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Collective Management of Copyrights between Competition, Regulation, and Monopolism

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A Comparison of European and U.S. Approaches to Collective Management Organizations

by

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Vorwort des Herausgebers

Das System des Schutzes der Verwertungsrechte des Urhebers und damit auch der Aufbau der Struktur und die Aufgaben der Verwertungsgesellschaften sind in Europa und in den Vereinigten Staaten von Amerika unterschiedlich. Während in Europa der Schwerpunkt der rechtspolitischen Betrachtung des Verwertungsrechts auf der Seite des Urhebers liegt, gewichtete das US-amerikanische Recht die Interessen der potentiellen Anwender bzw Nutzer stärker. Daraus ergibt sich, dass in der Alten Welt sich die Verwertungsgesellschaften in erster Linie als legitime Interessenvertreter der Urheber verstehen, während in den USA neben diesem Aspekt von den Verwertungsgesellschaften auch die berechtigten Interessen der Allgemeinheit an der Nutzung von besonderen Rechten, eben auch von klassischen Urheberrechten, betont wird.

Die vorliegende Arbeit basiert auf der von der Universität Wien approbierten Dissertation des Autors. Vor allem kann dadurch auch die unterschiedliche Struktur der Rechtsordnungen gezeigt werden, gleichwohl in Europa auch noch neben die europarechtlichen Vorgaben die nationalstaatlichen Normen treten.

Univ.-Ass. Dr. *Martin Miernicki* zeigt im vorliegenden Werk detailliert die unterschiedlichen Regulierungsansätze in Hinblick auf Verwertungsgesellschaften nach dem Recht der Vereinigten Staaten und dem Unionsrecht, wobei der Schwerpunkt der Untersuchung auf dem Kartellrecht liegt. Außerdem sind die umfassenden Ausführungen des Autors zur Rechtslage nach der EU-„Verwertungsgesellschaftenrichtlinie“ 2014/26 – wozu es bislang wenig Grundlegendes in der Literatur gibt – besonders hervorzuheben.

Insgesamt leistet dieses Werk einen wichtigen Beitrag zur aktuellen fachlichen Diskussion und ist auch für die rechtspolitische Betrachtung von großer Bedeutung.

Wien, im November 2017 *Arthur Weilinger*

Preface and Acknowledgements

Intellectual property law and antitrust law have fascinated me already since the earlier stages of my legal studies. Against this background, it is not surprising that I decided to dedicate my doctoral thesis to the collective management of copyrights, as this topic involves questions at the intersection of both fields of law. Furthermore, the adoption of Directive 2014/26/EU gave an additional reason to conduct research on the topic. However, the collective management of copyrights is also a highly topical issue in the United States which is exemplified by the review of the "Consent Decrees" between 2014 and 2016 and recent "rate court" proceedings. Furthermore, the economic and technical environment for the collective management of copyrights has undergone profound changes in recent years; this implies the need for research on the corresponding legal framework, also *de lege ferenda*. A comparative approach was chosen in order to highlight that similar problems occur in the United States and the European Union. Those problems are, however, not always addressed in the same way. Accordingly, I hope that this work – an adapted version of my doctoral thesis which was accepted by the University of Vienna in October 2017 – promotes the exchange of ideas and that both jurisdictions can benefit from each other's experiences.

I would like to thank my supervisor *ao. Univ.-Prof. Mag. Dr. Siegfried Fina* who inspired and promoted my interest in technology law and IP law as well as the international and comparative dimension of these fields of law. He invested a great amount of time in supervising this dissertation and was always available for helpful guidance and comments. *O. Univ.-Prof Dr.Dr. Arthur Weilinger*, the head of the Institute of Business Law, greatly supported me in the thesis process and helped me in completing this research in time. I would like to thank him for his useful advice, his encouragement throughout this project, and for pomoting the publication of the thesis. Also, I would like to thank *Univ.-Prof. Dr. Friedrich Rüffler* for examining the thesis, as well as *Mrs. Elisabeth Kainberger*, *MA*, and *Mr. Peter Wittmann*, Facultas Verlags- und Buchhandels AG, for their help in the publication process.

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I also owe a great debt of gratitude to my friends and family; through their motivation, support, and friendship, they have contributed considerably to the completion of this project.

I would like to express special thanks to my parents for making my legal studies as well as this project possible. They have always been there for me and I could not have completed this work without their support and patience. This work is dedicated to them.

This research is connected to the Fellowship Program of the Stanford-Vienna Transatlantic Technology Law Forum (TTLF), a joint international initiative of Stanford Law School and the University of Vienna School of Law. I would also like to thank Stanford Law School as well as Professor Siegfried Fina and Professor Roland Vogl, the TTLF's Co-Directors, for giving me the opportunity to conduct a research visit at Stanford Law School in August 2016, without which this research would not have been possible. Finally, 1 would like to thank the International Office of the University of Vienna for providing funding for the research visit (short-term grant abroad – "KWA").

Vienna, November 2017 *Martin Miernicki*

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I. Introduction

It has been said that "[c]opyright is founded on the concepts of the unique individual who creates something original and is entitled to reap a profit from those labors".[1] In following this idea, legal systems around the world decided to protect the authors of original creations by conferring exclusive rights upon them. These rights enable the "unique individuals" to exercise control over their works, which ensures their economic compensation and, to a more or lesser degree, protects their immaterial interests. By their very name, *exclusive* rights imply that the free discretion of enforcement and management of said rights is solely vested in the author,[2] enjoining others from certain acts like copying, distributing, or performing protected works. That being said, it becomes clear why authorship was declared "the functional and moral center of the [copyright] system".[3] Despite this framework of individuality,[4] the reality of copyright often does not correspond to this idea. Users nowadays obtain licenses for a vast number of works by concluding a single agreement with large organizations; such institutions represent thousands of right holders who themselves may not be involved at all in the licensing process. At the same time, lawmakers depart from the exclusive-rights approach by introducing rights to remuneration that do not provide for an equivalent legal position. It is therefore obvious that copyright law is not merely comprised of an individual side; the other side is of a collective nature and lies beyond the right holders' direct control, be it for legal or practical reasons. This collective side of copyright has several manifestations which on the one hand supplement, but on the other hand also limit the traditional individual approach to rights in original creations. Yet, copyrights and their management are subject to continuous changes. As will be seen, comparatively recent developments – like the major publishers' withdrawal of rights from collective licensing systems – suggest, to a certain

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1 Mark Rose, *Authors and Owners: The Invention of Copyright* 2 (1993). *See also* Karl-Nikolaus Pfeifer, *Individualität im Zivilrecht* 55 (2001).

2 Under certain circumstances, the initial copyright owner can be different from the actual author; moreover, rights can be transferred. However, even where the right holder and the author are not the same person, this does not mean by itself that rights are managed or enforced individually or collectively.

3 Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 153 Proc. of the Am. Philos. Soc. 147, 148 (2009). Prof. Ginsburg looks the position of authors in relation to intermediaries and modern technologies. *See also* on German law Gernot Schulze, *§ 1 UrhG* in *Urheberrechtsgesetz: UrhG* ¶ 1–2 (Thomas Dreier & Gernot Schulze eds., 5th ed. 2015).

4 There are diverging opinions on what the system actually aims at by equipping individuals with exclusive rights. The two prevalent approaches discuss whether copyright law primarily exists for the benefit of the general public (utilitarian perspective) or serves the interest of the author (natural rights perspective), *see, e.g.,* for the theoretical foundations of copyright law Ulrich Loewenheim, *Einleitung* in *Urheberrecht* ¶ 8–19 (Ulrich Loewenheim et al. eds., 5th ed. 2017). *See also* Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age* in *Collective Management of Copyright and Related Rights* 1, 16–17 (Daniel Gervais ed., 3rd ed. 2016).

degree, a trend toward what could be called a "re-individualization" of copyright (management).[5]

1. Collective Rights Management – Rationales and Functions

The management of copyrights involves different tasks like concluding license agreements, collecting license fees, monitoring the use of protected content, and enforcing rights in case of infringement. These tasks are essential to copyright holders: A songwriter,[6] for instance, probably wants her music to be included in the program of several radio stations; she is most likely interested to know about the popularity and the usage of her creations in bars or discotheques, and she would complain and demand compensation if her songs were played in those venues without her authorization. However, it would be extremely onerous, if not impossible, to accomplish all of the above mentioned tasks successfully for an individual person. Similarly, users (i.e. prospective licensees)[7] face the same problem on the other side of the transaction channel, as it would be practically infeasible to locate and conclude license agreements with a myriad of copyright holders whose works are needed for the users' services. Thus, if copyright was solely managed individually, it would in many instances be virtually impossible to maintain a functional licensing system. Therefore, it is often useful for both right holders and users to turn to a collective management organization (CMO). These organizations grant licenses, monitor the use of works, enforce copyrights on behalf of the respective owners, and specialize on the collective representation of their members, thereby serving as solutions to the imperfections of the individual side of copyright.[8] There are unquestionably many advantages of this form of management. Yet, these benefits have limits; while in many fields collective management of copyrights is very common, in others it is not. In this vein, the "first principle"[9] of collective management has been postulated as follows:

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5 *See also* Dinusha Mendis, *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* in *EU Regulation of E-Commerce* 290, 307–310 (Arno R. Lodder & Andrew D. Murray eds., 2017) (focusing on the CMD).

6 It should be noted, however, that there are different groups of right holders who do not necessarily share the same interests.

7 Users in this context are not consumers, but businesses which provide services or products associated with copyrighted content. Examples include innovating services like streaming just like traditional discotheques. *See* the concept of "users" in subsections and 3.2.1. and 3.2.6.f) below.

8 *See, e.g.,* Mihály Ficsor, *Collective Management of Copyright and Related Rights* 17 (WIPO Pub. No. 855, 2002), *available at* ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_855e.pdf (last visited May 23, 2017)*;* Gervais*, Theory and Practice, supra* at 8–12.

9 Mihály Ficsor, *Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU 'Acquis'* in *Collective Management of Copyright and Related Rights* 31, 55–56 n.69 (Daniel Gervais ed., 3rd ed. 2016).

> Collective management or other systems of joint management of copyright and related rights is justified where individual exercise of such rights – due to the number and other circumstances of uses – is impossible or, at least, highly impracticable. Such joint management of rights should be chosen, whenever possible, as an alternative to non-voluntary licensing.[10]

Hence, collective management can be seen as a solution to an array of legal and practical problems. These problems arise from the special subject-matter of copyright and the number and kind of recognized rights as well as technological developments.

First, copyright (and other IP) confers rights in intangible goods. Whereas a car can only be driven by one person at a time, songs can be sung, books can be read, and plays can be performed simultaneously in hundreds of places without interfering with one another. This is because the use of intellectual content is normally nonrivalrous and nonexclusive; in contrast to real property, immaterial goods are "ubiquitous" because access to them cannot be denied easily.[11] As a consequence, right holders will find it hard to enforce and monitor the use of their IP; individuals usually do not possess the capacity to consider all the uses of their works because these occur in considerable numbers, at different places, and at different times.[12]

Second, modern copyright is characterized by fragmentation.[13] Its most significant manifestation in the present context is that the legal position of right holders in modern copyright is characterized by several different exclusive rights. This provides more options for authors to benefit from their creations but, at the same time, makes rights management more complex. This process is paralleled by the historical development of copyright law: Back in the times when copyright legislation merely recognized the rights of reproduction and distribution, authors were able to enforce and monitor their rights personally;[14] any uses not falling within the scope of these rights did not conflict with applicable laws. However, over time, more rights (such as public performance rights[15]) were continuously conferred upon authors, thereby significantly expanding the scope of copyright law. This process continued throughout the

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10 Ficsor, *Collective Management*, *supra* at 157.

11 *See, e.g.,* Guido Kucsko, *Einleitung* in *urheber.recht* LI (Guido Kucsko ed., 2008); Robert P. Merges et al., *Intellectual Property in The New Technological Age* 2 (5th ed. 2010); Marcel Bisges, *Ökonomische Analyse des Urheberrechts*, 58 ZUM 930, 933–934 (2014); Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. Pa. L. Rev. 635 (2007).

12 Ficsor, *Collective Management*, *supra* at 17.

13 Fragmentation can be described as "the lack of cohesion, standardization and, to a certain extent, effective organization of both copyright law and collective management per se", *see* Daniel Gervais & Alana Maurushat*, Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management*, 2 Can. J. of L. & Tech. 15 (2003).

14 Jörg Reinbothe, *Vor §§ 1ff WahrnG* in *Urheberrecht* ¶ 1–2 (Ulrich Loewenheim et al. eds., 5th ed. 2017).

15 *Id.*

20th century; nowadays, copyright is often called a bundle of rights, formed by sub-rights like reproduction, public performance, communication to the public, translation, etc.[16] As a consequence, a single act of use of a work can affect several rights of various right holders who may be unknown, and to make things worse, each right can be held by more than one person. Therefore, even common processes easily become extremely confusing: For instance, a radio station that copies and saves music in a digital format in order to broadcast the content can require up to twenty licenses for every single song it wishes to add to its program, as rights can exist in the musical composition, the performance, and the sound recording.[17]

Third, advances in technology have been crucial to the development of copyright in general and especially to its collective management. As technologies like recording and television emerged and new devices triggering the mass proliferation of private copying of audio and video content were invented, copyright holders were increasingly faced with enforcement problems of their exclusive rights.[18] Levies – i.e. rights to remuneration – were introduced in many countries as an answer to private copying, for instance, in order to provide for the remuneration of right holders for copies made of their protected works.[19] In many cases, the revenues flowing from such levies are collected by a CMO.[20] Moreover, as mentioned before in connection with fragmentation, copyright law adapted to new forms of creations (*e.g.*, software) and dissemination (*e.g.*, the internet), thereby adding new rights to the copyright bun-

16 Gervais, *Theory and Practice*, *supra* at 12. In this context, *Prof. Shaffer Van Houweling* introduces the concept of copyright atomism in order to analyze the developments of modern copyright. Along with the fragmentation of the copyright bundle, she identifies proliferation (number of protected works) and distribution (number of copyright owners) as the three main factors that constitute atomism in the copyright realm, *see* Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 Va. L. Rev. 549, 553 (2010).

17 Gervais, *Theory and Practice*, *supra* at 4, 14–15. There is a debate on whether copyright should be organized as a bundle of fragmented rights, *see, e.g.*, Note, *A Justification for Allowing Fragmentation in Copyright Law*, 124 Harv. L. Rev. 1751 (2011) (reviewing the applicable U.S. literature and emphasizing the advantages of fragmentation in copyright law).

18 Ferdinand Melchiar, *§ 45* in *Handbuch des Urheberrechts* ¶ 1–2 (Ulrich Loewenheim ed., 2nd ed. 2010).

19 For the historical development of copyright levies *see* P. Bernt Hugenholtz, *The Story of the Tape Recorder and the History of Copyright Levies* in *Copyright and the Challenge of the New* 179 (Brad Sherman & Leanne Wiseman eds., 2012).

20 In the United States, the Alliance of Artists and Recording Companies (AARC) was founded for the collection and distribution of private copying levies, *see* AARC, *What is the AARC?* http://wp.aarcroyalties.com/what-is-aarc/ (last visited April 14, 2017). SoundExchange collects royalties arising from the statutory license in relation to sound recordings, *see* section II.1.2.4. below. In Germany, for instance, existing institutions created an joint organization, the Zentralstelle für private Überspielungsrechte (ZPÜ) to collect private copying levies, *see* Reinhold Kreile, *Die Zusammenarbeit der Verwertungsgesellschaften* in *Recht und Praxis der GEMA* 783, 785–786 (Reinhold Kreile et al. eds., 2nd ed. 2008).

dle, since traditional rights did not fit the new types of uses.[21] It is thus apparent that technology is also an important reason for the fragmentation of the rights bundle.

The implications of the foregoing factors and the role of collective management become clear when put in the economic context.[22] The main benefit of collective management is seen by most authors in a reduction of transactions costs.[23] These comprise the costs of finding a trading partner and the respective relevant information (search costs), drafting and concluding agreements (contracting costs), monitoring compliance with negotiated agreements (monitoring costs), and enforcing said agreements in the event of noncompliance (enforcement costs); the latter two types also refer to users who have not obtained permissions, especially in the copyright realm.[24] In this connection,

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21 Gervais, *Theory and Practice*, *supra* at 12–13. *See also* João Pedro Quintais, *On Peers and Copyright: Why the EU Should Consider Collective Management of P2P* 77–79 (2012) (stating that collective rights management is a viable answer to mass online uses such as P2P).

22 The economic foundations of collective management have been dicussed in several studies and need not be recounted here; a brief note on the most important aspects appears sufficient for the present purpose in order to put the intuitive advantages of collective management in a proper framework. For more details on the economics of collective management *see, e.g.,* Stanley M. Besen et al., *An Economic Analysis Of Copyright Collectives*, 78 Va. L. Rev. 383 (1992); Roya Ghafele & Benjamin Gibert, *Counting the Costs of Collective Rights Management of Music Copyright in Europe* (MPRA Paper No. 34646, 2011), *available at* https://mpra.ub.uni-muenchen.de/34646/1/MPRA_paper_34646.pdf (last visited May 23, 2017); Christian Handke & Ruth Towse, *Economics of Copyright Collecting Societies*, 38 Intern. Rev. of Int. Property & Competition L. 937 (2007); Gerd Hansen & Albrecht Schmidt-Bischoffshausen, *Ökonomische Funktionen von Verwertungsgesellschaften – Kollektive Wahrnehmung im Lichte von Transaktionskosten- und Informationsökonomik*, 56 GRUR Int 461 (2007); Ariel Katz, *Copyright Collectives: Good Solution, But For Which Problem?* (2009), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416798 (last visited May 23, 2017); Mark A. Lemley, *Contracting Around Liability Rules*, 100 Cal. L. Rev. 463 (2012); Moritz Lichtenegger, *Verwertungsgesellschaften, Kartellverbot und Neue Medien* 214–277 (2014); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293 (1996); Ruth Towse, *Economics of Copyright Collecting Societies and Digital Rights: Is There a Case for a Centralised Digital Copyright Exchange?*, 9 Rev. of Econ. Research on Copyright Issues 3 (2012); Richard Watt, *Copyright collectives: some basic economic theory* in *Handbook on the economics of copyright* 167–178 (Richard Watt ed. 2014); Zijian Zhang, *Rationale of Collective Management Organizations: An Economic Perspective*, 10 Masaryk U. J. L. & Tech. 73 (2016).

23 Christian Handke, *Collective administration* in *Handbook on the economics of copyright* 179 (Richard Watt ed. 2014). *See* for a critical opinion on this argument in connection with blanket licenses John Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 Fordham L. Rev. 277, 292–293 (1978). Some authors focus on an approach which centers risk allocation, *see, e.g.,* Lichtenegger, *Verwertungsgesellschaften*, *supra* at 222–225; Ana María Pérez Gómez Tétrel, *Efficient allocation of risk as an economic function of Collecting Societies* (2007), *available at* http://www.serci.org/2007/perezgomez.pdf (last visited May 23, 2017); Arthur Snow & Richard Watt, *Risk Sharing and the Distribution of Copyright Collective Income*, *available at* http://serci.org/2003/snowwatt.pdf (last visited April 14, 2017).

24 Handke, *Collective Administration*, *supra* at 183–184.

CMOs have generally been regarded as natural monopolies;[25] however, scholars have raised doubts about the efficiency of collective management[26] or question its design in light of the underlying normative foundations of copyright law.[27] It should be noted, however, that CMOs do not only fulfill economic functions. In many countries these organizations assume the role of "cultural agents", promoting creative production (*e.g.*, scholarships, events) and cultural diversity.[28]

2. Purpose and Structure of the Research

The environment for the collective management of copyrights has been subject to profound changes over the last several years. This development was triggered by public authorities, technological progress (especially in the digital field) and the emergence of new management models. Much research has been done in order to describe and explain these changes, however, mostly from a national (or regional) perspective. Less research has been done to compare the experiences made in other jurisdictions. The present research aims at filling this gap by providing a comprehensive comparison of the legal approaches taken by EU and U.S. law in relation to the collective management of copyrights.[29] The two jurisdictions are chosen because they have been at the forefront of the aforementioned developments; yet, they have established very different regulatory systems and legal practices. Highlighting these differences and putting them into perspective appears to be important not only for understanding the legal status quo but also for reflecting on the question whether or to what extent changes and reforms should be implemented. In this sense, the experiences made in the U.S. can be extremely valuable for the EU, and vice versa, provided, however, that due account is given to the differences in the respective underlying legal systems.

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[25] One speaks of a "natural monopoly" in situations "where a monopoly supplier is able to supply the market more efficiently than if there were competition […]", *see* Ruth Towse et al., *The Economics Of Copyright Law: A Stocktake of the Literature*, 5 Review of Economic Research on Copyright Issues 1, 4 (2008). *See also* Ivan L. Pitt, *Direct Licensing and the Music Industry* 115–123 (2015).

[26] *See, e.g.,* Ariel Katz, *Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?* in *Competition Policy and Intellectual Property* 449 (Marcel Boyer et al. eds., 2009); Ariel Katz, *The Potential Demise Of Another Natural Monopoly: Rethinking The Collective Administration Of Performing Rights*, 1 JCLE 541 (2005). *Lichtenegger* argues that the availability of digital rights management (DRM) systems (at least partially) contradicts the natural monopolies approach, *see* Lichtenegger, *Verwertungsgesellschaften*, *supra* at 261–264; *see* however *id.* at 270–272 on the problem of consumer acceptance of DRM.

[27] *See, e.g.,* Martin Kretschmer, *The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments*, 24 E. I. P. R. 126 (2002).

[28] *See* Gervais, *Theory and Practice*, *supra* at 7, 17–20.

[29] Where collective management of copyrights is mentioned hereinafter, reference is also to related rights, except where otherwise indicated.

A comparative analysis usually consists of three major stages: First, the selection of what will be compared; second, the description of the respective legal systems; and third, the analysis.[30] Rather than presenting the U.S. and EU regulation overall in separate sections, the present research is grouped around concrete legal questions (*e.g.*, the applicability of antitrust laws to CMOs or the "partial withdrawals" of rights from a CMO's repertoire) and juxtaposes the answers given by the two jurisdictions. The starting point will be EU regulation (first the EU competition case law, then the sector-specific regulation), followed by the regulatory system in the United States. At the end of each chapter, the legal status quo will be commented on from a comparative perspective, which is meant to provide the basis for a better understanding of the European and U.S. legal system as well as for a more general reflection on the regulation of collective management.[31] In the last chapter, general characteristics and conclusions will be drawn to provide a comprehensive picture of the EU and the U.S. approaches to collective management. The aim of the present research is thus not only to describe and compare the legal status quo in the European Union and the United States but also to highlight whether or to what extent experiences made in one of the two jurisdictions can or should be taken into consideration and relied upon in the other.

Since the musical performance rights are paradigmatic for collective management of copyrights, especially in the United States, the research focuses on this field; reference to other types of rights will be made where necessary for the present purposes. However, many findings of this reseach do not only apply to musical performance rights but also to the collective management of copyrights in general.

Before turning to the actual analysis, three introductory sections on terminology, substantive copyright law, and historical developments aim at laying the foundations for the main part of the research.

3. Terminological Remarks

The different forms of rights management are fairly diverse and so are the terms generally used to refer to organizations that manage copyrights. In line

30 Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?* in *The Oxford Handbook of Comparative Law* 383, 406–419 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

31 *See* in this context Klodi Shanto & Blerton Sinani, *Methods and Functions of Comparative Law*, 2 Acta Universitatis Danubius. Juridica 25, 31–33 (2013) on the notions of "micro-comparison" (comparing a specific legal institute like marriage) and "macro-comparison" (comparing the characteristics of two legal systems from a broader perspective) and *id*. at 34–37 on the functions of comparative law. *See* in this connection on the aims and functions of comparative law H. Patrick Glenn, *The aims of comparative law* in *Elgar Encyclopedia of Comparative law* 65 (Jan M. Smits ed., 2nd ed. 2012).

with what seems to be the most common and widespread use, *collective management organization* (CMO)[32] is understood as an umbrella term. The term refers to all kinds of organizational structures in which copyrights are not exercised individually but in the representation of a multitude of right holders and where the respective rights are owned by the members of these structures.[33] The following section gives a brief overview of related terms in order to facilitate the understanding of the ongoing debate.

3.1. Joint, Collective, and Centralized Management

From an international perspective, individual or direct management of copyright has been juxtaposed with the term *joint management*. The latter expression covers every non-individual form of copyright management, i.e. where the rights in a protected work are not managed by the copyright holder him or herself personally, but by an organization acting on his or her behalf.[34] Needless to say, such organizations take actions for a multitude of right owners; organizational structures that represent only a single right holder can be called agents or representatives,[35] depending on the arrangements in the specific case. Furthermore, joint management means that the managed rights are not held by the organization itself but by their members, in contrast to big enterprises that manage their own "catalogs" or "libraries".[36]

Joint management is a general term that can be subdivided into *collective management* and *centralized management.*[37] Collective management of copyright can be described as the tasks that are commonly associated with CMOs: These tasks encompass the enforcement and the monitoring of rights, the negotiation of licensing agreements, and the grant of licenses on the basis of a tariff system, as well as the collection and the distribution of the royalties.[38] On the contrary, centralized management or rights clearance has been defined as "a kind of agency-type activity" which is characterized by a reduction of the tasks performed by management organizations to a few elements like the col-

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[32] Josef Drexl et al., *Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for A Directive 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 Uses in The Internal Market Com (2012) 372* 3 n.2 (Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-04, 2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208971 (last visited May 23, 2017). *See* for more details on the classification of CMOs Gervais, *Theory and Practice*, *supra* at 8.

[33] *See* the definition of the CMD section II.1.1.4. below.

[34] Ficsor, *Collective Management*, *supra* at 16.

[35] Schulze, *§ 1 UrhG*, *supra* at ¶ 1.

[36] Ficsor, *Collective Management*, *supra* at 16.

[37] *Id*. at 22–24.

[38] *Id*. at 17.

lection and distribution of royalties.[39] In some cases, the only remaining joint element is the offer of a single licensing source along with individualized licensing conditions.[40] Hence, centralized management differs from collective management, inasmuch as copyright owners retain greater control over their works, while, at the same time, taking advantage of the economic benefits inherent to centralization. In this light, it is clear that both models can help reduce transaction costs and that collective management as described above is necessarily centralized. However, "traditional" collective management is seen as a task that does not only fulfill economic functions: It features a greater degree of cohesion among the members, since its aim can be described as the "advancement of the Creators' moral interests and the defence of the material interests of Creators and publishers";[41] this requires a real community of authors that share common goals and interests.[42] Furthermore, organizations engaged in collective management can in some respects be seen as performing cultural and social functions that go beyond actual rights management and the representation of their members, thereby causing beneficial effects for the general public.[43]

3.2. Collecting Societies and Copyright Collectives

There are several terms referring to organizations that offer copyright management services. Often used in this context – apart from the term "collective management organization" – are *collecting society* and *copyright collective.*[44] In the United States, copyright collectives are understood as organizations that offer licenses under conditions which are set by the collective with no or little competition within the repertoire.[45] Thus, the business model of a copyright

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39 *Id*. at 22. In the same context, but in a slightly different manner, the term centralized licensing has been used in contrast to collective licensing. It can be defined as "the aggregation of collective management societies into an umbrella society for the sole purpose of providing a central point of information", *see* Gervais & Maurushat, *Fragmented Copyright*, *supra* at 25. It therefore incorporates the idea of centralized rights clearing, but within a structure that associates multiple CMOs. Organizations which base their operations on this model can also be called *one-stop shops*, *see* Ficsor, *Collective Management*, *supra* at 98.

40 Ficsor, *Collective Management*, *supra* at 22.

41 CISAC Statutes Art 8(b), June 6, 2014, AG10-1275R6, http://www.cisac.org/What-We-Do/Governance/Statutes [hereinafter CISAC Statute]. CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs) is an international umbrella organization for CMOs composed of more than 230 member societies and was founded in 1926, *see* CISAC, *Who We Are*, http://www.cisac.org/Who-We-Are (last visited April 14, 2017).

42 Ficsor, *Collective Management*, *supra* at 20.

43 *Id*. at 20–21. *See also* Melchiar, *§ 45*, *supra* at ¶ 5.

44 Less common are *authors societies*, *copyright societies*, *collective rights management organizations*, *intellectual property rights exchange institutions* etc.

45 Glynn Lunney, *Copyright Collectives and Collecting Societies: The United States Experience* in *Collective Management of Copyright and Related Rights* 319, 319–320 (Daniel Gervais ed., 3rd ed. 2016).

collective can be regarded as a form of "traditional" collective management. On other hand, collecting societies operate on the basis of licensing terms set by the individual right holder and they merely enforce and collect the licensing fees.[46] Therefore, collecting societies fit best within the realm of centralized management.[47] On the other side of the Atlantic Ocean, the terminology differs. In the European literature (in English), the two terms do not seem as clearly distinguished, if not altogether used synonymously; however, generally, the expression *copyright collective* is rarely used. European publications often prefer the term *collecting societies*, and the usage of this notion indicates a broad concept of this type of organization. They appear to be understood as a rather heterogeneous group of organizations which share the common task of collective rights management in general.[48]

3.3. PROs and RROs

In the United States, one frequently refers to *Performing Rights Societies* or *Performance Rights Organizations* (PROs) when discussing the collective copyright management of musical works. Basically, these are CMOs that specialize in a certain field of rights as their activity generally encompasses the licensing of "the public performance of nondramatic musical works on behalf of copyright owners of such works".[49] It is worthwhile to note that this defini-

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46 *Id*.

47 Yet, the terminology is not uniform throughout the U.S. literature, *see, e.g.,* C. Scott Hemphill, *Competition and the Collective Management of Copyright* 34 Colum. J. of L. & Arts 645 (2011) (describing the CCC – a collecting society under the terminology explained by *Prof. Lunney* – as a "copyright collective"). *See also* II Paul Goldstein, *Goldstein On Copyright* § 7.9 (3rd ed. 2014, updated 06/2016) (using the term "collecting society" to refer to ASCAP and BMI).

48 *See, e.g.,* Ruth Towse & Christian Handke, *Regulating Copyright Collecting Societies: Current Policy in Europe* 1 (2007), http://www.serci.org/2007/towsehandke.pdf (last visited May 23, 2017); KEA European Affairs, *The Collective Management of Rights in Europe: The Quest for Efficiency* 14 (2006), *available at* http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/study-collective-management-rights-/study-collective-management-rights-en.pdf (last visited May 23, 2017); BOP Consulting et al., *Collecting Societies Codes of Conduct* 8–9 (2012), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310172/ipresearch-collecting-071212.pdf (last visited May 23, 2017). Note in this context that the final version article 3(a) of the CMD changed the proposal's definition from "collecting society" to "collective management organisation". *See* for the proposal European Commission*, Proposal for a Directive 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 uses in the internal market* (COM(2012) 372 final), *available at* http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf (last visited May 23, 2017). In this connection, it is noteworthy that the Satellite & Cable Directive's (*see* section 4. below) art. 1(4) contains a definition of the term "collecting society" ("any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes").

49 17 U.S.C. § 101.

tion is based on the type of right (public performance) and the nature of the work (nondramatic musical work) and not on the licensing practices or the existence of a uniform tariff system. However, neither of the most important American PROs[50] follows individualized licensing models as a principle.[51] A different organizational type, which is also defined by the managed rights, is the *Reproduction Rights Organization* (RRO). Its task is the management of a distinct set of rights, in particular the rights to photocopying and to other forms of reproductions.[52]

4. Introduction to EU and U.S. Copyright Law

This section provides a succinct overview of the copyright regimes in the United States and the European Union. In line with the focus of this research, the emphasis is put on U.S. federal law and European Union law; besides the constitutional background and a general overview, rights relevant to the public performance of music are especially mentioned.

4.1. Constitutional Background

The design of the constitutional foundation in the United States and the European Union (the EU treaties) feature fundamental differences. EU *primary law*[53] influences national copyright laws in numerous ways. First of all, general provisions of the EU treaties,[54] like the free movements of goods[55] and services,[56] competition law,[57] and the principle of non-discrimination,[58] govern the national law-making in the field of copyright. Legal acts adopted by

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50 These are ASCAP, BMI and SESAC. They are explicitly recognized by the U.S. Copyright Act, *see* 17. U.S.C. § 101.

51 Lunney, *The United States Experience*, *supra* at 320.

52 World Intellectual Property Organization & International Federation of Reproduction Rights Organisations, *Collective Management in Reprography* 5 (WIPO Pub. No. 924, 2005), *available at* http://www.wipo.int/edocs/pubdocs/en/copyright/924/wipo_pub_924.pdf (last visited May 23, 2017).

53 *See* for a succinct overview of the sources of EU law European Parliament, *Sources and Scope of European Union Law* (2017), http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf (last visited May 23, 2017). *See* for more details Matthias Ruffert, *Art. 1 AEUV* in *EUV/AEUV* ¶ 8–15 (Christian Calliess & Matthias Ruffert eds., 5th ed. 2016).

54 The most important sources of EU primary law are the Treaty on European Union, *see* Consolidated Version of the Treaty on European Union, 2012 O.J. (C326) 13–46 [hereinafter: TEU]; and The Treaty on The Functioning of the European Union, *see* Consolidated Version of the Treaty on The Functioning of the European Union, 2012 O.J. (C326) 47–390 (hereinafter: TFEU).

55 TFEU art. 28–44.

56 *Id*. at art. 56–62.

57 *Id.* at art. 101–106.

58 *Id.* at art. 18.