COLLECTIVE MANAGEMENT OF COPYRIGHT: AN ANALYSIS OF COLLECTING SOCIETIES AND WHETHER THIS IS AN EFFECTIVE WAY TO COLLECT ROYALTIES

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Collective administration is a system whereby certain rights are administered for the benefit of authors and/or copyright owners. The organisations that administer the rights are empowered to authorize various specified uses of their members' works, normally by the way of a license[1].

Dr. Mihaly Fiscor provides three reasons justifying the replacement of the word "collective administration" with the word "collective management". He argues that such a terminological change was required firstly because it has an official connotation with the danger of being mixed up with state copyright administrations (usually used to refer to authorities responsible in the governmental structure for performing state functions in the field of copyright). Secondly, the word does not express sufficiently the necessary proactive nature of the operation of the organisations dealing with the collective expression of rights and Thirdly, collective management better corresponds to the French expressions *gestion collective*[2]

Collective Management Organisations (Cmos)

The underlying principle of copyright is that it provides the original creator of the work exclusive rights to allow or prohibit the use of his works and also includes the right to financially exploit their work but it is practically impossible for a creator to individually manage these rights. For example, it is impossible for a musician to keep track of how many times his/her song is being performed in a restaurant. The impracticability of managing these activities individually - both for the owner of rights and for the user - creates a need for collective management organizations (CMOs). These organizations ensure that creators receive payment for the use of their works by issuing licenses and usually look after the right of public performance, broadcasting, mechanical reproduction, performing rights, reprographic reproduction and other related rights. Hence, CMOs usually grant a license to

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[1] Lionel Bentley and Brad Sherman, *Intellectual Property Law* (3rd edn,OUP 2009) 274-275

[2] Dr. Mihaly Ficsor, *Collective Management of Copyrights and Related Rights* (WIPO,2002) 11

use all the right fragments (copyright, communication etc.) for the copyright works and objects or related rights (performance and sound recording)

In a collective management system comprises of two relationships: firstly, the relation between an individual rights holder and the CMO and secondly, the relation between the CMO and a user.

Collective management organisations incorporate within their ambit Copyright Societies/ Collecting Societies or Performing Rights Organisations that are a derivative of the collective copyright management framework[3].

The main function of a CMO is rights management, that is, to license the use of protected works on behalf of rights holders. By licensing, they offer legal access to copyright works and make it easy for users to get the necessary permission from one source. **Rights management includes the following tasks that apply to any collective management organization:**

- **Monitoring where, when and by whom works are being used**
- **Negotiating tariffs and other conditions with users or their representatives**
- **Granting licenses in return for appropriate remuneration and under sound conditions;**
- **Collecting remuneration.**
- **Distributing remuneration to rights holders.**

The activities of a CMO can also include outreach and awareness-raising as necessary prerequisites for copyright to function in practice. CMOs may partner with the copyright office. In many countries, CMOs have social and cultural support functions that are considered to be vital. CMOs can also be involved in enforcement. They can assist in ensuring compliance with copyright laws, by initiating legal actions in their own name or assisting rights holders to pursue legal actions against unauthorized uses. Anti-piracy actions are usually carried out by industry bodies, such as the local branch of the phonographic industry or the publisher's association[4].

In order to understand collective management, it is essential to look at it from an historical context. Collective Management was born in France and its evolution paralleled the development of copyright. The rise of collective management began in France when the

[3] ibid

[4] Tarja Koskinen and Olsson Nicholas Lowe, *Educational Material on Copyright and Related Rights* (WIPO, 2012) 20 <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2014_1.pdf> accessed 9th May, 2016

French playwright Pierre-Augustin Caron de Beaumarchais first expressed the idea of collective management of copyright. He felt such a need because whilst theatre companies were enthusiastic in encouraging and promoting plays and artists, they were less generous when it came to sharing of revenues with the artists. Hence, Beaumarchais is credited for the creation the General Statute of Drama (*Bureau de legislation dramatique)* in Paris, in the year 1777. This was a meeting of twenty-two famous writers over certain financial matters that then turned into a debate about the collective protection of rights. These artistes appointed agents, conducted pen strikes and laid the foundation for the French Society of Drama Authors also known as the *Societe des auteurs et compositeurs dramatiques* (SACD), the first society dealing with collective management of authors' rights[5]. In 1838, Honore de Balzac and Victor Hugo established the Society of Writers (*Societe des gens de lettres)* which was mandated with the collection of royalties from print publishers. These societies, however, were not full-fledged collective management organizations in the manner that such organizations are known today. The events leading to fully developed collective management began in 1847 when two composers, Paul Henrion and Victor Parizot and a writer, Ernest Bourget, supported by their publisher, brought a lawsuit against les *"Ambassadeurs"*, a "cafe-concert" in the *Avenue des Champs- Eiysees* in Paris. They saw a flagrant contradiction in the fact that they had to pay for their seats and meals in the *"Ambassadeurs"*, whereas nobody had the intention of paying for their works performed by the orchestra. They took the brave- and logical- decision that they would not pay as long as they were not paid as well. In the litigation, the authors won; the owner of the *"Ambassadeurs"* was obliged to pay a substantial amount of remuneration. Great new possibilities were opened for composers and text-writers of non-dramatic musical works by that court decision. It was clear, however, that they would not be able to control and enforce their newly identified rights individually. That realization led to the foundation of a collective agency in 1850, which was soon replaced by the still functioning- and functioning with brilliant success- *Societe des auteurs, compositeurs et editeurs de musique(SACEM)*[6]

Two important initiatives, namely the founding of the Committee for the Organization of Congresses of Foreign Authors' Societies that was founded to tackle problems involving international copyright management issues and the the creation of the Universal Theatrical

[5] Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age (2nd edn,,*Kluwer 2010) 3-5
[6] ibid (n 2) 18-19

Society by Firmin Gemier led to the first founding congress meeting of the International Confederation of Societies of Authors (CISAC) in 1926, that identified the need to establish uniform principles and methods in each country for the collection of royalties and the protection of works to ensure that literary and artistic property were recognized and protected throughout the world[7]. Their very *raison d'etre* is the collective management of authors rights[8].

The formation of CMOs were in every sense revolutionary because of the changes it bought to the copyright framework and the kind of movements its created in the history of cultural and artistic renaissance. The evolution of this concept has led to the facilitation and establishment of unified methods for collecting and dispersing royalties while also expanding the scope of their functions to include the overseeing of copyright compliance, fighting piracy and perform various social and cultural functions.[9]

A United Kingdom Perspective

Collective Licensing came about in the United Kingdom in the early 20th century. It is interesting to note that, in the United Kingdom the Mechanical Copyright Licenses Company Ltd(MELILCO) was formed even before the Copyright Act of 1911 came into force. MELICLO was formed for the purpose of collection and distribution of mechanical royalties from gramophone companies.

It was then in 1914 that the Performing Rights Society(PRS) came into being with the specific aim of collective administration of public performance rights in musical works.

Finally, the Phonographic Performance Limited (PPL) was established in 1934 as a result of the *Cawardine* case that established that the Copyright Act, 1911 gave complete copyright protection to sound recordings and the need was felt to administer public performance rights in sound recordings.

In 1952, a report undertaken by the Gregory Committee mentioned the PPL and PRS as quasi-monopolies thereby shifting the focus to the regulatory aspect of these licensing societies. The committee saw a need for establishing a tribunal that could, whenever required, revise and review the tariffs and conditions that were being imposed by the PPL and PRS.

[7] Gervais (n 4) 5
[8] ibid (n 2) 20
[9] Gervais (n 4) 5

This recommendation was followed up and incorporated in the Copyright Act of 1956, that created the Performing Rights Tribunal, now also known as the Copyright Tribunal[10].

The Performing Rights Society Ltd (Prs)

The PRS aims to protect music from unauthorized exploitation and administers the performing rights (i.e. right to perform musical works in public, to communicate them to the public and the authorize others to do the same) in musical works. PRS collects practice license fees for the public performance and broadcast of musical works of its members. It does so as a part of its alliance with the Mechanical Copyright Protection Society Ltd (MCPS). PRS usually grants blanket licenses that allow for public performance of the entire PRS copyright repertoire and the tariff rates for such licenses depend upon the type of licensee[11].

Phonographic Performance Limited(Ppl)

The PPL is a collecting society for companies and performers. PPL licenses recorded music played in public or broadcast and then distributes the license fees to its performer and rights holder members.[12] The PPL was formed in May 1934 by two record companies, namely EMI and Decca Records, following a ground-breaking court case against a coffee shop in Bristol[13]. It provides blanket licenses the terms of which allow use of the recordings in the repertoire of the society or licenses for one off events or on an annual basis[14].

The Performing Artists Media Rights Association/The Association Of United Recording Artists (Pamra/Aura)

The emergence of the Performing Artists Media Rights Association (PAMRA) was a causal effect of the introduction of a right to equitable remuneration. This society specifically dealt with equitable remuneration of performers in the event that a commercially published sound recording was included in a broadcast or played in public. In 2006 PAMRA merged with PPL and went into voluntary liquidation.

[10] Prof. Dr Paul L.C. Torremans, *Collective Management in the United Kingdom and Ireland (2nd edn,,*Kluwer 2010) 252
[11] ibid
[12] <http://www.ppluk.com/About-Us/What-We-Do/> accessed 9th May, 2016
[13] <http://www.ppluk.com/About-Us/Who-We-Are/Company-history/> accessed 9th May, 2016
[14] ibid (n 9)

Whereas the Association of United Recording Artists(AURA) was founded in 1995 by performers to act as their exclusive agent to collect equitable remuneration from the exploitation of sound recordings embodying their performances and their right to remuneration in respect of blank tape levy, rental, public performance and communication to the public[15].

Licensing In The United Kingdom

Section 116 of the UK Copyright, Designs and Patents Act, 1988 provides for licensing schemes and licensing bodies as follows:

a "licensing scheme" means a scheme setting out—

(a)the classes of case in which the operator of the scheme, or the person on whose behalf he acts, is willing to grant copyright licenses, and

(b)the terms on which licenses would be granted in those classes of case;

and a "scheme" includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name.

(2) "licensing body" means a society or other organization which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licenses, and whose objects include the granting of licenses covering works of more than one author.

Sections 118 to 123 of the UK Copyright, Designs and Patents Act, 1988 Act provides for licensing schemes by licensing bodies while Sections 125-128 of the Act provide for licenses granted by licensing bodies other than in pursuance of a licensing scheme for the following:

a) Copying the work
b) Rental or lending copies of the work to the public
c) Performing, showing or playing the work in public
d) Communicating the work to the public.

The Act also places major decision making power regarding acceptance, amendment and approval of the licensing schemes on the Copyright Board. This board has the power to decide on whether a licensing scheme is fair and reasonable and also hear disputes pertaining

[15] ibid 259-261

to discrepancies in already existing licensing schemes.

The American Perspective

American Society For Composers Authors Publishers(Ascap)

In the United States, the phenomenon of protecting performers rights and the various avenues available to them to earn revenue for their works was first discussed over a dinner meeting, in the October of 1913 at a New York City hotel. In this meeting it was discussed as to how songwriters and artists were faced with two problems, first, it wasn't altogether clear whether songwriters had a right to collect for performances of their songs in nightclubs, restaurants etc because the 1909 revision of the United States copyright law placed a restriction on the right of performance stating that a copyright owner was required to give a license only if the performance was rendered 'publicly for profit' which was interpreted to mean that a license was required only if an admission fee was charged to hear the performance.

The second concern was policing the performance of compositions in every nightclub, music hall, theatre or any place where music could be performed in public. It was realized that it would be financially impractical for every songwriter to enforce public performance of his work in every nightclub, theatre etc. and clear permission to perform music by obtaining a separate license from each individual songwriter or publisher. As a result of these two pressing concerns, these group of songwriters came together to establish the American Society for Composers, Authors and Publishers (ASCAP), in 1914 which was a nationwide policing organization which issued licenses to establishments to perform the songs of its members.

It's safe to say that this marked the start of the 'collective management' of performers rights jurisprudence in the United States of America[16]. The ASCAP, soon after coming into existence filed its first major law suit against a plush New York City Hotel Shanleys alleging unauthorized public performance of an ASCAP Musical composition[17]. This case traversed all the way to the U. S Supreme Court and Justice Oliver Wendell Holmes opined "*if music did not pay it would be given up. If it pays, it pays out of the public's pocket, whether it pays or not the purpose of employing it is for profit and that is enough"* and hence it was sufficient that the music played by the restaurant was a part of its service to make a profit[18]. This

[16] Al Kohn, *Licensing Music in Live and Recorded Public Performances (*Kluwer 2009) 1249
[17] Herbert v Shanley 242 U.S. 591 (1917)
[18] ibid

interpretation by the Supreme Court was a direct boost to the working of the ASCAP, who went on a licensing spree thereafter issuing music performance licenses to hotels, theatres, concert halls and other similar places where music was performed for profit. ASCAP was the sole organisations engaged in the licensing of performing rights in the United States.

Broadcast Music Incorporated (Bmi)

In fact, during the course of ASCAP's growth, it had garnered the support of the court which enabled it to negotiate performance licenses even for radio stations, increase the rates royalty charged arbitrarily this eventually led to concerns regarding its monopoly over public performance licenses. It was due to this almost establishment of ASCAP's monopoly that a group of broadcasters including the major radio networks and independent radio stations established an organization in the 1940's called the Broadcast Music Incorporated(BMI) and by 1941 BMI became the new self-proclaimed "automatic performance royalty earning machine" and has ever since remained a strong competitive factor in performance licensing[19].

Society of European State Authors And Composers (Sesac)

Established in 1931 by the Heinike family the Society of European State Authors and Composers (now known as SESAC) is the smallest U.S. performance rights organization and unique in the sense that it provides its affiliates with consultation, legal advice on copyrights and placement assistance with publishers and record labels.

Presently, the United States all licensing of performances of music is conducted through the auspices of the ASCAP, BMI and SESAC through 40 music license organisations operating throughout the world[20].

Harry Fox Agency

The Harry Fox agency was established in 1927 by the National Music Publishers Association and is by far the largest music collecting and licensing society representing over 27000 music publishers. In addition to issuing mechanical license, the Harry Fox agency also grants on behalf of its publishers licenses for synchronization music with motion pictures and television programs.[21]

[19] ibid (n 15) 1250
[20] ibid 1251-1252
[21] ibid 809

The Indian Perspective

Chapter VII of the Indian Copyright Act of 1957 provides specifically for the functioning and administration of copyright societies. Section 33 of the Act provides for registration of a collective society, in fact the section is a direct embargo on private collective management organisations. In India, a copyright society can exist only upon registration. Section 33(3) of the Act provides that in the interest of copyright owners, the Central Government must provide for registration of only one copyright society to do business in the same class of works. With regards to distribution procedures the Act specifies that as far as possible it should be in proportion to the actual use of their works and the power to look into disputes regarding the functioning of such societies depends on the discretion of the government[22].

Indian Performing Rights Society(Iprs)

The first copyright society that emerged in India was the IPRS which was formed in 1969 and began its licensing activities in June, 1970. The Society is a non-profit making Organization and is a Company Limited by Guarantee and Registered under the Companies Act, 1956. It is also registered under Section 33 of the Copyright Act, 1957 as the only Copyright Society in the Country to do business of issuing Licenses for usage of Music.In other words, IPRS is the only National Copyright Society in the Country which is permitted to exercise the rights of collective copyright management with regards to music[23].

Phonographic Performance Limited (Ppl)

The Phonographic Performance Limited is a collecting society that was formed in 1941 by members of the Indian Music Industry(IMI) a successor of the Indian Phonographic Industry(IPI) to administer rights in sound recordings. Today, the PPL administers broadcasting/telecasting and public performance rights on behalf of over 120-member music companies.

Performing societies in India have been a failure in the sense that they haven't been an effective way to collect and distribute royalties[24] .The PPL is notorious for its opacity and

[22] < http://copyright.gov.in/Documents/Copyright%20Societies.pdf> accessed 10th May, 2016

[23] Shamnad Basheer, "The Day the Music Died: In the "Company" of Collusive Collecting Societies" <http://spicyip.com/2014/10/the-day-the-music-died-in-the-company-of-collusive-collecting-societies.html> accessed 10th May, 2016

[24] Prashant Reddy, "The Story of how IPRS was Investigated on the orders of Minister Kapil Sibal" <http://spicyip.com/2011/06/story-of-how-iprs-was-investigated-on.html> accessed 10th May, 2016

rather heavy handed attempt at extorting money from all establishments without making clear as to what music they hold rights over[25].

Presently, the IPRS and PPL are in the midst of a legal battle to determine whether they actually constitute a 'collecting society' as mentioned under the Act. Their main argument to substantiate such a claim is that in light of the 2012 amendments to the Copyright Act, a collecting society is supposed to be registered within one year and hence Since the Central Government failed to register IPRS as a copyright society, the old registration certificate granted to IPRS is deemed to have lapsed[26]. If this argument holds true, then the IPRS is not allowed to legally give out licenses, collect or distribute royalties.

Conclusion

When compared to collecting societies in the United Kingdom and the United States of America a stark difference in the Indian collecting society regime is the fact that Indian collecting societies are 'governmentalized' in the sense that they are constantly monitored, in every step of the way by the government, hence loosing their autonomy. A probable and most obvious solution to this problem would be to get rid of the provision for registration of a copyright society under Section 33 of the Act, this would help expand the functioning of copyright societies effectively and also regulate licensing, collection and distribution of royalties. The role of the government should only be to the extent of determining ceiling royalty rates that 'privatized' collective management organisations must comply with and nothing further. The aim must be to bring in copyright collectives that function independently without the interference of the government just like the copyright collecting societies in the United States of America. Also, privatization of copyright societies will bring in a dimension of profit-maximization and that acts as an incentive for such societies to function effectively, keeping in mind their best interests.

Another effective mechanism to tackle the problem of the ineffectiveness of collecting societies in India is to create two separate wings of collective management organisations. One that deals only with licensing and the other that is concerned only with distribution and collection of royalty. The latter acts like a 'royalty bank'. For instance, as a restaurant, if I need a license to play music in my premises, I should only approach the licensing wing of the CMO but the payment must be made to the 'royalty bank'. These royalty banks must then, every year, distribute the money collected from licensing, as the royalty to its members. This

[25] ibid (n 22)
[26] ibid

would help in bringing in a separation of functions between copyright collectives and also streamline the collection and distribution process. Another advantage of such a system is that payments could be regulated and accessed online (on online portals created by such collectives) hence also bringing in transparency and accountability in the functioning of copyright societies, thereby acting as an effective means to curb the ineffectiveness and problems of collecting societies in India.

While collecting societies as a concept is an effective mechanism to collect royalties because they more often than not comprise of or are created by artists, musicians, authors and other creators of copyright who have their best interests in mind as a collective, its failure in the Indian context is a result of excessive interference by state mechanisms(government) and such a problem can be tackled by bringing about effective self-regulation measures for existing copyright societies hence leading to their 'privatization' and minimizing government control and supervision.