Collective management in the digital environment

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Foreword

This book aims to introduce the reader to some of the legislative solutions regarding collective copyright management mechanisms in the digital environment around the world – in regions such as China, the United States, Canada, Latin America (with emphasis to Brazil) and the European Union.

The collective copyright management system studied here was analyzed from two perspectives: looking at the rights holders but also with a closer examination at the user's situation, since in the digital environment the latter is liable for using third parties works, at thw same time that such conducts are facilitated. In addition to phenomena such as dilution of authorship and confusion between author and user, there is also a whole ecosystem of "many-to-many" works creation and diffusion materialized in Web 2.0 concepts.

This pushes the need for answers from a copyright system created under "one-to-many" broadcast logic. Due to this possibility of addressing accountability to the user for digital uses, collective management system in such an environment needs to balance the possible forms of control at the most varied levels offered by the network, and the limits and exceptions to be imposed on the exercise of copyright. This way, a balance between the protection of rights holders interests and the freedom of the user can be established.

The past decades have witnessed the rapid expansion of the copyright consumer market in the digital environment through the combination of technologies such as the Internet, mobile telephony and accessible and globalized services, which results in the need for persuasive mechanisms

for legitimate and reputable practices. Therefore, the present study by Marcos Wachowicz and Alexandre Pesserl identifies the main international legal frameworks on copyright protection within the World Intellectual Property Organization (WIPO), collectively known as "Internet Treaties", as well as an analysis of internal regulations on the subject.

In terms of methodology, they list which countries have the greatest representation and relevance on the matter, as well as the changes in the internal norms of Public Law undertaken to implement the obligations of the Treaties (or even their absence), besides the collective management mechanisms in place and their effects on the digital world.

The aim is therefore to outline the challenges of collective management in the digital environment, considering both the duty of the public manager to ensure that it happens in a balanced way and under legal parameters, and also the fact that market practices influence the legislative sphere, public interest, and especially the accomplishment of fundamental rights of authors and other rights holders as well as users.

This piece of work is the direct result of the research that gave origin to the Study Group on Copyright and Industrial Rights – GEDAI/ UFPR – of the Graduate Program in Law of the Federal University of Paraná (PPGD / UFPR). The GEDAI/UFPR research focuses on the new challenges in the protection of Intellectual Rights in the Information Society and is currently being published after being previously presented at seminars, congresses and events held in Brazil and abroad with the support of research funding agencies, namely CAPES and CNPq.

GEDAI / UFPR was established with the main purpose of studying Intellectual Property in the Information Society. The comparative law perspective allows us to analyze the various systems of copyright and industrial protection, the processes of accomplishment of cultural rights and cultural diversity, and also the adequacy of the regulation of intellectual rights in the face of the challenges of the Information Society.

Its objectives include the study of the effects resulting from the implementation of fundamental rights to culture and cultural diversity on contemporary society; the analysis of the enforcement and limits of copyright in the protection of immaterial goods; the legal protection of new intellectual goods arising from information technologies of innovation, inclusion and dissemination of knowledge; assessments of the consequences of the ongoing technological revolution and the advent of

digital culture on copyright regulation; and identification of the content of legal protection and the scope of the circulation of cultural production developed in public institutions.

The GEDAI / UFPR Group brings together researchers, masters and doctors who dedicate to the study of various areas of Intellectual Property, establishing a true exchange network between national and foreign institutions. In order to intensify this research exchange, GEDAI / UFPR is involved in projects with various academic teams from other Brazilian and foreign higher education institutions and research groups.

In order to broaden the studies and circulation of its works on issues related to Intellectual Property and its challenges in the Information Society, GEDAI/UFPR presents bilingual versions (Portuguese and English), so that researchers from other nationalities will be able to integrate with this large research network and academic publication. With a global look research and publications GEDAI/UFPR promotes spaces for creation and collective sharing, available through the Internet at www.gedai.com.br with free download of their works.

Considering all the above, reading this book is fundamental and indispensable for the elaboration and construction of concepts that perceive the technological transformations in the current Information Society, being equally indispensable for the students of the subject of legal protection of Copyright Law.

Enjoy your reading!

Marcos Wachowicz

Alexandre Ricardo Pesserl

List of initials

AEPO	*Association of European Performers Organizations*
BTAP	*Beijing Treaty on Audiovisual Performances*
CCC	*Copyright Clearance Center*
CIS	*Common Information System*
ICSAC	*International Confederation of Societies of Authors and Composers*
CMS	*Copyright Management Systems*
CUB	Convenção de Berna (*Berne Convention*)
DMCA	*Digital Millennium Copyright Act*
DRM	*Digital Rights Management*
ECAD	Escritório Central de Arrecadação e Distribuição (*Central Bureau for Collection and Distribution*)
EGC	Extraction et Gestion des Connaisances (*Collective Management Entities*)
FIA	*International Federation of Actors*
FIM	*International Federation of Musicians*
ICMP	*International Confederation of Music Publishers*
IFPI	*International Federation of the Phonographic Industry*
IFRRO	*International Federation of Reprographic Reproduction Organizations*

ISAN	*International Standard Audiovisual Number*
ISNI	*International Standard Name Identifier*
ISRC	*International Standard Recording Code*
ISTC	*International Standard Text Code*
ISWC	*International Standard Musical Work Code*
LDA	Lei de Direitos Autorais (*Copyright Law*)
WTO	World Trade Organization
WIPO	World Intellectual Property Organization
RMI	*Rights Management Information*
STJ	Superior Tribunal de Justiça (*Superior Court of Law*)
TFEU	*Treaty on the Functioning of the European Union*
TPM	*Technological Protection Measures*
TRIPS	*Agreement on Trade-Related Aspects of Intellectual Property Rights*
WCT	*WIPO Copyright Treaty*
WPPT	*WIPO Performances and Phonograms Treaty*

Contents

1

Introduction

The present document is the result of some research conducted on solutions implemented by governments regarding collective copyright management mechanisms in the digital environment within the international scenario, but with a special focus on Latin America and the European Union. The dissemination of contents protected by copyright and related rights and also services associated to them, including books, audiovisual productions and phonograms require the licensing of rights by different copyright holders and related rights such as authors, performers, producers and publishers, who in theory may choose between the individual or collective management of their rights. Copyright and related management includes licensing users, auditing licensing and monitoring such uses of rights, collecting revenues from the exploitation of rights, and distributing amounts to rights holders – all of these are activities that can be controlled through licensing or through contracts, and also through enforcement of copyright and related rights. These activities can be legally protected, if necessary[1]; therefore, any attempt to extend such activities to the digital environment needs to take into account existing enforcement mechanisms.

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1 As an example of the mechanisms and norms elaborated to avoid copyright from being infringed on the Internet, see. PEREIRA, Alexandre Libório Dias. Direitos de autor e acesso à Internet: uma relação tensa. p. 98-105. WACHOWICZ, M. (coord.). "Direito Autoral e Interesse Público, Anais do IV CODAIP". UFSC: Fundação Boiteux, 2010; ASCENSÃO, José de Oliveira, Propriedade Intelectual e Internet. p. 145 e ss. Em: "Direito da Sociedade da Informação", Volume VI, APDI/Coimbra Editora, Coimbra, 2006.

Copyright is not restricted to the scope of proprietary-intermediary-user relations; because such relations constitute exclusive rights for the use of certain creative expressions, copyright represents a restriction to the freedom of expression of the public. Likewise, the exercise of copyright is confronted with other fundamental rights, such as the right to information and education, and to public domain. The weighing between such rights is resolved through the use of limits and exceptions (or fair use, in the doctrine of copyright[2]). Thus, besides the analysis of the present enforcement mechanisms, it is also necessary to take proper care of the existence of guarantees regarding the effective exercise of limits and exceptions; they represent essentially the faithfulness of the necessary balance to a copyright guarantor system.

With such milestones as their North, the starting point of the research was the identification of the main international legal frameworks on copyright protection in the digital environment: the WCT, the WPPT and the Beijing Treaties of the World Intellectual Property Organization (WIPO), known collectively as "Internet Treaties", whose contents were the object of previous analysis within the scope of this consultancy[3]. These Treaties constitute a direct source of obligations in relation to the domestic laws of the contracting parties; and in many cases, even countries not bound by such regulatory frameworks have created laws containing devices inspired by or derived directly from these legal texts. This is the case of Brazil, for example, which is not a signatory of any of these instruments, but its copyright law brings provisions that substantially implement the provisions of the Treaties. They are therefore central to addressing the issue at government level. However, the solutions that such Treaties offer are not fully satisfactory. In addition to representing dominant theoretical thinking in the late 1990s – hence the rise of social networks and the exponential growth of user-generated content, as well as the various legal consequences of such events

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2 For the purposes of this piece of research, the terms "limits and exceptions" and "fair use" were used in an exchangeable way due to their common role, though the two institutes have different roots.

3 Projeto 914BRZ4013 / Produto 02 – Estudo Técnico: Objeto da Proteção Concedida no Ambiente Digital/Internet pelos **Tratados de Internet** da OMPI (WCT, WPPT e Tratado de Beijing) e pela Lei 9.610/98.

– the Treaties offer a one-size-fits-all response, that is, a uniform mode of copyright treatment that disregards regional differences[4].

Furthermore, the Treaties deal fairly with the general issue of copyright: they certainly offer a perspective on existing enforcement mechanisms, but they do not address the specific issue of collective management. Analyzing them brings light to the general background regarding the operation of copyright in this environment, but it does not deepen the specific problem studied. Thus, in addition to the WIPO Internet Treaties, the initiatives adopted by the European Union as to dealing with the issue have proved to be of considerable interest in this piece of research. Its legal framework on the digital environment is based on Directive 2001/29/EC, strongly influenced by the Digital Agenda and the Internet Treaties; but it is in the evolution of Community law in the last decade that we will find normative initiatives that specifically concern the collective management of copyright in the digital environment, such as the rejection of the Santiago Agreement or on the recent making of a specific Directive on the subject[5], as detailed below. The Canadian case has also drawn attention, especially in the light of the recent Supreme Court cases or the change in its copyright law, which introduced the unprecedented exception to user-generated content. Above all, the general situation in Latin America, with very little specific doctrine on the subject and lack of major political initiatives, with serious problems in relation to the work of the collective management entities (EGCs[6]) is clearly overlooked.

Regarding the methodology used: from the identification, analysis and critical positioning in relation to the current international legal

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4 ASCENSÃO, José de Oliveira. Questões Críticas do Direito da Internet. Em: WACHOWICZ, Marcos. PRONER, Carol (Org.). "**Inclusão Tecnológica e Direito a Cultura**: Movimentos Rumo à Sociedade Democrática do Conhecimento". Florianópolis: Fundação Boiteux, 2012.

5 Directive 2014/26/EU of the European and Council Parliament, February 26th, 2014, on the collective management of copyright and connected rights on multi-territorial licensing of rights on music works for line use in the internal market.

6 This piece of research adopted the terminology "collective management entity" to designate all entities established for the purpose of collectively managing copyright and related rights. It should be noted that such entities may be constituted as foundations, associations, municipalities, societies or other forms of organization.

framework regarding copyright in the digital environment, the next step of the research was to identify: (a) the most representative countries of the study that adhered to the Treaties; (b) if any, what legislative changes have been introduced in their internal legislation for the implementation of Treaty obligations; and (c) the mechanisms of collective management of copyright present in government structures that have repercussions in the digital environment. As a matter of selection and cut out of the countries to have their internal legislations studied, the analysis was based on the relation of countries adhering to the WCT, since it recommends and implements the basic principles of the Digital Agenda of WIPO, followed by the two subsequent Internet Treaties. Thus, any internal legislative changes in the context of the Internet Treaties should not only be present but also reflect the introjection of such principles. The criterion used to select the representativeness of each country was its relative participation in the composition of the Brazilian trade balance, and the cases of American and European countries responsible for 1% (one percent) or more of the Brazilian international trade were analyzed (see tables below). This method made it possible for delimiting the initial universe of research to the analysis of the governmental solutions implemented by Argentina, Chile, Colombia, Mexico, Paraguay, Venezuela (Latin America); United States and Canada (North America); Germany, Belgium, France, Italy, Netherlands, Spain, United Kingdom and Portugal (Europe). In general, the analysis of the represented economic blocks and their solutions – or common problems, with emphasis on "government" activities, laws, policies or judicial decisions – in some way relevant to the advancement of the legal discussion on the subject was prioritized, thus putting together countries with a similar response. A brief approach of the Chinese legal functioning has also proven to be proficuous due to the relevance this countries impact on the Brazilian comercial balance and its influence over the international business trades as a whole.

EGC activities require regulatory and competitive considerations, especially with regard to possible enforcement, both in relation to the fiduciary duty that such entities have vis-à-vis the authors they represent and also in their relationship with the public. It aimed at giving privilege

to the analysis of the internal rules of public law in countries within a certain profile, in order to establish comparative standards regarding solutions proposed by governments on the subject. However, this is a difficult and complex task, since the practices and uses of collective management societies often end up influencing and directly molding the legal scenario, even if it is to verify that such practices are illegal (in the case of the Santiago Agreement within the EU setting), and that the objectives are simplifying and reducing transaction costs or bring more coherence to the system. The second methodological consideration that was presented, therefore, is qualitative and it was given in relation to what would be exactly "government solutions", or those solutions implemented by governments.

In this piece of research, the modern doctrine line of approach of the subject, which considers that copyright has the nature of exclusive rights (although some laws, such as the Argentinian, classify it as property rights, and some jurists such as Oliveira Ascensão[7] consider that this classification as property or not is indeed irrelevant[8]). As exclusive rights, their defining characteristic is that they only exist by express legal prediction: they constitute temporary legal monopolies. They reserve the exclusivity on the holding under competition. However, exercising them is often carried out through collective management entities (*Extraction et Gestion des Connaisances* – EGCs), which may have legal provisions or not, and may be public or private entities[9]. To what extent, for example, the existence

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7 ASCENSÃO, José de Oliveira. O Direito Autoral numa Perspectiva de Reforma. pg. 17. In **Estudos de direito do autor e a revisão da lei dos direitos autorais**. WACHOWICZ, Marcos; SANTOS, Manoel Joaquim Pereira dos (org.) – Florianópolis : Fundação Boiteux, 2010.

8 "Intellectual rights are essentially exclusive rights or monopoly rights. They reserve the exclusivity of the holders for their exploration, under competition. They are often described as property rights, particularly in the modalities of literary, artistic, and industrial property. But the qualification was born at the end of the eighteenth century. And it continues to exist with a clear ideological function to cover the naked nudity of the monopoly under the venerable guild of property". ASCENSÃO, José de Oliveira. Direito Intelectual, Exclusivo e Liberdade. **Revista da Escola de Magistratura Federal da 5ª Região**. n. 03. Recife: ESMAFE, 2002.

9 In Italy, for instance, the *Società Italiana degli Autori ed Editori* is an EGC considered as public entity.

of regulations or policies of such entities regarding actions in the digital environment can be considered as "government solutions"? This issue is justified because several organisms such as WIPO itself recognize the importance of the political action of private non-governmental groups in its institutional formulation and agenda[10]; and the legal construction of a system of constitutional rights can occur at the initiative of the holders of rights themselves by expropriations made by the Executive Branch of the various administrative levels, by the Legislative Power in the elaboration of laws that regulate such rights, or by the Judiciary in the interpretation adopted in the solution of disputes[11]. Thus, market practices influence legislative solutions, and the public interest requires supervision. Considering that we are in the presence of a multi-stakeholder environment whose activities (private or otherwise) and regulations directly affect public interest and fundamental rights, in which many of the observed regulations derive from market practices, it is concluded that the focus of this report should not be tied to government solutions, but to governance. Therefore, the following is sought: a design of the challenges presented by collective management in the digital environment. And the public manager should be concerned about ensuring that this takes place in a balanced way.

The role that EGCs will play in the management of transactional usages and / or online general-use licensing (comparable to a compensation

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10 *"There is now a well-established global network of collective management organizations, and they are strongly represented by non-governmental organizations such as the International Confederation of Societies of Authors and Composers (CISAC), the International Federation of Reprographic Reproduction Organisations (IFRRO), and at the European level, the Association of European Performers Organizations (AEPO), to mention only those. As part of its international development cooperation activities, WIPO is working closely with the above organizations, and also with others, such as the International Federation of Actors (FIA), the International Federation of Musicians (FIM), the International Federation of the Phonographic Industry (IFPI). The aim is to assist developing countries, upon their request, in establishing collective management organizations, and to strengthen existing organizations to ensure that they can be fully efficient and effective, among other things in their response to the challenges of the digital environment. Such activities are carried on under the WIPO Cooperation for Development Program."* Disponível em 15/11/13 em http://www.wipo.int/about-ip/en/about_collective_mngt.html

11 SOUZA, Allan Rocha de. **A Função Social dos Direitos Autorais**: uma interpretação civil-constitucionalista dos limites da proteção jurídica. Ed. Faculdade de Direito de Campos, 2006.

scheme) is not yet clear, and this depends to a large extent on how broadly such entities can facilitate and develop new business models. It may be the case that the development of new technologies minimizes the role of EGCs[12], but it can also lead to a significant increase in their importance[13]. The only certainty about it is that such a role will significantly change, as it is indeed happening. Whatever the position, the rationalization of the collective management of copyright remains an important task. For EGCs to play their full and effective role as intermediary, these organizations must acquire the rights they need to license digital uses of protected works and build (or improve) information systems in order to deal with increasingly complex issues of rights management and licensing[14]. In this sense, the initiatives of EGCs were collected and reports were made on those whose consequences directly influenced the construction of public policies, either by their approval or by their derogation, by their market effects or by transparency issues.

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12 ASCENSÃO, José de Oliveira. Representatividade e legitimidade das entidades de gestão coletiva de direitos autorais. **Revista da Ordem dos Advogados**. A. 73, nº 1, Lisboa, p. 149-183, Jan./Mar. 2013. p. 168-169. See also extracts on individual management of copyright in: MENDIS, D. Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. p. 290-312. Em: **EU Regulation of E-Commerce – A commentary**. Cheltenham: Edward Elgar Publishing, 2017.

13 NÉRISSON, S. Has Collective Management of Copyright Run Its Course? Not so Fast. "IIC - International Review of Intellectual Property and Competition Law", v. 46, n. 5, p. 505–507, 23 Jul. 2015. Streaming technologies exemplify the difficult issues, with all the potential revenue growth, that EGCs have before them Cf. WACHOWICZ, Marcos; VIRTUOSO, Bibiana Biscaia. A gestão coletiva dos direitos autorais e o streaming. **Revista P2P e INOVAÇÃO**, n. 1, v. 4, p. 4-17, 2017.

14 GERVAIS, Daniel J. Collective Management of Copyright: Theory and Practice in the Digital Age. In: GERVAIS, Daniel J. (org.). **Collective Management of Copyright and Related Rights**. Klumwer Law International, 2015. Holland.

TABLE 01 – Hiring parties of the WCT[15] in the Americas and in Europe

Hiring Party	Signed on	Instrument	Effective on
Argentina	18/09/97	Ratification: 19/11/99	06/03/02
Austria	30/12/97	Ratification: 14/12/99	14/03/10
Belarus	08/12/97	Ratification: 15/07/98	06/03/02
Belgium	19/02/97	Ratification: 20/05/06	30/08/06
Belize		Adhesion: 09/11/18	09/02/19
Bolivia	20/12/96		
Bosnia and Herzegovina		Adhesion: 25/08/09	25/11/09
Bulgaria		Adhesion: 29/03/01	06/03/02
Canada	22/12/97	Ratification: 13/05/14	13/08/14
Chile	20/12/96	Ratification: 11/04/01	06/03/02
Colombia	22/10/97	Ratification: 29/11/00	06/03/02
Costa Rica	02/12/97	Ratification: 23/05/00	06/03/02
Croatia	15/12/97	Ratification: 03/04/00	06/03/02

[15] Source: OMPI. Available at: http://www.wipo.int/treaties/en/ShowResultjsp?lang=en&treaty_id=16.

Hiring Party	Signed on	Instrument	Effective on
Cyprus		Adhesion: 04/08/03	04/11/03
Czech Republic		Adhesion: 10/10/01	06/03/02
Denmark	28/10/97	Ratification: 14/12/09	14/03/10
Dominican Republic		Adhesion: 10/10/05	10/01/06
Ecuador	31/12/97	Ratification: 21/06/00	06/03/02
El Salvador		Adhesion: 20/10/98	06/03/02
Estonia	29/12/97	Ratification: 14/12/09	14/03/10
European Union (EU)	20/12/96	Ratification: 14/12/09	14/03/10
Finland	09/05/97	Ratification: 14/12/09	14/03/10
France	09/10/97	Ratification: 14/12/09	14/03/10
Georgia		Adhesion: 04/04/01	06/03/02
Germany	20/12/96	Ratification: 14/12/09	14/03/10
Greece	13/01/97	Ratification: 14/12/09	14/03/10
Guatemala		Adhesion: 04/11/02	04/02/03
Honduras		Adhesion: 20/02/02	20/05/02

Hiring Party	Signed on	Instrument	Effective on
Hungary	29/01/97	Ratification: 27/11/98	06/03/02
Ireland	19/12/97	Ratification: 14/12/09	14/03/10
Italy	20/12/96	Ratification: 14/12/09	14/03/10
Jamaica		Adhesion: 12/03/02	12/06/02
Latvia		Adhesion: 22/03/00	06/03/02
Liechtenstein		Adhesion: 30/01/07	30/04/07
Lithuania		Adhesion: 18/06/01	06/03/02
Luxembourg	18/02/97	Ratification: 14/12/09	14/03/10
Malta		Adhesion: 14/12/09	14/03/10
Mexico	18/12/97	Ratification: 18/05/00	06/03/02
Monaco	14/01/97		
Montenegro		Statement of Continued Request: 04/12/06	03/06/06
The Netherlands	02/12/97	Ratification: 14/12/09	14/03/10
Nicaragua		Adhesion: 06/12/02	06/03/03

Hiring Party	Signed on	Instrument	Effective on
Panama	31/12/97	Ratification: 17/03/99	06/03/02
Paraguay		Adhesion: 29/11/00	06/03/02
Peru		Adhesion: 30/06/01	06/03/02
Poland		Adhesion: 23/12/03	23/03/04
Portugal	31/12/97	Ratification: 14/12/09	14/03/10
Republic of Moldavia	19/09/97	Ratification: 13/03/98	06/03/02
Romania	31/12/97	Ratification: 01/02/01	06/03/02
Santa Lucia		Adhesion: 24/11/99	06/03/02
Serbia		Adhesion: 13/03/03	13/06/03
Slovakia	29/12/97	Ratification: 14/01/00	06/03/02
Slovenia	12/12/97	Ratification: 19/11/99	06/03/02
South Africa	12/12/97		
Spain	20/12/96	Ratification: 14/12/09	14/03/10
Sweden	31/10/97	Ratification: 14/12/09	14/03/10
Switzerland	29/12/97	Ratification: 31/03/08	01/07/08

Hiring Party	Signed on	Instrument	Effective on
Macedonia		Adhesion: 04/11/03	04/02/04
Trinidad and Tobago		Adhesion: 28/08/08	28/11/08
Turkey		Adhesion: 28/08/08	28/11/08
Ukraine		Adhesion: 29/11/01	06/03/02
the United Kingdom	13/02/97	Ratification: 14/12/09	14/03/10
the United States	12/04/97	Ratification: 14/09/99	06/03/02
Uruguay	08/01/97	Ratification: 05/03/09	05/06/09
Venezuela	20/12/96		

TABLE 02 – Trade Bloc of the Americas and Europe and countries whose participation exceeds 01% in the Brazilian Trade Balance / 2017[16]

Trade Bloc / Country	% Exports	% Imports
SOUTHERN COMMON MARKET 5 - MERCOSUR 5	**10.39**	**7.89**
Argentina	8.09	6.26
Uruguay	1.08	0.88
Paraguay	1.22	0.75
THE ANDEAN COMMUNITY	**3.26**	**2.97**
Colombia	1.15	0.96
Peru	1.03	1.07
CHILE	**2.31**	**2.29**
MEXICO	**2.07**	**2.81**
CANADA	**1.25**	**1.17**
The UNITED STATES	**12.3**	**16.5**
CHINA	**21.8**	**18.1**
EUROPEAN UNION – EU	**16.03**	**21.28**
The Netherlands (Holland)	4.25	1.26
Germany	2.26	6.12
The United Kingdom	1.31	1.53
Italy	1.64	2.63
France	1.02	2.47
Belgium	1.46	1.12
Spain	1.75	1.89

16 Fonte: MDIC. Availabel at: http://www.mdic.gov.br/index.php/balanca-comercial

2

Collective management and the digital environment

The network was constructed as a technology-free platform (multi-platform), an open system in which behavior is determined by the dynamic interaction of its components, an interaction between multiple variables, and not by a mechanical structure of the system with its retraction mechanisms[17]. What makes it truly revolutionary is that it offers the real possibility of controlling the flow of information. It is possible for one to trace certain pieces of information along a chain of uses. Musical files that travel through the network do so in digital format, as bundles of information (bits), accompanied by metadata about their content; therefore, at a certain level, it is possible to monitor its use. Metadata are pieces of information about information. In information products, metadata are part of the product that describes the content of the product package. Some authors classify metadata into three categories: semantic, structural, and control. Semantic metadata describe the meaning of content, structural metadata describe the format and technologies used in the content, and control metadata contain information about the production and delivery of the package[18]. Control metadata help determine the status of content,

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17 BERTALANFFY, Ludwig von. **Robots, Men and Minds**: Psychology in the Modern World. New York: George Braziller, 1967. p. 167.

18 JOKELA, S., TURPEINEN, M., SULONEN, R. **Ontology Development for Flexible Content**, Education and Life-Long Learning (IJCEELL), Vol. 12, Nos 1-4. 2000.

the rights to content access and use, and are therefore key parts of an electronic license management scheme.

The collective copyright management system was developed keeping in mind, on the one hand, the holder of rights and on the other hand, the user. In the analog environment, the user will almost always be someone endowed with some sort of commercial interest – a radio, a theater, nightclubs, public performance and playing spaces[19]. In the digital environment, this situation does not repeat itself: since practically any use of the work in this medium involves some level of reproduction, any use, in theory, is liable to liability – the same private uses, stripped of commercial interests. Private use has always been an area outside the Copyright Law; what the law reserves to the author are forms of public use of the piece of work[20]. But the boundaries of public and private uses are mixed in digital environment, thus leading to some questions: to what extent an eminently private use such as posting a photograph of a third party on your personal blog or social network, or downloading a song, or merely linking certain content can generate accountability[21]? To what extent do such conducts amount to "publishing" or "reproducing" a piece of work? And what should be the response of content owners? The choice for a litigious path does not seem appropriate, only contributing to the creation of decentralized point-to-point distribution schemes. In addition, such industry efforts seek to extend copyright protection to traditionally free uses, to the detriment of the public domain. On the other hand, it is necessary to consider that the service providers and the contents in the network, which provide the platforms for the so-

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Availabel on 15/11/13 at http://www.computer.org/csdl/proceedings/hicss/2000/0493/06/04936056.pdf

19 The STJ has already ruled on two occasions for the incidence of the three-step rule in public execution (Resp. 964.404 - ES (2007.0144450-5) and AgRg in Resp 1,336,903 - SP (2012 / 0159866-7), both by the Third Group of magistrates.

20 ASCENSÃO, José de Oliveira. **Direito Autoral**. 2a.ed., Rio de Janeiro: Renovar, 1997, p. 159.

21 On the analysis of preceding European issues related to such matters, see: PEREIRA, Alexandre Libórias Dias. Direitos de autor e acesso à Internet: uma relação tensa. p. 98-105. **Direito Autoral e Interesse Público, Anais do IV CODAIP**. UFSC: Fundação Boiteux, 2010.

called blogs or social networks to operate, can profit from the traffic that is generated, suggesting that these entities started to play the role of commercial users of the blogs. Copyright in this case is precisely what will make the network available to the public, so that it can be accessed in different places and at different times.

The regulation of copyright in the network interferes with the traffic of contents. While on the one hand it produces direct effects on the freedom of information for citizens, on the other hand it makes it possible for the use of new forms of automated licensing. A collective management system in the digital environment needs to encompass the possibilities of control at different levels offered by the network, but it must also consider that the imposition of limits and exceptions is an important tool to establish the delicate balance between copyright protection and users' freedom in the digital environment[22]; the control of use must be carried out from a guarantor perspective that can effectively guarantee the rights of the public.

Copyright licensing implies a minimum level of negotiation between the holder of rights and the person who wishes to use the piece of work. Even assuming that the royalties and terms of use can be standardized, there is a need to conclude an agreement between the user and the holder. In certain sectors, such licenses are held individually between holders and users, even if automated – special notice can be given to software industry, in which there are innovations such as shrink wrap licenses (accepted by opening the plastic wrapper containing the media) or almost folkloric terms of use in their broadness and scope, as an example of mass multi-level licensing. In others, as in music, this type of individual negotiation has proven impractical to date: the musical repertoire is constantly being updated, in addition to being composed by artists from all over the world. The transaction cost to obtain all the authorizations required to operate a radio, for instance, would make the process impractical, resulting in a reduction in consumer choice. Such

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22 WACHOWICZ, Marcos. **Propriedade Intelectual do Software & Revolução da Tecnologia da Informação**. Curitiba: Juruá Editora, 2008. p. 212.

inefficiency has traditionally been solved through collective management mechanisms, which provide centralized access to a plurality of works for the benefit of users and holders.

The scope of the copyright moves from an area in which the holder has effective control of both use and individual negotiations (exclusive right) to the waiver of authorization, in the case of limits and exceptions. Among these positions, we can find possibilities for negotiations for directories or blanket licenses (ones that can be charged[23]), which is the case of collective management, or simply payment for use, without authorization, as in compulsory licensing[24]. Such positions therefore reflect the relativity of this exclusive use, which is transformed from a position of discretion into a mere right of remuneration. Therefore, traditional collective management necessarily involves the loss of some control of the work by the holder – some of the business models practiced by EGCs around the world may even include the assignment of rights to these entities. The counterpoint is non-discrimination against the user; anyone who pays royalties and follows certain rules may use a certain repertoire. Some authors draw a distinction between voluntary, forcible collective management (as in the case of music, its individual exercise being impracticable) and the forced type, which arises either from legal determination that a particular right can only be exercised through a EGC, euphemistically, the one that consists in extending the collective agreements concluded by the holders that are not represented by EGCs[25].

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23 It should be noted, however, that the practice of blanket licenses was one of the points considered by the Commission of the European Union to be outdated and in line with the doctrine of the more precise control possibilities offered by the new technologies. See Working Document 52012SC0205 (SWD / 2012/0205 final), which accompanied the Proposal for a Directive on Collective Management, available at https://eur-lex.europa.eu/legal-content/PT/TXT/?uri= celex% 3A52012SC0205.

24 Largely used in the US legal system since the Copyright Act of 1907. The first compulsory license that is known about copyright comes precisely from this law, when regulating the market for rolls of automatic pianolas. The rollers contained pins that, when inserted in such machines, reproduced the scores, in the style of the old "music boxes".

25 ASCENSÃO, José de Oliveira. **Direito da Internet e da Sociedade de Informação**. Rio de Janeiro: Ed. Forense, 2002, p. 290-1.

EGC services can be more or less elaborate and can offer a wide range of services. In the field of musical works, where there is a long tradition of collective management of rights[26], the system normally extends beyond the simple offer of centralized access and includes not only documentation but also the licensing and distribution of services. EGCs negotiate with users (such as radio stations, TV stations, discotheques, cinemas, restaurants and the like), or groups of users, and authorize the use of copyrighted works of their repertoire against payment, and under certain conditions. Based on documentation (information about members and their works) and programs submitted by users (for example, records of songs played on the radio), EGCs distribute royalties to their members in accordance with established distribution rules. Generally, an amount is deducted from the royalties to cover administrative costs, and in some countries also to pay for socio-cultural promotion activities[27].

EGCs tend to be organized on a territorial basis and, in order to better represent the interests of their members, they tend be associated to partners on a regional or international level. Examples of such associations are the International Confederation of Societies of Authors and Composers (ICAC) and the International Federation of Reprographic Reproduction Organizations (IFRRO). Usually, in the field of musical works, reciprocal representation contracts are concluded between the various national societies, on the basis of which a national company has the right to manage not only its own repertoire, but also the foreign repertoire of the other company in a reciprocal way. As a result of this network of agreements between different national societies, each of them is in a position to license the entire world music repertoire, which, from the national user's point of view, is highly desirable.

With the rapid expansion of the Internet and mobile telephony, the market for legitimate use of digital media (especially music) has grown enormously in recent years. Such services are usually accessible from

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26 The management of copyright on musical works remains central to the digital era, for example Title III of Directive 2014/26 / EU, which will be discussed below.

27 WIPO. IP Survey. **The Impact of the Internet on Intellectual Property Law.** Available on 15/12/18 at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap3.html

several countries, which impose the need for multi-territorial licensing mechanisms. An online content provider must therefore obtain a license for each relevant EGC in each territory where the works can be accessed. Currently, this type of licensing is done through a network of reciprocal representation agreements between EGCs. But this mechanism does not fit easily into the digital environment, as the ubiquity of this medium potentially exposes content providers to liability in all territories where their services are technically accessible. This radically alters the existing licensing terms, based on the territory for which the EGC holds licenses[28].

In the analog environment, this mechanism is tested and accepted; if the user's market operation is placed in a particular country, or if he intends to enter a certain territory, it is sufficient to license with the EGC in question. In the digital medium, the user would have to obtain licenses for all countries that potentially access their services. There are technical ways of blocking a country's access to a particular site / service – for instance, via IP address filtering[29]. However, this method is not only easily teased through VPN access or proxies but also a questionable answer to a systemic problem, even though it is in the consumer's interest to have access to new forms of musical distribution in its ubiquitous form[30].

Another verified function of EGCs is the "bundling" of rights. In the case of a radio station that wants to copy music on its computers and then use such a copy to broadcast, it must license the copyright (reproduction) as well as the right to communicate the work to the public. Both rights must be licensed for the work and for the phonogram and related rights. Such

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28 HAUNSS, S.; The changing role of collecting societies in the internet. "Internet Policy Review", 2013. Available at: https://policyreview.info/articles/analysis/changing-role-collecting-societies-internet. GUIBAULT, Lucie; GOMPEL, Stef van. Collective Management in the European Union. p. 140-174. GERVAIS, Daniel (ed.) **Collective Management of Copyright and Related Rights**. Kluwer Law International, 2015).

29 AKDENIZ, Yaman. Case Analysis of League Against Racism and Antisemitism (LICRA), French Union of Jewish Studens, v Yahoo! Inc. (USA), Yahoo France, Tribunal de Grande Instance de Paris, Interim Court Order, 20 November, 2000. **Electronic Business Law Review**, 1(3) 110-120. Availabel on 15/12/18 at http://www.cyber-rights.org/documents/yahoo_ya.pdf

30 The analysis of the Santiago Agreement, within the framework of the European Union (below), clearly illustrates this issue.

rights may be from national or foreign artists; and thus even the licensing of a single piece of work acquires extraordinary complexity. Using the same example, let's say that the work has two authors (lyrics / music) and it has been recorded by a band with five members. If the rights were not transferred to a publisher, the two authors, the five musicians / performers and the phonographic producer would need to be authorized for both the reproduction right and the right of communication to the public. It is EGCs' role to put together such "packages" of rights in order to require a single authorization against a single payment. Certain countries allow EGCs to accumulate more than one entitlement category; others have exclusive EGCs for each category (author, performer, phonographic producer)[31]. In other cases, only the authors have collective representation, and the clearance of the rights to the phonogram and the related rights is done directly with the phonographic producer ("artistic rights"). However, lack of market standardization imposes an increase in transaction costs and in practice it prevents multi-repertoire, multi-territory, cross-border licensing.

2.1 Regulation

Another major issue presented by EGCs is accountability. EGCs are mandated, subject to the duty of trust for the service they provide[32]; and, recurrently, the whole system has been permeated by a number of

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31 LIU, W. Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance. **Journal of Intellectual Property Rights**, v. 17, p. 46–54, 2012. p. 47.

32 There is considerable discussion about the legal positioning of EGCs vis-à-vis their constituencies. The European Union sought to pacify this issue by framing collective management as a service provision, thus subject to the rules of consumption. In any case, the Commission of the European Union has already explicitly recognized that EGCs are companies for the purposes of Article 81 and 82 of the Treaty of Amsterdam (see ASCENSÃO, José de Oliveira, Internet Law and Information Society. January: Forensic Ed., 2002, 288). However, shortly after the adoption of Directive 2014/26 / EU, the Court of Justice of the European Union has stated that the Services Directive (2006/123 / EC) does not cover the EGCs, resulting in criticism of the doctrine (see GUIBAULT , Lucie GOMPEL, Stef van Collective Management in the European Union, 140-174 GERVAIS, Daniel (ed.) **Collective Management of Copyright and Related Rights**, Kluwer Law International, 2015). P. 145-146

cases of abuse, inefficiency or incompetence, to a greater or lesser extent, depending on the entity in question[33]. Transparency and good practices are requirements for the representation, governance and efficiency of such entities. As *de facto* or *de jure* monopolies, they certainly require a degree of state supervision. But how much regulation is needed[34]? EGCs can be set up from simple non-exclusive rights licensing centers (CCC – Copyright Clearance Center, as in the U.S format) for legal obligations, or administrative impositions such as the Brazilian case – there is no obligation to associate to an EGC, but as collection is unified, an obligation is actually created for those who wish to receive the values collected in their name. Thus, if in the first case we are dealing with a mere private exercise of rights, in which the role of the State is limited to executing contracts; in the second, an EGC acts in the exercise of typical attributions of public power, such as supervision of the use and application of "fines", while at the same time it operates in the market with tariff setting, often with abuse of dominant positions. Therefore, it should be open to scrutiny of both the users (i.e. the public) and the owners and authors.

The European experience suggests difficulties in the application of antitrust laws as regulators of the activity in that continent, partly due to the different internal legislations, partly due to the fine adjustments that are often necessary to the system. Some authors consider the antitrust laws as very heavy remedies, inadequate for copyright filigrees: in light of the complexity of the environment and associated regulatory objectives and tasks, the regulator's role would require more "watchmaking" than "carpentry"; it should be more concerned with the design of policies

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33 ASCENSÃO, José de Oliveira. Representativeness and legitimacy of collective copyright management entities. **Journal of the Bar Association**. Lisbon. A. 73, paragraph 1, Jan./Mar. 2013, p. 149-183.

34 Rochelandet pointed out in careful research that there is no positive correlation between the level of state oversight and the results of EGCs, but that an intermediate level of supervision is the most inefficient option. It should be noted that this research was done in 2003, therefore before several important changes in the paradigm of the information society. ROCHELANDET, Fabrice. Are Copyright Collecting Societies Efficient Organisations? An Evaluation of Collective Administration of Copyright in Europe". Gordon, W. J.; Watt, R. (coord.), **The Economics of Copyright. Developments in Research and Analysis**. Edward Elgar, Cheltenham, Northampton, pp. 176-197, 2003.

appropriate to the theme than with the enforcement of anti-cartel rules[35]. In any case, two obligations derive from the monopoly position, concerning hiring as to (a) all the holders who wish to manage the works or render them and (b) all those interested in the use of the works or services, authorizing them on reasonable terms[36].

To the extent that an EGC exercises rights in several categories, it is necessary to take into account the possibility of conflicts of interest between the holders represented, since this is contrary to the fundamental principles of representation in law; thus, if an EGC simultaneously manages the interests of authors and other categories, such as performers or producers of phonograms, there should be safeguard mechanisms for potential conflicts of interest[37]. In Germany, for instance, it is possible for an EGC to have a lot of, if not all, the monopoly rights for a particular category, to the point of acquiring a "world monopoly" for its operating territory. Such a dominant position based on the bundling of rights of all incumbents was considered both inevitable and desirable, as it is beneficial to incumbents and users, as well as a condition of efficient low-cost management. At the same time, the legislator took this dominant position into account by creating the legal basis for state-specific copyright control over EGCs in order to prevent abuse of their position vis-à-vis holders or users[38]. In the United States, the *Copyright Royalty Board,* an administrative organism of judges that is subordinate to the Library of Congress by means of express legal provision[39], has functions of mediation, regulation and pricing. The point that seems to be consensual is that the activity of EGCs must necessarily be subject to a degree of state control, and preferably that this control be exercised by a specialized body, which should proceed on a case-by-case basis.

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35 GERVAIS, Daniel. The Landscape of Collective Management Schemes. **Columbia Journal of Law & the Arts**. 34:4, 2011. p. 605.

36 ASCENSÃO, José de Oliveira. **Direito da Internet e da Sociedade de Informação**. Rio de Janeiro: Ed. Forense, 2002, p. 289.

37 Op. cit. p. 284.

38 REINBOTHE, Jörg. Collective Rights Management in Germany. GERVAIS, Daniel. (org.) **Collective Management of Copyright and Related Rights**. Klumwer Law International, 2010. Holanda. p. 221.

39 17 U.S. Copyright Code § 801

2.2 Documentation

In addition to best practices in governance, transparency and accountability, the compilation, standardization and wide availability of consistent information on ownership, authorship and performers is indispensable for the creation of a fair and efficient model for cross-border licensing models that are appropriate to the digital environment. Accurate data are the key to proper distribution of royalties, besides being a necessary element in any collective licensing scheme – a unified database with transparent and accurate information on musical copyrights is an essential tool for the development of the area. In order for such a database to be accepted and adopted, it must be open (non-proprietary), widely accessible to the public, and endowed with a higher level of accuracy than the current one. Thus, it should provide transparent information and services to users who wish to license in part or fully the available repertoire and be easy to operate by the holders. It should include metadata with information about works, authors and performers, as well as ownership, control and administration, and also provide certified information on which organization – publisher, phonographic producer, EGC or others – can license what category of rights, what types, which territories and for how long. It should be noted that, in theory, minor or niche repertoires would tend to benefit from that, as they often fail to receive adequate rights due to deficiencies in existing documentation, and inadequate compensation procedures.

The international code standard for uniquely identifying sound recordings and music videos is the International Standard Recording Code (ISRC), defined by ISO 3901, which has the IFPI as the registration and secretarial authority. Such a system was created long before the Internet was available, and therefore it does not have a centralized database of allocated codes. Users allocate their own codes using a prefix assigned to them; this creates a reasonable expectation of uniqueness, but other users are not able to locate the allocated codes if they wish to use it, and cannot determine which phonogram such code represents. In addition, there are no means to determine if the phonogram has already had its ISRC allocated,

so multiple allocations are common. The International ISRC Agency plans to introduce a simplified record that will store the ISRC with some basic metadata – probably just the title, artist, duration and date of recording. It should not contain information on rights, title, gender, popularity or other attributes, but such data classes may be created and made interoperable by third parties, by using ISRC as a basis[40].

In this sense, a project called the Global Repertoire Database (GRD) was proposed and elaborated over years. Its working group consisted of representatives of organizations of authors, editors, EGCs, digital service providers (such as Apple and Google) and their class associations. The GRD defines itself as a "central, certified, multi-territorial source of metadata on musical copyrights of the global repertoirel"[41,] and it was formed following a call for discussion by the European Commissioner for Competition, the result of which was a Recommendation Document in 2010[42]. Throughout its development it presented some controversial issues, such as what the certification process for access, operation and alteration of such a database would be (the model initially proposed provided that only publishers and EGCs should have direct access to the database), or whether such database should identify works in the public domain. Similarly, the International Confederation of Societies of Authors and Composers (ICSAC) has the Common Information System (CIS), which includes the International Standard Musical Work Code (ISWC), International Standard Audiovisual Number (ISAN), International Standard Text Code (ISTC) and International Standard Name Identifier (ISNI), a unique identifier number for contributors (such as the author or publisher) as complements to the information system.However, the project failed and it was discarded in July 2014 after

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40 International ISRC Agency Bulletin 2013/03. **Proposed Evolution of the ISRC Standard and System**. Available on 15/12/18 at http://www.ifpi.org/content/library/isrc_bulletin-2013-03.pdf

41 "[GRD] *is a central, authoritative, multi-territorial source of the global repertoire of musical works copyright metadata*". Available on http://www.globalrepertoiredatabase.com/index.php/faq at 15/12/18

42 Global Repertoire Database Working Group. Recommendations for: **The Way Forward For the Development of a Global Repertoire Database**. Available at http://www.globalrepertoiredatabase.com/docs/GRD-077-GRDRecommendations(Finalv1.0).pdf em 15/12/18

a number of problems, the largest one being the withdrawal of significant support from EGCs and investors. It caused a debt of millions of dollars.

It should be noted that the provision of technical means of rights information is a unilateral act of the entity that launches the works or uses in the networked exploitation; the producer becomes determinant in the qualification of a certain content as a protected work or benefit, granting the entrepreneur a practically absolute "legislative" power, even if a limit or exception applies to the right or if it has fallen in the public domain[43]. On the other hand, if there are effective mechanisms for safeguarding and resolving conflicts, one of the great benefits of an effectively public database is also a return of the author (and the owner) to control over the work, since they would have more effective control of who owns what kind of rights over it, and they can act if they find that their interests are not being fully achieved.

Some industry bodies such as the ICMP (International Confederation of Music Publishers) advocate a model of competition between EGCs in which authors and holders can exit/leave EGCs with minimal requirement, and may choose to license via EGCs in a unique or non-exclusive way, or leave (opt-out) based on a license blanket, i.e. by repertoire[44]. In a certain way, what is observed is that large holders of rights tend to support reforms that allow them to manage their repertoires directly, as one could observe with the Collective Management Directive. This is by no means harmful to holders of small repertoires; but one understands the lack of vocation of many of the small ones to directly manage such contracts, suggesting therefore that an EGC directed to the digital world should have a flexible platform and direct access by the holders with options of management by the EGC. In any case, the possibilities offered by a digital system of documentation, certification and control of the permissions associated with the works have advantages for all the parties involved, provided that the system's openness and transparency are maintained, namely the

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43 ASCENSÃO, José de Oliveira. **Direito da Internet e da Sociedade de Informação**. Rio de Janeiro: Ed. Forense, 2002, p. 299.

44 ICMP. Policy Positions. **ICMP and the European Union. Collective Rights Management**. Avilable on 15/12/18 at http://www.icmp-ciem.org/node/55

configuration of compatible coding and identification schemes of universal communication and treatment of results[45].

2.3 LIMITS AND EXCEPTIONS

Private use assumes the role of social counterpart to protect the freedom of cultural creation, since in the constitutional sphere this freedom is weighed against other fundamental rights, among which we highlight the right to express and disseminate thought, the right to inform and to be informed, the freedom to learn and to teach, and the very right of private property[46]. But the role of the regulator in copyright issues tends to be captured by the interests of holders of rights and EGCs, away from the public interest. Thus, for instance, the Europe Commission's report on collective cross-border management makes no mention of the issue of exercising limits and exceptions (or fair use, for all intents and purposes)[47]. The role of limits and exceptions in the copyright system works as a counterweight to monopoly: it solves certain market failures, it mediates conflicts between freedom of expression and exclusive rights, and it facilitates bargaining between incumbents and potential users. Current automated Copyright Management Systems (CMS) address only one of these purposes – to avoid market failure due to comparatively high transaction costs. Current CMS proposals do not envisage ways to enforce other boundary and exception functions without predicting access to protected contents. Thus CMS-coded access and rules of use potentially displace copyright policies, either by prohibiting access and use or by allowing the holder of rights to

45 ASCENSÃO, José de Oliveira. **Direito da Internet e da Sociedade de Informação**. Rio de Janeiro: Ed. Forense, 2002, p. 300.

46 TRABUCO, Cláudia. Direito de Autor, Intimidade Privada e Ambiente Digital: Reflexões sobre a Cópia Privada de Obras Intelectuais. **Araucária**, vol. 09, n. 18. Universidad de Sevilla. Espanha, 2007. See also the constitutional aspects of Copyright in Brazil: BARBOSA, Denis Borges. Bases Constitucionais da Propriedade Intelectual. Em: "Revista da ABPI". N. 59, p. 16-39. São Paulo, 2002.

47 COMMISSION OF THE EUROPEAN COMMUNITIES. **Commission Staff Working Document Study On A Community Initiative On The Cross-Border Collective Management Of Copyright**. Brussels, 07/07/05.

determine the degree of technological exercise of the limits and exceptions at their discretion. An effective system should take into account potentially anonymous access possibilities, at the discretion of the user, and low cost.

Some US authors are proposing the creation of a CMS structure that includes a trusted third party – in this case, the third party would be the Library of Congress. As a condition for anti-circumvention protection, holders of rights who choose to encrypt their works for public distribution should be required to deposit the key with the Library. Free uses and exceptions would be made by requesting the key to the Library or to a private repository within the network, rather than to the owner. Identities associated with key requests would be legally protected under legislation similar to existing ones in order to ensure the privacy of library users (in that country)[48].

The idea of a *bona fide* third party holder of the keys would also lend itself as a certifying authority, which is in accordance with the ICP-Brazil's standards. In the same sense, the Portuguese Code of Copyright and Related Rights, in Article 221/1, determined that the owners of the sites deposit with the Inspection General keys in order to give access to the sites, thus allowing the beneficiaries to exercise the limitations that matter; which may request access to them (paragraph 3). In practice, the initiative proves to be still inoperative, because in case of resistance of the holder of the site only the judicial route remains. Again, an administrative authority would be in a position to decide immediately, in the light of the foregoing, whether or not access should be granted and to impose the remedy if it is not complied with. If the parties do not agree, the discussion can only proceed in court. The rule must be injunctive, not allowing the parties to dismiss it; and duly sanctioned, so that arbitrary refusal does not compensate[49].

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48 BURK, Dan L. COHEN, Julie E. Fair Use Infrastructure for Copyright Management Systems. **Harvard Journal of Law and Technology**, Vol. 15, pp. 41-83, 2001; Georgetown Public Law Research Paper No. 239731. Available on 15/12/18 at SSRN: http://ssrn.com/abstract=1007079

49 ASCENSÃO, José de Oliveira. **As "Exceções e Limites" ao Direito de Autor e Direitos Conexos no Ambiente Digital.** Available on 15/12/18 at http://www2.cultura.gov.br/site/wp-content/uploads/2009/02/texto_mesa11_ascensao.pdf

3

International regulatory benchmarks

In the light of the above considerations, there is need for a brief analysis of the international legal landscape, vastly influenced by the WIPO Internet Treaties; the majority of the countries that have been studied end up introjecting their measures in a very similar way. But the excess rigidity of these instruments turns out to be harmful, considering the dynamics of the digital world – the European Community law, as well as the Canadian case, show an evolutionary advantage, suggesting ways to be taken.

3.1 WIPO and Internet Treaties

The Internet Treaties (WIPO), as they are called, constitutes the main international legal framework regarding copyright protection in the digital environment. Its motivation was reportedly the establishment of a minimum and universal framework for copyright and related rights in the digital environment. In general, such rights apply single revenue for their safeguarding, although this is done in relation to different objects and to each of the Treaties[50]. They innovate on the one hand by incorporating the right to make the network available to the public and, on the other hand, for technological measures – prohibition of circumvention of

[50] Copyright (WCT), performances and phonograms (WPPT) and audiovisual performances (Beijing Treaty), respectively.

technological protection measures (TPMs) and prohibition of alteration of Rights Management Information (RMIs) as ways to ensure copyright enforcement. Its most important implementation in terms of domestic legislation is undoubtedly the 1998 US Digital Millennium Copyright Act (DMCA), which still introduces a safe harbor for providers (immunity if they withdraw contents by notification), as verified below in the appropriate topic.

These Treaties are considered as expressions of the so-called "Digital Agenda" of WIPO, formally approved by the General Assembly of that body in September 1999, and they reflect an ideology that takes the controversial utilitarian (or maximalist) doctrine of positive international copyright as its theoretical basis, according to which proprietary incentives constitute the main (or only) requisite for creation. The Digital Agenda and its implementations have been the subject of a lot of criticism in the last decade for they limit legitimate rights (for instance, the prohibition against circumvention of technological protection measures, even when such evasion arises from the application of constitutional rights, legal and fair use) and to apply a single protective model to all adherents, despite their different stages of economic development and degrees of social evolution, thus showing some rigidity and lack of flexibility of the Treaties by sticking to a single enforcement formula.

In relation to internal implementations, the Internet Treaties, even on account of their formulation as an accessory to the Berne Convention, do not have the power to change the fundamental copyright policy practiced or the structure of the legal systems to which they apply. Their implementation usually occurs in a punctuated way; especially considering that one of the justifications for their autonomous existence is exactly the complexity present in the Berne and Rome Conventions, which makes it significantly difficult to alter any substantive provisions. Typically, a country may have to clarify the scope of existing rights to ensure that the right to make a piece of work in an available network be included. The Treaties do not necessarily require any changes to the limits and exceptions to the rights, although a country may choose to make updates or adjustments.

Finally, they require the addition of technological measures, providing adequate and effective legal remedies against the neutralization of technical protection measures of Digital Rights Management (DRMs), and the deliberate suppression or alteration of Rights Management Information (RMIs), new elements established by treaties that previously did not exist in the legislation of most countries[51]. At this point, we can approach a crucial issue concerning collective management – documentation, increasingly inclined towards standardization and inclusion in globally accessible databases.

Analysis must be made of the financial argument that the economic rationale is the greatest impulse of motivation for the creation of works of authorship, and of knowledge in general. Certainly, professional creative activity is central to the system, especially in cultural industries; however, this is not the only factor to be considered. In a study with the UK Arts Council involving artists and creators, only 22% of the people claimed to have engaged in creative activities aiming at financial gain as motivation, which suggests that somewhere between three-quarters or four-fifths of the universe of works created was done so for other purposes – personal satisfaction, need for artistic expression, involvement with the community, pursuit of knowledge, educational activities (articles, monographs, theses, etc.) or other reasons[52]. By basing public policies on a utilitarian theory, there is a risk of privileging the protection of the interests of the rights holder (investor) to the detriment of both the public and the author, thus hitting the necessary balance to a copyright policy that can be consistent with access to information, education and culture, as well as human dignity. Culture is produced from access to cultural works, without which there is no public; access is essential for the formation of a paying market[53]. It is true that a professional and creative activity enhances general well-being;

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51 Article 11of WCT and Article 18 of WPPT.

52 UK ARTS COUNCIL. **Visual artists in shared workspaces - resources and facilities.** UK, 2007. Available on 15/12/18 at http://www.artscouncil.org.uk/media/uploads/documents/publications/creyorksvispart2_phpeK4wff.pdf

53 SOUZA, Allan Rocha de. Direitos autorais e acesso à cultura. **Revista do IBICT**, v.7, n.2, setembro, 2011, Rio de Janeiro, p. 416-436. Available on 15/12/18 at http://revista.ibict.br/liinc/index.php/liinc/article/viewFile/438/329

therefore, the public manager must find ways to preserve financial flows to professional authors, whose works the public wishes to enjoy, instead of focusing only on access and enforcement restrictions, and at the same time preserving the fundamental right of access to education.

In addition, the protection mechanisms established by the Treaties do not consider alternative ways on how the creation of knowledge and copyrighted works could be better stimulated and sustained in the digital context. Digital technologies bring up questions that fundamentally change the way we relate to the works of authorship, since this environment not only allows us to overcome limitations that are characteristic of rivaling goods (especially those impacting the aspects of reproduction and distribution of cultural goods) but also can radically broaden the possibilities of interaction of the public with the work, of the public with the author and of the public with the public itself.

Within this realm, it is possible for one to observe the emergence of open works – pieces of work created from previous works (not only in the sense of the work derived or inspired by an earlier work, but literally constructed from excerpts of cultural artifacts, as it is the case of sampling)[54] and of new modes of collective and collaborative creation that check not only the concept of creative paternity of a piece of work but also the business models established in the physical environment[55].

In this sense, it should be noted that in 2007, WIPO formally adopted 45 recommendations (out of 111 proposals) on the so-called "Development Agenda" proposed by Brazil and Argentina, which contains directives to offer differentiated treatment to countries at different stages of development, as well as considerations regarding access to knowledge, among others. But even though it is formally accepted, it still finds it difficult to implement such an agenda – the recent Treaty

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54 PESSERL, Alexandre. Arte ilegal? Os tribunais e a cultura do sample. p. 415. In **Anais do II Congresso de direito de autor e interesse público**. Fundação Boiteux: Florianópolis, 2008

55 PESSERL, Alexandre; BERNARDES, M. B. Transformação criativa na Sociedade da Informação. In: I**II Mostra de Iniciação Científica da Associação Nacional de Pós Graduação**, 2010, Rio de Janeiro. XXII Congresso Nacional de Pós Graduandos, 2010, available on 15/12/18 at http://www.egov.ufsc.br/portal/sites/default/files/transformacao_criativa_na_sociedade_de_informacao.pdf

of Beijing (the "Third Internet Treaty") maintains almost unchanged the above-mentioned provisions on the right to online placement and protection technological measures, directly reflecting the concerns of the previous Digital Agenda. However, the most recent approval of the Marrakesh Treaty[56], the first international normative text to deal specifically with limits and exceptions (with important participation of the Brazilian delegation in the negotiations) is a sign of the expected change in the theoretical paradigm within that organ. This treaty makes free the adaptation of literary works printed in standard formats for models accessible to individuals with limited or no visual capacity, such as formats with larger fonts or printed in the Braille system.

3.2 European Union

In addition to the enormous historical consequences of developing copyright, such as the introduction in France of the idea of collective copyright management almost 250 years ago, or the concept of forced collective management in 1995, the situation in the European Union and its countries continues to be quite interesting and as an area of legal and jurisprudential innovation.

From the background of Directive 2001/29 / EC and the recent decision on DRMs (Nintendo Case v. PC Box[57]), which considers that there is a possibility of circumvention due to the actual use made, the panorama of collective management went through a condition of licensing experiment of the one-stop-shop model (Santiago Agreement), initiated by EGCs linked to music. It was considered unlawful for anti-competitive

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56 Formally, "Marrakesh Treaty to facilitate access to works published for blind people, visually impaired or with other difficulties to access the printed text". It should be noted that, with the enactment of Decree 9522 / 2018, published on October 9th , 2018, this is, as of the date of this writing, one of the only two international human rights treaties internalized in the Brazilian legal order that has the normative hierarchy of Constitutional amendment.

57 TJUE, Quarta Seção, Caso C355/12. Nintendo v. PC Box e 9Net. Relator: M. Safjan. Acórdão de 23 de janeiro de 2014.

reasons, and it ended up in the recent announcements of the formulation of a new Directive specifically designed for collective management in the digital environment.

3.2.1 DIRECTIVE 2001/29/EU

In the wake of the discussions under the WIPO Treaties, and three years after the publication of the US-DMCA, the European Union published Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the Information Society – legislation carried out for the specific purpose of implementing the Internet Treaties. The Directive expressly foresees the validity of copyright in the new environment, clarifies that there is an exclusive right to control the availability of intellectual works and services in interactive networks and allows Member States to derogate for temporary reproductions and to decide on whether or not to establish other limitations, observing in any case, the three-step rule. In this sense, its only innovation compared to what is foreseen in the Internet Treaties is the reinforcement of protection by means of technological nature measures of the *sui generis* right in relation to databases, which is widely criticized and is being re-evaluated under the argument of bringing inefficiency to the system[58] – see especially the comparative ones with the North American case where such right does not exist, thus having contributed directly to the construction of a more vigorous ecosystem[59].

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58 ASCENSÃO, José de Oliveira. Direito Intelectual, Exclusivo e Liberdade. **Revista da Escola de Magistratura Federal da 5ª Região**. n. 03. Recife: Esmafe, 2002. p. 139-140. The analysis by the European Union itself consolidated the criticism: the first evaluation report on Directive 96/9 / EC (on legal protection of databases), published in 2005, pointed out not only that the economic impact of this right is uncertain but it also has created legal uncertainty in the European environment. This meant that in 2016 the European Parliament would approve a Resolution text (2015/2147 (INI)) urging, in its item 108, that Directive 96/9 / EC be repealed. Recently, on April 25, 2018, a new study was published on the subject, reinforcing the conclusions of the 2005 report.Cf. https://ec.europa.eu/digital-single-market/en/news/study-support-evaluation-database-directive

59 HERR, Robin Elizabeth. Is the Sui Generis Right a Failed Experiment? **DJØF Publishing**. Copenhagen, 2008. Available on 15/12/18 at http://openarchive.cbs.dk/bitstream/handle/10398/7716/robin_herr.pdf?sequence=1

On the issue of technology protection, considering Digital Regulatory Measures (DRM), the Directive leaves national legislators with the option to provide adequate legal protection against the counterfeiting of any effective technology measures designed to protect copyrighted contents. But this right is not absolute, as observed in the recent decision (Jan / 14) of the European Court of Justice. It was a discussion about a PC Box device that suppressed DRM from Nintendo's console in order to run its own software[60]. The Court decided that such legal protection should respect the principle of proportionality without prohibiting devices or activities that have a commercial purpose or use other than the neutralization of technical protection for illicit purposes, within the terms of the decision shown below:

> DECISION BY THE COURT OF LAW (Fourth Section) – January 23rd, 2014
>
> "Directive 2001/29 / EC - Copyright and related rights in the information society – 'Notion of technological measures' – Protection device – Protected apparatus and complementary products – Similar devices, products or similar components from other undertakings – Exclusion of all interoperability between them – Effect of such technological measures – Relevance"
>
> Directive 2001/29/ EC of the European Parliament and of the Council of 22 May 22nd, 2001 on the harmonization of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the concept of 'Effective technological measures' within the meaning of Article 6 (n.3) of that directive may cover measures of a technological nature consisting mainly of equipping with a recognition device, not only the medium containing the protected piece of work (as the video set), aiming to protect it against acts not authorized by the copyright owner, but also portable devices or consoles intended to allow access to such games and their use.
>
> It is for the national court to determine whether other measures or those measures not installed on the consoles could cause less interference with the activities of third parties or the limitations

60 Court of Justice of the European Union. Case C-355/12. **Nintendo and Others v PC Box Srl and Others**. Press release 9/14, 23/01/14. Available on 15/12/18 at http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-01/cp140009en.pdf

> of such activities, providing protection comparable to the rights of the holder. To that end, it is appropriate to take into account, in particular, the costs relating to the different types of technological measures, the technical and practical aspects of their application, and the comparison of the effectiveness of these different types of technological measures with regard to protection of the rights of the holder, which, however, does not have to be absolute. It is also for that court to determine the purpose of the devices, products or components capable of neutralizing those measures of a technological nature. In that regard, it will be particularly relevant, depending on the circumstances in question, to prove that third parties actually use them. The national court may, in particular, examine the frequency with which such devices, products or components are actually used in breach of copyright, and the frequency with which they are used for purposes which do not infringe that right[61].

The Court therefore observes that the scope of legal protection of technical measures should not be assessed according to the uses defined by the holder of the exclusive, but that instead it is necessary to examine the purpose of provisions for neutralizing measures of taking into account, within the circumstances, the use that third parties will actually make of them. Concerning this issue, such a decision represents an important precedent in ensuring limits and exceptions, as well as strongly mitigating the application of anti-circumvention measures, thus reiterating the importance of the public domain for a vibrant ecosystem.

Regarding the obligation to protect management over rights information, the Directive also left it to national legislators to establish legal measures on this point. The purpose of such measures is not to protect the works, but to protect the information that identifies the work, the rights holder and / or the conditions of use of the contents. By

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61 Full text of the decision available on 15/12/18 at http://curia.europa.eu/juris/document/document.jsf?text=&docid=146686&pageIndex=0&doclang=pt&mode=req&dir=&occ=first&part=1&cid=650101. For further appreciation, see: RENDAS, Tito. Lex Specialis(sima): Videogames and Technological Protection Measures in EU Copyright Law. **European Intellectual Property Review**, v. 39, 2015. Available at: https://ssrn.com/abstract=2456273

leaving the regulation in charge of the domestic legislation, in a certain way the Directive contributed to the problem of lack of standardization of documentation, one of the items addressed in the proposal of the new Directive, as it can be seen below.

In that regard, on 16 November 2016, for Case C-301/1[62] the ECJ ruled that the discretion of national copyright laws cannot conflict with the rules of the Directives. In this case, French authors opposed the country's Decree 2013-182, which regulated the digitization of "unavailable books" in the market, making them again accessible under EGC management. The court replied that the decree was against EU standards, pointing out that the provisions of Directive 2001/29 / EC exhaustively set the limits and exceptions to copyright protection, and that the situation was not framed in any of them, and that all efforts were required possible to individually communicate the authors for authorization. The supervision of the works by collective management entities, besides the existence of an opt-out mechanism when digitizing, did not attenuate the need for the author's manifestation. The subject of this judgment, as well as that of the Google Books case that will be discussed below, shows how EGCs continue to be central to the most recent copyright developments, playing a role in balancing the diverse interests, among them is public interest, in the field of rights[63].

3.2.2 The Santiago Agreement and Recommendation 2005/737/EC(3)

The Santiago Agreement was signed in October 2000 by five EGCs, including the American BMI and four European organizations[64]; consequently, before the publication of Directive 2001/29/EC. This agreement was intended to deal with the problems that traditional

62 ECLI:EU:C:2016:878

63 NÉRISSON, S. Has Collective Management of Copyright Run Its Course? Not so Fast. **IIC - International Review of Intellectual Property and Competition Law**, v. 46, n. 5, p. 505–507, 23 jul. 2015.

64 United Kingdom (PRS), France (SACEM), Germany (GEMA) and the Netherlands (BUMA).

copyright licensing regimes face within the digital world. Before the agreement, someone wishing to license music for online use would be required to negotiate individually with each national collection society, as societies control the use of music in their respective countries.

The Santiago Agreement sought an adaptation of the traditional framework to the online world, allowing each participating society to grant a single license for use, which would include the musical repertoires of each of the member societies and would be valid in all its territories (one-stop-shop). However, only the collective management society of the country where the content provider had its real and economic location would be able to grant such license. The agreement was notified to the European Commission in April 2001. Subsequently, all other EU EGCs joined the agreement (except Portugal (SPA) and Switzerland (SUISA)).

There has been a long process of analysis of this Agreement within the European Commission, including public comment calls. While the Commission supports the "one-stop shop" principle for online licensing, it also believes that such development should be accompanied by increased freedom of choice for consumers and business users with regard to their service providers. According to the Commission, as a result of the Santiago Agreement, commercial users could apply for a license only from EGCs established in their own Member State; and this constitutes a breach of European competition rules. The Commission considered that the territorial exclusivity conferred by the Santiago Agreement is not justified by technical reasons and is incompatible with the worldwide reach of the Internet. The lack of competition between national EGCs in Europe makes it difficult to achieve a truly single market in the area of copyright management services and may result in unjustified inefficiencies with regard to the provision of online music services to the detriment of final consumers. Given the fact that there is only one EGC per territory (monopolistic approach), and that all EGCs entered the Agreement, then each EGC would have absolute exclusivity in its territory regarding the possibility of offering multi-territory / multi-period licenses for use of music online. In addition, such facts lead to a standardization of licensing terms, preventing the market from evolving in different directions and

crystallizing the exclusivity of each of the participating EGCs[65]. In 2008, the European Commission decided that cross-licensing agreements were therefore in breach of competition law.

The need to improve the EGCs was formally identified in Commission Recommendation 2005/737/EC(3), which established certain principles such as the freedom of holders to choose their EGC, equal treatment of different categories of holders and fair distribution of royalties. The Recommendation, as a non-binding soft law instrument, further required EGCs to provide users with tariff and directory information in advance of negotiations between the parties. It also contained recommendations on accountability, representation of incumbents in EGC governance bodies, and dispute settlement mechanisms. Despite this, the Recommendation failed to be regularly implemented, making evident the need for binding action[66].

3.2.3 The United Kingdom and Hargreaves Review

In the United Kingdom, the so-called Hargreaves Review (The Hargreaves Review of Intellectual Property and Growth)[67], an independent study of the British intellectual property system focused on copyright analyzes how this framework supports economic growth and innovation. Conducted by Professor Ian Hargreaves at the request of British Prime

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65 European Commission. Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 — **BUMA and COMP/C2/39151 SABAM** (Santiago Agreement — COMP/C2/38126) (2005/C 200/05). Available on 15/12/18 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:200:0011:0012:EN:PDF

66 Position of the European Parliament adopted at first reading on 4 February 2014 with a view to the adoption of Directive 2014/.../**EU of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market**. Available on 15/12/18 at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0056&language=EN&ring=A7-2013-0281#top

67 HARGREAVES, Ian. **Digital Opportunity - A review of Intellectual Property and Growth. UK Intellectual Property Office**. Available on 22/03/14 at http://www.ipo.gov.uk/ipreview-finalreport.pdf

Minister David Cameron, the study was published in May 2011. According to the study, the UK's intellectual property system needs a review because lobbying activities in favor of holders have been more persuasive to legislators than technical assessments of economic impacts. In this sense, it emphasizes the importance of an intellectual property framework adaptable to technological and market changes, keeping such points as its north. The report points out that UK's intellectual property policies are not based on facts but rather on pressure from rights holders.

In its introduction, the study states the problem of research: are laws made more than three centuries ago specifically designed to create economic incentives for innovation while protecting the rights of creators obstructing innovation and economic growth? The answer, in short, is "yes". According to the findings by the study, intellectual property policies are increasingly important tools for stimulating economic growth. However, the proliferation of the use of intellectual property rights can increase the transaction costs of intellectual property and prevent market access for innovative small businesses. Digital creative industries represent the UK's third largest export volume (behind advanced engineering and financial and professional services). The growth of such enterprises requires an efficient digital market, which allows the licensing of copyright in a fast and secure way. In this sense, the review points to the need for changes in copyright laws, for digital communication technologies involve the routine copying of texts, images and data. The existing framework is outdated, acting in effect as a regulatory barrier to the creation of new Internet-based ventures[68].

The Hargraves Review states that in order to support innovation and promote economic growth on the basis of facts, institutional changes are needed, thus recommending greater powers to the British intellectual property office to dialogue with antitrust authorities, for instance; and also legislative changes are needed to make it easier for large and small content

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68 HARGREAVES, Ian. **Digital Opportunity - A review of Intellectual Property and Growth. UK Intellectual Property Office**. p. 03. Available on 22/03/14 at http://www.ipo.gov.uk/ipreview-finalreport.pdf. For a deeper understanding of the problems of the traditional justification of copyright applied to the Internet paradigm: LEMLEY, Mark A. IP in a World Without Scarcity. "NYU Law Review", v. 90, p. 460–515, 2015.

owners to license their content to third parties. Market transactions require faster, more automated and lower costs to establish a digital copyright market in which disputes are settled quickly by alternative mechanisms, without litigation costs. It also points out the following as a crucial element for advancement in this area: to increase the ease of cross-border licensing and licensing of wholesale digital content through collective management mechanisms by EGCs.

The study also urges the government to update copyright law in ways that can increase consumer confidence. According to the text, data mining techniques and scientific texts are prohibited by British law, which has chosen not to implement all the limits and exceptions allowed by European Community legislation; thus, changes to music or video formats for personal use, the use of works under copyright protection in parodies, or libraries to archive protected works in digital formats are not permitted. Taking full advantage of the limits and exceptions allowed by community norms would bring cultural and economic benefits, as it could also make copyright law more acceptable and better understood by the public[69]. The report states that the copyright regime cannot be considered fit for the digital age when millions of citizens are in a situation of counterfeiting simply by carrying music or video files from one device to another, and that people are confused about what is permitted or not, with the risk that the law falls into disrepute. In this regard, it encourages, for instance, the adoption of the US doctrine of fair use by fully implementing the limits and exceptions allowed under Community law, as well as demanding additional limits and exceptions at the European level to accommodate future technological developments and activities that do not threaten the interests of holders of rights. The study also addresses other items, such as orphan works, enforcement mechanisms, patents, design and market access, always basing its conclusions on the need for evidence-based public policymaking[70].

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69 *Idem*, p. 04. Disponível em 15/12/18 em http://www.ipo.gov.uk/ipreview-finalreport.pdf

70 *"Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers*

The recommendations of the review were widely accepted by the British government, which initiated a public consultation process to implement the proposed changes and adjustments. This triggered a comprehensive reform in its copyright legislation and other intellectual property items with an explicit purpose of updating the framework of copyright limits and exceptions, thus expanding the chances of free use of protected works for a variety of economically and socially valuable purposes, without the need for permission from the owners. The amendments contain safeguards in order to ensure a reasonable balance between the interests of creators, owners, performers, consumers and users of protected works[71].

3.2.4 Collective Management Directive (Directive 2014/26/EU)[72]

On the assumption that Recommendation 2005/737/EC[73] was insufficient to harmonize standards within the European Union, Directive 2014/26/EU of the European Parliament and of the Council on the collective management of copyright and related rights and the granting of multi-territorial rights licenses for music works for on-line use in the domestic market was elaborated and approved on February 26th, 2014.

Among the concerns of the legislator, one was to guarantee cultural diversity, in the terms required by Article 167 of the Treaty on the Functioning of the European Union (TFEU), and to ensure uniform access to the market for all repertoires.

Its provisions cover two broad areas: titles I, II, IV and VI define the requirements to ensure the proper functioning of EGCs while seeking to

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and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.". Op. cit., p. 08.

71 UK Intellectual Property Office. **Explanatory Memorandum on Changes to the Copyright, Designs and Patents Act 1988**. Disponível em 15/12/18 em http://www.legislation.gov.uk/ukdsi/2014/9780111112717/pdfs/ukdsiem_9780111112717_en.pdf

72 Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX%3A32014L0026

73 See item 3.2.2.

improve their governance and transparency, also showing their cultural role besides their economic role[74]. This first part aims at encompassing all the EGCs no matter their category of associates and their category of protected rights. Title III, on its turn, aims to facilitate the granting of multi-territorial licenses for rights to music works for online use in the domestic market towards the EGCs within this category. This latter point is absolutely central to the matter, thus radically changing the functioning of entities and trying to respond to the challenges of the digital era and recent technological advances. It opens up more spaces for action beyond the national territory, following the forms of communication in the virtual environment that have long ignored the existence of borders. Nevertheless, Title III has also been criticized for the weakening and disappearance of smaller EGCs because the process for multi-territorial licensing is costly and restricted. Even the alternatives for smaller entities result in bounds with relative dependencies of these with the major agents of the market[75], generating great risks to a healthy competitive environment.[76]

EGCs operating across European borders rather than having to negotiate with separate organizations for each Member State. EGCs should issue licenses under the same conditions for all repertoires. It also establishes expeditious payment obligations, never more than nine months after the end of the tax year in which the duties were collected. It also allows greater interference of the holders in the management of their rights and freedom to select the EGC that they want, within the whole European territory. Of particular note is the obligation of the EGCs to respect non-commercial licenses, such as Creative Commons[77], and the possibility for copyright holders to entrust their management to Independent

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74 See Recital (3). However, in the binding part of the text, the same theme was scarcely addressed, giving high priority to the economic aspects of EGCs. For further study, see: DIETZ, Adolf. European Commission's Proposal for a Directive on Collecting Societies and Cultural Diversity – a Missed Opportunity. In: **International Journal of Music Business Research**, 3(1), pp. 7-25, 2014.

75 Articles 29 and 30 of the Directive.

76 MENDIS, D. Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. p. 290-312. Em: **EU Regulation of E-Commerce – A commentary**. Cheltenham: Edward Elgar Publishing, 2017.

77 Widely approached in Recital (19), and set in Article V (3) of the Directive.

Management Entities[78]. This is one of the central and potential points of the Directive, allowing, at least in theory, greater flexibility and the creation of innovative forms of copyright management by its owners. Critics, however, highlight problems concerning novelties such as stimulating the individual management of these rights, pointing out that only the major content creators and publishers of the art market would potentially benefit, and that could be used as a way to protect rights of these entities when they were not profitable.[79]

It is noted that the solutions of this Directive were the result of wide negotiations, a situation reflected in the approval by 640 of the 680 votes of the European Parliament. They reflect both the desire of the industry for the adoption of the one-stop-shop model, but balanced by the provisions regarding the protection of cultural diversity as they also guarantee equal access to markets and repertoires, suggesting a way for the country legislature to act. However, this did not, however, prevent the Directive from continuing with some serious shortcomings, which had already been pointed out before its entry into force[80]. Among them, the lack of care with cultural barriers, the lack of adequate detail on the differences between types of authorship and between some rights entitlements, and the excessive focus on EGCs wishing to participate in multi-territorial licensing activities, stand out in cross-border issues of entities that do not have that specific interest nor economic capacity.

The member countries of the European Union had to adapt their legislation to the Collective Management Directive until 2016, bringing

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78 See Recital (15) and (16), and Article II(4) of the Directive. Independent Management Entities also function as copyright intermediaries, and although they differ significantly in relation to EGCs and generally coexist side-by-side (or even reinforce themselves), they end up competing in economics. Some examples of EGIs, from different categories, are entities such as Itunes Store, Spotify, and Creative Commons.

79 GUIBAULT, Lucie; GOMPEL, Stef van. Collective Management in the European Union. p. 140-174. GERVAIS, Daniel (ed.) **Collective Management of Copyright and Related Rights**. Kluwer Law International, 2015.

80 See report on the proposal of directive from BEUC - *Bureau Européen des Unions de Consommateurs*. While congratulating the advances and intentions, it shows that a number of serious problems which should ideally be addressed at the time were not actually resolved Cf.: https://ameliaandersdotter.eu/sites/default/files/beuc_-_crm.pdf

the divergent solutions on the subject very close. As a matter of curiosity, it is mentioned that it was made public that the European Commission decided to bring proceedings against Bulgaria, Luxembourg, Romania and Spain on December 7th, 2017 for failure to notify the harmonization of Directive 2014/26/EU with its internal ordering within the time limit that was set. The same action was taken against Poland on January 25th, 2018. Spain, in the process, published Royal Decree-Law 2/2018 on April 13th, 2018, thus harmonizing its domestic legislation with that of the European Union.

3.2.5 Copyright Directive in a Single Digital Market[81]

By the time this article is being written, the proposal for a Directive on copyright in the Digital Single Market 2016/0280 (COD) is the center of a heated debate with intense mobilizations from various sectors of society. As Internet standards in the European Union have a noticeable impact on the rest of the world, the controversy is present far beyond the regional scope. There are defenses of extreme positions for both sides: there are those who argue that such devices are necessary for the dignified pay and even for the survival of the creative authors, while others claim that this will potentially be the termination the Internet. It is also important to note the criticism from a wide variety of scholars[82]. The EGCs are not all on the same side, although most tend to defend the Directive[83], with some arguing that such legislation will perpetuate the interest of large companies over that of the artists[84].

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81 Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX%3A52016PC0593

82 As it is with the analysis made by Reto M. Hilty and Valentina Moscon from Max Planck Institute of innovation and Competition, still about the first text placed for voting. Cf. https://pure.mpg.de/rest/items/item_2574154/component/file_2574153/content.

83 Such as Sociedade Portuguesa de Autores e do Grupo Europeu de Sociedade de Autores e Compositores: <https://www.spautores.pt/comunicacao/noticias/spa-apela-para-que-haja-consenso-na-proposta-da-directiva-sobre-o-mercado-unico-digital>

84 Such as Gestão de Direitos dos Artistas (GDA), which manages intelectual copyright of musicians, authors and ballet dancers. <http://www.gda.pt/pt/gda/noticias/arquivo/diretiva-europeia-sobre-mercado-digital-perpetua-injusticas>

The main reasons for the conflict are Article 11 and especially Article 13 of the Proposal for a Directive. Dubbed "the link fee", Article 11 deals with a right to remunerate content producers (especially publishers and newspapers) when links to their creations are shared on the Internet in the form of thumbnails with snippets of text or images. This is the case, for example, when one shares news on Facebook or Whatsapp. Article 13, which is the main focus of the controversy, requires that content-sharing platforms (such as YouTube) take appropriate and proportionate measures to prevent copyrighted material from being made available through its services. This means a shift from the current DRM accountability paradigm, which is accountability for non-removal of illicit material by providers only after notification, and it poses risks to freedom of expression and to the entry of new agents into the market.[85]

Faced with such a movement around these two articles, several other provisions of the Directive are not receiving the deserved attention. Article 7 (along with Recitals 25, 26 and 27) is one such example, which is very important for the issue of EGCs and dissemination of information. It provides for flexibility in the choice of mechanisms to facilitate the licensing of works that are no longer marketed to institutions responsible for cultural heritage, by extending the system to cover the rights of holders of rights not represented by collective management entities, provided that certain conditions are fulfilled. It seems possible here to identify a choice in the sense of collective management of forced type, albeit for socially beneficial purposes[86].

The Directive had its first text published on September 14th, 2016, it was developed (although without the support of Germany, Finland, Holland, Slovenia, Belgium and Hungary) and it was sent to the European Parliament for a vote in 2018. The first voting, on July 5th, 2018 decided

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85 For a synthesis of the problems and positive aspects of the Directive, see: SAMUELSON, P. The EU's controversial digital single market directive. **Communications of the ACM**, v. 61, n. 11, 20–23, 2018.

86 See the notes on the globalizing system and its link with forced collective management of copyright and EGCs in: ASCENSÃO, José de Oliveira. Representatividade e legitimidade das entidades de gestão coletiva de direitos autorais. **Revista da Ordem dos Advogados**. A. 73, nº 1, Lisboa, p. 149-183, Jan./Mar. 2013. p. 152 e 165.

by a small margin not to proceed to the negotiation stage, but to reopen the debate until September 12th , 2018. In that second moment, clarifying and correcting several of the ambiguities, an improved version of the text was approved by 438 votes in favor and 226 against, initiating Parliament's dialogues with the European Commission and the Council of the European Union to complete the work, which should take place in early 2019.

3.2.6 Germany

Germany presents some particularities in digital law and collective management of copyrights that deserve to be mentioned in their own section. The first is an example of how European Union Directives can make it difficult for certain public accesses that were previously legitimate under national law. German libraries used to be authorized, in an analogue environment, to photocopy articles and parts of texts of protected works that were found in their collection and to send them by mail to requesters, once these paid patrimonial rights. But the same act was banned in the digital environment, which made the entire process less costly and faster, because the rules of Directive 2001/29 / EC did not consider such use to be a private copy.[87]

The German order in this area is characterized by being one of the most advanced and comprehensible ones in the world, achieving a reasonable balance between the interests involved and enabling the modernization and effectiveness of the entities. Although the GEMA (Gesellschaft für Musikalische Aufführungs- und mechanische Vervielfältigungsrechte) stands out for its size and influence, being the largest German EGC, there are 13 other collective management entities in the country that generally have a monopoly of their category and are therefore supervised by a government body (Das Deutsche Patent-und Markenamt – DPMA). It has adopted a sui generis system to regulate the acquisition of rights by EGCs, focused on the equitable

87 PEREIRA, A. L. D. Arquivos e Bibliotecas digitais: Os direitos autorais e a sentença Google. **Revista Eletrônica do IBPI**, n. 7, p. 337–356, 2012. p. 346.

protection of all right holders of a certain category of collective management, provided that certain conditions are met. There is also the use in the country of the technique of legal presumption of management of a whole category by the EGCs that claims to be responsible for it, with the reversal of the burden of proof for those who wish to challenge this statement.[88]

Considering the positive points herein mentioned, it is paramount to understand Germany's role in promoting and defending the ideas that led to the Collective Management Directive. The country's system is regulated in detail and was already very close to the essence of what was set in 2014 in the community standards. This can be seen in the position issued by GEMA, praising the 2012 draft directive and recalling that it has already encouraged the European Union to take this path since 2010, though criticizing the fact that further measures have not been taken[89]. On May 24th, 2016, the new law on collective management entities (Verwertungsgesellschaftengesetz – VGG) was enacted to harmonize national and European legislation. This new legislation, in addition to the obvious effect of increasing the integration and operation of German EGCs at EU level, also called for greater transparency by increasing the scope of DPMA supervision to independent entities as to the points VGG also applies to them, such as requirements for information and communication, and for EGC subsidiary entities.

3.3 North America

As previously stated, the US-DMCA is the main reference and model for implementing the Treaties, establishing a pioneering legal framework that eventually became widely adopted. But there are innovative discussions in Canada, especially in the light of recent Supreme Court decisions in this country and changes in its copyright law.

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88 LIU, W. Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance. **Journal of Intellectual Property Rights**, v. 17, p. 46–54, 2012. p. 47-48.

89 Cf. https://ameliaandersdotter.eu/sites/default/files/gema_position_paper_en.pdf

3.3.1 The United States

The first legislation to implement the obligations of the WIPO Internet Treaties was the 1998 Digital Millennium Copyright Act (DMCA), which laid the groundwork for this new regime of copyright protection in the digital environment. The solutions that the DMCA gave the issue of DRMs stand out. The law prohibits not only unauthorized access to protected content, but also the manufacture or provision of devices used to circumvent anti-circumvention rights. This standard has been criticized for reducing the possibility of exercising the foreseen exceptions and for restricting the application of fair use situations without any penalties in case of abuse of right by the holder. Examples of such abuses can be found in "Free Culture" by Lawrence Lessig, one of the most important pieces of work on freedom of expression, copyright and the entertainment industry[90].

Some influence of the DMCA (and, consequently, Internet Treaties) can be perceived in the Brazilian Law 9610/98 (LDA). This is the case of Articles 30[91] and 107[92], respectively, regarding the right to place the work online and the technological protection and right management devices. This influence is repeated in several countries and it is subject to heavy criticism by the doctrine, because it is linked to the commercial

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90 LESSIG, Lawrence. **Cultura Livre**: Como a grande mídia usa a tecnologia e a lei para bloquear a cultura e controlar a criatividade. São Paulo: Editora Trama Universitária, 2005.

91 Art. 30. In the exercise of the right of reproduction, the copyright holder may make the work available to the public in the form, place and for as long as it wishes, whether for some sort of financial reward or free of charge.

92 Art. 107. Regardless of the loss of the equipment used, it shall be liable for losses and damages, never lower than the value that would result from the application of the provisions in art. 103 and its sole paragraph: I – to alter, delete, modify or render useless, in any way, technical devices introduced in the copies of works and protected productions to avoid or restrict their copy; II – to alter, suppress or render useless in any way coded signals intended to restrict the communication to the public of protected works, productions or broadcasts or to prevent their copying; III – to delete or alter, without authorization, any information on the management of rights; IV – to distribute, import for distribution, issue, communicate or make available to the public, without authorization, works, interpretations or performances, copies of interpretations fixed in phonograms and broadcasts, knowing that information on rights management, coded signals and devices have been deleted or altered without authorization.

pressures of the U.S. so that its system of copyright could be imported to other countries. This import was made with too much focus on business interests, without proper concern for national particularities, especially those concerning developing nations.

The U.S. also hosted the litigation over the Google Books Project, which in agreement with some of the world's largest libraries has decided to form a gigantic database of digitized books. This represents, at least in thesis, a major breakthrough in the diffusion and preservation of culture and knowledge. This project was considered illegal by EGCs; and allegedly representing the interests of authors and publishers they filed an action that resulted in an Amended Settlement Agreement, better known as Google Agreement. This agreement, however, has also been challenged judicially especially for competition issues and Google's monopoly situation, and one of the reasons for its annulment was the mechanisms that presume authors' authorization to use their works, allowing only an opt- out. In his ruling, the judge suggested that it would be more appropriate to create an opt-in system, supported by EGCs.[93]

In general, the American system of collective management is unique, since it does not cover a monopoly in collective management. There are three private entities that compete in the music market – ASCAP, BMI and SESAC, with the first two holding 96% of the market. Critics of this system claim that although it promotes competition between the entities in their search for filiations, such a situation wastes resources on marketing and promotion, rather than channeling them to collection and distribution activities. Therefore, there is not a consensus as to the doctrine on the best system to reinforce more or less the internal competitiveness.[94] There are a number of other business models on the market, such as the Copyright Clearance Center (CCC) – which primarily licenses non-exclusive rights to the educational market, or Harry Fox Agency, which represents music publishers.

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93 PEREIRA, A. L. D. Arquivos e Bibliotecas digitais: Os direitos autorais e a sentença Google. **Revista Eletrônica do IBPI**, n. 7, p. 337–356, 2012.

94 LIU, W. Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance. **Journal of Intellectual Property Rights**, v. 17, p. 46–54, 2012. p. 53.

3.3.2 Canada

The recent amendment to the Canadian copyright law includes the distinction of commercial and non-commercial uses, new provisions for fair dealing, and a new specific exception for educational institutions, allowing them to use freely available materials on the Internet. However, there is considerable criticism as to the extremely restrictive DRM provisions in favor of US interests[95], which could potentially render the exercise of the new exceptions ineffective. Such a law is currently going through a process of review (started in 2017), as defined in its section 92, once 5 years have gone since its proulgation.

Today, the law presents a wide range of user-oriented (final) provisions that legalize common activities. For example, time shifting, or the recording of television programs, is recognized as lawful conduct; the same is true for format shifting, copy for private use, and backup copy creation. Such changes will be valuable to those seeking to scan content, transfer content to portable devices, and store data securely. The law also extends the assumptions of free use (fair dealing), which now includes educational uses, parodies and satires to those already in existence (research, private study, journalistic use, criticism and review).

On July 12th, 2012, the Canadian Supreme Court issued recent rulings (the "pentalogy" of copyright) that placed emphasis on the importance of preserving fair dealing as a guarantor of users' rights. All the cases had EGCs as part of them, so these precedents became relevant for the entities in question. Such decisions textually affirm that fair dealing situations should be treated not as exceptions, but as rights of users, subject to a broad interpretation; that the purposes of the end user, rather than those of the commercial or non-commercial intermediaries who actually perform the copy and provide it to the user, are of primary relevance in determining free use; and that factors such as the provision of use licenses or even the

95 GEIST, Michael. **Entrevista ao Huffington Post**. Bill C-11: Copyright Legislation And Digital Lock Provisions Face Opposition In Canada. Disponível em 15/12/18 em http://www.huffingtonpost.ca/2012/06/17/bill-c-11-copyright-modernization-act-canada_n_1603837.html

full impact of unlicensed uses on the existing or potential market for the work are not as relevant as in the US market[96]. Such interpretations, in light of the new law, give considerable flexibility to the system, which allows the citizens of that country greater use of works without previous permission or accountability. Nevertheless, it must be noted that a certain level of judicial insecurity to the parameters that characterize the fair dealing have been generated.[97]

The law also includes a novel right to user-generated content, which establishes a safe harbor for non-commercial user-generated content creators such as remixed songs, mashup videos, or home movies with commercial music in the background. This provision became known as the "YouTube exception", although it is not limited to videos. The most significant restriction introduced involves the digital padlock rules (DRMs), which prohibit circumvention of technological protection devices. There are some exceptions (including the possibility of breaking the DRM for personal information protection, unlocking of cell phones, and access to content if the person has perceived deficiencies), but these are extremely limited and restrictive. The unauthorized download approach is centered on a notice-and-notice system, which allows holders to send notifications of alleged non-compliance to rights for Internet service providers, who must forward such notifications to their subscribers. The Internet Service Provider has no obligation to disclose who the subscriber is or to take any further action[98].

Collective management entities in Canada also have some particularities. The most relevant one is the existence of a regulatory body

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96 Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34; Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35; Society of Composers, Authors and Music Publishers of Canada v Bell Canada, 2012 SCC 36; Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37; Re:Sound v Motion Picture Theatre Associations of Canada, 2012 SCC 38.

97 As it can be noticed at the occasion the Federal Court of Canada nullified the parameters set by the University of York. See: Canadian Copyright Licensing Agency v York University 2017 FC 669

98 GEIST, Michael. **What the New Copyright Law Means For You**. Disponível em 15/12/18 em http://www.michaelgeist.ca/content/view/6695/135/

called the Canadian Copyright Commission. Its current format originates from the Copyright Act of 1989 and it decides on litigation between authors and users with almost-judicial force, having as jurisdiction all areas related to the collective management of copyright[99]. The decisions of this Commission cover issues such as peer-to-peer sharing and net neutrality, and have a primarily economic function of regulating market relations.

The Canadian legislation also does not establish the legal nature (whether private or public) of EGCs. This is why there are many different models in operation in that country, which means that even the way of acquiring rights by entities is varied, having as background a model similar to that of the German legal presumption; it is fairer, though, because it allows the opt-out of authors.[100]

3.4 Latin America

The overwhelming majority of countries in the region have copyright laws, most of which have been enacted (or amended) in the 1990s in the wake of the WIPO Internet Treaties, which recognize that authors, artists, interpreters and phonographic performers have the right to control the use of works and services in the digital environment with significant alterations that have updated it in the past few years. In general terms, they conform to the international commitments that countries have contracted in bilateral and multilateral agreements. In relation to the DRMs, a discussion is observed regarding the true self-custody that they represent; some legal texts, such as those of Ecuador and Peru, expressly so designate them[101]. Notwithstanding these facts, it should be pointed out that the process of

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99 The existence of specialized bodies on the subject, however, is not a Canadian exclusivity, as this is an efficient and effective solution to copyright litigation. Other nations, such as Germany and the United Kingdom, also have arbitration tribunals focused primarily on dispute settlement between EGCs and rights holders.

100 LIU, W. Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance. **Journal of Intellectual Property Rights**, v. 17, p. 46–54, 2012.

101 VIGNOLI, Gustavo y de Freitas, Eduardo, **Las entidades de gestión colectiva. Su importancia. Desafíos ante las nuevas tecnologías. Herramienta de los autores**

formation of copyright and related laws in Latin America continues to show the origin of the absence of authors and artists, who continue to have no preponderant role. As a consequence, even if the purpose of the norm of granting higher degrees of protection is obtained, its natural recipients (authors and artists) are not convinced that the legislation of their country will guarantee the enjoyment and exercise of their rights[102]. Another negative aspect is the way in which authors and artists watch the reduction of the possibilities of control of their works and benefits, in contrast to the increase of rights recognized to them. There is a great paradox here: laws with a lot of substantive content, but few possibilities for control[103].

As for the collective management system, with the exception of Cuba, all EGCs operating in Latin America are private entities (and typically not for profit), although there is a need for state authorization to be created, with a plurality of them in each country[104]. Despite the strong similarity of structure and development, as the great majority of EGCs in the region work in the musical area, there are important differences in relation to the degree of state control and control among the analyzed systems. Although almost all of them are limited to the management of rights within their territories, there are examples of entities that cross national boundaries, such as the Collective Management System in the Caribbean, which was stimulated by WIPO in its formulation.

There is a notable lack of government policies in relation to collective management as a whole, and criticisms are voiced at the lack of transparency

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en el entorno analógico y digital., 2007. Disponível em 15/12/18 em http://rnu.com.uy/innovaportal/file/13981/1/anexo_gestion_colectiva.pdf

102 Artículo 38 da Lei de Direitos Autorais (Decreto Legislativo nº 822) do Peru: "El titular del derecho patrimonial tiene la facultad de implementar, o de exigir para la reproducción o la comunicación de la obra, la incorporación de mecanismos, sistemas o dispositivos de autotutela, incluyendo la codificación de señales, con el fin de impedir la comunicación, recepción, retransmisión, reproducción o modificación no autorizadas de la obra"

103 LÓPEZ, Fernando Zapata. Realidad Institucional del Derecho de Autor en America Latina. In: **Diagnóstico del Derecho de Autor en América Latina**. Cerlac: Colombia, 2007.

104 There was a variation between 5 and 14 EGCs per country analyzed, among those listed at the beginning of the study, with a correlation between the number of entities and the size of the population.

in the distribution of resources, conflicts of interest and abuses committed by EGCs as a whole; thus, government actions on the subject are still focused on sectoral control, moving away from the discussion about collective management in the digital environment. The few discussions in this area focus on the repressive control of digital user activity, instead of seeking to understand it and create alternatives that use the technologies in an innovative and positive way. The region presents several musicians who have little contact with the collective copyright management system, or even aversion to it, using rather the digital medium to publicize their work, which makes the scarcity of regulation and public policies on the subject an even more serious problem.[105]

The model of monopolistic entities with full repertoire management, which are predominant in Latin America, bring not only inquiries on the part of the users required to pay these private entities, but also on the part of the very authors that these entities claim to represent. Problems such as monopoly management, lack of public audit, lack of information on distribution forms, as well as the historical lack of transparency of many of these entities has generated a lot of criticism and complaints[106]. Countries such as Chile and Colombia have laws that require greater control and monitoring by the State over EGCs, while Argentina and Brazil have much more timid means in this regard. During the early 21st century (and especially after the year 2010), several Latin American countries promoted reforms or experienced crises in their collective management systems; these countries include Brazil, Chile, Peru, Argentina, Ecuador, and Colombia.

Within Latin America, the specific legislation of the Andean Community (CAN, in Spanish), a South American economic bloc founded

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105 BOTERO, Carolina (coord.). **La gestión colectiva ante el desafío digital en América Latina y el Caribe (Parte I, Informe de Investigacíon)**. Bogotá: Fundacíon Karisma. p. 55-141.

106 BUSANICHE, Beatriz. **Repensando la gestión colectiva del derecho de autor**. Fundación Vía Libre. Disponível em 15/12/18 em http://www.vialibre.org.ar/2013/04/15/repensando-la-gestion-colectiva-del-derecho-de-autor/. In Uruguay, written by Movimiento Derecho a la Cultura, see: https://derechoalacultura.org/tag/sociedades-de-gestion-colectiva/

by the Cartagena Agreement in 1969 and today made up of Bolivia, Colombia, Ecuador and Peru, should be noted. CAN Decision 315 of 1993 defined intellectual property rules to be followed by its members[107], indeed regulating the operation of EGCs in articles 43-50. Membership of entities is voluntary in principle but it may be made compulsory under national law. All EGCs must submit to the official copyright law of their country, demonstrating the constant concern in the Latin American continent about the problems of trust in collective management[108].

3.4.1 Brazil and the High Courts

Brazil is a prominent case in Latin America in the area of collective copyright management. Both on the positive side and on the high participation of society (at least in the first instance) for the elaboration of the Civil Internet Framework, a progressive initiative that led to greater participation of neighboring countries in the legislative scenario. This is so that similar processes are also found in Colombia, Uruguay and Chile. But drawbacks are also found as it is with ECAD, being one of the great regional examples of problems that lack of supervision and transparency can cause in collective management systems[109]. Legislative advances and the understanding of the Brazilian courts are therefore of great importance not only to find possible solutions but also to identify the errors or gaps that need to be corrected.

The recent advent of Law n. 12583 / 2013 brought significant changes in the regulation of EGCs. This law modernized the collective management

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107 Available at: <https://www.wipo.int/edocs/lexdocs/laws/es/can/can010es.pdf>

108 In Colombia, there is also some talk on the need for a state action to supervise the duties of the users with the EGCs and those they represent in order to guarantee the right of remuneration.
CASTELLANOS LEAL, Alejandro. La gestión colectiva de derechos de propiedad intelectual, en el derecho de remuneración de los actores en Colombia. **Revista de Derecho Privado**, enero-junio 2017.

109 BOTERO, Carolina (coord.). **La gestión colectiva ante el desafío digital en América Latina y el Caribe (Parte I, Informe de Investigacíon)**. Bogotá: Fundacíon Karisma. p. 55-141.

system seeking greater transparency, efficiency and monitoring, and it was heavily influenced by research on the activities of the Central Office of Collection and Distribution (ECAD)[110] promoted by a Parliamentary Commission of Inquiry (CPI) of the National Congress, in parallel to the lawsuit filed by the Administrative Council for Economic Defense (CADE). After three years of investigation, the ECAD and six associations that compose it were convicted of cartel formation and abuse of dominant position, being punished with a total fine of R$38 million[111]. Law 12583 was also the subject of two Direct Actions of Unconstitutionality (n. 5062 and n. 5065) in 2013, the first one by ECAD and the second one by the Brazilian Union of Composers and the Brazilian Union of Music Publishers. Both orders were jointly dismissed by the Plenum of the Federal Supreme Court on 10/27/2016, with publication of the ruling almost a year later; the contents of these decisions being a paradigm for the Brazilian courts' understanding of the duties and functioning of EGCs:

> 2. The collective management of copyright and the coexistence of state participation assume varying degrees in different constitutional democracies [GERVAIS, Daniel (org.) Collective Management of Copyright and Related Rights. Alphen aan Den Rijn: Kluwer Law International, 2nd Edition, 2010], which suggests that there is no single, perfect and finished model of the Public Power, but, on the contrary, a greater or lesser role of the State, always dependent on the political choices of elected majorities. (...)
>
> 5. The canon of proportionality is embodied in the means chosen by the legislator, aimed at promoting the transparency of collective management of copyright, a legitimate purpose according to the Brazilian constitutional order, as it is able to mitigate the rentier bias of the previous system and prestige, immediately, the interests of copyright owners (CRFB, article 5, XXVII), users (CRFB, article 5,

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110 ECAD is not a Collective Management Entity in the strict sense, but it is formed by a set of associations that are EGCs. It has, therefore, a central role in the system of collective management of copyright in Brazil, including with regard to issues of legal and de facto monopoly.

111 WACHOWICZ, Marcos. A Revisão da Lei Autoral, Principais Alterações: Debates e Motivações. Em: **PIDCC**, Aracaju, Ano IV, Edição nº 08/2015. Fevereiro de 2015. p. 449-551

> XXXII) and, considering intermediacy, socially relevant legal assets related to intellectual property such as education and entertainment (CRFB, article 6), access to culture (CRFB, article 215) and information (CRFB, article 5, XIV). (...)
>
> 20. The regulatory model admits the personal performance of each owner in the collection of their rights. That is why it is in the interest of any user, effective or potential, to have knowledge about individual participation in the works. (…)
>
> 27. Law n. 9610 / 1998, as amended by Law 12853 / 2013: a) establishes that collective management associations must account for the amounts received to their associates (article 98-C, caput), which, although they have the legitimacy to carry out the inspection directly (Article 98-C, §1), may provoke the Ministry of Culture in its defense if they are not covered in a plan (article 98-C, §2); and b) provides that it is the responsibility of the Federal Public Administration to arbitrate conflicts between users and copyright holders as well as between owners and their associations regarding available rights (Article 100-B). (...)
>
> 32. The creation of new collective entities imposes competitive pressure on already active associations, which will tend to be more efficient, offering quality service and greater return to its members.
>
> 33. The legal monopoly that favors ECAD, seen as a bonus, undergoes the incidence of consistent compensation in their duty to admit any legally qualified entity.[112]

But the higher courts have not only been sources of bad news for ECAD in the past few years. The Superior Court of Justice also focused intensively on copyright cases involving digital rights, with decisions that were very favorable to the agency, clearly detrimental to users of the digital environment and even sometimes to intellectual creators. In 2014, the STJ issued a controversial decision allowing ECAD to charge copyright when the performers themselves are the authors of the works[113], which directly

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112 STF, ADI 5062 / DF, Rel. Luiz Fux, julgado em 27/10/2016 Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=13065385.

113 STJ, REsp 1.219.273, Rel. Nancy Andrighi, decision on 24/04/2014.

affects the highly interactive and spontaneous creativity of platforms such as YouTube. As early as 2017, the court ruled that the Central Office can promote fundraising over Internet broadcasts via streaming, both in webcasting and simulcasting[114]. As already mentioned, the tendency in the digital scope of institutions related to the collective management system is focused on the control (and collection) of users' activity, instead of stimulating cultural purposes or the development of technologies.

3.5 CHINA

The first regulations on digital rights and DRMs in China could be observed in the provisional measures on management of software products issued in 1998 by the Ministry of Electronic Industry (now Ministry of Industry and Information Technology), reinforced in 2001 and 2010 by the revisions of the Copyright Law to adapt to the Internet Treaties after pressure from partner countries in international trade. It is also noted that China did not detail or specify technological measures of protection, leaving tutelage under a more open standard to regulations made in 2006. Guilt is required for characterizing infraction (unlike the US DMCA), and care was taken to ensure that the growing Chinese information industry was not undermined by the law. The country has long been known for lack of enforcement related to the protection of intellectual property, but in recent years protection has been increasing exponentially.

The emergence of EGCs in China's history is recent, as the first one was founded in 1992 and remained the sole one until 2005 (currently there are 5). The subject was only envisaged in regulations promulgated in 1991 until the first revision of the Copyright Law in 2001, which also enabled the rapid development of such entities. EGCs were defined as non-profit organizations,

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114 STJ, REsp 1.559.264, Rel. Ricardo Villas Bôas Cueva, decision on 08/02/2017; and STJ, REsp 1.567.780, Rel. Ricardo Villas Bôas Cueva, decision on 14/03/2017. It should be noted that the Ministry of Culture, still existing at the time, even published a Normative Instruction (IN 1 MinC, DE 4-5-2016) trying to reduce the controversies about what would characterize public execution.

with exclusive protection over the rights of the represented category, and due to legal barriers and restrictions they ended up being all official or governmental institutions, without the entry of private agents. The lack of competition, the intensity of state control and the level of transparency are some of the biggest criticisms of this system[115].

There is a third revision of the Copyright Law being drafted in the country. The first proposal text was made public in 2012, with a much more detailed approach on the subject of digital rights management. In the years that followed, several new regulations on copyright protection emerged in the digital environment, in part because the Chinese industry has become one of the world's innovation hubs. But these new measures, despite giving greater precision and applicability to the legislation, are also considered excessive by some authors, who see in this third revision of the copyright law an opening to solve the problem and to balance the interest of users, companies and creators[116].

115 JIANG, Fuxiao; GERVAIS, Daniel J. Collective Management Organizations in China: Practice, Problems and Possible Solutions. **The Journal of World Intellectual Property**, Vol. 15, No. 3, pp. 221–237, 2012. Available at SSRN: https://ssrn.com/abstract=2171190

116 ZHONG, Zheng. Reestablishment on the Interests Balance between Copyright Holders and Users: From the Perspective on Reasonable Regulation concerning TPMS in the Third Amendment of Chinese Copyright **Law. China Legal Sci.**, v. 5, p. 59-81, 2017.

Conclusion

Copyright has a very marked social transversality, as its effectiveness goes beyond the private sphere of the holders, authors, users and intermediaries due to their cultural and social dimension. It represents the economic interests of the holders, as well as its exercise directly affects the fundamental rights of the public. Their protection must be made with attention to the existence of a broad public domain with effective possibilities of free use, with attention to the norms of concentration of markets and mechanisms of resolution of conflicts, while it also takes care of the moral and material interests of breeders. In this sense, a regulatory framework should focus on adhering to the rules pertaining to fundamental rights: the ability of governments to regulate them – whether to protect the human rights involved or to achieve other social objectives – should be restricted[117]. In the case of collective management, what is observed is increasingly strong monopolistic positions, especially with regard to the packaging of rights from different categories, and the use of "one-stop-shop" concepts for multi-territorial licensing. As noted by the German legislature, such functions are not only necessary but also desirable, since they contribute to the ease of use and to lowering transition costs; but they need close and constant supervision, preferably by a specialized

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117 HELFER, Laurence R., Collective Management of Copyright and Human Rights: An Uneasy Alliance. **Collective management of copyright and related rights**, pp. 85-114, GERVAIS, Daniel (ed)., Kluwer Law International, 2006; Vanderbilt Law School, Public Law and Legal Theory Research Paper Series No. 05-28. Available at SSRN: http://ssrn.com/abstract=816984

administrative body with coercive effectiveness, which can guarantee the desired transparency of the system and has an effective mechanism for the settlement of disputes. Considering that, public subjective law of the beneficiaries before the state supervision can be affirmed[118].

In general terms, this piece of research sought to identify the initiatives of governments regarding collective management in the digital environment, with a special focus on Europe and Latin America. In the latter, it is clear to the eyes that a lot has to be done in relation to the subject, since the discussions are but in the phase of regulating activity in the physical environment; criticisms and accusations against collective management entities throughout the continent are striking, demonstrating that the intermediaries are effectively dissociated from their agents, even arguing in court that there is not any demand for accountability[119]. In this sense, collective management in the digital environment can effectively contribute to the solution of the problem, depending on the availability of accurate information regarding the rights and uses of each work; effective documentation with qualified metadata is possibly at the heart of the matter, and the same can be said about who will be the actors authorized to operate such metadata.

The counterpoint to the Latin American situation is Canada's position. This country effectively stands at the forefront of introducing a novel right to user-generated content as well as ensuring broad and strong exercise of limits and exceptions. It is relevant to mention the position of the European Union, supported by a rather rich in detail panorama both concerning EGCs and digital rights, in which multi-territorial licensing basically imposed after long years of fruitless discussions. The formula of the European Bloc aimed at a result that proved to be consensual for both the market and the public, thus giving priority to a deep understanding of the digital environment and the Internet potential, which suggests the choice of ways to reconstruct a Brazilian model.

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118 HAIMO, Schack, Urheber- und urhebervertragsrecht, 2.ª ed., Mohr Siebeck, 2001, n.º 1191. *APUD* ASCENSÃO, José de Oliveira. Representatividade e legitimidade das entidades de gestão coletiva de direitos autorais. **Revista da Ordem dos Advogados.** A. 73, nº 1, Lisboa, p. 149-183, Jan./Mar. 2013. p. 173.

119 RAFFO, Julio. **Derecho Autoral. Hacia un nuevo paradigma**. Buenos Aires: Marcial Pons Argentina, 2011. p. 13

Annex I – Internal Rules

In this annex, the most relevant norms related to the subject of copyright and EGCs of each surveyed country were compiled, with alterations made until January 2019.[120]

[120] Source: https://wipolex.wipo.int/en/main/legislation

Europe

Germany

Copyright Law of September 9th, 1965, (Urheberrechtsgesetz - "UrhG"), as amended by the Copyright Law on the Information Society of 2017.

Act on the Management of Copyright and Related Rights by Collective Management Societies of May 24th, 2016 (Verwertungsgesellschaftengesetz – VGG), amended in 2017.

Belgium

Title V, of Copyright and Related Rights Law, Book XI (Intellectual Property) of the Code of Economic Law of February 28th, 2013, according to the Royal Decree of May 12th ,2015 and amended in September, 2018. Rules on EGCs are found in Chapter 9 of the herein mentioned Title.

Spain

Consolidated text from Ley de Propriedad Intelectual (aproved by *Real Decreto-Ley* n. 1/1996), as amended by *Real Decreto-ley* n. 2/2018.

France

Code de la Propriété Intellectuelle codified through Law n. 92-597 of July 1st, 1992,and latest updated in December 2018 with changes about EGCs by means of Decrees of year 2001 (n. 2001-334 and 2001-809).

Italy

Legge n. 633/1941, *sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio, of April 22nd*, amended by means of Decree-Law n. 64 of April 30th, 2010.

The Netherlands (Holland)

Copyright Law of September 23rd, 1912, amended in September 2004.

Related Rights Law of March 18th, 1993.

Law on the Supervision of Collective Management of Copyright and Related Rights Organizations of March 6th, 2003, amended in November 2015.

Portugal

Code of Copyright and Related Rights of September 17th, 1985, amended by means of Decree-Law n. 100/2017.

Law N. 83/2001 of August 3rd (Entities for collective management of copyright and related rights)

The United Kingdom

Copyright, Designs and Patents Act of November 15th, 1988, amended by the Digital Economy Act de 2017.

Harmonization of Directive 2014/26/EU by Statutory Instrument n. 221 of 2016.

Latin America

Argentina

Ley sobre el Régimen Legal de la Propiedad Intelectual of September 26th, amended in November 2009.

Law n. 17648/1968 of February 22nd, 1968 originates the Sociedad Argentina de Autores y Compositores de Música (SADAIC), regulated by means of Decree 645/2009; and Law 20115/1973 of January 23rd originates the *Sociedad General de Autores de la Argentina de Protección Recíproca* (ARGENTORES).

Brazil

Law n. 9610/1998 of February 19th, amended by Law 12853/2013 (with major changes as to EGCs).

Regulation of EGCs by means of Decree n. 8469/2016.

Chile

Law n. 17336, on *la Propriedad Intelectual*, of October 2nd, 1970, amended in May 2014 and regulated by means of Decree n. 277 of 2013.

Law n. 20243, of January 16th, 2008, which establishes *las Normas sobre los Derechos Morales y Patrimoniales de los Intérpretes de las Ejecuciones Artísticas Fijadas en Formato Audiovisual*

Colombia

Law n. 23 of January 28th ,1982 on *Derechos de Autor*, amended by means of Law 1915 of July 12th, 2018, regulated by means of Decree n. 3942 of 2010.

Law 1493 of December 26th, 2011 about EGCs, regulated by means of Decree n. 1258 of 2012.

Mexico

Ley Federal de Derechos de Autor of December 24th, 1996, amended in June of 2018 and with latest update in the year 2016.

Paraguay

Law n. 1328/98 of Copyright and Connected Rights of October 20th, amended by means of Law n. 4798/2012 and regulated by means of Decree n. 5159/1999 and n. 460/2013.

Peru

Ley sobre el Derecho de Autor (Legislative Decree n. 822) of April 23rd, 1996, amended in September 2018.

Law n. 28131 *del Artista Intérprete y Ejecutante*, amended in September 2018.

Legislative Decree n. 1092 *que aprueba medidas en frontera para la protección de los Derechos de Autor y Derechos Conexos y los Derechos de Marcas*

Uruguay

Law 9739 on Literary and Artistic Copyright of December 17th, 1937, with the latest amendment in 2013 and latest regulation by means of decree in 2017. The regulations made through administrative instructions should also be noticed.

North America

United States

U.S. Copyright Act – Title 17 (U.S.C.), §101 and ss., according to the Copyright Cleanup, Clarification, and Corrections Act of 2010 and the Consolidation of 2011, extra-legally regulated by a set of practices of the U.S. Copyright Office of 2017.

Canada

Copyright Act, R.S.C., 1985, c. C-42, with latest amendment in June 2017. The Canadian legislation is rather diffuse, with very specific laws.

Asia

China

Copyright Law of September 7th, 1990, amended in 2010.

Regulations on collective management of December 22nd, 2004.

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