Compensating Creators of Intellectual Property

Collectives That Collect

Stanley M. Besen, Sheila Nataraj Kirby
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PREFACE

This report, which was supported by a grant from the John and Mary R. Markle Foundation to The RAND Corporation, is part of a series of studies of the effects of new technologies on the markets for intellectual property. Previous reports include: Stanley M. Besen, Private Copying, Reproduction Costs, and the Supply of Intellectual Property, N-2207-NSF, December 1984; Stanley M. Besen, New Technologies and Intellectual Property: An Economic Analysis, N-2801-NSF, May 1987; and Stanley M. Besen and Sheila Nataraj Kirby, Private Copying, Appropriability, and Optimal Copying Royalties, R-3546-NSF, October 1987. This report examines the role of collective administration which is used by copyright owners when decentralized use makes individual enforcement of their property rights uneconomic. It examines the behavior both of traditional performing rights organizations and newer reproduction rights organizations which administer rights for photocopying. Collective administration in the United States and in other developed countries is examined. The analysis in the report should be of interest to economists who study the production and distribution of intellectual property, to copyright owners, to users of intellectual property, and to government officials who are engaged in establishing policies toward intellectual property.
SUMMARY

Many uses of intellectual property occur in ways that make it difficult, or impossible, for copyright owners individually to enforce their rights. Where each use has small value relative to the cost of enforcement, no owner will find it economic to collect fees and enjoin infringers unless he can cooperate with other rights holders to economize on transaction costs. The result is the formation of collecting societies or, more generally, copyright collectives.

Traditional copyright collectives, such as the American Society of Authors, Composers, and Publishers (ASCAP) in the United States and SACEM in France, have administered rights for public performances of musical works for many years. More recently, reproduction rights organizations, which administer rights for photocopying, have come into existence. These include the Copyright Clearance Center in the United States and the Copyright Licensing Agency in Great Britain. Moreover, other technological developments that permit widespread decentralized copying of intellectual property are likely to reduce further the ability of individual copyright holders to enforce their rights and to lead to the creation of new copyright collectives. This report is a study of the collective administration of copyrights.

The report analyzes the determination of license fees by developing economic models of alternative ways in which copyright collectives might operate. In one model, copyright owners share the costs of enforcement but each owner establishes his own fees. In others, copyright owners share costs and establish fees cooperatively. Cooperative pricing involving the same fee for all uses, different fees for different uses, and “bundled pricing” are all explored.

The report also provides detailed descriptions of the operations of performing rights and reproduction rights organizations. It examines the operations of the major collectives in the United States and in Europe, focusing on the ways in which royalty fees are established and distributed among members of the collectives. Although extensive discussions are provided for the Copyright Clearance Center, ASCAP, and BMI (Broadcast Music, Inc.) in the United States, major collectives in Europe are also described fully. The report also explores the legal regimes under which copyright collectives operate, including any special legislation that governs their behavior and the antitrust laws that constrain their operations.
The report reaches four tentative conclusions:

1. Cooperative pricing may be inevitable when collective administration is employed. Because copyright users as well as copyright owners incur transactions costs, they are likely to seek ways to reduce these costs. Especially where the rights being administered are small, users will often wish to forgo the alternative of having separate prices for each right purchased, preferring instead the ability to use any item from the repertory of the collective in return for a single payment that is independent of actual use. Thus, we expect to see bundled pricing as the dominant form of collective administration. Where pricing arrangements in which the license fee depends on usage are employed, payments are likely to be strictly proportional to usage, with no distinction among works. In fact, we find that performing rights organizations invariably use bundled pricing while the newer reproduction rights organizations tend to use either bundled pricing or fees that are strictly proportional to usage. In both cases, the license fees are, almost invariably, set cooperatively, i.e., there is no competition among rights holders.

2. Collective administration should be limited to instances in which infringements cannot be dealt with individually. This conclusion follows from the observation that, although cooperative pricing is not a logically necessary concomitant of collective administration, the two tend to occur together. Thus, the use of collective administration appears inevitably to reduce competition among rights holders. This loss of competition can be justified only where the associated reduction in transaction costs is large, which will occur only where the value of rights to be administered are individually small.

3. There will often be many license fees and distributions of revenues for which collective pricing is better for everyone than is individual pricing. Where collective administration produces large transaction cost savings, the benefits to be divided among copyright owners and users will be very large. As a result, for many distributions of these benefits, all owners and users will be better off than if they attempted to engage in individualized transactions. This means that copyright collectives will have substantial discretion in setting fees and distributing the resulting proceeds since it will be very difficult for any individual transactor—licensor or licensee—to improve his situation by defecting from the cooperative arrangement.

4. The nature and form of the collective administration of any given set of rights will be similar in all countries. This is so for three basic reasons. First, reciprocity—whereby rights holders who reside in one country obtain payments through the copyright collective in the country where the right is licensed—is promoted where collectives have
similar forms. Second, newer collectives are likely to model themselves after successful collectives that administer the same set of rights in other countries. Finally, the similarity of rights themselves leads to similar forms of administration. Thus, we find that an organization that administers performing rights in a given country is more similar to those that administer performing rights in other countries than it is to the organization that administers reproduction rights in the same country. This is especially striking given the fact that the various collectives in a given country operate under similar legal regimes.
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I. INTRODUCTION

Organizations that administer copyrights held by a large number of owners—copyright collectives—are an important but not well understood part of the industries that supply intellectual property. Because many individual uses of copyrighted works have relatively small value to users, monitoring and obtaining payment for each such use is often not economically feasible. Copyright collectives exist to overcome this difficulty. By providing centralized administration of copyrights, they lower collection costs and permit many transactions to occur that would otherwise not take place. Moreover, copyright collectives are likely to become increasingly important over time as new technologies make possible decentralized uses of intellectual property for which individual enforcement of copyrights is uneconomic.¹

In May 1986, the World Intellectual Property Organization convened an International Forum on the Collective Administration of Copyrights and Neighboring Rights in Geneva, Switzerland.² Among the questions discussed at the forum were:

- In what cases is collective administration preferable to individual agreement between the rights holder and the prospective user?
- What are the types of work and types of use for the administration of which rights holders and/or commercial users should be represented by an association or other entity? Should there be different associations or other entities for the administration of different rights? Should there be several associations for the administration of the same rights?
- How can the “blanket” licensing and equitable distribution of royalties . . . be ensured where not all the commercial users and not all the rights holders have given power to the associations or other entities to represent them?
- What supervision, if any, should governments exercise over associations or other entities, particularly if they are in a near-monopolistic position and if they “represent” also persons from whom they have not received the power of representation?

¹See S. M. Besen and S. N. Kirby, Private Copying, Appropriability, and Optimal Copying Royalties, The RAND Corporation, R-3546-NSF, October 1987, for a recent analysis of how producers of intellectual property can adapt unilaterally to the existence of unauthorized reproduction of their works. A revised version of this report is forthcoming in the Journal of Law and Economics.

²A Note describing the proceedings appears at 22 Copyright 196, 1986.
• On what principles should the distribution of monies received by an association or other entity representing rights holders be based?³

These are the questions that the present study seeks to illuminate. By analyzing the economics of copyright collectives, examining the behavior of collectives that administer different rights in different countries, and exploring the various forms of government oversight that are employed, we hope to understand how collective administration works, what are its costs and benefits, and how government policies may improve its performance.

THE SIMPLE ECONOMICS OF COPYRIGHT COLLECTIVES

The primary justification advanced for the formation of collecting societies⁴ is that they permit copyright owners to enforce their rights at lower costs than if each rights holder were required to enforce his rights separately. Indeed, it is often argued that certain rights of copyright owners could not be enforced at all unless rights holders could join together for collective enforcement. Tournier and Joubert,⁵ for example, contend that “. . . it is obvious that it would be utopian to imagine that an author could undertake the individual administration of each of his musical works, even on the territory of the country to which he belongs, and therefore only collective administration of the repertoire of musical works by a specific centralizing body is materially, economically and legally practicable . . . .” Similarly, Abada⁶ argues that “as an individual acting alone in today’s society, characterized by the wide range of means available for using works of the mind and the frequency of their simultaneous exploitation both at home and abroad, an author cannot effectively ensure that his rights are protected . . . authors must organize themselves, either at their own initiative or at that of the State, within bodies that will collectively administer their rights.”

It should be noted, however, that some writers have expressed skepticism over whether collective administration will be effective in the

³Id. at 196.

⁴We use the term collecting societies to characterize all collective enforcement mechanisms, whether or not organized as organizations of rights holders. Thus, for example, the Copyright Clearance Center is a collecting society under our definition.


face of new technological developments. For example, Freegard\textsuperscript{7} notes that "not even the collective administration of his rights is found, in itself, to be an adequate solution for the copyright owner when the use he is supposed to be entitled to license or to forbid takes place in circumstances far removed from the possibility of detection." At the same time, others have argued that technological innovation may, by reducing the cost of individual administration of copyrights, provide an alternative to the use of collective administration.\textsuperscript{8} Nonetheless, it appears likely that, at least for the near term, copyright collectives will be the preferred means through which administration of "small" rights is effected.\textsuperscript{9}

In our terms, "small" rights are those rights for which the cost of administration is large relative to their value. In such cases, unless there is collective administration, there may be no market for these rights because administrative costs exceed the revenues from licensing. And, in any event, where administrative costs are high relative to the value of a use, relatively few licenses will be issued.\textsuperscript{10}

\textbf{Cooperative Administration/Noncooperative Pricing}

The simplest type of collective administration is one in which rights holders combine to administer their rights but retain the freedom to establish the license fees for the use of their own works.\textsuperscript{11} That is, rights holders behave cooperatively with respect to administration but price their products on a noncooperative basis.

\textsuperscript{7}M. J. Freegard, "The Situation of Authors' Copyright in Europe in 1984," \textit{Reports to the General Assembly, XXIV Congress of CISAC,} Tokyo, 1984, at 243.

\textsuperscript{8}For example, Paul Goldstein has argued in private correspondence to us (November 9, 1988) that "a far more efficient technological solution is in the offing under which copyright owners could employ computer-based retrieval systems to monitor and obtain compensation for individual uses of copyrighted works .... A prospective user could, after calling up an abstract of the piece from the database, determine whether he wished to make a copy of it. That decision could be facilitated by information appearing in the abstract indicating whether or not the copyright owner wishes to license reproduction of the piece, the terms on which the copyright owner would be willing to license reproduction, and appropriate billing information. Thus, if the user chose to make a copy on the terms proposed, the user could enter his affirmative decision into the database, and the system could then automatically arrange for billing to the user's account."

\textsuperscript{9}Not only have copyright collectives been formed recently to license photocopying rights but a number of these organizations have also begun to discuss the possibility of administering site licenses on behalf of a number of different computer software publishers. See, for example, Copyright Clearance Center, "Found Money: Protecting Copyright without Copyright Protection," mimeo, February 19, 1987.

\textsuperscript{10}Whether users are harmed by the failure of rights holders to find licensing profitable depends on the extent to which the production of works can be supported out of revenues from other sources.

\textsuperscript{11}The transactional service offered by the Copyright Clearance Center, described below, is an example of such an arrangement.
Collective administration of the copyrights of a group of publishers is efficient if its cost is lower than that of administering the copyrights of all possible subsets of the same group of publishers. For example, collective administration of the copyrights of publishers A, B, and C is efficient if it is less costly than administering the copyrights of (1) A separately and B and C together, (2) B separately and A and C together, (3) C separately and A and B together, and (4) A, B, and C separately.\(^\text{12}\)

This condition will be satisfied if the licensees of A, B, and C are the same people\(^\text{13}\) and the costs of administration for a given licensee do not rise in proportion to the number of licenses he obtains. In such circumstances, a visit by one inspector to the premises of a given user will suffice to administer the licenses of several producers and will be less costly than separate visits by inspectors for each licensing producer.

There may, in addition, be economies of scale in administration that do not result from the fact that the licensees of one producer tend to be the same as the licensees of another. One possible source of such economies is that searching for infringements may involve looking at the same sources of information regardless of who the licensor is. For example, a list of holders of liquor licenses may be usefully examined for possible infringing users whether the establishments in question employ country and western or rock and roll music.

Another possible source of economies may result from the development of inspection techniques that may be employed for seeking out infringers using different portions of the repertory of the collective. For example, the techniques employed to monitor radio broadcasts may be useful in overseeing the programming of both jazz and Latin stations.

If there are economies in collective administration arising from one or more of these sources, the question still remains as to how the costs of administration are to be divided among members. One plausible

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\(^{12}\)Technically, the cost function for administration is subadditive. G. R. Faulhaber, "Cross-Subsidization: Pricing in Public Enterprises," 65 American Economic Review 967, 1975, at 978, notes that the existence of subadditivity "insures that there are incentives to cooperate."

\(^{13}\)More precisely, a sufficient condition is that the group of licensees of any publisher in the collective is a subset of any larger group of licensees of any other publisher in the collective. Thus, if the number of licensees of A is larger than that of B which, in turn, is larger than that of C, and all of the licensees of C are among the licensees of B who, in turn, are among the licensees of A, collective administration is likely to be efficient. This condition is not necessary, however. If some licensees take only A and B, others take only B and C, and still others take only A and C, similar economies will exist.
way is to apportion these costs according to the marginal revenues generated for each member by an additional inspection "visit."\textsuperscript{14}

If each licensee is assessed an amount equal to his marginal revenue\textsuperscript{15} as his contribution to administrative costs, the collective will find it worthwhile to undertake additional visits so long as the combined marginal revenues of all members exceed the cost of an additional inspection visit.\textsuperscript{16} This arrangement has the virtue that the amount assessed on each member makes him just willing to contribute to the cost of an additional inspection visit. If he is assessed less than this amount, not enough will be collected to justify an additional visit, although it would be collectively desirable. If he is assessed more than this amount, he will want the number of visits to be reduced.

Given that license fees are established noncooperatively, allocating administrative costs in proportion to the marginal revenues of rights holders will result in the amount of administration being demanded that maximizes the combined profits of licensors. Nonetheless, the profits of some members of the collective may be increased either by excluding others as members or by a different distribution of administrative costs.

Exclusion of some members may raise the profits of others because members who pay a relatively small proportion of the administrative costs are able to offer low license fees. Since this reduces the demand for licenses issued by other members, they, too, must lower their prices. For members who pay a relatively large portion of the costs, the benefits they receive from shifting a portion of the costs to others may be outweighed by the additional competition to which they are subject because other users also have lower costs.\textsuperscript{17} The more similar are the demands faced by the various members, the less likely it is that this outcome will occur.

If a different method of distributing costs is employed, joint profits will not be maximized (subject to the condition that prices are established noncooperatively). Nonetheless, such methods may be

\textsuperscript{14}Marginal revenue is the increase in the total revenue of the publisher that results from a small increase in the number of licenses issued. It will generally be less than the fee for that license, since the fee will also need to be reduced for those users who would have acquired a license at a higher fee.

\textsuperscript{15}There may, of course, be some members for whom marginal revenue is zero.

\textsuperscript{16}Each member receives profits under this arrangement, since his average revenue, i.e., the license fee, exceeds his marginal revenue.

\textsuperscript{17}The situation occurs most clearly where there are members who have marginal revenues of zero. They contribute nothing to the costs of administration under the rule described here, and the increase in the number of licenses that they issue reduces the fees that other members of the collective can obtain.
demanded by those who pay a large share of the administrative costs and be acquiesced to by those who might otherwise be excluded.\textsuperscript{18}

Cooperative Pricing

A situation in which prices are established noncooperatively may not be sustainable for two reasons. The more benign reason is that users may find it unduly cumbersome to deal with a system in which they face different prices for each of the licenses that they might acquire. Since, by definition, the rights in question have relatively small individual values, the additional complexity involved in both decisionmaking and recordkeeping that results from having separate prices for each license may make such an arrangement less attractive than one with a simpler pricing structure.\textsuperscript{19}

The second reason why the use of noncooperative pricing may not be sustainable is that the profits of producers can often be increased if license fees are set cooperatively. In such circumstances, we can expect that the activities of copyright collectives will not be limited to collective administration but will also extend to setting license fees. In the limit, a collective will behave as a monopolist and will attempt to maximize the joint profits of its members. The tradeoff for consumers is then between the reduction in compliance costs that results from having a simpler price structure and the resulting loss in competition among licensors. Users may prefer a simple pricing structure even if prices are set cooperatively to a complex structure in which prices are set competitively.

One way in which the price structure might be simplified is to set the same price for licensing the use of each work, with users free to determine the number of licenses to acquire. This simplifies decisionmaking and recordkeeping for users, since they need keep track only of the number of uses that they make of copyrighted works and not which works they use. Although some attempt must be made to estimate the use made of particular works if the distribution of the proceeds is to be made on the basis of usage, this can be accomplished through

\textsuperscript{18}It should be observed that a member who pays a large share of the costs may not leave the collective even if he is unable to exclude others or shift more of the costs to them. Although the profits of some members may increase if they can exclude others, their profits may still be higher in an inclusive collective than under individual administration. More likely is the defection as a group of those members who collectively pay most of the costs.

\textsuperscript{19}Apparently, part of the reason for the lack of success of the Copyright Clearance Center's Transactional Service, discussed below, was that users were unwilling to incur the recordkeeping costs that it entailed. It should also be noted that the costs of administration for the collective may also be reduced if a simple pricing structure is adopted.
sampling, and many of the benefits of a simpler price structure can still be preserved.\textsuperscript{20}

Establishing the same price for licensing all works clearly results in a simpler price structure for users than does setting different prices, but there are two drawbacks to such an arrangement. First, users may still incur substantial compliance costs even if they need only record the number of uses.\textsuperscript{21} Thus, they might prefer an even simpler pricing scheme. Second, a price structure in which every work has the same license fees can result in the sacrifice of substantial profits for the collective as a whole.

\section*{Bundled Pricing}

In general, the cooperative pricing arrangement that maximizes the combined profits of the members of a copyright collective involves setting different prices for each work.\textsuperscript{22} By limiting the copyright collective to setting the same price for all of the works that it licenses, therefore, profits will usually be lower than they would have been had different prices been charged.\textsuperscript{23} However, for the reasons already suggested, a pricing scheme in which users face different fees for licensing different works may be unattractive to users. An alternative is to offer users access to the entire repertory of the collective as a "bundle" at a single price.\textsuperscript{24} This has the advantage of imposing low compliance costs on users and providing the members of the collective with the opportunity to increase their joint profits. They may even be able to

\textsuperscript{20}As we note below, some of the arrangements currently employed to obtain compensation for photocopying involve a charge per page that is the same for all works and sampling to obtain information about usage to provide a basis for distribution.

\textsuperscript{21}For example, users would still have to distinguish between the copying of protected and unprotected works.

\textsuperscript{22}See J. M. Henderson and R. E. Quandt, \textit{Microeconomic Theory}, Third Edition, McGraw-Hill Book Company, New York, 1980, at 185–186, for a discussion of pricing by a multiproduct monopolist. The statement in the text applies to the class of pricing schemes in which a separate price is set for the licensing of each work and users are free to determine the number of works to license. Below, we discuss an arrangement involving a "blanket license," which may produce even larger profits.

\textsuperscript{23}They may even be lower than they would have been had prices been set non-cooperatively. This is more likely the less substitutable are the various works being licensed. If the works are completely nonsubstitutable, there are no advantages from cooperative pricing and a disadvantage from setting the same price for all of the goods so that joint profits must fall when such a cooperative pricing scheme is introduced.

\textsuperscript{24}Note that this is a type of blanket license because it involves access to works of all of the members of the collective. However, blanket licensing need not involve bundled pricing. For example, licenses offered by the Copyright Licensing Agency permit licensees to photocopy all works in the CLA repertory in return for a fee that depends on the number of pages copied.
increase their profits above those they would earn if they could charge different license fees for each work.\textsuperscript{25}

Before leaving this subject, we want to emphasize that bundling does not necessarily improve the situation of users even where they favor a simple price structure. One reason is that the bundles they are offered may be larger than the ones that they prefer. A nightclub that offers its patrons rock music may not be especially attracted to a bundle that also includes country and western music, and a pharmaceutical company may prefer a blanket license that covers only photocopying of scientific works to one that also includes economic and literary ones. In short, it is possible to make bundles too large as well as too small.

A second reason why smaller bundles might be preferred relates to the possibility of competition among copyright collectives. Suppose, for example, that nightclubs offer their customers either rock or country and western music, but not both. Having two collectives, each of which offers licenses to perform the works from one of these repertoires, may still produce the benefits of reduced administrative costs and simplified price structures without having to forgo the benefits of competition that would result if a single collective offered a blanket license for both sets of works.\textsuperscript{26} With competing collectives, each nightclub would have a choice of licensors, i.e., a choice of which type of music to provide to its patrons.\textsuperscript{27}

Bundled pricing offers the potential of higher profits and lower administrative costs but it offers another benefit to members of the collective, as well. We noted previously that when license fees are set noncooperatively and administrative costs are divided in proportion to each member's marginal revenue, some members may wish to exclude

\textsuperscript{25}See W. J. Adams and J. L. Yellen, “Commodity Bundling and the Burden of Monopoly,” 60 Quarterly Journal of Economics 475, 1976, for an analysis of the conditions under which this will be the case. Profits will rise under bundling if users place similar values on the bundle as a whole but different values on each of its components. Adams and Yellen show that bundling can be a profitable strategy even if costs are not thereby reduced.

\textsuperscript{26}Since a nightclub is assumed to offer only either rock or country and western music, a visit by an inspector on behalf of, say, rock music publishers and writers does not generate any benefits for publishers and writers of country and western music. There may be, however, some complementarities arising from other sources that lower costs when a single collective administers rights for both types of music.

\textsuperscript{27}Tournier and Joubert, op. cit., at 98, argue that "... the financial cost of negotiation, supervision and control of the use of works can obviously only be borne if these activities are carried out on behalf of the greatest number of persons entitled and interested in the same type of exploitation of works belonging to the categories or types that cannot be administered individually." This is not inconsistent with our view that one can have competing collectives each of which licenses works that are individually close substitutes for one another and which as a group are substitutes for the works of other collectives.
others. When the collective issues licenses for a bundle of works at a single price, however, it is straightforward to establish a procedure for apportioning the costs that makes every member better off the more inclusive is the membership of the collective.\textsuperscript{29} The reason is that the more members there are in the collective the greater will be the demand for the blanket licenses that it issues and the larger will be the revenues that it can earn. Since revenues increase with membership and there are more members among whom to distribute costs, existing members are willing to add new ones. By allowing the separation of the process of establishing license fees from that of arranging for the distribution of these fees among members, the incentive for exclusionary membership, noted above in the case of noncooperative pricing, should be attenuated. We would, therefore, expect new members to be welcome where bundled pricing is employed.\textsuperscript{29}

**Distributing the Proceeds of a Blanket License**

Once the proceeds of a blanket license have been received by the collective, the question remains as to how they are to be distributed.\textsuperscript{30} If we assume, as we believe to be the case, that there are significant economies from collective administration, there will be many distributions of the proceeds that will make all rights holders better off than if they licensed their works individually. This follows from the fact that if the revenues that are obtained from collective licensing minus the cost of administration are very much greater than the revenues that are collected from issuing individual licenses minus the cost of administering those licenses, it will be easy to make every rights holder as well off as if he licensed his works individually and still have a very large amount left over. Since this “surplus” can be distributed in many ways, there will be many allocations of the overall proceeds that leave all rights holders with a larger amount than they would obtain from licensing their works on an individual basis.

One implication of this argument is that some rights holders can receive distributions from the collective that are much larger than they could obtain on their own, whereas others may receive payments that are only slightly larger, without the latter group leaving the collective.\textsuperscript{31}

\textsuperscript{29}This assumes that adding a member does not add to administrative costs.

\textsuperscript{30}We do not mean to suggest that limited membership will always be the case where pricing is noncooperative, since the benefits of cost sharing can conceivably exceed the losses from increased competition for all members. However, we would not be surprised if collectives were to employ limitations on membership in such circumstances.

\textsuperscript{31}This issue does not arise where rights holders individually establish the license fees for the use of their own works.
Although some rights holders may be dissatisfied with the payments that they receive, and may attempt to have the payments increased, dropping out of the collective is not an attractive alternative so long as the payments they receive from the collective are larger than the payments that they can obtain on their own. Indeed in many, if not most, cases, the administrative costs of individual licensing are so large that rights holders will be unable to license their works unless they are members of a collective, i.e., the net proceeds from individual licensing will be negative. As a result, any payment from the collective will be larger than they could obtain from “going it alone.” As a result of the large economies that arise from collective administration, it should be relatively easy for a collective to distribute the proceeds of license fees in a manner that causes no member to wish to defect.

If this argument is correct, it should be difficult to explain precisely how the proceeds of blanket licenses are distributed. Given the large element of discretion possessed by the collective, any of a large number of distributions can be an equilibrium in the sense that it leaves the membership of the collective unchanged. In such circumstances, distributions can depend on chance, history, favoritism, or any of a number of other factors that are not easy to take into account in a conventional economic model.\(^{32}\) As we observe below in our discussion of particular copyright collectives, a very wide range of methods are employed to distribute the proceeds of blanket licenses and the justifications provided for the use of these methods are not especially compelling.

**Observations on the Extended Collective License**

The previous argument that there exists a large number of possible distributions of the proceeds from collective licensing for which no member of the collective would wish to defect is based on the premise that it is economically difficult, and in many cases completely infeasible, for any member to enforce his rights individually. That is, the existence of very many potential equilibrium distributions results from the large economies that are associated with collective administration. This would suggest that membership in collectives would be highly sought and that there is little need to compel anyone to join. It is, therefore, a small puzzle why a number of Scandinavian countries have adopted legislation calling for the establishment of “extended collective

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\(^{31}\) Another implication is that the costs of administration can be larger than they need be without causing defections.

\(^{32}\) To be sure, there are some limits on discretion. For example, a rights holder with a very large number of works for whom individual licensing is a plausible alternative must receive a payment at least as large as the one he would obtain from individual licensing. However, this still will leave a very large amount of discretion.
licensing.” Under this institution, after a copyright collective has enrolled a sufficient proportion of a particular group of rights holders, others in the group of rights holders must also license their rights through the collective. This means both that they are entitled to revenues for the use of their works when the collective issues a license and that they are unable to individually bring actions for infringements against those who have acquired licenses from the collective. In short, users must treat those who do not join the collective as if they had done so, and nonmembers must honor agreements reached by the collective as if they were members.33

The existence of extended collective licensing remains a puzzle, because if we are correct about the inability of nonmembers to bring individual actions against infringers because it is economically infeasible to do, we should expect virtually all rights holders to wish to join a collective. Indeed, we have argued that rights holders will retain their memberships even if they receive relatively small payments from the collective because the alternative may be to receive no payments at all, which accounts for the wide discretion that we believe collectives have in determining how they will distribute their revenues. Thus, we wish to inquire as to why there is need for an extended collective license given this strong incentive for everyone to wish to join voluntarily.

One possible reason is that although a rights holder cannot credibly threaten to leave the collective and bring infringement suits on his own, it may be the case that the value of a license from a collective with universal membership is far greater than one with, say, only 99 percent of a group of rights holders as members. If users highly valued absolute assurance that they could not possibly be sued for infringement if they were licensed by a collective, which could only occur if membership were universal, then any rights holder, although he is clearly better off as a member of the collective than if he is not, can impose such a large cost on the collective by not joining. Thus, an individual rights holder who threatened not to join might be able to increase his share of the revenues of the collective. But, of course, if all rights holders attempt to hold out in this manner, it will be impossible for the collective to form in the first place, since the sum of the demands of all would-be holdouts is likely to exceed the revenues that can be obtained by the collective even if it had universal membership. On this explanation, extended collective licensing is a device for eliminating the leverage held by any small number of rights holders. By empowering collectives that sign up a large number of rights holders as

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33 In a number of other countries, certain rights can be administered only through collectives, which serves as an incentive for nonmembers to join, since otherwise they cannot enforce their rights.
members with a kind of "eminent domain," this type of behavior can be avoided. If the explanation is correct, the provisions of the extended collective license would never have to be invoked, since all rights holders would join voluntarily.

Although the argument that extended collective licensing is a device for overcoming the holdout problem is logically consistent, we are inclined to put small weight on it. Our reason is that it is difficult to see why users would attach such large value to universality of membership if they knew that nonmembers could not economically bring infringement actions individually.

It is clear that users would be willing to pay a large amount for a collective license, the more inclusive is the membership of the collective. This is so for two reasons. First, the larger is the repertory of the collective, the greater the amount of resources it will find profitable to spend on enforcement and the greater is the likelihood that an infringing user, one without a license from the collective, will be discovered. Second, the larger is the repertory, the larger the number of works that will be found to be infringing if an inspection visit to an unlicensed user occurs. For both reasons, we would expect that the larger is the repertory, the higher the blanket license fee that a collective can command for its use.

We would also observe that there may be some (possibly quite high) minimum membership for a collective below which it would not be able to license any users. The reason for this is that prospective licensees want to have some assurance that they will not be sued if they take a license from the collective. But only a collective that represents a very large proportion of rights holders—although not necessarily all—can provide such an assurance. It can do so because the nonmembers represent such a small group that even collectively they would not find it feasible to engage in enforcement.

If this argument is correct, an effective collective will be one that represents a large proportion of rights holders in a given class, but not necessarily all of them. But since universality of membership is not required, no individual member can effectively threaten to withhold his membership to increase his share of the license fees that are collected. But this means that no one will wish to hold out and membership will be nearly universal.

A second possible explanation for the existence of the extended collective license is that, although all rights holders will eventually discover that they are better off joining the collective, some may, for a time, either miscalculate the benefits of membership or fail to calculate

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these benefits at all. On this explanation, the purpose of the extended collective license is to accelerate the formation of collectives and to extend the benefits of collective licensing to some rights holders before they discover that it is in their interest to join.

A final explanation for the extended collective license takes a completely different tack. Instead of assuming that the extended collective license is intended to make rights holders join who otherwise would not do so, it is possible to think of the arrangement as an attempt to force collectives to represent rights holders who they otherwise might reject as members. By extending the license to nonmembers, the issue of the terms on which membership is granted and to whom becomes of much more limited significance although there may still be a concern that nonmembers receive the same treatment as members in matters of distribution.

QUESTIONS TO BE ADDRESSED

The preceding discussion suggests four questions that should be addressed in assessing the behavior of copyright collectives. First, are the rights that the collective administers "small" enough that individual enforcement is infeasible and collective administration is the only feasible alternative? Unless this threshold question is answered in the affirmative, we should probably conclude that collective administration should not be permitted.

Second, is the set of works for which rights are administered by a collective too large? Although collective administration may be necessary for a particular set of uses, this does not necessarily mean that it

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35 We owe this argument to Richard R. Nelson. As the past editor of a journal that has still not registered with the Copyright Clearance Center, and thus is receiving no royalties from photocopying, one of the authors (S. M. Besen) finds this explanation especially persuasive.

36 A related explanation, also due to Nelson, is that some rights holders may never discover that they should join the collective and that the extended collective license overcomes this deficiency in their decisionmaking. In both cases, however, a rights holder cannot refuse to be represented by a collective even if he has made a conscious, as opposed to an inadvertent, decision not to join. This difficulty could be dealt with by extending the collective license to all nonmembers except those who explicitly request that they not be included.

37 As we describe below, ASCAP's membership policy was initially fairly restrictive.

38 We say probably because there may be situations in which the cost savings are sufficiently great even in the presence of "large" rights that collective administration should be permitted. For a useful discussion of the tradeoff between economies of joint operation and the resulting reduction in competition, see O. E. Williamson, "Economies as an Antitrust Defense: The Welfare Tradeoffs," 88 American Economic Review 18, 1998.
need extend to all works. Competition among collectives may still be feasible. 39

Third, does the price structure adopted by a collective correctly balance the need for administrative simplicity and any resulting loss in competition among the members of the collective? Under certain circumstances, it may be possible to limit collectives to cooperative administration, although for most small rights it is likely that collectives will also be involved in setting prices.

Fourth, do the membership policies of collectives promote efficient behavior? Do collectives exclude members? Under what conditions, if any, should collectives be permitted to enforce the rights of those rights holders who are not members?

Each of these questions should be kept in mind as we discuss, in the following sections, the operations of a large number of copyright collectives. In Sec. II, we examine in detail the behavior of performing rights societies that, in some cases for a very long period of time, have administered the licensing of small musical performing rights. That section not only examines ASCAP and BMI, the major American performing rights societies, but also considers the behavior of a number of societies in Western Europe to see how the same rights are administered in different countries.

Section III examines the behavior of some of the major "reproduction rights organizations" that have recently come into being to license photocopying both in this country and abroad. 40 By considering the activities of a number of such organizations, we are able to compare their performances with those of the performing rights societies and with each other.

Copyright collectives, because they engage in cooperative behavior, are frequently subject to governmental oversight. Section IV considers this oversight, which is undertaken primarily through the courts in the United States and through specialized administrative bodies in other countries.

Section V concludes the report by describing some tentative conclusions that may be reached through an examination of the behavior of performing rights societies and reproduction rights organizations.

39 Competition among collectives seems more plausible for musical performing rights, where particular outlets may have a choice about the type of music that they will offer to their patrons, than for photocopying, where articles from one discipline are unlikely to be substitutes for articles from another.

40 In some cases, this function has been added to others that existing organizations had performed.
II. PERFORMING RIGHTS ORGANIZATIONS

In both Europe and the United States, a distinction is made between
dramatic and nondramatic performing rights in music (sometimes
referred to as "grand" and "small" rights). A performance of a musical
comedy or an opera with scenery and costumes is a dramatic per-
formance; the performance of a song, even one that forms part of a larger
work, in a nightclub or a concert hall is a nondramatic performance.
The distinction is important because it gives rise to two totally dif-
fferent methods of licensing performing rights. Dramatic performances
are usually individually valuable and involve questions of artistic con-
trol as well as of remuneration. They are also relatively rare, making
direct licensing between author and producer economically feasible.
Nondramatic performances, on the other hand, typically involve many
separate works, where the performance of any single work does not
have great value. Moreover, they take place with great frequency and
in a vast range of locations so that licensing on an individual basis is
virtually impossible. The need for a centralized organization to moni-
tor and license "in bulk" has led to the formation of performing rights
societies in a large number of countries.

The first performing rights society for music, Societe des Auteurs,
Compositeurs et Editeurs de Musique (SACEM), was established in
1851 in France, although a society to protect and license dramatic per-
forming rights, Societe des auteurs et compositeurs dramatiques
(SACD), had been formed in 1829. The first British and U.S. music
performing rights organizations were established in 1914. Performing
rights societies now exist in most industrialized countries and in many
developing countries as well. In 1988, the Confederation Internationale
des Societes d'Auteurs et Compositeurs (CISAC), the international
federation of these societies, listed 109 ordinary members and 25 asso-
ciate members in 64 countries.

1See J. M. Kernochan, "Music Performing Rights Organizations in the United States
of America: Special Characteristics; Restraints; and Public Attitudes," 21 Copyright 399,
1985, at 390.

2Private correspondence from J.- Alexis Ziegler, Le Secretaire General, Confederation
U.S. PERFORMING RIGHTS ORGANIZATIONS

In the United States before 1897, music performing rights were not protected\(^3\) and the Copyright Act of 1909,\(^4\) which was in force until 1976, limited performing rights to renditions that were in public and for profit. Renditions by coin-operated machines and for certain educational and religious uses were specifically exempt.\(^5\) It was not until the enactment of the Copyright Act of 1976\(^6\) that a very broad definition of what constituted "public performance" was adopted. The act also provided specific and limited copyright exemptions for (1) performances in the course of face-to-face teaching activities of nonprofit educational institutions, (2) certain governmental and nonprofit educational broadcasts, (3) performances in the course of religious services, and (4) purely noncommercial performances meeting certain criteria. Performances by jukeboxes (previously exempt), cable television (exempt by court decision), and public broadcasting (that users claimed were exempt) were no longer exempt but were allowed to obtain statutory compulsory licenses.\(^7\) A new administrative agency, the Copyright Royalty Tribunal, was established to supervise the setting and distribution of the compulsory license fees.\(^8\) All users, other than those specifically noted above, must obtain licenses from copyright owners for public performances of copyrighted material.

Unlike most other countries, the United States has three competing performing rights organizations of widely diverse character.\(^9\) These are the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc., formerly the Society of European Stage Authors and Composers.

From 1909 until the revision of the copyright law in 1976, the courts, in a seemingly endless list of cases (the more important of which are discussed below), were asked to interpret the provisions of the 1909 copyright act. These battles shaped the structure of American performing rights organizations and also resulted in unique restraints being placed on their operation.

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\(^4\)Copyright Act of 1909, as amended.

\(^5\)Amendment to the Copyright Law of January 6, 1897, Rev. Stat. 4966.

\(^6\)Copyright Act of 1976 (effective 1 January 1978); Public Law 94–553, 90 Stat. 2541.


\(^9\)Canada has two competing organizations, CAPAC and PRO/CANADA. Brazil has multiple organizations. Most other countries have only one.
Structure and Size

ASCAP is an unincorporated nonprofit membership association, whose members are composers, lyricists and music publishers. ASCAP currently has about 29,000 writers and 12,000 publisher members. To be eligible for full membership, a writer must have created one work that has been regularly published or commercially recorded or performed; music publishers must be actively engaged in the music publishing business. (ASCAP Articles of Association, Art. III, Sec. 1.A (i), (ii).)

ASCAP is managed by a board of directors consisting of 12 writer (elected by writers) and 12 publisher (elected by publishers) members; three of each must represent “serious” or symphonic music. (ASCAP Articles of Association, Art. IV, Sec. 1.) Voting for board members is on a weighted basis, the weights being determined by members' contributions to the repertory. No member may cast more than 100 votes. The board meets once each month and oversees all of ASCAP’s operations.

BMI was created in 1939 when ASCAP attempted to increase broadcast stations' license fees and to license broadcast networks for the first time. In response, the broadcasters boycotted ASCAP music and created their own performing rights organization, BMI. BMI is a corporation owned entirely by broadcasters, although the owners have never received any dividends. Writers and publishers have no voice in the management of BMI. In 1985, BMI had approximately 48,000 writers and 29,000 publishers who are designated as “affiliates” rather than members. From the beginning, BMI, affiliation was open to all music publishers.

SESAC, which was founded in 1930 by Paul Heinecke, a former music publisher member of ASCAP, was incorporated in 1931. Originally, SESAC’s catalog was based entirely on European music, for which it granted European performing rights. Difficulties during World War II in obtaining European rights led SESAC to specialize in country and gospel music, although currently it represents both European and American works.

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10 Much of the material in this and the following sections on U.S. organizations is based on J. M. Kernochan, op. cit., at 389–410.

11 Details about ASCAP operations were obtained from Bernard Korman, General Counsel, ASCAP.

12 Details of BMI operations were obtained from Theodora Zavin, Senior Vice President and Special Counsel, BMI.

13 ASCAP's initial membership policy was restrictive, but membership is now open to anyone who meets certain minimum qualifications.
SESAC is a private, family-owned corporation. Until the 1970s, when writers were admitted, it had only publisher affiliates. Currently, it has 1,800 writer and about 1,130 publisher affiliates. As in BMI, they do not participate in management. SESAC claims to be “highly selective” in its admissions policies, a position that differs from the minimal requirements of ASCAP, BMI, and most foreign societies.

ASCAP’s foreign and domestic receipts for calendar year 1987 were about $325 million. BMI reported total revenues of $155 million for the fiscal year ending June 30, 1985. SESAC is much smaller; its receipts amounted to $5.5 million in 1984–1985.

Operation and Scope of Activities

In both ASCAP and BMI, writers and publishers grant, to their respective organizations, the nonexclusive right to license nondramatic public performances of their works. ASCAP and BMI do not have the authority to collect fees for dramatico-musical performances of their members’ works14 or to administer the mechanical rights required for producing and selling records and tapes of members’ works.15 Unlike European societies, neither organization collects fees from movie exhibitors for public performance of copyrighted music during an exhibited film. SESAC obtains, from its publisher-affiliates, both the dramatic rights and, from most publishers, the mechanical and synchronization rights. From its writer-affiliates, SESAC obtains public performance rights, although writers can issue nonexclusive licenses to others, as well as limited mechanical and synchronization rights, although again on a nonexclusive basis. The latter rights are administered primarily through a subsidiary, Music Royalties Limited.

In addition to the rights granted to them by their members or affiliates, all three organizations have relationships with foreign societies that allow them to license the repertories of these societies as well.16 Similarly, foreign societies license the works in the American organizations’ repertories and collect and remit fees for the public performances of such works. SESAC has similar arrangements with foreign mechanical rights organizations.

14See the discussion of Alden-Rochelle, Inc. v. ASCAP, below.
15BMI does obtain some relatively limited rights for the recording of works for broadcast as part of either a network delayed broadcast or the prerecording of a regularly scheduled program.
16Works that are licensed through ASCAP are typically not available for licensing through BMI, and vice versa.
Licensing

The principal licensees of ASCAP, BMI, and SESAC are broadcasters, including network-affiliated and independent television stations, radio stations, and television and radio networks. Others licensees are cable systems, bars, restaurants, nightclubs, hotels, arrangers of live concerts, and those providing background music services. Compulsory license fees are collected from cable television systems, jukeboxes, and public broadcasting, as authorized by the Copyright Revision Act of 1976. As mentioned above, the Copyright Royalty Tribunal oversees the rates for, and distribution of, the fees collected under these compulsory licenses.

ASCAP and BMI license broadcasters to carry their entire repertoires. A distinction is made between “blanket” and “per program” licenses.

The ASCAP blanket radio license fee is determined as follows:\(^\text{17}\) First, a station computes its gross revenues, defined as all payments from sponsors, time brokers, and independent networks. The station then subtracts payments received from networks licensed by ASCAP, advertising agency commissions, and revenues from political advertising to determine its adjusted gross revenue.\(^\text{18}\) Next, the station is permitted to subtract certain items of expenditure to the extent that they exceed 15 percent of adjusted gross revenue to determine revenue subject to fee. The license fee for a blanket license is currently 1.56 percent of revenue subject to fee, with a minimum payment of $360.

To determine the per program radio license fee, a station first determines the number of programs subject to fee, which are all local programs in which it makes use of compositions in the ASCAP repertoire.\(^\text{19}\) Next, it computes its adjusted gross revenue as in the case of the blanket license. It then determines its weighted hours—the number of hours in which it broadcasts local programs during a calendar year weighted by their relative importance; e.g., hours between 6 a.m. and 10 a.m. weekdays receive a weight of 1.00 and hours between midnight and 6 a.m. weekdays receive a weight of 0.25. Next, it computes revenue per weighted hour by dividing adjusted gross revenue by weighted hours. Finally, to determine revenue subject to fee, the station multiplies its revenue per weighted hour by the number of weighted hours of programs subject to fee.\(^\text{20}\) Although this produces a

\(^{17}\) ASCAP Local Station Blanket Radio License.

\(^{18}\) Certain other small items can also be deducted.

\(^{19}\) ASCAP Local Station Per Program Radio License.
smaller base than the one used in calculating the blanket license fee, the percentage of the base that is paid for the license is higher. At present, the per program license fee is equal to 4.22 percent of revenue subject to fee plus 48 times the highest one-minute advertising card rate of the station.

General (or nonbroadcast) users are offered a variety of blanket licenses, with the fees being based on a number of objective factors. For example, hotel fees are based on expenditures for live entertainment, with an additional charge for the use of mechanical music. Colleges and universities pay a fee based on the number of full-time-equivalent students. Fees for bars, grills, taverns, restaurants, and similar establishments are based on a complex formula that includes the seating capacity of the establishment; the number of nights per week in which music is performed; whether the performance is mechanical or live and, if live, the number of instrumentalists; whether there is an accompanying show or vocalist; whether an admission or cover charge is made; and, for mechanical music, whether there is dancing, either by patrons or performers.\[21\]

Most license agreements are negotiated with associations representing user industries. For example, the All-Industry Radio Music Licensing Committee negotiates on behalf of local radio stations, and hotels and motels are represented by the American Hotel and Motel Association. Basically, agreements are tailored to the industry being licensed, with license fees set at levels representing the “value” of music to that industry. Licensing of these general users is done through district offices. Field representatives locate and license users. Clipping services also keep the societies informed about local advertisements for concerts. Occasionally, other licensees advise ASCAP and BMI of nonlicensed users.

SESAC also offers “blanket” licenses for monthly fees. It sets fees for broadcasters on the basis not of receipts but of certain factors such as the market population of the area served and the station’s advertising rates. License fees are negotiated with users, not associations.

\[21\]If the weighting of hours is ignored, this amounts to setting the base for the per program license fee equal to adjusted gross revenues times the proportion of local program hours in which programs in the ASCAP repertory are used.

\[22\]ASCAP rate schedule for the year 1987 for bars, grills, taverns, restaurants, lounges, supper clubs, night clubs, discos, piano bars, cabarets, roadhouses, and similar establishments.
Monitoring and Distribution

The three societies differ to some extent in their methods of monitoring performances and distributing royalties. ASCAP distributes all the license fees it collects, after deducting its administrative costs, which are approximately 18 to 19 percent of its gross revenue. ASCAP uses a variety of techniques to determine which of its members' works are being performed. It obtains logs and cue sheets from the television networks for all programs. A sample of local television and radio programs is taped for review. From concert licensees and major background music services, ASCAP receives programs and logs. General licensees (bars, taverns, etc.) are not surveyed. However, fees for their uses are distributed on the basis of a "proxy" of radio and television feature uses, as revealed by the sampling in those areas. Of the revenues that are distributed, one-half goes to publishers and one-half to writers, who may receive payments based either on "current performance" or, if they so elect after an initial period, on the average performance over a period of years.

The proceeds of the license fees collected by ASCAP are distributed among its members on the basis of an arcane procedure approved by the courts as part of the 1950 amendments to the ASCAP consent decree. Fees from each source, such as television networks and radio stations, are initially divided among publishers, writers, and composers. Each work receives credit based on an estimate of the number of performances it has received and on the nature of the work, e.g., theme, background music, jingle, or feature. Funds from each source are divided based on credits for performances of works in the most recent year (current performances), whether the work has been performed over a long period of time (recognized performances), and, for writers and composers, for performances over the previous five years (average performances) and the length of the period in which they have been members of ASCAP.

Arguably some of the factors that are taken into account in the division of revenues, for example, the number of performances and the nature of the work, are related to the value of uses. This is less clear in other cases, however. For example, it is difficult to relate the length of membership or the number of performances of a composer's work in previous years to the proportion of the present year's license fees that

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22Kernochan, op. cit., provides an excellent summary of the methods employed and the differences among them.


he should receive. Nonetheless, for the reasons discussed above, members are unlikely to defect from ASCAP even if they feel that they are getting less than their "fair share." BMI, like ASCAP, also receives daily television network logs. It uses a randomly selected, stratified probability sample to monitor all local radio stations, covering, in each quarter's logging, stations of varying size and type of location. Complete logs of syndicated shows and films are requested from all local television stations and other industry sources. In contrast to ASCAP's analysis of actual tapes of local stations broadcasts, BMI uses station logs. BMI publishes a schedule informing its affiliates of the minimum rates applicable for payments to them for each type of broadcast performance, although the amounts paid are generally substantially higher than the rates specified in this schedule. It distributes quarterly all income less operating costs and a "reasonable reserve."

ASCAP reported that 751 matters were referred to counsel in 1984 (almost double the number ten years previously). Most of these were infringement suits against non-broadcaster commercial users, who resisted obtaining a license. BMI brings 450 infringement suits yearly against similar defendants; almost half are against unlicensed jukebox operators.

Because SESAC is so much smaller than ASCAP or BMI, it does not employ sampling surveys, because of the expense involved. SESAC receives, and bases its payments on, network logs, pay-TV logs, and educational television and radio cue sheet data. It conducts spot checks of local performances on radio and television. Radio performances are monitored daily through Billboard Information Network (BIN). SESAC uses these and a variety of other factors, including information from the major trade publications such as "chart activity" (reports on sales of the top recordings), to determine the quarterly payments to each affiliate.

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25 An intermediate case appears to be that of recognized works where it might be argued that the fact that a work that has been performed over a long period of time makes it especially valuable because listeners value familiarity. At the same time, however, there may be diminishing returns, so the case is far from clear cut.

26 They may, of course, attempt to have the distribution formula changed, exercising "voice" because they cannot "exit." See A. O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States, Harvard University Press, Cambridge, MA, 1970, at 33–36, for a discussion of the use of voice when exit is not possible. However, the ability of dissatisfied members to change the formula may be limited by voting rules that accord greater weight to established members.

27 See Kernochan, op. cit., for details.
Legal Restraints on U.S. Performing Rights Organizations

The operation of music performance rights organizations in the United States cannot be fully understood without an understanding of the legal restraints under which they operate. Some of these restraints are peculiar to the United States and some to a particular organization. However, others, which derive from antitrust concerns and the need to ensure price competition, are potentially more significant for other areas of the world.28

The Consent Decrees. In 1941, the Department of Justice, concerned about complaints received from the National Association of Broadcasters, filed suit against both ASCAP and BMI. The suit against BMI was dropped when it signed a civil consent decree, but the United States filed a criminal antitrust suit against ASCAP on February 5, 1941. ASCAP entered a plea of nolo contendere to the criminal charges and avoided the civil action brought against it by signing a consent decree.29 The decree’s licensing provisions were aimed at: (a) curbing ASCAP’s power to exact higher fees by withholding licenses and (b) limiting some of ASCAP’s trade practices that were alleged to be unfair. Some of the more important provisions were: ASCAP’s exclusive right to license was limited; it could not discriminate between similarly situated licensees; license fees charged had to be related to the amount of music actually used; ASCAP had to offer three types of licenses—blanket, per program, and per piece.30

Both ASCAP and its users became increasingly discontented with the 1941 consent decree. Because of this and other concerns, such as the growing impact of television and other new developments in the musical entertainment field and the Alden-Rochelle decision which called into question the basic manner in which ASCAP operated, a complete revision of the earlier decree was filed on March 14, 1950. The provisions of the 1950 consent decree fall into three categories: general provisions, provisions related to licensing and fee structure, and provisions authorizing judicial fee-setting.31

28SESAC has occasionally been the subject of antitrust legislation; see, e.g., Affiliated Music Enterprises, Inc. v. SESAC, Inc; 361 U.S. 831 (1959). In addition, it must be concerned with the antitrust rulings that affect its rivals.

29U.S. v. ASCAP, 1940–1943 Trade Cas. (CCH) ¶156,104 (S.D.N.Y. 1941).

30Per piece licenses, which set a price for each individual use of a specific composition, were available only to nonbroadcast users.

1. General Prohibitions: ASCAP was restrained from: (1) "holding, acquiring, licensing, enforcing or negotiating concerning any rights copyrighted musical compositions other than rights of public performance on a non-exclusive basis" and restricting members from individually licensing these rights on a nonexclusive basis; (2) discriminating in license fees or other terms between similarly situated licenses; (3) issuing licenses lasting longer than five years (with the exception of motion picture performance rights, discussed below); (4) negotiating with or granting a license to any motion picture theater exhibitor for any motion picture performance rights and instituting any proceeding against motion picture theater exhibitors for infringements related to these rights; (5) instituting any proceeding against users for infringement of compositions not in ASCAP's repertory; (6) restricting the rights of members to withdraw from ASCAP, subject to existing licenses and advance notice; and (7) restricting the public performance of any composition to obtain additional fees "or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition."

2. Licensing Provisions: ASCAP was required to: (1) issue licenses to radio broadcasting networks, telecasting networks, and wired music services (e.g., "Muzak"), which would allow for simultaneous and delayed broadcasting by all affiliates of the networks or subscribers to the services without requiring each affiliated station or subscriber to obtain a separate license; (2) issue licenses to manufacturers, producers, or distributors of a transcription or recordation of an ASCAP composition, which is intended for television or radio broadcast, without requiring each television or radio station to obtain an individual license; (3) issue a single license covering motion picture performance rights to any motion picture producer on either a "per film" or "blanket" basis, but not on an industry-wide basis; (4) issue nonexclusive licenses covering all ASCAP compositions to any user making a written application, and issue licenses for specific

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32U.S. v. ASCAP, 1950-51 Trade Cas. (CCH) ¶62,595, Sec. IV(A) (S.D.N.Y. 1950).
33Id. at ¶62,595, Sec. IV(B).
34Id. at ¶62,595, Sec. IV(C).
35Id. at ¶62,595, Sec. IV(D).
36Id. at ¶62,595, Sec. IV(E and F)(1).
37Id. at ¶62,595, Sec. IV(F)(2).
38Id. at ¶62,595, Sec. IV(G).
39Id. at ¶62,595, Sec. IV(H).
40Id. at ¶62,595, Sec. V(A).
41Id. at ¶62,595, Sec. V(B).
42Id. at ¶62,595, Sec. V(C).
compositions only upon the written request of both member and user or upon request of the user and a failure to respond within 30 days by the member.\textsuperscript{43}

Under the 1950 consent decree, the blanket license was essentially retained as the major method of the ASCAP licensing structure. However, per program licenses were to be made available upon request to provide a real and effective alternative to blanket licensing.\textsuperscript{44}

3. Setting of License Fees: License fees for radio and television broadcasting were not to be based upon a percentage of the income obtained by the licensee from those commercial programs not performing compositions in the ASCAP repertory, unless the licensee requested otherwise.\textsuperscript{45} In addition, ASCAP was ordered to "use its best efforts" to establish fees for its various licenses in a way that gives users a "genuine choice."

4. Judicial Fee-Setting: If the parties were unable to agree on a fee within 60 days, then the applicant for the license could ask the court for a determination. At this time, the burden was on ASCAP to prove that its proposed fee was reasonable. In the meantime, the applicant had the right to use the requested music subject to an interim fee set by the court. Once the final fee was set by the court, the fee became retroactive to the time that the petition was filed.\textsuperscript{47}

Until 1988, the court had never been asked to invoke its fee-setting power;\textsuperscript{48} instead, its main function has been to oversee negotiations between ASCAP and its users and to approve the rates privately agreed upon between the concerned parties. The provision, however, has been invoked by others seeking to force ASCAP to offer different kinds of licenses not merely agreement on fees. For example, in U.S. v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.),\textsuperscript{49} local television stations sought licenses that would limit their billable time for ASCAP licenses to only locally produced programs. In other words, independent producers would have to obtain licenses from ASCAP for their programs before marketing them to the local stations. The local

\textsuperscript{43}Id. at \$62,595, Sec. VI.
\textsuperscript{44}Id. at \$62,595, Sec. VIII(B).
\textsuperscript{45}Id. at \$62,595, Sec. VII.
\textsuperscript{46}Id. at \$62,595, Sec. VIII.
\textsuperscript{47}Id. at \$62,595, Sec. IX.
\textsuperscript{48}In 1988, the court tried a case (U.S. v. ASCAP (Application of Showtime/The Movie Channel)) in which it was asked to determine reasonable fees for pay television services. A decision has not yet been rendered.
stations claimed that the court, under the provisions of the decree, had the power to fix any type of license that the court considered reasonable. The district court held that with respect to broadcasters, judicial power encompassed only the determination of fees for the blanket and per program license (licenses that were expressly mentioned in the decree). On appeal, the Second Circuit Court of Appeals affirmed the decision. The court stated that the purpose of the fee-setting provisions of the decree was “to describe how fees were to be set for licenses that ASCAP was bound to grant, not to delineate ASCAP’s obligations to grant them.”

This issue surfaced again ten years later in U.S. v. ASCAP (Application of National Broadcasting Co.). In this case, the NBC television network sought per piece licenses for 2,217 ASCAP musical compositions, arguing that this was authorized under the decree (Paragraph VI). The view of the Department of Justice was that the decree did not compel ASCAP to grant such a license unless the user requested it and all appropriate members agreed. The court held that ASCAP was not required by the terms of the consent decree to issue such a license and further stated that the purpose of the judicial fee-setting provisions was to “provide the mechanics for setting appropriate license fees, not for establishing the scope of a license.”

BMI also operates under a 1941 consent decree, revised in 1966, but fewer restraints are placed on BMI. The 1941 decree calls for source licensing in certain cases and bars discrimination among licensees. The 1966 revision provides for a maximum term of five years for agreements between BMI and its affiliates and that nonexclusive direct licensing by affiliates must be permitted by BMI. However, unlike ASCAP, there is no provision for judicial rate fixing.

**Private Antitrust Actions.** Several user groups have, over the past forty years, filed antitrust suits against ASCAP and BMI, primarily aimed at their practice of issuing only blanket licenses.

1. **Motion Picture Exhibitors:** Under the terms of the 1941 consent decree, ASCAP expanded its operations to include issuance of licenses to motion picture theaters showing films using music in ASCAP’s repertory. Although motion picture producers obtain *synchronization* licenses from individual ASCAP members for songs used in their films, theaters had to obtain separate *performance* licenses for playing the
soundtrack while exhibiting the film. In 1947, ASCAP attempted to increase its rates to exhibitors by changing its licensing formula. In response to strong objections, it reinstated the old formula but with a general increase in fees.

Earlier, a group of theater owners had brought suit against ASCAP, alleging that because ASCAP would not allow direct licensing by its members, and would not grant public performance rights to motion picture producers, movie exhibitors were compelled to obtain additional licenses from ASCAP. The Alden-Rochelle court found ASCAP in violation of the Sherman Act, and enjoined ASCAP from acquiring performing rights in musical compositions that had been synchronized with movies and ASCAP’s members from refusing to grant such rights to motion picture producers simultaneously with the synchronization rights. When the consent decree was amended in 1950, the Alden-Rochelle judgment was vacated.

2. Radio Broadcasters: In an attempt to defend itself against an infringement suit by ASCAP members, a Seattle radio station claimed that ASCAP was an illegal combination engaging in price fixing in violation of the antitrust laws. The Court of Appeals for the Ninth Circuit based its holding that ASCAP’s activities did not constitute a combination in restraint of trade or a monopoly on the fact that ASCAP’s licensing authority is nonexclusive, so that licensees can deal directly with ASCAP members if they wish. Further, the court noted that under the 1950 consent decree all licensees have recourse to the District Court for the Southern District of New York if they feel that ASCAP’s fees are unfair. In this view, ASCAP had been “disinfected” by the decree so that it was not a potential combination in restraint of trade.

3. Television Networks: Despite the K-91 decision, CBS in 1969 brought suit against BMI and ASCAP and sought a ruling that the practice of blanket licensing was an unlawful restraint of trade under the Sherman Act. CBS sought an injunction directing BMI and ASCAP to offer a license on terms that reflected the nature and

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\(^{56}\) Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948).

\(^{57}\) Id. at 893–894.

\(^{58}\) Id. at 900 n. 2.

\(^{59}\) K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967).

\(^{60}\) Id. at 4.
amount of music use. The District Court for the Southern District of New York held that CBS had failed to prove that direct licensing was not a viable alternative to blanket licensing and, thus, that blanket licensing illegally restrained trade, and dismissed the complaint.\textsuperscript{61}

In its review, the Court of Appeals for the Second Circuit found that, since direct licensing was an available alternative, ASCAP’s blanket licenses were neither a tie-in nor a block-booking arrangement.\textsuperscript{62} However, unlike the District Court, the Court of Appeals found that blanket licensing did constitute illegal price fixing, because it set one price for all music, thereby eliminating price competition among ASCAP members.\textsuperscript{63} Since price fixing is a \textit{per se} violation of the Sherman Act, this finding sustained the complaint.

Subsequently, the Supreme Court reversed the Appellate Court’s ruling on the \textit{per se} illegality of the blanket license.\textsuperscript{64} The court noted Congress’ acceptance of blanket licensing in the Copyright Act of 1976, 17 U.S.C. § 111(d)(5)(A), 118(b), and 116(c)(4) (1977).\textsuperscript{65} In deciding whether the blanket license should be placed under a \textit{per se} rule, the Supreme Court focused on the issue of whether “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output”\textsuperscript{66} with no other purpose except stifling of competition. It found that the blanket license “cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue.”\textsuperscript{67} Finally, it held that “the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions” and that “it should be subjected to a more discriminating examination under the rule of reason.”\textsuperscript{68}

Because of the various efficiencies of the blanket license, the Supreme Court concluded that a more comprehensive economic analysis was needed than that which application of the \textit{per se} rule would allow. It then remanded the case to the Court of Appeals for a

\begin{itemize}
\item \textsuperscript{61}CBS, Inc. v. ASCAP, 400 F. Supp. 737 (S.D.N.Y. 1975).
\item \textsuperscript{62}562 F.2d 130, 134–135 (2d Cir. 1977).
\item \textsuperscript{63}Id. at 140.
\item \textsuperscript{64}BMI v. CBS, Inc., 441 U.S. 1, 7–25 (1979), rev’d CBS, Inc. v. ASCAP, 562 F.2d 130 (2d Cir. 1977).
\item \textsuperscript{65}Id. at 15.
\item \textsuperscript{66}Id. at 19–20.
\item \textsuperscript{67}Id. at 23.
\item \textsuperscript{68}Id. at 24.
\end{itemize}
determination of whether blanket licensing was an unreasonable restraint of trade under a “rule of reason” analysis.\(^{69}\)

On remand, the Second Circuit\(^ {70}\) held that customer preferences for blanket licenses, and not the licenses themselves, were responsible for any restraint on potential competition. “[I]f copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to deal with them, the blanket license is not a restraint of trade.”\(^ {71}\) CBS had not offered any evidence that it had attempted to deal directly with the writers or publishers. As a result, the court held that CBS could not complain that the blanket license restrained trade, when realistically available market alternatives were available and it had chosen not to use them. The court also rejected CBS’s claims that individual copyright owners would be reluctant to deal directly with the network.\(^ {72}\)

4. Local Television Broadcasters: The most recent major challenge to the legality of blanket licensing came from local television broadcasters who filed suit against ASCAP and BMI in 1978.\(^ {73}\) The broadcasters argued that the blanket license unreasonably restrained competition in the licensing of performance rights for music used in syndicated television programs and prevented source licensing, in which performance rights are acquired by the program producers and conveyed in the contract authorizing the broadcast of a program, from being a realistic alternative.

The district court found for the plaintiffs holding that “there is no realistically available marketing alternative to the blanket license.”\(^ {74}\) The court found that “the insignificant cost savings of the blanket license in the context of the local television industry do not balance the anticompetitive consequences of the absence of price competition” and that “should the blanket license be enjoined, source licensing would probably evolve” and that “this would permit price competition among musical compositions.”\(^ {75}\) The court also found that the transaction cost savings involved in licensing music rights for locally produced programs were not significant enough to outweigh the license’s anticompetitive effects.\(^ {76}\)

After reviewing the extensive litigation history of ASCAP’s licensing of music performing rights, the Court of Appeals for the Second Circuit

\(^{69}\)Id. at 24–25.

\(^{70}\)CBS v. ASCAP, 620 F.2d 930 (2d Cir. 1980).

\(^{71}\)Id. at 936.

\(^{72}\)Id. at 937–938.


\(^{74}\)Id. at 293.

\(^{75}\)Id. at 296.

\(^{76}\)Id. at 294–295.
reversed the district court decision and held that the blanket licensing of performing rights to local television stations was not a restraint of trade.\textsuperscript{77} Using the same mode of analysis applied on remand in \textit{CBS, Inc. v. ASCAP},\textsuperscript{78} the court first asked whether local television stations had demonstrated that they "lacked a realistic opportunity to obtain performance rights from individual copyright holders."\textsuperscript{79} Where the district court had found that program licenses were not a realistic alternative, the Court of Appeals noted that "the absence of evidence that the program license has been artificially priced higher than is reasonable for value received bars any conclusion that the program license is ‘too costly’ to be a realistic alternative"\textsuperscript{80} and that, in any event, rates for such licenses could be adjusted under the provisions of the Amended Final Judgment. It also found that there was no evidence that the recordkeeping requirements associated with program licenses were unnecessarily burdensome.

With respect to direct licensing, the Court of Appeals held that there was no evidence that local stations could not offer composers direct payments for the rights to perform their works. The court rejected the argument that local stations could not induce anyone to perform the necessary brokering function and noted that no local station had even attempted to obtain a direct license since the Amended Final Judgment had been in effect. Furthermore, the court stated that "the alleged infeasibility of direct licensing is further undermined by the acknowledged ability of the stations to secure direct licensing of music needed for their locally produced programming."\textsuperscript{81}

Finally, the Court of Appeals found that source licensing was a realistic alternative to the blanket license. In doing so, it rejected the district court’s finding that producers of syndicated programming have no incentive to depart from the standard practice of contracting only for synchronization rights with broadcasters being required to acquire performance rights separately. The court concluded that the "aggregate demand from stations willing to pay a reasonable price for source licensing of music performance rights"\textsuperscript{82} would lead to a favorable response from a wide range of syndicators. In sum, the Court of Appeals found that local television stations had not presented evidence that the ASCAP and BMI blanket licenses were a restraint of trade in violation of Section 1 of the Sherman Act.

\textsuperscript{77} Buffalo Broadcasting Company, Inc. v. ASCAP, 744 F.2d 917 (2d Cir. 1984).
\textsuperscript{78} 920 F.2d 930 (2d Cir. 1980).
\textsuperscript{79} Buffalo Broadcasting Company, Inc. v. ASCAP, 744 F.2d 917, 925.
\textsuperscript{80} \textit{id.} at 927.
\textsuperscript{81} \textit{id.} at 929.
\textsuperscript{82} \textit{id.} at 931.
THE PERFORMING RIGHT SOCIETY
(UNITED KINGDOM)

The Performing Right Society (PRS) is an association of composers, authors, and publishers of musical works, founded as a limited, nonprofit company in 1914, to represent copyright owners in the United Kingdom, the Republic of Ireland, and many Commonwealth countries. It has approximately 20,000 members. The society is controlled by an elected General Council of Non-executive Directors, of whom half are composers and authors and half are music publishers. The council appoints the management headed by the chief executive and two directors.

The society administers the performing rights of all its members' musical works, including the right to perform a work in public, to broadcast over radio or television, or to include the work in a cable program. It does not administer "grand rights," i.e., rights for performances of dramatico-musical works and ballets, excerpts from such works that are performed dramatically, or, if performed nondramatically, are over 25 minutes long, or a complete act of the work or a "potted" version of it, which are usually licensed individually. PRS also administers the film synchronization right of writer-members in any musical work especially commissioned for a film.

There are three categories of membership in PRS. A writer, composer, or publisher first becomes a provisional member if he meets certain criteria, generally having to do with a minimum number of works that have been either commercially recorded or broadcast or performed in public within the previous two years. There is an admission fee of £25 for writers and £125 for publishers. After one year of provisional membership, members are eligible for associate membership, provided that their aggregate PRS earnings meet certain minima £420 ($669 in 1987 dollars) for writers and £2,120 ($3,382 in 1987 dollars) for publishers. The earnings criteria for full membership are higher; full membership entitles such members to nominate, or be nominated for, the general council, and to qualify for extra votes.

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83The Performing Right Society Ltd, The Performing Right Yearbook, 1986–87, London. Additional material on PRS was obtained from Michael Freeguard, Chief Executive, and G.M.B. Hudson, Licensing Controller, of PRS.

84Other exceptions are music especially written for son-et-lumière productions and for dramatic production in theaters.
PRS revenues for 1985 are shown below:

<table>
<thead>
<tr>
<th>Source</th>
<th>£000</th>
<th>$000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic licensing royalties</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public performances</td>
<td>18,031</td>
<td>23,393</td>
</tr>
<tr>
<td>Radio and television</td>
<td>27,862</td>
<td>36,148</td>
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<tr>
<td>Commonwealth revenue</td>
<td>409</td>
<td>531</td>
</tr>
<tr>
<td>Royalties from foreign affiliated</td>
<td></td>
<td></td>
</tr>
<tr>
<td>societies</td>
<td>24,220</td>
<td>31,422</td>
</tr>
<tr>
<td>Investment income</td>
<td>3,965</td>
<td>5,144</td>
</tr>
<tr>
<td>Total</td>
<td>74,487</td>
<td>96,639</td>
</tr>
</tbody>
</table>


The net administration costs of £13.9 million ($18 million) represent about 19 percent of the society’s total gross revenue and about 30 percent of total gross domestic licensing income in 1985. Figure 1 presents the income of PRS by source and the distribution of that income.

Approximately 200,000 establishments are licensed by PRS. Among these, clubs, public houses, jukeboxes, hotels, restaurants, and cafes account for well over half of all domestic royalties collected for public performances.

Licensing

PRS offers blanket licenses in the form of yearly contracts. These licenses cover both “live” performances as well as performances by mechanical means. The royalties payable by users are specified in a series of about 50 different tariffs, which take into account the kinds of music performed and the type of establishment seeking the license. Most tariffs have been negotiated with national associations representing different classes of users. Disputes over royalties are referred to the Performing Right Tribunal, established by the Copyright Act of 1956.86

85Occasionally, PRS will issue a blanket license for its entire repertory, or specified works for a single performance, or a small number of performances. These are similar to ASCAP’s blanket, per use, and per program licenses.
86See the discussion of the tribunal in Sec. IV.
Fig. 1—Sources and applications of PRS income
Examples of the tariffs are given below:

Tariff BO: bingo clubs and halls, live music, 2.5 percent of expenditure on musicians if that amount is $\geq 4,500$ per annum; otherwise, an amount based on the number of days on which performances occur.

Tariff C: cinemas, 0.575 percent of gross box office receipts if that sum is $\geq 22,000$ per annum; otherwise, 0.425 percent.

Distribution of PRS Royalties

PRS divides its revenues into “broadcasting” and “general performance” royalties (i.e., royalties received from nonbroadcast users), with each of these further subdivided into distribution pools, known as sections, relating to specific source. PRS obtains complete program logs from almost all broadcasting stations, the sole exception being some local radio stations that submit only samples. Other music users are required to supply programs only for concerts and recitals of “serious” music, and other concerts and live musical events.

On the basis of these program logs and programs, each of the works identified receives points, the number of which varies depending on the frequency of performance, the duration of the work, etc. The total number of points within each particular section is then divided into the revenue for that section to determine the value of a point. For live performances for which programs are not obtained, royalties are distributed primarily on the basis of data from radio program logs. For mechanical performances, e.g., in discos, jukeboxes, and background music, distributions are based on statistical data collected from a variety of sources that are intended to reflect contemporary music use. Royalties from motion picture distribution are based on revenues from exhibition.

The payment for a particular work is divided among the composer, writer, and publisher according to the terms of the contracts among them, subject to the PRS rule that no more than 50 percent can accrue to the publisher. Normally four distributions are made each year and a detailed account is sent to each member.  

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Footnote: Adjustments to the distribution system are made for “unlogged performances” and “special claims.” These allocate monies to writers and publishers on a sliding scale based on earnings in the previous year. The smaller are these earnings, the greater the allocation pro-rata, up to some maximum.
PHONOGRAPHER PERFORMANCE LIMITED
(UNITED KINGDOM)\textsuperscript{88}

Phonograph Performance Limited (PPL) is a nonprofit organization established by British record producers to license the broadcasting and public use of their recordings.\textsuperscript{89} Member companies assign to PPL their U.K. public performance and broadcasting rights. PPL then licenses broadcasters (BBC, commercial television, and radio companies) as well as a variety of nonbroadcast users, such as discos, jukeboxes, hotels, shops, and amusement. Most fees are negotiated with national organizations of users.

PPL obtains from broadcasters and other users (the latter on a sample basis) detailed returns listing the actual music used. This is matched against lists maintained by PPL of the labels owned by their members, and members are paid in proportion to the amount of use. The rate paid per unit of time is the same for every member.

Revenues are distributed as follows: First, 8 percent of revenues is given to the Mechanical Copyright Protection Society, an organization formed to collect payments on behalf of music publishers for mechanical copies made of copyrighted music where the copyright is owned by a member publisher. Next, administrative expenses are deducted. Of the net distributable revenue, 12.5 percent is paid to the Musicians’ Union, 20 percent to recording artists, and 67.5 percent is distributed to PPL members. PPL collects several million pounds in royalties each year.

SUISA (SWITZERLAND)\textsuperscript{90}

SUISA was established in 1942, when the Swiss Federal Copyright Legislation came into force, to administer rights for public performances, broadcasting, distribution by means of cable, network, and recordings on carriers, of nontheatrical musical works. Some authors cede nonexclusive rights directly to SUISA whereas others grant rights to publishers who, in turn, can authorize SUISA to act for them. As a result, both authors and publishers are admitted into the society as

\textsuperscript{88}This material was obtained in an interview with John Love, General Manager of PPL.

\textsuperscript{89}Unlike the United States, in the United Kingdom record producers, as well as composers and publishers, must be compensated when a sound recording is performed or broadcast. Section 12 of the Copyright Act of 1956 protects against unauthorized copying, public performance, and broadcasting of sound recordings.

\textsuperscript{90}Much of this material was obtained in an interview with Ulrich Uchtenhagen, Director General, and Alfred Meyer of SUISA.
mandators. As such they have the right to vote at the General Assembly and are eligible to become members. To become a member, a mandator must have received more than 500 Swiss francs ($328 in 1987 dollars) from the exercise of his rights during the previous three years. The attainment of membership does not affect the administration of rights. Currently, SUISA has 3,578 members and 1,905 mandators.

Licensing

SUISA enters into agreements that grant blanket licenses in exchange for payments based on a tariff structure fixed and approved by the Federal Arbitration Commission (even if previously agreed to by both parties). The tariff schedules attempt to mimic the amounts that authors would obtain if direct licensing were possible. Tariffs vary both by type of music (categories decided by SUISA's board) and by type of user. The result is an extremely detailed and complex set of tariffs.

The tariffs are based on a “10 percent” rule that appears to be based more on tradition than on any economic rationale and that has been confirmed by the Swiss High Court in a number of decisions. Where some of the music that is played or performed is in the public domain, the “pro rata temporis” rule comes into play. Under this rule, the payment is reduced in proportion to the amount of nonprotected material used by a licensee.

The question of the appropriate base to which the 10 percent rule is applied is a knotty one. Performers wish to obtain 10 percent of a large number, e.g., the entire receipts of a nightclub, whereas users would clearly prefer a small base, e.g., the salaries of the musicians. In fact, the tariff is applied to the entire receipts in the case of concert performances, but only to the cost of the music (hiring performers, etc.) in the case of nightclubs. In the case of theaters, the tariff amounts to 1.2 percent of total ticket sales, a figure arrived at by assuming that protected music is played during 32 percent of the film and the intermission.

Total receipts in 1985 from Switzerland and Liechtenstein amounted to over 41 million Swiss francs ($16 million) with income from abroad of about 8 million francs ($3 million). Total income earmarked for foreign societies was about 13 million francs ($5 million) and total administrative expenses were about 15 million francs ($6 million).

91See the discussion of the Commission in Sec. IV.
Distribution

The distribution of royalties by SUISA involves two pieces of data: (a) work declarations from authors (approximately 30,000 annually) and publishers and (b) program logs of actual music played by radio and broadcasting stations. SUISA distributions are based on 100 percent reporting rather than from sampling. As a result, administrative costs are fairly high, about 15 percent in the case of mechanical rights and close to 30 percent in the case of performance and broadcasting rights, although the high percentage may partly reflect the fact that Switzerland is a relatively small country and certain administrative costs are independent of volume.

The distribution of receipts between publishers and authors differs depending on the kinds of rights. Publishers receive one-third of revenues from performance and broadcasting rights and one-half of revenues for mechanical rights. This contrasts with distribution in the United States, where publishers receive one-half of revenues for performance and broadcasting rights as well. This difference is at least partly because in Europe the author is also the arranger. In the United States, where the publisher’s share is larger than in Europe, he must pay for the arrangement out of his share.

After deduction of SUISA’s administrative costs, payments are made to foreign and Swiss rights holders, with the two groups being given equal treatment. Eighty percent of the repertory used in Switzerland is of foreign origin. Payments to foreign rights holders are sent to the appropriate national copyright organization for distribution. SUISA is preparing a list consisting of all composers, authors, editors, and publishers who are members of all copyright organizations in the world to facilitate this distribution.

AKM (AUSTRIA)

Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (AKM) is the Austrian performing rights organization, founded in 1897 to negotiate rates with important users’ organizations. AKM is organized in the traditional model of a performing rights society. It obtains from its members (authors, composers, and publishers of musical works and their legal successors) assignments of the rights of performance and broadcasting for musical works written

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92For works subpublished in Switzerland, the original and subpublisher receive one-half of revenues from performance rights.
93Much of this material is based on an interview with Walter Dillenz, Director of AKM.
or controlled by these parties. AKM is a nonprofit organization that distributes all its receipts to its members and to the foreign collecting societies with which it has reciprocal agreements after its administrative costs have been deducted. As of December 31, 1985, AKM had 6,365 members.

In 1936, the Austrian Copyright Act, which substantially is still in effect, was passed. Also adopted at the time was a law governing the activities of collecting societies. The essential purpose of this law was to regulate the relations between performing right societies and organizations of users of copyrighted works. The law requires that rates for the use of these works be established through collective agreements modeled after those between trade unions and associations of employers.

In 1980, Austrian copyright law was amended to provide for (a) a system of equitable remuneration for rights holders and foreign broadcasts that are retransmitted by cable systems in Austria and (b) the provision of equitable remuneration for home taping, both audio and video, by imposing a levy on blank audio and video tapes. The latest amendment to the law occurred in 1986 and related to social welfare provisions of the blank tape license. It set aside the greater part of the blank tape levy (51 percent at present) for social welfare and cultural purposes.

For all exclusive rights established by the copyright law of Austria, the author has the right to permit or prohibit exploitation and use of his work. To use a copyrighted work, the user must obtain a contractual license from either the author or the author's organization. For some rights, users may obtain a legal license, which gives them the right to use the work but requires the payment of equitable remuneration to the author or his organization. Disputes over remuneration are referred to the courts. For still other rights, users can obtain a compulsory license, which entitles them to a contractual license from the author. If the author refuses to grant such a license, the user may petition the courts for relief.

One exception to the grant of exclusive rights occurs in the case of public performances of radio and television broadcasts, for example in restaurants or bars, where, once a user has obtained a license from a competent collecting society, he is automatically protected against claims from nonmembers of the society. This is very similar to the

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94 This description of Austrian copyright law is based on an interview with Guenther Auer of the Austrian Federal Ministry of Justice.
95 Before 1936, disputes concerning remuneration for the use of copyrighted works where collective administration was used were settled in the courts.
extended collective license arrangement that is being used in some of the Scandinavian countries. \(^{96}\)

AKM basically administers two types of rights, those for public performances and broadcast rights. Mechanical reproduction rights, such as those administered by the Harry Fox Company in the United States, are administered by Austro-Mechana. \(^{97}\) Revenues from broadcasters are collected separately by both AKM and Austro-Mechana. For public performances, AKM collects all revenues and disburses to Austro-Mechana that portion involving mechanical rights.

Broadcasting within Austria is operated by a statutory authority, the Austrian Broadcasting Organization (ORF), the members of whose governing body are appointed by the central government, the governments of the provinces, and other public institutions. There is no privately operated radio or television organization in Austria. ORF is financed primarily through license fees obtained from radio listeners and television viewers and through advertising.

Under an agreement with AKM dated July 11, 1975, ORF is licensed to broadcast by radio and television copyrighted musical works within the repertory of AKM. \(^{98}\) The agreement provides for payment to AKM by ORF of annual license fees calculated as follows: First, the number of hours occupied by the broadcast of copyrighted works within the AKM repertory is expressed as a percentage of total broadcasting hours, an application of the pro rata temporis rule, for both radio and television. These percentages are then divided by 10, an application of the “10 percent rule,” and the resulting percentages are applied to ORF’s income for radio and television, respectively, to produce the amounts payable by the ORF to AKM. As a result of the application of the two rules, AKM collects 10 percent of approximately 27 percent of total television revenues and 10 percent of approximately 47 percent of total radio revenues. Distribution among rights holders is based on actual use and complete ORF program logs are employed as the basis for the distribution.

On September 12, 1988, a new contract between AKM and ORF was signed, effective January 1, 1988. The contract basically retained most of the provisions of the 1975 agreement except that a distinction was made between ORF’s revenue from advertising and from license fees. AKM now collects 8.7 percent of advertising revenues and 10 percent of revenues from license fees.

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\(^{96}\) See the discussion of the extended collective licenses in Sec. III. Other exceptions are for retransmissions of foreign broadcasts by cable and for mechanical licenses.

\(^{97}\) Interview with Helmut Steinmetz of Austro-Mechana.

\(^{98}\) The principles underlying this agreement were first laid out in 1968.
For public performance rights, there are two types of contracts, one for daily or periodic performance (restaurants, buses, airplanes, discos, etc.) and the other for single performances (balls, other single events, etc.). The contracts are negotiated with the owners of such establishments, with organizers of the performances, or with organizations of users. There are approximately 60 different classes of users, each with a different tariff structure. Distribution is based on usage.

**SACEM (FRANCE)**

The Societe des Auteurs, Compositeurs et Editeurs de Musique (SACEM) is the primary French performing rights society.\(^96\) It administers public performance rights as well as broadcasting rights for musical works. The Societe pour l’administration du Droit de Reproduction Mechanique (SDRM), a subsidiary of SACEM, administers mechanical rights.

SACEM has approximately 57,000 members, of whom 24,000 received money from the society in 1987. The board of SACEM is composed of six authors, six composers, six publishers, and one audiovisual director.

In 1987, total gross income of SACEM-SDRM combined (royalties collected plus investment income) was Fr 1.85 billion ($303 million).

The sources of revenues for SACEM in 1985 were:

<table>
<thead>
<tr>
<th>Source</th>
<th>FF000</th>
<th>$000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic licensing royalties</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public performances</td>
<td>730,533</td>
<td>81,350</td>
</tr>
<tr>
<td>Radio and television</td>
<td>332,360</td>
<td>37,015</td>
</tr>
<tr>
<td>Royalties from foreign affiliated</td>
<td></td>
<td></td>
</tr>
<tr>
<td>societies</td>
<td>170,060</td>
<td>18,939</td>
</tr>
<tr>
<td>Total</td>
<td>1,232,973</td>
<td>137,304</td>
</tr>
</tbody>
</table>


\(^{96}\) Much of this information was obtained in an interview with Eric Dufaure of SACEM.
Fees due from users are negotiated either as a percentage of total income, for instance between 4 and 6 percent of a radio or television station's advertising income, or as a flat fee, as in the case of hair salons and clothing stores. The fees and their methods of calculation are intended to reflect the importance of music to the business. Under French law, all rights agreements are negotiated. There are no fees that are mandated by law (compulsory licenses).

The distribution of the license fees that SACEM collects is based mainly on programs that are received from radio and television stations, concerts, record companies, etc. Sixty-five percent of all monies paid out are distributed in this manner. Sample surveys, carried out by SACEM's musical inspectors in discos, dance halls, jukebox installations, mobile discos, etc., are used for 25 percent of distributions. For the remaining 10 percent where there is no program or survey available, distributions are carried out by analogy with uses by similar music users.

Revenues from the licensing of performance rights are distributed among authors, composers, and publishers of a musical work. The distribution of royalties from mechanical rights by the SDRM is negotiable, but the division is generally 50 percent to writers and 50 percent to publishers.

Administrative costs vary depending on the rights being administered. For mechanical rights, where collections are fairly easy, administrative costs constitute between 10 and 15 percent of royalties. For public performance royalties, they are closer to 30 percent. In 1987, combined net administrative costs of SACEM and SDRM amounted to 20 percent of royalties after deduction of income from monies invested between distribution periods.

As permitted under the rules of CISAC, SACEM finances cultural and social programs through a levy of 10 percent on revenues from licensing public performances and 3 percent on the revenues from licensing mechanical rights. Additional revenues are obtained from fees collected for private copying. Under the programs, in 1987, Fr 88 million ($14.4 million) were allocated to some 1,500 elderly or needy members, and grants totaling Fr 17.5 million ($2.8 million) supported "serious music" (symphonic, chamber music and poetical works), live music (festivals and associations), and musical education.
GEMA (GERMANY)¹⁰⁰

There are nine societies administering performing rights in Germany, among which GEMA (Genossenschaft zur Verwertung Musikalischer Aufführungsrechte) is the oldest and by far the most important economically. GEMA was founded in 1915, cooperated for several years, beginning in 1930, with AKM (Austria) in a federation called “Musikschutzverband,” and was reinstated after 1945 (after being centralized by the Nazi regime under “Stigma”).

In 1985, GEMA had 16,000 ordinary and extraordinary members and rights holders associated under an entitlement agreement. Ordinary membership includes the right to vote in the general assembly and is granted only after five years of extraordinary membership and if a minimum collection requirement has been satisfied of DM 40,000 ($13,597) in five consecutive years for authors and composers and DM 100,000 ($33,992) for producers.

Rights of copyright holders in works of literature, arts, and science are governed in Germany by the Copyright Act, enacted in 1965, that is based upon the previous acts of 1901 and 1907. The rights and duties of the performing rights societies are regulated under the Law of Authors Societies of 1965. Under this law, performing rights societies approved by the federal government—conditioned on meeting certain statutory requirements—may represent copyright holders in negotiations with individual users or organizations of users.

Under the Copyright Act, rights for certain uses, for example, those for private copying of audio and video materials, photocopying, and radio performances, can be enforced only through performing rights societies. If a copyright holder becomes a member of, or enters into an entitlement agreement with, an approved rights society, the society has the exclusive right to collect royalties for certain uses of all of his works during the duration of the agreement, usually six years. For these uses, the copyright holder cannot withhold completed works, or any works produced during the term of the agreement, from commercial exploitation. For other uses, for example, public performances of operas and comic operas, rights are generally not ceded to a performing rights society.

Under 13 subsection 3 of the Law of Authors Societies, collectives must set and publicly announce tariffs based on the revenues that users derive from the use of protected works, or on any other basis that reflects the economic benefits derived from the use of the work. Under the law, users may exploit the work “under reasonable conditions” set in an agreement with the association.

¹⁰⁰Stephan Goetz, an L.L.M. student at Columbia Law School, provided extremely valuable research for this subsection.
Licensing

In 1985, GEMA collected DM 532 million ($181 million) for composers, authors, and publishers of music for performance, broadcasting, and mechanical reproduction. Licenses for mechanical rights contributed DM 174 million ($59 million) and levies on blank tapes and equipment in the audio and video industry accounted for another DM 33 million ($11 million), one-third of which was paid by the audio industry. The two major public television networks paid DM 130 million ($44 million) and another DM 55 million ($19 million) was collected from licenses for public performances.

The license schemes for radio and television broadcasting are set by GEMA in agreements with public and private broadcasters. The agreements with public broadcasters, which are not disclosed by GEMA, provide for a license fee including a fixed amount (as renegotiated by the parties each year) reflecting expected average audience and the share of music in the total programs of the broadcaster, plus a share of advertising revenues.

The private radio and television broadcasters and cable program services pay a maximum of 4.8 percent (television) and 6.2 percent (radio) of their advertising revenue based on a full program, which is defined as 24 hours of operation for radio and eight hours for television. A lower rate is applicable if less than a full program is delivered, and if the share of music in the program falls short of fixed rates. Finally, the rates are differentiated by the number of households reached.

GEMA also was one of the contracting parties to an agreement signed on November 3, 1987, between the Federal Post Office (DBP), as the only cable operator in Germany, and a large number of copyright owners, following a decision of the German Supreme Court on July 4, 1987, that denied the DBP the right to retransmit broadcast signals by cable without the permission of GEMA. The agreement provides for a flat license fee of DM 33.6 million ($18 million) for television programs and DM 6.4 million ($3.5 million) for the redistribution of radio programs by the DBP cable for a period of one year. The amount was paid to GEMA as trustee for all other rights holders and collectives (with DM 200,000 ($109,000) deductible for GEMA as reimbursement for costs incurred). Of the amounts collected, 35 percent went to film collection societies, 40 percent to broadcasters, and 24 percent to all other parties, including GEMA and VG Wort. GEMA expects that this agreement will be modified and that fees will be based on a percentage of gross revenues from operations.
Distribution

The distribution of revenues is determined by a committee consisting of members of all rights holders groups according to a distribution plan following a very detailed and complicated scheme assigning points to each work. In the case of public performance and broadcasting, the scheme reflects the type of music, attributing a higher multiplier to orchestral music than to popular music, the frequency of performances and broadcast runs, and the length of the work. For mechanical rights, the distribution of the proceeds is determined by the revenues from sales.

The distribution of revenues among the rights holders for a specific musical work is set as follows: Generally, 5/12 is allocated to the composer, 3/12 to the author, and 4/12 to the publisher. If there is no author, 8/12 is distributed to the composer. In the case of mechanical rights, revenues are distributed 60 percent to composers and authors and 40 percent to publishers.\footnote{In specific cases in which the input by the publisher is considered to be greater than usual, he may get 50 percent of the revenues.}

The levy on blank video and audio tapes and equipment is distributed between GEMA, GVL (collecting royalties for the copyright holders in the film and television industry), and VG Wort in the proportions of 42 percent, 42 percent, and 16 percent (the levy on audio equipment under the Copyright Act is DM 2.50, on video equipment DM 18 and 0.12, and DM 0.17 for audio and video tapes).

In 1985, GEMA had 1,100 employees and deducted 15 percent of the total revenues collected to cover its administrative costs.
III. REPRODUCTION RIGHTS ORGANIZATIONS

Organizations that administer rights to photocopy printed material are a relatively new phenomenon.\(^1\) Of the 15 entities “providing or conveying reproduction authorizations, and collecting or distributing fees (or planning to do so)” that participate in the International Federation for Reproduction Rights Organisations (IFRRO), most are less than ten years old.\(^2\) These “reproduction rights organizations”—other participants in IFRRO are primarily associations of publishers—are located entirely in developed countries. The RROs that currently participate in IFRRO are BONUS (Sweden), CanCopy (Canada), Centre Français du Copyright (France), Centro Español de Derechos Reprográficos (Spain), Copyright Agency Limited (Australia), the Copyright Clearance Center (United States), Fjolís (Iceland), Kopinor (Norway), Literar-Mechana (Austria), Musikedition (Austria), Pro Litteris-Teleedrama (Switzerland), Stichting Reprorecht (The Netherlands), the Copyright Licensing Agency Ltd. (United Kingdom), Union des Ecrivains Québécois (Canada), and VG Wort (Federal Republic of Germany).

Most RROs were formed specifically to deal with the administration of photocopying rights. These include Centre Français du Copyright, the Copyright Clearance Center, and the Copyright Licensing Agency. However, a small number have added this role to that of administering other literary rights. For example, VG Wort, which has existed since 1958, also administers literary rights for public lending, home taping, public performances from television and radio, publishing in school books and anthologies, cinematic works, and cable retransmission, among others. Similarly, Pro Litteris-Teleedrama, which was founded in 1975, is engaged in licensing dramatic, literary, and artistic works to broadcast stations, cable television systems, and book, magazine, and poster publishers, in addition to licensing photocopying.

Some of these organizations are participants in bilateral arrangements that permit publishers in one country to share in the revenues collected by an RRO in another. For example, among the organizations with which the Copyright Clearance Center has such agreements

\(^1\)Some authors prefer to use the generic term reprography to refer to the reproduction of printed material, since not all copying involves light processes. See S. M. Stewart, *International Copyright and Neighbouring Rights*, Butterworths, London, 1983, at 69.

\(^2\)Until quite recently, the organization was known as the International Forum for Reproduction Rights Organisations.
are the Copyright Licensing Agency Ltd., Centre Francais du Copyright, Kopinor, Copyright Agency Limited, and VG Wort. However, not all of these agreements provide for reciprocity.

To this point, the revenues collected for reproduction by all RROs have been far smaller than those collected by performing rights societies.\(^3\) Most RROs are at an early stage of development and are still experimenting with new collection methods and seeking new markets. For similar reasons, few, if any, revenues are obtained through bilateral agreements. By contrast, ASCAP received approximately $50 million from foreign societies in 1987.\(^4\)

**COPYRIGHT CLEARANCE CENTER (UNITED STATES)**

The Copyright Clearance Center (CCC), a nonprofit organization, was founded in 1978 in response to a Congressional recommendation that a mechanism be established to permit an economical method for granting rights to those who wish to photocopy and to provide revenues to those whose works were being copied.\(^5\) Congress had taken this position in response to claims by American publishers that widespread copying of their works was resulting in a significant erosion of their rights and the loss of substantial revenues. At the same time, Congress recognized that transaction costs would be large if there were no collective mechanism to assist users in acquiring reproduction rights. Much

\(^3\)For example, the Copyright Clearance Center will distribute $2.5 million to more than 600 publishers in 1989. This will complete the payments due for 1983, 1984, 1985, and a portion of 1986 (Copyright Clearance Center release February 9, 1989). The single largest distribution that had previously been made was approximately $1 million in 1988 (Copyright Clearance Center Annual Review, March 1988). The Copyright Licensing Agency Ltd. in the United Kingdom distributed £1.4 million in fiscal 1989 (letter from Colin Hadley, General Manager, CLA, October 25, 1988). Similarly, H. C. Jehoram, "Letter from the Netherlands," 24 Copyright 27, 1988, at 28, reports that "Now Reprorecht does indeed negotiate with libraries, schools, universities, etc., but no shining success can be reported as yet." These experiences can be contrasted with that of ASCAP, which had over $200 million to pay out to its members in 1987. See I. Lichtman, "ASCAP Tops $200 Mil for Members," 100 Billboard, February 27, 1988, at 3.

\(^4\)See Lichtman, op. cit. Nonetheless, it seems likely that RROs will become increasingly important and, as they mature, may become the sources of significant revenues for publishers and authors.

of the early financial support for CCC came from publishers and authors.  

CCC operates as an intermediary between publishers and users and its board of directors contains representatives of both groups. It seeks to enroll a large number of publishers so that it can offer licenses to photocopy a large number of works which, in turn, would make these licenses valuable to a large number of users. Publishers do not pay to join CCC but, instead, CCC covers its costs out of the license fees that it collects. Users who wish to take advantage of the licensing system provided by CCC make payments that reflect the volume of their copying. By making such payments, users avoid liability for copying the works of those publishers whose works are registered with CCC. These licenses are generally limited to copying for internal use by business firms. CCC's present agreements with publishers do not permit it to collect for copying done by government agencies or educational institutions, although this may change. Significantly, CCC does not enforce the rights of its participating publishers other than by collecting license fees. Suits against infringers are brought either by individual publishers or through their trade associations. Recently, however, publishers and authors have formed the Association for Copyright Enforcement, Inc. (ACE) to perform this function. Thus, CCC operates to facilitate transactions rather than as the agent of its members. This distinguishes CCC from, for example, ASCAP, and other performing rights societies.

The CCC reported in 1989 that it administered reproduction rights for about 1,000,000 publications, a substantial increase from the 7,200 titles registered at the end of 1983. Titles are primarily in the technical, scientific, and medical fields with about one-fourth being periodicals and the remainder books and monographs. Approximately 6,200 publishers are represented, of which foreign publishers account for about 40 percent. Most foreign participation is through bilateral agreements with other RROs. Under some of these agreements, U.S.

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7Details of CCC operations have been obtained in interviews and private correspondence with Joseph S. Alen, Eamon T. Fennessey, and Virginia Riordan of CCC.

8Details of the various ways in which this is accomplished are provided below.


10Association for Copyright Enforcement Press release, July 20, 1986. Funding for ACE will come from royalties collected by CCC.
publishers can receive revenues collected on their behalf in other countries. Payments are based on the principle of national treatment under which foreign rights holders are treated by an RRO in the same manner as domestic ones. The first receipt of royalties under such an agreement was a payment of $340,000 from Kopinor in 1988.11

Initially, CCC licensed photocopying only on a “transactional” basis. Under the arrangement in place for the Transactional Service, each publisher establishes a fee for each of the items in his repertory. Thus, for example, the publisher of a journal determines the price at which he will license the right to photocopy each of the articles he published.12 Users maintain records of each of the items they copy and, on a periodic basis, provide documentation to CCC. Users then pay CCC the combined amounts of the license fees for these items. After deducting the cost of its operations, CCC makes a payment to each publisher based on the amount of copying of his works and on the price attached to each item copied.

It is important to note that this arrangement does not involve a bundled pricing, as in the case of the performing rights societies described above. Each publisher establishes his own fees for the licensing of his works and users face these prices in deciding whether to copy.13 Although, as we will see, CCC has come to offer a number of alternatives to its Transactional Service, the principle that fees shall be established by individual publishers has been retained. That is, although blanket licenses are now offered, the fee for such licenses depends on fees that have been set by each publisher separately.

Clearly, the Transactional Service places a substantial record-keeping burden on users, since they must maintain records of each copy they make to determine their overall license fee and to permit CCC to distribute the proceeds to participating publishers. For large companies making many copies, the burden is obviously very great. Even a conscientious user who wished to make the necessary payments is likely to be daunted by the need to maintain these records and, in fact, a relatively small amount of copying has been reported to the CCC under this arrangement, and few businesses have ever employed

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12The price together with a code number identifying the publisher and the article would often be displayed at the bottom of the first page of an article.
13Neither these fees nor those established by the CCC under the other licensing arrangements described below are subject to government review. This contrasts with the situation in a number of other countries where an administrative agency is charged with resolving disputes between copyright owners and users. Presumably, if CCC becomes involved in such disputes, they could become the subject of antitrust cases such as those in which the performing rights societies, ASCAP and BMI, have been defendants.
the Transactional Service. In 1982, the last year in which the Transactional Service was the only one offered by CCC, fewer than 400,000 copies were reported. The principal users of the Service appear to be document delivery services and small businesses.

In an attempt to reduce the administrative burden of compliance, while still retaining many of the features of the Transactional Service, in 1983 CCC began to offer to users an alternative Annual Authorization Service (AAS). The AAS has become the major source of revenues for the Copyright Clearance Center. At present, more than 70 corporations take the service and the number continues to increase. The AAS has since gone through a number of changes, and it is worth recounting in some detail the various metamorphoses that have occurred.

The first AAS offered was merely a version of the Transactional Service modified to permit the relevant data to be collected by sampling rather than by enumeration. Under this arrangement, a user would provide data on his copying for a sample period, usually 90 days. The information collected both on the amount and nature of copying during this period was used to estimate annual copying behavior. To determine the annual license fee and the distributions to each publisher, the dollar amounts obtained from the sample period were "blown up" to reflect the proportion of a year represented by the sample period, so that, for example, data for a 90 day sample were multiplied by 4. Users had the option of employing data from the 90 day period combined with any revised publisher fees to determine their license fee for a second year.

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14See Alen, op. cit., at 6.
16Since document delivery services must already maintain records to bill their customers, the additional burden of reporting to the CCC is relatively small. Moreover, the fact that document delivery services make copies for a large body of diverse users makes their activities more suitable for the Transactional Service than are those of a user copying largely for its own employees.
17Copyright Clearance Center release, January 27, 1989. One possible explanation for the relatively slow growth of CCC is the fact that its repertory was initially quite limited. As the number of publishers who permit CCC to license their works increases, however, we expect the demand for licenses will grow more rapidly.
18See Alen, op. cit., at 7-8, for a brief description.
Except for the possible unrepresentativeness of the 90 day sample period or the possibility that users might attempt to "game" the system by reducing copying during the sample period, this version of the AAS should, in principle, produce results similar to those under the Transactional Service. However, compliance costs were sharply reduced so that, in practice, the amount of reported copying increased dramatically when the AAS was introduced.

In a further effort to reduce compliance costs, the AAS was later modified to limit data requirements not only by sampling by time but also by sampling the photocopying machines employed by each user. Using copying data from a "representative sample" of the users' locations and a statistical model, the total number of copies made and the average price of each copy were estimated. Separate estimates were made for each licensee's "major business groups." Using the estimates of the amount of copying and their average prices, the total license fee was determined. These data are also used as the basis for distributing the license fees among publishers. In short, the principal difference between this arrangement and the one involving a 90 day sample of all sites was that here a smaller sample was employed and a more sophisticated method was used to "blow up" the sample data to obtain estimates of total copying and the associated prices. Even this method involves substantial compliance costs, however, and CCC was led to consider still another form of the AAS. This method continues to be offered to users, however, as does the first version of the AAS.

Under the third AAS arrangement, the amount of copying by a user is determined not by a survey of his copying but on the basis of statistical models of copying developed specifically for the industries in which the user participates. Thus, for example, the estimate for the copying done by a chemical company would be based on the characteristics of that company and a statistical model of copying developed

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20The incentive to "game" the system arises because, under this form of AAS, the effective price for copies made during the sample period was four times their nominal price, since it was assumed that the sample period was representative of the remainder of the year. By the same token, the effective price for copies made during the remainder of the year was zero, since the license fee was determined only by copies made during the sample period. Such incentives exist under any sampling system in which the amount paid depends on usage and the sampling period is known in advance.

21CCC reports that this typically involves five to eight sites with 10 to 20 percent of all employees. See Testimony Submitted on Behalf of Copyright Clearance Center, Inc., by Alexander C. Hoffman, Chairman, and Eamon T. Fennessey, President, at Public Hearings of the Register of Copyrights Under the Provisions of 17 U.S.C. 108A(i), April 8, 1987, at 4.

22It was also necessary to adjust the copying data to take into account the fact that not all copyrighted works are in the CCC repertoire. Presumably this was also a consideration in the arrangements described above.
for the chemical industry. If a user participates in more than one of
the 20 industry groups for which statistical models are being developed,
predictions of the volume of his copying are made separately for each
of his lines of business and the results are aggregated. To obtain the
user's annual license fee, the estimate of his total copying is multiplied
by the proportion of copies from the CCC repertory and the average
price of the items copied from previous surveys of all users.

A limited sample of actual copying is still required for each user.
This serves two purposes. The first is to provide data on actual copying
to form a basis for distribution. The second is to "refresh" the
database used to estimate the industry models. At this point, models
have been developed only for a small number of industries. CCC's
objective, however, is to develop such models for all 20 industry groups.

Four aspects of this arrangement deserve attention. First, unlike the
methods described above, here the link between the payment made by
any individual user and the prices established by publishers for their
works is not a tight one. If, for example, a user copies items that are
more expensive than average, his license fee will fall short of the
amount needed to pay publishers the amounts they demand for copies.
By the same token, of course, those users who copy relatively inexpen-
sive items will generate fees that exceed the amounts needed to pay
publishers what they demand. The reason is that, in effect, users pay a
price that equals the average price incurred by all users who share
similar characteristics. Similarly, the amount of copying is based on
the average for all users with a given set of characteristics rather than
on the amount a user actually undertakes. Thus, users who copy more
than the average pay license fees that are too small whereas users who
copy less than average do the reverse.23

Second, individual users will have an incentive to copy both more
items, and more expensive items, than they would under the previous
arrangements. This occurs because the effect of copying an additional
item on the license fee depends on how the average amount of copying
is affected. Thus, with \( n \) users, if one user were to make an additional
copy, the average amount of copying would increase by \( 1/n \). For simi-
lar reasons, a user who might otherwise prefer to copy an inexpensive
item may instead copy an expensive one because the difference in
prices is, in effect, spread over all users. In the limit, the license fee

\[ \text{Since users who believe they are copying less than average or copying items that are}
\text{less expensive than average can switch to one of the two methods described above, one}
\text{might think that this arrangement would be employed only by those with higher than}
\text{average copying amounts or prices. However, users incur higher compliance costs under}
\text{either of the previous methods, so that they may employ this method even if it discrimi-
\text{nates against them.} \]
that a user will pay is determined not by his behavior but by the behavior of all other users who are in the same industry group. If this is the case, copying will be unaffected by the license fee and will be the same as if there were no fee at all. The only effect will be to increase the profits of producers which may, in turn, increase the incentive to produce originals.

Third, individual publishers have an incentive to increase the price that they charge because each of those prices has little effect on the prices that are faced by users. In effect, each user faces a weighted average of all prices, where the weights represent the number of copies that are made of each item. An increase in the price charged by one publisher is unlikely to have much of an effect on the average price and thus is likely to have little effect on the amount of copying. On the other hand, by raising the price he charges for his originals, each publisher can increase his share of the proceeds of the fees that are collected. For example, a publisher with a relatively small share of total copying can approximately double his receipts if he doubles his fee while other publishers keep their fees constant.\textsuperscript{24} In fact, publishers do not appear to behave in this fashion because we have no satisfactory explanation for why this is the case. Although if all publishers raised their prices in this manner, the viability of the AAS might well be threatened. But this still does not explain why each publisher, acting in his own self-interest, does not raise his price, since he is better off if he does so whether or not others also do so. Possibly some form of cooperative behavior prevents the “prisoner’s dilemma” from occurring, but we have no evidence that this is the case.

Of course, if all publishers raise their fees, the average fee will rise and that will reduce the amount of copying that takes place. However, as we have already observed, at any given set of fees established by publishers, users will wish to copy more than they would if they faced the true fees. The result is that although the average fee has risen, we cannot predict what will happen to the amount of copying that occurs. The result may thus be either (a) a reduction in the number of copies made, with a resulting loss in short-run welfare, but with producers possibly better off; (b) no change in copying, with a transfer of wealth from users to producers; or (c) an increase in copying, with an associated increase in short-run welfare, but with users possibly worse off.

We should observe that even if the amount paid to publishers is increased as a result of this arrangement, the overall cost to users can

\textsuperscript{24}Apparently under either of the previous AAS arrangements, a user can “redline” a publisher who charges prices that are regarded as excessive, i.e., he can ask to have that publisher removed from the licensing arrangement. Here, he has little incentive to do so since most of the benefits of reducing the average license fee accrue to other users.
still decline. The reason is that the arrangement reduces the cost of compliance, which is not taken into account in the above analysis. Even if the effect of the AAS is to encourage publishers to raise license fees, users may still be better off than under the transactional system if the reduction in compliance costs is sufficiently large.25

Finally, it is important to observe that although users make payments that are virtually independent of how much and which works they actually copy, license fees are not set cooperatively. Instead, the fees depend, in a complex way, on other fees that are established non-cooperatively by publishers. This arrangement, in which each user faces a bundled price and each publisher separately sets his own fees, is apparently unique. As we have described above, performing rights organizations typically offer blanket licenses in return for bundled payments that are set cooperatively. As we describe below, other reproduction rights organizations either employ bundled pricing or set fees that depend on usage but, in both cases, prices are set cooperatively.26

In no other copyright collective of which we are aware do prices set by individual members play such a large role.

THE COPYRIGHT LICENSING AGENCY
(UNITED KINGDOM)

Like the Copyright Clearance Center in the United States, the Copyright Licensing Agency (CLA) in the United Kingdom came into being because of government recommendations that a convenient way for users to obtain permission to photocopy copyrighted works be established. In its report27 the Whitford committee noted that “the solution of the problems posed by photocopying should lie not in any suppression of the use of modern technology but in the adoption of arrangements which ensure that authors and publishers continue to enjoy sufficient financial incentives to write and publish. Negotiated blanket licenses are seen as the only practicable solution by the majority of interested parties.”28 Under such a blanket license, “Instead of


26To preserve relatively simple pricing rules, usage fees depend only on the amount of copying and not on the identities of the works that are reproduced.


28Id. at 70. The Whitford committee rejected the idea of imposing a levy on photocopying machines on the ground that these machines have many noninfringing uses.
individual authors or publishers being responsible for collecting their own royalties, remuneration *at a standard rate* is collected by a central collecting agency or society which undertakes the task of distribution of the revenue to the individual copyright owners whose works are reproduced.\(^{29}\)

The Whitford committee also envisioned a method, perhaps involving sampling, to determine which items were being copied to facilitate distribution of the resulting revenues. The committee proposed that (1) photocopying should not be a copyright infringement unless and until blanket licensing systems existed, (2) to limit compliance costs such systems should be administered only by a small number of collecting societies recognized by the government, and (3) a copyright tribunal should resolve disputes between users and collecting societies.\(^{30}\) The committee proposed that the jurisdiction of the Performing Right Tribunal, established under the Copyright Act of 1956 to adjudicate disputes involving the collective administration of rights for public performance, broadcasting, or rediffusion of literary, dramatic, or musical works, be extended to include photocopying.\(^{31}\)

In addition to proposing that the number of collecting organizations be limited, the Whitford committee argued for administrative arrangements that were “as simple as possible in order to avoid the cost of collection and distribution exceeding the amount collected.”\(^{32}\) It also contended that a collecting society should be recognized by the government only after providing assurance that it represented a reasonable proportion of copyright owners and that it would not exclude from membership copyright owners with reasonable claims.\(^{33}\)

Finally, the Whitford committee argued for a significant narrowing of the “fair dealing” exceptions under English copyright law.\(^{34}\) The principal basis for the committee’s position was that it felt that these exceptions created a “loophole” that significantly reduced the incentive for libraries to acquire blanket licenses, since they could contend that the fair dealing exceptions absolved them from the need to do so. The committee contended that the exceptions were a significant barrier to the creation of blanket licensing arrangements. Many of the proposals of the Whitford committee with respect to photocopying were later

\(^{29}\) Id. emphasis added.

\(^{30}\) Id. at 71.

\(^{31}\) Id. at 198–199. The activities of the tribunal are described in D. de Freitas, “The Performing Right Tribunal in the United Kingdom,” 34 *Journal of the Copyright Society of the U.S.A.* 161, 1987.

\(^{32}\) Whitford at 72.

\(^{33}\) Id.

\(^{34}\) Id. at 70.

The Copyright Licensing Agency was established in the United Kingdom in 1982. Like the CCC, it developed out of a concern by publishers, represented by the Publishers Licensing Society (PLS), and authors, represented by the Authors’ Licensing and Collecting Society (ALCS), that the widespread photocopying of their works was adversely affecting their markets. The board of CLA consists of six author members, drawn from the Society of Authors, the Writers’ Guild of Great Britain, and the Authors’ Agents Association, and six publisher members, drawn from the Publishers Association, the Periodical Publishers Association, and the Association of Learned and Professional Society Publishers.

The CLA exists to provide a convenient mechanism for licensing photocopying. The proceeds of license fees for the photocopying of books are divided equally between publishers and authors whereas the proceeds of copying from journals are paid entirely to publishers. In addition, unlike CCC, CLA’s initial target was copying in educational institutions, with its first efforts designed to obtain payments for photocopying in elementary and secondary schools. Because of this difference in strategy, the nature of the licenses that have been offered by CLA is substantially different from those provided by CCC.

In 1984, after a number of lawsuits had been brought by publishers and authors against schools for engaging in photocopying, CLA entered into an experimental arrangement with the Association of County Councils, the Association of Metropolitan Authorities, and the Convention of Scottish Local Authorities, in which state schools in England, Scotland, and Wales would collect data on copying in schools.

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37Details on CLA are from J. Hurrell, “The Birth of CLA,” Clarion, Spring 1987, and interviews with Colin Hadley, General Manager and Company Secretary, and Charles Clark, Chairman, CLA.

38This organization was previously known as the Authors’ Lending and Copyright Society.

39In CCC, all payments are made to publishers, but it is likely that the bulk of copying is from journals.

40For details of the settlement of one of these lawsuits see Press Release, Settlement of Action on Photocopying Against Manchester City Council, the Publishers Association, 3 June 1986.
and colleges. The experiment, which ran for 17 months, was followed by the negotiation of a three-year blanket licensing agreement between CLA and all 30,000 state schools and colleges. The agreement, which went into effect on April 1, 1986, calls for a payment that averages £1 million per year in return for which these schools can, under certain conditions, make photocopies of all of the items in the CLA repository.41

This licensing arrangement represents the first substantial source of revenues for CLA. In negotiating the payment, CLA initially wished to obtain a fee of 2.5p per page, which was based on its estimate of the cost of a textbook page. Given its estimate that 100 million pages were being photocopied in each year, this would have produced an annual payment of £2.5 million. The schools balked at this figure and a fee of about .9p per page was finally agreed to for the first year, 1p for the second year, and 1.1p for the third year. Together with the estimate of one million pages per year of copies, this produced annual license fees of £0.9 million, £1 million, and £1.1 million for each of the years of the agreement. The payments are to be collected from Local Education Authorities.

As part of the agreement, the schools agreed to collect and provide to CLA data on a sample of actual copying.42 These data are to be used both to distribute the proceeds of the license payment and to provide the basis for negotiating license fees in subsequent agreements. Thus, CLA regarded the willingness of the schools to provide data and absorb the costs of its collection as a quid pro quo for reducing its license fee demands. An important aspect of the agreement between CLA and the schools is that the fee is fixed in advance, so that the amount of copying does not affect the amount paid.43 Except for the provision of the sample data, this relieves users of the need to collect and maintain detailed records of actual photocopying. Since these payments are based on an estimate of the amount of copying, and not on actual copying, they are effectively bundled prices.

The other significant feature of the license is that a “standard rate” was agreed to for each page copied. This meant that there is no distinction among types of works copied so that compensation is

41The principal conditions are that no more than 5 percent of any book be copied, that a short story or poem can be copied in its entirety if it does not exceed 10 pages in length, and that no more than the number of copies required for use by each member of a class and the teacher be made. The agreement calls for copying to be controlled by teachers, resource technicians, and secretaries.

42Data are from a rotating stratified sample of users constituting about 5 percent of all institutions.

43CLA also offers a transactional license at 2.5p per page but it clearly expects the bulk of its revenues to come from the annual licenses.
proportional to the amount of copying of a publisher's or author's works.

Subsequently, CLA began to license the independent education sector and, more recently, it entered into an experimental licensing arrangement with universities in Great Britain and Northern Ireland. Under this agreement, which went into effect on January 1, 1988, within limits, multiple photocopying from books, journals, and periodicals can be made in return for payment of a fee of 2.5p per page. The license specifically covers "(a) all multiple copying and (b) those occasions when, for the purposes of a seminar, lecture, tutorial or other formal instruction or study, recipients of that instruction individually or collectively make or receive photocopies of copyright material for use in connection with that instruction or study. This includes the use of material borrowed from loan collections for these purposes." Under this arrangement, users are relieved of the need to negotiate a per page fee but records must still be kept on the amount and nature of copying both to determine the total license fee and to permit distribution of the resulting revenues. Since payments depend on actual usage, these are not bundled prices.

VG WORT (FEDERAL REPUBLIC OF GERMANY)

Unlike the Copyright Clearance Center and the Copyright Licensing Agencies, which came into being recently to deal exclusively with photocopying, VG Wort was founded in 1958 and administers a wide range of literary rights. VG Wort, which has approximately 90,000 author members and 2,000 publisher members, is authorized to collect on behalf of its members for: (1) private lending; (2) private taping; (3) public performances from radio and television, e.g., in restaurants; (4) publication in press digests; (5) reprography; (6) publication in anthologies for school use; (7) limited broadcast use; (8) archiving; (9) public performances from published works; (10) poems set to music; (11) literary works used for social, cultural, and religious purposes; and (12) cable retransmission. In all of these cases, VG Wort represents the creators and the publishers of literary works and the owners of other rights, e.g., composers, obtain compensation through other organizations.

46Much of this information was obtained in an interview with Ferdinand Melichar and Frank Thoms of VG Wort.
Under the German Copyright Law of 1965, authors had the right to equitable remuneration when their works were reproduced for commercial purposes. However, when a single copy was made for personal use, no liability was incurred. Subsequently, VG Wort concluded licensing agreements with various user groups, including the ministers of culture of the provinces, for copying in educational institutions, and with several commercial groups. Commercial enterprises agreed, for example, to pay 20 percent of a periodical's annual subscription rate for the right to photocopy. The license fees were divided equally between publishers and authors, with the author's share being used for the general welfare of authors. In 1985, the law was changed to permit authors and publishers to collect whenever their works were photocopied.

As under the previous law, an author cannot prevent the reproduction of his works but is entitled to compensation if copying occurs. The effect of the amendment is to bring private copying under the requirement of equitable remuneration.

The law imposes an equipment levy, payable by the manufacturer or importer of a photocopying machine, with the levy being between DM 75 and DM 600 depending on the capacity of the machine. In addition, to take into account the difference in the amount and frequency of copying in "domestic" versus "extra-domestic" situations, an operator levy is charged for copying that takes place in schools, universities, public libraries, copy-shops etc.; this amount of this levy is DM 0.05 per page copied from a school book and DM 0.02 per page for all other copying. The operator levy is paid only by certain groups determined by law and is based on a sample of use by similar institutions. The law provides that a collecting society can demand from the operator of a photocopying machine the information necessary to determine the

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46German Copyright of Law 1965, Art. 54 (2).
47"The Printed Word," Preparatory Document for and Report of the WIPO/Unesco Committee of Governmental Experts, 24 Copyright 42, 1988, ¶100. During the same period, WISSENSCHAFT, the collecting society representing authors of scientific works, also entered into such agreements.
48Stewart, op. cit., at 3.
50Recall that the Whitford committee in the United Kingdom rejected the idea of an equipment levy.
51"The Printed Word," ¶103.
operator levy and that collections can only be made through a collecting society.52

The reason for specifying the fee in the law was to avoid the need for the long and costly negotiations that had previously accompanied the determination of fees for other rights. In fact, it has proved extremely difficult to estimate the amount of copying to which the fee specified in the law should be applied. As a result, VG Wort has been forced to negotiate agreements with operators of copying machines in which a lump sum fee replaces the per page levy specified in the law. At present, there are more than a dozen different tariffs under which the lump sum fees are negotiated. Thus, bundled prices have replaced charges based on usage.

VG Wort distributes to authors 70 percent of the revenues it collects for all uses of works of fiction and 50 percent of the revenues it collects for the use of scientific works, with the remainder being distributed to publishers. If the contract between a publisher and an author calls for a larger or smaller payment to the author, the payment from VG Wort must be redistributed by the individual parties involved.

For the distribution of revenues from the photocopying levy, data are obtained from a sample of use in public libraries and a sample of holdings of scientific libraries. These are augmented by data on the prices of books and journals and on the length of the press run for journals to provide the basis for the distribution.

CENTRE FRANCAIS DU COPYRIGHT (FRANCE)

The Centre Francais du Copyright (CFC), organized in 1984, is one of the newest reproduction rights organizations.53 As of the middle of 1987, CFC had arrangements to collect for photocopying on behalf of about 120 publishers, including publishers of both books and journals. Its primary target users are libraries and public and private document centers. As of mid-1987, the only authorizations CFC had granted were to the Centre National de la Recherche Scientifique (CNRS), which is a major public document center.54 It was also seeking to

52Ibid. at §104.
53Much of this information was obtained in an interview with A. Riviere and M. L. Riedinger of CFC.
54CNRS had been the defendant in a dispute with publishers that was decided by the Tribunal de grande instance de Paris in 1974 in favor of the publishers. The court held that CNRS could supply copies of protected works to researchers only if the copies were not used for commercial purposes but that, in the instant case, it had gone beyond permissible limits. See A. Francon, "Copyright Problems of Reprography in Research and Education—The Legal Situation Concerning Reprography Internationally and in
negotiate licenses with a number of pharmaceutical laboratories, with a
document delivery service, and with the Chamber of Commerce.

Initially, CFC intends to establish a fairly low fee (10 centimes per
page). However, this fee is contingent on the licensee supplying to
CFC data on the extent and nature of copying, i.e., the “fee” will be
paid both in cash and in the form of information.\textsuperscript{55} It is CFC’s expec-
tation that the cash portion of the fee will eventually be increased.

CFC has also polled publishers to determine the costs of publishing
a page of a particular type of book. It is also inquiring about the fees
at which publishers would be willing to license photocopying. These
data will be used to determine the fees for licensing particular types of
works. Thus, CFC anticipates an arrangement that is different from
both the CCC’s Transactional Service, in which there is a separate fee
for each publisher’s own work, and CCC’s Annual Authorization Sys-
tem, in which there is bundled pricing. Legislation that would define
more precisely the rights of publishers is also pending in the National
Assembly. One provision would make binding on all members of a user
class a licensing arrangement that had been negotiated with a number
of users who are representative of that class. Another would permit
CFC to license the works of all publishers in a given class once a suffi-
ciently large number of members of that class had agreed to have their
works licensed by the center.\textsuperscript{56}

THE NORDIC COUNTRIES

The five Nordic countries—Denmark, Finland, Iceland, Norway, and
Sweden—have similar legal systems and arrangements for dealing with
photocopying.\textsuperscript{57} In all of these countries, small scale private reproduc-
tion is not considered a copyright infringement, but photocopying by
educational institutions for distribution to students, or copying by pub-
lic or private enterprises, is.

\textsuperscript{55}Note that this is similar to the arrangement negotiated between CLA and the Brit-
ish schools.

\textsuperscript{56}Note the similarity between the latter provision and the extended collective licensing
arrangement employed in the Nordic countries, discussed below.

\textsuperscript{57}For more detail see G. Karnell, “Copyright Problems of Reprography in Research
and Education—The Legal Situation Concerning Reprography in the Nordic Countries,”
15 International Review of Industrial Property and Copyright Law 685, 1984, and Repro-
graphic Reproduction in the Nordic Countries, Information from BONUS, Copy-Dan,
During the 1970s, each Nordic country adopted legislation based on a system of extended collective license agreements.\textsuperscript{58} Under this arrangement, an organization of copyright holders that represents a substantial portion of the owners of a particular category of works can enter into licensing arrangements that bind other owners in the category to the same terms. The purpose is to permit a large subset of owners to offer users the convenience of a license that covers all works of a given type without having to obtain the agreement of all other owners.\textsuperscript{59} The fees that are collected need not be distributed individually but instead may be used for collective purposes, except that non-members must be paid individual remuneration if they request, except in Norway where this provision applies only to foreign authors. However, in countries such as Sweden and Finland, where the payment of individual remuneration requires proof of the extent to which an author’s works have been copied, such requests are likely to be rare or nonexistent.\textsuperscript{50}

Beginning with the organization of BONUS in Sweden in 1973,\textsuperscript{61} reproduction rights organizations have been established in each Nordic country to obtain remuneration for photocopying and, in some cases, for other uses of copyrighted materials. BONUS was followed by Copy-Dan in 1977, Kopiosto in 1978, Kopinor in 1980, and Fjolis in 1983. There are collective agreements for photocopying for educational purposes in all five countries, although the agreements differ somewhat in the works covered and the types of licensees. In Finland, most licenses involve a lump sum payment, i.e., there is bundled pricing, whereas in the other four countries a per page fee is negotiated. In Denmark, the fees collected are distributed directly to authors on the basis of the results of a sample of copying activities in elementary and secondary schools. In the other four countries, remuneration is paid to organizations of rights holders based on statistics on (1) source—book,

\textsuperscript{58}\textsuperscript{58}See G. Karnell, “Extended Collective License Clauses and Agreements in Nordic Common Law,” 10 Columbia-VLA Journal of Law and the Arts 73, 1985, for details. Such a system is, of course, completely antithetical to U.S. legal principles.

\textsuperscript{59}\textsuperscript{59}Under Danish, Norwegian, and Swedish legislation, this arrangement applies only where the licensee is an educational institution. A somewhat different arrangement designed to achieve the same objective exists in The Netherlands where Stichting Reprorecht is designated by law to collect photocopying fees from libraries and universities to the exclusion of the rights of the individual authors. See H. C. Jehoram, op. cit.

\textsuperscript{60}\textsuperscript{60}Karnell, op. cit., at 77, observes that “No [Extended Collective License] system currently in force requires users of protected works to keep records of their uses in order to provide individual non-member authors with such information, though this would undoubtedly be essential to guarantee the effective exercise of their rights to individual compensation.”

\textsuperscript{61}\textsuperscript{61}For a brief description of the origins of BONUS see Whitford committee, op. cit., at
newspaper, periodical, (2) type of work—fiction, nonfiction, music, and (3) nationality of the author—national or foreign. These four organizations employ the proceeds for collective purposes. The laws in these countries provide for arbitration or mediation when collecting societies and users are unable to agree on the size of the levy.62

PRO LITTERIS-TELEDRAKA (SWITZERLAND)

Pro Litteris-Teledrama was organized in 1975 and represents authors and publishers in licensing dramatic, literary, and artistic works to broadcast stations, cable systems, publishers of books, magazines, posters, and photocopiery.63 Revenues from licensing photocopying are a relatively small portion of the organization's current revenues.

Anyone with reprography equipment in Switzerland is expected to obtain a license from Pro Litteris-Teledrama. The chemical industry was the first to negotiate a license. When the impending agreement with the Swiss Federal government is completed, other industries are expected to follow. Negotiations are also under way with schools and colleges.

Licensed photocopiery pay 6 Swiss centimes per page when they make copies of protected works, regardless of the works that are copied. Each licensee is placed into one of approximately 30 categories, and each reports the volume of its copying annually. Based on an earlier survey of copying in each category, this figure is adjusted to reflect the proportion of copies that involve protected works. Royalties are based on this adjusted figure. The 6 centimes per page fee is the result of a compromise that (loosely) takes into account the "10 percent rule"64 and an estimate of the contribution of the work to the revenues generated by the copier. The figure is supposed to represent 10 percent of the average cost of publishing a page of different kinds of materials. Ten percent of the costs of copying was considered too low a fee, and 10 percent of all revenues of the copier was considered to be too high.

Judging by the earlier survey, the proceeds of the license fees are divided among six categories of claimants—publishers of trade books, scientific and technical books, school books, newspapers/magazines, and music. Within each category of claimants, the proceeds are

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63 Much of this information was obtained in an interview with Ernst Hefti, Director of Pro Litteris-Teledrama.
64 See the discussion of the rule in connection with our survey of performing rights organizations.
distributed on the basis of the amount published in a recent period. In other words, in distributing the fees, it is assumed that copying is proportional to the amount of new material available to be copied.

**STICHTING REPRORECHT (NETHERLANDS)**

Dutch law permits photocopying by government, libraries, and educational institutions in return for a payment of 0.025 guilder per page for copies from scientific publications and 0.10 guilder per page for copies from other publications. The Dutch collecting society, Stichting Reprorecht, was founded in 1977 to collect these fees. However, until the adoption of a Royal Decree in 1985, Stichting Reprorecht was unable to make significant collections. The Decree provided for the appointment of an exclusive collecting society which would be the only institution through which rights of copyright owners could be exercised. Stichting Reprorecht became the exclusive society in 1986.

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IV. OVERSIGHT OF COPYRIGHT COLLECTIVES

Copyright collectives in almost every country are subject to some form of governmental scrutiny. There appear to be several reasons for this. First, in common with other transactions of a commercial nature between suppliers and users, disputes may arise between collectives and users or bodies of users. These disputes may involve the amount of the royalty fee, the types of licenses to be issued, or other contractual provisions. Although these disputes may be settled through private negotiation or arbitration, or in civil lawsuits, in some countries, special bodies have been established to oversee the contracting process and, in some cases, to set rates. There appears to be a feeling that specialized bodies are required to resolve these disputes.

A second and probably more important reason for the establishment of oversight bodies is that the monopoly (or near-monopoly) power enjoyed by the collecting societies must be subject to scrutiny to prevent the exploitation of market power.¹ Instead of direct regulation, where contract terms are dictated and rates set by government, various bodies have been given the task of overseeing the behavior of collectives and the power to intervene when abuses are identified.

A third reason for governmental activity in this area arises out of the difficulties involved in collecting from all users of a work, or in negotiating for permission from all sellers of a work. To deal with these problems, compensatory levies under copyright law are sometimes established. Under such arrangements, copyright holders are entitled to demand equitable remuneration from users, with the amount of this remuneration either specified by statute or left to negotiations between rights holders and users. Even where fees are established by law, government bodies are frequently established to oversee the collection and distribution of the revenues accruing from the compensatory levies.²

This section examines the provisions for oversight in the various countries discussed above. In countries where statutory commissions

¹As we argued in Sec. I, it appears likely that collecting societies that develop to facilitate the licensing of small rights will also be involved in establishing license fees.

²By contrast, in the United States, the collection and distribution functions are carried out by a governmental body, the Copyright Royalty Tribunal.
have been established, we describe the composition of the commissions, their mandates, and the nature of their proceedings.  

FRANCE

Until 1977, France had no special statutory provisions to regulate the activities of collecting societies. In that year, legislation was enacted that authorized the French Commission for Competition and Prices to act as a consultant to the civil courts in matters of dispute between collecting societies and users, and to assess the nature of the dispute when complaints are registered by trade organizations of users. Although it is strictly a consultative body, the commission is seen as providing specialized economic knowledge that can help the courts in their deliberations. The main disadvantage of this system, however, is the fact that recourse to the civil courts is a lengthy process.

Under the 1985 French Copyright Amendment Law, provisions were enacted that tightened governmental scrutiny of authors' organizations. For example, authors' societies are now required to bring to the notice of the Minister of Culture any proposed changes in their rules for the collection and distribution of royalties. In addition, the amount of remuneration to be paid by the manufacturers and importers of blank audio and audiovisual tapes to compensate for private copying is to be determined by a committee headed by a state-appointed representative and comprises persons nominated by the organizations representing the beneficiaries of the levy, organizations representing the manufacturers and importers of blank tapes, and consumers' organizations.

An example of oversight by the French courts is a recent case in which SACEM brought suit against a disco owner, claiming that works from its repertory has been used in the disco without payment of a royalty. The regional court (the Tribunal de Grande Instance) ordered the owner to pay the royalty but the owner appealed, arguing that the contracts on which the claims were based violated both French and EEC

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3The material in this section draws heavily from M. J. Freegard, "Collective Administration: the Relationship between Author's Organizations and Users of Works", 21 Copyright 443, 1985, and articles in 34 Journal of the Copyright Society of the USA, 1987, devoted to the subject of copyright tribunals. We should also note that, in addition to oversight by national bodies, collectives in countries that are members of the European Economic Community (EEC) are subject to the antimonopoly provisions of the EEC Treaty. Below, we discuss a case in which these provisions were invoked.


5Id. Article 34.

6Id. Article 39.
laws on competition. He charged that SACEM had abused its monopoly power by charging an excessively high rate (8.25 percent of the discos’ gross turnover) and that, moreover, this rate included a “supplementary mechanical reproduction fee” of 1.65 percent.

The Cour d’Appel, Versailles, to which the matter was eventually remitted, held that SACEM, by virtue of being a de facto monopoly, held a dominant position in the market. However, it rejected the claim that the royalty rate was too high and stated that, under French law, the author’s rights include both the right of performance and the right of reproduction. Although normally the reproduction right is assigned to the manufacturer of sound recordings and is paid at the time when the recordings come on the market for sale, it ruled that there is nothing under French law to prevent SACEM from charging for both rights.

The Cour d’Appel was uncertain, however, whether imposition of this mechanical reproduction fee was compatible with EEC law and referred this question to the Court of Justice of the European communities. It asked whether Articles 30 and 36 or Article 86 of the EEC Treaty prohibits charging an aggregate fee where the sound recordings were manufactured and marketed in a member state where only a performance royalty is charged.

In its decision, the Court of Justice7 upheld SACEM’s right to charge for both the reproduction and the performance rights. Further, it found that a copyright-management society using the possibilities available to it under national legislation was not engaged in abusive conduct under Article 86 of the Treaty. Whether the fee itself was too high was a matter for the national court to decide.

SWITZERLAND8

A 1940 Swiss law9 requires organizations active in the “classical” area of collective licensing, i.e., licensing of public performances of nontheatrical musical works, to obtain authorization from the Federal Council, or its designated representative, to operate. Further, the council was given authority to extend the provisions of this law, by analogy, to the collection of royalties for other rights guaranteed under Article 12 of the Law of December 7, 1922.10

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7Case No. 402/86.
10Federal Law concerning Copyright in Literary and Artistic Works.
On February 7, 1941, an executive order was promulgated that established the conditions for obtaining authorizations. Any organization wishing to be authorized to collect copyright royalties must file an application with the Federal Department of Justice and Police setting forth: (1) its bylaws and regulations; (2) information regarding its managing personnel; (3) the type of royalty to be collected and the number of Swiss authors that have assigned their rights to the organization; and (4) how the royalties are to be administered.

Once organized, collecting societies are subject to both administrative supervision by the Bureau of Intellectual Property, a division of the Federal Department of Justice and Police, and a Federal Arbitral Commission that oversees the tariff structure. Administrative supervision by the bureau consists of examining the competence of the collecting societies and determining that collection and distribution are being carried out according to established rules. All societies are required to report their receipts and expenditures, modifications of their bylaws and regulations, reciprocal agreements with foreign societies, and legal claims filed in court. They must also submit an audited financial statement.

Article 6 of the Federal Law concerning Collection of Copyright Royalties authorizes the Federal Council to nominate an Arbitral Commission to approve the royalty rates set by collecting societies. The commission consists of a chairman, generally a member of a cantonal high court, two impartial judges or professors, and two representatives of authors and users. Although nominations are solicited from authors' and users' organizations, these nominations need not be binding on the Federal Department of Justice and Police, the department charged with appointing the members and supervising the commission.

Article 12 of the revised executive order of the Swiss government dated December 21, 1956, details the jurisdiction of the commission. The commission can: (1) approve the rate schedules provided for in Article 4 of the federal law; (2) give advice to the courts; (3) give advice to the supervising authority; and (4) give advice to interested parties on legal questions having to do with contracts covered by Article 4 of the law. The commission cannot actually set tariffs. If it rejects a tariff offered by a collecting society, negotiations continue. Only when either the parties agree or a tariff acceptable to the commission is offered does the process stop.

It is important to note that the decisions regarding approval of rate schedules are not final but can be appealed to the Swiss Federal Court. However, a collecting society can only charge royalties that have been published and approved by the commission. When establishing rate schedules for submission to the commission, the collecting societies are
required to ask for proposals from the principal associations of users and incorporate them, as far as possible, into the schedules. The schedules then must be published in the "Official Swiss Paper."

Finally, under conditions imposed by an order of the Federal Department of Justice and Police (April 8, 1982) with regard to the collection of royalties for retransmission of broadcast signals by cable television systems, three collecting societies, SUISA for musical works, and Swissimage and Pro Litteris-Teledrama for all other works, must have a common royalty schedule and appoint a single organization to administer this right. After some initial difficulty in reaching an agreement, the collecting societies established a rate of one Swiss franc per month per cable subscriber. In November 1986, the Arbitral Commission approved this rate.

The main advantage of the Swiss system is that prior approval of the tariff structure helps lower the incidence of disputes between users' and authors' organizations. However, the administrative proceedings are rather slow and can delay the collection of royalties for long periods of time.\footnote{M. J. Freegard, op. cit., at 453.}

**FEDERAL REPUBLIC OF GERMANY**\footnote{See W. Dillenb, "The Copyright Royalty Tribunals in Austria, the Federal Republic in Germany and Switzerland," 34 Journal of the Copyright Society of the USA 198, 1987, for more detail.}

The German Law on the Administration of Copyright and Neighbouring Rights of 1965 established, for the first time, rules for the operation of collecting societies, including the provision that such organizations must be licensed by the German Patent Office which supervises their activities. Under this law, collecting societies and users' organizations are required to enter into contracts with each other, setting the conditions and royalty fees to be paid for licenses. The tariffs set by collecting societies are presumed to be reasonable. However, the law provides for the establishment of an arbitration board by the patent office to deal both with challenges by users as to the reasonableness of a license fee and with instances in which a collecting society or a user group refuses to negotiate. The arbitration board consists of three members, including a chairman appointed by the patent office and two members appointed by the parties involved in a dispute. Decisions of the board may be appealed to the competent Superior Court whose decisions are binding. The copyright law was revised in 1985 to extend the jurisdiction of the board to disputes between individual users and collecting organizations.
AUSTRIA

Before 1936, disputes between users and Austrian authors' organizations were settled in court. In 1936, a law was enacted regulating the activities of organizations engaged in licensing public performances and broadcast of small musical and literary rights. Under this law, both performing rights organizations and users' organizations are required to obtain government licenses to operate. Interestingly, the law requires agreements on rate schedules to be reached between organizations of users and rights holders. This collective agreement forms the basis for contracts between individual users and the collecting society.

If a collective agreement cannot be reached, the matter can be referred to a copyright tribunal. The parties may choose the members of the tribunal or, if they cannot agree, each can appoint a member who, in turn, selects three other members, or the Ministry of Justice can appoint the members. Decisions of the tribunal are binding and cannot be appealed.

In 1980, a revision of the copyright law established levies on blank audio and video tapes and a compulsory license for cable television, with the amounts of remuneration to be decided by the parties concerned. In the event of a dispute, the rates are to be determined by a copyright board, rather than the copyright tribunal.

The members of the copyright board are appointed by the President of the Republic of Austria for five-year terms. The government selects two members, two members are nominated by the official users' organizations, two members by the consumers' organizations, and one member each by the copyright organizations, the private association of users, and organizations representing the arts.

UNITED KINGDOM

When the Performing Right Tribunal was established under the provisions of the Copyright Act 1956, the British government was

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13See W. Dillenz, op. cit., for more detail.
14Law No. 112 of 1936.
15Copyright Amendment Law of July 2, 1980.
16W. Dillenz, op. cit., at 197, argues that the decision to set up a new body resulted from fears of consumers and users who apparently felt that the tribunal would not give proper consideration to their interests in establishing remuneration. The fact that five of the nine members of the board are selected by consumers' and users' organizations lends some credence to this argument.
17See D. de Freitas, "The Performing Right Tribunal in the United Kingdom", 34 Journal of the Copyright Society of the USA 166, 1987, for more detail. Additional materials on the Performing Right Tribunal were obtained in interviews and private correspondence with E. J. Barnett, John P. Britton, and J. E. Owens of the Industrial Property and Copyright Department, Department of Trade and Industry.
especially concerned with protecting the public against possible abuses of the monopoly power of the performing rights organization. The chairman of the tribunal is appointed by the Lord Chancellor, with between two and four other members appointed by the Department of Trade and Industry.\textsuperscript{18}

Under the terms of the act,\textsuperscript{19} the tribunal is to resolve disputes between licensing bodies and users or users' organizations concerning licenses to (a) perform literary, musical, or dramatic works in public, or broadcast such works or include them in a cable program; (b) publicly broadcast sound recordings, or include them in a cable program; and (c) cause television broadcasts to be seen or be heard in public.

The tribunal has the authority to hear two kinds of cases:

1. Disputes regarding the terms of a license scheme, in cases where a license scheme is in operation;
2. Disputes concerning an application by an individual seeking a license either where a licensing scheme is alleged to exist and the organization fails to grant him a license, or where there is no license scheme and the organization has either refused to grant the individual a license or offered a license under unreasonable terms.

All but two of the disputes that have been referred to the Performing Right Tribunal have centered on the terms and conditions proposed by a licensing body.\textsuperscript{20}

\textit{BBC v. PRS:} The tribunal had to consider in 1967, and later in 1971, whether the license terms offered to the BBC by the Performing Rights Society (PRS) were reasonable. In 1967, the tribunal gave great weight to the previous licensing arrangement between the parties under which the fee was based on the number of households receiving radio and television licenses and refused to consider a PRS proposal under which the royalty would be calculated as a percentage of BBC's income. In 1971, the BBC argued that it should receive a license on the same terms except for an increase to the fixed amount. PRS, however, contended that the formula was no longer appropriate and offered several alternatives based on percentages of the income or expenditure of BBC.

\textsuperscript{18} § 23 of the Copyright Act 1956.
\textsuperscript{19} § 24 (1) of the Copyright Act 1956.
\textsuperscript{20} The other two disputes involved the refusal of PRS to offer licenses to "middlemen" who had previously been licensed by PRS to grant licenses to others. See D. deFreitas, \textit{op. cit.}, at 174–175.
In its deliberations, the tribunal considered several factors. First, echoing statements by the PRS, the tribunal agreed that there was no market price for the right to broadcast PRS music because there was no market in which this right was freely bought and sold.\textsuperscript{21} The tribunal also agreed with PRS that it was not bound by the terms of past licensing agreements provided it could show that circumstances had changed or that the previous agreement was a bad bargain.\textsuperscript{22}

In setting the royalty fees, the tribunal attempted to take into account the following factors:

1. Inflation since the last determination of the fees;
2. Changes in the amount of use by the licensee;
3. Increased value of the society’s repertory; and
4. Agreements between PRS and other comparable users (in this case, the independent television companies).

Given these factors, the tribunal concluded that PRS was justified in setting its license fee as a percentage of the gross income of the BBC and fixed this percentage at 2 percent, subject to certain ceilings in the first two years of the license. Subsequent agreements between the PRS and the BBC contain a similar provision.

*Independent Television Companies and Independent Television News v. PRS.*\textsuperscript{23} This case involved a dispute between PRS and commercial television broadcasters over whether the royalty to be paid for the use of the PRS repertory should be calculated as a percentage of gross advertising revenue or on some other basis and on the determination of reasonable license fees. Commercial television broadcasters had previously paid lump sums adjusted upward periodically to reflect cost-of-living changes and changes in the volume of use. The tribunal concluded that a royalty based on a percentage of revenue was not reasonable in this case because there was no adequate correlation between the use of music from the PRS repertory and the advertising revenue of the broadcasters.

\textsuperscript{21}In the first case referred to the tribunal, involving a dispute between ballrooms and the PRS (PRT 1/58), the tribunal had attempted to analogize the licensing of rights to the sale of commodities in the open market. PRS criticized this approach on the grounds that there are not a large number of buyers and sellers in the market so that an average, or “fair,” price will not emerge. Indeed for the commodity being overseen by the tribunal, there was no such market. The tribunal, in its later proceedings, appears to have adopted this point of view.

\textsuperscript{22}This also represents a change in the tribunal’s point of view. In earlier decisions, the tribunal was influenced greatly by previous licensing agreements. PRS criticized this, pointing out that several of these agreements were made when the society was weak, or did not have a particularly valuable repertory, or because of the climate of hostility that existed regarding its activities.

\textsuperscript{23}PRT 38/81.
After considerable discussions and a report by the Whitford Committee, the British government issued a White Paper setting out its intentions for a new comprehensive copyright law. The White Paper contemplated a considerably expanded role for the Performing Right Tribunal:

- The new tribunal would have jurisdiction over disputes regarding licensing schemes of all collecting societies, not merely those relating to public performance, broadcasting, and cable distribution rights, as at present.
- The tribunal would have jurisdiction over disputes relating to the then-new statutory scheme relating to the blank tape levy payable by manufacturers and importers of blank tapes. It would also have jurisdiction over disputes arising from the statutory blanket license scheme for educational recording from television broadcasts and cable programs.
- The tribunal would have jurisdiction over the licenses required from satellite television program providers (other than the BBC or IBA) for transmitting their programs.
- The tribunal would be renamed "The Copyright Tribunal," and would have a larger panel, headed by a chairman and one or two deputies who could also sit as chairmen.
- The government did not propose to require that the tribunal consider any special factors in its deliberations, with the exception of disputes over photocopying licenses where the tribunal must take into account three specified factors: whether and to what extent published editions of the work are available other than by photocopying; the use to which the photocopies will be put; and the proportion of the work that will be photocopied under the license.

The White Paper's proposals have generally been included in the Copyright, Designs and Patents Bill which, as of October 1988, had almost completed all stages of its passage through the Parliament. However, after publication of its White Paper, the government's policy on home taping changed and no blank tape levy appears in the bill.

While the bill retains the considerably expanded role for the tribunal delineated in the White Paper, there are nonetheless certain

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restrictions not previously contemplated. The government retained the power to cancel or modify conditions in licenses or to grant licenses in cases where the Monopolies and Mergers Commission reports adverse findings. In addition, the previous limitation of appeals on points of law from decisions of the tribunal to the High Court has been removed.

UNITED STATES

The revision of the U.S. Copyright Law enacted in 1976 provides for the establishment of a Copyright Royalty Tribunal (CRT) which has jurisdiction over the determination of the royalties payable under the statutory compulsory licenses and determination of the distribution of royalties collected with respect to the cable transmission and jukebox compulsory licenses. The Copyright Royalty Tribunal consists of five commissioners, appointed by the President, with a chairman elected by the members. The compulsory licenses falling under its jurisdiction are for certain secondary transmissions of broadcasts by cable systems, making and distribution of records, noncommercial broadcasting of certain works, and public performances over jukeboxes.26

Performing rights organizations in the United States, unlike those in most other countries, do not come under the direct jurisdiction of the tribunal. Disputes involving organizations administering performing rights and reproduction rights are typically settled judicially.27 Nonetheless, the CRT is engaged in establishing license fees and distributing their proceeds for rights that in other countries are administered by collectives. In such cases, the tribunal often attempts to promote voluntary agreements between organizations of rights holders and users and only when such agreements are not reached does the tribunal intervene.28 Thus, although the form is substantially different and the range of activities in which the CRT is involved is quite limited, the tribunal may still be thought of as being involved in overseeing the activities of the collectives in much the same way as are its European counterparts. As in some countries, only when the parties fail to agree does the tribunal take action.

In the CRT's first proceeding, it was asked to determine a reasonable fee for the use of music in the ASCAP repertory by the Public


27For example, under its 1950 consent decree, disputes between licensees and ASCAP are referred to the U.S. District Court for the Southern District of New York, which may then determine what is a reasonable fee.

28In the case of the cable television compulsory license, the tribunal is empowered to intervene only when the private parties fail to agree.
Broadcasting Service (PBS) and National Public Radio (NPR). Subsequently, however, the tribunal stressed the importance of voluntary agreements and, indeed, when the public broadcasting schedule came up for review in 1982, all important issues had been resolved by voluntary agreement. Similarly, although the tribunal, in response to a request by ASCAP, increased the compulsory license fee for jukeboxes, while the decision was on appeal, the Amusement and Music Operators Association reached a private agreement with ASCAP. In still another instance, the tribunal successfully encouraged claimants for the proceeds from jukebox royalties to reach a voluntary agreement.

The tribunal is authorized to adjust the statutory schedule for the cable television compulsory license royalty every five years to allow for the effects of inflation and to modify the schedule whenever there are changes in Federal Communications Commission rules regarding distant signal carriage by cable systems. In addition, the tribunal is authorized to distribute the proceeds of the license fees whenever the claimants are unable to reach agreement concerning distribution. There has been one proceeding in which the inflation adjustment has been made and another in which a substantial increase was granted following the FCC’s elimination of its distant signal carriage and syndicated exclusivity rules in 1980.

The distribution proceedings for the cable television royalties have occupied a considerable amount of the tribunal’s time. The funds to be distributed have grown from $15 million in 1978 to more than $100 million in recent proceedings. Although the decisions of the tribunal have frequently been appealed, they have virtually all been upheld. The courts have argued that, as long as the tribunal’s procedures are fair, it has considerable discretion in making distributions and the courts will defer to its decisions.

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30It is possible that private agreement was facilitated because the parties knew how the tribunal had ruled in its previous proceeding.
32Brennan, op. cit., at 157-158.
One effect of the courts' deference to the decisions of the CRT is that private parties are motivated to seek voluntary agreements, since that results in substantial savings in litigation costs. To the extent that the parties adopt this form of behavior, the role of the CRT will be limited to overseeing these agreements and intervening only when private agreements do not occur. In that sense, the task of the tribunal may become much like that of the European oversight bodies.
V. CONCLUSIONS

This study was undertaken because the authors believe that collective administration of copyrights will become more important over time. The development and growth of reproduction rights organizations during the past ten years is one basis for this belief. However, we believe that these organizations are part of a broader trend that is driven by technological changes that make widespread and decentralized reproduction of all forms of intellectual property economically attractive\(^1\) and that make enforcement of copyrights by their individual owners infeasible.

A second trend, related to the first, is that government involvement in the enforcement of copyrights is increasingly going beyond providing judicial forums for resolving disputes over infringements. In particular, governments are being asked to impose statutory levies on recording media and machinery, with the proceeds to be distributed by copyright owners. In those countries where such levies have been adopted, copyright collectives are involved in the distribution of the proceeds from these levies.\(^2\)

If we are correct that the importance of collective administration will increase in the future, it is important that the behavior of these institutions be well understood. In particular, we wish to know whether their structure and organization promote economic efficiency and whether they involve any unnecessary anticompetitive restrictions. The previous descriptions and analysis are intended to clarify these issues. We reach several tentative conclusions.

Cooperative Pricing May Be Inevitable under Collective Administration

In theory, it is possible for collective administration to be confined to the enforcement of rights and the collection and distribution of revenues, with the establishment of license fees being left to individual


\(^2\)See Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action*, Brussels, 7 June 1988, at 105–109, for a discussion of existing and proposed levies in a number of European countries.
rights holders. The Copyright Clearance Center’s Transactional Service is a real world example of such an arrangement and, in a previous section, we have provided a theoretical analysis of how such a system might work. Nonetheless, both theoretical analysis and the practical experience of the CCC suggest that arrangements under which collectives do not engage in price setting may be unstable and, perhaps, not even viable.

It is obvious that the members of collectives will wish to have them engage in pricing, as well as in enforcement and collection, since they can raise their joint profits by doing so. By combining their pricing activities, the members of a collective reduce competition among themselves and can add to the benefits they obtain from reducing transaction costs. However, if this were the only effect of joint pricing, it is likely that society would wish to prevent such behavior, through the antitrust laws or other forms of oversight. However, this neglects the fact that joint pricing may provide important benefits to users as well as rights holders.

Copyright collectives are most likely to exist for the enforcement of small rights, where the value of each individual transaction is small relative to the costs of making that transaction. These cost savings accrue not only to rights holders but also to users. Where the value of a transaction is small, a user will not wish to undertake the transaction if his costs of doing so exceed the benefits of the transaction. Thus, other things equal, users are likely to prefer to purchase small rights in a way that reduces their costs. If rights holders make such institutions available, it may be possible both to increase the amount they receive and to reduce the costs—both license fees and transactions costs—incurred by licensees. For that reason, when obtaining licenses for small rights, users are likely to prefer arrangements in which they incur relatively small costs in complying with the terms of the license.

Clearly, the form of license that involves the smallest transactions cost for the licensee is one that gives him rights to the entire repertory of the collective in return for a single payment. Although the payment may be geared to some measure of the value of the use, this arrangement does not require the licensee to keep track of actual use. In fact, the license fee is established before the use occurs. Such arrangements are, in fact, the most common form of collective license, being employed by organizations as diverse as ASCAP and the Copyright Clearance Center.

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3 The particular method we considered for distributing the costs of administration is not the only way that might be accomplished.
An alternative arrangement—one involving somewhat higher transactions costs than a license that gives the rights holder access to the entire repertory for a single fee—occurs where the license fee depends on the amount of actual use but not on the content of what is used. The experimental arrangement under which British universities will pay the Copyright Licensing Agency a fixed amount per page of photocopying of protected works regardless of what is being copied is one example of such an arrangement. Here, only the amount of use, but not the particular items that are used, must be accounted for. Although this still requires that the user separate infringing from noninfringing uses in order to avoid paying for the latter, the administrative costs are likely to be substantially smaller than where records must be kept on the identity of actual copying.\footnote{It should be noted that the arrangement under which British elementary and secondary schools account for photocopying does involve recording and reporting the content as well as the amount of actual usage. However, in return for providing these data during an experimental period, the schools were able to negotiate a smaller license fee. For its part, the Copyright Licensing Agency was willing to accept a smaller fee because it regarded the information it obtained as highly valuable. If we are correct, however, such an arrangement is unlikely to be viable in the long run.}

A third possibility, and one that we regard as unlikely to be viable in the long run, involves establishing individual prices for each item in the repertory and charging for each use of each item. This arrangement might involve either having the prices determined by the holders of the rights, in which cases the rights holders would be competitors, or having the separate prices determined jointly by the collective. As should be clear from our earlier examples, the former arrangement produces higher prices and higher joint profits for rights holders. However, even the latter arrangement is likely to be unacceptable to licensees since it, too, requires that they maintain detailed records of their usage. In the case of small rights, the costs of such recordkeeping is likely to swamp the benefits of the licenses. For that reason, we believe that even licensees will find the arrangement under which rights holders compete to be an unacceptable one.\footnote{Another way to state our point is that if rights are small enough to require collective administration they will probably also require simple license terms.}

Whether a bundled pricing arrangement or one involving a fee that depends on the amount but not the content of usage is employed, there is still likely to be some need to measure actual usage to provide information useful in both setting license fees and in distributing them among rights holders. To accomplish this end, it may be necessary to sample actual usage of at least some users. But, since obtaining these data is costly, we would expect significant efforts to limit the amount
of data that is actually collected. Indeed, in a number of cases in which the value to all users combined of a set of rights is small, distribution is accomplished not by sampling the usage of those rights but by using "analogous" data from the usage of other rights.

**Collective Administration Should Apply Only to Instances in Which Infringements Cannot Be Dealt with Individually**

Because users demand relatively simple price structures, collective administration of copyrights appears almost inevitably to result in a reduction in competition among licensors. This follows from the fact that setting both bundled prices and uniform usage-based prices requires cooperation. That is, it appears difficult to confine collective administration solely to enforcement, with the establishment of license fees being left to individual rights holders. Collective administration in all but one of the cases of which we are aware involves cooperative setting of license fees.

Although cooperative pricing is not a logical concomitant of collective administration—one of the theoretical models described above shows how this could be accomplished, and the Transactional Service of the Copyright Clearance Center provides a tangible example—the two appear together with sufficient regularity to make it seem plausible that they are linked practically, if not necessarily theoretically. Since we share the view that competition should be restricted only where it is necessary to do so, we would limit collective enforcement to those instances in which it is demonstrable that individual enforcement is not economically feasible. In practice, this means that a careful distinction must be made between "large" and "small" rights and that collective administration should be limited to the latter.

Where competition among rights holders is feasible, it should be promoted and should not be replaced by bilateral monopoly. For this reason, collective administration should be confined to small rights, although deciding which rights are small enough to justify collective administration will not always be easy. In short, the sole rationaliz-

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6 The sole exception appears to be SUISA, where all music played by broadcasters is recorded. However, this is possible primarily because of the small number of broadcasters in Switzerland. Where less valuable rights are administered, no attempt is made to measure actual usage.

7 The activities of the Copyright Clearance Center are the sole exception to this statement. Although the Annual Authorization Service of the CCC involves a bundled price, the fee paid by any user arises out of a complex process in which license fees that are set noncooperatively by individual publishers play a role. It will be interesting to see whether such an arrangement will continue.
tion for the use of collective administration should be that it lowers costs. ⁸

A corollary to the proposition that collective administration should be limited to the case of small rights, where it is more likely that the gains in efficiency from collective administration exceed the losses from reduced competition, is that large rights should not be converted to small ones. As we described above, at one point American motion picture theater owners were required to obtain performance licenses from ASCAP as a condition of exhibiting a motion picture that had music in its sound track. ⁹ Under pressure from the government, however, this system was replaced with one in which motion picture producers obtain performance rights in the same transaction in which they acquire the rights to record the music in the sound track, the synchronization rights, thus relieving theater owners of the need to engage in transactions with music rights holders.

As long as motion picture producers could not acquire performance rights, it was probably inevitable that collective administration would be employed in licensing theater owners, since the number of required transactions was very large and many had relatively small value. But once the licensees became the producers rather than the theater owners, it became feasible for rights holders to negotiate directly with licensees, because the value of the resulting transactions was large, and the role of ASCAP in licensing the use of music in motion pictures was eliminated. A change in the method of licensing in which large rights replaced small ones thus resulted in the replacement of a system of collective licensing with one in which competition among rights holders prevailed.

A similar reduction in the role for copyright collectives would result if television program producers were able to obtain "source licenses" from rights holders. Under such a system, producers would negotiate with the owners of musical copyrights to obtain performance rights for television at the same time that they obtained synchronization licenses. This arrangement, which is at present bitterly opposed by ASCAP and rights holders, would reduce the role of ASCAP but would increase competition in the supply of music to television. ¹⁰

⁸If it were feasible to have many competing collecting organizations, we would be prepared to permit them to administer large rights, on the grounds that competition among these organizations would limit their market power. Where only a single organization exists, however, we would insist on a clear demonstration of the efficiency gains from collective administration. In this regard, our approach is similar to that taken by the Department of Justice in its merger guidelines, where a showing of substantial "efficiencies" may be used to justify a merger that would otherwise be opposed.

⁹See the discussion of the Aiden-Rochelle case above.

¹⁰It is probably not feasible for performance rights to be acquired in this manner for music played in a nondramatic context. Thus, collective administration would continue to be required for licensing musical rights in variety programs, live concerts, and the per-
There Will Often Be Many Tariffs and Distributions for Which Collective Pricing Will Be Better Than Individual Pricing

One of the great frustrations in conducting the research for this report has been our inability to obtain a precise answer to the question that we asked of many copyright collectives, "How are your tariffs determined?" We have been provided with discourses on the "10 percent rule," under which copyright owners seek to obtain 10 percent of the revenues, or a portion of the revenues, from users, without a satisfactory explanation of the basis for the figure of 10 percent. Moreover, exceptions to the 10 percent rule seem as plentiful as its use and, as important, even where the rule is accepted, there often remains considerable dispute about the revenues of which copyright owners are entitled to 10 percent. Thus, for example, there are arguments about whether copyright owners should receive 10 percent of all revenues at a nightclub, or only 10 percent of the amount that the establishment pays for its music, e.g., the salaries of the musicians, or 10 percent of some other amount.

Similarly, we have had described to us the factors that are taken into account in determining how much to charge different types of users. Usually, these descriptions contained references to the importance of music to a particular type of establishment, with larger amounts being asked of establishments for which music is deemed a more important input, but with no very precise indication of how these factors are translated into actual tariffs. In some instances, extremely elaborate tariff structures have developed with very fine gradations among apparently similar types of establishments,\textsuperscript{11} but the justification for these gradations is often difficult to discern.

In most instances, the tariffs that are established are the result of a bargaining process between the copyright collective and an association of users.\textsuperscript{12} The outcome of this bargaining must occur between the reservation prices of the respective organizations. In the case of users, the maximum price they are willing to pay for a blanket license is the smaller of (a) the amount by which their revenues are increased by having access to the repertory of the collective and (b) the amount that they will have to pay if they are found liable for infringements by the

\textsuperscript{11}One of our favorites is the distinction in the AKM tariffs between the fees charged to ice skating rinks using artificial ice and those charged to rinks using natural ice.

\textsuperscript{12}This is clearest in the case of the Reproduction Rights Organizations, whose fees seem determined primarily by what they can obtain from users.
court multiplied by the probability of being found liable. For copyright owners, the reservation price for any particular group of users may be close to zero, since there are few, if any, additional costs incurred when a body of work is used by a new set of users.

It is our thesis that these reservation prices are, in many instances, quite far apart. This means that there are many tariffs at which (1) users will prefer to take the license rather than risk being found liable for infringement and (2) producers will prefer to grant the license rather than collect no revenues by denying users access to their works. In the language of game theory, there are a great many distributions of benefits in the core of the game. Moreover, even when we take into account the fact that producers must at least cover their costs out of payments from all groups of users, there may still be a great many possible distributions of the costs among user groups that leave each group at least as well off as if it chose not to acquire a license.

The point that we are arguing here, that there is not a unique set of equilibrium tariffs, applies with at least equal force in the case of the distribution of the proceeds of the tariffs among copyright holders. Consider a particular distribution. Although each rights holder would prefer a larger share, each is, over a large range of distributions, better off than if he chose to leave the collective and engage in individual enforcement of his rights. That is, the gains from collective enforcement, both in terms of reduced transactions costs and reduced competition among the members of the collective, are generally likely to be so great that, over a wide range of distributions, it will not be attractive for any member to defect.

The fact that transactions costs savings are substantial distinguishes collective administration from those cases in which the entire gain from cooperative behavior arises from reduced competition. Where cooperative behavior produces only gains from reduced competition, the agreement may be unstable in that each agent can generally benefit by defecting. Where transactions cost savings are substantial, however, few, if any, rights holders will be large enough to engage in individualized enforcement of their rights, so that their payoff if they defect from the collective will be zero. As a result, over a wide range of distributions, defections will not occur. In a sense, the existence of significant cost savings may convert an otherwise unstable situation into a stable one.\(^{13}\)

\(^{13}\)A copyright owner can defect either by declining to join the copyright collective or by licensing his works directly while maintaining his membership in the collective, which can occur in cases like ASCAP where the collective acquires only nonexclusive rights. Where transactions costs are important, however, neither type of behavior will occur with any frequency.

\(^{14}\)We say may because, in repeated games where the number of plays is unknown, players may be reluctant to defect from a cooperative equilibrium even where they would defect in a "one shot" game. See J. Tirole, *The Theory of Industrial Organization*, MIT
The significant point here is that there may be no particular justification for the actual tariff and distribution method that is chosen. A large number of stable equilibria exists, so that regardless of which emerges, it will not be disturbed. A threat to "go it alone" is likely to be regarded as empty, since everyone knows how difficult it will be to follow such a strategy. It will, therefore, generally not be possible to predict which equilibrium will actually occur.

A corollary is that those who control the tariff and distribution mechanisms will have substantial discretion because they can favor certain groups of rights holders without risking the defection of those who are disfavored. Indeed, they may even be able to favor themselves if they cannot easily be replaced. Similarly, if a particular group of users succeeds in obtaining especially favorable tariffs, others groups that are not so favored will still not choose to license directly if collective administration is far more efficient. All that is required to prevent their defection is to make collective administration more profitable to them than individual licensing, which will often be easy to accomplish.

The Form of Collective Administration of Any Given Set of Rights Will Be Similar in All Countries

One of the questions with which we began this study was whether the nature and form of collective administration is determined primarily by the country in which it occurs or by the type of rights being administered. On the one hand, one might expect a country's legal system to have a significant impact on the nature and form of administration of all collectives in that country, since all must operate under similar legal constraints. On the other, one might believe that economic imperatives will cause a given right to be administered similarly regardless of where the administration occurs. We now incline to the latter belief. Three basic reasons support our view.

First, with the international use of most types of intellectual property, it is important that copyright collectives maintain reciprocal arrangements with their sister organizations in other countries if their members' rewards are to maximized. Without these arrangements, each collective would have to maintain separate administrative organizations in each country where its members' works are used, thus forgoing many of the economic advantages that collective administration is designed to create. Indeed, where the market for the works of its
members is too small to cover the costs of administration, it will not pay for the collective to operate. Reciprocal arrangements among geographically dispersed collecting societies provide a solution to this problem. The highly developed form of reciprocity among performing rights organizations is the most important example of the joining together of collectives in different countries but even the newer reproduction rights organizations have been moving toward such arrangements. Although it is possible to imagine reciprocity among organizations with highly divergent structures, clearly such behavior is facilitated when the cooperating organizations have similar forms.

Second, collectives are likely to model themselves after those that are successful in administering the same types of rights in other countries, assuming that there are no significant legal impediments to doing so. Rather than incurring the costs of designing a totally new form of administration, copying what other collectives—especially successful ones—are doing is often an efficient way to proceed.

Finally, and most importantly, the similarities of the rights being administered are likely to lead to similar forms of administration. For example, where uses are public and easily monitored, as in the case of broadcasts, substantial information will be collected about the amount and nature of what is performed. On the other hand, where uses are private and decentralized, as in the case of photocopying, much smaller amounts of information will be obtained. Indeed, in these situations, it may not be possible to obtain any direct information at all about what is being used so that the collective may only be able to administer the payment of fees that are collected under government direction. And, where the combined value of rights is small, no information about use may be collected and distribution will occur by analogy. Since these factors are present in all countries, we would expect the collectives that administer each of these rights to behave in similar ways.

Although we have hardly performed a rigorous test of this proposition, even rough observation provides some support for it. For example, it is clear that the structure of the Centre Francais du Copyright will resemble much more that of the Copyright Clearance Center and the Copyright Licensing Agency, reproduction rights organizations, than it will that of the French performing rights organization, SACEM. Moreover, their common membership in IFRRO will further promote the similarities. For the same reasons, ASCAP and BMI will continue to look more like each other, and like SACEM, than they will resemble the Copyright Clearance Center.

Indeed, we have been told that CFC has been modeled to some extent on the structure of other reproduction rights organizations.