is in French only.

[79] Krust, *supra* note 67.

[80] http://www.senat.fr/lc/lc30/lc301.html. This is in French only.

[81] *Ibid.*

Overview of a Specific Collective Management Organization

COPY-DAN is an umbrella organization similar to certain Canadian CMOs, heading up various CMOs and associations in the sectors of reprography and private copying, among others. All groups representing rights holders, including authors, performers, producers and publishers, are thus under the guidance of the parent organization. COPY-DAN serves approximately 4,500 educational establishments, as well as all Danish state organizations since agreements were negotiated with 19 government departments and 2,500 individual agreements with municipalities, private corporations, and associations.[82]

Danish law gives COPY-DAN the mandate to represent the interests of Danish and foreign rights holders, negotiate collective licences with users, collect royalties, and distribute them among the rights holders.[83] Since it represents the vast majority of domestic rights holders (as well as almost all foreign rights holders) by contract, COPY-DAN has easily obtained an extension. Hence, users are protected from any claims that rights holders who are not members of COPY-DAN or of an affiliated foreign CMO might make against them.

COPY-DAN is divided into two sections: education and business. The education section is by far the larger.

[82] http://www.ifrro.org/members/copydan.html

[83] http://www.copydan.dk/cm12.asp?d=1

Since COPY-DAN is an umbrella organization, it oversees the inner workings of the administration, accounting, and technology departments of the CMO's. This enables the organization to aim for the optimal efficiency of the management systems that all, or a majority, of the seven member organizations share.[84] These seven specialized organizations are TV for Mariners, Educational Copies, AV-Copies for Education, Cable-TV, Pictorial Art, Business Copies, and Blank Tape.[85]

The royalties collected by COPY-DAN are distributed to domestic and foreign rights holders. General supervision of administration of the royalties is assumed by the Joint Collecting Society, which is composed of two representatives from each specialized member CMO.[86] As for unknown or untraceable rights holders, if the remuneration is deemed to be not enough to justify individual distribution, a fund is established to hand out grants aimed at supporting projects, studies, or various initiatives undertaken either by member or non-member rights holders.[87]

[84] *Ibid.*
[85] *Ibid*. The English names are taken from the COPY-DAN Web site.
[86] *Ibid.*
[87] *Ibid.*

Finland

The first Finnish legislative foray into the copyright world came in 1927. This law has been amended many times.[88] The modern incarnation of the Finnish copyright law dates back to 1961. It served as a model for the work undertaken by the Nordic Commission, created in 1970, in which Finland was an active participant. The first extended collective licence was used in the field of reprography in 1980. Major amendments were implemented in 1984 to expand application of the extended collective licence to the recording of radio and television broadcasts for an educational purpose. Two years later, the system was expanded again, to simultaneous cable retransmission of radio or television programs.[89]

Legislative Context

The Finnish copyright law stipulates that an extended collective licence permits the use of an author's work or an artist's performance, when an agreement was reached for that use, with a CMO representing an important number of Finnish authors or performers in a particular field.[90]

The law permits the use of the extended collective licence in many and diverse sectors;[91] therefore, there is no need for the compulsory licence for retransmission via cable, for example.[92] Rights holders must be members of a CMO approved by the Minister of Education.

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[88] M.-M. Krust, *Finlande – Sommaire*. http://www.aidaa.org/matin/krust/finlande.html. This is in French only.

[89] *Ibid.* and comments by Tarja Koskinen-Olsson (see Acknowledgments).

[90] *Ibid.*

[91] See *IFRRO Detailed Papers.*

[92] Krust, *supra* note 88.

Collective Management Organizations

The remuneration received by each rights holder for the broadcast and communication to the public of a sound recording is calculated with the help of technological data. Until recently, GRAMEX redistributed the monies it collected according to the following formula: 51% went to the rights holders on an individual basis and 49% was channelled into funds set up to finance collective projects.[93] Currently, all royalties are paid to rights holders on an individual basis, apart from revenues that belong to foreign rights holders and for whose interests no reciprocal agreement has been reached,[94] or for whom a type B agreement is in place.[95] Unclaimed monies are reserved for three years to enable the CMO to respond to any future claim.[96] If the rights holder does not request his or her due after three years, the money is returned to the general fund.[97]

[93] *Ibid.*

[94] As a general rule, CMOs operate only in one country. They collect royalties on behalf of domestic and foreign rights holders. The rights of the latter are accorded to a CMO by law (for example, an extended collective licence system) or by a reciprocity agreement signed with a foreign CMO operating in the same field.

[95] There are two main types of reciprocity agreements. The type A agreement involves an exchange of repertoires and royalties – that is, each CMO distributes to the others the monies received for foreign rights holders represented by that CMO. The type B agreement involves the exchange of repertoires only. In its own territory, each CMO may grant authorizations for use of the repertoire of its sister CMO, but it retains the monies collected instead of remitting them. When two CMOs exchange sums that are about equivalent and not very high, a type B agreement considerably reduces the costs of management and fund transfers.

[96] Krust, *supra* note 88.

[97] *Ibid.*

The largest CMOs in Finland are GRAMEX, TOESTO and KOPIOSTO. Created in 1967, **GRAMEX** is a mixed CMO, representing performers and producers, composed of three associations: the Union of Finnish Musicians, the Finnish Soloists Society and the Association of Finnish Sound Recording and Video Recording Producers. Rights holders tend to sign individual agreements with GRAMEX, though collective involvement is also possible, for example, for orchestras, music groups, or non-profit organizations.[98] **TEOSTO** is a collective of composers and music publishers. It administers the monies collected as remuneration for private copying of musical works, and also manages the area of public performance. **KOPIOSTO**, in existence since 1978, is composed of 21 associations operating in copyright protection. This CMO began by collecting royalties in the reprography sector. Since then, it has taken on the sector of cable retransmission of radio and television broadcasts.[99] KOPIOSTO is also charged with distribution of royalties for private copying (except for the music sector).

There are two more CMOs in Finland: KUVASTO, for visual artists, and TUOTOS, for audiovisual producers.

[98] *Ibid.*
[99] *Ibid.*

Overview of a Specific Collective Management Organization

By virtue of the Finnish legislation, KOPIOSTO is authorized to grant extended collective licences in the following fields: reprography (s. 13), recording of radio and television programs for educational purposes (s. 14), and rebroadcasting (s. 25h).[100] Founded in 1978 as a CMO representing both rights holders and publishers, KOPIOSTO has numerous member associations representing more than 30,000 Finnish rights holders from a wide range of sectors.[101] The users of KOPIOSTO's repertoire include approximately 1.8 million students, 1.3 million public servants, 18,000 church employees, 443 municipalities employing 290,000 people, and nearly 3,000 corporations.[102]

Rights holders and publishers give their particular organization or association the mandate to represent them, which then entrusts KOPIOSTO with this responsibility. To become a member organization of KOPIOSTO, a CMO must be officially registered, have members who hold rights protected by copyright legislation, and be in charge of protecting these rights.[103]

For reprography, KOPIOSTO relies on surveys and statistics to redistribute the royalties collected.[104] A non-represented rights holder has a right to individual remuneration.[105] Although most member organizations distribute the royalties directly to the publishers, certain CMOs representing authors create collective funds from which they can hand out grants or prizes.[106] Distribution to foreign rights holders is assured by sister CMOs.

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[100] Finland's *Copyright Act,* Law No. 404 of July 8, 1961, as amended by Law No. 365 of April 25, 1997. http://www.unesco.org/culture/copy/copyright/finland/fr_sommaire.html

[101] http://www.ifrro.org/members/kopiosto.html

[102] *Ibid.* and information received from Tarja Koskinen-Olsson (see Acknowledgments).

[103] http://www.kopiosto.fi/english/engfram.htm

[104] *Ibid.*

[105] *Ibid.*

[106] *Ibid.*

Iceland

Iceland adopted its copyright law in 1972.[107] It is therefore the most recent piece of legislation in this field of all the Nordic countries. Iceland also participated in the Nordic Commission's work in 1970. A domestic reform committee on copyright was created in 1983.

Legislative Context

Iceland's copyright law is newer than the ones in effect in other Nordic countries. This piece of legislation is also less long and complex than are the laws in the other countries in the group.

Collective Management Organizations

CMOs must be approved by the Minister of Education in order to have the authority to represent the interests of the rights holders.[108] The Minister of Education is also in charge of drafting provisions regulating administration of the CMOs.[109]

[107] G. Karnell, "Nordic Copyright Law Reform: A Situation Report," *EIPE*, vol. 6, No. 4 (1984): 99.
[108] *Ibid.*
[109] *Ibid.*

Overview of a Specific Collective Management Organization

Fjölis was created in 1985 to put into practice collective management agreements in the field of reprography, particularly in the education sector.[110] The various member organizations represent the interests of authors of fictional works as well as other authors, music composers, journalists, and book publishers, and a few years ago rights holders in the sector of visual arts were added to the list. However, newspaper publishers are not members.[111]

In June 1992, an amendment to Iceland's law created the extended collective licence (s. 15a).[112] This legislative change enables the Minister of Culture and Education to broaden the system to the digital world by regulatory means. As well, since 1996, Fjölis has had the power to grant a licence for digital reproduction of written works.[113] However, the power to put this system in place has yet to be handed over to Fjölis by Iceland's rights holders.

Norway

Norway has a situation similar to Denmark's. The first legislative tools in the collective management system were applicable only to the educational system. Later on, they were expanded to encompass other sectors of activity.[114]

Legislative Context

Norway's copyright law was adopted by the legislature in 1961.[115] It was amended in 1995.[116]

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[110] http://www.fjolis.is/060101GeneralInfo.html
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] See *IFRRO Detailed Papers*.

Much like its counterparts in the other Nordic countries, Norway's law includes provisions for an extended collective licence (s. 36).[117] This licensing system is applied to the field of reprography and to copies of audiovisual material made by educational establishments (s. 13). Section 14 guarantees that the extended collective licence is applied to reprography in corporations and institutions; s. 17 applies to copies made of material for people with a visual impairment or disability; s. 30 applies to public transmission of published works; and s. 34 applies to cable retransmission. The Norwegian government is considering applying the extended licence in the digital field.[118]

Amendments to the law have recently been proposed, and they will be studied during the summer of 2003. The amendments would permit application of an extended collective licence in the following cases:

- digital copying in education (s. 13)
- digital copying for use in businesses and enterprises (s. 14)
- compilations, replacing the compulsory license in s. 16
- digital and analogue copying in libraries (beyond library privileges) (s. 18)
- the reuse of copyright protected material held in radio and television archives (new s. 30a)
- certain uses of artistic and photographic works in scientific publications, replacing the compulsory license (s. 23).

In addition, a restriction to the exception for copying for private use within businesses and enterprises is being considered.

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[115] Norway's *Act Relating to Copyright in Literary, Scientific and Artistic Works, etc.,* of May 12, 1961, amended by Law No. 27, June 2, 1995.
http://www.unesco.org/culture/copy/copyright/norway/fr_sommaire.html

[116] *Ibid.*

[117] *Ibid.*

[118] Information obtained from John-Willy Rudolph (see Acknowledgments).

Collective Management Organizations

All CMOs in Norway must have their existence approved by the Minister, acting on behalf of the King.[119] The various CMOs are required to have a *substantial* number of Norwegian rights holders within their ranks in the particular field concerned.[120]

Overview of a Specific Collective Management Organization

Established in 1980, KOPINOR represents (through its member associations) authors (journalists, photographers, illustrators, composers, and translators), publishers, and certain holders of neighbouring rights.[121] There are 21 societies under the umbrella of KOPINOR,[122] which licenses approximately 730,000 students and 80,000 teachers in 4,100 schools, 176,000 students and 22,600 university and college professors and support staff, 442,000 public servants at the national and local levels, and 17,700 companies and associations employing nearly 530,000 people.[123] KOPINOR also represents all non-member rights holders as a result of the extended collective licence agreement.[124]

Sweden

Sweden adopted its national copyright law in 1960;[125] ten years later, it joined the Nordic Commission. A national commission was set up in 1976 to review the state of copyright in Sweden.[126] The extended collective licence was added to Swedish law in 1986.[127]

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[119] Norway's *Act Relating to Copyright*, s. 38a.
[120] *Ibid.*
[121] http://www.ifrro.org/members/kopinor.html
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid*
[125] M.- .M. Krust, *Suède – Sommaire*. http://www.aidaa.org/matin/krust/suede.html. This is in French only.
[126] *Ibid.*
[127] *Ibid.*

Legislative Context

According to section 26(i) of the 1995 Act, a cable company may retransmit radio or television broadcasts when an agreement has been reached with a CMO representing an important number of rights holders in this field.[128] This agreement is thus extended to all rights holders, whether they are members of the CMO or not. However, the extended collective licence does not come into play in cases where the broadcaster is both the owner of the retransmission rights and the creative force behind a specific work.[129] The legal conditions attached to the extended collective licence in the cable retransmission area provide for a right to remuneration on an individual basis in addition to a mediation procedure if a dispute should arise. The law does not include a right to prohibit, however. Consequently, a rights holder cannot forbid the use of his or her work.[130]

Broadcasting a work via satellite is also regulated by the extended collective licence system. Section 26(d) stipulates that such a licence does not, however, apply in cases where the broadcasting corporation simultaneously transmits the program via a land-based transmitting device.[131]

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[128] *Ibid.*

[129] Krust, *supra* note 125.

[130] http://www.copyswede.se/english/engcent.htm

[131] Sweden's *Act on Copyright in Literary and Artistic Works*, Law No. 729 of December 30, 1960, amended by Law No. 1274 of December 7, 1995.
http://www.unesco.org/culture/copy/copyright/sweden/fr_sommaire.html

Section 13 of the Swedish Act applies to the use of works in the educational sector, which is also covered by an extended collective licence.[132] Thus, the act of recording a radio broadcast of a performance to use as an educational tool must comply with the extended collective licence.[133] In this particular field, a right to prohibit is granted to rights holders, and a right to remuneration on an individual basis is guaranteed; a mechanism for dispute resolution is also in place.[134]

Collective Management Organizations

The main CMOs in Sweden are **STIM,** which operates in the music field,[135] and **SAMI,** which represents the interests of music performers. Created in 1963 following a proposal from the Swedish Musicians Union, SAMI is in charge of the collection and distribution of royalties for radio transmission and public presentation of performances on sound recordings.[136] It also manages royalties collected in the field of private copying. **TROMB** oversees the rights of actors. **COPYSWEDE**, established in 1982, acts on behalf of many rights holders' organizations, especially in the sector of cable retransmission.[137] Finally, **BONUS-Presskopia,** created from the merger of BONUS and Presskopia in 1999, manages reprography, particularly in the educational and business sectors.[138]

[132] *Ibid.*
[133] Krust, *supra* note 125.
[134] http://www.copyswede.se/english/engcent.htm
[135] Krust, *supra* note 125.
[136] *Ibid.*
[137] *Ibid.*
[138] http://www.b-pk.se/files/english_index.html

The rights holders whose works are used under an extended collective licence have three years to present a request for remuneration to the relevant CMO.[139] The ways in which remuneration is made are set out not in the Act, but in contracts negotiated on an individual or collective basis between rights holders and users.[140]

Overview of a Specific Collective Management Organization

Responding to the educational sector's expressed need to make legitimate copies of excerpts from books, newspapers, periodicals, and other artistic and literary works, rights holders and users reached an agreement for reprography in this sector in 1973,[141] and the CMO called BONUS was created.[142] Presskopia, established in 1982, also managed reprography rights in the newspaper and periodicals sector.[143] The CMOs involved in the photography field merged with Presskopia in 1996.[144]

On January 1, 1999, BONUS and Presskopia merged to create a new entity, BONUS-Presskopia.[145] The new CMO has the power to grant licences in both the education and business sectors.[146]

A portion of the royalties collected by BONUS-Presskopia must be put aside in a special fund.[147] It is used to compensate rights holders in cases of infringement.

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[139] Krust, *supra* note 125.
[140] *Ibid.*
[141] http://www.b-pk.se/files/english_index.html
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*

The collective licence system established by Swedish law extends agreements struck between users and rights holders to all those who are not represented by the CMO involved in the negotiations. This type of licence is currently in force only in the educational field and applies only where an agreement is negotiated between, on the one hand, the state, a municipality, or another organization pursuing educational objectives, and, on the other hand, a CMO representing a *substantial* number of Swedish authors.[148] Only works of the same nature as those covered by the agreement will be included in the extended licence.[149] Authors retain the right to prohibit the reproduction of their works. They must, however, warn the CMO in charge of the negotiations of their decision. The CMO will, in turn, inform the interested parties of this fact. Finally, an author who is not a member of the CMO always retains the right to individual remuneration.

BONUS-Presskopia relies on statistical data to redistribute the royalties. The monies collected are divided among its various member organizations, which distribute the royalties to their members on their own terms. Some funds were established to provide financial support for the creation of scholarships and grants.[150]

[148] *Ibid.*
[149] *Ibid.*
[150] *Ibid.*