Copyright Collectives: Good Solution But for Which Problem?

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WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY

INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY

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I. Introduction

Collective administration of copyright (CA) has been touted as a solution to many of the ills of the copyright system and to many of the legal challenges brought about by the encounter between copyrights and the digital realm. It has been viewed

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as the magic bullet that bridges the unfortunate tradeoff between incentive and access, a mechanism that rewards creators while allowing unfettered access to their works. While not at all a new phenomenon—music performing rights have been administered collectively in many countries for most of the twentieth century—CA has recently proliferated across many other areas of copyright, often with enthusiasm. In the US, for example, proposals to create new forms of CA have been made by a spectrum of voices. Organizations such as the Electronic Frontier Foundation,¹ scholars,² and recently music industry lobbyists³ proposed such solutions as a way to move forward from the legal battles around online file-sharing wars. Justice Ginsburg proposed such a scheme as a possible solution to the concerns about gaping holes in electronic databases arising from the recognition of freelance journalists’ rights to prevent the inclusion of their works in such databases.⁴ Canada has taken such proposals more seriously. Several reforms adopted over the last two decades encouraged the collectivization of copyright management, motivated by the belief that the advent of digital technologies foreshadows a greater role for collective management.⁵ Consequently, some 34 copyright collectives,⁶ most of them new, have emerged, coupled with an expansion of the Copyright Board’s jurisdiction to set tariffs and levies on various uses, ranging from photocopying of printed materials to public performance of music, to private copying of sound-recordings, to ring-tones, and online music stores.⁷

Nevertheless, this trend has emerged with only scant attention to the actual roles that collectives play and the various rationales for their existence, and without a rigorous cost-benefit analysis of their operation. To date, most of the literature has focused on performing rights organizations (PROs). Conventional wisdom holds PROs are an efficient way to administer those rights, by reducing transaction

⁴ New York Times v. Tasini, 533 U.S. 483, 505 (2001) (suggesting that authors and publishers, and if necessary, Congress, may draw on numerous models for distributing copyrighted works and remunerating authors, and referring specifically to PROs and the blanket license).
⁷ The term ‘copyright collectives’ encompasses various types of organizations, with different mandates, structures, forms of governance and regulatory oversight. From this point on I will use the term ‘copyright collective’ to describe only the paradigmatic form of CA: an organization which administers discrete rights on behalf of their members or affiliates, grants blanket licenses and determines the price of these licenses (with or without regulatory oversight). These organizations will be distinguished from organizations that act as mere agents for numerous right holders, whereby the price and other license terms are determined by the individual copyright holder.
costs of various types. My previous work has been skeptical of this argument in the context of PROs. This chapter summarizes my earlier arguments and expands them to other types of CA.

My analysis starts with two related premises. First, in a liberal market-based economy, competition is the rule and monopolistic arrangements are the exception. Second, prices and other terms of trade are best determined by market players, not by government agencies. Accepting these premises, of course, does not preclude the possibility that in some situations competitive conditions will not function as well as expected. Some markets will be better served by a monopoly, and, occasionally, regulating such monopolies would be the best policy response. However, accepting these premises implies that departure from the competitive paradigm requires justification. Generally, such departure may be justified if monopolistic arrangements: (a) improve allocative efficiency (e.g., when economies of scale render production by a monopoly more efficient than production under competition); or (b) contribute to dynamic efficiency (such as in the case of intellectual property rights, properly designed). In some cases the law may allow, excuse, or encourage monopolization to promote some distributional or other political goals, but its justification will not always be found within the realm of welfare economics.

Most commonly, collectives are explained in terms of improving allocative efficiency. CA is often regarded as an indispensable way to efficiently license and enforce certain types of copyrights in the face of otherwise prohibitively high transaction costs. Other efficiency theories regard copyright collectives as institutions that solve problems of fragmentation or anticommons that might otherwise occur. Because all such theories maintain that CA improves remunerated utilization of copyrights, they are also compatible with the dynamic efficiency goals of copyright law. But a more straightforward view of copyright collectives as contributing to the dynamic efficiency goals of copyright would simply stress that augmenting the market power held by individual copyright holders increases their incentives to create. Lastly, CA, at least in some cases, may arguably be justified on distributional grounds as a variant of collective bargaining in labor contexts. CA allows authors to ‘use the power of collective bargaining to obtain more for the use of their work and negotiate on a less unbalanced basis with large multinational user groups.’

In this chapter I will argue that, with rare exceptions, efficiency-based justifications for CA are too weak to justify departure from the competitive paradigm and that


in most cases collusion and rent-seeking are the main drivers of the formation of copyright collectives. I suspect that only rarely will such rent-seeking be justified as a matter of policy, either as a way to improve the incentives to create socially valuable works or on distributional grounds.

The chapter is structured as follows: Part II surveys the various efficiency arguments made in favor of CA and their shortcomings, followed by Part III which demonstrates how new technologies further undermine many of these transaction-costs justifications. Part IV describes four cases, across various industries and jurisdictions, demonstrating how, contrary to accepted wisdom, right holders can easily enter into direct transactions yet choose to form collectives for reasons that have very little to do with efficiencies and very much to do with collusion and rent-seeking. Part V explores some situations in which transaction costs justifications for CA are more plausible, yet shows that in many of them collectives poorly address the problems they purport to solve. Part VI discusses the possible contribution of collectives to the incentives to create socially valuable works and Part VII asks whether CA can be justified on distributional grounds. Part VIII considers some options for containing the trend towards unnecessary collectivization. Part IX concludes.

II. Copyright Collectives: Efficiency Arguments

A. The classic argument

In *BMI v. CBS*,\(^\text{10}\) the US Supreme Court articulated the classic transaction costs theory of copyright collectives:

ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers ... [T]he costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose. A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided.\(^\text{11}\)

While *BMI* dealt with performing rights, this rationale behind CA has been applied to other types of rights,\(^\text{12}\) and, more generally, whenever the individual

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11 Ibid. at 20.
12 See, eg, MIHÁLY FICSOR, *WORLD INTELLECTUAL PROP. ORG., COLLECTIVE ADMINISTRATION OF COPYRIGHT AND NEIGHBORING RIGHTS* 63–65 (1990) (noting that users of reprographic reproduction
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exercise of copyrights seems impracticable. \(^{13}\) Essentially, this view regards CA as the optimal solution to a market failure that would otherwise occur due to prohibitively high transactions costs entailed by less centralized modules of licensing, monitoring, and enforcement. It assumes severe diseconomies of scale in the administration, licensing, and enforcement of copyrights under a normal competitive market structure. Therefore, it regards CA as an essentially pro-competitive arrangement. \(^{14}\)

1. Proves too much; explains too little

Nevertheless, despite its superficial appeal, closer examination reveals that this pro-competitive rationale fails to provide the necessary justification for abandoning the competitive paradigm because it simultaneously proves too much and explains too little. The transaction costs rationale proves too much because it fails to notice a subtle, yet critical, difference between acknowledging that management by individual authors on a per-work basis may be inefficient and concluding that pooling all works and setting a uniform price for them is the solution. Accepting that management by individual authors on a per-work basis may be inefficient only implies that management will be done by different sorts of intermediaries; it explains why we have different kinds of publishers, producers, agents, and content aggregators, not why it is necessary to have only one of them. In other words, the Court in *BMI* was correct in pointing out that a middleman was 'an obvious necessity' \(^{15}\) but failed to explain why this necessity dictates only one middleman as opposed to competing middlemen, \(^{16}\) offering a greater quantity and variety of licenses at different sizes and shapes and sold at lower prices.

Moreover, the theory does not convincingly explain why we shouldn't assume that beyond some point, copyright management would be subject to diminishing rights and the rights concerned by simultaneous and unchanged retransmission of broadcast programs face similar problems in identifying, seeking authorization from, and remunerating the relevant copyright holders.

13 See, eg, Gervais, n. 9 above ('Collective management of copyright was promoted as an effective way for authors and other right-holders [...] to monitor, and in some cases, control certain uses of their works that would be otherwise unmanageable individually due to large number of users worldwide or due to the development of new technologies.'). See also WORLD INTELLECTUAL PROP. ORG. ET AL., WIPO PUB. NO. 922(E), FROM ARTIST TO AUDIENCE—COLLECTIVE MANAGEMENT OF COPYRIGHT, (2007), at <http://www.wipo.int/freepublications/en/copyright/922/wipo_pub_922.pdf> ('... in many cases it is impossible to negotiate individual licenses or permissions for dissemination of works. Think of playing songs on a radio station, showing a movie on a cable network, or performing a play in theaters around the world: there is no way each user could remunerate each individual creator or rights holder every time a work is accessed or enjoyed. In many of these cases rights are managed through the system of collective management. ' Ibid. at 6).

14 See, eg, NCAA v. Board of Regents of Univ. of Okla., 468 U.S 85, 103 (1984) (characterizing PROs as an example of 'a joint selling arrangement [that] may be so efficient that it will increase sellers’ aggregate output and thus be pro-competitive').

15 BMI, n. 10 above.

16 I acknowledge that in the US there are three PROs and not just one, but neither the Court, nor commentators base their endorsement of CA on competition among PROs.
returns to size and scope. It also fails to explain why we shouldn’t assume that competitive markets are quite capable of providing incentives for the efficient formation of intermediaries and their pricing decisions. In fact, the theory must assume that copyright management is a form of natural monopoly and that the marginal utility from adding an extra work to the bundle never diminishes and always outweighs the inefficiencies caused by lack of competition. Because the theory fails to delineate the limits of efficient intermediation, and because it sloppily assumes that if an intermediary is necessary then having a single intermediary is desirable, the theory proves too much.

In addition to proving too much, the transaction costs rationale simultaneously explains too little by ignoring the roles intermediaries actually play in the production, licensing, and distributions of copyrighted works. The theory does not tell us what distinguishes rights that are commonly administered collectively (such as performing rights) from rights that are administered individually (e.g., the production of books, CDs, the distribution of films, or the licensing of video games). In each of these cases the products are often comprised of numerous distinct rights initially owned by distinct authors, and sold or licensed to thousands of diverse users worldwide. In each of these cases it would be prohibitively costly for users to negotiate with separate individual authors. But generally, one of the most important functions that publishers and producers perform is obtaining or clearing the rights from the relevant owners and packaging those in a product delivered to users. The transaction costs theory of copyright collectives fails to explain what prevents the myriad middlemen who already exist from acquiring all the rights necessary for users and including them in the bundle of rights that they license them.

Moreover, the theory fails to account for the fact that many industries in which copyright collectives operate are quite concentrated. In the music industry, for example, four multinational ‘majors’ control more than 80% of the market for pre-recorded music. Each of the majors has its own publishing house, which often represents other independent publishers and self-publishing songwriters. It is quite plausible that even in the absence of collectives most users could secure access to reasonably wide repertories through only a limited number of contracts.

**B. Monitoring and enforcement**

Nevertheless, among the classic transaction costs rationales for CA, one explanation seems more credible than the others: economies of scale in monitoring and enforcement. These functions do exhibit true characteristics of a natural monopoly, because the per-work cost of monitoring infringement and enforcing the rights

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17 See *The Potential Demise I*, n. 8 above, at 551–53.
18 See ibid. at 575–76.
seems to fall as the number of works increases.\textsuperscript{19} In the extreme (yet highly frequent) case, when all the relevant rights in a given territory are administered by a single collective, monitoring and proving an infringement can be done at the lowest cost. Instead of constantly monitoring every user in order to know whether any of an owner's works have been infringed, the collective only needs to know (and later prove in court) that a user has used works of the type administered by the collective without obtaining a license.\textsuperscript{20} Moreover, when collectives prevail on the issue of infringement, courts tend to issue an injunction prohibiting the continued unauthorized use of any of the works in the repertoire of the collective, not only the ones identified to have been performed.\textsuperscript{21} Obviously, such a remedy is much more effective in securing compliance in the first place.

Nevertheless, despite the clear efficiencies in monitoring and enforcement it is less clear that they should justify CA. First, it is not clear whether the gains from these cost savings outweigh the costs of eliminating competition. The US experience provides an insightful counterfactual. Two of the three PROs in the US (BMI and ASCAP) represent more than 90% of the worldwide music repertoire. SESAC, despite its considerably smaller size, continues to thrive. It does not face a significant comparative disadvantage with respect to monitoring or enforcement, and it remains attractive to creators. Therefore, it seems quite plausible that reasonably efficient monitoring and enforcement can be achieved on a scale smaller than the entire world repertoire.

Second, even if monitoring and enforcement do tend to exhibit characteristics of a natural monopoly, the case for collective licensing of music is much weaker. Thus, it might be possible to separate monitoring and enforcement from licensing. The first function would be carried out collectively while the latter by the copyright holders or their agents.\textsuperscript{22}

The classic economic theory of copyright collectives has focused on transaction costs in the narrow sense: on highlighting the low value of an individual work relative to the costs of licensing, monitoring, and enforcing the copyrights in this work. The theory assumes that because the costs of administering the work outweigh the benefit that a user can derive from the work, a suboptimal number of transactions will take place.\textsuperscript{23} The preceding discussion highlighted the flaw in this perceived market failure. The following discussion will explore additional and more recent theories. The first maintains that copyright collectives prevent a possible "tragedy


\textsuperscript{22} See \textit{The Potential Demise I}, n. 8 above, at 559.

\textsuperscript{23} Exactly the same type of market failure is often used to explain and justify a diametrically opposite solution: fair use and other exceptions, see Wendy J. Gordon, \textit{Fair-Use As Market Failure—A Structural and Economic Analysis of the Betamax Case and Its Predecessors}, \textit{82 Colum. L. Rev.} 1600 (1982).
of the anticommons’. The second suggests that bundling very large number of works may achieve simultaneously both higher profits and greater access.

C. Collectives and anticommons

Parisi and Depoorter have suggested that the public performance of music might be a victim of the tragedy of the anticommons if the performing rights for the individual compositions are complementary inputs.24 If true, then CA may indeed lead to lower prices and greater output compared to their levels under competition.25

While anticommons theory provides a seemingly attractive framework for understanding the phenomenon of copyright collectives, it is important to identify the kinds of situations in which fragmentation would actually lead to an anticommons tragedy. Generally, three types of situations are prone to anticommons problems: (1) jointly created individual works; (2) when users need to combine separate complementary works; and (3) when users purchase an indivisible compound product but need separate licenses for each of its components. As will be seen below, upon closer examination it becomes apparent that while in many situations CA solves the problem, it does so in an excessive manner compared to the extent of the problem or to alternative more competitive solutions.

At the level of the individual work, it is not uncommon that the different copyrights are held by more than one copyright holder, such as when the composer and the lyricist in a song are different individuals. This may lead to an anticommons problem, because each of the copyright holders, by withholding his consent, can effectively veto the utilization of the song. Obviously, CA could solve the problem by pooling the rights of all right holders. Nevertheless, the solution seems excessive. In the case of individual works, right holders can anticipate the anticommons problem ex ante, or experience it ex post when their song will be less marketable relative to others. Therefore, they can act to increase their profit by transforming their song into a marketable cleared-parcel of rights by authorizing each other, only one of them, or a third party to grant licenses for the parcel as a whole. It is true that once property rights have been fragmented, rebundling them could be a costly enterprise (and sometimes too costly),26 but the competitive advantage of non-fragmented works might provide writers with the proper incentive to avoid


25 Ibid. at 33–36.

fragmentation in the first place.\textsuperscript{27} Accomplishing this should not be too problematic. In many cases, works are the product of team effort by several creators, who are often players in a repeat game and are therefore less susceptible to opportunistic behavior by one towards the other. Even when distinct creators cooperate on an \textit{ad hoc} basis, the producer, who clears the rights necessary to produce the work, can clear the rights necessary for its subsequent uses in order to maximize the potential for commercial viability of the works.\textsuperscript{28}

Therefore, like previous efficiency arguments, the anticommons argument, applied to this scenario, proves too much. Overcoming the problem of fragmentation at the level of the individual work only requires rebundling the different rights in each \textit{work}; there is no need to bundle the entire worldwide repertoire of works of the same type.\textsuperscript{29}

Even if all right holders made their works available in the form of cleared-parcels, the tragedy of the anticommons might still occur if different works are complements in the production of some subsequent product of service. Consider songs again. If for some reason a user needs to play very specific songs in some fixed proportion, eg, for a radio program, these songs become complementary inputs in the production of this program. Because each right holder will be able to veto the program's production, it will be governed by an anticommons regime—a tragic outcome indeed, but arguably avoidable if all songs are licensed by one collective.

The flaw here lies in the unrealistic assumption that songs are strict complements.\textsuperscript{30} In most cases, despite users' need for a variety of songs (a radio station cannot repeat the same song without alienating its audience), economically songs remain substitutes rather than complements.\textsuperscript{31}

One occasion which may give rise to an anticommons problem is when a user purchases an indivisible compound product but needs to get a further license for each of its components. Consider, for example, a bar that publicly performs music by delivering radio or television broadcasts to its patrons, or theatre owners that perform the music synchronized into the soundtrack of a film. Once the user decides to perform a particular radio or television program or exhibit a film, all the underlying copyrighted works are indeed complements; each right holder of each underlying copyright can effectively veto the performance of the film or the program, and

\textsuperscript{27} Note that in general co-authors or co-owners of copyrights can each grant non-exclusive licenses to use the work, which provide a defense to a claim of infringement brought by the non-licensing joint owner, see 2 William F. Patry, \textit{Patry on Copyright} § 5.7 (2009). This rule can be regarded as a legal device to minimize anticommons problems.

\textsuperscript{28} For real-life examples, see The Potential Demise I, n. 8 above, at 562.

\textsuperscript{29} Just as solving problems of fragmentation of ownership in a single tract of land (eg, when several heirs cannot agree on what to do with it) normally would not require creating a monopoly that will be the sole owner of all the land in the country.

\textsuperscript{30} For example, during an official visit of a foreign head of state, an orchestra may need to perform the national anthems of both countries. In such case, both songs are strict complements. Someone may lose his job for substituting another song for the anthem. Such examples are rare.

\textsuperscript{31} See The Potential Demise I, n. 8 above, at 563–65.
no substitute is available. In this case a blanket license issued by a PRO is clearly preferable to protracted individual negotiations. But here, again, collective licensing is overkill. Source-licensing (when the producer of the work licenses the rights that users need to exploit the work) is an equally effective, yet more competitive solution. Had the producer of the program or the film been authorized to permit the public performance of the works included therein, no anticommons problem would have arisen.\(^{32}\)

In addition to proving too much, the anticommons argument explains too little because in practice, as will be demonstrated below, in their rush to extract monopolistic rents by assigning different rights to different collectives, copyright holders have created a new type of fragmentation and anticommons. When a single activity, such as distributing a song online, requires not only the authorization of the recording label but additional simultaneous authorization from one or more collectives, collectives may actually perpetuate the very problem of fragmentation they purport to solve.

D. Copyright collectives and ‘economies of aggregation’

Work on the economics of bundling has inspired yet another justification for CA, especially in the digital realm. Professor Jacques Robert maintains that even if the classic transaction costs justifications for CA no longer hold, copyright collectives present an efficient mode for administering copyrights because they bundle large repertories of works under a single blanket license. Such bundles are attractive, according to Robert, because they allow right holders to extract revenues while limiting the deadweight losses otherwise associated with the pricing of copyrighted works on a per-work basis.\(^{33}\)

Robert relies on the work of Yannis Bakos and Erik Brynjolfsson who showed that the Internet, by significantly reducing the marginal cost of producing and distributing digital information goods, gave rise to the emergence of large-scale bundling, driven by ‘economies of aggregation.’\(^{34}\) Economies of aggregation emerge

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\(^{32}\) It is noteworthy that in *Twentieth Century Fox v. Aiken*, 422 U.S. 151 (1975), the Court held that a restaurant owner did not infringe the public performance right when he performed radio broadcasts in the restaurant. One of the Court’s reasons was that since copyright holders receive royalties in proportion to advertising revenues of licensed broadcasters, and a broadcaster’s advertising revenues reflect the total number of its listeners, including those who listen to the broadcasts in public business establishments, requiring the restaurant owner to pay would constitute double charge on the same rendition of music. In a way, by refusing to allow such double charge, the Court constructively found that the music had been source-licensed to the radio stations. The *Aiken* holding was narrowly codified in the 1976 Copyright Act, exempting ‘the public reception of a transmission embodying a performance of a work on a single receiving apparatus.’ See 17 U.S.C. § 110(5).


because a seller may more easily predict how a consumer will value a collection of goods than how she will value any individual good. For example, while a newspaper publisher may find it extremely difficult to predict the value each reader puts on news as opposed to sports (or the value put on every article in each section) it is easier to predict how much she will be willing to pay for the entire newspaper. As a result, a seller typically can extract more value when an information good is part of a bundle than when it is sold separately. At the optimal bundle price, the number of consumers who will find the bundle worth buying will be greater than the number of consumers who would have bought the same goods if sold separately. Because of the predictive value of bundling, large aggregators will often be more profitable than small aggregators, including sellers of single goods. Bakos and Brynjolfsson also predict that large bundlers may be able to out-compete other sellers both in the upstream competition for content (when purchased on an exclusive basis), and in the downstream competition for consumers.

While such economics of aggregation can explain why large-scale bundles might emerge, why licensors might use blanket licensing, and perhaps why some mega-bundlers might dominate some markets, it is not obvious that the theory can sufficiently justify CA and its designation as a policy of choice. Like other justifications for CA, the bundling argument proves too much because it fails to recognize the subtle, yet critical, difference between acknowledging that bundling can be efficient and concluding that bundling everything is always efficient. It must assume that at no point will there be offsetting diseconomies of scale. 35

Thus, rather than insisting on a single (typically regulated) bundler, it would make more sense to let the market determine the number, size, and shape of the bundles offered. 36 A crucial policy question here is whether the relationships between the bundler (or the collective) and the content owners are exclusive or whether content owners have only given the bundler (or the collective) the non-exclusive right to grant licensees on their behalf. The first option would tend to cement the dominant position of an incumbent bundler, whereas the second option would allow greater competition.

Further, the claimed benefit of the large-scale bundle must be exaggerated in the case of CA. Collectives typically only license specific uses of copyrighted works, but do not distribute the works themselves. The user, then, can only use works copies of which she had previously purchased not as part of the collective's mega-bundle. Therefore, if bundling is efficient, these efficiencies will be offset by the inefficiency of unbundled distribution.

35 Ibid. at 69.
36 In fact, Bakos & Brynjolfsson compare the case of competition between two bundlers offering non-overlapping bundles and a single mega-bundle. They show that even when consumers purchase two bundles, consumer surplus is increased and deadweight loss is minimized compared to when the two bundlers merge, Ibid. at 73–74.
III. Transaction Costs and New Technologies

Regardless of the flaws in the various transaction costs theories, the advent of new digital technologies undermines the justification for CA even further. In particular, the Internet, Digital Rights Management (DRM) technologies (either Rights Management Information systems (RMI) or Technological Protection Measures (TPM)), and computerized automatic scanning of broadcasts and other performances reduce many of the relevant costs associated with the administration of various copyrights.

The Internet’s cost-reduction possibilities need no introduction. If proper online databases with adequate search capabilities are maintained, law-abiding users can easily identify the relevant right holders in every work they need licenses for. If right holders are ready to grant licenses online (either by themselves or, more realistically, with the aid of intermediaries) the Internet could facilitate a low-cost alternative for CA.

The Internet, of course, could be used not only for licensing but also for efficiently bundling licensing with the distribution of the content itself, as demonstrated by the growth of authorized online music services such as Apple’s iTunes. DRM systems (whether by combining RMI and TPMs or using only RMI) facilitate the process and provide copyright holders with an efficient mechanism for effectively controlling the use of their content, for collecting money, and for distributing the proceeds.37

Several observations about the emerging online music services are instructive. First, despite Apple’s iTunes’ prominence in the market, online distribution of music seems to be developing into a competitive business, with additional entrants joining the game.38 Second, the repertoires of all major services are largely overlapping; all of them offer the repertoires of the major music groups, as well as songs from independent artists and record labels. These repertoires are smaller than the entire worldwide repertoire currently offered by PROs, but it does not seem that an ability to offer the entire worldwide repertoire is considered imperative by those services. Apparently a smaller scope of songs satisfies most of their customers’ needs.

37 I note that recently online music services and music labels began shifting away from implementing TPMs, see eg, Jenna Wortham, Report: RIP DRM, As Last Major Label Plans to Ditch Restrictions, THE UNDERWIRE, WIRED BLOG NETWORK (Jan. 4, 2008), at <http://blog.wired.com/underwire/2008/01/drm-free-future.html> This trend is not inconsistent with my argument. The power of the new technologies to facilitate competitive administration of copyrights depends primarily on RMI systems rather than on TPMs. Beyond controlling access to the supplier’s website or to downloading the files, TPMs are not essential for such business models. What is crucial is an effective RMI system that can facilitate collecting money and distributing it to the various eligible right holders.

38 I am not arguing that online music distribution markets are perfectly, or near perfectly, competitive; my only point here is that it seems clear that there is room for more than one competitor in the market. See generally, THOMAS O. BARNETT, U.S. DEPARTMENT OF JUSTICE, INTEROPERABILITY BETWEEN ANTITRUST AND INTELLECTUAL PROPERTY (2006), at <http://www.webcitation.org/S0lOOGYD>. 
This finding suggests that the assertion in BMI that most users want access to ‘any and all of the repertory of compositions’ is exaggerated. Access to a reasonably large repertoire is probably sufficient.

Interestingly, however, none of these services offers the licensing of performing rights, or any other rights currently administered collectively, although one could easily envision a DJ in a bar or a musical editor in a radio station using a service like iTunes for purchasing songs with the accompanying performing rights, instead of obtaining these rights from a PRO. The reason why a hypothetical ‘iTunes for Business’ service doesn’t exist cannot be technological. More likely, the existence of collectives which set license fees at monopoly rates provides little incentive for right holders to expand the scope of rights that services like iTunes are authorized to grant.

The next category of technological advancements influencing the costs of copyright administration pertains to the areas of monitoring and enforcement, the only activities which might plausibly be thought to have the characteristics of a natural monopoly. Until recently, monitoring was a low-tech enterprise. In order to know whether music had been publicly performed, what music had been performed and by whom, copyright holders would have had to physically monitor every user on a constant basis. The futility of such monitoring technology is obvious. PROs issuing blanket licenses provided a cost-effective alternative by making it easy to distinguish between licensed and unlicensed public performers, while detailed reports by broadcasters indicating the music they had played, and surveys in the case of other users, were used to estimate what music was performed and distribute the royalties accordingly.

All of this seems to be changing dramatically. Technologies that enable computerized automatic scanning and tracking of all songs, jingles, movies, and video clips as they are aired are currently available. Such technologies can allow copyright holders to accurately know which of their works have been broadcast and by whom. Suppliers of such technologies automatically scan broadcasts (including Internet radio) and then can issue detailed reports on what music had been played, when, and by whom. All US PROs currently use such systems. It is not imperative, however, that only PROs use them; they could be used by individual publishers or even individual artists and music professionals, buying the service from third parties. As a result, efficient monitoring can be done on a much smaller scale than before, without a collective.

39 BMI, n. 10 above.
40 Access to each and every song is no doubt ideal, but the question is whether the marginal benefits justify the cost. Moreover, since collectives typically do not distribute the content, the blanket license practically applies only to the content which the user already has. Therefore, the benefits of access to ‘any and all of the repertory’ is overrated.
41 See The Potential Demise II, n. 8 above, at 250.
42 See ibid at 252.
43 Ibid.
PART III: PUBLIC ORDERING

In sum, new technologies have reduced the costs of many aspects of copyright administration: delivery of content, licensing, collection of monies, even monitoring and enforcement, thus opening opportunities for efficient management of copyright on scales smaller than before. This doesn't imply that authors would administer their rights individually, only that various intermediaries of different sizes may do so.

IV. Source-Licensing

When questioning the various transaction-costs rationales for CA, I previously suggested that producers are often well situated to obtain not only the rights necessary to produce the work but also the various rights users need for exploiting it, a practice sometimes known as 'source-licensing'. In the following paragraphs I describe four examples of source-licensing, demonstrating that publishers and producers can and often do overcome the alleged transaction costs used to justify CA. The examples are also interesting because they all deal with transitions towards or away from CA, or describe situations where efficiency cannot explain why the same rights are source-licensed in one jurisdiction or one sector but collectively administered in others. The first example is the story of music in the US motion picture industry, where regulatory intervention forced a shift from CA to source-licensing. In the other examples, the industry moved in the opposite direction: from source-licensing or conditions that clearly enable source-licensing to a collective model. The examples teach two lessons: first, rent-seeking and collusive behavior, not efficiency, often better explain the adoption of CA. Second, when regulators are vigilant enough, source-licensing can serve as a viable alternative to CA more frequently than usually thought.

A. Source-licensing in the US motion picture industry

When a film is publicly performed in a theater, the theater owners must obtain a license to publicly perform it. Normally, the producer holds the copyright in the film. But the producer is only the first owner of her original creation, namely the cinematographic work, but not necessarily of other works incorporated into the film.44 So when music is synchronized into the soundtrack of a film, the producer must obtain a synchronization license from the copyright holders, and when the film is publicly performed, unless the producer holds the music rights or was authorized to license them, an additional and separate license to publicly perform the music is required.

44 Except in the case of works made for hire.
Prior to 1948, American music publishers would only grant film producers the right to synchronize music, not the right to publicly perform it or authorize theaters to perform it. Theater owners could obtain this right only from a copyright collective, usually ASCAP. Separating the right to perform the film from the right to perform the accompanying music made sense when films were silent and music was live. But subsequent to the advent of sound films, separating the licensing of the film from its soundtrack made little economic sense. Soon, however, it made good business sense for copyright owners and film producers.

When music is embodied in a film, the rights in the cinematographic work and the rights in the music become strict complements—one cannot publicly perform the one without the other. If two complements are sold separately, and one is sold by a monopolist, the monopolist can set a monopoly price deriving from the combined product’s demand curve rather than from that of its own input. Thus, by monopolizing music, ASCAP members could transfer to themselves a large portion of the film’s value. The films themselves were licensed by producers competing among themselves thus permitting theater owners to retain more of consumer surplus; ASCAP would then reap this surplus. Good for ASCAP; bad for theater owners.

But this situation is not optimal for film producers either. Since the film and the music are complements, monopoly-priced music reduces the demand for the film and the concomitant producer’s profit. Therefore, one can wonder why a producer wouldn’t insist on obtaining both rights when negotiating with right-holders prior to producing the film, as they did when contracting with non-ASCAP composers. One explanation is that prior to the US government antitrust intervention, ASCAP members assigned their performing rights to ASCAP and as a result could not have licensed those rights to producers. Another explanation is that the producers themselves realized that if ASCAP was a tool for appropriating monopoly rents from films, they could be better off by sharing those profits. And indeed, by the late 1920s the film studios bought controlling interest in several of the major music publishers thus gaining substantial influence over ASCAP. Therefore, by integrating into music publishing and maintaining the separation between the competitive licensing of films and the monopolized licensing of the music embodied therein, film studios could get additional profit, beyond that which they could earn while competing with other film producers. In fact, because of the complementarity between the film and the synchronized music, licensing the music separately and charging a

46 Richard E. Caves, Creative Industries: Contracts Between Art and Commerce 304 (2000). See also Alden-Rochelle, n. 45 above, at 892–93. According to Caves, the studios’ main reason for integration into music publishing was their early realization of the existence of spillovers between the film and the music embodied therein (for example, that music embodied in film could boost the demand for the music in other embodiments). This explanation is not inconsistent with the proposition that doing so allowed them to share in the monopoly rents appropriated by ASCAP.
monopoly price for it forced theater owners to pay a total price for the movie that was likely closer to what the film studios might have charged had they been allowed to collude and fix the price of films.\textsuperscript{47}

In 1948, however, this practice was brought to an end. After two successful antitrust challenges by theater owners of ASCAP’s licensing practices,\textsuperscript{48} ASCAP was prevented from collectively administering performing rights of music in films. Consequently, copyright owners were effectively compelled to license performing rights to film producers directly, a practice known as ‘source-licensing.’ Those decisions were subsequently incorporated into the 1950 consent decree entered into between the US Department of Justice and ASCAP, following the government antitrust challenge of ASCAP’s many practices.\textsuperscript{49}

In practice, however, source-licensing of music in films is limited to the US. A typical US motion picture synchronization license agreement grants producers performing rights in movie theaters and other public venues in the US, but explicitly excludes television performance in the US and all other forms of public performance outside the US. The license provides that the producer can only authorize US television performances by entities having separate performance licenses from ASCAP, BMI or the relevant publisher, and, in the case of public performance outside the US, that such performances shall be subject to clearance by foreign PROs.\textsuperscript{50} A typical television synchronization license agreement grants television producers only the right to synchronize a composition and explicitly stipulates that the performance of the composition requires a separate performing license.\textsuperscript{51} It seems that the only difference between theatrical performance in the US (the right for which is source licensed) and other forms of performances (where source licensing does not exist) stems from the provisions of the consent decree, which are confined to US theatrical performance. The decision to limit source licensing to the US motion

\textsuperscript{47} To illustrate this point, assume that the price of a new car in a competitive market is $20,000 but would rise to $25,000 if car manufacturers were able to form a cartel. Now assume that steering wheels are subject to a patent pool owned collectively by the car manufacturers and that the right to use the steering wheel is licensed separately from the car. Since a car without a steering wheel is worthless, consumers who would be willing to pay $25,000 for a new functioning car would be willing to pay the competitive price for a car body ($20,000) plus an additional $5000 for the steering wheel. While the price for the car body seems as competitive as before, monopolizing the rights to the steering wheel and licensing them separately from the car would allow the car manufacturers to charge the same overall price for a complete car as they would have had they formed a price-fixing cartel.

\textsuperscript{48} Alden-Rochelle, n. 45 above; M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948), appeal dismissed per curiam, 177 F.2d 515 (8th Cir. 1949).

\textsuperscript{49} Section IV(E) of the 1950 Consent Decree enjoins ASCAP from granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theater exhibitor concerning any motion picture performance rights, see United States v. ASCAP, 1950-51 Trade Cases (CCH) Par. 62,595 (S.D.N.Y. 1950).

\textsuperscript{50} See Synchronization License for Motion Picture Theatrical and Television Exhibition Only in AL Kohn & BOB Kohn, Kohn on Music Licensing 791 (3d ed. 2002). Source-licensing should be distinguished from music that has been composed specifically for the film or program. In that case, being a Work Made for Hire, the producer is considered the author, see eg, 17 U.S.C. § 101, § 201.

\textsuperscript{51} See Television Synchronization License in Kohn & Kohn, n. 50 above, at 800.
picture industry cannot be attributed to the industry’s unique economics but rather
to the fact that a consent decree reflects a regulatory compromise, not necessarily
an optimal policy.\(^\text{52}\)

While the motion picture example demonstrates a rare regulatory-induced move
from CA to source-licensing, the following examples will demonstrate moves or
attempts to move in the opposite direction—away from source-licensing towards
CA. As will be seen, none of these situations could be explained on efficiency
grounds.

B. Israel: TV creators establish a new copyright collective

In Israel, a struggle recently took place between TV commercial broadcasters,
independent producers, and writers’ and directors’ lobbying groups. Most of the
production of local TV programs is outsourced by commercial broadcasters to
independent producers, which, in turn, enter into contracts with creators: often fre­
lance writers, directors, actors, and others. Source-licensing, whereby creators
would vest their copyrights in the hand of the producer, had been a common practice
in the industry; the producer could then grant all necessary rights to broadcasters.
It seems that transaction costs efficiency would dictate such a structure. In 1999,
however, two trade organizations, the Writers Guild of Israel and the Israel Film
and Television Directors Guild established a new copyright collective named
TALI\(^\text{53}\) whose main mission was collecting royalties for the public performance of
audio-visual works by broadcasters. For this purpose, TALI demanded that all its
newly recruited members sign a document assigning to TALI all their existing and
future public performance rights in their works.\(^\text{54}\) It then instructed its members to
include in every contract with a producer a specific clause (TALI Clause), which
purports to exclude the public performance right from the bundle of rights assigned
to the producer. This would enable TALI to collect directly from broadcasters and
distribute to each member her share of the resulting total monopoly profit. The
creators’ motivation is clear and quite understandable. With source-licensing each
of them can only get the competitive rate for her work, which, perhaps with the
exception of a few star-creators, may not be as high as they would hope. Moving to

\(^{52}\) Because ASCAP had lost *Alden Rochelle and Witmark* it probably could not oppose incorporating
their practical consequences into the consent decree, but the US Department of Justice probably could
not or was not sufficiently motivated to force ASCAP and its members to agree to wider exceptions
to their collective practices.

\(^{53}\) TALI—The Collecting Society of Film and Television Creators in Israel, Ltd., see <http://tali-rights.
org.il> (in Hebrew).

\(^{54}\) See Pessach, n. 9 above, at 642. While there is no question that a freelance script writer, absent an
agreement to the contrary, is the first owner of the copyright in the script, it is not yet settled under Israeli
copyright law whether and to what extent writers and directors have copyright as co-authors in the sub­
sequent audio-visual work. Part of TALI’s activities was petitioning the courts to recognize directors’
rights. On at least two occasions it had been successful, ibid. at 643.
a collective model allows them to get a share of a monopolistic rent, and retain a
greater share of the surplus created by their broadcast works.

So far TALI’s success record has been mixed. Initially most broadcasters were
not highly impressed, insisting that they had cleared all necessary rights through
their contracts with producers. Relying on their superior bargaining positions as
being ones of very few outlets available for Israeli creators, they refused to negotiate
with TALI. Moreover, the Tel Aviv District Court has largely sided with a defen­
nant broadcaster. It is also unclear how successful TALI has been in obtaining
compliance with its instruction to include the TALI Clause in contracts with pro­
ducers as the Producers’ Union advised its members to include a Counter-TALI
Clause which would reserve all rights to the producer. Nonetheless, the Writers
and Directors’ Guilds have been highly successful in attracting favorable public
opinion and political will by portraying their struggle as of one between Davids and
Goliaths: poor artists, struggling to pay their bills, against greedy broadcasting
capitalists. They succeeded in persuading the commercial TV regulator to include
a commitment to negotiate with TALI in all bids for commercial TV franchises.
Thus, the move from source-licensing to CA would not reflect a response to a trans­
action costs market failure; after all, the market worked with source-licensing in
place. More likely it would reflect a political choice to increase the rents available
for these sympathetic creators.

Nevertheless, TALI’s ultimate success likely depends on its ability to persuade
both its members and producers to adopt the TALI Clause, but producers’ interests
do not seem to favor that. Therefore, one lesson that TALI might want to learn from
the history of other collectives is that by admitting the producers into the collective
and splitting the monopoly rent with them the interests of the creators and the pro­
ducers would align instead of diverge.

C. Canada: new tariff affecting online music stores

The next example, from Canada, concerns the decisions of the Copyright Board,
approving separate tariffs proposed by CMRRA/SODRAC and SOCAN for online

55 CC (T.A.) 1217/06, Peled v. Matav—Cable Sys. Media, Ltd. et al., 2006(2) TAKDIN-MEHOZI 5771.
In this case the plaintiffs, TALI members, sued a broadcaster for copyright infringement by broadcast­
ning works created by the plaintiffs. The broadcaster was authorized to broadcast the works by their
producers. Some of the works were produced under a contract containing the TALI Clause. However,
the court regarded the agreement between the creators-plaintiffs and TALI as only establishing an
agency relationship between the creator and TALI, authorizing TALI to negotiate on his behalf, which
terminated when the creator chose to negotiate on his own behalf.

archived at <http://www.webcitation.org/5ia6TdVjY> (in Hebrew). The Israeli Antitrust Authority has
started probing TALI and its activities. Although no action has been taken to date, the probe itself may
have chilled TALI’s zeal.

57 Pessach, n. 9 above, at 644.
music services.\textsuperscript{58} Online music services, such as Apple’s iTunes, allow their customers to purchase and download songs. These songs are reproductions of sound recordings as well as of the underlying musical works. When the record labels producing these songs sell them as CDs they have acquired all the necessary rights to reproduce the works and distribute copies. But when the same songs are sold online as digital files, further reproduction of the works is done by the online sellers, who authorize their customers to download the files and often make additional copies. Technically, these reproductions and authorizations require a license as well. In the US, record labels generally secure all the necessary rights and provide them to online services for one fee.\textsuperscript{59} In Canada, however, record labels can only grant online services the right to reproduce the sound recording, but the right to reproduce the musical work must be licensed separately and can be obtained from two copyright collectives, CMRRA and SODRAC through their jointly owned corporation, CSI. Moreover, the Copyright Board had previously held that the online distribution of the songs also constitutes ‘communication to the public by telecommunication’, which is a separate right requiring a separate license.\textsuperscript{60} In Canada, such a license can only be secured from a collective, yet a different collective: SOCAN, which indeed filed a separate tariff.\textsuperscript{61} But if online distribution of songs is indeed ‘communication to the public by telecommunication’, then under section 19 of the Copyright Act online sellers are liable to pay ‘equitable remuneration’ to the NRCC,\textsuperscript{62} another collective, who will divide such royalties between the performers of the recorded songs and the producers of the sound recordings—the same record labels with which the online sellers have already negotiated.\textsuperscript{63}

The Copyright Board did not consider the necessity of collective licensing in this area, but I doubt that it could be seen as necessary. It would seem rather strange that the market can handle the production and distribution of songs embodied in CDs


\textsuperscript{62} The Neighbouring Rights Collective of Canada.

\textsuperscript{63} So far, no such tariff has been proposed to the Copyright Board.
with no impeding transaction costs, whereas online distribution of the same songs, generated from the same master recordings, cannot be done efficiently without collectives. It would seem even stranger if it were the case that source-licensing functions well in the US, but would not function well in Canada. Again, rent-seeking explains this situation much better than concerns for efficiency. Moreover, it seems that CA in this case only hampers the development of online music services by turning the market into an anticommons through overlapping royalty requirements.

D. Belgium: newspapers’ collective sues Google

The last example is a Belgian case in which Google was sued by Copiepresse, a copyright collective representing Belgian daily newspapers in French and German.\footnote{Founded in 2000, Copiepresse issues licenses and collects license fees for activities such as photocopying and online reproduction; it also distributes blank-media levies among its members, see <http://www.copiepresse.be/copiepresse.php?id=2> (in French), archived at <http://www.webcitation.org/5dyb985jZ>.

\footnote{Google v. Copiepresse, Case No. 06/10.928/C, Court of First Instance of Brussels, at <http://www.webcitation.org/5OOQptZVW>.

\footnote{‘A robots.txt file provides restrictions to search engine robots (known as “bots”) that crawl the web’, Google, How do I use a robots.txt file to control access to my site? (2007), <http://www.webcitation.org/5OOXPKFCd>.

\footnote{Google v. Copiepresse, n. 65 above, at para. 5.

\footnote{Ibid.

\footnote{For excellent analysis of these issues from a US perspective, see Oren Bracha, Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property, 85 TEx. L. REV. 1799 (2007).}}}

In 2007 the Brussels Court of First Instance ruled in favor of Copiepresse.\footnote{\footnote{GoogLe v. Copiepresse, Case No. 06/10.928/C, Court of First Instance of Brussels, at <http://www.webcitation.org/500QptZVW>.

\footnote{‘A robots.txt file provides restrictions to search engine robots (known as “bots”) that crawl the web’, Google, How do I use a robots.txt file to control access to my site? (2007), <http://www.webcitation.org/5OOXPKFCd>.

\footnote{Google v. Copiepresse, n. 65 above, at para. 5.

\footnote{Ibid.

\footnote{For excellent analysis of these issues from a US perspective, see Oren Bracha, Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property, 85 TEx. L. REV. 1799 (2007).}}}}

Copiepresse’s claims related to Google’s practice of caching the newspapers’ content and displaying titles and snippets of newspaper articles in its Google News service. The court ruled that these practices infringed the newspapers’ copyrights. The court also found that Google’s failure to properly identify the author of the copyrighted work on its Google News site amounted to an infringement of the author’s moral right, and that exceptions to copyright, such as citation, use for criticism and review or public news reporting were inapplicable. Finally, the court found that as a matter of law it was immaterial that the newspapers could implement widely used, free and easily implementable measures such as robots.txt\footnote{‘A robots.txt file provides restrictions to search engine robots (known as “bots”) that crawl the web’, Google, How do I use a robots.txt file to control access to my site? (2007), <http://www.webcitation.org/5OOXPKFCd>.} to prevent their indexing by Google but declined to do so, because ‘copyright is not a right of opposition but a right of prior authorization.’\footnote{Ibid.}

The court added that the failure to adopt such measures does not amount to implied or express consent for Google’s activities.\footnote{Ibid.}

I am not interested here in the merit of the copyright claims raised against Google.\footnote{For excellent analysis of these issues from a US perspective, see Oren Bracha, Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property, 85 TEx. L. REV. 1799 (2007). I assume arguendo that as a matter of Belgian copyright law the court’s decision is rock-solid. Instead, I am interested in the newspapers’ decision to license collectively and sue Google collectively. It seems to me that arguing that the transaction would seem even stranger if it were the case that source-licensing functions well in the US, but would not function well in Canada. Again, rent-seeking explains this situation much better than concerns for efficiency. Moreover, it seems that CA in this case only hampers the development of online music services by turning the market into an anticommons through overlapping royalty requirements.}
costs of direct agreements between Google and newspapers are so prohibitively high as to necessarily require CA would be farfetched. The problem for the newspapers is not the ability to negotiate but the likely outcome of such negotiations. In their relationships with Google, individual newspapers likely face a prisoners’ dilemma. A newspaper deciding to make its content available online has no reason to object to making the newspaper searchable and available by Google, or Google News. Quite the contrary, newspapers must be interested in being indexed by Google. As Margaret Boribon, Copiepresse Secretary General acknowledged ‘our content without a very good search engine would not be the most efficient thing on the Internet.’\(^7^0\) One may even assume that notwithstanding its copyright, an individual newspaper would readily authorize such inclusion, in many cases for free, especially when knowing that withholding its consent would not result in a payment by Google, but rather in reduced exposure and the channeling of reader traffic to competitors’ websites.\(^7^1\) Therefore, the individual newspapers’ failure to prevent their inclusion by using robots.txt is highly instructive, as it reveals their true preferences. By deciding to act collectively the newspapers seek to overcome the prisoners’ dilemma that exists under competition. As Margaret Boribon also points out, “if all the content producers refuse to go along, [Google’s search engine] is no longer worthwhile either, or much less, in any case.”\(^7^2\) Acting collectively, then, the newspapers have better chances of extracting rents from Google. Rather than a solution to a market failure caused by high transaction costs, the newspapers’ collective action in this case seems more like an attempt to charge money to license a right which in a competitive market would have no or very low market value.

V. More Plausible Transaction Costs Justifications

While source-licensing may provide an alternative to CA in many cases, high transaction costs may still render it infeasible in others. Such cases present a seemingly stronger case for CA. However, as will be discussed below, identifying the existence of prohibitive transaction costs does not necessarily imply that CA should be the policy response of choice. In some cases CA is a solution more cumbersome than the problem. In others, the law may provide much more elegant solutions ranging from opt-out regimes, to adoption of liability rules, to complete exemptions.


\(^7^1\) It does not mean Google would never agree to pay for content. Google has indeed struck deals with major purveyors of news content, such as the Associated Press, which grant it broader access to content than it currently has under its claim of fair use. See eg, Reuters, Google Shift on Handling of News, N.Y. TIMES, Sept. 1, 2007, <http://www.nytimes.com/2007/09/01/technology/01news.html>; Caroline McCarthy, Google reveals payment deal with AP, ZDNET NEWS, Aug. 3, 2006, <http://news.zdnet.com/2100-9588_22-149100.html>, archived at <http://www.webcitation.org/5dyeRUSq5>.

\(^7^2\) Daly n. 70 above.
Therefore, recognizing that CA solves a problem is a necessary condition, but not a sufficient one. CA’s superiority over other solutions should be established as well. The following sections describe instances in which transaction costs make the case for CA seemingly more plausible, but only seemingly.

A. Defragmenting existing works

Although a competitive market may provide right holders with the incentive to prevent fragmentation and maintain their works as cleared-parcels, rights that have been administered collectively may remain fragmented if the market moves to a competitive model. Where collectives solved the fragmentation problem (albeit excessively), right holders did not face enough incentives to create cleared-parcels \textit{ex ante}, and unfortunately, forming cleared-parcels \textit{ex post} might turn out to be too costly. If the future commercial prospects of the work are low and the cost of re-contracting exceeds the expected benefit, some works currently available as part of the collective’s repertory might become inaccessible under the competitive model. Therefore, as a practical matter, there might be good reasons to allow users to obtain from collectives residual blanket licenses (or per-work licenses) covering back catalogues.

At the same time, however, it would make less sense to maintain CA with regard to new works where it is clearly unnecessary. Therefore, even if collectives remain indispensable for enabling efficient access to back catalogues, it might be wise to plan their gradual phasing-out by enjoining them from accepting new works, and letting them administer only existing works until those become public domain.

B. Fragmentation resulting from legal intervention

In some cases, even if publishers successfully create cleared-parcels while negotiating with authors, legal intervention may re-fragment them. This may happen if legislatures enact new copyrights with retroactive force, or if courts decide \textit{ex post} that some rights are not actually part of the bundle granted to publishers. A case in point is \textit{New York Times v. Tasini},\textsuperscript{73} decided in 2001, where the US Supreme Court ruled that freelance authors’ copyrights had been infringed when newspapers included the authors’ articles in electronic databases. The dispute arose because at the time the writers and the newspapers entered into mostly oral publication contracts; electronic databases had not been anticipated by the parties and therefore not specified in the contracts. The majority ruled in favor of the authors, finding that the right to reproduce the articles in electronic databases had not been granted. The decision resulted in fragmentation of the rights in the articles originally published in the newspaper. The publishers held both print and electronic rights for the

\textsuperscript{73} \textit{Tasini}, n. 4 above.
articles written by staff writers, but only the print rights for freelance authors’ articles.

Justice Stevens, writing in dissent, was concerned about the possible implications of finding for the authors. He warned that “the difficulties of locating individual freelance authors and the potential of exposure to statutory damages may well have the effect of forcing electronic archives to purge freelance pieces from their databases.”

Justice Ginsburg, writing for the majority, was less alarmed. She was more optimistic about the possibility of reaching voluntary agreements between publishers and individual writers but in case that proved wrong, offered two instructive remarks. First, she suggested that finding for the authors does not mean that an injunction is the automatic remedy, thus indicating willingness to transform the copyright into an entitlement protected by a liability rule. Second, she suggested that should individual transactions be impractical some kind of CA may be a solution.

While the collective model seems attractive in this context, and was actually advocated by several commentators, I am less certain that it solves the problem, or which problem it actually solves. Developments in the aftermath of Tasini are instructive. Since 1995, when the legal mess created by the intersection of oral contracts and new technologies became apparent, the New York Times has required freelance authors to grant the Times electronic rights as well. This is consistent with my prediction on the ex ante incentives to prevent fragmentation. Following their legal victory the authors offered to negotiate but the New York Times refused. Instead, it offered freelance authors an option: either grant the electronic rights to articles with no additional payment or have the author’s articles purged from the Times electronic archives. Other publishers did the same. Some went even further. After the Second Circuit’s decision in Tasini, The Boston Globe gave each of its freelancers an ultimatum: either sign a new written license agreement granting all electronic rights, or The Globe would not accept any additional work from

74 Ibid. at 520.
75 Ibid. at 505.
76 Ibid.
78 See The Potential Demise I, n. 8 above, at 561.
80 Ibid.
81 Ibid.
the freelancer. The threats seem to have worked quite well, although some articles were eventually purged. This suggests that in many cases publishers have enough leverage over freelance authors to allow them to defragment rights, even ex post. Clearly, no CA is necessary with regard to these works. However, some articles remained unlicensed and eventually purged: either because their authors were too costly to locate, or because the articles were published by smaller publishers that might not have the same leverage as the New York Times or The Boston Globe. This is the class of works for which, from a transaction costs perspective, CA may seem more appropriate. However, if the problem that publishers face is locating prohibitively remote or unknown right holders, a collective will face a very similar problem: it may be able to collect, but not distribute to the rightful authors.

The fact that not all newspapers have the leverage of the New York Times or The Boston Globe may suggest that the problem may extend beyond that of locating all individual authors. There might also be a possibility of strategic behavior by right holders. The value of a comprehensive database likely exceeds the sum of its individual components, and a hold-out may attempt to capture part of this comprehensiveness value. CA may prevent such individual hold-outs but unfortunately such right-holders may not see much benefit in joining a collective.

In contrast to CA, the other solution suggested by Justice Ginsburg, denying an injunction as a remedy can address both problems. Justice Ginsburg’s solution, transforming copyright into a liability rule, would allow the newspaper to include the non-licensed articles, subject to possible retroactive payment of damages determined by the court (or negotiated in the shadow of such potential determination). If such damages were calculated to reflect what would have been paid had a license been negotiated, and comparable licenses served as benchmarks, the amount of damages most likely would be very small. This would reduce the incentive of some authors to behave opportunistically by withholding their consent and would also reduce the legal risk in keeping the articles in the database when the costs of obtaining a license are prohibitive. In order to succeed, however, the transformation into liability rule should also expand to eliminate statutory damages and accounting for profits.

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83 Bickham, n. 80 above.
84 While the publisher’s heavy-handedness may raise questions of equity (which may be mitigated through collective bargaining on the part of the authors) the focus here is on efficiency. I discuss the equity question in Part VII.
85 Access Copyright, the Canadian copyright collective administering reproduction rights of printed works, collects fees for the reproduction of works even when the copyright owners of these works are not known to Access and may not be members of Access. These payments are pooled and then divided annually among Access’ members. See Access Copyright, FAQs About the Creator Repertoire Payment, <http://www.accesscopyright.ca/Default.aspx?id=75>, archived at <http://www.webcitation.org/5eK4Rrdct>.
Therefore, in the case of freelance authors, forming a collective is far from being an effective solution for addressing the problems of transaction costs. In fact, as in the examples of Israeli creators or Belgian newspapers, the motivation to form collectives can be better explained not as a response to a market failure, but rather as dissatisfaction with the amount of compensation available to authors in a reasonably functioning market.

C. Search engines

Search engines provide another area in which CA may solve transaction costs problems, and indeed new collectives have emerged in the area. One example is Copiepresse, discussed earlier. Another example is the Registry that is to be established as part of the proposed settlement in the class action between the Authors’ Guild and Google regarding Google Book Search (GBS). Search engines, either when they copy entire pieces of content for indexing purposes, or when they allow access to these cached copies, or when they present snippets from the content, may be exposed to various claims of copyright infringement. Obviously, if copyright law indeed requires the search engine to obtain prior authorization, the costs might be prohibitive and might place the entire endeavor in jeopardy. In the case of GBS, the market failure may be even more severe, because many of the works are Orphan Works, for which there are no traceable copyright owners. Google’s traditional response to the problem was a simple but effective opt-out system. It would copy and index everything, but then exclude material from any right-holder who notified it of her desire, either directly or by embedding HTML protocols to the same effect.

Google’s view, that this solution was fair, practical, and respectful of right holder’s wishes without sacrificing efficiency was rejected by the Belgian court. In the GBS case, Google decided to settle rather than test its solution. As part of the settlement, a new copyright collective will be established. Therefore, we are facing two radically different solutions to the transaction costs problem. Under the opt-out regime, content owners carry the burden of communicating their wishes to Google individually; under the settlement they do so collectively. Which approach is preferable?

First, it should be noted that the choice is illusory, because a collective model doesn’t really eliminate transaction costs; it merely shifts them and creates others. Even if a collective is set up, the collective still faces the challenge of establishing

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86 For a detailed analysis of the lawsuit and the proposed settlement see Randal C. Picker, *The Google Book Search Settlement: A New Orphan Works Monopoly*, 5 J. COMPETITION L. & ECON. 383 (2009), at <http://ssrn.com/abstract=1387582>. This chapter refers to the settlement as originally proposed by the litigating parties. It is possible that at the time this chapter goes to print some aspects of this settlement may be revised.

87 See generally Bracha, n. 69 above.

88 Ibid.
and maintaining relations with all relevant right holders, which, by definition, are numerous and dispersed. This is best demonstrated in the case of orphan works under the GBS settlement: the Registry will collect money from Google for using these works, but the money will not be distributed to the copyright holders (who are by definition unknown). Rather, it will be divided among the known copyright holders. Thus, the Settlement solves the orphan works problem for Google, but only because the owners of such works are part of the plaintiff class and have not opted out, not because it facilitates payment to these unknown owners. The features of the class action mechanism solve the problem, not the creation of the new collective. In addition, the collective faces the enormous challenge of how, and according to what formula, to distribute the fees it collects. These problems may be relatively small in the case of Belgian newspapers, but may gain proportions if a collective model is extended to cover the vast amount and diversity of content indexed by search engines.

Second, and more fundamentally, the choice between the models depends on one’s premises and first principles: is CA justified only as long as it provides the best remedy to a market failure, or is it justified merely because it allows copyright owners to get more than they could in a functioning market? Between both solutions, the opt-out solution is more consistent with the way copyright law has traditionally worked as a market-based system. At its core, copyright encourages voluntary market exchange between copyright holders, intermediaries, and users, while carving out exceptions to facilitate uses when the market fails. It assumes that these forms of market exchange generate the necessary financial incentives to create. If search engines face a potential market failure, its source is a default rule that requires prior authorization. Changing the default rule while permitting an opt-out regime eliminates the market failure and allows content owners and search engines to reach mutually beneficial deals. Any solution beyond that is superfluous.

VI. What About Incentives?

Even if rent-seeking better explains the formation of copyright collectives than the various transaction costs theories, one could still argue that such rent-seeking should be allowed, even encouraged, because it is consistent with the dynamic efficiency goals of copyright law. In other words, allowing copyright holders to extract even greater rents by forming collectives will further increase their incentive to engage in creative activity.

My response is threefold. First, the consequences of this argument extend beyond the question of CA. If it justifies CA in the absence of any static efficiency gains,

89 Picker, n. 86 above, at 3.
90 In principle, the settlement could solve the orphan works problem by endorsing Google’s current practice.
it essentially would permit any kind of collusion between IP owners, under the
theory that such collusion and the additional profits it generates increases the incen-
tive to create. But this is definitely not the law. In the absence of demonstrable static
efficiency gains, collusion among IP holders is illegal and the antitrust laws do not
make any dynamic efficiency defense of this kind available to IP holders. Nor
should they: maximizing reward per se has never been the aim of intellectual prop-
erty law, and overcompensating creators may itself be distortionary. In fact, rent-
seeking behavior is one such distortion.

Second, merely increasing the reward to right holders can have various effects,
not necessarily the salutary ones of enhancing creativity. There is no general, pre-
dictable outcome. For example, in the Israeli TV creators’ case, increasing the
payment to creators might indeed spur additional creativity. However, it could also
decrease the amount of money available for producers, which in turn, might scale
down investment in programs or reduce the risk that they would be willing to take
in producing innovative programs. If that were the case, forming a collective would
work contrary to the dynamic efficiency goals of copyright.

Third, even if greater reward increases the incentives to create, it does not neces-
sarily mean that it increases the incentives to create socially valuable works. The
relationships between the copyright reward and incentives are notoriously complex
and a full discussion is beyond the scope of this chapter. It must be noted, however,
that while CA may provide greater rewards, it reduces the role that the market
mechanism plays in directing resources to creative activities. We have no guarantee
that additional rents will necessarily create more incentives or the desirable type
of incentives. Therefore, the argument that more money available to copyright
holders is necessarily compatible with the dynamic efficiency purpose of copyright
must be rejected.

VII. What About Authors?

To some extent, copyright collectives resemble collective bargaining in labor
contexts, especially since both types of organizations, unions and copyright collect-
es, attempt to overcome collective action problems and strive to increase
their members’ share from the surplus created with their physical or intellectual
labor. Therefore, it may be tempting to conclude that the law should treat the two

91 See, e.g., Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 TEX. L. REV. 1031,
1058 (2005). See also Glynn S. Lunney, Jr., Copyright’s Price Discrimination Panacea, 21 HARV. J. L.
92 Ibid.
93 Elsewhere, I consider the hypothesis that CA may provide an incentive to create more mediocre
works. see Ariel Katz, Commentary: Is Collective Administration of Copyrights Justified by the
Economic Literature in COMPETITION POLICY AND INTELLECTUAL PROPERTY 449, 460 (Marcel Boyer
et al. eds., 2009).
phenomena similarly. However, despite the similarities, some crucial differences exist. First, the analogy works best for collectives representing individual authors, such as in the examples of the Israeli TV creators or the freelance journalists in *Tasini*, especially when negotiating with seemingly powerful users. The analogy is clearly inapplicable to collectives representing publishers or producers, such as Copiepresse, or to those representing both authors and publishers (e.g., PROs). Second, whereas in the typical labor situation unionization mainly changes the distribution of producers’ surplus between the employer and the employees without directly or significantly affecting consumers’ surplus, copyright collectives often target consumers directly.

Comparisons between unions and copyright collectives raise a host of questions, and answering them is beyond the scope of this chapter. I raise the issue here merely to suggest an area for further exploration, hypothesizing that perhaps some forms of CA might be justified on grounds related to the economics of the creative process which have not been fully explored yet, and which may be informed by labor economics.

**VIII. Policy Recommendations**

My skepticism notwithstanding, one can easily observe that in many countries and in many areas more collectives presently exist than ever before, with a corresponding increase in the range of institutions, organizations, and individuals that may have vested interest in maintaining them and expanding their reach. Perhaps, without much attention, CA has turned into what Mark Lemley and Philip Weiser called a ‘rent-seeking orgy.’

While we cannot unwind history, we can think about ways to improve the current system. We can also adopt methods to avoid new errors and to ensure that collectives exist only when they are efficient and to the extent that they are efficient.

In this section I want to clarify what I advocate and what I do not, and provide some principles and recommendations for containing the trend towards collectivization, to maximize whatever benefits CA may achieve while minimizing its negative impact. Although I am skeptical about the justification for CA, I am not arguing categorically that CA can never be efficient and superior to other arrangements. Rather, I want to set out a non-exhaustive list of principles that can minimize the anti-competitive outcomes of CA and maximize the benefits from their operations, when such exist.

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A. Source-licensing

My first general proposition is that in most cases the market failure that copyright collectives purport to solve is imaginary. Source-licensing can solve most of the problems which collectives purport to solve. If producers or publishers of works obtained the rights to authorize all possible uses, and if they distributed copies of the works as cleared-parcels, many transaction costs and anticommons problems would disappear. It seems to me that the advent of new technologies strengthens this proposition even further. This proposition does not imply that individual right holders must be forced to administer their rights personally. Administering copyrights efficiently clearly benefits from economies of scale and scope which may require the aggregation of rights in the hands of various intermediaries. Efficient administration may also rely on other intermediaries at the distribution or retail level. Therefore I do not envisage or advocate an economy in which every author becomes a self-publisher setting up her own commercial web presence. What I do envisage are services like iTunes, which can cater not only to the consumer end user market but also serve the needs of commercial users (eg, licensing public performance rights or reproduction rights).

Moreover, when I mention cleared-parcels I do not mean that that every copy of a work should be sold with all the rights included. When I argue that there is no practical reason preventing a record label, for example, after obtaining all the necessary rights from authors and publisher, from bundling the right to publicly perform the song with the CD itself, I do not suggest that all CDs sold should be sold with a permission to publicly perform them. I can clearly see why a record label would be interested in separately licensing the public performance right in order to price discriminate between home users and different types of commercial or institutional users, and why this type of price discrimination may be socially desirable. What I mean by cleared-parcels is that the record label will be able to distribute CDs with various bundled rights. For example, it could sell ‘home-use only’ CDs through general retail outlets while licensing other rights separately. It could license other rights directly by the label or through specialized agents, or it could sell different versions of CDs coming with different rights.95

B. Scope of antitrust scrutiny

In most jurisdictions, consistent with the view that copyright collectives are natural monopolies, copyright collectives are regulated, primarily by specialized copyright tribunals.96 This type of regulation is behavioral, focused on, and limited to, overseeing the tariffs set by collectives as well as some of the licensing terms they

95 See further discussion and examples in The Potential Demise I, n. 8 above, at 556.
96 Ibid at 546. See also the various chapters on individual countries in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Daniel Gervais ed., 2006).
seek to enter into with users. In some cases it may also oversee the relationships between collectives and their members. This form of regulation takes the collective model for granted and doesn’t question the rationale for a collective’s existence, nor is it interested in maintaining more competitive market structures. Antitrust laws play no or very limited roles in the oversight of copyright collectives, and in any event their scope is limited to the behavior of collectives, not to the collectives’ mere existence. This model makes a lot of sense on the assumption that copyright collectives are indispensable and that the main challenge is preventing them from charging too much.

The regulation of collectives can benefit from adding a structural component, assuring that competitive market structures would be hampered as minimally as possible. Antitrust law may play an important part in such oversight. Structural regulation should have three foci: screening, contestability, and reversibility. It would require justification before new collectives are set up or enter new fields; it would seek to ensure that even when CA is justified, it remains responsive to market discipline as much as possible; and it should preserve the ability to revisit the rationale for the existence of the collective in light of changes in technology, markets, or accrued knowledge.

1. Screening
Antitrust law has the analytical tools to distinguish between collectives that genuinely increase efficiency and those that do not, as well as the legal mechanisms to allow for the first and forbid the latter. Moreover, antitrust analysis is particularly apt to the task of screening because it is flexible enough to take account of technological and other changes that influence the underlying transaction costs, and it is highly adaptive to developments in the economic theory relevant to the scrutinized business practices. In the US, following BMI, copyright collectives are subject to a rule of reason, meaning that although their mere existence can be challenged, the burden of proving that they are anti-competitive is on the challenger. Procedurally, this screening occurs ex post. Antitrust law, however, is also familiar with ex ante modes of screening, which may be applicable to proposed new collectives. In mergers, mandatory pre-notification procedures allow the antitrust agencies to examine proposed mergers before they are completed and challenge them where appropriate. The Agencies also have voluntary procedures for ex ante screening of non-merger activity. Other jurisdictions may have different procedures. I do not intend to

97 See The Potential Demise II, n. 8 above, at 264–70 (discussing the limited role of antitrust oversight in Canada).
98 It should be noted though that the Court, in applying the rule of reason, took into account that both ASCAP and BMI were governed by consent decrees entered into after they were challenged by the Department of Justice, see BMI v. CBS, n. 10 Above, at 13, 24. This may provide grounds for distinguishing the case of PROs from that of other forms of CA which are not as regulated.
99 Interestingly, Business Review Letters have been used extensively in an area that has a lot in common with copyright collectives: patent pools and standard setting organizations.
discuss the pros and cons of various procedures here, only to demonstrate the point that antitrust law can and should play an important screening role. Given that CA entails stark departure from the way competitive markets normally work, and that the case for their existence is normally weak, I would shift the burden to justify the benefit of CA onto the collective. In satisfying this burden, the collective would also have to demonstrate why source-licensing and other forms of market intermediation may not be sufficient.

2. Contestability
Even when CA is deemed necessary for overcoming transaction costs, collectives should remain contestable, ie, responsive to market discipline, as much as possible. This can be best achieved by prohibiting exclusive relations between the collective and its members. Non-exclusivity has been a central requirement in the regulatory oversight of PROs in the US, but largely ignored in many other countries where collectives require full assignments of the rights they administer.100

Non-exclusivity ensures two aspects of contestability: static and dynamic. Statically, non-exclusivity restrains the market power of the collective by allowing individual transactions between right holders and users. Such transactions may occur if the collective raises prices too much. However, mere non-exclusivity achieves only limited contestability. Because of the all-or-nothing nature of the blanket license, bypassing the collectives makes sense only if a sufficiently large number of members defect to allow the user to gain access to a sufficiently broad repertory, or if the collective reduces the price of the blanket license to account for works that were licensed individually. The collective, of course, has no incentive to voluntarily adjust its price, and compelling it to do so can be quite difficult.101

Contestability can be improved by allowing right holders to license not only independently but also through other third-party agents that can aggregate large enough repertories. Licensing through third parties may also ensure that other forms of licensing and licenses may be available if it becomes efficient to offer them.102

The dynamic aspect of contestability encompasses the notion of competition-for-the-market. Allowing right holders to license through other third parties ensures that even when the collective is a natural monopoly, it may be superseded by another

100 While I think that it does not alleviate all concerns, it is still an important requirement. See The Potential Demise I, n. 8 above, at 578–82.

101 Ibid. See also Glynn Lunney, Copyright Collectives and Collecting Societies: The United States Experience, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 311, 337 (Daniel Gervais ed., 2006).

102 While non-exclusivity has been mandated in the US since the early consent decrees in the 1940s, see United States v. Broadcast Music, Inc., 1941–1943 Trade Cases (CCH) ¶ 56,096, 382 (E.D. Wis. 1941); United States v. Am. Soc'y of Composers, Authors and Publishers, 1941-1943 Trade Cases (CCH) ¶ 56,104, 403 (S.D.N.Y. 1941), the ability to license through third parties was made explicit only in the Second Amended Final Judgment entered into in 2001. Note however that ASCAP is still allowed to prevent its members from being affiliated with another PRO. See United States v. ASCAP, 2001-2 Trade Cases ¶ 73,474, § IV(B) (S.D.N.Y. 2001).
licensing agent should the latter be able to outperform the collective. Moreover, contestability ensures that even if presently the market is best served by a single collective, a competitive market might evolve organically should market conditions change.

Non-exclusivity may be a necessary condition for effective contestability, but it is not a sufficient one, and additional regulatory steps may be required. A significant obstacle to effective contestability is the lack of a publicly accessible database informing potential users and intermediaries of who owns what. It may not be enough that individual copyright holders are permitted *de jure* to enter into direct transactions with users. It is equally important that intermediaries interested in brokering such transactions have the necessary ownership information. This innocuous requirement is more challenging than it initially seems. There is no comprehensive and publicly accessible database providing full information about ownership or administration rights. Copyright collectives often possess such databases, because they need them for distributing the fees they collect, but the information would not necessarily be available to third parties.

Without knowing who owns what, transactions that bypass the collective are virtually impossible even if legally permissible. While copyright collectives are best positioned to provide the information, they have no incentive to do so. Therefore, to ensure contestability, regulatory intervention might be required to make comprehensive information about ownership and administration rights easily accessible.

3. Reversibility

Transaction-costs justifications for CA inherently depend on the relevant existing technologies and business models, which of course may change over time. As the US Supreme Court noted prophetically in 1979, ‘changes brought about by new technology or new marketing techniques might also undercut the justification for the practice.’ Changes may also occur in our understanding and appreciation of how collectives work generally or how specific collectives perform. Therefore, when endorsing collective models it may be wise to set timeframes for such approvals, either by institutionalizing review processes or introducing sunset provisions.

Implementing this recommendation may be much trickier. Even if a collective model is endorsed with express sunset provisions, the collective, its members and its managers might have a vested interest in its continuation, especially if it is a source of supra-competitive rents. As a result, they may be expected to resist any change in the status quo through lobbying and litigation. The problem extends beyond simply controlling egregious rent-seeking. Once a collective exists, a network of various business relations organizes around it, and even if it turns out that the particular market or industry can be reorganized in a more competitive manner,

103 *BMI*, n. 10 above, at 21 note 34.
such reorganization can be costly, or the cost of coordination between all interested parties might render it impossible.

In reality, if any such sunset provisions exist, they are very rare. I am not aware of any jurisdiction that has implemented express sunset provision into the regulatory framework overseeing its copyright collectives. In many countries reforming the system of CA would require legislative intervention. Even in the few jurisdictions that have made the existence of a collective rights organization potentially challengeable under the antitrust laws—the closest thing to sunset provisions—there is no certainty about the outcome of such challenges.

The US case provides a good example of the problems that antitrust regulators face. Even if US regulators were convinced that the endorsement of ASCAP and BMI is no longer justified, there is no guarantee that vacating the consent decrees that currently regulate them would lead to a superior result. Regulators would have to take into account the fact that post BMI a rule of reason analysis is the standard to evaluate the legality of PROs, meaning that regulators would have to persuade the court that the anti-competitive effects of the practice outweigh its benefits. Satisfying this burden may not be simple given the overall support of the practice among courts and commentators, the widespread adoption of CA worldwide, and the lack of visible operational alternatives to the practice. Therefore, resuming the litigation involves the risk of losing the case and losing any regulatory oversight over the two PROs. Even if regulators won the case in the courts, there is no guarantee that legislators would not reverse it in order to preserve the status quo. All of this suggests that while setting time limits for any endorsement of CA is desirable, proper screening might be the most important measure.

C. Other recommendations

1. Consolidation

   As noted earlier, when a single activity, such as distributing a song online, requires not only the authorization of the recording label but simultaneous authorization from one or more collectives, the collectives perpetuate the very problem of fragmentation they purport to solve. Therefore, as long as copyright collectives continue to exist, it may be wise to consolidate all types of rights administered by the separate collectives into a single license. In Canada, in recognition of this issue, the Copyright Board has adopted a policy of consolidating tariff hearings when they deal with overlapping rights. The policy does not provide a perfect solution. It enables the Board to set one overall price later divided among separate collectives, but it is not clear whether it can prevent all attempts by individual collectives

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104 See The Potential Demise II, n. 8 above, at 282.

to act strategically. In the EU, the 2005 Online Recommendation encourages right holders to grant all their online rights to any collective of their choice.

2. Competition between collectives
Another option worth considering is whether competition between collectives in the licensing of the same type of rights yields better results compared to the common case of a single national monopoly. Three options are available: (1) collectives offer identical repertories; (2) collectives offer largely overlapping repertories but differentiated at the margin; (3) collectives offer non-overlapping repertories (the US PRO model). Determining whether any of these models is preferable to the monopolistic one is beyond the scope of this chapter, so I will only explore them cursorily.

The first model offers a potential for the highest degree of competition. However, if the products are homogenous and the collectives compete solely on price, the result might be licenses priced at marginal cost. Under such conditions right holders might actually be better-off without CA, so this model is probably untenable. The benefits of the third model depend on whether licenses from the separate collectives are strict complements or not. If they are, then a single PRO is preferable. However, despite the fact that many users might be interested in having access to the repertoire of more than one PRO it isn’t clear that this indeed makes them strict complements. It is possible, for example, that having secured a license for the ASCAP repertory, a user negotiating a license from BMI would only be willing to pay according to the marginal value of the BMI and SESAC repertories (respectively). Under such conditions the total prices charged by the three PROs might be lower than that of a monopolistic PRO. Prices under the second model will probably be somewhere in between, depending on the degree of differentiation between the PROs’ repertories.

Competition between collectives might have another benefit for their members and overall efficiency. It might provide an exit option for members, which could help overcome serious corporate governance issues endemic to the monopolistic structure of collectives, resulting from a combination of dispersed ownership and the lack of threats of takeover or exit by members.

3. CA and other responses to market failures
My suggestion to increase the role of antitrust in the oversight of copyright collectives may weed out those collectives that do not actually solve transactional

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106 Ibid.
108 See Part II.C above.
109 Katz, n. 93 above, at 463–64.
market failures. But even when such market failures do exist and CA passes muster under antitrust laws, CA is not the only response to these market failures. Indeed, copyright law has traditionally endorsed a radically different approach to market failures, namely fair use and other exceptions. The two solutions are diametrically opposite: the one allows the copyright holder to charge a monopoly price in excess of what she otherwise could get by virtue of their copyright; the other sets the price at zero. This implies that transaction costs alone cannot justify either solution. From a purely economic perspective, transaction costs are a necessary condition for both solutions but a sufficient condition for neither. What principles then can guide us in choosing between the two?

Fair use fares better on the access front. By setting the price of a work at zero, it maximizes access to and use of the work. Yet it may be less than perfect on the incentive front and may sometimes be deemed unfair to the right holders. Once a particular use has been identified as fair, the administrative cost of fair use is low; no determination of fees or other terms is required. But if it is less certain whether a use is fair or not, determining this issue may be costly, and this fact alone may deter some uses.

CA seems to be fairer to right holders and provide better incentives, but allowing right holders to extract monopoly rents may seem unfair to users and provide excess incentives. On the access front the score is mixed. Since a collective cannot price-discriminate perfectly access must be inferior compared to fair use. On the other hand, it allows those users who might be deterred by the uncertainty about the scope of fair use to have authorized access. Considering administrative costs, CA is a very costly solution. It involves not only the costs of running a collective, enforcing the rights, granting licenses and distributing the income but also the costs of regulatory oversight. In addition, as a source of rents, CA involves less visible costs associated with rent-seeking, such as attempts to expand the scope of the rights under the collective’s mandate through litigation and lobbying, to combat payola, and to forestall change by erecting artificial barriers to more efficient licensing.

But describing CA and copyright exceptions as the only possible responses to transactional market failures is misleading. In fact, these two solutions may just represent two extreme points on a spectrum of possible solutions. In between, other solutions or a combination of solutions may work as well, some of which I have already mentioned. For example, liability rules may allow reasonable remuneration to right holders while minimizing impediments to individual transactions when such transactions are too costly to enter into or are hindered by opportunistic behavior.

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10 See Gordon, n. 23 above.

11 In fact, many regulatory regimes prohibit collectives from even attempting to perfectly price discriminate, by requiring them not to discriminate between different users of the same class.

12 On the connection between payola and CA see The Potential Demise I, n. 8 above, at 582-90.

13 See generally Lemley & Weisner n. 94 above.
Opt-out regimes are another type of intermediate solution. By opting out, the right holder signals that the cost of entering into an individual transaction is not as high as she originally thought. Technological opt-out systems, based on cheap and easily administrable measures to prevent certain uses (such as robots.txt in the search engine context) may provide a solution that minimizes transaction costs, while being fair and responsive to the wishes of copyright holders. I will leave the full consideration of these intermediate solutions for another time but will only note that more scholarly and judicial attention to such intermediate solutions may provide the law with richer tools and wider options to address the problems of transaction costs and contain the trend toward overuse of collective models.

IX. Conclusion

In recent years CA has been touted as a solution to many of the ills of the copyright system. Copyright collectives have been promoted as an indispensable mechanism for efficient licensing, necessary to overcome plaguing transaction costs of various kinds, and facilitating markets which otherwise would fail. This chapter has sought to spoil the party. It showed that the various transaction costs justifications are overstated, most of them confuse the apparent need of some middlemen with an assertion that a single middleman is the solution. Many of them ignore the fact that such market intermediaries actually exist and that in most situations collectives are necessary neither for matching authors with users nor for overcoming problems of fragmentation and anticommons. In fact, in some cases copyright collectives tend to exacerbate the very problems they purport to ameliorate. A deeper look into their internal mechanisms, the events that lead to their formation, the actual role they play, and a comparison to other market-based solutions reveals a somewhat inconvenient truth: in most cases CA is motivated by rent-seeking. Moreover, despite apparent regulatory oversight, the proliferation of CA may have evolved into a rent-seeking orgy that can hardly be justified as encouraging the creation of socially valuable works or even improving wealth distribution.

This chapter began with the premise that in a liberal market-based economy market competition is the rule, and monopoly or collusion are the exception, and that prices and other terms of trade are best determined by market players, not by government agencies. While deviation from these principles is occasionally justified and required, there is no serious indication that these premises are inapplicable to the various creative industries in which copyright collectives have proliferated. It will therefore be highly advisable for policy-makers to begin examining right holders’ claims about efficiencies more critically: to allow the very few cases where CA makes sense and challenge the rest.

114 See generally Bracha n. 69 above.