A Regional Approach to the Management of Copyright in the Caribbean Community

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by

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Declaration

I declare that the work presented in this thesis is the result of my own research undertaken at the Centre for Commercial Law Studies, Queen Mary, University of London.

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Abstract

Copyright is a property right that confers valuable economic rights. However, the benefits of the copyright system can be realized only if the rights are suitably managed. Traditionally, copyright is managed on a territorial basis. This thesis questions the suitability of copyright management on a territorial basis in the small states of the Caribbean Community (CARICOM). It argues that the relatively small pool of right-holders in each state, and the small national repertoires make the territorial management of rights unsuitable and unviable.

The hypothesis of the study is that copyright management in CARICOM will be successful only if it is undertaken on a regional basis with centralized structures that can benefit from economies of scale. The hypothesis is tested with reference to the management of copyright generated by two distinct groups of right-holders in CARICOM a) authors, composers and publishers of music and b) Universities. The study concludes that the effective management of the rights of authors, composers and publishers of music should be undertaken in CARICOM by one collective management organization which would issue a pan-Caribbean licence covering the works of right-holders in all CARICOM states, and that the copyright generated by Universities in these states should be managed by a single regional mechanism.

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Table of Abbreviations

A&B	Antigua and Barbuda
AAU	Association of American Universities
ACS	Association of Caribbean States
AIPJ	Australian Intellectual Property Journal
ARL	Association of Research Libraries
ASCAP	American Society of Composers, Authors and Publishers
AVVC	Australian Vice-Chancellors' Committee
Bds.	Barbados
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
BERR	Department of Business, Enterprise and Regulatory Reform
BMI	Broadcast Music Inc.
BPI	British Phonographic Industry
BUMA	Vereniging Buma
Bze.	Belize
Cal. Rptr.	California Reporter
Cardozo Arts & Ent.L.J.	Cardozo Arts and Entertainment Law Journal
CARICOM	Caribbean Community
CCJ	Caribbean Court of Justice
CD	Compact Disc

CDPA	Copyright, Designs and Patents Act
CFIS	Caribbean Forum on the Information Society
Chi. J. Int'l L.	Chicago Journal of International Law
CIBER	Centre for Information Behaviour and the Evaluation of Research
CIMI	Caribbean Inter-Cultural Music Institute
CIS	Common Information System
CISAC	Confédération Internationale des Sociétés d´Auteurs et Compositeurs
CMO	Collective Management Organisation
COSCAP	Copyright Society of Composers, Authors and Publishers Inc.
COTED	Council for Trade and Economic Development
COTT	Copyright Organization of Trinidad and Tobago
CRNM	Caribbean Regional Negotiating Machinery
CSME	CARICOM Single Market and Economy
CTLR	Computer and Telecommunications Law Review
DAT	Digital Audio Tape
DCMS	Department of Culture, Media and Sport
DRM	Digital Rights Management
DSR	Dispute Settlement Reports
DVD	Digital Versatile Disc
EC	European Commission

ECCO	Eastern Caribbean Copyright Organisation
ECDR	European Copyright and Designs Report
ECJ	European Court of Justice
ECR	European Court Reports
ECRRA	Eastern Caribbean Reprographic Rights Association
EEC	European Economic Community
E.I.P.R.	European Intellectual Property Review
Ent.L. R.	Entertainment Law Review
EU	European Union
FCA	Federal Court of Canada
FedLRev.	Federal Law Review
FSR	Fleet Street Report
Geo.L.J.	Georgetown Law Journal
GEMA	Gesellschaft für musikalische Auffuhrungs-und Mechanische Vervielfältigungsrechte
GOJ	Government of Jamaica
GOTT	Government of Trinidad and Tobago
Hastings L.J.	Hastings Law Journal
Harv. L.R.	Harvard Law Review
HEFCE	Higher Education Funding Council for England
HEI	Higher Education Institution
HMS	Hewanorra Musical Society

IADB	Inter-American Development Bank
ICCP	Information, Computer and Communications Policy
ICT	Information and Communication Technology
IESALC	Institute for Higher Education in Latin America and the Caribbean.
IFPI	International Federation of the Phonographic Industry
IIC	International Review of Intellectual Property and Competition Law
IICD	International Institution of Communication and Development
IPJ	Intellectual Property Journal
I.P.Q.	Intellectual Property Quarterly
IPRS	Intellectual Property Rights
ISP	Internet Service Provider
J. Copyr. Sco'y U.S.	Journal of the Copyright Society of the U.S.A.
JACAP	Jamaica Association of Composers, Authors and Publishers
J.C.&U.L.	Journal of College and University Law
JCALT	JISC Committee for Awareness, Liaison and Training
JCLE	Journal of Competition Law and Economics

JISC	Joint Information Systems Committee
J. Law Inf. & Sc.	Journal of Law, Information and Society
J.W.I.P.	Journal of World Intellectual Property
LSUC	Law Society of Upper Canada
MCPS	Mechanical Copyright Protection Society
MMC	Monopolies and Mergers Commission
NBER	National Bureau of Economic Research
NCAT	National Center for Academic Transformation
NCU	Northern Caribbean University
NRCC	Neighbouring Rights Collective of Canada
NWJT&IP	Northwestern Journal of Technology and Intellectual Property
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
OECS	Organisation of Eastern Caribbean States
O.J.	Official Journal of the European Union
Oxf. J. Leg. Stud.	Oxford Journal of Legal Studies
PRS	Performing Right Society
Revised Treaty	Revised Treaty of Chaguaramas Establishing the Caribbean Community, Including the CARICOM Single Market and Economy

RCT	Regional Copyright Tribunal
R.I.D.A.	Revue Internationale du Droit d'Auteur
RPC	Report of Patent Design and Trademark Cases
RRO	Reprographic Rights Organisation
SABAM	Société d'Auteurs Belge – Belgische Auteurs Maatschappij.
SABIP	Strategic Advisory Board for Intellectual Property Policy
SACEM	Société des auteurs, compositeurs et éditeurs de musique
SALISES	Sir Arthur Lewis Institute of Social and Economic Studies
SBIPP	Strategic Board for Intellectual Property Policy
SCBD	Standing Committee on Business Development
SERCI	Society for Economic Research on Copyright Issues
SESAC	Society of European Stage Authors and Composers
SGAE	Sociedad General de Autores y Editores
SOCAN	Society of Composers, Authors and Music Publishers of Canada
STEMRA	Stichting Stemra
St. Lca.	Saint Lucia

SydLRev	Sydney Law Review
T&T	Trinidad and Tobago
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UB	University of Belize
UCC	University College of the Caribbean
U. Chi. L. Rev.	University of Chicago Law Review
UCL	University College London
UCMC	University Copyright Management Centre
UTech	University of Technology
UG	University of Guyana
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Committee for Trade and Development
UNESCO	United Nations Educational Scientific and Cultural Organization
U.S. /U.S.A.	United States/United States of America
UTT	University of Trinidad and Tobago
UOLTJ	University of Ottawa Law and Technology Journal
UWI	University of the West Indies
Vill. L. Rev.	Villanova Law Review

WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

"We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time."

"Four Quartets" T.S. Eliot

INTRODUCTION

Copyright confers a property right on the creators of literary and artistic works.[1] For a prescribed time, copyright owners enjoy a bundle of exclusive economic rights in relation to protected works, including the rights of reproduction, communication to the public and adaptation, respectively. In addition to economic rights, creators of literary and artistic works enjoy moral rights which entitle them to be identified with their works and to object to any derogatory treatment of such works which negatively impacts the honour or reputation of the creators. Today, the copyright laws of most countries reflect the minimum normative standards prescribed by international agreements. These agreements also provide for the enactment by national governments of limitations and exceptions to copyright infringement, in order to strike a balance between the private rights of the copyright owner and the public interest.

The value of copyright protection is that it entitles the copyright owner to prevent others from using the protected work without authorization. Put positively, it provides copyright owners with a protective regime within which they can exploit their creative works for both economic and reputational gains, (assuming that favourable market and other conditions exist that would conduce to achieving such gains).

[1] Under Article 2 of the Berne Convention, the expression "literary and artistic works" is defined in general terms to include "every production in the literary, scientific and artistic domain whatever may be the mode or form of its expression…". The Article then provides an indicative list of the type of works covered by the definition. These include books, pamphlets and other writings, lectures, addresses, dramatico-musical works; choreographic works and musical compositions with or without words.

Scant attention seems to be paid to the fact that the rights conferred can be enjoyed only if they are managed - that is, monitored and safeguarded against unauthorized use, licensed appropriately and defended where they are infringed. Without adequate management, copyright is of little value to the beneficiaries of the rights conferred. The main approaches are a) individual management and b) collective management carried out by collective management organisations (CMOs) which pool the rights of a number of right-holders and offer a repertoire of works to users under a blanket licence, against fixed fees in the form of tariffs.[2]

Individual management is practical where the nature and circumstances of use of works are such as would allow the right-holders to negotiate with and offer licences to users directly, as may obtain, for example, with plays and other theatrical productions. However, individual management is not feasible where repeated high volume use of works is involved, as in the case of the multiple uses of protected music in all corners of the globe. It is generally accepted that in such a case, collective management of rights is the only feasible management mechanism. It reduces the transactional costs that would be incurred both by the copyright owner in monitoring, licensing and collecting royalties for use of works and also by users, in searching for works and paying individual copyright owners. The collective management system has been in existence since the late 19th century when the first CMOs were set up in France.[3] CMOs are well-established

[2] Garnett, K., Davies, G., and Harbottle, G., (eds.) *Copinger and Skone James on Copyright* 15th Ed. Vol. 1 (London: Sweet & Maxwell, 2005) paragraph 28-02 *et seq.*
[3] See *infra* at 3.4. for a discussion on the origins of the collective management organisations.

as an integral part of the copyright system.[4] Consistent with the traditional territoriality of copyright, CMOs operate on a territorial basis. The repertoire of a national CMO is managed in foreign countries on that organisation's behalf under reciprocal bilateral agreements with other CMOs.

This study questions whether the traditional territorial model of copyright management is suitable for right-holders in CARICOM states.[5] The enquiry is motivated by some observations on the difficulties encountered over several years on the copyright management scene in these states. The first observation is that, in general, there is a serious gap in all CARICOM states with respect to the management of copyright. In relation to music, the gap has existed over decades with most copyright owners not participating in the collective management system and unable, individually, to manage their rights. Many false starts have been made to establish CMOs and for years some have existed on paper only.[6] The second observation is that the national copyright management mechanisms so far established cater to a relatively small number of right-holders and serve very small local markets. Low levels of income and a lack of the requisite skills to run successful national copyright management systems are constant threats to the viability of existing CMOs.

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[4] Ibid.

[5]The term CARICOM refers to the Caribbean Community established by the Revised Treaty of Chaguaramas Establishing the Caribbean Community, Including the CARICOM Single Market and Economy, 2001. The establishment, structure and objectives of CARICOM are discussed in Chapter 3.

[6] K. Nurse, "Cultural Industries in CARICOM: Trade and Development Challenges" *Report*, prepared for CRNM, 2006 (revised 2007) p.210. http://www.acpcultures.eu/pdf/The%20Cultural%20Industries%20in%20CARICOM.pdf

Gaps in the management of University-generated copyright[7] are also evident. The management of copyright in Universities has become a new area of interest in some countries, mainly because of the high value placed on the rights inherent in materials for online teaching and also because, by exercising control over University-generated copyright, institutions are able to manage the availability of materials for use by the academic community. While Universities in CARICOM have similar concerns, the majority do not have copyright management structures in place, with the result that they are not harnessing the benefit of valuable copyright generated within their walls.

This study does not seek to argue that the difficulties identified above are attributable solely to the fact that rights are managed on a territorial basis. The argument advanced is that the territorial approach to copyright management may not be appropriate in the particular circumstances of the small CARICOM states. The current difficulties being experienced in the EU with respect to the cross-border licensing of online music caused by the territorial restrictions on licensing built-in to the traditional management model demonstrate that territorial management of rights may not be appropriate in all circumstances.[8] In this case, digital and communication technologies have rendered territorial boundaries irrelevant.

[7] The term "University-generated copyright" is used in this study to refer to copyright material created in Universities by various categories of persons. See 5.2. *infra*
[8] This issue is discussed *infra* at 3.5.2.

The hypothesis of this study is that copyright management in CARICOM will be effective only if it is undertaken on a regional, rather than a national, basis with centralised structures that can benefit from economies of scale. The hypothesis will be tested in relation to the collective management of the rights of authors, composers and publishers of music and also in relation to the management of University-generated copyright created within Universities in CARICOM states.

Objectives, Scope and Limitations

The principal objectives of the thesis are:

1) to establish the nature of copyright and its theoretical bases, and to identify the nature and scope of rights conferred on copyright owners;
2) to demonstrate the importance of copyright management with specific reference to the rights of authors, composers and publishers of music and rights in University-generated copyright;
3) to analyse, on a comparative basis, the nature and scope of various national, regional and international systems for managing copyright;
4) to suggest a regional framework for the management of the rights of authors composers and publishers of music in CARICOM states, in light of the problems inherent in the territorial model of management when applied to these small states;
5) to make a case for the establishment of mechanisms for managing copyright in Universities in CARICOM, and to offer a model for a regional management structure.

The overall objective of this study is to propose regional structures for the management of copyright in CARICOM that would enable copyright owners to derive greater benefit from the copyright system.

This study necessarily limits the scope of enquiry in order to provide depth to the investigation. Accordingly, in relation to music, the study is delineated in two ways: first, it focuses on the management of copyright only, and does not extend to related rights, and second, it deals only with the management of the rights of authors, composers and publishers of music. Copyright management in the sphere of music was selected for examination because of the social, cultural and economic significance of music in CARICOM, and also because copyright management in the region has been undertaken mainly with respect to the rights of authors, composers and publishers of music. The enquiry into the management of University-generated copyright calls for attention, as no studies have been done on this subject in the region. The study is confined to a selected number of Universities in the region.

The existence and operation of a copyright management system that delivers the benefits of copyright to right-holders are dependent not only on the management structure but on other factors, including the attitude of copyright users, legislative provisions and government policy. This study focuses only on copyright management structures. The other factors are outside of its scope but are referenced in the study where appropriate.

Map of the Caribbean

CARICOM is a multi-lingual grouping of fifteen states in the Caribbean.[9] (See Map above). The study deals only with the English-speaking states of CARICOM. Therefore, references in the text to 'CARICOM', 'CARICOM states', "the Community" or "the region" are references to the English-speaking Caribbean, unless otherwise stated. Where it is necessary to cite the copyright laws of CARICOM, a selected number of laws is referenced so as to avoid the

[9] The CARICOM States are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Vincent and the Grenadines, St. Lucia, Suriname and Trinidad and Tobago. Of these, thirteen are English-speaking and all except Montserrat are independent states, having been British colonies. Haiti, a former colony of France is French-speaking and Suriname, a former colony of the Netherlands, is Dutch-speaking. Belize (formerly British Honduras) is in Central America and Guyana (formerly British Guiana) and Suriname are in South America. All the other countries are islands.

redundancy of citing the laws of several countries that may be identical or similar in terms.[10]

Methodology and Resources

The methodology adopted in this study is a comparative review of existing national, regional and international mechanisms used by both copyright owners and governments to administer copyright. Such a review demonstrates the variety of copyright management mechanisms currently employed in different countries and offers some possible management solutions for examination, in order to evaluate their suitability for adoption by right-holders and Governments in CARICOM states.

Studies and other publications of the EU authorities on the regulation of collective management organisations, in particular, those that challenge the orthodox copyright management paradigm based on territoriality, have been valuable resources.

The study benefits from the growing body of literature, emanating mainly from scholars in the UK, U.S., and Australia, that deal with the legal and other issues pertaining to proprietary and other rights in materials generated in Universities. Comparative references are made to university copyright policies.

[10] The copyright laws of CARICOM states referenced in this study are those of Antigua and Barbuda, Barbados, Belize, Jamaica, St. Lucia and Trinidad and Tobago, respectively. Electronic versions of these laws are contained on a CD submitted with the study.

The main source of reference is the legal literature on copyright and the literature on the music industry, collective management and copyright in Universities. These comprise official reports of Governments and international bodies and various Committees, policy statements and a large body of scholarly work including books, monographs and journal articles. Statutes and secondary legislation as well as judicial decisions are also referenced.

The process of conducting the study has revealed the absence in the Caribbean of any critical scholarly writing on copyright (or intellectual property rights in general) or any significant body of jurisprudence in the field. It has also revealed that the body of work on the music industry in the Caribbean is slim. Such writings as exist (which have been liberally used in this study) are studies and reports commissioned by Governments or UN bodies. In some cases, key informants have had to be relied on to fill information gaps.

Outline of the Thesis

Chapter 1 lays the foundation for the study. It examines the main justifications for allocating property rights to works of the mind, and searches each theory to see whether any guidance is provided on the management aspects of copyright. The chapter then reviews the major international agreements to identify the nature and scope of the rights they confer on copyright owners. Given that limitations and exceptions perform the vital function of balancing the rights of the copyright owner and the interest of the public in accessing and using protected works, the chapter examines the controversy surrounding the interpretation of the "three-step

test" by the Dispute Settlement Mechanism of the WTO. A consideration of the nature and scope of rights enjoyed by copyright owners highlights the extent of the potential for economic gain. It also confirms that such potential will be unrealized if suitable rights management mechanisms are not in place.

Chapter 2 examines in some detail the study's two areas of interest. The music industry in the Caribbean is characterised with reference to the growth and development of the industry in Jamaica and Trinidad and Tobago. Issues faced by the local industries are located in the context of a discussion on current challenges faced by the global music industry. Next, the protection of copyright in Universities is studied. Several reasons are identified to explain why the ownership and management of copyright which, traditionally, have been of little interest to academic institutions, have become topics of intense interest and attention in many Universities. The findings of this chapter pave the way for the development of the regional models of management proposed in Chapters 4 and 5, respectively.

The desire to find guidance to fashion new models of management leads to an interrogation, in Chapter 3, of various collaborative copyright management practices that exist nationally, regionally and internationally. A comparative approach is adopted with a review of co-operative approaches to the management of copyright at the level of governments and copyright-owners in selected countries. The chapter also notes a de-emphasis of the territoriality of copyright

management as demonstrated by the growing numbers of alliances and joint ventures among copyright management organisations in Europe.

Building on the findings of previous chapters, Chapter 4 fleshes out a new regional model for the management of the copyright of authors, composers and publishers of music in CARICOM. It proposes that a pan-Caribbean licence should be issued by a single regional collective management organisation that controls the repertoire of authors, composers and publishers in CARICOM states. Chapter 5 elaborates a regional mechanism for the management of University-generated copyright. Recalling the findings of Chapter 2 that pointed to the absence of copyright management structures in most Universities in the region, the Chapter provides a blueprint for the establishment of a regional copyright management mechanism for Universities.

Chapter 6, the concluding chapter, provides a summary of the findings and recommendations of the study.

This thesis is based on the laws in operation and materials available as of May 2009 However, any amendments to laws or materials coming to light between that date and the date of the submission of the study have been included.

CHAPTER 1: MAPPING THE LANDSCAPE

1.1. Introduction

The purpose of this chapter is to lay the foundation for the study on copyright management – in particular, the management of the rights of authors, composers and publishers of music and rights in University-generated material. The chapter first explores the main justificatory arguments for allocating property rights to creations of the mind, and then examines the nature and extent of the rights conferred on copyright owners by the multilateral agreements.

By establishing the rationale for the copyright system and identifying the rights with which copyright owners are endowed, the chapter seeks to highlight two points: 1) that there is a wide array of statutory rights enjoyed by copyright owners and 2) that while the conferral of copyright gives protection from unauthorized use, it does not, *per se*, guarantee that copyright owners will derived any benefit from their protected works, and that unless these private rights are appropriately managed, the economic promise of the copyright system remains unfulfilled.

1.2. Justifications for Copyright

1.2.1. General

In the literature on the theory of intellectual property rights (IPRS), several justificatory arguments have been advanced to explain why property rights should be given to works of the mind. According to Bently and Sherman, the dominant theories on intellectual property rights fall under the following headings: 1) Natural rights 2) Reward 3)

Incentives-based theories 4) neo-classical economics 5) democratic principles.[11] However, many other classifications of the theories have been offered.[12] The utility of a review of the theoretical underpinnings of copyright and other IPRS is that it clarifies the social, philosophical and cultural considerations underlying the grant of property rights (which are often forgotten) and directs attention to the appropriate balance that must be struck between the conferral of rights and the public interest.[13]

Irrespective of how the theories are classified, as a practical matter, there ought to be some connection between the theoretical rationale for the allocation of rights and the actual enjoyment of those rights. In relation to copyright, rights management is the means by which the theoretical and philosophical underpinnings of the copyright system are translated into intangible and tangible benefits in the form of recognition and/or financial gain. Without management, copyright as a property right would be an interesting legal construct, but with little practical significance. This is an underlying theme in this study which seeks to highlight the centrality of copyright management to the copyright system, and to devise regional copyright management systems best suited to right–holders in the small states of CARICOM. Of the theories classified by Bently and Sherman, the most relevant for the purposes of this study are discussed below.

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[11] L. Bently, and B. Sherman, *Intellectual Property Law*, 3rd Ed. (New York: Oxford University Press, 2008) pp.35-39.

[12] For example, Sterling's classification is a) the natural justice arguments; b) the creative incentive arguments; c) the general public interest arguments; d) social contract arguments; e) moral arguments. J.A.L. Sterling, *World Copyright*, 3rd Ed. (London: Sweet & Maxwell, 2008) paragraph 2.27. According to Zimer, six major approaches dominate the literature on copyright theory i) the utilitarian approach; ii) the labour theory of property; iii) the personhood theory; iv) social-institutional planning; (v) traditional proprietarianism; vi) authorial constructionism. L. Zimer, "On the value of copyright theory", (2006) 1 I.P.Q. 55. See also K. Garnett, G. Davies and G. Harbottle *Copinger and Skone James on* Copyright, 15th Ed. (London: Sweet & Maxwell, 2005) paragraph 2-05.

[13] Zimer, op cit., p.55.

1.2.2. Natural rights

Arguments based on the natural rights theory reflect the thinking of the "age of enlightenment" and notions of freedom associated with the French Revolution and articulated by John Locke and later, by Rousseau, Kant and Hegel, among others.

The essence of the natural rights argument is that a property right in intellectual productions should be recognized because of the very fact that they emanate from the mind of individual authors.[14] This school of thought is based on John Locke's theory of property, according to which a person is entitled to a property right in anything resulting from his own labour and efforts.[15] Accordingly, a poem, play or other literary expression results from the intellectual effort and inspiration of the author who has a natural property right in it. Copyright law simply acknowledges this self-evident ethical precept.[16]

A corollary to the notion that natural rights flow from authorship is the idea that the creator must have the ability to control the work by protecting it from misappropriation, modification and unauthorized exploitation.[17] It is submitted that this will occur only if

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[14] S. Le Gall, "Justifying Intellectual Property Rights", (2002) 12(1) *The Caribbean Law Review,* 21.

[15] The basic thesis of Locke's theory of property is that everyone has a natural property right in his or her own "person" and in the labour of his or her body. Locke put it this way "Whatsover, then, he removes out of the state that nature has provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property" John Locke, "Second Treatise on Government" (1690) Chapter V "On Property", Section 27. See also Sterling, op cit., paragraphs 2.11-2.12; R. Spinello and H. Tavani, "Intellectual Property Rights: From Theory to Practical Implementation" in R. Spinello and H. Tavani (eds.) *Intellectual Property in a Networked World* (London: Information Science Publishing, 2005).

[16] Bently and Sherman, op cit., p.35.

[17] Ibid. See also Garnett *et al,* op cit., paragraph 2-05.

the right-holder has management mechanisms in place to deal with monitoring and licensing of protected works and to take action against unauthorized exploitation.

A variant of the natural rights approach is the theory of personality as a basis for the allocation of rights. Inspired by Kantian and Hegelian philosophies, the theory posits that IPRS are justifiable as manifestations of an individual's personality in his or her intellectual expressions and as barriers to expropriation of inalienable features of his personality, invested in his authorial creations.[18]

1.2.3. Reward

Justificatory arguments based on the principle of reward regard copyright as an expression of gratitude to the author for making available creative works for the general enjoyment and enrichment of the public. It differs from the incentive-based theories in that there is no inducement effect. The property right is an end in itself - a recognition of the creative gift offered by the author.[19] In addition, the reward theory operates on a general principle of fairness, according to which authors deserve to be remunerated when their works are exploited.[20] But, as this study argues, if the rights accorded copyright owners are not appropriately managed, then, their value as rewards for creativity can be easily undermined especially in the digital environment.

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[18] Zimer, op cit., p.64. According to Zimer, the German and French copyright laws evolved from this philosophical underpinning and its impact on Anglo-American laws was eventually grounded in a separate system of moral rights. Ibid. For a discussion of personality theory based on Hegel's ideas, see J. Hughes, "The Philosophy of Intellectual Property", (1988) 77 Geo. L.J. 287.
[19] Bently and Sherman , op cit., p.36.
[20] Sterling, op cit., paragraph 2.32.

1.2.4. Incentive –Based Theories

Incentive–based theories are not as "author-focused" as the reward and natural rights theories. Influenced by Bentham's utilitarian philosophy, incentive-based theorists have regard to the benefits that would accrue to the public in general and, as a consequence, do not place emphasis on the individual as an independent entity entitled to rights.[21]

Proponents of this theory are influenced by the notion that it is a social requirement, and in the public interest, that authors and owners of intellectual property rights should be encouraged to publish their works. These investments would likely not be made unless there is a reasonable expectation of obtaining a return on them.[22] Utilitarian theorists, therefore, endorse the creation of intellectual property rights in order to induce innovation and intellectual productivity. The grant of property rights is justified on the basis of the good consequences of their legal recognition.[23]

Incentive-based theories presuppose that copyright is needed as an incentive to correct the "market failure" that would result in a copyright-free world, where the labour and investment applied to the development of cultural and informational productions would

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[21] Public interest considerations seem to underlie the first statute on copyright - the UK's Statute of Anne 1710 which is entitled "An Act for the encouragement of learning…". The preambular provisions also acknowledged the need to protect the author from the unauthorized exploitation of his work. The U.S. Constitution authorizes Congress to "… promote the progress of science and useful arts, by securing for limited times to authors and investors the exclusive right to their respective writings and discoveries. (Art. 1 Section 8, Clause 8). The grant of exclusive intellectual property rights must therefore serve the purpose of generating scientific knowledge and cultural products. See G. Davies, *Copyright and the Public Interest*, 2nd Ed., Chapter 9 (London: Sweet & Maxwell, 2002) for an examination of the basic justifications for copyright, including its moral and economic functions in the public interest.

[22] Garnett *et al*, op cit., paragraph 2-05.

[23] Le Gall, op cit., p.15.

be undermined by free-riding competitors.[24] However, it is evident that the grant of property rights as an incentive to creativity will not bring the desired results unless creators can derive some benefit, and benefits will not occur unless attention is paid to the management of the rights concerned and efforts made to reduce, if not eliminate, free-riding.

1.2.5. Neo-Classical Economics

Proponents of the neo-classical theory of economics are concerned with the efficient allocation of resources. According to this school of thought, private ownership of resources is the juridical arrangement that most conduces to optimal exploitation. The exploitation of private rights in a free-market setting brings about market equilibrium between demand and supply. The grant of IPRS is justified because, in the absence of exclusive property rights (i.e. where there is no ownership or common ownership), resources are not only undervalued but over-exploited and would likely result in what has been called the "tragedy of the commons". A theory of copyright rooted in this philosophy justifies copyright as necessary to protect "value".[25]

To the extent that this theory advocates the grant of proprietary rights over resources and optimal exploitation and maximization of profits, it provides theoretical support for copyright management. In most cases, and certainly in the case of music, the rationale for managing copyright is to convert the value which copyright law accords to a creative product into economic gain. In this regard, the exercise by copyright managers

[24] Bently and Sherman, op cit., p.37.
[25] Ibid., p.38.

(whether CMOs or otherwise) of management functions such as licensing, collection, and royalty distribution is indispensable.

1.2.6. Justifications for copyright in the Caribbean

It is not so easy to discern what theoretical justifications underpin the various copyright laws of CARICOM states. There is no mechanism under the Revised Treaty of Chaguaramas[26] analogous to the EC Directive, empowering an organ of CARICOM to prescribe, authoritatively, measures that members of CARICOM must adopt in relation to copyright or other subject-matter.[27] Article 66 of the Revised Treaty mandates COTED[28] to "promote the protection of intellectual property rights within the Community" and lists specific actions to be taken towards this end. CARICOM states have developed their copyright laws independently of each other, despite a mandate under the Revised Treaty to harmonise laws relating *inter alia* to intellectual property rights.[29]

However, in their implementation of the various international copyright agreements, and to the extent that their laws are modelled on the UK's CDPA, 1988, the copyright laws of CARICOM states would reflect, or be influenced by, the philosophical underpinnings of those instruments. The implementation of the Berne Convention in domestic law means that the copyright laws of these states reflect the author-based

[26] Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy signed at Chaguaramas, Trinidad and Tobago on 5th July 2001(hereinafter referred to as the Revised Treaty).
[27] This is because CARICOM has no supranational structure that can prescribe laws that bind member states. See chapter 3 for a comparison of the regional structures of the EU, the Andean Community and CARICOM.
[28] The Council of Ministers for Trade and Economic Development (COTED) is one of the organs of the Caribbean Community. The structure of CARICOM is described in Chapter 3.
[29] Revised Treaty, Art. 74(2)(b).

natural rights and personality theories as well as the utilitarian incentives-based approaches. The former are reflected in the moral rights provisions of these laws while the latter are expressed in the extensive economic rights accorded to right-holders.[30]

Under the TRIPS Agreement, the minimum standards for the protection and enforcement of copyright and other IPRS were strengthened in the context of global trade. The challenges posed to copyright by digital and communication technologies necessitated the conclusion of the WCT and WPPT to augment the rights of copyright owners and to support their use of DRMS. The emphasis on strengthened private rights is consistent with the neo-classical theory of economics, which would be reflected in CARICOM copyright laws by the implementation of these Treaties.

In recent studies focused on the cultural industries, justificatory theories are not explicitly referenced, but some seem to be invoked implicitly. Consistent with utilitarian and neo-classical economic theories, Nurse has urged Caribbean Governments to invest in the cultural industries to boost employment, production and exports. He argues that copyright protection and exploitation as well as the collective administration of rights are vital components of the industrial and export upgrading agenda that the region should pursue.[31]

In a recent study on the economic contribution of the copyright industries in Jamaica, James reported that the economic contribution of the copyright-based industries to

[30] See discussion on the Berne Convention *infra* at 1.3.
[31] See generally K. Nurse, "The Cultural Industries in CARICOM: Trade and Development Challenges", *Report*, CRNM, 2006 (revised 2007).
.http://www.acpcultures.eu/pdf/The%20Cultural%20Industries%20in%20CARICOM.pdf

Jamaica's economy was estimated in 2005 at US$464.7 million or 4.8 per cent of GDP.[32] Given the potential of these industries to make a greater impact on the economy, James calls for the refinement and enforcement of copyright policies in Jamaica as a matter of priority. He asserts that the strengthening of the copyright regime (together with other factors) would provide greater incentives for innovation and creativity and the rapid diffusion of new technologies, and calls for a stronger copyright regime focused on enforcement and on education about the copyright system.[33] James's emphasis on the incentive-providing aspect of copyright and the recommendation for a stronger copyright regime suggest that incentive-based and neo-economic theories may be implicitly at play.

1.2.7. Effect of Theories on Policy

As a general proposition, it may be asserted that in the development of modern copyright laws, the economic and social arguments are given more weight in the legal systems that follow the common law tradition, while the natural rights theories reflecting an author-based paradigm are given first place in countries with civil law systems. Notwithstanding the varying emphases in different countries, scholars have suggested that the theories complement each other and are "cumulative and interdependent"[34]

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[32] V. James, "The Economic Contribution of Copyright-Based Industries in Jamaica", Report prepared for WIPO, 2007, paragraph. 1.5. http://www.wipo.int/ip-evelopment/en/creative_industry/pdf/1009E-3.pdf

[33] Ibid., paragraph 7.2.

[34] Garnett *et al* , op cit., paragraph 2-05.

If the general function of theories is to guide policy-makers in the process of legislating, it is reasonable to enquire whether these theories have any influence whatsoever on the development of copyright law and policy. Scholars doubt that they exert much influence. For example, Bently and Sherman assert that despite their "distinct philosophical pedigree" the theories are not generally used as guides to inform policy developments in the field: rather, some or all of them are pressed into service by lobby groups to further their own ends.[35] In referring to copyright negotiations some years ago among industry interests, Litman observed that "normative arguments about the nature of copyright show up as rhetorical flourishes, but, typically, change nobody's mind".[36] In Teilmann's view, the earliest notions of copyright and the original rationales have been forgotten, resulting in the decline of copyright into "mere protectionism".[37] Despite these pessimistic views, the theories remain useful reference points and reminders about the philosophical foundations of IPRS and are still capable of providing guidance in the formulating of laws and policies on intellectual property rights.

While none of the justificatory theories examined deals with any aspect of copyright management, it can be argued that the management of rights is implied in each of them

[35] Bently and Sherman, op cit., p.39.
[36] J. Litman, *Digital Copyright: Protecting Intellectual Property on the Internet* (New York: Prometheus Books, 2001) p.77. See also G. Austin, "Copyright's Modest Ontology-theory and Pragmatism in Eldred v. Ashcroft" (2003) 16 Canadian Journal of Law & Jurisprudence 163 (stating that in the realities of law-making in intellectual property there are few instances where theory dictates the formulation and development of positive law); S. Gavrilescu, "The Justification of Copyright in the Information Society (1) *Legile Internetuli* (arguing that copyright evolved into the system we know today mainly as a result of the bargains between market interests and not because justification theories had a major role in shaping this area of law.) http://www.legi-internet.ro/index.php?id=1
[37] S. Teilmann, "Justifications for Copyright: The Evolution of *le droit moral"* in F. Macmillan (ed.) *New Directions in Copyright Law,* Vol. 1 (Cheltenham: Edward Elgar Publishing, 2005) p.73. For a summary of arguments advanced against the copyright system, see Sterling, op cit., paragraph 2.42.

since the benefits that may be derived from the allocation of rights based on any of the theories can be realized only if some level of management is exercised in relation to the rights conferred.

1.3. The Berne Convention.

The Berne Convention for the Protection of Literary and Artistic Works[38] is the foundational multilateral copyright agreement. It requires members of the Berne Union to recognize and protect certain minimum rights of authors in literary and artistic works.[39] These rights include the rights of reproduction,[40] public performance,[41] translation,[42] adaptation[43] and broadcasting, respectively.[44] Subject to certain exceptions, protection must be accorded for at least the life of the author plus fifty years thereafter.[45] In recognition of the need of the public to be able to enjoy some use of protected works without payment, the Convention provides limited scope for members of the Berne Union to prescribe exceptions to these rights in their national laws.[46]

A governing principle of the Convention is national treatment, which requires (subject to very limited exceptions) a country that is a member of the Berne Union to accord to the nationals of other members of the Union the same level of protection which that

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[38] The Berne Convention was first established in 1886 and is administered by WIPO. It was last revised in 1971 with amendments made in 1979.
[39] The term "literary and artistic works" is broadly defined. See Note 1 *supra*.
[40] Berne Convention, Art. 9.
[41] Berne Convention, Arts. 11 and 11*ter*.
[42] Berne Convention, Arts. 8 and 11(2).
[43] Berne Convention, Arts. 12 and 14.
[44] Berne Convention, Art. 11*bis*.
[45] Berne Convention , Art. 7.
[46] Bently and Sherman , op cit., p.41. However, the Convention requires that any exception to the reproduction right must satisfy certain criteria set out in Article 9(2). These criteria constitute the so- called "three-step test" discussed *infra* at 1.6.

country gives to its nationals.[47] Another key principle is that the enjoyment and exercise of copyright in works covered by the Convention must not be subject to any formality.[48] This means that copyright protection should be accorded automatically on the creation of the work and not conditioned on the observance of any bureaucratic process such as registration, the giving of notice or the deposit of the work. Initially drawn up as a small treaty among mainly European countries, the Convention now has a membership of 164 countries.[49]

Despite the centrality of the Convention to the global copyright system, the Berne Convention does not offer a complete system of norms for the protection of copyright. It contains no provisions as to what constitutes infringement; nor are there provisions relating to remedies, penalties and enforcement or the settlement of disputes among states on matters covered by the Convention. Further, the Convention offers no guidance on concrete steps to be taken to realize the benefits arising from the conferral of rights. Yet, the accrual of rights is of little practical significance to a copyright owner unless the rights are properly managed.

1.4. TRIPS

Intellectual property rights were introduced as a discipline in a multilateral trade agreement for the first time when the TRIPS Agreement was concluded in 1994 as part

[47] Berne Convention, Art. 5(1).
[48] Berne Convention, Art. 5(2).
[49] WIPO, Berne Convention: Contracting Parties.
http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=150

of the Agreement establishing the WTO.[50] The Agreement introduced new minimum standards for the protection of intellectual property rights and addressed perceived deficiencies in the regulatory and institutional multilateral framework, notably the absence of provisions on enforcement and mechanisms for settling disputes.

As regards copyright, the TRIPS Agreement builds on the foundations of the Berne Convention.[51] A significant change introduced by the TRIPS Agreement relates to the limitations and exceptions that countries may impose on exclusive rights. Article 13 mandates members of the Agreement to "confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."[52] The TRIPS Agreement falls within the ambit of the WTO dispute settlement procedure, so any dispute between members concerning the implementation of the Agreement can be brought before the WTO's Dispute Settlement Body.[53] However, disputes concerning copyright management practices of right-holders or CMOs could not be brought before the WTO dispute settlement mechanism because the Agreement contains no provisions on copyright management.

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[50] The Agreement on the Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) contained in Annex 1C of *the Marrakesh Agreement Establishing the World Trade Organization*, signed in Marrakesh, Morocco, on 15 April 1994.

[51] Art. 9 of the Agreement stipulates that member states should comply with the provisions of Articles 1-21 of the Berne Convention, Paris Act, 1971 (other than Article 6*bis* which deals with moral rights). This means that even those WTO member countries who are not parties to the Berne Convention would, nevertheless, be bound by its provisions by virtue of the TRIPS Agreement.

[52] Article 13 of the TRIPS Agreement mirrors the provisions of the Berne Convention restricting the limitations and exceptions which countries could prescribe in respect of the reproduction right only. The effect is that to be consistent with Article 13, any limitation or exception to rights conferred not only under the TRIPS Agreement but, it seems, also those under the Berne Convention must satisfy three conditions- referred to in the legal literature as the "three-step test". The test is discussed *infra* at 1.6.

[53] Under Art 64 of the TRIPS Agreement, disputes concerning copyright or other intellectual property rights covered by the Agreement fall within the dispute settlement provisions of the GATT and the Dispute Settlement Understanding.

1.5. WCT

The WIPO Copyright Treaty (WCT) was adopted in 1996[54] and is a special agreement under Article 20 of the Berne Convention.[55] The main purpose of the WCT is to clarify and strengthen the rights of copyright owners in the digital environment, in light of their concerns about the new digital and communication technologies.[56]

A number of provisions reflect the so-called "digital agenda" of the Treaty.[57] First, it confers the right of distribution (or the right of making available to the public) on authors of all categories of works.[58] Second, the Treaty grants to authors of literary and artistic works the right of communication to the public by wire or wireless means, including interactive transmission on demand (the "on demand availability right") thereby enabling them to control the making available of their works over the Internet.[59] The possibility of mass use of protected works provides copyright owners

[54] A companion instrument, the WIPO Performances and Phonograms Treaty (WPPT) was also concluded in 1996. It addressed the rights of performers and producers of phonograms in the digital environment.

[55] WCT, Art. 1. Under Art. 20 of the Berne Convention, Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention or contain other provisions not contrary to the Convention.

[56] The existence of global digital networks and the Internet has significantly disrupted the traditional markets for copyright, especially in the music and film industries. The challenge arises because of the characteristics of digital technology (e.g. ease of replication, plasticity of digital media, ease of transmission and multiple use). For a detailed discussion on these characteristics see S. Stokes, *Digital Copyright: Law and Practice*, 2nd Ed. (Oxford and Portland, Oregon: Hart Publishing, 2005) paragraph 1.4. A major concern of copyright owners is peer-to-peer file sharing. This is the online transfer between individual users of files (usually of sound or film recordings) retained in the file of users and made accessible worldwide. The availability of MP3 technology, which enables the compression of digital data, facilitates the movement of large files. Such files contain materials that are likely to enjoy copyright protection and the transmission of a file usually implicates the reproduction, distribution and, possibly, the right of public performance (the performing right). See P. Akester, "Copyright and the P2P Challenge", (2005) E.I.P.R. 106.

[57] Bently and Sherman, op cit., p.44.

[58] WCT, Art. 6.

[59] WCT, Art. 8. This Article was not intended to replace the provisions of the Berne Convention dealing with the communication right. Art. 8 specifically states that it is without prejudice to those provisions. The utility of Art. 8 is that it extends the right to all authors of literary and artistic works and enlarges the author's right to include an "on-demand availability right". This

with tremendous opportunities for licensing and significant financial returns. However, this can be realised only if efficient management structures are in place to exploit these opportunities. Third, it requires Contracting Parties to provide adequate legal protection against the circumvention of effective technological measures used by authors to protect their rights.[60] Fourth, Contracting Parties must provide copyright owners with adequate remedies against those who tamper with rights management information embedded in protected works.[61]

In addition to strengthening and clarifying the existence of rights, the WCT has reduced the scope of the limitations and exceptions to the rights that Contracting Parties may prescribe in their domestic law, by the general application of the three-step test to all limitations and exceptions.[62] The logical effect of this restriction in the scope of limitations and exceptions is the retention of more rights by copyright owners.

It is clear that, underlying the conferral of these rights as well as the restriction of the scope of limitations and exceptions by the WCT, is a presumption that right-holders would, or should, make their own arrangements to protect and exploit these rights. In so far as the Treaty requires Contracting Parties to support the use of DRMs and rights management information systems by right-holders, it assists them in their efforts to prevent the unauthorized use of their works. What is clear is that the rights conferred by the WCT and other international agreements cannot possibly be enjoyed without

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clarification was necessary as it was not clear in many copyright laws that communication to the public could take place in any fashion. W. Cornish and D. Llewellyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 6th Ed. (London: Sweet & Maxwell, 2007) p.398.

[60] WCT, Art.11.

[61] WCT, Art. 12.

[62] Art. 10 WCT.

there being in place fairly sophisticated systems for managing those rights: absent such mechanisms, the rights are of little value to the copyright owners. Where national management mechanisms are not in place or are weak or inefficient, as is the case in CARICOM, a new management approach, such as the regional approach proposed in this study needs to be explored.

1.6. The Three- Step Test

The Berne Convention allows members of the Berne Union, in certain specified cases, to prescribe exceptions in their copyright laws to the rights conferred by the Convention.[63] Such restrictions on the scope of rights of a copyright owner are designed to balance the interests of copyright owners on the one hand, and the public interest on the other, and may appear in the form of compulsory licences or uses permitted without the need to obtain the permission of the copyright owner or to pay licence fees.[64]

In relation to the reproduction right, the ability of members to restrict the scope of enjoyment of the right by the copyright owner is more circumscribed. Article 9(2) of the Berne Convention allows members of the Union to permit the reproduction of copyright works "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". The three elements of this provision, namely, that permission may be grant a) only in special cases and where the reproduction b) does not conflict with the normal exploitation of the work and c) does not conflict

[63] See Berne Convention, Arts. 2 *bis*(1),(2), 10 and 10 *bis*
[64] Sterling, paragraph 10.01. See also Copinger *et al* 9-01.

with the legitimate interests of the author, are known in the legal literature as "the three-step test".

The three-step test is reflected in both Article 13 of the TRIPS Agreement and Article 10 of the WCT and applies in both cases to *all exceptions* and not, as in the Berne Convention, only to the reproduction right.

The test is relevant to this study because the restriction it imposes on the ability of member states to allow free use of protected works means that more rights are left in the hands of copyright owners, thereby augmenting the vast array of rights conferred on them by multilateral copyright conventions. However, as this study argues, an enlarged scope of rights is of little benefit to copyright owners in the absence of effective rights management systems.

An understanding of the meaning and scope of three-step test, as reflected in Article 13 of the TRIPS Agreement and Article 10 of the WCT, is important for policy-makers and copyright managers in CARICOM states, especially since some of these states are in the process of implementing these agreements.

The opportunity for an authoritative interpretation of Article 13 of the TRIPS Agreement presented itself when a reference was made to a WTO Panel by the EC against the U.S. concerning certain exceptions allowed by the U.S. Copyright Act in

respect of the right of public performance.[65] The EU alleged, *inter alia*, that, these exceptions were not compatible with Article 9(1) of the TRIPS Agreement together with Articles 11(1)(ii) and 11*bis* (1)(iii) of the Berne Convention. The U.S. contended that in enacting section 110(5)A, it was fully compliant with its obligations under the TRIPS Agreement and that the exception embodied in the section fell within the standard prescribed by Article 13 as the standard by which the appropriateness of any limitation must be judged.

Considering the first element of the "three-step test", that is, that the limitation or exception must be confined to "certain special cases", the Panel interpreted the provision to mean that exceptions in national legislation should be "clearly defined" and "narrow in its scope and reach". On this basis, it found that the "homestyle" exception fell within Article 13 in that it was well-defined and limited in its scope and reach. However, in the Panel's view, the business exception failed to meet the test because it related to a major part of the users that are specifically intended to be covered by Article 11*bis* (1)(ii) and so could not be considered as a special case in this context.[66]

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[65] The issue turned on the legitimacy under Art. 13 of exceptions under the U.S. Copyright Act. Section 110(5)A allowed public communication of transmissions of protected works by a single receiving apparatus of a kind commonly used in private homes if no charge is made or no further transmission is effected (the "homestyle" exception) while section 110(5)B permitted a transmission or retransmission of a non-dramatic musical work "originated by a radio or television station" or a cable system or satellite carrier and is in relatively small establishments such as shops, bars and restaurants (the "business exception").

[66] See Report of the Panel established under Art. 6 of the Dispute Settlement Understanding, and Art. 6(4) of the TRIPS Agreement: United States-Section 10(5) of the US Copyright Act, circulated June 15, 2000, Ref. WT/DS160/R (hereinafter referred to as "the Report"). http://www.wto.org/English/Tratop_E/dispu_e/cases_e/ds160_e.htm

The Panel interpreted the second element of the test - that the exception or limitation "must not conflict with a normal exploitation of the work" - to mean that the exception prescribed by domestic law must not "enter into competition with the ways that right-holders normally extract economic value from that right in the work and thereby deprive them of significant or tangible economic gain.[67] In relation to the case referred, the homestyle exception was again found to pass this aspect of the test, while the business exception failed to do so. As regards the third element of the test, the Panel concluded that prejudice to a right-holder's interests reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the right-holder.[68]

Scholars have expressed reservations about the Panel's interpretation of Article 13.[69] A particular concern is that, in some countries, the test is being applied in an overly restrictive way, thereby tilting the balance too much in favour of right-holders to the detriment of the public interest. This worry underlies the Declaration recently issued by some teachers and scholars of intellectual property who argue that:

> "The WTO Panel's interpretation of the test in its decision on s110(5) of the United States' Copyright Act 1976 was self-avowedly economic in focus and appears to leave limited scope for states to balance the interests of right holders with countervailing interests of fundamental importance. Domestic courts have

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[67] Report, paragraph 6.183.
[68] Report, paragraph 6.229.
[69] For an analysis of the Panel's decision see J. Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the "Three Step Test" for Copyright Exceptions", *Working Paper*, 181 Social Science Research Network Electronic Library. http://papers.ssrn.com/paper.taf?abstract_id=253867 The Decision has been widely criticised. See e.g. Haochen Sun, **"**Overcoming the Achilles Heel of Copyright Law", (2007) 5 *NJ T&I P* 265; C. Geiger, "The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society", *Copyright Bulletin*, UNESCO, January-March, 2007 and D. Brennan, "The Three-Step Frenzy-Why the TRIPS Panel Decision Might Be Considered *per incuriam"*, (2002) I.P.Q. 212. However, in addition to its integration into the WCT and the WPPT, the test also appears in the EU Information Society Directive (Art. 5.5).

> sometimes misunderstood the requirements of the test and, as a result, have applied it in a profoundly unbalanced manner".[70]

While acknowledging the utility of the three-step test, the Declaration calls for a multi-faceted approach to the test and offers some guiding principles to govern its interpretation and application.[71]

Organisations that are involved in the management of copyright and act as either agents or assignees of copyright owners have a vested interest in how the three-step test is interpreted by both international and national tribunals. This is because such interpretation has the potential of either reducing or augmenting the rights to be enjoyed, exploited and managed.

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[70] C. Geiger, J. Griffiths, R. Hilty, "Declaration On A Balanced Interpretation Of The "Three-Step Test" In Copyright Law", Introductory Remarks, (2008) 39(6) IIC 707. The Declaration was made at the meeting of the Association of Teachers of Intellectual Property held in Zurich in July 2008, and its development was a joint project of the Max Planck Institute for Intellectual Property, Competition and Tax Law, Germany, and the School of Law at Queen Mary, University of London. The Declaration appears at http://www.law.qmul.ac.uk.

[71] The essential elements of the Declaration are a) that the three-step test is indivisible- that is, it should be applied as a comprehensive overall test (as distinct from applying each element of the test discretely); b) that the test should not be interpreted narrowly: limitations and exceptions should be interpreted according to their objectives and purposes; c) that the restriction of exceptions and limitations to "special cases" should not preclude legislatures from introducing open-ended limitations and exceptions so long as their scope was reasonably foreseeable; nor should it prevent courts from applying existing statutory limitations or exceptions or creating new ones where possible within a particular legal system; d) that limitations and exceptions do not conflict with a normal exploitation of protected subject matter if they are (i) based on important competing considerations or (ii) have the effect of countering unreasonable restraints on competition, notably on secondary markets, especially if adequate compensation is assured; e) that in applying the test the interests of the original right-holders as well as subsequent right holders must be taken into account; and f) that the test should be interpreted in a manner that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms, interests in competition, notably on secondary markets and other public interests, notably in scientific progress and cultural, social or economic development. For concerns over the application of the test in national law, see C. Geiger "From Berne to National Law, via the Copyright Directive: the Dangerous Mutations of the Three-step Test", (2007) E.I.P.R. 486. For an alternative approach to interpreting Article 10 see J. K. Koelman,, "Fixing the Three-step Test", (2006) E.I.P.R 407.

As stakeholders, these organisations should, therefore, participate in the current debate on the three-step test, so as to bring to bear their own perspectives on the issues. In this context, it is interesting to note that the Panel's interpretation of the test leans in favour of broadening the economic interests of copyright owners. This supports this study's concern that appropriate copyright management mechanisms should be established to assist authors, composers and publishers of music, and the owners of University–generated copyright to enjoy and protect such interests.

It is uncertain how the three-step test would be applied by the courts in CARICOM states. However, it would be expected that the Panel's ruling would exert a significant influence on a court's interpretation of the provisions of the copyright laws of CARICOM States that implement Article 13 of TRIPS and Article 10 of the WCT. However, it is submitted that the courts should also have regard to the caution sounded by several scholars on the Panel's approach to the interpretation of the test.

1.7. Conclusion

This chapter sought to provide a context for the study. It presented various theories justifying the grant of copyright for works of the mind and explained the source and nature of the international norms that govern copyright. The study found that international copyright agreements, from Berne Convention to the WCT have endowed copyright owners with a vast array of rights. It was noted that neither in the grant of rights by these international agreements nor in the articulation of the various theories justifying copyright was any explicit reference or guidance provided to copyright owners on how the rights conferred should be managed.

The findings of the chapter confirm that inadequate attention is paid to the central role of copyright management in the operation of the copyright system. They also point to the need for focused attention to be given to copyright management practices in CARICOM with a view to determining the management modalities that would best serve the interests of copyright owners in these small states. To this end, the next chapter will examine how the rights of authors, composers and publishers of music and rights that subsist in University-generated copyright are currently managed in CARICOM states.

CHAPTER 2: COPYRIGHT MANAGEMENT IN CARICOM: MUSIC AND UNIVERSITY- GENERATED COPYRIGHT

2.1. Introduction

This chapter examines current and evolving copyright management patterns in CARICOM in the music sector (with particular reference to the performing right of authors and composers of music), and also in Universities. In the case of the music sector, an overview of the nature and operation of the global music industry provides the context for a brief exposition on the origin and development of Caribbean music. This establishes a platform for a discussion on the existing collective management systems in CARICOM and an analysis of the problems and challenges faced.

The under-researched area of copyright management in Universities is next addressed in the chapter. The rationale for rights management and current management methodologies are interrogated.

The findings of the chapter lay the groundwork for testing the hypothesis of this study - that copyright management in these two areas would be best undertaken on a regional basis.

2.2. The Music Industry

2.2.1. Global Scene

The business aspect of music is generally referred to as “the music industry”. The term is often used in a narrow sense to refer to the music publishing business and the

recording business. However, more broadly viewed, the music industry also encompasses broadcasting, live performances, the use of information and communication technologies in the creation and distribution of music, music training, the manufacture and sale of instruments, professional and technical services (e.g. legal and accounting) and the protection of interests and management of rights by trade associations and CMOs. This makes the global music industry a complex of activities with various income streams.[72]

Historically, the music industry has benefited from the introduction of new technologies and new forms of exploitation. With the invention of the phonogram in the early part of the 20th century, the recording industry replaced the industry for sheet music and became, over time, a massive industry consisting of artistes, producers, distributors, manufacturers, retailers, engineers, record labels, recording studios, publishers, marketing agencies and songwriters. Many businesses developed with their own labels under which they recorded, produced and published music. Recording and publishing companies mushroomed, and lucrative deals with established publishers and record producers were coveted by songwriters and musicians. Record producers became very powerful as broadcasting organisations relied on them for the supply of music, and composers and musicians needed recording and publishing contracts to

[72] K. Nurse, "The Cultural Industries in CARICOM: Trade and Development Challenges", *Report* prepared for CRNM, 2006 (revised version December 2007) p.28. http://www.acpcultures.eu/pdf/The%20Cultural%20Industries%20in%20CARICOM.pdf
For insights into various aspects of the industry see generally S. Frith and L. Marshall (eds.) *Music and Copyright, 2nd* Ed. (New York: Routledge, 2004).

enable their works to reach the market. Later, the introduction of the compact disc was responsible for an increase in industry revenue[73].

Despite the challenges posed to the industry by digital technologies (discussed below) the overall volume of music consumed in recent years has been greater than ever before, and the global music industry has been one of the fastest growing sectors in the world economy. IFPI reported that 2008 marked the sixth consecutive year of growth in the digital music business internationally, with growth in 2008 up by 25% to U.S$3.7 billion in trade value. The U.S.A. accounted for about 50% of the global digital music market with Japan, the UK and Germany showing steady growth.[74] However, rising digital sales have not kept pace with the plunge in CD sales. Record company revenues from such tangible products tumbled roughly 6% in 2007, leaving firms with some $19.3 billion in total sales last year, a quarter less than in 1999.[75]

A striking feature of the global music industry is corporate concentration. By pursuing various business strategies, including vertical as well as horizontal integration, the major players retain their dominance in the market.[76] Through the strategic use of mergers and acquisitions, four large firms -"the majors" - dominate the global music

[73] Garnett, *et al*, op cit., paragraph 27-124.
[74]IFPI, *Digital Music Report 2009*, p. 4. http://www.ifpi.org/content/library/DMR2009.pdf
[75] A. Smith, "The Music Industry: Lost in the Shuffle" *Time Magazine*, March 19, 2008. http://www.time.com/time/magazine/article/0,9171,1723689,00.html
[76] Vertical integration involves increasing control over different stages in the production and distribution process. Horizontal integration involves the merger or buy-out of businesses, some of which may be successful in strategically important niche markets. In the music industry a company may own the recording rights in a deal with an artiste, while the rights to publish, record and distribute the products are owned by a holding company, sister companies or subsidiaries. See R. Wallis, "Best Practice Cases in the Music Industry and their Relevance for Government Policies in Developing Countries", WIPO/UNCTAD, 2001, p.6. http://www.wipo.int/about-ip/en/studies/pdf/study_r_wallis.pdf ,and T. Cvetkovski, "The Great Rock 'n' Roll Firesale: The Politics of Popular Music Production and Consumption.", (2008) 6(1) *Dialogue.* http://www.polsis.uq.edu.au/dialogue/Vol6/Cvetkovski.pdf

market, accounting for almost 75% of global music sales. Latest reports allocate market share as - Universal (28.8%); Sony BMG (20.1%), Warner Music Group (14.4%) and EMI (10.9%). Independent labels from all over the world enjoy just under 25% of market share.[77]

2.2.2. Digital Technology

The music industry has been revolutionised by digital technology and the development of the Internet. Digital technology enables the creation of new music products and the growth of new income streams, but it also facilitates the copying of music easily and cheaply, without impairment of quality. The Internet has enabled distribution of digital music anywhere in the world. Further, the development of MP3 technology which allows the compression of digital data (thereby facilitating the transmittal of large files) coupled with the proliferation of the peer-to-peer platforms (as exemplified by Grokster[78]) put people in the position to upload and download music files, without permission, for trading and swapping. In response, digital rights management (DRM) systems have been developed to give right-holders more control over the use of their

[77] See K. Holton, "Universal extends Music Market share: Report", Reuters, April 3, 2008. http://www.reuters.com/article/entertainmentNews/idUSL0375895920080403

[78] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* (04-480) 545 U.S. 913 (2005) (Grokster distributed free software that allowed users to share files electronically through computers that communicated directly with each other (peer-to-peer) and not through a central server. A group of movie studios and other copyright owners sought an injunction and damages for copyright infringement alleging that the company knowingly and intentionally distributed software to enable users to infringe works protected by copyright in violation of the U.S. Copyright Act. The U.S. Supreme Court held that a person who distributes a device "with the object of promoting its use to infringe copyright as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device regardless of the device's lawful uses." pp. 10-24. Before its transformation into a licensed service, Napster was the first peer-to-peer service that came to prominence. The original Napster service was shut down after the U.S. Court of Appeals held that its peer- to -peer service which allowed users to download copyright material could be liable for contributory infringement of the plaintiff's copyright. See *A &M Records v. Napster*, 239 F. 3d 1004 (9th Cir. 2001).

works.[79] While the use of DRM technologies remains critical to the music and motion pictures industries, their effectiveness has been reduced by two factors - the lack of interoperability,[80] resulting in negative consumer reaction, and the development of various circumventing technologies.[81] Legal protection for the use of technological measures and rights management information has been provided at the international level by the WCT and the WPPT.[82]

The availability of DRM systems for use by right-holders themselves has raised the question whether the collective management system is still necessary or relevant.[83] Some scholars have argued that the collective management system is redundant in the digital age since individual exercise of rights is both feasible and possibly more efficient, in some cases.[84] Others take the view that collective management of rights

[79] According to the OECD Working Party that examined the issues affecting the sale of online music, DRM offers three key procedures 1) the encryption of content to keep it unavailable to unauthorised users; 2) the establishment of a licensing system for controlling who can access the content and what can be done with it in specific circumstances; and 3) the authentication of the identity of the user, a required step for accessing the different usage rights awarded by the licence. OECD, *Report on the Information Economy*, OECD, DSTI/ICCP/IE (2004)12/FINAL, June 8, 2005. Cited by C. Stromdale, "The Problem with DRM", (2006) 17(1) Ent.L.R. 1.

[80] Interoperability refers to the fact that DRM could prevent services from being used or accessed using different types of equipment. For example, DRM systems have not permitted compressed music files to be played on iPods unless they were downloaded off iTunes or converted from CDs using Apple's own software; also in relation to data placed on music CDs, some DRM systems prevented the data from functioning on computers and from being replicated on CD burners. See Stromdale, op cit., p. 1.

[81] A good example is the descrambling software DeCSS, created by Norwegian Jon Johansen, then 16 years old, which cracked the code used to encrypt movies for use on DVDs, known as CSS (Contents Scramble System). The software allowed film DVDs to be played on systems other than Windows and MacIntosh (e.g. Linux) and was posted on the Internet. See A. Thomas, "DVD Encryption- DECSS", (2000) 11(6) Ent.L.R.135.

[82] See WCT Articles 11 and 12 and WPPT Arts. 18 and 19.

[83] M. Ricolfi, "Individual and Collective Management of Copyright in a Digital Environment", in P. Torremans, (ed.) *Copyright Law: A Handbook of Contemporary Research* (Cheltenham: Edward Elgar Publishing, 2007) p.283.

[84] M. Kretschmer, "The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments", (2002) E.I.P.R. 126, p.133.

remains relevant[85] and may even strengthen, given the growth of new fields such as the licensing of multimedia productions.[86] However, as has been pointed out, the relevance of CMOs is assured only if they adjust their own business models and internal practices and structures to enable them to remain effective intermediaries between the creators they represent and the market.[87]

2.2.3. New Business Models

The need for new business models in the music industry arises because, in the changed environment engendered mainly by technological advances, consumers want music delivered to them in new ways. In particular, young consumers have grown accustomed to accessing music through their computers or multi-channel television and radio. Further, the increased production of music on digital versatile discs (DVDs) marked a shift towards a more visual appreciation of music and performers. The CD, vinyl records and cassettes have become less attractive in light of the ability to download music in digital form from the Internet.[88]

After initial resistance, the music industry seems to have accepted that, for its survival, it was imperative for the industry to move away from the "record-centric" model of doing business and the emphasis on rents from the exploitation of copyright material

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[85] D. Gervais, "The Changing Role of Copyright Collectives", in D. Gervais (ed.) *Collective Management of Copyright and Related Rights* (The Netherlands*:* Kluwer Law International, 2006) p. 20.

[86] For example, M. Ficsor, *Collective Management of Copyright and Related Rights,* (Geneva: WIPO, 2002) paragraphs 256-264.

[87] Gervais, op cit., pp. 20-21. In this connection it should be noted that the EU Authorities have issued various documents pertaining to rights management and the structure and operations of CMOs. Much of the impetus for their interest derives from the problems that arise in relation to the cross-border licensing of online music in the EU. For a discussion of the approach of the EU authorities to collective management of rights see Chapter 3 *infra*.

[88] Keynote Publications Ltd., *"Music Industry Market Review 2006"* April, 2006. http://www.mindbranch.com/prod-toc/Music-Review-R310-1320/

and to create, instead, new business models that would allow for the diversification of its revenue streams across a wide variety of products, services and platforms.[89] As Nurse puts it, the industry has had to shift away from "selling things to the exploitation of rights and lifestyle merchandising."[90]

The association representing the recording industry has confirmed that the music business "is moving from sales to 'monetising' access to music".[91] This new business model has led to many initiatives. Record companies have established online music services on the Internet in competition with illegal sites.[92] The focus on access has led to the offering of music bundled with other services or devices, usually in partnership with technology companies, in order to reach consumers. New revenue streams have also been created through strategic partnerships with social networks on the Internet such as MySpace, and the use of platforms such as YouTube. There has also been a greater thrust to use music in advertisements and games and to engage in merchandising of products associated with artistes.[93]

Record labels have also had to cope with the new approaches being adopted by major artistes as alternatives to the traditional arrangements with the labels. Among the prominent examples is the decision in 2008 by the UK band Radiohead to release its

[89]The traditional business model of the recording industry was based on the sale of records and CDs in retail stores. CD sales have declined drastically over the last 10 years with a commensurate increase in digital sales, which only partially covers the shortfall from the reduced sale of records and CDs. Consistent with the increase in the use of digital music is the increase in sales of Ipods and Itunes which permit the storage and playing of vast quantities of music. See A. Koster, " The Emerging Music Business Model: Back to the Future?", Paper presented at the European Applied Business Research and College Teaching and Learning Conference, Salsburg, 2008. http://www.jamk.fi/download/Strategic_Music_Management_8.pdf

[90] Nurse, op cit. p33 (see Note 70).

[91] IFPI, *Digital Music Report*, op cit., p.1.

[92] It has been reported that digital platforms now account for abut 20% of record music sales, up from 15% in 2007. Ibid., p.4.

[93] Ibid., pp.4 -13.

new album "In Rainbows" directly to the public *via* their website (rather than through a record label) and allowing their fans to choose whether, and how much, to pay for the album. This was soon followed by the giving away, by the American recording artiste Prince, of three million copies of his new album with the British tabloid, *The Mail*, a week before it was scheduled for release. Subsequently, the singer/performer Madonna, signed an agreement with Live Nation, a concert promoter, which covers not only future albums but also her brand name, touring, merchandising and media projects – the arrangement now commonly called the "360-degree" deal.[94] Attempting to recover lost ground and revenues, some major record labels are said to be increasingly pressuring new and emerging artistes to agree to these types of contracts.[95]

Other new business approaches by the recording industry include the making available of DRM- free music so as to avoid the interoperability problem faced by consumers,[96] offering advertising-supported services as a strategy to "reclaiming a younger generation of consumers habituated to a culture of "free music", and the use of peer-to-peer technology to support paid downloading services. [97]

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[94] I. Brereton. "The Beginning of a New Age? The Unconscionability of the 360-Degree", 27 Cardozo Arts & Ent.L.J. 167, 168. A 360-degree deal may be defined as a contractual arrangement in which a company that derives its profits from a traditional type of business (e.g., selling recorded music, organizing concerts and producing television series) reaches beyond these traditional sources of income and creates additional income streams which would otherwise flow into the pockets of the artiste or to third parties - for example, income from touring, sale of merchandise and other business in which the artiste might be engaged. E. Kromer, "Implications of 360-Degree Deals", The Music Industry Report, December 4, 2008. http://musicindustryreport.org/?p=2141

[95] However, the question has been raised as to whether, especially in relation to new young artistes who may not have ready alternatives, 360 degree contracts may not violate unconscionability doctrine under U.S. Law. See Brereton, op cit., for a discussion of this issue.

[96] This DRM-free model allows consumers to buy music from any store and to play tracks on any device.

[97] IFPI, *Digital Music Report 2008*, p. 16. http://www.ifpi.org/content/library/dmr2008.pdf

Despite the increase in the number of legitimate sites from which online music can be obtained, downloading from unauthorized sites has continued unabated, and appears to be on the increase.[98] Although it appeared that the view advocated by the recording industry – that Internet Service Providers (ISP) as carriers of digital content must assume some responsibility to curb the piracy of music online -- was gaining ground, there is no consensus on the matter.[99] Given the ubiquity of the Internet and the fact

[98] The claim of the industry is that 95% of all music downloads are illegal. IFPI Digital Music Report 2009, op cit., p.3. As far as the UK is concerned, a recent study commissioned by the quasi-Government body the Strategic Advisory Board for Intellectual Property and conducted by the Centre for Information Behaviour and the Evaluation of Research (CIBER) of University College, London (UCL) found that at least seven million people in Britain use illegal downloads, costing the economy billions of pounds and thousands of jobs. See CIBER/UCL "Copycats? Digital Consumers in the Online Age", SBIPP, May 2009. http://www.sabip.org.uk/sabip-ciberreport.pdf

[99] No uniform pattern has emerged in Europe with respect to the liability of ISPs for infringement of copyright by users. What exists is a variety of approaches both at the official level and at the level of ISPs themselves. Backed by the Government, ISPs in France have instituted a voluntary enforcement regime which adopts a 'three-strikes and you're out' approach (meaning that the service of a copyright infringer would be disconnected if three infringements are recorded). In Belgium, in a case brought by a collective management organisation (*SABAM v SA Scarlet* (2007) E.C.D.R. 19.) the court ordered the ISP Tiscali to implement filtering software to block infringing content. However, the ECJ has ruled (in *Productores de Musica de Espana (Promusicae) v Telefonica de Espana*, (2007) ECDR CN1 (C-275/06)) that ISPs cannot be forced to disclose the identities of individual file-sharers to rights-holders who are seeking to take legal action for infringement, unless the Member state in which the disclosure is sought has implemented a specific derogation from the obligations imposed on ISPs by the e-Piracy Directive to respect confidentiality in electronic communications. See L. Hetherington, "Peer-To-Peer File Sharing-ISPS and Disclosure of User Identities", (2008) 19(4) Ent.L.R 81. See also M. Frabboni, "ISPS Not to Disclose the Identity of Their Users: A Green Light for File-Sharers", (2008)19(1) Ent.L.R. 19. In the UK, while indicating its preference for a voluntary or commercial agreement between ISPs and others in the sector with respect to action to be taken in respect of illicit file sharing, the UK Government has declared its willingness "to legislate in this area if required" and undertook to consult on the form and content of such regulatory provision with a view to implementation of legislation by April 2009. See UK Govt./DCMS/BERR, "Creative Britain: New Talents for the New Economy", *Green Paper*, 2008, paragraph 5.9.
http://www.culture.gov.uk/reference_library/publications/3572.aspx
A consultation document has been issued by the Government through the Department of Business Enterprise and Regulatory Reform (see UK Govt./BERR, "Consultation Document on Options to Address the Illicit P2P File- sharing", July 2008.) http://www.berr.gov.uk/files/file47139.pdf
However, up to the time of writing, no legislation on the subject had been implemented. In the meantime, ISPs in the UK have taken different approaches in dealing with the issue. For example, while Virgin Media has agreed with BPI (the UK body representing the recording industry) to trace illegal downloading to individual accounts and to send two letters to their consumers in respect of infringing action, TalkTalk, the third largest ISP in the UK, regards the demand by BPI to disconnect people who ignore requests to stop file-sharing as unreasonable and unworkable. See generally, R. Massey "Independent Service Providers or Industry's Secret Police? The Role of the ISPS in Relation to Users Infringing Copyright", (2008) 19(7) Ent.L.R. 160.

that the problem is an international one, it is submitted that a transnational approach to the solution would be most desirable.

While these developments in the global music industry have their greatest impact in the large markets, the issues so far discussed in this chapter also have a bearing on the music industry in the Caribbean. The sections that follow provide an overview of the Caribbean music industry, with specific reference to two CARICOM states - Jamaica and Trinidad and Tobago.

2.3. The Importance of Caribbean Music

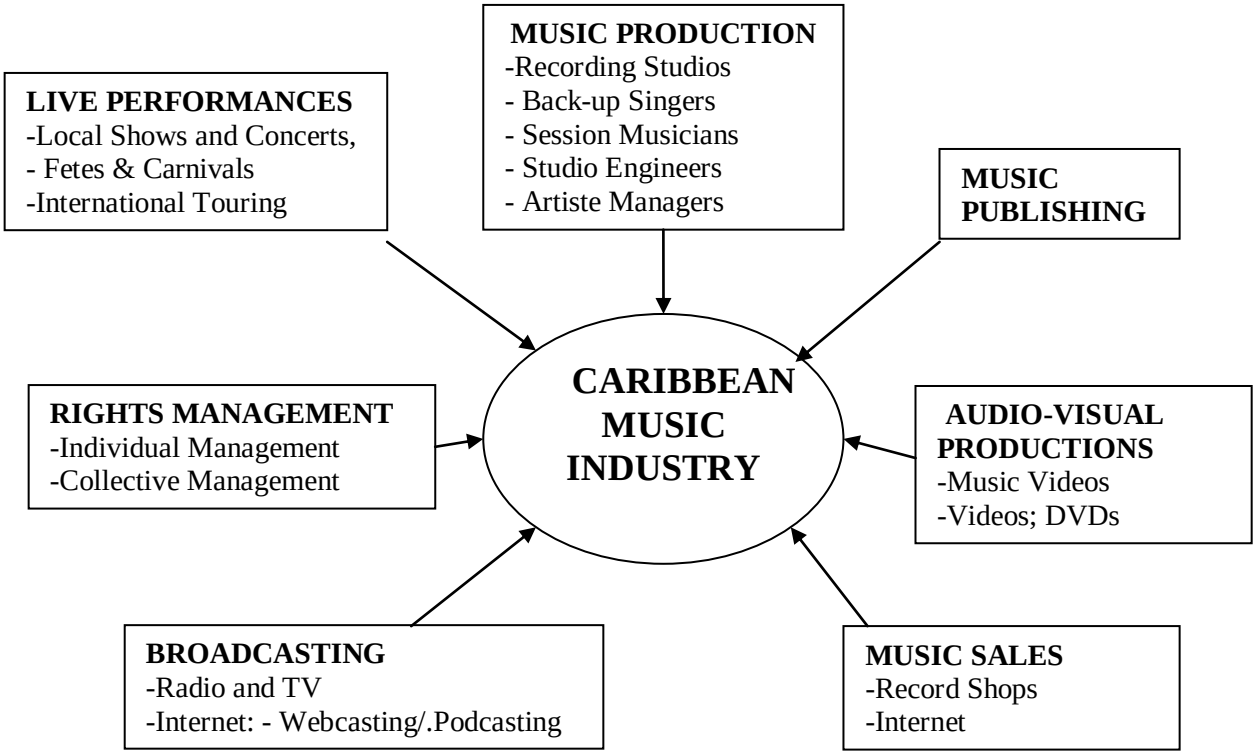
In this study, the term "Caribbean music industry" refers to the existence of a market for music goods and services originating in the English-speaking states of CARICOM. It encompasses all the economic activities concerned with the production and marketing of such goods and services and the management of the copyright and related rights involved.[100] (See Table 1). Various genres of music have been exported from the English-speaking Caribbean - notably calypso, ska (blue beat) and reggae, and many artistes from the region, in particular, Bob Marley, have a global following.[101] As is the case with many developing countries, the Caribbean has not been able to translate this abundance of creativity into a wider and deeper productive capacity, although some

[100] Nurse, op cit., p 29.
[101] K. Dawes, *Bob Marley: Lyrical Genius* (Berkeley, California: Publishers Group West (PGW) 2007). See also E. Wint and C. Cooper (eds.) *Bob Marley: The Man and His Music (*Kingston, Jamaica, Arawak Publications, 2003) a collection of essays arising from a symposium held in Jamaica in 1995 under the auspices of the Reggae Studies Unit of the University of the West Indies to celebrate the 50th anniversary of Bob Marley's birth.

level of popularity has been achieved in the global markets by a small number of outstanding artistes.[102]

Table 1

Structure of the Caribbean Music Industry



Source: K. Nurse, Cultural Industries in CARICOM: Trade and Development Challenges, 2006 revised December 2007, p.30.

The function of this overview is to provide an understanding of the nature and origins of current problems in the industry in the region, including rights management, and to provide the context for a discussion of the existing collective management systems for

[102] See generally R. Wallis and Z. Kozul-Wright. "From Minor to Major: Policy Challenges for developing countries in the Global Music Industry", Paper prepared for UNCTAD (TD/401), 2004. http://www.unctad.org/en/docs/td401_en.pdf

music. Against this background, the central theme of this study - that in the Caribbean the collective management of copyright should be undertaken on a regional basis – can be advanced.

In more recent years, the music industry in the region has developed around two genres of music, reggae and its offshoot "dancehall" created in Jamaica, and soca originating in Trinidad and Tobago. Both genres have been popularized mainly through recorded music, with reggae music being the more dominant in terms of global reach and appeal.

As many writers have indicated, [103] one of the distinct drawbacks to research efforts on the music industry in the Caribbean is the absence of quantitative data. Consequently, scholars (including the author) have had to base their assessments of various aspects of the industry on qualitative information and key informants.

2.3.1. Jamaica

2.3.1.1. Origin

The expression "Jamaican music" refers to a variety of styles of music evolved over generations, with each style developing through the creativity and experimentation of composers, performers and music producers. All the studies conducted on Jamaican music recognize the strong social and cultural significance of music to the sense of

[103] For example, H. Brown," "National Strategy & Action Plan to Further Develop the Jamaican Music Industry", *Report* prepared for UNESCO, 2004.
http://portal.unesco.org/culture/en/files/25324/11061492859Music_Strategy_Final_Draft_December_2004.doc/Music%2BStrategy%2BFinal%2BDraft%2BDecember%2B2004.doc
GOTT/SCBD, "Strategic Plan for the Entertainment Industry of Trinidad and Tobago", *Final Report*, December 2006.
http://www.tradeind.gov.tt/Business_Dev/MusicEnt/EntertainmentFinalReport06-01-20.pdf

identity of the people. Many also allude to the vast untapped economic potential of the industry as a contributor to development.[104]

Witter identifies three distinct periods in the development of the Jamaican music industry.[105] The first period identified is the pre-1950 era, before the recording of music in Jamaica. The music of the day was mainly American music- swing and jazz - played by big bands, and accepted as the popular music in more sophisticated dances and clubs. The music of the people was "mento" generally played by small groups of musicians mainly in rural areas. It was popular at village festivals and in hotels, as entertainment for tourists.[106] The dominance of American music on the Jamaican scene continued after World War II with the assistance of the newly established radio stations which also showed a strong bias for classical and country and western music.

During this period, the Sound System became established and the beginnings of an industry associated with music could be discerned.[107] Some of Jamaica's iconic record labels evolved from sound system operations.[108]

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[104] See Brown, op cit. p. 3 and works there cited.

[105] M. Witter, "Music in the Jamaican Economy", *Report*, UNCTAD/WIPO 2004. http://www.wipo.int/about-ip/en/studies/pdf/study_m_witter.pdf

[106] As a music form, mento arose in the 19th century Jamaican slave society. It was a fusion of the African music of the slaves and the British folk music of the slave owners and their employees.

[107] The Sound System is said to be a Jamaican innovation. As Hutton explains, the Sound System is "an electronic mode of playing for mass entertainment; units of pre-recorded music analogically stored on gramophone or phonographic records spun on a turntable connected to an amplifier from which an assemblage of speakers (sometimes called house of joy) are attached… ". It was initially used as a marketing tool to attract potential shoppers to an already established business place but evolved to become the centrepiece of social gatherings throughout Jamaica, especially in urban areas. C. Hutton, "Forging Identity and Community through Aestheticism and Entertainment: The Sound System and the Rise of the DJ", in (2007) 53(4) *Caribbean Quarterly* 16. The dances at which the Sound Systems played spawned other small-scale economic activity as they provided opportunities for the sale of food and drink. Like the dance promoters, most of the patrons were from the working classes. Today, Sound Systems regularly play in North American cities with large Jamaican communities. Witter, op cit., pp. 4, 24. See also J. McMillan "Trench Town Rock: The Creation of Jamaica's Music", Graduate School of Business, Stanford University, June 2005. http://www.gsb.stanford.edu/cgbe/cases/case_pdfs/IB56.pdf

The second period identified by Witter spans two decades - 1950 to 1970. It is in this period that a distinctive Jamaican sound began to emerge. By the beginning of this period, a new style of local music called "ska" or "blue beat"[109] came into vogue. The new sound was a blend of mento rhythms with American rhythm and blues. During this time, a fledging recording industry began to take shape, with small manufacturers producing vinyl records for the local market.[110]

In this period also, with improved technology and experimentation among Jamaican musicians, international artistes such as Paul Simon, Mick Jagger, Eric Clapton, Roberta Flack and flautist Herbie Mann were attracted to Jamaica. They recorded music in the distinctive Jamaican style which, by then, had evolved from "ska" to "rock steady" and then to "reggae"[111]. The business aspect of music tended to be concentrated in a few companies, but many informal enterprises became involved.

In the third period identified by Witter- after 1970 - the elements that constituted a local music industry were being solidified, and a well-defined sphere of economic activity in the form of several interlocking markets for music goods and services could be

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[108] The legendary "Treasure Island" label of Arthur "the Duke" Reid and the rival label "Studio One" run by Clement "Coxsonne" Dodd, were said to be both outgrowths of their respective Sound System businesses. J. Shepherd and D. Laing, *Continuum Encyclopedia of Popular Music of the World* (London/New York: Continuum International Publishing Group, 2003) p.678.

[109] "Ska" was marketed in the UK as "blue beat" mainly through the hit song "My Boy Lollipop" sung by the Jamaican Millie Small who was managed by Jamaican-born Englishman Chris Blackwell. Blackwell was later to manage Bob Marley through his company Island Records. The success of "My Boy Lollipop" not only signalled that there was an appetite for Jamaican music in the UK but demonstrated the importance of investment in promoting and marketing the music. Witter, op cit., p.34.

[110] Ibid.

[111] Ibid. See also J. Shepherd and D. Laing, op cit., p.657.

discerned. Further, Jamaican music began to have increased global appeal[112] and the growth in the demand for Jamaican music overseas led to the establishment of a few local recording and manufacturing companies.[113] However, the need to provide good quality products for the international market led to a shift of recording and manufacturing processes overseas, where more modern recording and manufacturing technologies were available, and where services and facilities relating to the business aspects of music, such as marketing, managerial, legal and collective management services were readily accessible. In the absence of a vibrant collective management system for music in Jamaica, local artistes became members of foreign CMOs such as ASCAP, BMI and PRS. Through such membership, Jamaican artistes were able to earn substantial and sustainable forms of hard currency income.[114]

The local music industry in Jamaica has always relied heavily on the foreign music manufacturing and distributing sectors.[115] The recording of music and the manufacture of CDs and records overseas, sometimes followed by tours to promote the recordings,

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[112] The global appeal of reggae music is attributable not only to its compelling rhythms. Reggae songs often have powerful lyrics containing social and political commentary, decrying injustice, and proclaiming freedom and brotherly love. Some of the Marley songs became anthems for various movements: notably, the song "Get up Stand up, Stand up for your Rights" became a rallying song for resistance groups fighting against the apartheid regime in South Africa. (The author heard this publicly declared by Nelson Mandela in his acceptance speech on the occasion of the conferment on him of the Honorary Degree of Doctor of Laws from the University of the West Indies at the Mona Campus in Kingston, Jamaica in July 1991).

[113] Very modest recording businesses had been established in the 1950s which initially recorded mento and later recorded and helped to promote other forms of Jamaican music as they evolved. Over the years, recording facilities became increasingly sophisticated, improving with the growth and spread of digital technology. Several home studios were also developed especially in the early years of the current decade and seem to have generated a constant flow of new releases from Jamaican singers. In the year 2002, it was estimated that more than 200 recordings were being released each week. Witter, op cit., p. 35.

[114] Witter, op cit., p.8.

[115] V. James, "The Economic Contribution of Copyright-Based Industries in Jamaica", *Final Report*, WIPO, 2007, paragraph 2.11.1.

became the pattern for top Jamaican artistes. This meant that significant elements of the business relating to Jamaican music were taking place abroad.

As regards copyright protection, while copyright legislation was in force to protect songwriters and composers and record producers,[116] there was little familiarity with copyright principles among the major players of the day. Moreover, arrangements between artistes and producers tended to be informal, and written contracts were hardly in place.[117]

Of all the genres of Caribbean music, Jamaica's reggae music has enjoyed the highest level of internationalization, due mainly to the global appeal of the work of Bob Marley and the Wailers.[118] Although reggae remains popular, new types of music, notably the "dancehall" genre[119] have evolved within the last two decades and there is a growing market for home-grown gospel music[120].

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[116] The UK Copyright Act of 1911 was in force in Jamaica at this time, supplemented by a local Act of 1913 which dealt mainly with penalties. Although it was outdated in many respects, the 1911 Act provided a fair level of protection for authors, composers, publishers and record producers.

[117] See *infra* at 2.3.1.2.

[118] See C. Barrow-Giles and D. Marshall, *Living at the Borderlines: Caribbean Sovereignty and Development* (Kingston Jamaica, Ian Randle Publishers, 2004) p.84. McMillan points out that from a business point of view, Marley's recordings have been perpetual big earners especially after his death in 1981. The compilation album "Legend" released in 1991 sold 12 million copies in 2004 in the United States and the United Kingdom. Two decades after Marley's death, his estate was earning about US$10 million each year. In 2007 Marley was named in the Forbes Magazine list of top-earning dead celebrities. See L. Goldman, D. Walt (eds.) "Top-Earning Dead Celebrities", *Special Report*, 2007. Forbes.com. http://www.forbes.com/2007/10/29/dead-celebrity-earning-biz-media-deadcelebs07_cz_lg_1029celeb_land.html. In 1999 the BBC chose Marley's "One Love" as the millennium song and the Time Magazine named his 1977 album "Exodus" the best album of the century. J. McMillan, op cit., p.5. However, while Marley is the dominant figure internationally, several other exponents of Jamaican music such as Jimmy Cliff, Peter Tosh, Steel Pulse and Third World, have contributed significantly through their recordings and foreign tours to the creation of a niche for reggae in the world market.

[119] Currently, the Jamaican music genre "dance hall" is the dominant indigenous music throughout the English-speaking Caribbean. See. W. Sinclair, "Artistic Creation as a Vector for Development: a Caribbean Music Industry Perspective", Paper presented at a Workshop on the

Even during this post-1970 period, inadequate attention was paid to rights management. Often, credits for songs were casually assigned, and it was not unknown for a given song to be credited to different writers at different times and in different circumstances.[121]

2.3.1.2. Characteristics

McMillan suggests that the Jamaican experience in growing its music industry from scratch has valuable lessons for other developing countries.[122] Locating the development of the Jamaican music industry within a theoretical framework, he describes the Jamaican music industry as "a very tight cluster".[123]

McMillan asserts that "industrial clusters" are a feature of third-world businesses although not unique to developing countries. The term refers to the concentration in a particular geographic area of firms (usually small ones) producing the same goods. Industrial clustering allows small firms to benefit from at least some forms of economies of scale and cumulative innovation.[124]

Music Industry as a Key Development Factor in ACP Countries, Culture and Creativity, Brussels, p. 3. http://www.culture-dev.eu/colloque/Culture-Dev.eu-theme4-en.pdf
Sales of dancehall recordings have been impressive with notable exponents such as "Shaggy" and Sean Paul achieving, respectively, Platinum status of 6 million copies and Gold, Platinum and Multi-Platinum status in the U.S. Nurse, op cit., p.33.

[120] Witter, op cit., p.14.

[121] McMillan, op cit., p.7.

[122] Ibid., p. 12.

[123] Ibid., p. 14.

[124] McMillan points out that in Jamaica the main recording studios of the formative years were concentrated on a single street in downtown Kingston. He cites a survey of the theory of agglomeration by Duranton and Puga (2004) which identified three distinct elements of agglomeration economies. 1) *Sharing*- firms share the gains from a wider variety of input suppliers and a finer division of labour 2) *Marketing* - clustering means markets are thick – so the large number or buyers and sellers result in efficient matches being realized and limits the holdup

One of the characteristics of the Jamaican music industry is the way in which markets are supplied. Traditionally, in the retail trade, Jamaican consumers and sound system operators are supplied with both Jamaican and non-Jamaican music by music stores, while recorded music outlets are supplied by the wholesale trade. There is also some demand from record store operators in the Eastern Caribbean and Japan and from migrant populations in North America and Europe.[125] The extensive global market for Jamaican music tends to be supplied through international record companies, some with Jamaican ownership or influence. The size of the global market may be contrasted with the country's small market, given its small size.[126] In 2000, the sale of 5000 copies of a record in the Jamaican market was regarded as successful by industry players.

As regards the retail aspects of the industry, a small retail trade supplies Jamaican consumers with imports of recorded music, and the creative and productive sector with music related goods such as musical instruments and audio and video equipment.[127]

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problems that arise in a thin market (c) *Learning* - the fact that the firms were physically close to each other helps with the diffusion of knowledge. McMillian sees each of these sources of agglomeration economies illustrated in the Jamaican music industry. Proximity lowered transaction costs. Further, given the thousands of musicians and the dozens of recording studios, matches between specific musicians and specific music producers could be made and the musician and producer could specialize narrowly. But the main source of gains from the Kingston music cluster, he argues, has been to foster innovation similar to that observed in Silicon Valley with its culture of mobility and sharing. Despite the competition among producers and session sponsors musicians moved freely among the record companies. Moreover, the circle of musicians who were in high demand tended to play together, working on and experimenting with new musical ideas with innovations spreading freely and forming the basis for new experimentation. Op cit. pp 14-16.

[125] Witter, op cit., p.15.

[126] Ibid. However, it is often vital for the success of a song overseas that it does well in the Jamaican market as this gives it the stamp of approval and confirms its authenticity as a true Jamaican sound.

[127] Op cit, p.12.

Another characteristic of the Jamaican music industry is the consistent demand in the market for live music by both local and international audiences. It seems that the weak institutional arrangements for collecting royalties for recorded music has meant that earnings from live concerts and tours have always overshadowed the returns from recorded music.[128] However, this is not peculiar to Jamaica. It has been observed that musicians worldwide, in various genres of popular music, now earn far more from concerts than from recordings, the price of concert tickets having grown rapidly since the 1990s.[129]

As regards the structure of the Jamaican music industry, studies have characterised it as highly fragmented, underdeveloped and informal.[130] According to Davis, fragmentation in the industry is manifested by the lack of an organized industry lobby, a fragmented agenda, short-term planning and sporadic individual marketing campaigns. In addition, there is an absence of strong global labels for Jamaican music and limited international market penetration. Management skills in the areas of music business and talent development are limited, as are education and training opportunities for music production, performance management and marketing.[131]

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[128] Op cit., p.44.
[129] M. Connolly and A, Kreuger, "Rockonomics: The Economics of Popular Music", *Working Paper* No. W11282, NBER, April 2005, cited by McMillan, op cit., p.12.
[130] Brown, op cit., p.6.
[131] A. Davis, "Strategies for a Successful Caribbean Music Industry in the Global Market: Branding Intellectual Property- The Case of Jamaican Music", Presentation at a CRNM Workshop on the impact of trade and technology on Caribbean Creative Industries, Port of Spain, Trinidad, 2004. http://www.musicdish.com/downloads/CARIBBEAN%20MUSIC%20IN%20A%20GLOBAL%2.0MARKET.ppt

Yet another feature of the industry is the multiple roles that one individual may play - as musician, producer and promoter, perhaps ensuring, in this small market, different steams of income from different as aspect of the business.[132]

A decidedly negative aspect of the industry is piracy which has become a debilitating feature of the local industry, and is one of the reasons for the lack of competitiveness of domestic production, especially in the digital environment.[133]

As regards rights management, the collective management system in Jamaica is weak, overall. In this regard, James's assessment of existing CMOs is telling and is worth quoting:

> "In general, all of these agencies are tiny, with two to four clerical employees, a manager, one or two computers and related furniture comprising a typical operation. Most employees other than managers have no better than grade 11 education and typically had less. All of the copyright agencies lack sophisticated databases for storage of comprehensive data on clients and provision of the level of knowledge of the clients required to adequately represent their interests in the local and regional policy arena…" [134]

This characterisation of CMOs in Jamaica could well apply across the region. It supports the hypothesis of this study that, given the small size and lack of adequate human and other resources, the management of copyright should be pursued on a regional basis.[135]

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[132] Witter, op cit., p.47.
[133] Nurse op cit., p.31.
[134] James, op cit., paragraph 3.1.9.
[135] This argument is developed in Chapter 4 in relation to the management of the rights of authors, composers and publishers of music and in Chapter 5 in respect of the management of University-generated copyright.

Despite the challenges and deficiencies of the industry, Nurse points out that, compared to the music industries of other Caribbean countries, the Jamaican case has been outstanding. He alludes to the fact that a special sector of the Grammy Awards has been established for reggae[136] and notes that no other developing country to date has produced such large numbers of artistes who have enjoyed high international sales, international awards and lucrative performing contracts all over the world.[137]

2.3.1.3. Economic Contribution

Over the years, several attempts have been made to quantify the earnings accruing from the exploitation of Jamaica music, the bulk of which is generated overseas mainly from live performances and tours.[138] However, these efforts have been hampered by the unavailability of consistent and/or reliable data. This information gap has adverse implications for the development of public policy and for planning.[139] Crude estimates by Kozul-Wright and Stanbury attribute US$450M or 3% of world sales as accruing to Jamaican musicians in 1996.[140] Casting doubt on the accuracy of such a high figure for that time, Witter more modestly estimates that for the year 2000, the amount from world sales of Jamaican music was in the region of US$60-100 million.[141]

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[136] The special category for reggae music was established in 1985. http://reggaegrammy.com
[137] Nurse, op cit., p.38.
[138] Witter, op cit., p.56. (Top Jamaican artistes appear to earn in excess of US$1M per year in shows alone).
[139] Brown, op cit., p.6.
[140] Z. Kozul-Wright and L. Stanbury, "Becoming a Globally Competitive Player: The Case of the Music Industry in Jamaica", UNCTAD, 1998 (UNCTAD/OSG/DP138) p. 24. http://www.unctad.org/en/docs/dp_138.en.pdf
[141] Witter, op cit., p.32.

In a more recent study, James assessed the contribution of the copyright sector in general to Jamaica's economy in 2005 as US$464.7M or 4.8% of the GDP.[142] Of this figure, the main contribution of approximately 36.6% came from the core copyright sector in which music is located. The sector also employed 3% of the employed workforce.[143]

In relation to CMOs, the study found that in 2005, their share of the copyright GDP was 0.0796 while the overall share of GDP was a miniscule 0.0004%.[144]

2.3.1.4. Government Involvement

The music industry in Jamaica has developed without much assistance from Government.[145] This is despite the fact that the economic potential of the entertainment industry in general had long been recognised by Government. The National Industrial Policy of Jamaica (1996), a fifteen- year plan and policy statement, discussed culture and entertainment as one of the target clusters for development as a non-traditional export, and declared the Government's "formal recognition of the entertainment industry, its importance as an expression of the richness of our national culture, and its incorporation as an integral element of the national effort to promote growth and

[142]James (op cit., at paragraph 1.3) adopts the WIPO classification of "core copyright industries" which includes music, theatrical productions, radio and TV, new media and copyright collective management". For a full classification of copyright industries see WIPO, *Guide on Surveying the Economic Contribution of Copyright-Based Industries* Geneva, WIPO Publication No. 983(E), 2003.

[143] James, op cit., paragraph 1.5. James's assessment relates to the copyright sector in general. In an earlier study, Witter (op cit., p. 56) had assessed that the music industry, in particular, employed the equivalent of 1% of the workforce.

[144] James op cit. paragraph 5.5 "Table 25- Contribution of Copyright Sectors to GDP, 2005".

[145] For example, Witter, op cit., p. 57.

development of the Jamaican economy and society."[146] This was the first time that music was acknowledged as an instrument for economic growth. More recently, after years of agitation by interested groups, the Government eliminated duties on the tools of trade for musicians.[147]

In recent years, scholarly analysis of the music industry in the Caribbean has taken place in the context of an assessment of the potential economic value of the cultural industries in growing the economy. The studies have been conducted against the background of the steady dimunition in the economic significance of export earnings derived from the traditional sources - sugar, banana and bauxite. This is due in part to trade liberalization and the loss of preferential trading arrangements with the UK.

A common theme in the studies is that, despite the wealth of creativity and innovation in the Jamaican music sector over the years, and the constant flow of talented artistes with styles of music of wide international appeal, the economic impact on Jamaica's economy is negligible. This suggests that most of the money being made from the Jamaican music business is being made outside of Jamaica and, most likely, largely by non-Jamaicans.

In his study on the contribution of copyright-based industries to the economy of Jamaica[148] James has made several recommendations concerning the development of the copyright sector in general, on the basis that the economic analysis and projections

[146]GOJ, *The National Industrial Policy* (1996); p. 128; Brown, op cit., p. 4.
[147] Witter, op cit., p. 57.
[148] See James cited at Note 113 *supra*.

indicate that investment in this sector would, over time, bring returns far in excess of current returns from the traditional, Government-incentivized sectors such a tourism and agriculture. Among the recommendations are a) strengthening of the legislative framework and enforcement mechanisms to curb piracy; b) expansion of public educational programmes, including the education of workers about the potential gains from innovative and creative activity in all segments of the sector; and c) improvement of the capacity of the CMOs, especially in upgrading their e-business capability in the areas of digital documentation, logging and monitoring of the use of works controlled by them.[149]

2.3.2. Trinidad and Tobago

2.3.2.1 Origin

The plural ethnic mix of Trinidad and Tobago has resulted in the development of a diverse repertoire of music that is indigenous to the country, alongside the global mainstream genres of jazz, gospel and rock.[150] The music most closely identified with Trinidad and Tobago is calypso, an admixture of African and European rhythms.[151] While calypso became popular in the Caribbean from the early to mid-1900s, it gained popularity internationally, especially in the U.S., when the American trio, The Andrews

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[149] Ibid., p.318.

[150] GOTT/SCBD, "Strategic Plan for the Entertainment Industry of Trinidad and Tobago", *Final Report*, December 2006, paragraph 2.1.1. http://www.tradeind.gov.tt/Business_Dev/MusicEnt/EntertainmentFinalReport06-01-20.pdf

[151] Trinidad was colonized by the Spanish, received large numbers of French immigrants, and was later ruled by the British. The majority of people are of African, Indian and European descent. The country's multi-colonial past has greatly impacted the development of calypso in Trinidad. Many early calypsos were sung in a French-Creole dialect called patois and were usually led by one individual called a "griot ", the predecessor of the modern calypsonian. See Caribbean Music 101 on Carib Planet. http://caribplanet.homestead.com/101.html

Sisters, did a cover version of Lord Invader's song "Rum and Coca Cola",[152] and Henry Belafonte recorded "The Banana Boat Song"[153] Calypso is often the vehicle for trenchant social and political commentary: lyrics were often risqué and laced with *double entendre*.[154]

Continuous experimentation over the years gave rise to a variety of new forms, the main ones being 1) soca (a mixture of American soul music and calypso); 2) rapso (a mixture of Calypso, music from Jamaica and black "rap" music from the centres of the U.S. 3) chutney (the fusion of Indian music and ingenious rhythms) and 4) direct fusions of Trinidad jazz with music of the steel pan and Indian instruments like the sitar. A Latin element in the form of "parang" had been introduced with the influx of Venezuelans in the 19th century. Blends of styles have yielded "Soca Parang", chutney soca; and chutney parang. Gospel music, confined to the Christian community and initially imported, has shown rapid growth, mirroring the expansion of the evangelical movement in the country and the popularity of this genre of music among local practitioners. Classical music and chorale singing form part of the musical tradition of

[152] S. Stuempfle, "Documenting Calypso in New York and the Atlantic", Institute for Studies in American Music, (2004) 33(2) Newsletter, City University of New York. http://depthome.brooklyn.cuny.edu/isam/S04Newshtml/Calypso/Calypso2.htm The version by the Andrew Sisters became one of the top songs in the U.S. during the World War II era, and subsequently sparked a major copyright battle in the courts. Ibid. See *Baron* v. *Leo Feist* 78 F. Supp. 686 (S.D.N.Y. 1948).

[153] Popularly known as "Day O!", which are the opening words of the song. The song was released in 1956 on Belafonte's album *Calypso* which was the first full length record to sell more than a million copies. Nurse has observed that Belafonte's six Gold Albums in between 1961and 1967, singing mainly in the calypso style was a remarkable achievement in its time. Op cit., p.33.

[154] For example, the Might Sparrow's calypso "Jean and Dinah" celebrated the departure of U.S. troops and the resulting demise of prostitution as a lucrative trade. (The troops had been stationed at a Naval Base on lands that had been leased to the U.S. Government during World War II) E. Doumerc, *Caribbean Civilisation: the English-Speaking Caribbean since Independence*, (Toulouse, France, Presses Universitaires du Murail, 2003) p.48.

the country and some local artistes work in rock, jazz and rhythm and blues. [155] While local music is widely enjoyed, like Jamaica and the English-speaking Caribbean in general, North American popular music dominates the airwaves in Trinidad and Tobago.[156]

The steel pan is a central feature of the music of Trinidad and Tobago. It is both a musical instrument and a form of music. Government subventions and corporate sponsorship sustain 'pan' music. However, the recording of pan music and the manufacturing of pans form only a small part of the domestic music industry, both being integrated in the metropolitan (mainly U.S.) industry. Once the core of the annual pre-Lenten Carnival in Trinidad, steel bands now mainly operate in the fetes leading up to the Carnival.[157]

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[155] Henry, op cit., pp.4– 6.
[156] Ibid.
[157] The steel pan is said to be the only music instrument invented in the 20th century. It is a Trinidadian invention. A steel pan is made from a 55 gallon drum typically used to store crude oil (Trinidad and Tobago is the Caribbean's leading producer of oil and gas). It is a pitched percussion instrument and is tuned chromatically. Players are called "pannists". The manufacture and use of the pan as a musical instrument is considered part of the traditional knowledge of Trinidad and Tobago. Ibid., p.2. The Government successfully challenged a patent issued by the United States Patent and Trade Mark Office (USPTO) on an alleged invention - The "Cycle of Fifths" – that claimed ingenuity for an arrangement of notes on the surface of the steel pan which purportedly made the playing of the steel pan easier. It was demonstrated that the system was well- known locally and appeared in the local literature on the subject. However, the USPTO confirmed the validity of another patent issued to inventors associated with the University of Delaware for the "Production of a Caribbean Steel pan" by a hydro forming production method for the mass production of steel pans .(See http://www.ipo.gov.tt/Steelpan%20Challenge.html) and has issued other patents for pan production. For example, a patent was issued in 2006 for the production of an Electronic synthesized steel pan drum. http://www.patentstorm.us/patents/7030305/description.html

2.3.2.2. Characteristics

In many respects, the Trinidadian music industry reflects some of the characteristics noted in relation to the industry in Jamaica. Goods and services are supplied to consumers through sound recordings, live performances, broadcasting (via television and radio), musical instruments and retail outlets for recorded products.[158] The number of recording artistes is relatively small, reported in 2006 to be in the region of 900, most of who record calypso or soca.[159] In addition to the small local market, the demand for music from Trinidad is associated with the development and institutionalisation of carnivals and festivals throughout the world.[160] Because of the small Caribbean markets, economic returns are significant only if the music is accepted internationally. However, entry into the international market requires a high degree of adaptability to satisfy the tastes of a wider market, and only a few musicians succeed.[161]

Nevertheless, the music of Trinidad enjoys some degree of success through sales to the large Caribbean communities in North America and the UK. Experience shows that acceptance of the music overseas is largely dependent on whether it has been a "hit" in the home market, even though a big hit song in the local market means sales of only 5000 units. For this reason, investment in the local market, though expensive, is critical, as popularity of a song in the home market operates as a stamp of approval..[162]

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[158] Henry, op cit., p 6.
[159] Strategic Plan, op cit., paragraph 2.1.1
[160] Ibid., paragraph 2.1.2. Trinidadian-inspired Carnival celebrations are now annual events in different parts of the world supported by people of the Caribbean Diaspora but also by other nationalities in the host country. E.g. Notting Hill Carnival in London, Caribana in Toronto and the Labour Day Carnival in Brooklyn, New York. See also Henry, op cit., p.2.
[161] For example, Trinidadian Anselm Douglas's song "Who Let the Dogs Out?" became a big international hit when the composition was adapted to the international market by a Bahamian group which appeared to have a cultural proximity to the U.S. market. Henry, op cit., p.4.
[162] Ibid., p.9.

Another characteristic of the industry is the low level of manufacturing capability. Henry reports that manufacturing constitutes a very small part of the domestic music industry, comprising small firms offering compact discs produced from inexpensive commercial duplicating equipment. There are no mastering and duplicating facilities to international standards. Recordings are usually sent to U.S. on DAT tapes for mastering, and CD, cassettes and vinyl recordings are produced and sent back to Trinidad. The domestic industry is therefore integrated into the metropolitan industry and performs a secondary role to it. [163]

A peculiarity of the industry in Trinidad is the intense activities in the local market in the period leading up to the annual pre-Lenten Carnival. At this time, songwriters, composers and musicians have opportunities to earn mainly by appearing in Calypso "Tents". There are also competitions leading up to crowning of a calypso King and Queen who will "reign" over the carnival celebrations. The winning songs are played widely on the airwaves and at Carnivals in the region and also in the post-Carnival circuit overseas in countries where Caribbean people reside.[164] This period is very significant for the collective management organization, COTT, as it is the time of every year when the most income is generated for its local members.[165]

A significant feature of the industry is the wide disparity in income generated abroad by local performers compared to amounts they earn from local engagements: artistes are

[163] Ibid., p.8.
[164] Strategic Plan, op. cit., paragraph 2.1.1.
[165] See *infra* at 2.4.2 for a review of COTT's activities.

able to earn up to six times the standard fee for a foreign, as compared with a local, performance. Calypsonians and other musicians, therefore, tend to operate in a trans-national mode- that is, their market space is beyond the domestic market. However, whether occurring locally or overseas, live performances have increasingly become the main sources of income for artistes because music sales have declined. This has been due mainly to piracy, including illegal downloads, the limited broadcasting of their works and the high costs involved in recording and marketing albums.[166]

Music publishing is undertaken only to a limited extent in Trinidad and Tobago. COTT records only 32 publisher members.[167]

With respect to musical instruments, most professional musicians purchase instruments overseas, but there is a small market for locally-made steel pans. However, steel pan manufacturing is a slow painstaking process involving the cutting of steel oil drums, sinking, grooving, tempering and tuning. There are a few established companies now manufacturing and exporting steel pans mainly to the educational music market in North America and Europe.[168] However, there is evidence of effective competition in metropolitan countries from steel pan manufacturers using advanced industrial processes for some of which patents have been issued.[169]

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[166] A. Demas and R. Henry, "Entertainment Services with Special References to Music, Mas and the Film and Video Segments", Report prepared for CARICOM Trade Project, CRNM, 2001. http://www.bahamas.gov.bs/bahamasweb2/home.nsf/vImagesW/CRNM+Entertainment+Study/$FILE/crnmentertainmentstudy.pdf

[167] Henry, op cit., p.10.

[168] Ibid., pp.7-8.

[169] See Note 155.

2.3.2.3. Economic Contribution

It is estimated that the music industry contributes between US$50-60 million dollars every year to the economy of Trinidad and Tobago, generated mainly by festival tourism, live performances and the recording industry. The music industry ranks in the country's top ten export sectors [170].

2.3.2.4. Government Involvement

As a significant stakeholder in the development of the industry, Government is expected to facilitate the creation of the infrastructure for a sustainable music industry and to make the industry more competitive. Actions would include continuing music literacy education, training and apprenticeship programmes and the strengthening of the enabling environment by the provision of fiscal incentives and easy access to working capital. However, it has been said that, over the years, the Government of Trinidad and Tobago has been ambivalent in its support for the development of the industry.[171] In official circles, issues affecting the industry tended to be subsumed in plans to develop the entertainment industry as part of a thrust to increase foreign exchange earnings.[172] The music industry has been a subject of renewed interest in more recent times in the context of the potential of the cultural industries to contribute to economic development. Music and entertainment are among the areas identified for development in the Government's thrust for economic diversification.[173]

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[170] Strategic Plan, op cit., paragraph 2.1.2.
[171] S. Sandiford , "Integrated Cultural Products", Presentation at *CFIS*, 2004. http://www.sanch.com/global-music-industry.htm
[172] Henry, op cit., p.31.
[173] See Address by the Hon. Patrick Manning, Prime Minister of Trinidad and Tobago, on the launch of the Trade and Investment Convention, April 30, 2008, *Trinidad and Tobago News* http://www.news.gov.tt/index.php?news=130

2.4. Caribbean Collective Management Organisations

2.4.1. The PRS Model

The UK-based Performing Right Society (PRS) was the sole performing right organisation in the English-speaking Caribbean for over sixty years. It operated through resident commission agents, and in some cases, a resident agent would serve more than one country in the region.[174] The main task of a PRS agent was to license local users of works controlled by PRS and collect royalties for such use. Licensing was carried out using tariffs established by PRS Head Office in the UK. The agent was also expected to recruit local right-holders for PRS membership. Documentation on local members and their works would be transmitted to Head Office to be stored in the PRS database and distribution of royalties for local members would be done from London. From the amount collected locally, PRS would deduct the cost of maintaining the local agent, plus the costs associated with various administrative functions. These costs ranged from 40-50%.

In the absence of indigenous societies, PRS provided a needed service for some local authors, composers and publishers of music. However, there was some concern among local right-holders that the use of their works locally was not being adequately monitored by the agents and that the sampling system used in the UK by PRS and elsewhere by PRS affiliates, was not capturing the true use of Caribbean works which, in turn, negatively affected the level of royalties paid.[175] In addition to the view that local interests were being underserved by the PRS agents, nationalist sentiment in the

[174] P. Berry, "Feasibility Study Relating to Regional Collective Management of Copyright in the Caribbean", Paper presented at WIPO Roundtable on Collective Management of Copyright and Related Rights for Caribbean Countries, June 1999 (WIPO/CCM/MBY/99/1) p. 24.
[175] Henry, op cit., p.10.

post-independence period leaned in favour of the formation of a local organisation For its part, PRS espoused a policy that encouraged the formation of local bodies and facilitated their establishment in Trinidad, Jamaica, St. Lucia and Barbados.[176]

2.4.2. Copyright Organisation of Trinidad and Tobago (COTT)

The Copyright Organisation of Trinidad and Tobago (COTT) is a national performing right organisation that represents songwriters, composers and music publishers in Trinidad and Tobago. Established in 1984 as a not-for-profit membership body, its principal function is to manage the performing, broadcasting and mechanical rights of its members.

Replacing PRS, COTT was the first indigenous performing right organisation established in the Caribbean. Its establishment brought more structure to the music industry and greater participation by local copyright owners.[177] Until it was firmly established with the requisite expertise, technology and experience, COTT only managed the rights of its members locally. By virtue of a bilateral arrangement, COTT's members were represented worldwide (outside of Trinidad) by PRS. Under that arrangement COTT paid PRS a fixed 70% of broadcast income collected in Trinidad which was allocated to the international repertoires.[178]

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[176] Berry, op cit., p. 25. More recently, PRS assisted in the development of ECCO See *infra* at 2.4.5.
[177] Henry, op cit., p. 17.
[178] This is on the basis of a 70:30 ratio use of foreign to local music in Trinidad and Tobago.

The organisation is run by a twelve-person Board of Directors comprised of six elected writer members, two elected publisher members, two non-members (independent Directors) selected by the elected Directors, one Honorary director and a Consultant Director. Membership of COTT is open to any person who is the original composer of music or lyrics that are publicly performed or recorded for release. A music publisher qualifies for membership if he or she has publishing contracts covering at least five (5) musical works. In 2007, total membership stood at 1722.[179] The fact that this is a relatively small number is, in part, a function of the smallness of this state, a feature which characterises all CARICOM states.[180]

COTT is a member of CISAC and has concluded reciprocal representation agreements with several foreign CMOS, including PRS, and the two large CMOs in the U.S., ASCAP and BMI. This indicates that COTT's improved performance over the years has earned the confidence of sister organisations in its ability to manage their repertoires locally.

Table 2 below presents the total collections by COTT (including collections for foreign CMOs) with respect to the licensing of the performing right over a five-year period. It demonstrates relatively low annual intakes which is attributable to the small size of the market, under-licensing (owing to the resistance of some major users) and the high incidence of piracy, including illegal downloading. The Table does, however, indicate a pattern of marginal improvement over the years.

[179] COTT, *Annual Report* 2007, p.12.
[180] See Chapter 3 *infra* for a discussion of the impact of small size on rights management.

Table 2

Total Performing Right Royalties collected by COTT 2003-2007

YEAR	US$
2007	2,166,361.00
2006	1,789,412.00
2005	1,348,819.00
2004	939,786.00
2003	1,141,879.00

Source: COTT, *Annual Report 2007*, pp.9-10

Table 3 below shows COTT's receipts from foreign CMOs over the period 2003-2007 for the exploitation of the performing right in Trinidadian music overseas. There is some variation in the level of amounts remitted over the years, with 2007 showing a significant increase. COTT attributes this to increase in receipts that year from PRS following COTT's submission of information concerning some of its members.[181]

In 2007 COTT made total distributions of US$1,022,955. For the first time in COTT's history, 69% of the amount collected in that year went to members of COTT because of increased efforts at licensing the use of music during the Carnival period.[182]

In general, however, the bulk of distributions by COTT is usually made to its foreign affiliates, reflecting a high use of Anglo-American music and music derived from the Bollywood film industry in India.[183]

[181] Annual Report, op cit., p. 9.
[182] Ibid., p.10.
[183] Ibid., pp.10-11.

Table 3

Performing Right Royalties received by COTT from Foreign CMOs 2003-2007

YEAR	US$
2007	108,066.00
2006	45,493.00
2005	71,598.00
2004	27,534.00
2003	62,746.00

Source: COTT, *Annual Report 2007*, pp 9-10

Further, while Trinidadian music enjoys some popularity in various localities in North America and Europe, it is not played in mainstream radio stations or in other fora that are targets for licensing and collection by international CMOs.[184]

Like other CMOs in CARICOM, COTT remains constantly challenged by the high rate of piracy in Trinidad and Tobago and weak enforcement. The view has been expressed that Government authorities appear to give low priority to copyright infringement.[185] COTT is the most vibrant and advanced of all the CMOs in the region. In more recent years, it has enjoyed strong and dynamic leadership and has made significant improvements to its management systems.[186] COTT carries out social and cultural functions through its philanthropic arm, the COTT Foundation.[187]

[184] Strategic Plan, op cit., p.5 8.
[185] Ibid., p.59.
[186] However, a rival organization, the Trinidad and Tobago Collections Organization was established in 2000 and focuses on collecting royalties for the use of Indian music. The existence

2.4.3. The Jamaica Association of Composers, Authors and Publishers (JACAP)

JACAP is the performing right organisation in Jamaica. Like COTT and other CMOs in CARICOM, it is established as a not-for-profit membership organisation, having as members, composers, authors and publishers of music. It offers the typical services of an organisation of its kind - licensing music that is publicly performed, broadcast and/or diffused by cable, monitoring the use of members' works and collecting and distributing royalties. It also manages the mechanical rights of its members.[188]

The second indigenous performing right organisation to be established in the English-speaking Caribbean (after COTT), JACAP commenced operations in 1999, having been formed in the previous year with significant help from PRS, which it replaced. The organisation is managed by a Board of Directors, including a representative of the Government. Current membership stands at just over 500 persons. [189] JACAP is a member of CISAC and has reciprocal bilateral agreements with several foreign CMOs.

Figures available show steady increases over the years in membership and distributable income although these remain relatively low.[190] However, opportunities exist for

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of another performing right organisation has caused uncertainty among users (Strategic Plan, p. 60-61) and has fractured an already small market.

[187] The Foundation's primary aim is to foster the development of Trinidadian music and an appreciation for its commercial value. It also assists songwriters and composers to identify opportunities to have their works performed and/or recorded nationally and internationally. Ibid., p. 21.

[188] See JACAP website http://www.jacapjamaica.com

[189] This figure is quite small when compared to the membership of COTT, considering that Jamaica is a relatively larger country with a more developed industry and a larger number of writers and composers. JACAP appears to be experiencing some difficulty in wooing away artistes from membership of foreign CMOs such as PRS and ASCAP and also has a problem attracting and retaining appropriate staff at the managerial level.

[190] Information supplied informally to the author of this study by an employee of JACAP is that for the years 2006-2008, average licensing income was just over US$300,000 per annum, with the bulk of this amount going to foreign CMOs with respect to the use of their members' works

licensing on a wider scale and there is need for improvement in data collection. JACAP has concluded reciprocal representation agreements with a number of foreign organisations including ASCAP and BMI, and is a member of CISAC.[191]

2.4.4. Copyright Society of Composers Authors and Publishers (COSCAP)

COSCAP is established in Barbados as a not-for-profit membership organisation to manage the performing, mechanical and synchronization rights of its members. It also administers related rights of performers and producers of phonograms. [192] COSCAP is run by a Council comprised of elected representatives from among authors, composers, publishers, producers and performers as well as a Government nominee. COSCAP has reported growth in its membership over the years with the current number of members being over 600.[193]

The conversion of the PRS agency in Barbados took place in 1998 with the establishment of the Barbados Association of Composers Authors and Publishers which was renamed in the year 2000 as the Copyright Society of Composers, Authors and Publishers. In that same year PRS and COSCAP agreed to the handing over to COSCAP of the responsibility to manage locally the rights of the Barbadian members of PRS as well as the international repertoire which PRS had administered under reciprocal agreement with sister organisations. PRS was authorised to represent all of

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locally. The amounts actually paid to local JACAP members were not disclosed. According to the informant, in the same period, administrative costs ranged between 28% and 40%.

[191] Ibid.

[192] In 2004 the National Society for Managing the Rights of Performers - the Caribbean Related Rights Association (CARRA) was dissolved and absorbed into COSCAP to enable the pooling of resources.

[193] COSCAP, Annual Report 2007, p.3. Its membership includes performers and record producers.

COSCAP's interests outside of Barbados until the former could conclude its own bilateral agreements. COSCAP now has reciprocal agreements with over 30 foreign CMOs and is a member of CISAC.[194]

Figures available show that the levels of royalty distributed by COSCAP are very modest. In the period 2005-2007 the largest amount distributed to authors, composers and publishers of music amounted to the equivalent of US$35,000). As is the case with other CMOs in CARICOM, COSCAP's administrative costs are quite high- ranging between 35% and 45%.[195]

COSCAP has established a Foundation that seeks *inter alia* to advance the welfare of its members and to foster the development of the music industry and other creative industries in Barbados.[196]

2.4.5. Hewanorra Musical Society (HMS)/ECCO

HMS was established in 1998 as the successor to PRS in St. Lucia. It is a not-for-profit membership organisation that is managed by a Board of Directors which includes a Government appointee. In 2007, membership of HMS stood at just over 200. HMS's main source of income is derived from licences issued to radio stations and cable operators in St. Lucia and revenues collected from hotels, restaurant and bars. The organisation also receives revenue from licensing the streaming and downloading of

[194] Ibid., p.10.
[195] Ibid., pp. IV-V.
[196] The COSCAP Foundation for the Promotion of the Barbados Music Industry.

music over the Internet and for the use of music as ringtones. No information on the income levels or royalty distribution is publicly available.

HMS has negotiated reciprocal representation agreements with societies in Spain, France, Barbados and Jamaica, but under a special arrangement is represented by PRS in the rest of the world. Administrative costs are high, reported as 50% of collected revenue.[197]

In September 2008 HMS was converted into the Eastern Caribbean Copyright Organization for Music Rights Incorporated (ECCO) and assumed collective management responsibility for the performing right in several countries in the English-speaking Caribbean - Anguilla, Antigua & Barbuda, the British Virgin Islands, Dominica, Grenada, Montserrat, St Kitts-Nevis and St. Vincent and the Grenadines, where the PRS had operated for several decades through local agents.[198] This move towards a sub-regional approach is significant. Many authors, composers and publishers of music in these countries were not members of PRS. The availability of a regional indigenous organization should see an increase in membership and licensing income throughout the Eastern Caribbean. The establishment of a sub-regional CMO supports the hypothesis of this study that the traditional management of rights on a territorial basis is not appropriate in the small states of CARICOM. However, as will be

[197] See HMS Website- http://www.hmsstlucia.org/faqs.htm
[198] S. Bishop "ECCO Officially Launched", in *The Voice*, January 29, 2009, The Voice Publishing Co., St. Lucia. http://www.thevoiceslu.com/features/2009/january/29_01_09/ECCO%20Officially%20Launched.htm

seen, this study advocates a more radical form of regionalism in the collective management of rights in CARICOM.[199]

2.4.6. Caribbean Copyright Link (CCL)

The management tasks associated with the collection and distribution of royalties, in particular, are complex and demanding, requiring good data gathering and analysis. The experience of the local CMOs shows that the cost of administering copyright and related rights is high. The traditional mode of rights management requires that each national CMO establish the machinery and employ the expertise to undertake the full range of functions normally carried out by national CMOs, thereby replicating costs and effort. It became clear that, unless economies of scale could be achieved by the sharing of management resources, the operation of these small national organisations would not be sustainable.

CCL was incorporated in 2000 under the laws of Trinidad and Tobago as a not-for-profit company. It evolved out of a Regional Committee that had been established to liaise with WIPO, which had undertaken, at the request of Governments of the region, the task of examining the feasibility of "a regional approach to the collective management of copyright in the Caribbean region, based on minimizing operating costs at the national level".[200] The concept was that CCL would function as a regional hub,

[199] See Chapters 4 and 5, *infra*.

[200] The issue was raised at the WIPO Regional Meeting of Heads of Intellectual Property Offices of Caribbean Countries and the WIPO Ministerial-Level Meeting on Intellectual Property for Caribbean Countries held in Port of Spain, Trinidad in 1997. The recommendations of the study were accepted in 1999 at the WIPO Roundtable on Collective Management of Copyright and Related Rights and the WIPO Ministerial-Level Meeting on Intellectual Property for Caribbean Countries held in Montego Bay, Jamaica. See WIPO "Development of a Regional System for the Collective Management of Copyright and Related Rights in the Caribbean", Progress Report to the

providing back-office services to the four founding CMOs - COSCAP (Barbados), COTT (Trinidad and Tobago) HMS (St. Lucia) and JACAP (Jamaica).[201] WIPO provided significant levels of funding to get CCL operational, particularly for the training of Caribbean personnel and the purchase of hardware and software. It concluded a co-operation agreement with the Spanish author's society (SGAE) which had been in the process of developing rights management software to enable its own operations in Latin American to be conducted on a regional basis. This system, Sistema de Gestion de Sociedades (SGS), was installed at the four CMOs,[202] but the CCL server is able to support other CMOs that might come on stream.[203]

A significant development for CCL was the achievement of International Standard Work Code (ISWC) agency status from CISAC. This allows CCL to assign a unique identification number that all CISAC member societies will apply to each musical work entered into the regional database by CCL member organisations. The use of the work codes has meant the easy identification of work with right-holder, thereby ensuring Caribbean right-holders get the royalties due to them for foreign use or record sales.[204]

Permanent Committee on Co-operation for Development Related to Intellectual property Second Session, Geneva February 5-8, 2001 (PCIPD/2/3).

[201] See Chapter 4 *infra*, for a discussion of the regional approach discussed in two WIPO studies.

[202] SGS is made up of several integrated modules which together perform all the necessary collective management functions, including performing right licensing, collection, mechanical rights licensing, documentation of works and right-holders, distribution of royalties, and the generation of statistics and data. An important feature of the system is the incorporation of the data and data exchange standards established by CISAC and used by other CISAC members worldwide. See P. Berry, "Study of the Potential Feasibility of a Cluster Approach to Extending Collective Management Operations to Micro Markets in the Caribbean Region by Means of Existing, Adapted, or New Elements of the Regional System", 2004, prepared for WIPO (unpublished).

[203] The server is located in Madrid and, along with the Internet-based network connecting the CMOs, is managed by the SGAE-SGS development team. A. Demas and R. Henry "Entertainment Services with Special reference to Music, Mas and the Film and Video Segments", Study prepared for the CRNM, Barbados, 2004.
http://www.bahamas.gov.bs/bahamasweb2/home.nsf/vImagesW/CRNM+Entertainment+Study/$FILE/crnmentertainmentstudy.pdf

[204] WIPO, "Progress Report on the Project for Establishing Collective Management Organizations in the Caribbean Region", Paper presented at WIPO Meeting of Heads of IP Offices of Caribbean

CCL does not licence works or collect royalties. Its task is to facilitate the member organisations in the performance of those functions. Its main tasks may be summarized as follows: a) to implement and maintain documentation standards and quality across the region for all incoming data; b) to deliver regional documentation to CMOs worldwide and to other regional or international data centres; c) to maintain the functionality of the regional data network; d) to carry out the processes necessary for royalty distribution, and e) to assist national CMOs to identify unmarked works and performances.

The establishment of CCL as a regional mechanism for copyright management is a step in the right direction in that it was designed to relieve the national CMOs of many of the time-consuming and labour intensive administrative functions. Indeed, its value as a back-office for member organisations has been acknowledged.[205] It is submitted, however, that if the problems affecting the management of copyright rights in CARICOM are to be adequately addressed a more comprehensive regional approach is needed along the lines developed in Chapter 4.

2.4.7. Summary of Challenges facing CMOs in CARICOM

In general, CMOs in CARICOM are not robust organisations. Undoubtedly, significant improvements in collective management of rights have occurred over the years,

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Countries, November 25 and 26, 2003, Antigua and Barbuda, (WIPO/HIP/AG/03/3) paragraph 18.

[205] For example, COTT credits CCL with helping it to reduce the number of unidentified musical works in the Caribbean because of its assistance in the identification, registration and documentation of these works, resulting in increased royalty distributions. COTT, *Annual Report* 2007, p.6.

especially in Trinidad and Tobago, Jamaica and Barbados. However, copyright management has been severely hampered by many challenges both in the external environment and in the internal operations of the CMOs.

The fact that the markets in which they operate are small, and in some cases, are micro-markets - a significant but unalterable fact – is a challenge in itself. Membership of these organizations is low- only COTT in Trinidad has more than 1000 members. As regards their use of technology, the available proprietary software the CMOs rely on for the collection of data and aiding distribution is not fully adapted to their needs, and difficulties have been experienced in having it adjusted or acquiring new software. CMOs also face human resource issues. [206] Low income precludes the employment of persons to operate at the levels required, and staff turnover is said to be high.[207] The extensive use of Anglo-American music means that the bulk of royalties collected in the region is transmitted to CMOs in the U.S. and UK.[208] Calls have been made to the Governments of CARICOM[209] to review their broadcasting policy with a view to requiring broadcasters to air not less than a prescribed percentage of local music, as was done by the Government of Canada. The situation is aggravated by the fact that despite the widespread use of Caribbean music in North American and Europe, on the airways, in clubs and at a number of annual Carnivals, foreign CMOs do not usually

[206] See Note 132 and related text.
[207] Nurse, op cit., p.202.
[208] According to Smith, over 80% of distributions are made to foreign CMOs. E. Smith, "Challenges Facing the Cultural Industries – A Caribbean Perspective" http://www.sedi.oas.org/dec/espanol/documentos/challengesfacingtheculturalindustries.doc
[209] See, for example, Nurse, op cit., p.44.

remit royalties for the use of the music because their sampling mechanisms are directed to the mainstream media and events and do not capture the use of Caribbean music.[210]

Perhaps the most serious challenge to Caribbean CMOs is piracy. While this is a universal problem, there are socio-cultural factors in CARICOM states that appear to exacerbate the situation. There is a strongly held view that creative expression should be free. This notion engenders hostility to the idea of obtaining licences for the use of music, even among large players like broadcasting organisations.[211] The inability to collect revenues threatens the economic viability of the CMOs whose revenues are further reduced by the illegal downloads of Caribbean music. Commentators point to the absence of political will to tackle piracy and the low priority placed on copyright breaches by the judiciary, police and customs authorities in the region.[212]

Failure of most Governments in the region to accede to the WIPO Treaties and to amend their laws accordingly, has deprived local right owners of the protections the Treaties afford in the digital environment.[213] Government's role is regarded as critical in advancing copyright management, particularly in upgrading their e-capacity in the areas of digital documentation, logging and monitoring,[214] public education, enforcement and the upgrading of copyright laws to increase the level of penalties.[215]

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[210] Strategic Plan, op cit., 1.5.
[211] Smith, op cit. p.1.
[212] Brown, op cit., p.9.
[213] Nurse, op cit., p.202.
[214] James, op cit., paragraph 5.1.
[215] Brown, op cit., p.9.

This section of the chapter examined the music industry in two of the most active markets in the Caribbean- Jamaica and Trinidad and Tobago. The review was done against the background of developments and trends in the global music industry and the challenges presented by digital technologies. The purpose of the section was to identify the origins, characteristics, structures and challenges of the industry in these countries and, by so doing, provide insights into the context in which collective management of rights operates in the Caribbean. The objective was to lay the foundation for a proposal that a regional model of copyright management should be instituted. A similar objective will be pursued in the following section of the chapter with respect of the management of University-generated copyright.

2.5. University-Generated Copyright

2.5.1 The University Scene in CARICOM

Universities in the English-speaking Caribbean occupy the top level of the higher education sector in the Caribbean, which is comprised of over 150 institutions.[216] Of these, over 60% are publicly supported, about 30 % are privately funded and the rest are under private ownership with some government support.[217] Brandon contrasts the situation of the exclusivity enjoyed by UWI for decades as the only degree granting-institution in the English-speaking Caribbean (while various national colleges offered lower level qualifications) with the current diversified higher education landscape with new players and programmes. Many national degree-granting institutions are now firmly established in several CARICOM States. In addition, within the last decade, there has been a proliferation of private off-shore distance education providers, based mainly in North America and the Untied Kingdom, that use both traditional and modern distance learning technologies to offer programmes to students in the region. In some cases, institutions at the local level offer tuition in support of these external or distance programmes.[218]

In this study, the advocacy of regional co-operation in the management of copyright relates only to Universities in the English-speaking states of CARICOM. However, the model proposed could be extended to other types of tertiary institutions. By way of

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[216] G. Howe, "Contending with Change: Reviewing Tertiary Education in the English-Speaking Caribbean", Paper prepared for IESALC-UNESCO, July 2003. http://unesdoc.unesco.org/images/0013/001315/131593e.pdf

[217] Ibid.

[218] See generally E. Brandon, "New External Providers of Tertiary Education in the Caribbean", Paper prepared for IESALC-UNESCO, July 2003. http://www2.iesalc.unesco.org.ve:2222/programas/internac/Informe%20Final%20Internacionalizacion%20-%20Caribe.pdf

providing a context for the proposed model, the following section provides a brief description of the main Universities in the English-speaking states of CARICOM and an indication of their current status with respect to copyright management.

2.5.1.1. The University of the West Indies

UWI is the oldest institution of higher learning in the English-speaking Caribbean. Established by Royal Charter,[219] it is supported by fifteen (15) English-speaking countries, the majority of which are former colonies of the United Kingdom.[220] Modelled on the chartered British University, UWI operates on three physical campuses- the Mona Campus in Jamaica, the St. Augustine Campus in Trinidad and Tobago and the Cave Hill Campus in Barbados, and a newly established Open Campus that mainly serves those contributing countries without physical campuses.[221] It is the only higher education institution with a presence throughout the Caribbean and has the largest concentration of intellectual capital in the region.

UWI is administered through "Centre" and "Campus" management structures. The University Council, chaired by the Chancellor, is the principal policy-making body. All academic matters fall within the purview of the Senate, notably the approval of courses of study and the grant of degrees, diplomas and other awards. The Vice

[219] A Royal Charter of 1948 established the University College of the West Indies in "a special relationship" with the University of London. In 1962 a new Charter established the autonomous University of the West Indies. See P. Sherlock and R. Nettleford, *The University of the West Indies: a Caribbean Response to the Challenge of Change* (London: MacMillan Caribbean, 1990).
[220] The contributing countries of UWI are Anguilla, Antigua and Barbuda, The Bahamas, Barbados, Belize, British Virgin Islands, Cayman Islands, Dominica, Grenada, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago. \in 2009 Bermuda was admitted as a contributing country. Bermuda's petition to become a contributing country was approved by the University Council in May 2009. UWI Public Relations Office, "Bermuda Joins the UWI Family", *Press Release*, May 14, 2009.
[221] The Open Campus was established in 2008.

Chancellor, the principal executive officer, presides over the running of the "Centre" which is responsible for the corporate business of the University as a whole. The Centre exercises management functions in relation to all cross-campus Faculties, Institutes, Centres, School and administrative units.

Each campus enjoys a fair degree of autonomy. It has its own administrative structure of Committees and Boards and is headed by a Principal. Institutional coherence and the regionality of the University are maintained mainly through various inter-campus appointments to Boards and Committees and membership of campus personnel on Centre bodies. All campuses offer undergraduate and post-graduate courses in several disciplines.[222] In the academic year 2007/2008, total student enrolment at UWI was 40,673.[223]

It was not until the late 1990s that any serious attempt was made to address the issue of the ownership and protection of intellectual property rights generated within UWI. Several factors gave impetus to the development of an institutional policy on the subject. Internally, these included an increase in the innovative activity in engineering, biotechnology and agriculture, the increasing involvement of staff and students in the development of software, films, multimedia products and distance education materials, the expansion of the operations of the University Press, and the establishment of a radio station. In the external environment, co-operative agreements with other institutions

[222] For information on the campuses see UWI websites.: http://www.uwi.edu/; http://www.cavehill.uwi.edu/ ;http://www.mona.uwi.edu/; http://sta.uwi.edu/; http://www.open.uwi.edu/

[223] See *Vice Chancellor's Report to Council*, 2007/2008 p.164. http://www.guild.uwi.tt/resources/documents/vc_report_0708.pdf

and an increasing number of sponsored research agreements necessitated an institutional policy framework within which intellectual property provisions of such agreements could be negotiated.[224]

The Policy on Intellectual Property, which was adopted in 1998, provides the framework for the management of intellectual property rights generated in UWI.[225] Of the Universities in the English-speaking CARICOM states, UWI is the only one with a policy of this kind.

2.5.1.2. The University of Technology

The University of Technology (UTech) is a national public university established in Jamaica by statute in 1995.[226] The institution's focus is on skills-oriented technical education, using a work-based approach to learning. The emphasis is on science, technology, innovation and entrepreneurship. Many of its programmes are linked to national and international professional organisations. It offers Degrees, Diplomas and Certificates relating to academic programmes taught in their five faculties.[227] The

[224] This information is not documented: the author has personal knowledge of it by virtue of her involvement in the Policy formulation process.
[225] An electronic copy of the Policy is submitted with this study.
[226] The institution was previously the College of Arts Science and Technology (CAST) which was modelled on the English polytechnic. CAST itself evolved from small beginnings in 1958 as the Jamaica Institute of Technology.
[227] Faculty of the Built Environment (including the Caribbean School of Architecture), Faculty of Business Management, Faculty of Engineering and Computing, Faculty of Health and Applied Science and Faculty of Education and Liberal Studies. (A source of enormous pride for UTech is that Asafa Powell. who, up to three years ago, was regarded as "the fastest man in the world" was trained by personnel in the Faculty of Health and Applied Science. At the 2008 Olympics in Beijing, China, Powell lost this position to his compatriot Usain Bolt who trains at UWI. UWI scientists are undertaking research to identify DNA information that would explain the exceptional talent of Jamaican sprinters. The research will likely result in the creation of intellectual property rights.

largest of the national Universities in Jamaica, UTech has an enrolment of just under 10,000 students drawn mainly from Jamaica.[228]

In recent years UTech has supplemented its intra-mural offerings with distance learning programmes, through its Continuing Education Open and Distance Learning Unit, which was developed to facilitate the achievement of "the expansion of learning opportunities through flexible access and delivery modes, including offerings by distance and continuing education," [229] .

The institution is active in the development of multimedia instructional products for use in the training of students and also for commercial purposes. UTech has no infrastructure for managing rights in these products or other copyright material generated within the institution.

2.5.1.3. University of Belize

The University of Belize (UB) was established in 2000 through the amalgamation of five tertiary institutions.[230] UB has two campuses and a University Centre and offers its programmes through six faculties.[231] According to its Mission Statement, [232] UB

[228] UTech, *Annual Report*, 2007-8, p. 23. http://www.utech.edu.jm/UtechAnnual Report2008.pdf
[229] See http://www.utech.edu.jm/Academic/CEODL/index.htm
[230] UB was created by the University of Belize Act, 2000. The institutions amalgamated are: the Belize College of Agriculture, the Belize Teachers" College, the Belize Technical College, the Belize School of Agriculture, the Belize School of Nursing and the University College of Belize.
[231] The Faculty of Agriculture and Natural Resources, the Faculty of Arts and Science, the Faculty of Business, the Faculty of Education, the Faculty of Engineering and Technology and the Faculty of Nursing, Health Sciences and Social Work.
[232] The Mission Statement reads: "The University of Belize is a national, autonomous, and multi-location institution committed to excellence in higher education, research and service for national

was founded to provide greater access to university education for Belizeans, to create an increased pool of well-educated university graduates to power the development of the country.[233] Among UB's stated goals are the enhancement of the ability of its students and faculty to contribute to the economic, social and cultural development of Belize, the establishment of a research capacity and culture that would advance knowledge and support learning, the promotion of creativity and critical thinking, and the increase in access to adult and continuing education.

Under the University of Belize Act, a Board of Trustees consisting of fifteen members representing various stakeholder interests is responsible for the management, maintenance and development of the institution. The Board is the institution's policy-making body. A President, appointed by the Governor-General, is the chief executive officer. UB has a small student population of about 2,700.[234] It is currently engaged in the development of materials for distance education and e-learning programmes.[235] It has no institutional copyright policy or other administrative structures for managing copyright.

2.5.1.4. The University College of the Caribbean

The University College of the Caribbean (UCC) is one of the latest additions to the higher education sector in Jamaica. A private institution, it was established in 2004 as

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development. As a catalyst of change, it provides relevant, affordable and accessible educational and training programs that address national needs based on principles of academic freedom, equity, transparency, merit and accountability." http://www.ub.edu.bz/about_ub/

[233] E. Aird, *The Evolution of the Belizean University*, *Dissertation*, Boston College, 2002, p.3.

[234] University of Belize http://www.panrimo.com/study-abroad/locations/belize/city-info/university-of-belize/

[235] M. Hyde, "Country Presentation, Belize", Paper presented to the Commonwealth of Learning Conference (undated) http://www.col.org/SiteCollectionDocuments/focal_point_belize_presentation.pdf

a company to provide the educational services offered by the merger of two post-secondary institutions- the Institute of Management and Production (IMP) and the Institute of Management Sciences.[236]

UCC's mission statement reflects an orientation towards "professionally focused tertiary education and training" and the acquisition of skills and competencies by its students to compete in the global market place and to contribute to national economic growth and development.[237] A review of its mission statement and its aims raises the question of its status as a University in the traditional sense. It seems to be a hybrid institution, having characteristics of both a university and a polytechnic.

In addition to programmes offered on its own or in collaboration with local and overseas higher education partners, including Universities, UCC is the local partner for the University of London in respect of the administration of several of its External Programmes in Jamaica.[238] Enrolled students number about 6,884.[239]

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[236] Both IMS and IMP are subsidiaries of UCC. IMP was established in 1976, initially as an in-house training arm of the Jamaican Company ICD Group of Companies and latter opened up to the wider public, offering courses in human resource development, management and production. In 1999 IMP and the Florida International University entered into a partnership and later launched joint programmes leading to the Executive MBA Degree, the Bachelor's degree in Hospitality and Management and the Bachelor of Science Degree in Computer Sciences and Information Technology. Established in 1992 as a private company, IMS sought to respond to the growing demand in Jamaica for tertiary education. Its primary focus was on the provision of associate degree programmes mainly in business administration. Over time, further partnerships for the delivery of courses locally were established with other institutions such as Penn State University, Howard University and the University of Florida. IMS courses are offered in several centres throughout Jamaica, thereby providing access to a wide cross-section of the population. The institution also offers a wide array of tailor-made courses for Jamaican businesses and is the overseas agent for several foreign higher institutions who offer educational services in Jamaica.

[237] See Statement at www.uccjm.com/company_history.html

[238] For example, the University of London's LL.B. Programme.

[239] www.uccjm.com/company_history.html

From the point of view of this study, the particular interest in this institution lies mainly in its distance education initiative which has implications for the management of the copyright and related rights involved. UCC's Distance Education and Global Learning Initiative incorporates the use of the Internet, cable television, free television, video conferencing and electronic mail, with the aim of addressing the challenge of making tertiary education opportunities accessible and affordable to the most under-served areas of rural Jamaica. This approach potentially involves multiple right-holders of the various categories of copyright and related rights. A system of copyright management with respect to the ownership and use of materials for the distance programme is, therefore, required. Instead of creating its own management structures, UCC could utilize the common services of the proposed regional centre for the management of University-generated copyright.[240]

2.5.1.5. University of Guyana

The University of Guyana was incorporated by statute in 1963.[241] At that time, Guyana was still a British colony (named British Guiana) working towards independence and was a contributing country of the regional UWI. The establishment of a national University was, however, thought to be necessary to produce the teachers, trained personnel for the public service as well as the scientists and technologist needed for the national programme of agricultural and industrial development. It would provide higher education to a large number of Guyanese who could not afford to study in

[240] See Chapter 5 *infra.*

[241] University of Guyana Act, 1963, Act 6 of 1963. Amendments effected by Act 5 of 1965 and Act 21 of 1977, altered UG's original administrative structure and strengthened and clarified the scope of authority of its officers and boards and provided rules relating to its internal governance and operations.

universities abroad.[242] Its stated aim is "to provide a place of education, learning and research of a standard required and expected of a university of the highest standard, and to secure the advancement of knowledge and the diffusion and extension of arts, sciences and learning throughout Guyana."[243]

Established with a campus at Turkeyen, near Guyana's capital, Georgetown,[244] UG has also operated since the year 2000 from its Tain campus in Berbice which was intended to serve populations in outer regions unable to attend the Turkeyen Campus. UG has several faculties[245] and a student population of just over 5,500.[246]

An area of particular focus for UG is distance education. The Institute of Distance and Continuing Education was mandated to assist UG to become dual-mode, that is, to offer

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[242] Even the cost of study at the UWI which then had only the Mona Campus in Jamaica and the St. Augustine Campus in Trinidad and Tobago, was seen as high. The Government questioned the cost-effectiveness of sponsoring students to the UWI and took the view that the funds expended to support the attendance of its nationals to the regional university were better used to finance its own national university. See *Draft Strategic Plan 2006-2011*, University of Guyana, http://www.uog.edu.gy/stratplan/plan/htm
Guyana later withdrew as a contributing country of UWI. The desirability of both institutions having a collaborative relationship was recognized by the signing on January 5, 2006, of a Memorandum of Understanding which will provide a framework for the institutions to engage in joint research and joint programmes, distance education, the use of information technology, staff development programmes, student exchange and capacity building activities. See Focus *on UG*, Newsletter, September 2005 and January 2006, issued by the Public Relations Division of the University of Guyana. This MOU could provide a framework for inter-institutional co-operation with respect to the establishment and operation of the regional copyright management mechanism proposed in Chapter *5 infra*.

[243] University of Guyana Act, Chapter 30:02 as amended.

[244] The Turkeyen Campus is located on lands handed over to Government by the Booker Group of Companies, the British multinational company which at that time owned most of the sugar estates and several businesses in Guyana.

[245] These are the Faculties of 1) Social Sciences 2) Technology 3) Health Sciences 4) Agriculture and Forestry 5) Natural Sciences 6) Education and Humanities, respectively. There is also the Institute of Distance and Continuing Education which, in 1996, replaced the Institute of Adult and Continuing Education whose primary function was to provide a range of extra-mural offerings ranging from basic to pre-University level courses. The new Institute was intended to play a vital role in UG's distance education thrust. See *Institute Briefing*, Institute of Distance and Continuing Education, University of Guyana. http://idce.uog.edu.gy/Brief.htm

[246] Commonwealth Universities online "University of Guyana" http://www.cedol.org/cgi-bin/items.cgi?_item=static&_article=2006112017144115 10

courses both intra-murally and by distance.[247] Internally, the Institute collaborates with faculties and functions externally through linkages with the Government, conscious of the national goal of providing equality of access to education, and also with non-governmental agencies.

UG already participates in many regional initiatives including the Caribbean Universities Project for Integrated Distance Education (CUPIDE)[248] and the Caribbean Knowledge and Learning Network Project.[249] Among the institution's strategic goals are the development of online courses and the creation of multimedia products for the delivery of teaching *via* the World Wide Web.[250]

Making determinations with respect to the ownership and rights of use of these and other works created in UG is best done within the framework of an established copyright management structure. No such structure exists at UG. The regional copyright management model for University–generated copyright which this study proposes would be highly beneficial to UG in addressing this gap.

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[247] Ibid.

[248] CUPIDE is a UNESCO-UWI project to enhance human resource development in distance teaching. The overall goal of this collaborative project to enable the five participating universities (The University of the West Indies, the University of Technology, Jamaica, the University of Guyana, the Anton de Kom University of Suriname, and the University Quisqueya in Haiti) to better develop and deliver quality distance education programmes using ICTs. http://cupide.dec.uwi.edu/

[249] This is a multilateral project supported by various international organisations, the EU and CARICOM and is designed to enhance the competitiveness of Caribbean countries, using information and communication technologies to connect the Caribbean to the global pool of knowledge and to develop human resources and facilitate greater regional integration. http://www.ckln.org/

[250] *Draft Strategic Plan 2006-2011*, op. cit.

2.5.1.6. University of Trinidad and Tobago

A recent addition to the University scene in the Caribbean is the University of Trinidad and Tobago (UTT) which was established in 2004. The economy of Trinidad and Tobago is dominated by oil and gas production and related industries. Entrepreneurial in outlook, UTT's has established programmes which are driven directly by the needs of industry and it has a strong research and development focus. In 2008 the total student population was 5,316.[251]

UTT was established as a charitable trust. Its governance structure is intended to facilitate a business-like mode of operation.[252] The institution has established close links with overseas institutions for the delivery of some programmes and the distance mode of teaching and learning is playing an important role in the delivery and business of the institution. Given its emphasis on science and technology, it is expected that UTT will pay particular attention to the protection of inventions, know-how and confidential information. However, the institution should also pay attention to the protection and management of copyright material especially in the context of copyright ownership issues that may arise under collaborative projects with other institutions and the development of distance education courses.

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[251] See President's Remarks at President's Medal Function. http://www.news.gov.tt/index.php?news=11

[252] Unlike the highly bureaucratic governance structure of universities of the classic mode, UTT has a lean management structure comprising a President and two Vice Presidents responsible, respectively for Academic Affairs and Corporate Services and a Board of Governors of eight persons initially, to be enlarged as needed the majority of who are from industry. UTT's administrative and financial functions will be carried out by various committees to which persons will be co-opted as needed.

UTT would benefit from the regional structure for the management of University-generated copyright which this study proposes.

2.5.1.7. Northern Caribbean University (NCU)

Although granted university status in only 1999, NCU's history is rooted in institutions that have provided educational services in Jamaica for several decades.[253] NCU is a small, private educational liberal arts institution with just under 5,000 students from over 35 countries. It offers diplomas, certificates and degrees, including post-graduate degrees through various Colleges.[254]

NCU pursues a very active programme of software development.[255] The institution needs to ensure that the proprietary rights in the software are managed for the maximum benefit of the institution and other stakeholders. NCU does not have a copyright policy or any administrative structures in place to deal with the ownership and management of copyright. The absence of these management tools also affects the institution's ability to adequately safeguard its courses and programmes, in particular,

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[253] It grew out of the West Indian Training School, a secondary and vocational school which was upgraded to a College in 1959, offering programmes in association with foreign institutions. Its main campus is in the parish of Manchester, Jamaica with small campuses in Jamaica's capital city, Kingston and parts of rural Jamaica. A Board of Directors superintends the overall running of the University while an Administrative Council, headed by a President, is responsible for the day-to-day running of the institution. See *Bulletin* 2004-2006, pp. 351-352, Northern Caribbean University.

[254] College of Arts and General Studies, College of Business and Continuing Education, College of Natural and Applied Sciences and College of Teacher Education and Behavioural Science.

[255] In May 2009, four students enrolled in NCU's computer science program emerged the winners from a field of students of Universities in the Caribbean and Central America in the finals of the Microsoft Corporation's "Imagine Cup" competition, having secured third place in the competition in 2007. The competition is described by the company as "an annual global technology competition, designed to provide an outlet for students to explore technological and artistic interests outside the classroom. See C. Robinson, "NCU Makes Another Microsoft Imagine Cup Final", *The Jamaica Observer* , May 17, 2009. http://www.jamaicaobserver.com/magazines/Career/html/20090516T210000-0500_151563_OBS_NCU_MAKES_ANOTHER_MICROSOFT_IMAGINE_CUP_FINAL_.asp

its online programmes, the provision of which is a major developmental thrust. [256] This gap could be filled by the proposed regional copyright management structure for Universities in the region.

2.5.2. Copyright Management: Why Should Universities Pay Attention?

Given their very nature, Universities are prime locations for the creation of works of the mind that are protectable by intellectual property laws. However, as many commentators have noted, Universities traditionally paid little attention to intellectual property rights. To the extent that they did, the focus was on patents which had the potential to provide a revenue stream through commercial exploitation. As a result, Universities tended to develop policies concerning ownership, credit and reward in respect of University-generated inventions.[257] As long as scholarly works were thought to fall outside of the realm of commodity production and circulation, Universities seemed content to allow their academic employees to publish their works and retain whatever royalties that may come their way.[258]

Within the last two decades, for reasons that are discussed below, Universities have shown considerable interest in copyright in materials created by their employees and students, as evidenced by the large numbers of working groups, task forces and

[256] NCU participates with other regional higher education institutions in the CUPIDE project which is aimed at building capacity for the delivery of programmes by distance. See Note 248.
[257] HEFCE, "Intellectual Property Rights in e-Learning Programmes: Report of the Working Group", 2003, paragraph 24; L. Longdin, "Copyright Dowries in Academia: Contesting Authorship and Ownership of Online Teaching Materials in Common Law Jurisdictions", 35(22) IIC, p.26.
[258] Longdin op cit., p.26.

committees that were commissioned to examine the subject.[259] The institutional interest in copyright has engendered passionate debates among academics on several issues, including the legal and moral basis for the appropriation of works of the mind created by academics, the role of a university, its responsibility to the public and the meaning of academic freedom.[260]

Several factors in both the internal and external environments account for this new preoccupation with copyright. One of the most significant factors is the revolutionary effect of information and communication technologies (ICTs). Digital technology has transformed the way information is created, reproduced, manipulated and stored, and the Internet and other communication technologies enable easy, cheap and rapid transmission of large quantities of information over vast spaces.[261] For Universities, this means that alongside the paper-based class room approach to teaching and learning, there is now the possibility of developing teaching materials in digital form – new instructional media - and distributing them to students anywhere and anytime through a web of communication networks [262] The facility offered by ICTs coupled with the increasing demand on many universities for distance education pointed to the

[259] For example, University College of London's New Review Group on Copyright which produced a revised UCL Copyright Policy in June 2002 ; L. Wiseman "Copyright in Universities" Occasional Paper Series, 99 E. QUT, Dept. of Education, Training and Youth Affairs, 1999; R. Weedon, "Policy Approaches to Copyright in HEIs", A Study for the JISC Committee for Awareness, Liaison and Training (JCALT), The Centre for Educational Systems, Glasgow, 2000; AAU/ARL, *Report of the AAU Task Force on Intellectual Property Rights in an Electronic Environment*, Association of American Universities, Washington DC 1994. http://www.arl.org/resources/pubs/aau/ip/ip1.shtml

[260] These concerns are discussed later in this section.

[261] In the last decade, as the possibilities and challenges of the digital environment began to unfold, the Association of American Universities urged that, given the electronic superhighway, universities should pay immediate attention to copyright, arguing that "[H]igher education will not prosper if universities fail to give focused, coherent management attention to such a crucial resource as the intellectual property their faculty produces.". AAU/ARL, *Report*, op cit. p.1.

[262] Longdin, op cit., p.24.

potential for significant economic returns from the provision of courses online.[263] But who should exercise control over the material produced and who should enjoy the returns from their commercial exploitation? While the rules of ownership were stipulated in copyrights laws, universities needed their own internal policies to operationalise those rules.

In many jurisdictions, Universities began to institute policies that reserve to themselves the control of copyright in Internet-based educational materials and delivery software developed wholly or mainly under their auspices.[264]

Another factor that spurred Universities to take interest in copyright (and other types of intellectual property rights) was the increasing pressure on them to find alternative funds to make up for the shortfall in government subventions. They faced the pressure of simultaneously reducing costs, increasing intake and finding new sources of income, including income from the exploitation of University-generated intellectual products.[265]

A third influential factor in the external environment was the move towards "an information society", a term used to designate a system of social relations oriented economically, politically, legally and culturally towards the production, commodification, circulation and manipulation of information. This puts information

[263] According to Longdin the ownership of copyrightable instructional materials in digital format is the "important weapon" in the race of some universities to promote online teaching and learning and set up virtual classrooms. Ibid.
[264] Longdin op cit., p.25. See also A. Monotti and S. Ricketson, *Universities and Intellectual Property: Ownership and Exploitation,* p.348 *et seq.*; J. Caladine, "Can I Take it With Me When I Go?", (2001) 12 J. Law Inf. Sc. 129.
[265] Longdin, op cit., p.24.

at the front and centre as a political, economic and ontological category.[266] In such a context, issues pertaining to the ownership of copyright in informational products created in Universities were inevitable, given the fact that they generate a great deal of information .

Another aspect of the changed environment in which Universities found themselves was the shift in the perception of the role and function of a university in society. The role of the modern university has long been accepted as teaching, research and public service. However, over the last two decades, it seems that a tacit agreement has evolved among the major players, that is, governments, industry and universities, that the mission of universities should be reformulated to include an entrepreneurial component which includes the responsibility to protect intellectual property rights as part of a programme of transfer of technology and other intellectual assets to the public. Increasingly, the University is becoming entrepreneurial as specialised knowledge is no longer shared but appropriated and sold to a range of customers.[267]

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[266] Longdin expresses succinctly how these technological developments caused a shift in attitude in Universities with respect to the economic value of intellectual creations. She asserts that "[B]efore the advent of digitally networked communications, universities largely left unchallenged the comfortable Lockean assumption among their traditionally peripatetic employees that they enjoyed a copyright dowry which remained not merely intact during their passage from employer to employer but could also be augmented in the process. This long standing custom has now come under ideological challenge with the advent of the self-conscious (if perhaps less often self-examining) pursuit of 'the knowledge economy' a term which has taken on a mantra status in most developed countries". Longdin, op cit., p. 23. See also on this point C. McSherry, *Who Owns Academic Work? Battling for Control of Intellectual Property* (Cambridge, MA: Harvard University Press, 2001) p.5. As to the Lockean assumption regarding copyright, to which Longdin refers, see the discussion at 1.2.*supra.*

[267] See generally J. Sutz, "The New Role of the University in the Productive Sector" ,in Etzkowitz H., and Leydesdorff, L. (eds.) *Universities and the Global Knowledge* (London: Continuum, 2002). See also P. de Maret, "Universities in the World: What For?", in J. Sadlak and N. Liu (eds.) *The World-Class University and Ranking: Aiming Beyond Status* (Bucarest: UNESCO-CEPES/Shanghai Jiao Tong University, 2007).pp.31and 32. http://base.china-europa-forum.net/rsc/docs/doc_738.pdf

In many universities, a critical factor that led to a more thoughtful approach to copyright and to calls for reform is the practice whereby scholars relinquish the copyright in their works to publishers in exchange for the credentials afforded by the publication of the works in professional, refereed publications (necessary for tenure and promotion). The employing institutions then have to buy back their employees' scholarly publications through increasingly expensive purchase and subscriptions. The rising costs of acquiring or gaining access to scholarly materials and the consequential reduction in their acquisition by University libraries are often described as "the crisis in scholarly communication". How institutions and academics manage copyright is seen as one of the keys to alleviating the crisis.[268] An influential set of guidelines called the "Zwolle principles" have been formulated with the objective of achieving "maximum access to scholarship without compromising quality or academic freedom and without denying aspects of costs and rewards involved". The key factor in achieving this objective is said to be "the optimal management of copyright in scholarly works to secure clear allocation of rights that balance the interests of all stakeholders".[269]

Consistent with the philosophy underlying the Zwolle principles many universities, in their review and reform of copyright management practices, have placed emphasis on designing policies and strategies that enable the institutions and others in the academic

[268] K. Crews, "Copyright Publishing, and Scholarship: The "Zwolle Group" Initiative for the Advancement of Higher Education.", (2007) 13(2) *D-Lib Magazine.* http://www.dlib.org/dlib/january07/crews/01crews.html

[269] The guidelines bear the name 'Zwolle' after the town in the Netherlands in which they were formulated in a series of conferences between 2001 and 2004 under the theme "Copyright for Scholarship". For the principles in their entirety and a commentary on them, see J. Harvey, "What Does Zwolle Stand For", (2003) 16 *Learned Publishing*, 290-292. http://copyright.surf.nl/copyright/files/Article_Harvey.pdf

community to have greater access to University-generated copyright so as to fulfil better the mission of research, scholarship and the dissemination of knowledge.

2.6. Linking the parallel management systems

This chapter discussed the current situation in CARICOM states affecting the generation of material protected by copyright, and the management of the rights involved in two key sectors of CARICOM, the music sector and the university sector. The objective, as we saw in 2.4, was to demonstrate that, in relation to the rights of authors, composers and publishers of music, there was the need for a regional model of copyright management. A similar need was established in 2.5 with respect to the management of University-generated copyright.

While these sectors are different from each other, they share common characteristics as far as copyright management is concerned. In both cases, the enjoyment of the benefits of the copyright system is, currently, less than optimal on account of several factors, including:

a) inadequate or no structures for the management of copyright;

b) a small pool of right-holders in each state;

c) small markets;

d) the lack of expertise in the area of rights management;

e) the relatively high cost of managing rights on a territorial basis;

f) under-licensing of copyright works; and

g) piracy.

The aim of this study is to develop two regional models for copyright management in CARICOM:

i. a regional system for managing the performing right using a single CMO; and

ii. a centralized regional mechanism for the management of University-generated copyright.[270]

These regional systems, which will be developed, respectively, in Chapters 4 and 5, are intended to be parallel systems operating independently of each other. However, since the proposed regional copyright management entities would be two powerful monopolistic bodies, they would have to be under the supervision of a Regional Copyright Tribunal, which this study proposes should be set up under the Revised Treaty of Chaguaramas that establishes the Caribbean Community. The Regional Copyright Tribunal would, therefore, be the link between the two management systems and a major unifying feature in the regional copyright management landscape.

2.7. Conclusion

This chapter highlighted the centrality of copyright and copyright management in two key sectors of CARICOM. First, it discussed the characteristics of the Caribbean music industry, against the background of the global music scene. The existing collective management organisations that administer the rights of authors, composers and

[270] The development of a regional system for other rights conferred by copyright law is outside the scope of this study, but many of the arguments advanced herein would be germane to such an undertaking.

publishers of music were reviewed and the main challenges that they face were identified. The findings of this chapter appear to support the hypothesis that the collective management of copyright on a territorial basis is not feasible in CARICOM. States and that a regional approach should be taken. A proposal for such an approach is developed in Chapter 4.

The chapter also gave an overview of the main Universities in the English-speaking CARICOM states in order to give a sense of their structure, size and institutional focus and the areas in which copyright management would be important, from an institutional perspective. The study found that there is a copyright management gap in most of these institutions, in that, apart from UWI which has some elements of a management structure, the issue of University-generated copyright is not addressed at all. Yet, as was demonstrated in this chapter, there are compelling reasons for Universities to protect University-generated copyright, and in this regard Universities in CARICOM are lagging behind. Two propositions flow from this: the first is that steps should be taken in these Universities to manage copyright effectively, and the second is that this should be done on a co-operative, regional basis. This line of argument is pursued in Chapter 5 which proposes a model for a common regional copyright management mechanism for Universities in the region. Both regional systems would operate within the context of an overall regional copyright management system, a critical feature of which would be a Regional Copyright Tribunal.

COPYRIGHT MANAGEMENT: A COMPARATIVE REVIEW OF NATIONAL, REGIONAL AND INTERNATIONAL SYSTEMS AND NETWORKS

3.1. Introduction

This chapter studies existing management models adopted by copyright owners nationally and internationally, as well as the approaches taken by governments at the national and regional levels to administer copyright. A comparative approach is adopted. The purpose of this chapter is to demonstrate that governments as well as organisations representing copyright owners have in place well-established systems for managing rights on a regional or collaborative basis, and that these provide insights that can guide the formulation of regional management structures for CARICOM.

At the outset of the chapter, the main activities involved in managing copyright are identified. Following a review of the types of rights managed, the chapter examines the mechanisms of copyright management, focusing on the blanket licence, the extended licensing system and the international network of reciprocal bilateral arrangements between CMOs. Next, there is a discussion of the state mechanisms used to regulate CMOs, particular attention being paid to the role of Copyright Tribunals in settling disputes between CMOs and users, and also to the application of competition policy to the operations of CMOs. Thereafter, existing regional structures in the EU, the Andean Community and CARICOM are comparatively reviewed, followed by an examination of the main issues in current debate in the EU on the proposal for a pan-European licence for the use of online music. The chapter then discusses the actions taken by EU Authorities towards the regulation of CMOs and the advocacy by the Authorities of a

pan-European approach to the licensing of online music in the EU. A review of some of the joint ventures and co-operative initiatives taken by organisations representing right-holders is then undertaken.

Within this context, the regional structure of CARICOM is examined to determine whether the foundation exists for a regional approach to the management of copyright by right-holders and the governments of the region. The chapter closes with the characterisation of CARICOM as small states, based on generally accepted criteria.

3.2. Copyright Management

In this study the term "copyright management" is used to refer to the actions that need to be taken by or on behalf of a copyright owner to authorise the use of a work protected by copyright and to safeguard it from unauthorized exploitation.[271] Copyright management entails at least (1) the grant of licences (2) the auditing and monitoring of rights to ensure payment of royalties (3) the collection and distribution of royalties and (4) the enforcement of rights.[272]

Copyright management may be exercised on an individual basis by the copyright owner, where this is feasible, or on a collective basis, usually by a CMO. In some

[271] In this study the term "copyright management" is used to refer *only* to the management activities aimed at the *protection* of copyright. In the literature on the subject the term is sometimes used to refer to actions taken by users of protected works to ensure compliance with copyright law. The term is also used to refer to a management approach that encompasses both the protection and compliance aspects of copyright. R. Weedon, "Policy Approaches to Copyright in HEIs" Centre for Educational Systems", University of Strathclyde, JISC Committee for Awareness, Liaison and Training, The Centre for Educational Systems, Glasgow, 2000. http://www.learningservices.strath.ac.uk/docs/JCALT.pdf

[272] See listing of rights management functions in Art 1(a) of EC Recommendation on the collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) O.J L276/54.

cases, the law mandates compulsory collective management.[273] The main features of a collective management system are set out below.

3.2 1. Copyright Management: Music

In the area of music, copyright management is usually done on a collective basis by collective management organisations. Collective management is essential for the effective management of the performing right of authors and composers of music.[274] It would be impossible for an individual right-holder to manage the exploitation of rights in his or her works all over the world[275] and, in any event, the transactional costs in doing so would be prohibitive.

Collective management of rights not only assists copyright owners to reduce transactional costs and to maximize licensing opportunities: it also helps users to avoid the often lengthy and costly searches involved in obtaining rights clearance.[276]

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[273] For example, Art. 9(1) of the EC Directive 93/83/EEC, 27 September, 1993, (OJ L248/15) directs member states to ensure that the right of copyright owners (and those who hold related rights) to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a CMO.

[274] When the first performing right societies started to operate "the performing right" simply meant the right to perform a work by performing artistes in the presence of an audience. However, over time, the concept was broadened to include, in addition to the right of public performance, the right of broadcasting and the right to communicate to the public in general. M. Ficsor , *Collective Management of Copyright and Related Right*, (Geneva: WIPO, 2002) paragraph 76.

[275] K. Garnett, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, Vol. 1, 15th Ed. (London: Sweet & Maxwell, 2005) paragraphs 28-05; U. Suthersanen, "Collectivism of Copyright: The Future of Rights Management in the European Union" in E. Barendt and A. Firth, (eds.) Y*earbook of Copyright and Media Law*, Vol. 5, 2000, pp.15and 16.

[276] Suthersanen, op cit., p.17.

3.2.1.1. Documentation//Database

Central to the effective performance of these management functions is the maintenance of proper documentation systems containing information about the protected works and their creators. Documentation forms the basis for the identification of works used and the allocation of royalties.[277] CMOs must also ensure the capture and storage of vital information such as the tariff structures for different uses of protected works and the various reciprocal bilateral agreements to which they are parties.

3.2.1.2. Licensing

Typically, CMOs negotiate tariffs and other licensing conditions with users or associations representing users. The principal management tool of a CMO is the blanket licence which allows users non-exclusive performance or copying rights in respect of the repertoire of works controlled by the CMO against payment of a fee, usually on an annual basis. Within a particular country, the blanket licence issued by the national CMO authorises the use of works of the members of that CMO as well as the works of members of other CMOs with which the national CMO has bilateral representation agreements. As a result, in most countries CMOs control the world repertoire. For this reason, blanket licensing creates a strong bargaining position.[278]

In countries where the extended collective licensing system exists,[279] a blanket licence issued by a CMO would, by operation of law, also permit the use of the works of non-members of the CMO.

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[277] See paragraph 3.4.1.2. *infra*, which shows how the Common Information System (CIS) established by CISAC assists CMOs in carrying out this function.
[278] Garnett, *et al*, op cit., paragraph 28-04.
[279] For a discussion on the extended collective licensing system, see *infra* at 3.4.1.3.

3.2.1.3. Collection and Distribution

The collection and distribution of royalties and fees to right-holders are at the heart of the collective management system. CMOs exercise collection and distribution functions not only where there is a voluntary contractual arrangement with right-holders to do so, but also where compulsory licences are granted, extended collective licensing systems operate and the compulsory collective management of rights is mandated.

CMOs that manage the performing right distribute royalties according to their internal distribution rules which take account, *inter alia*, of the type of works used and the frequency of use.[280]

3.2.1.4. Monitoring and Defence

The functions of CMOs include monitoring the use of the works of their members to ensure lawful exploitation. Also, in the case of infringement of rights, CMOs enforce the rights they manage - a service that is of great value to right-holders, since a CMO would likely have the finance, expertise and personnel to undertake infringement proceedings, far beyond those available to individual right-holders.[281]

3.2.1. 5. Cultural and Social Functions

In addition to safeguarding the economic interests of their members, CMOs often exercise welfare and cultural functions which may be voluntarily assumed or imposed

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[280] For an explanation of the distribution process of CMOs see P. Schepens, *Guide to the Collective Administration of Authors' Rights* (Paris: UNESCO, 2000) p.42 *et seq.* http://unesdoc.unesco.org/images/0012/001206/120677e.pdf

[281] J.A.L. Sterling, *World Copyright* (London: Sweet & Maxwell, 2008) paragraph 12.25.

by statute.[282] Welfare benefits to members may include assistance with payment for medical treatment or insurance, annuities on retirement or some sort of guaranteed income based on the members' record of royalty payments. These benefits are financed by a deduction that the CMO makes from the royalties collected.[283] CMOs may sponsor cultural activities to promote the national repertoire of works at home and abroad. The issue whether such functions are properly within the remit of CMOs is controversial.[284] However, as Ficsor has observed, the cultural and social functions of CMOs are particularly important in developing countries where extra effort is needed to develop creative capacity.[285]

3.2.2. Copyright Management: University-Generated Copyright

Where Universities own and commercially exploit protected works such as multimedia, courseware and online courses, they would be responsible for exercising all the rights management functions indicated in the preceding section. Universities also have an

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[282] Suthersanen, op cit., p.19. See also R. Towse and C. Handke, "Regulating Collecting Societies: Current Policy in Europe" SERCI, Annual Congress 2007 at Humboldt-Universität zu Berlin/Centre for British Studies, 12-13 July 2007, paragraph 4.2. http://www2.hu-berlin.de/gbz/downloads/pdf/SERCIACPapers/towsehandke.pdf
Many European CMOs have this function as a statutory duty. For example, under Articles 7 and 8 of the German Copyright Administration Act (UrhWG), CMOs are assigned cultural and social duties which they perform through their welfare and support funds and also through the promotion of culturally important works and performances. See R. Kreile and J. Becker "Collecting Societies" in R. Moser and A. Scheuermann (eds.) *Handbook of the Music Industry*,6th Ed. (Verlag: Josef Keller, 2003). Even those who are not statutorily obliged to perform such functions - for example, in the UK - often voluntarily donate for cultural purposes. It is estimated that in France alone all CMOs taken together spent €95 million in 2004 on cultural activities. See KEA European Affairs, "Collective Management of Rights in Europe: the Quest for Efficiency" *Report,* the European Parliament, 2006, p.28. http://www.europarl.europa.eu/comparl/juri/study/rights_en.pdf

[283] The rules of CISAC prescribe that deductions should not exceed 10% of net income.

[284] See Suthersanen, op cit., p29. See also W. Dillenz "Functions and Recent Developments of Continental Copyright Societies", (1990) E.I.P.R 191.

[285] Fiscsor, op cit., paragraph 35. The Caribbean CMOs COTT and COSCAP have both established foundations to carry out this socio-cultural function.

interest in encouraging its employees and students to manage their copyright in the interest of the academic community.

While the management of music copyright is aimed at maximizing economic returns for right-holders, the emphasis of rights management in a University environment is somewhat different. Here, effective management of copyright entails maximising the availability of intellectual products for use by the academic community, while ensuring that the major stakeholders in the community have sufficient rights to use those products for their own academic purposes.[286] A secondary objective for Universities is to save some of the costs associated with purchasing or accessing scholarly material from commercial publishers. In some cases, for reasons already mentioned, income-generation may be a motivating factor, for example, in relation to the development of multimedia products and online courses.[287]

The main instruments for managing copyright and other IPRS in Universities are institutional policies and employment contracts.[288] The use of copyright policies on their own or as part of a comprehensive policy on intellectual property rights is now commonplace in Universities.

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[286] For example, staff need to be able to refresh the works they create and use them in their teaching and Universities need to secure and maintain high quality provision for their students and to exploit materials in global markets to generate revenue. See HEFCE Report, op cit., paragraph 12b.

[287] See 2.5.2 *supra.*

[288] Institutional policies governing the ownership of IPRS may also be included in industrial awards or enterprise bargaining agreements. AVCC, "Ownership of Intellectual Property in Universities: Policy and Good Practice", *Discussion Paper*, AVCC, Canberra, 2002, paragraph 3.2.1. http://www.universitiesaustralia.edu.au/documents/publications/IP_ownership_discussion_paper.pdf

3.3. Types of Rights Managed

Under their domestic laws, copyright owners typically enjoy an array of rights derived primarily from the Berne Convention. The provisions of the Convention are binding not only on state signatories but also on all WTO members, on account of the incorporation of the Berne provisions by reference into the TRIPS Agreement.[289] Under the Berne Convention copyright owners enjoy, *inter alia*, rights of reproduction, public performance, broadcasting and adaptation, respectively. To these rights the WCT, which is a special agreement under section 20 of the Berne Convention, has added the right of distribution by sale or other transfer of ownership and the right of communication by wire or wireless means.[290]

In relation to the works of authors and composers of music, the collective management system traditionally operates in relation to: a) the right of public performance, that is, the playing or performing of music in public places (such as restaurants, dance halls and theatres; b) the right of broadcasting; and c) the mechanical reproduction right.[291]

3.4. Management Structures and Mechanisms

In general, the international legislative framework that grants these rights provides no guidance on how they should be managed. None of the agreements addresses the structures or conditions of rights management. Copyright owners are, therefore, left to devise their own management mechanisms which could involve individual

[289] See TRIPS Agreement, Art. 9.1.
[290] WCT Arts. 6 and 8, respectively.
[291] CMOs also commonly manage the reprographic reproduction right in literary and musical works, the resale right (*droit de suite*) and the right of performers and producers of phonograms to obtain remuneration for broadcasting or the communication to the public of phonograms.

management or some form of joint management.[292] Collective management has emerged over the years as the most practical and cost-effective management mechanism. In relation to the protection of the rights of authors and composers of music, collective management of rights was established in France in the late 19th century and the organisation formed then became the foundation on which the French CMO, SACEM, is built.[293]

But while copyright owners may choose how their rights are managed, rights managers are usually subject to some level of supervision or regulation by state authorities. National arrangements differ: there may be direct political control or continuous scrutiny by specialized supervisory bodies, or simply the application of competition and contract law.[294] The level of Government control ranges from a "light", minimalist

[292] Different models of joint management have evolved: these range from agency- type rights clearance organisations (for example the Copyright Clearance Center in the U.S in respect of the reproduction of literary works) to collective management organisations, where collectivisation is expressed in terms of common tariffs, licensing conditions and distribution rules. See Ficsor, op cit., paragraph 9. Other management models that have developed in recent years include one-stop-shops and alliances of CMOs. See 3.6 *infra* on joint ventures and alliances involving CMOs.

[293] The formation of CMOs for music is associated with a colourful story involving the French composer Ernest Bourget, at the time a popular composer of chansons and chansonnettes comiques, and the Concert Cafe "Les Ambassadeurs" in Paris. Among pieces played by the string band of Les Ambassadeurs was one by Bourget who had not been asked permission for the performance of the song at the Café. Bourget refused to settle the bill for his drink arguing that his music was being used without payment to him. The Tribunal de Commerce de la Seine, to which the matter was brought, found in favour of Bourget. Subsequently, the Cour d'Appel de Paris ordered the owner of Les Ambassadeurs to pay compensation to Bourget for the use of his music. Buttressed by this decision, Bourget, together with other composers and a publisher, formed the *Agence Central* in 1850 for the control and enforcement, collectively, of the performing right recognised by the courts. See Ficsor, op cit., paragraph 29 and D. Peeperkorn "Collecting for 'Bluettes' ", in *Collecting Societies in the Music Business*, (MAKLU Publishers, Apeldoorn/Netherlands, 1989) p.11. In subsequent years, many authors' societies were established in Europe and elsewhere. By the middle of the last century, performing right organisations were formed throughout Europe and in some of the larger English-speaking countries of the Commonwealth of Nations. Today, organisations that administer copyright have been established all over the world. Sterling, op cit. paragraph 12.21.

[294] For a discussion on the rationale for intervention and the different levels of regulation of CMOs see Suthersanen, op cit., pp. 19-28. See also Rowse and Handke.op cit., p.6; F. Rochelandet, "Are Copyright Collecting Societies Efficient? An Evaluation of Collective

approach, exemplified by the UK authorities, to one that is highly interventionist and strict, as in Germany. In recent years, the EU authorities have proposed greater regulation of the structure and function of CMOs.[295]

With the availability of technological measures in the form of digital rights management (DRM) systems[296] as well as the protection afforded under the WCT, the capabilities of individual copyright owners and CMOs to manage digital rights have been significantly enhanced.[297]

3.4.1. Territorial Licences and International Networks

3.4.1.1. Territorial Licences

CMOs operate on a territorial basis and manage the repertoire of right-holders in a particular country. CMOs often issue transactional licences,[298] but, as previously mentioned, their main management mechanism is the blanket licence.

The licences are issued by national collective management organisations that traditionally have as members only persons who are nationals or residents of the country in which the CMO operates. Territorial licensing is consistent with the

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Administration of Copyright in Europe", in W. Gordon, and R. Watt, (eds.) *The Economics of Copyright – Developments in Research and Analysis* (Cheltenham: Edward Elgar, 2003) pp.176.

[295] This is fully discussed 3.5.2 *infra.*

[296] Digital technology permits the identifying, controlling of access to, and the tracing, monitoring and rewarding all uses of, the protected work. Garnett *et al,* op cit., paragraph 28-40 *et seq*.

[297] The EC has observed that, with respect to some new forms of copyright applications, new digital means of identification of protected material and of automatic licensing of their uses may allow for more individualized management. Green Paper (Com (95) 382 Final, p.75. See also M. Ricolfi, "Individual and Collective Management of Copyright in a Digital Environment" in P. Torremans, (ed.) *Copyright Law: A Handbook of Contemporary Research*, (Cheltenham: Edward Elgar Publishing, 2007) p.283 (speculating whether the ability of individual right owners to use DRM systems to monitor and meter the use of their works would eventually make CMOs obsolete. Others hold the view that the role of CMOs would probably increase. Ficsor, op cit., paragraph 260.

[298] A transaction licence is one issued for the exploitation of particular right or rights in relation to a particular work or works.

territoriality of copyright. But the territorial restriction on a national CMO means that it cannot exercise management functions in respect of the use of its members' works in foreign countries. This difficulty was overcome by the establishment of international networks of CMOs and the use of reciprocal bilateral agreements.

3.4.1.2. International networks

Under bilateral reciprocal representation agreements with organisations managing similar rights, CMOs are authorised to give local users permission to use foreign works. In this way a local CMO can, under a blanket licence, offer the world repertoire to users in its country of operation, on a non-discriminatory basis.[299] Royalties collected by a CMO with respect to the use of foreign works may be remitted to the foreign CMOs or retained by the local organisation, depending on the terms of the bilateral agreements concerned. The relationship between CMOs that manage the performing right worldwide is facilitated by the International Confederation of Authors and Composers of Music (CISAC) an international network of organisations that manage the rights of authors, composers and publishers of music.[300]

Among the challenges faced by CMOs over the years has been the ability to match, accurately, the exploited works with right-holders and other interested persons, because

[299] Sterling, op cit., paragraph 12.24. Typically, the agreements are based on the CISAC Model Contract, Article 3(1) of which provides that "...the contracting party undertakes to uphold to the greatest possible extent, by way of the appropriate measures and rules, applied in the field of royalty distribution, the principle of solidarity, as between the members of both Societies even where, by the effect of local law, foreign works are subject to discrimination. In particular, each Society shall apply to works in the repertoire of the other Society the same tariffs, methods and means of collection and distribution of royalties as those which it applies to works in its own repertoire.".

[300] CISAC was established in Paris in 1926 to co-ordinate the activities of its member performing right organisations. It represents the interests of its member organisations in various international fora such as WIPO and UNESCO.

of the lack of standardisation in the way in which information is collected and supplied, and the lack of an appropriate infrastructure that CMOs and others use to share information about works. Further, traditionally, the exchange of data among CMOs was paper-based, and the matching of works with right-holders was manually done.

With the increased creation of works in digital form and their delivery by means of global networks such as the Internet, CMOs have sought to gain greater efficiencies by the use of technology to identify works more accurately, to track usage and to facilitate the distribution of royalties. They have been assisted in this quest by an electronic rights information system developed by CISAC called the Common Information System (CIS). The objective of CIS was expressed as follows:

> "To administer rights across digital superhighways, societies must share information about musical works and other types of creations by implementing systems to enable their unique identification and to establish the current owner of the rights. CIS is a plan for standardizing and communicating data in an efficient and integrated way. It is designed to replace the many duplicate sets of data managed independently by royalty collection societies and publishers or producers or broadcasters with their individual and unrelated numbering schemes. To become efficient and integrated, all parties need to be able to identify the same work by a single unique identification number no matter where in the digital world it is exploited."[301]

[301] Cited by Ficsor, op cit., paragraph 274. When it was established, the CIS was described by Hill as "perhaps the most significant collaborative development" to have come out of CISAC. He pointed to the need for CMOs to increase their efficiency as to remain attractive to right-holders. One way to do this was to remove the areas of duplication from that aspect of the business which carries the most significant overheads within each CMO-the management of information. The establishment of the CIS was significant in the quest for efficiency. See K. Hill, "CIS – A Collective Solution for Copyright Management in the Digital Age" (1997) 76 *Copyright World,* p.18. The reduction of the costs associated with the management of information was a prime motivating factor in the establishment of CCL as a back-office for CMOs in CARICOM that manage the rights of authors, composers and publishers of music. See Chapter 2 *supra*, for a discussion of the organisations concerned with collective management of rights in CARICOM states and the functions of CCL.

The use of unique identifiers results in more timely and efficient distributions. In addition to the standardized international identifiers of works and the parties involved, CIS is an international network of global databases that serves as "the repository information on each stage of the creative process."[302]

3.4.1.3. The Extended Collective Licence

Royalties for the use of protected works may be collected under an extended collective licence. The extended collective licensing system was initiated in the Nordic countries in the 1960s and continues to operate today.[303] The system combines voluntary assignment of rights to a CMO with a legal extension of the repertoire to encompass non-represented right-holders, thereby accelerating the acquisition of rights by the CMO. Where a CMO covered by the relevant legislation represents a substantial number of right-holders in a county, its licence will cover the use of works of persons who are not members of the CMO. This is a practical solution to the need for users, for example, broadcasting organisations, to have access to protected works of authors who are not members of the CMO or whose CMO has no reciprocal arrangement with the CMO in question. The non-member right-holder may, within the allowed period, claim the remuneration due.[304]

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[302] D. Uwemedimo, "Creative Content on-line in the Single Market", Staff Paper, CISAC, (SG08-2111 19/02/008) p.4.
http://ec.europa.eu/avpolicy/docs/other_actions/col_2008/ngo/cisac_contr_en.pdf

[303] Sterling, op cit., paragraph 12.24; Suthersanen, op cit., p.26. For the history and rationale of the extended licensing system see generally T. Koskinen-Olsson, "Collective Management in the Nordic Countries" in D. Gervais, (ed.) *Collective Management of Copyright and Related Rights* (The Netherlands: Kluwer Law International 2006) p.257 *et seq*.

[304] Olson summarises the main features of the Nordic Model as follows: a) it presupposes that CMOs exist in a particular field with mandates from their members to enter into contracts with users, and that agreements have been concluded between the CMO and users or groups of users following negotiations; b) the copyright law prescribes that the contract applies also to right-holders who are not members of the contracting CMO, usually subject to certain safeguards for the non-members; c) on the basis of the contract and the provisions in the law, the user concerned may use the material covered by the contract

The extended collective licensing scheme has spread to Central and Eastern Europe and Africa.[305] Its adoption in Canada has been strongly advocated by Gervais who regards the system as a legal solution to problem of rights clearances especially where most of the material subject to licensing comes from foreign countries.[306]

It is submitted that CARICOM governments should consider the desirability of introducing the extended collective licensing system. If a determination were made to introduce the system, then, appropriate provisions could be inserted in harmonised copyright legislation mandated by the Revised Treaty of Chaguaramas under which CARICOM is established.[307] However, it is noted that one feature of the system is that a substantial number of right-holders in a given category must agree to manage their rights collectively[308]- a state of affairs that does not currently exist in any CARICOM state.

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knowing that he or she may not be subjected to infringement actions; d) right-holders who are not members of the CMO must be treated in exactly the same way as the organisation's members. Outside right-holders usually have a right to individual remuneration and in many cases (depending on what is prescribed in the national legislation) usually have a right to prohibit the use of their works under the terms prescribed, and to opt out of the scheme. The extended licensing system was originally instituted in respect of musical and literary works for use in sound radio and television broadcasts and was subsequently applied to the retransmission by cable and/or re-broadcasting of broadcast programmes, reprographic reproduction of printed material, recordings of radio or TV programs for educational use and library distribution of digitised material. See H. Olson. **"**The Extended Collective License as Applied in the Nordic Countries", *Presentation*, Kopinor 25th Anniversary International Symposium, Oslo, May 20, 2005.

[305] D. Gervais " The Changing Role of Copyright Collectives" in Gervais, D., (ed.) *Collective Management of Copyright and Related Rights* (The Netherlands: Kluwer Law International 2006) p28.

[306] Gervais, op cit., p.29.

[307] The establishment and nature of CARICOM is discussed *infra* at 3.7.

[308] Gervais, op cit., p.28.

3.4.2. Managing De Facto/De Jure Monopoly

One mechanism that Governments use to control CMOs is competition policy. The need for control arises because CMOs tend to be either *de facto* or *de jure* monopolies that manage specific rights.[309] It is generally accepted that the efficiencies and benefits that CMOs offer to right-holders and users outweigh the disadvantages associated with their monopolistic nature. Nevertheless, the system of collective rights management is in constant tension with competition rules and policy. In countries where a free market system prevails, competition in the market is considered an essential characteristic, and monopolies are anathema.[310] This is because monopolies are in a position to abuse their dominant position in the market.

In relation to CMOs, abuse of dominant position could occur mainly in the following areas:1) refusal to license certain uses without any valid reason; 2) unjustifiable discrimination among users in the same category; 3) overly high levels of tariffs set; and 4) the stipulation of conditions of use that may be arbitrary or unreasonable. The control of CMOs through the application of competition policy is discussed later in this

[309] CMOs have been called "natural monopolies", meaning that as monopoly suppliers they are more efficient in the sense of having lower costs than if they were in competition. See Towse and Handke, op cit., p.11. For a vigorous challenge to the characterisation of CMOs as natural monopolies see A. Katz, "The Potential Demise of A Natural Monopoly: Rethinking the Collective Administration of Performing Rights (2005) 3(1)JCLE 541. http://ssrn.com/abstract=547802 and A Katz, "The Potential Demise of Another Natural Monopoly: New Technologies and the Administration of Performing Rights", 2006 2(2) JCLE. 245. http://jcle.oxfordjournals.org/cgi/reprint/nhl010?ijkey=ruzzYOYOf2jkovr&keytype=ref" In some countries CMOs are established as legal monopolies designated by the State for the management of a particular category of right and a particular group of right-holders. In others, relevant laws are silent as to whether or not CMOs are legal monopolies or whether there can be competition among CMOs that manage the same type of rights. See KEA Report op cit., p.67.

[310] The theory is that without competition resources are not allocated efficiently by the market. Where competition is excluded or restricted, producers can charge more for their products and sell few of them, thereby making a greater profit and denying the consumer the benefit of having goods to buy at the lower price. See P. Groves, *Intellectual Property With Competition Law and Practice* (London: London Guildhall University, 1994) paragraph 2.2.

chapter with reference to the actions of the competition authorities in the UK, the EU and the U.S.A.[311]

3.4.2.1. Complaints Structure – Intrinsic

3.4.2.1.1. CMOs and Right-holders

Among the issues that have arisen in respect of the governance of CMOs is that, in general, they seem to lack effective internal mechanisms to deal with the complaints of their members. Such complaints may relate to the terms and conditions of membership, distribution rules, royalty levels or the deduction of fees for administrative and other purposes. Where the members' complaints raise anti-trust considerations, the complaint may be dealt with by competition authorities [312] However, it is submitted that a dispute resolution mechanism should be an aspect of the internal management structure of CMOs. This would enhance the relationship between them and the right-holders whose interests they were established to serve.

In Australia a Voluntary Code of Conduct developed by CMOs as a self-regulating device has extensive and salutary provisions on handling complaints and resolving disputes. CMOs in the UK and CARICOM might find it useful to consider a similar

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[311] *Infra* at 3.4.2.3.

[312] In the UK, the MMC (now the Competition Commission) in its investigation of the management of the performing right had to address some of these management issues. The pop group U2 complained that they were obliged under the terms of membership to assign all their performing rights to PRS. As a result, the group had to pay performing right fees when they performed their own music, leading to double deductions for live performances abroad– one to the foreign CMOs with which PRS had reciprocal agreements, and the other to PRS. Complaints were also made about the distribution formula used by PRS for live performances, which was said to favour popular music, and about administrative efficiencies and high administrative costs. The MMC found that the PRS did not adequately consult with its members and that its policies and practices were not sufficiently transparent.

course of action.[313] Where the complaints by users appear to violate competition policy, the matter can be referred to the official bodies having the authority to deal with competition matters.[314]

3.4.2.1.2. CMOs and Users

Typically, complaints of users about the operation of a CMO relate to the level of fees charged, the scope of licences or the CMO's refusal to issue a licence. As in the case of complaints by right-holders, CMOs tend not to have internal mechanisms to deal with users' complaints. As will be discussed below, such complaints are usually dealt with by external dispute resolution mechanisms – usually a statutory tribunal or other arbitral body and by competition authorities.[315]

3.4.2.2. Complaints Structure – Extrinsic

3.4.2.2.1. The Copyright Tribunal - UK

A. Functions

The Copyright Tribunal, established under the CPDA,[316] is the primary external mechanism for resolving copyright disputes between CMOs and users. Its main function is to decide, where the parties cannot agree between themselves, on the terms and conditions of licences issued by CMOs or of licensing schemes operated by them. The Tribunal has the statutory task of conclusively establishing the facts of a case and

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[313] "Code of Conduct for Copyright Collecting Societies" as amended April 2008: http://www.copyright.com.au/reports%20&%20papers/CodeFinal2008%20(4).pdf
Article 3(a) of the Code requires each CMO that voluntarily adopts the Code to develop and publicise procedures for dealing with complaints against the CMO by its members and/or licensees and for resolving disputes between the CMO and its members and/or licensees.

[314] For example, the Competition Commission in the UK, formerly Monopolies and Mergers Commission.

[315] *Infra* at section 3.3.4.

[316] The Copyright, Patents and Designs Act, 1988.

coming to a decision which is reasonable in the light of those facts. It also has the duty to determine the royalty or other sums payable or the terms of use, where statutory licences are granted.[317] The Tribunal's jurisdiction includes (i) deciding on the licensing of rights not encompassed in the licensing scheme of a CMO and (ii) making decisions about licences or licensing schemes in relation to the playing of sound recordings, referred to it by the Secretary of State.[318]

With respect to its adjudicatory functions, the Tribunal is authorized to hear and determine applications concerning royalty payments for a wide range of usage of works under statutory licences, including applications concerning the royalty or other remuneration payable for the cable re-transmission of a wireless broadcast.[319]
An appeal lies to the High Court on any point of law arising from a decision of the Copyright Tribunal.[320] The Copyright Tribunal is authorized to issue Practice

[317] It also has a very narrow appeal function in that it can hear and determine appeals against an order by the Secretary of State as to the coverage of a licensing scheme or licence in respect of reprographic copying by an educational establishment. See s139 CDPA, 1988.
[318] This function was introduced into the CDPA, 1988 following the implementation of the EC Directive 93/98/EEC of October 29, 1993 on harmonizing the term of protection of copyright and certain related rights (1998) O.J. L290/9).
[319] The Tribunal may also determine (i) the royalty or other remuneration payable to the owners of the rights conferred by Part II of the CDPA in relation to a performance or a recording of a performance, with respect to the re-transmission by cable of a wireless broadcast including the performance or recording;(ii) the amount of equitable remuneration that should be paid to authors of literary, dramatic, musical and artistic works and the principal directors of films, and also to performers, where their rental rights concerning a sound recording or film has been transferred to the producer of the sound recording or film; (iii) entitlement to a licence under a licensing scheme dealing with copyright licences or under a licensing scheme relating to performers' property right licences; (iv) the terms of payment or reasonableness of condition in relation to the use, as of right, of sound recordings in broadcasts; (v) the royalty or other rate payable for lending certain works to the public or lending of certain recordings treated as licensed by performers by virtue of an order of the Secretary of State; (vi) the amount of equitable remuneration payable to performers where commercially published sound recordings of their works are performed or communicated to the public; (vii) the terms of copyright licences and licences in respect of performers' property rights available as of right consequent on the exercise of powers by the Secretary of State, the Office of Fair Trading Commission and the Competition Commission. See sections 118-144, CDPA.
[320] Section 152(1), CPDA.

Directions to regulate its business. The Tribunal has no jurisdiction over the relationship between CMOs and their members, and this has been regarded as a drawback.[321]

B. Constitution

The Chairman and two deputy chairmen (all of whom must be senior lawyers) are appointed by the Lord Chancellor and the ordinary members, being not less than two but no more than eight, are appointed by the Secretary of State for Trade and Industry.[322] For the purpose of proceedings under the Act, the Tribunal must consist of a chairman, who should be the Chairman or one of the Deputy Chairmen of the Tribunal and two or more ordinary members.[323] The Tribunal is a quasi-judicial body whose members must observe the rules of natural justice.

C. Criticisms of the Tribunal

The Copyright Tribunal has been the subject of much criticism. Viewed in the context of the accepted advantages of tribunals over courts - that is, cheapness, accessibility for the parties, freedom from technicality, speed and expert knowledge of the subject, the Tribunal, according to a Report released in 2007 by the UK Intellectual Property Office, has earned a reputation among stakeholders for elaborate procedures, high costs and long delays.[324]

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[321] Suthersanen, op cit., p.22.
[322] Section 145(2), CDPA.
[323] Section 148, CDPA.
[324] See UK Intellectual Property Office, "Review of the Copyright Tribunal" May, 2007, pp.13-4. http://www.ipo.gov.uk/ctribunalreview.pdf Acting as Chairman of the Tribunal in *Universities UK Ltd.* v *Copyright Licensing Agency Ltd.* (2002) RPC 36, Christopher Floyd Q.C. referred to the evidence of the parties in the case, that reference to the Tribunal was a last resort. The

The Report characterised the Rules of the Tribunal as "pernickety, repetitious and restrictive" and suggested that they might be hampering, rather than assisting, the Tribunal. There was a groundswell of opinion that the Civil Procedure Rules (CPR) which were specifically formulated to improve access to civil justice, should govern the procedures of the Copyright Tribunal, and that the CPR and Practice Directions should be used together to achieve control with flexibility.[325] The Report makes several far-reaching recommendations aimed at avoiding "the twin scourge of cost and delay" and at transforming the Tribunal into a streamlined, adequately resourced and suitably staffed body, providing cost-efficient, quality service in a timely manner.[326]

The pattern over the years of few cases before the Tribunal lends support to the view that licensing bodies and users are reluctant to use its services. This would account for the many "quiet years" reported by the Tribunal in its annual reports.[327] Assuming that measures will be taken to make the Tribunal more cost-effective and efficient in its proceedings, it might be instructive after the changes have been in place for a reasonable length of time, for a review of the Tribunal's operation to be undertaken in order to assess the extent to which these improvements affect the use of the Tribunal by licensing bodies and users.

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perception was that proceedings before the Tribunal were "necessarily extremely costly, intolerably lengthy and highly complex". Cited at p.19 of the *Report*.

[325] *Report* paragraphs 7.2 and 7.12.

[326] Among the recommendations are the following: (i) the abolition of the fees of the Tribunal; (ii) the imposition of clear limitations on the type and quantity of evidence that is submitted and the need to emphasise written rather than oral evidence; (iii) strict time-tables on hearings, where they are necessary; (iii) introduction of case management procedures; (iv) alternative dispute resolution procedures for use in appropriate cases; (v) appointment of permanent staff of the Tribunal; (vi) open recruitment of a Chairman whose position should be salaried; (vii) the formulation by the Tribunal of guidelines for the establishment of objective criteria for determining the conditions of licensing schemes and licences.

[327] See Copyright Tribunal Annual Reports. http://www.ipo.gov.uk/ctribunal.htm

The Tribunals established under the Copyright Acts of some CARICOM states are modelled on the UK Tribunal.[328]

3.4.2.2.2. The Copyright Board of Canada

A. Functions

The Canadian Copyright Board is a specialised administrative agency established under the Copyright Act to oversee the collective administration of copyright in Canada.[329]

In general terms, the functions of the Board are similar to those of the UK Copyright Tribunal. Like the latter, it functions as an arbiter between CMOs and users where disputes arise between them. Broadly, the Board's functions are (a) to establish either mandatorily, or at the request of an interested party, the royalties to be paid for the use of copyright works, in cases where the administration of the copyright is entrusted to a CMO and (b) to supervise agreements between users and licensing bodies.[330]

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[328] See *infra* at 3.4.2.2.3.

[329] Copyright Act (R.S 1985, c. C-42) as amended. The Board succeeded the Copyright Appeal Board which was restructured in 1989 following the coming into operation of Bill C-60). See H. Knopf, "Canadian Copyright Collectives and the Copyright Board: A Snap Shot in 2008" Paper presented at LSUC Continuing Legal Education Program of February 28, 2008, p.14. http://www.moffatco.com/pages/publications/Knopf_Canadian_Copyright_Collectives_Copyright_Board_Feb2008.pdf

[330] In specific terms, the Board's statutory functions include the authority to (i) certify tariffs for the public performance or the communication to the public by telecommunication of musical works and sound recordings; (ii) certify, if the CMO so requests, tariffs with respect to the use of works in which copyright subsists, the exploitation of performers' rights in performances, rights in sound recordings and rights in communication signals; (iii) set royalties payable by a user to a CMO, where there is disagreement on the royalties that should be paid or on the terms and conditions of use; (iv) certify tariffs for the retransmission of distant television and radio signals or the reproduction and public performance by educational institutions of radio or television news or news commentary programs and all other programs for educational or training purposes; (v) set levies for the private copying of recorded musical works; (vi) rule on applications for non-exclusive licences to use published works, fixed performances, published sound recordings and fixed communication signals when the copyright owner cannot be located. See Copyright Act, R.S.C. 1985, c. C-42, Part VII.

There are some statutory functions of the Board that the UK Tribunal does not have under the CPDA. For example, at the request of the Commissioner of Competition appointed under the Competition Act, the Board must examine agreements made between a CMO and a user which have been filed with the Board, where the Commissioner considers that the agreement is contrary to the public interest.[331] The Board has been described as an "economic regulator", dealing with complex social, cultural, demographic and technological issues.[332] It is regarded as operating within the broad policy framework of the Canadian Government that is aimed at developing several industries underpinned by copyright tariffs, for example, broadcasting, the arts, films, Internet publishing and software.[333]

B. Constitution and Procedure

Members of the Board are appointed (on a part-time or full-time basis) by the Governor-in-Council to hold office during good behaviour, for a term not exceeding five years and may be re-appointed once only. Whereas up to eight members may be appointed to the UK Tribunal, the statutory maximum of appointees to the Board is five, including a chairman (who must be a sitting or retired judge of a superior, county or district court) and vice-chairman.

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[331] Copyright Act (R.S.C 1985, c. C-42) section 70.6(1).

[332] Copyright Board of Canada, *Departmental Overview, 2007-2008*, Treasury Board of Canada Secretariat p.4. http://www.tbs-sct.gc.ca/dpr-rmr/2007-2008/inst/cop/cop01-eng.asp

[333] The Board sets tariffs that are estimated to be worth over $300 million annually, and operates within a broader policy framework of the Canadian Government that seeks to develop several industries. In 2004, these industries together generated an amount representing 4.5% of Canada's GDP, employed 875,000 Canadians and grew between 1997 and 2004 at a rate exceeding that of the Canadian economy. Ibid., p.5.

An interesting characteristic of the Board is that the Vice Chairman is designated under the Act as the Chief Executive Officer and is authorised to direct the Board, and to supervise its staff.[334] As a quasi-judicial tribunal, the Board, like its UK counterpart, must observe the rules of natural justice in carrying out its functions. With the approval of the Governor-in-Council, the Board may make regulations as to (a) the practice and procedure in respect of hearings, including the number of members that constitutes a quorum (b) the time and manner of making applications (c) the form of applications and notices and (d) the management of the Board's internal affairs. There is no appeal as of right from the decision of the Copyright Board. A dissatisfied party can, however, seek judicial review of a decision of the Board from the Federal Court of Appeal.[335]

C. Criticisms of the Board

While the Report on the review of the UK Tribunal[336] commented favourably on various aspects of the Canadian Copyright Board's operations, the Board has attracted its own share of criticism**.** Knopf, while acknowledging "that the Board does many things very well" has identified a few areas where, he suggests, improvements can be made. One such area relates to the Board's perceived practice of reliance on expert opinion evidence from persons who might not be sufficiently independent of the party for whom they are testifying and who may even function as advocates.[337] Another area

[334] Persons appointed as permanent staff fall within the civil service system and technical staff may be contracted by the Board on a temporary basis to provide specialized knowledge.
[335] Knopf, op cit. p.20.
[336] See Note 321.
[337] Knopf, op cit., p.23.

is the tendency of the Board not to give adequate reasons for its decision, a failing that has attracted judicial comment in the Federal Court of Appeal.[338]

As in the case of the UK Tribunal, lack of timeliness in disposing of cases was another concern - what Knopf calls the "pendency issue". In recent times, it has taken as much as 18 months to render a decision from the time the hearing was over.[339]

Also of concern is the apparent lack of accountability of the CMOs and the role that the Board should play in this regard. Arguably, the existing powers of the Board would enable it to give active oversight of the internal workings of Canadian CMOs, including their distribution mechanisms, administrative costs, transparency and reporting of key financial information. However, in light of the uncertainty as to whether the Board has the power to perform this function, it has been proposed that the authority to do so should be explicitly given by law.[340]

The Copyright Board has acknowledged these shortcomings and in its 2007-2008 *Report on Plans and Priorities* tabled in Parliament in 2007. The Board declared that it was "continuously looking for ways to improve the efficiency of the hearing process by

[338] The case involved the Canadian Association of Broadcasters which sought judicial review of a decision of the Board to grant to SOCAN and NRCC, two large CMOs in Canada, a 30% increase in the tariff payable by commercial radio stations. The court's view was that the Board "must explain the basis of its decisions in a manner that enables the Court on judicial review to determine, on the basis of the reasons read in context, whether the decision is rationally supportable." See *Canadian Association of Broadcasters v SOCAN*, (2006) FCA 337, paragraph 16.

[339] Current practice allows those proposing a tariff and those who might object to it to provide very little information at the outset. It has been suggested that an intermediate pre-hearing conference should be instituted in which the known issues are placed on the table early, allowing for the Board and the parties concerned to be aware of the details of the issues and to reduce delay later. See Knopf, op cit., pp. 30 and 32.

[340] Ibid., p.34.

minimising the overall participants' expense while ensuring that the process and the tariffs remain fair and equitable."[341] The Report identified three priorities associated with its "strategic outcome of achieving fair decision-making to provide proper incentives for the creation and use of copyrighted work". These are a) to ensure timely and fair processes and decisions- the rationale being to minimize administrative costs; b) to advance the analytical framework for decisions and regulatory processes for tariff-setting and c) to improve management practices. [342]

3.4.2.2.3. Copyright Tribunals - CARICOM

A. Functions

The Copyright Acts of some CARICOM states establish Copyright Tribunals as dispute settlement mechanisms, while others assign the dispute resolution function to the courts. [343] As previously indicated, where Tribunals are established, they are modelled on the UK Copyright Tribunal and are given similar functions. In general, disputes may arise in relation to a) the licensing scheme or tariffs operated by CMOs; b) the refusal or failure of a licensing body to grant licences; or (c) the terms on which licences are issued.[344]

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[341] Copyright Board of Canada, "Report on Plans and Priorities 2007-2008", p.10.
[342] Ibid., p.7.
[343] Tribunals are established under the laws of Antigua and Barbuda, Barbados and Jamaica. In Belize, St. Lucia and Trinidad and Tobago disputes are referred to the High Court.
[344] See for example, A&B ss 89-99; Bds. ss 87-97; Jam. ss 89-99. The High Court exercises similar functions except that under the Copyright Act of Trinidad and Tobago, by contrast with the extensive provisions in the other laws dealing with references to the Tribunal, the circumstances in which a reference can be made to the High Court are not spelt out in detail. The Act simply permits a reference to the Court by a person or a licensing body where a dispute arises between them with respect to the refusal of that body to grant a licence or where there are objections to the terms on which the licensing body proposes to grant a licence. See T&Ts53.

B. Constitution and Procedure

Where Tribunals exist, members are appointed by the Governor–General in some states, and in others, by the Minister assigned responsibility for copyright. In general, only a person with several years standing as an attorney-at-law or who has held office as a judge may be appointed chairman. The influence of the Government over the operations of the Tribunal is exerted through regulations made by the Minister. Such regulations may prescribe the matters that the Tribunal should take into account when references or applications are made to it in connection with any class of cases, and may also prescribe provisions relating to the conduct of the proceedings of the Tribunal.[345]

As is the case of the UK Tribunal, Tribunals established under CARICOM copyright laws can act only if a dispute is referred to them by one of the parties. There is an explicit right of appeal to the Court on any point of law arising from a decision of the Copyright Tribunal[346]

C. Criticism

Despite the availability of Copyright Tribunals for more than a decade, no disputes have been referred to them for resolution. Consequently, no basis exists for an assessment of their operations. The inactivity of the Tribunals may be symptomatic of underdeveloped rights management systems but could also indicate the concern of users that the procedures could be long and costly.

[345] For example, Bds. s103; Jca. s105.
[346] For example, A&B s106; sT&T s53.

The criticisms levelled at the Copyright Tribunal in the UK and at the Copyright Board in Canada provide good lessons for the operation of Tribunals in CARICOM - national Tribunals as well as the Regional Copyright Tribunal proposed in Chapter 4. In particular, efforts must be made to ensure that a) the costs associated with references to the Tribunal are not prohibitive b) that proceedings are not unduly protracted c) that procedures are not overly formal and d) that decisions are rendered in a timely manner and with clearly articulated reasons.

3.4 2.3. Competition Law and CMOs: U.S.A./UK /EU

In addition to the control exercised over them by Governments through Tribunals or courts, as indicated in the previous section, CMOs are subject to competition laws. As will be demonstrated below with reference to the performing right organisations in the U.S.A. UK and the EU, the principles of competition law apply to CMOs, whether or not they occupy a monopoly position.

3.4 2.3.1 U.S.A.

In the U.S.A. there are three music performing right organizations - ASCAP, BMI and SESAC. Despite the absence of a single dominant CMO, the existence of exclusive rights coupled with the blanket licence mechanism which allows these organisations to fix prices for the use of the works concerned, was considered to be a potential violation of U.S. anti-trust laws. Several lawsuits, many instituted by the Department of Justice, alleged that the CMOs were unlawful combinations and unreasonably restrained

trade.[347] Litigation was settled by the drawing up of voluntary agreements from as early as the 1940s, called Consent Decrees, which govern the practices of these organisations.[348]

Consent Decrees are in effect with respect to both ASCAP and BMI. They preclude the organisations from, *inter alia*, discriminating among similar users with respect to the prices and terms of use of works, and oblige them to offer a per programme alternative to a blanket licence and to provide radio network licences that cover the downstream broadcast by local radios.[349]

Over the years, several amendments have been made to the Consent Decrees in light of new technologies and new markets.[350] The latest amendment, made in 2000 to the ASCAP Consent Decree, was aimed at promoting increased competition in music licensing, updating the procedures for settling licence fee disputes, and eliminating certain costly and outdated provisions of the original decree. Notably, the amendment eliminated many of the restrictions governing ASCAP's relationship with its members

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[347] G. Lunney, "Copyright Collectives and Collecting Societies: the United States Experience" in D. Gervais (ed.) *Collective Management of Copyright and Related Rights* (The Netherlands: Kluwer Law International, 2006) p.312. In *Alden- Rochelle v. ASCAP 80 F. Supp. 888 (SD NY 1948)* the court's view was that the price-fixing power of ASCAP coupled with the combination of the members copyright constituted an unlawful restraint of trade. However, in *Broadcast Music Inc. v Columbia Broadcasting Systems, Inc.*, (1979) 441 U.S. 1, the Supreme Court determined that there were desirable efficiency results in the operation of ASCAP and BMI. The court supported the use of the blanket licence employed by ASCAP and BMI and confirmed the utility of these organisation despite their anti-trust characteristics. See R. Sherman, "The Future of Market Regulation" Department of Economics, University of Houston, 2001, paragraph 3. http://www.uh.edu/~psherman/SEApres.pdf

[348] A consent decree was first imposed on ASCAP in 1941 to resolve an anti-trust case brought by the Department's Anti-Trust Division of the U.S. Department of Justice, charging that ASCAP and certain members of ASCAP agreed to restrict competition in the licensing of the performing right and discriminated against certain members in managing those rights.

[349] Lunney, op cit.,p. 322.

[350] Ibid., p.313.

and paved the way for ASCAP's members to switch to another performing right organisation without being penalised.[351]

3.4.2.3.2. UK

In the UK, although official control and supervision of the operations of CMOs are generally "light",[352] mechanisms are in place to curb any abuse of their dominant positions. One of the main functions of the Copyright Tribunal is to ensure that the monopoly enjoyed by CMOs is not abused. Under the CDPA, references may be made to the Tribunal by any person who feels that he or she has been unreasonably refused a licence by a CMO or who considers the terms of an offered licence to be unreasonable. In addition, the activities of CMOs are subject to the scrutiny of the Competition Commission.[353]

3.4.2.3.3. EU

Traditionally, CMOs in Member states of the EU enjoy a monopolistic position with respect to the management of a particular right entrusted to them by copyright owners. In addition to being subject to control mechanisms established under domestic copyright laws and competition laws,[354] they are governed by EU competition law.

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[351] See "Justice Department Announces Agreement to Modify ASCAP Consent Decree", Release, September 5, 2000, Department of Justice.
http://www.usdoj.gov/atr/public/press_releases/2000/6404.htm

[352] There is very little Government supervision of the day-to-day conduct of CMOs. Because UK CMOs are private companies established by right- holders to manage their private rights, the official position seems to be that they should be self- regulating and that official intervention into the internal working of the organisation should be minimal, except where some overarching policy such as competition policy otherwise dictates.

[353] The Competition Commission replaced the Monopolies and Mergers Commission on 1 April 1999. It was created by the Competition Act of 1998.

[354] For a discussion of national regulatory models within the EU see Suthersanen, op cit., p.22 *et seq*.

In the EU, the practices of CMOs raise a range of potential anti-trust concerns under Articles 81 and 82 of the EC Treaty which prohibit, respectively, anti-competitive agreements and the abuse of a dominant market position.[355] There is consensus among EU institutions that CMOs are subject to the competition rules[356] and also that they are an economic, cultural and social necessity. The European Parliament put it this way:

> "..the de jure and de facto monopolies which the collecting societies generally enjoy do not, in principle, pose a problem for competition, provided that they do not impose unreasonable restrictions on their members or on access to rights by prospective clients; [Parliament] recognizes that collecting societies carry out tasks in the public interest and in the interests of right holders and users and, therefore, require a degree of regulation; [Parliament] emphasises the importance of competition law in examining possible abuses of monopoly by collecting societies in individual cases so as to be able successfully to ensure rights management also in the future." [357]

3.4.2.4. Relationship with Members

The basic framework governing the relationship between CMOs and their members was established decades ago in a case involving the German CMO, GEMA, in which the EC made at least two significant rulings on the issue.[358] In GEMA I,[359] the EC ruled that the obligation placed by a CMO on members to assign unduly broad categories of rights - for example, to assign exclusively all their current and future

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[355] B. Batchelor, "Anti-Trust Challenges to Cross-Border Content Licensing: The European Commission Investigations of Collecting Societies and iTunes" (2007) 13(8) CTLR 217 at p.218.
[356] See *BRT v SABAM* (1974) ECR 51.
[357] European Parliament Resolution, "A Community Framework for Collective Management Societies in the Field of Copyrights and Neighbouring Rights" O.J. C 92 (2002). The Parliament has also (through Resolution No. 27) recognized the important non-commercial role of CMOs referring to them as "vehicles of public authority" to the extent that they use their distribution rules to promote culturally important activities.
[358] D. Gervais, "Collective Management in the European Union" paragraph 2.1.1in Gervais, op cit. See Note 344.
[359] Gesellschaft fur Musikalische Auffufrungs-und Mechanische Vervielfalltigungsrechte (GEMA) v. Commission of the European Communities (1971) O.J.L. 134/15 [GEMA I].

rights with respect to all categories of works worldwide, could constitute an abuse of dominant position. In *BRT .v SABAM,*[360] the ECJ confirmed this aspect of the EC's decision articulating two tests- the "indispensability test" and the "equity test" that should be applied when the statutes of CMOs are examined in the light of EU competition rules.[361]

The ECJ also ruled in GEMA I that CMOs could not lawfully discriminate among members with respect to the distribution of income, nor could they deny membership to nationals of other EU member states or impose discriminatory terms concerning their membership (for example, by preventing a foreign right-holder from becoming an ordinary or extraordinary member, thereby denying them voting rights). In the opinion of the EC, such practices infringe Article 82 of the EC Treaty which prohibits discrimination in treatment within the internal market.[362]

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[360] See *BRT v SABAM* (1974) ECR 51.

[361] The "indispensability test" asks the question whether the statutes exceed the limits absolutely necessary for effective protection, and the "equity test" seeks to ensure that the statutes limit the individual copyright holder's freedom to dispose of his work no more than is necessary. Ibid., paragraphs 8-11. The ECJ ruled that a compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different and generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal." Ibid., paragraph 12.

[362] The treatment by a CMO of right-holders who are members of other CMOs would be governed by the reciprocal agreements that the organisations conclude among themselves. The EC's position in GEMA I concerning GEMA's discriminatory practices was confirmed by the ECJ in *Phil Collins v. Imtrat Handelsgesellschaft GmbH,* (1993) 1ECR. 5145. The Court stated that domestic provisions containing reciprocity clauses cannot be relied on in order to deny nationals of the EU member states rights conferred on national authors.

3.4.2.5. Relationship with Users

The application of Community competition rules to the relationship between CMOs and users was addressed by the ECJ in the seminal *Tournier* case.[363] In this case, French discotheque owners had complained that the fees that SACEM, (the French CMO) required them to pay for the use of music was excessive, non-negotiable and unfair. They argued that since their interest was mainly in popular dance music of Anglo-American origin, they should not be issued with a blanket licence with fees calculated on the basis of the availability of a worldwide repertoire. Rather, they insisted, licences should be granted and fees paid only in respect of the part of the repertoire that they wanted. The discotheque owners had tried, without success, to obtain licences directly from the CMOs that controlled the repertoires in which they were interested. Among the key principles that emerged from the Court's decision are the following:

(1) A national CMO may only refuse to grant direct access to its own national repertoire to users established in other EU Member States for efficiency reasons. If the refusal is based on agreements or concerted practices between national CMOs in the Member States in which the users are located, then this would have the effect of restricting competition in the common market and would be a breach of Article 81 of the EC Treaty.[364]

(2) The refusal by a CMO to grant national users a blanket licence for only parts of its repertoire was not prohibited by Article 81 of the EC Treaty, unless access to a part of the repertoire could entirely safeguard the interests of the right-holders

[363] *Ministère Public v. Tournier* (1989) E.C.R. 2521.
[364] Ibid., paragraphs 16-26; see also *Lucazeau v SACEM* (1988) E.C.R. 2811 at paragraphs 10-20.

without increasing the cost of managing contracts and monitoring the use of the protected works.[365]

(3) In respect of SACEM's tariff (having regard to the allegation that charges were excessive and unfair) the fees charged by a national CMO impose unfair trading conditions within the meaning of Article 82 of the EC Treaty if the royalties charged are appreciably higher than those charged in other Member States, account being taken of the differences in the level of operating expenses among CMOs in Members States.[366]

3.5. The Benefits of Regional Systems

3.5.1. EU and the Andean Community: Comparative Review

In addition to being subject to rules at the multilateral level concerning copyright and other intellectual property rights, countries that are part of a regional grouping of states, usually under trade agreements,[367] are likely to be bound by provisions on intellectual property rights contained in those agreements. The harmonisation of intellectual property laws within a regional grouping of states gives coherence and certainty as it minimises, if not removes, the barriers to trade that would be caused by widely differing levels and scope of protection.[368]

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[365] *Tournier*, paragraphs 27-33.
[366] Ibid., paragraphs 34-36.
[367] Such agreements generally take on one of four forms: a free trade area, customs union, common market or economic union. A free trade area exists when member countries eliminate tariffs and trade barriers, but maintain individual foreign trade policies. In a customs union, member countries eliminate tariffs and create a common external trade regime. With a common market, regional integration includes trade as well as the free movement of all aspects of production. An economic union represents the coordination of all the economic policies of the member countries. K. Johnsrud "Regional Trade Organizations" in *International Trade Law Guide*, 2008.
http://www.law.columbia.edu/library/Research_Guides/internat_law/trade_guide#nafta_intro
[368] Ibid.

Two regional groupings that administer copyright on a regional basis are the EU and the Andean Community. An examination of these regional systems provides insights that are valuable in the crafting of a regional management approach for CARICOM.

3.5.1.1. EU

The EU is a political and economic Union of independent states.[369] Harmonisation of laws on copyright and related rights is achieved through the issue of Directives containing normative and procedural provisions that each member of the Union must reflect in its domestic law.[370] Harmonisation of laws in the EU reduces the significant disparities in the copyright laws of member states as well as the differences between laws of countries having a common law tradition and those with a civil law tradition.

The harmonisation of copyright laws in the EU does not, however, result in a community copyright.[371] The territoriality principle remains intact,[372] and member

[369] It was established as the EEC under the Treaty of Rome. A principal aim of the Treaty was to create an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital. Through a series of enlargements the membership of the EU stood at 27 in January 2007. Member states are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia , Finland, France, Hungary, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania,, Slovakia,. Slovenia, Spain, Sweden, and the United Kingdom. http://ec.europa.eu/enlargement/the-policy/from-6-to-27-members/index_en.htm

[370] The legal basis for the issue of Directives is Art. 249 of the Treaty of Rome which confers authority on the European Parliament acting jointly with the Council, and on the Council and the Commission, to make regulations, issue directives, take decisions, make recommendations and deliver opinions.

[371] Unlike trade mark and design laws where there is a Community trade mark and a Community design. T. Dreier and P. Hugenholtz (eds.) *Concise European Copyright Law*, (The Netherlands, Kluwer Law International, 2000) p.1.

[372] The territoriality principle means that protection is conferred independently by each member state, and is interpreted and applied by the courts of that state.

states are left to implement the Directives at the national level.[373] However, the laws and procedures of member states are subject to the jurisdiction of the EU authorities, given the EU's supranational structure. While copyright laws are harmonised, no harmonised system of rules or procedures governs the operation of CMOs. As discussed below,[374] the EU authorities have taken action in recent years in an attempt to remedy this situation.

3.5.1.2. Andean Community

The Andean Community is a sub-regional grouping of four South American countries.[375] Community legislation is issued in the form of Decisions which correspond to the EU Directives. Two Decisions are relevant to the harmonisation of

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[373] A Directive is binding on member states as to the results to be achieved. Unlike a regulation which is directly applicable, a Directive must be transposed into the domestic law of a member state. However, the national authorities of each state are left the choice of form and method of implementation. Where a member state fails to transpose a Directive or its legislation does not adequately comply with the Directive, the European Commission may initiate infringement proceedings against the member state. If the case is not resolved the Commission may refer it to the European Court of Justice which may impose a fine on the offending state. The Commission has instituted proceedings against several states in relation to the implementation of Directives concerning copyright and related rights. See for example the case against the Czech Republic, Hungary, Italy, Portugal and Spain relating to the implementation of the Directive on rental and lending rights: IP/07/359 March 21, 2007 and the case against France, Finland, Spain and the Czech Republic for non-implementation of 2001 Copyright Directive: IP/05/921 dated July 13, 2005. http://ec.europa.eu/internal_market/infringements/index_en.htm

[374] At 3.5.2.

[375] They are Bolivia, Colombia, Ecuador and Peru. Venezuela, a founding member of the Community, withdrew in 2006. It was established as a legal entity by the Cartagena Agreement- "The Sub-Regional Integration Agreement of May 26, 1969". The Community together with the regional bodies and institutions set up under the Agreement represent the "Andean System of Integration" (SAI). The Community legal order is based on a number of instruments the main ones being: a)The Cartagena Agreement, its protocols and additional instruments; b) The Treaty of the Andean Community Justice Tribunal, its protocols and additional instruments; c) Decisions of the Andean Council of Ministers of External Relations and the Commission of the Andean Community; d) Resolutions of the General Secretariat of the Andean Community; e) Conventions adopted by the member countries within the framework of the Andean integration process. R. Ferreira, **"**Regional Cooperation Agreement and Competition Policy–The Case of Andean Community" Chapter XI, in UNCTAD, *Multilateralism and Regionalism: The New Interface* (UNCTAD/DITC/TNCD/2004/7, 2004) pp.145 and 146. http://www.unctad.org/en/docs/ditctncd20047ch8_en.pdf

intellectual property rights in the Community. Decision 351[376] provides a complete code of authors' rights and related rights for implementation in the member countries of the Community. Like the EU, a feature of the Community is its supranational structure. In both cases, the principle of direct applicability of Community law operates and in the case of a conflict, Community law has pre-eminence over national laws.[377]

A significant feature of Decision 351 is its extensive regulatory provisions with respect to collective management of rights within the Community. There is no comparable Directive in the EU although aspects of the EU Recommendation on the cross-border licensing of online music cover some of the issues addressed in the Decision, but only to the extent that they relate to the management of rights in online music.[378]

Decision 351 explicitly puts CMOs under the supervision and control of state authorities and obliges them to obtain licences to operate. Such licences are to be issued subject to compliance with certain rules. These include a) a requirement to put in place rules of distribution that guarantee equitable apportionment of royalties among right-holders, after deduction of administrative costs that must not exceed the maximum percentage allowed by national law; b) rules on membership, tariffs and distribution; c) the obligation to grant appropriate rights of participation to members in decision-making, and d) the duty to publish periodically, in a medium with wide

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[376] Commission of the Cartagena Agreement, Decision 351 "Common Provisions on Copyright and Neighbouring Rights" concluded on December17,1993. http://www.comunidadandina.org/ingles/normativa/d351e.htm . For a detailed examination of this Decision see R. Antequerra Parilli, "Copyright and Andean Community Law" (1995) 166 R.I.D.A. 56.

[377] Ibid., p.146-147.

[378] Commission Recommendation 2005/737/EC on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, O.J. L 276/54 (2005).

national circulation, their balance sheets and accounts, as well as the general tariffs for the use of the rights that they represent.[379] The Decision also provides for sanctions to be imposed for non-observance of the conditions of the licence, and prescribes provisions pertaining to the collection of royalties and the assertion of rights by CMOs in judicial proceedings.[380]

3.5.2. EU Copyright Management Systems

3.5.2.1. EU Legislative Proposal

The question whether there should be a regional legislative framework for CMOs has been an item on the agenda of the European Commission at least since the publication of the Green Paper of 1995.[381] Also at issue has been the need to reform the management structures and modes of operation of CMOs in a way that would allow for cross- border management of rights.

The EC took the view that legal action to harmonise the collective management of copyright and related rights was necessary to level the playing field in this area and, thereby, achieve a genuine internal market for both the off-line and the online exploitation of copyright and related rights.[382] The argument is that disparities in

[379] Decision 351 op cit., Chapter 1, Art. 45.
[380] The Decision also makes provision for the establishment of national offices for the administration of authors' rights and related rights and prescribes the acts that are covered by "communication to the public" making it, as Sterling has observed "the first international instrument to deal specifically with the copyright aspect of on-line communication". Sterling, op cit., paragraph 25.08.
[381] European Commission Green Paper on Copyright and Related Rights in the Information Society. COM (95) 382 (1995).
[382] The general legal basis for the pursuit of such an "internal market objective" can be found in Article 95 of the EC. Treaty which provides that measures may be adopted "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment or function of the Internal Market". See L. Guibault and S. van Gompel "Collective Management in the European Union" in Gervais, op cit (see Note 344), Chap. IV, pp.117-152.

national rules and practices affecting CMOs could contribute to the distortion of conditions for competition- for example, where right-holders are prevented from "shopping around" for the services of CMOs[383] A harmonised regional legal framework is required, it is argued, to remove these disparities. Such a framework would prescribe common minimum rules that would govern, *inter alia* -

(a) the establishment and status of CMOs, including provisions relating to standards of efficiency, accountability, and membership of right-holders;

(b) the relationship between CMOs and right-holders, including provisions allowing for flexible mandates by right-holders in terms of scope (e.g. right-holders should be able to license certain rights themselves) duration of membership, access to documents and participation in decision-making;

(c) the relationship of CMOs to users, including provisions aimed at the functioning of these organisations as one-stop-shops, the grant of licences on reasonable terms and transparency in pricing policy;

(d) external control of CMOs, including provisions covering such matters as the behaviour of the organisations, the control of tariffs, licensing conditions and the settlement of disputes.

In determining the appropriate instrument to govern CMOs, the EC is constrained by the principle of subsidiarity which requires a determination as to whether the objectives to be attained could also be achieved by Member States individually, using their own

[383] Ibid., paragraph 4.2.1.

powers or whether the circumstances justify a response at the Community level.[384] The EC must also take into account the proportionality principle (regarded by the European Court of Justice as a cornerstone of the Community law)[385] which requires that any action by the Community should not go beyond what is necessary to achieve the objectives of the Treaty.[386]

Instead of taking legislative action in the form of a Directive, the EC could opt to use "soft law" in the form of guidelines or recommendations to be observed by CMOs in conducting their affairs. As Guibault has observed "[T]he Community legislator has increasingly used soft law as an alternative to legislation".[387]

Over the years, efforts of the EC have shifted away from considering a regional framework to govern CMOs and have focused instead on the more urgent issue of the cross-border licensing of online music.

3.5.2.1.1. Cross-Border Collective Management of Rights

The phenomenal growth in the use of digital technology and the extensive use of communication technologies, notably the Internet, as well as the development of the

[384] Community action is justified if (a) the issue under consideration has transnational aspects that cannot be satisfactorily regulated by the action of the Member States (b) action by Member States alone or lack of Community action would conflict with the requirements of the EC Treaty or would significantly damage the Member State's interests and (c) action at the Community level would produce clear benefits by reason of its scale or effects compared with action at Member State level. See Gibault, op cit., paragraph 4.2.2.
[385] Ibid., paragraph 4.2.3.
[386] In the context of the proposed legislative framework for the collective management of rights in the EU, the application of this principle would mean that account must be taken not only of the objectives relating to the internal market but of other issues and interests such as cultural and social aspects and the well-established legislation of member States. Ibid.
[387] Ibid., paragraph 4.3.

mobile telephone industry have resulted in an explosion in the market for the delivery of legitimate online music service. A study undertaken by the EC[388] found that over the period of five years preceding the study, the gap between the level of revenues for online music services[389] earned in the U.S. and the level earned in Western Europe had progressively widened, revealing the un-competitiveness of the online music industry in Western Europe.[390]

The study asserted that one of the factors contributing to this gap was the way in which copyright for online music services was cleared across the EU member states. When online music services are provided in a particular country in the EU, they are technically accessible in all the countries of the EU, at least. However, the traditional model of cross-border co-operation works on the assumption that each CMO is exclusively responsible for the cross-licensed or represented repertoire in a particular country with respect to all commercial users established in that country. As a result, online content providers must obtain copyright clearance in each of the EU countries.[391] Further, CMOs in the EU tend to manage particular rights and sometimes specific types of exploitation only, as there was no multi-territorial licensing arrangement in place for the online rights of all categories of right-holders.[392].

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[388]EC "Study on a Community Initiative on the Cross-Border Collective Management of Copyright", Commission Staff Working Document, July 2005 (referred to herein as the Study). http://ec.europa.eu/internal_market/copyright/docs/mamagement/studies-collectivemgmt_en.pdf

[389] Online music services include any music service provided on the Internet such as simulcasting, webcasting, streaming, downloading, online "on-demand" service and music services provided to mobile telephones. Ibid., paragraph 1.1.

[390] In 2004, U.S. online revenues were almost eight times higher than those achieved in Western Europe.

[391] It was estimated that in the EU member states over 300 bilateral reciprocal representation agreements would have to be concluded among collective management organisations to cover, at least, the aggregate repertoire of European collective management organisations for the exploitation of one particular right.

[392] Ibid., paragraph 1.1.4.1.

As previously discussed, the traditional model of cross-border co-operation is based on the principle that a national CMO is exclusively responsible for issuing licences to commercial users in that country for the use of repertoires controlled by foreign CMOs.

3.5.2.1.2. Territorial Licensing of Online Music: the Problem

The collective management of cross–border licensing of online music according to the traditional management practice was considered to be sub-optimal because of restrictions contained in the reciprocal bilateral agreements between CMOs. The main restriction is that CMOs have agreed to license only the works of right-holders within the CMO's country of operation.[393] In addition, neither right-holders nor commercial users in a country can access the services of CMOs in another country because of the agreement among CMOs not to accept as members, persons who are members of other CMOs or nationals of member states in which other CMOs operate.[394] Further, the agreements may include elements of discrimination with respect to the distribution of royalties made on the basis of nationality and categories of right-holders.[395]

These and other elements identified in the Study are systemic features of a management system designed for an analogue environment and which seems unable to accommodate

[393] CMOs typically use CISAC model agreements as templates for their reciprocal bilateral agreements The model agreement on public performance and performance broadcasting rights (Paris 1974) as amended covers several modes of copyright exploitation online, including uploading or downloading of music or films on a computer, disk, mobile phone or other device. Under Article 6 II, each contracting society undertakes to "refrain from any intervention within the territory of the other society in the latter's exercise of the mandate" conferred by the contract. Ibid., paragraph 1.1.4.1.
[394] Ibid., 1.1.4.0.
[395] Ibid., paragraph 1.1.4.2. For a review of the study and its proposals, see Frabboni, M., "Cross-Border Licensing and Collective Management: A Proposal for the Online Context", (2005) 16(8) Ent.L Rev. 204.

easily the demands of the online environment, indicating that radical reform of the existing management model of CMOs may be required.[396].

3.5.2.1.3. Proposed Solution

The Study's recommendation for a legislative instrument to govern the management of rights in online music services is premised on the assumption that innovative and dynamic structures at the EU level for cross-border collective management of legitimate online music services would not simply emerge through the force of the market and that legislative intervention was necessary.[397]

In its discussion of the question how the cross-border management of rights in the online music industry could be improved, the Study presented three scenarios 1) do nothing; 2) improve cross-border co-operation between national CMOs in the EU Member States, and 3) give right-holders the additional choice of authorising a collective rights manager for the online use of their musical works across the entire EU. In the context of the aims of the internal market, the Study discussed the pros and cons of each approach. Option 3 was the most radical. It envisaged that right-holders across the EU would have direct membership of a CMO of their choice in any country of the EU, and that CMO would be authorised to issue a single licence covering the entire EU. Reciprocal bilateral agreements would therefore be redundant. The Study advocated the adoption of this latter approach.[398].

[396] Study, paragraph 1.4.1.
[397] Ibid., paragraph 1.4.
[398] Ibid., paragraph 7.

In the result, the EC issued a Recommendation reflecting this position [399]. The Recommendation invited Member States of the EU to take the steps necessary to facilitate the growth of legitimate online services in the Community by promoting a regulatory environment which is best suited to the management, at the Community level, of copyright and related rights for the provisions of legitimate online music services.[400] Among the principles enunciated in the Recommendation are that right-holders a) should be entitled to entrust the management of any of the rights necessary to operate legitimate online music services on any territorial basis to any CMO of their choosing, irrespective of their nationality or residence and b) should be able to withdraw the management of their rights from one CMO and transfer them to another without penalty.[401]

In addition to these principles, the Recommendation articulated several provisions aimed at providing a coherent system of governance for CMOs in the EU.[402]

3.5.3. Joint Ventures and Alliances

Even before the Recommendation was issued, some CMOs in EU members states had made adjustments to their traditional *modus operandi* to address the challenges posed

[399] Commission Recommendation 2005/737/EC on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, O.J. L 276/54 (2005) (referred to hereinafter as "the Recommendation").
[400] Recommendation, paragraph 2.
[401] Ibid., paragraph 5.
[402] Other aspects of the Recommendation include provisions that urge a) the grant of licences to commercial users on the basis of objective criteria; b) the distribution of royalties on an equitable basis to all right-holders and all categories of right-holders they represent; c) the need for rules to specify whether and the extent to which deductions from royalties are allowed; d) the need for rules governing the relationship between the CMOs to embody principles of equal treatment in relation to all elements of the management service provided by the society; e) fairness and balance in the dealings of collecting societies and accountability to the right-holders they represent.

by the online exploitation of musical works. These adjustments included the formation of joint ventures and alliances, some of which created new models of regional rights management in the EU.

One attempt at a joint management approach was initiated under the Santiago Agreement, concluded in 2001 by several CMOs in the EU concerned with authors' rights (PRS in the UK, SACEM in France, GEMA in Germany and BUMA in the Netherlands).[403] The agreement related to the management of authors' rights in online communication to the public, including the making available right with respect to the downloading and streaming of music. The purpose of the Agreement was to allow commercial users of musical works to have a one-stop-shop for copyright licences which would cover the music repertoires of all the CMOs that are parties to the agreement, and which would be valid in all their territories. The benefit of this form of rights management to users is that it obviates the necessity of clearing online rights in different countries.[404] Further, the CMOs involved would benefit from economies of scale reflected in the cost savings associated with the issue of a single licence.

Despite these advantages, the Agreement was short- lived[405] because of the objections of the EC to the economic residence clause in the Agreement, according to which, the authority of a CMO to issue a licence was based on the economic residence of users.

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[403] To be joined subsequently by all authors' societies in the European Economic Area (except SPA in Portugal) as well as SUISA, the Swiss authors' society. The Agreement was notified to the Commission in April 2001. See Notification of the Agreement (COMP/C2/38.126) O.J. C145/02 (2001).

[404] D. Wood , "Regulation and Competition in the Media Sector", *Competition Law Insight,* published 15 November, 2005 Informa Professional. http://media.gibsondunn.com/fstore/documents/pubs/CLImedia-111505-DWood.pdf

[405] When the agreement expired in 2004 the CMOs concerned did not renew it.

This was, in effect, mandatory customer allocation, and was considered to be anti-competitive and inimical to the objectives of the internal market.[406]

The BIEM/Barcelona Agreement[407] was another effort by CMOs at the multi-territorial licensing of the mechanical reproduction right as it related to online reproduction in respect of webcasting and on demand transmission by acts of streaming and downloading. Having mirrored the Santiago Agreement, including the anti-competitive clause to which the EC objected, the parties decided against renewing the Agreement when it expired.

However, there have been other successful efforts at devising various forms of regional rights management mechanisms. These include the IFPI brokered agreements for Simulcasting[408] and Webcasting[409] as well as models for pan-European licensing arrangements in respect of online rights that have emerged in recent years.

A significant collaborative initiative is the Centralized European Licensing and Administrative Service (CELAS), an alliance formed by GEMA, MCPS/PRS that was the first Pan-European licensing system for online and mobile uses in Europe. Since

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[406] H. Ungerer " European Music Cultures and the role of copyright organizations- competition aspects: European Music Cultures: Sounds or Silence?", European Commission, 2004.

[407] The Agreement was notified to the Commission. See (COMP/C2/38.377) O.J. 132/18 (2002).

[408] The term "simulcasting" refers to the transmission of radio or TV programmes over the Internet at the same time as they go out on air. It enables national and local stations to broadcast to the world. See J. Lambert "EC Competition Law: Case Note- IFPI Simulcasting Exemption", 2002. http://www.ipit-update.com/compec05.html The Agreement was signed by CMOs representing record producers in 31 European countries.

[409] Although the one -stop- shop would have simplified the approval process, the old fee structure of the CMO remained intact. Webcasters would still have to pay each national body a fee for songs broadcast into the country in which each organisation operates. Several European CMOs as well as the US performance rights organization Sound Exchange are signatories to the agreement.

January 2007, CELAS has licensed the Anglo-American mechanical repertoire of EMI Music Publishing.

Another example of increasing co-operation is the joint venture arrangement between Universal Music Group and SACEM under which SACEM and SDRM (Society for the Administration of Mechanical Right of Authors, Composers and Publishers) would license and administer the online rights owned and/or controlled by Universal together with those works from SACEM's repertoire that are published by Universal as available for multi-territorial online and mobile exploitation.

Further, the Pan-European Digital Licensing (PEDL) standards have been agreed under a partnership deal between GEMA, MCPS-PRS and STIM, on the one hand, and the Warner Chappelle Music, on the other. The arrangement will allow EU-wide licences for Warner Chappelle Music to be granted by the partnering organisations as well as other CMOs that adhere to the standards set by the initial partners.[410]

The European Commission has continued its efforts to institute a multi-territorial licensing regime not only in respect of online music but other creative content sectors such as the audiovisual sector.[411] The ultimate aim is to facilitate the making of formal

[410] S. Butler "Societies Promote Pan-European Licensing", Billboardbiz, published April 11, 2008.
[411] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM (2007) 836 Final (SEC (2007) 1710 http://ec.europa.eu/avpolicy/docs/other_actions/col_en.pdf

recommendations on new ways to achieve a single online content market for 500 million potential consumers, predicted to be worth 8.3 billion euros by 2010.[412]

It remains to be seen whether the current trend towards multi-territorial licensing of online music in Europe will continue and deepen in response to the demands of the market, or whether the EU authorities will have to take legislative action to ensure that this occurs. Increasingly, arguments in favour of territorial management of rights are becoming difficult to defend especially where online works are concerned.

3.6. The CARICOM Mechanism

3.6.1. CARICOM: Structure

The proposal for the management of copyright on a regional basis in CARICOM is consistent with many regional co-operation initiatives taken by CARICOM states over the years. The most ambitious regional, political and economic undertaking is the establishment by Treaty of the Caribbean Community, which includes the CARICOM Single Market and Economy (the CSME).[413] The Community comprises 15 member states.[414]

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[412] Ibid., paragraph 1.1.

[413] The Revised Treaty of Chaguaramas Establishing the Caribbean Community, Including the CARICOM Single Market and Economy, 2001(hereinafter referred to as The Revised Treaty). For the text of the Revised Treaty see http://www.caricom.org/jsp/community/revised_treaty-text.pdf The existing arrangement evolved from the Caribbean Free Trade Agreement established in 1972 which was subsequently transformed into a Common Market and a Caribbean Community by the Treaty of Chaguaramas (named after the location in Trinidad where it was signed) in 1973. With the adoption of the Revised Treaty, the Caribbean Community was further transformed into a Single Market and Economy. Another major regional initiative is the University of the West Indies which is supported by 15 Governments of the region. See *supra* at 2.5.1.1.

[414] See Note 9. Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Turks and Caicos Islands enjoy associate membership.

The main purpose of the Treaty is to integrate the economies of the member states into a unified market in which people, goods, services and capital move freely, and to create a single economy that functions under the same co-ordinated and harmonised economic policies. Among its objectives is enhanced functional co-operation including, more efficient operation of common services for the benefit of is peoples. The principles of non-discrimination among member states of the community and most-favoured nation treatment operate under the Treaty.[415]

The principal Organs of the Community are the Conference of Heads, consisting of Heads of Governments of Member States, and the Community Council of Ministers. As the "supreme organ of the Community", the Conference provides policy direction.[416] In performing their functions the principal organs are assisted by a) the Council for Finance and Planning b) the Council for Trade and Economic Development ;[417] c) the Council for Foreign and Community Relations and d) the Council for Human and Social Development.

CARICOM states have also established the Caribbean Court of Justice (the CCJ) with an original and appellate jurisdiction.[418]

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[415] Revised Treaty, Arts. 7 and 8, respectively.
[416] Revised Treaty, Art. 12.
[417] COTED has functions pertaining to intellectual property rights. See 3.6.2.1 *infra.*
[418] The CCJ is not an organ of the Community. It was set up under the Agreement Establishing the Caribbean Court of Justice. In the exercise of its original jurisdiction, the CCJ hears and determines contentious matters relating to the application and interpretation of the Revised Treaty. As a municipal court of last resort, it will replace the Judicial Committee of the Privy Council (in due course) and as an international tribunal, it employs the rules of international law in interpreting and applying the Revised Treaty. The text of the Agreement may be found. http://www.sice.oas.org/trade/ccme/ccj1.asp

The impulse for even greater regional co-operation has led to the establishment of the Organisation of the Eastern States (OECS) [419]and the Association of Caribbean States (ACS).[420]

3.6.2. Treaty Provisions on Intellectual Property Rights

3.6.2.1. Promotion of IPRS

Under Article 66 of the Revised Treaty, COTED has the function of promoting the protection of intellectual property rights in the Community.[421] One of its key functions is to promote the establishment of a regional administration for intellectual property rights, excluding copyright.[422] The provision envisages that where the law requires formal registration procedures for the grant of rights, (e.g. for the grant of a trade mark or industrial design) such procedures would be carried out for all members of the community by a single regional entity.

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[419] The OECS was established by the Treaty Establishing the Organisation of Eastern Caribbean States. 1981. Full membership is enjoyed by Dominica, Grenada, Montserrat, St Kitts and Nevis, St. Lucia and St Vincent and the Grenadines. Anguilla and the British Virgin Islands, which are both UK colonies, are associate members. OECS countries share a single currency- the Eastern Caribbean Dollar- the operation of which is overseen by a single monetary authority- the Eastern Caribbean Central Bank. They also share a common court, the Eastern Caribbean Supreme Court. http://www.oecs.org/about.html#

[420] See the Convention Establishing the Association of Caribbean States (ACS) signed on 24 July 1994 in Cartagena de Indias, Colombia (ACP Convention). The ACS comprises all CARICOM states as well all other states bordered by the Caribbean Sea (referred to as the "Greater Caribbean") that is, Colombia Costa Rica, Cuba, Dominican Republic, El Salvador Guatemala, Mexico. Nicaragua, Panama, Venezuela (See ACP Convention Art IV and Annex l). The ACS was established as an organization of co-operation, consultation and concerted action with the objective of establishing an economic space in the Greater Caribbean. Regional co-operation among these states is regarded as a strategy of resource pooling in areas such as international negotiations, higher education, science and technology, where economies of scale and critical mass requirements are significant. See http://www.acs-aec.org/about.htm

[421] Art. 66.

[422] The exclusion of copyright relates to the fact that there are no formal processes involved in the grant of copyright protection. Other key aspects of COTED's mandate under Art. 66 to promote the protection of IPRS are (i) the establishment of mechanisms for the preservation of indigenous Caribbean culture; (ii) the legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous populations in the Community; (iii) increased dissemination and use of patent documentation as a source of technological information ; (iv) public education.

This study proposes a single regional CMO exercising functions in the region with respect to the management of the copyright of authors, composers and publishers of music. This proposal is in harmony with the clear policy directive in Art. 66 that a regional system for administering the formal statutory processes relating to the grant of certain types of IPRS should be promoted. Both in respect of the grant of the rights by the state machinery and the management of the private rights granted to the copyright owners, a regional approach would allow for the pooling of resources, thereby reducing needless duplication of effort.

3.6.2.2. Harmonisation of IP laws

In order to promote investments, especially cross-border investments within CARICOM's single economic space, Article 74 of the Revised Treaty mandates the harmonisation of the laws and administrative practices of Member States in several areas of law, including laws relating to intellectual property rights. As indicated in Chapter 4, the harmonisation of the copyright laws of CARICOM states would be critical to the operation of a single regional CMO to manage the rights of authors, composers and publishers of music in the region.

3.6.3. CARICOM: Small states and small economies

According to Kida, the Caribbean is the world's largest group of small states.[423] Although there is no single method of characterising states and economies as small, perhaps because size is a relative concept,[424] international bodies and scholars invariably regard three criteria as critical indicators: land size, population and gross domestic product.

Table 4 below demonstrates that most CARICOM states have populations of less than a million, with St. Kitts and Nevis having a population of 50,000. Jamaica and Trinidad and Tobago have the largest populations while Guyana and Belize have the largest land size but relatively low population levels. Despite their small size and other commonalities, CARICOM states differ significantly in their levels of economic development. Based on their per capita income, the Bahamas and Barbados are high-income countries while Guyana with a per capita income of less than $4,000 is a low-income country.

3.6.4. EU and CARICOM small states compared

The relative smallness of CARICOM states in terms of land size and economy may be demonstrated by a comparison with some small states in the EU. Table 5 below shows the indicators for the smallest economies in the EU. According to the accepted

[423] See Mizuho Kida "Caribbean Small States – Growth Diagnostics" World Bank, the Economic Policy and Debt Department (PRMED), 2006. http://www.docstoc.com/docs/1003942/Caribbean-Small-States-Growth-Diagnostics

[424] See Commonwealth Secretariat/World Bank, "Small States: Meeting Challenges in the Global Environment" Report of Joint Task Force on Small States, 2000, p.3. ("the Report").

population threshold, Luxemburg, Cyprus, Slovenia and Estonia are small states. When EU small states and CARICOM small states are compared, two features stand out. The first is that despite their small land size and populations (both of which are similar to those of some CARICOM states) EU small states have a significantly higher income per capita. The GDP per capita is a crude indicator of earnings of individuals in a given economy. In the context of this study, GDP per capita has a bearing on the purchasing power of individuals and on the market for goods and services protected by copyright.

The second feature is that the small states of the EU constitute a very small minority of the 27- member EU, while in the case of CARICOM, all member states are small states with small economies. The value of this comparison is that it provides a useful perspective about the small size of CARICOM member states. The data provided emphasise their relatively small markets and low incomes. Given this reality, the institution of regional centralized management structures to manage copyright, as proposed in this study seems highly desirable, in place of the traditional nationally-based management structures which the right-holders in most of these states have been able to establish, and, in any event, would likely not be able to maintain.

Table 4:

Size of CARICOM States

CARICOM MEMBER STATE	GEOGRAPHIC SIZE KM²*	POPULATION MID-2007 US$M **	2007 GDP PER CAPITA US$***	GDP PPP US$M ****
Antigua and Barbuda	442	0.1	12,799	1,581
Bahamas	13,939	0 .3	22,700	$9,189
Barbados	431	0.3	12,687	4,950
Belize	22,966	0. 3	4,429	2,086
Dominica	750	0.1	4,838	579
Grenada	345	0.1	5,081	825
Guyana	214,970	0.8	1,435	2,225
Haiti	27,750	9.0	612	6,137
Jamaica	10,991	2.7	4,147	17,908
St. Kitts and Nevis	269	0.05	1,0447	706
St. Lucia	616	0.2	5,810	1,680
St. Vincent and the Grenadines	389	0.2	4,660	926
Suriname	163,820	0.5	4,463	3,577
Trinidad and Tobago	5,128	1.4	15,457	31,324

*Source: Caribbean Community Secretariat
http://www.caricom.org/jsp/community/member_states.jsp?menu=community
** Source: Population Reference Bureau, 2007 World Population
http://www.prb.org/pdf07/07WPDS_Eng.pdf
***Source United Nations Statistics Division: Social Indicators available at
http://unstats.un.org/unsd/demographic/products/socind/inc-eco.htm
****Source: World Development Indicators Database, World Bank
http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP_PPP.pdf

Table 5:

EU Small States

EU MEMBER STATE	GEOGRAPHIC SIZE KM²	POPULATION IN 2007 US$M*	2007 GDP PER CAPITA US$**	GDP PPP US$M ***
Malta	316	0.4	18,227	6,375
Luxembourg	2,586	0.5	108,217	47,942
Cyprus	9,250	0.8	27,465	21,277
Estonia	45,000	1.4	15,935	21,279
Slovenia	20,273	2	22,936	45,451

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*Source: Europa The EU Countries- Europe at a Glance. http://europa.eu/abc/european_countries/index_en.htm
**United Nations Statistics Division-Demographic and Social Statistics. http://instats.un.org/unsd/demographic/products/socind/inc-eco.htm
***Source: World Development Indicators Database, World Bank Revised 10 September 2008. http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf

3.7. Conclusion

This chapter emphasised that the inherent value of copyright will not be realized without proper management of the rights conferred. It was established that most rights in music, in particular the performing right, are managed collectively with the blanket licence being the main management tool. It was noted that in contrast to the rationale for managing rights in music, the primary objective of copyright management in Universities is to exercise control over the copyright works so as to ensure their availability for use by the academic community.

The chapter explained the traditional practice of managing rights on a territorial basis. It also discussed the benefits of a regional approach to managing copyright and other intellectual property rights in the context of regional groupings of states such as the EU

and the Andean Community. It was shown that in the case of both regional blocs, actions taken to harmonise copyright laws, copyright management practices and the operations of CMOs are consistent with the imperatives of an internal market. This finding is instructive for the CARICOM Single Market and Economy and indicates the need to make adjustments to the existing framework in the Revised Treaty relevant to the management of IPRS.

The chapter also examined the challenge posed to the collective management of copyright on a territorial basis in the context of the problems faced in the EU with respect to the licensing of online music. It presented the arguments of the EC in its advocacy of multi-territorial licensing of online music. The lesson for CARICOM from the EU experience is that the traditional management of rights on a territorial basis is not sacrosanct, and that new models of management can be devised that best suit particular circumstances. It was also noted in the chapter that several initiatives have been taken in the EU among CMOs and others towards the management of rights on a co-operative or regional basis in the form of joint ventures and alliances.

With the benefit of insights gained from the developments discussed in this chapter, the next two chapters will flesh out proposals for the establishment of regional structures to manage copyright in CARICOM- first in relation to the management of the copyright of authors, composers and publishers of music, and then in relation to University-generated copyright.

CHAPTER 4: REGIONAL MUSIC MANAGEMENT

4.1. Introduction

Using as points of departure the findings of Chapter 2 concerning the problems of collective management in CARICOM states, this chapter develops the argument for the establishment of a single CMO in CARICOM to manage the rights of authors, composers and publishers of music. First, previous proposals for a regional approach to rights management in the Caribbean are referenced and then the elements of the proposed new model are elaborated. The chapter argues for the issue of a pan-Caribbean licence by a single CMO in place of a multiplicity of licences issued by several small CMOs. It advocates the integration of copyright management into the structure of the CARICOM Single Market and Economy, through an extension of the existing provisions of the Revised Treaty dealing with intellectual property rights. The chapter proposes new Treaty provisions and complementary policy and legislative actions that would be necessary to support a successful regional collective management system.

4.2. Previous Proposals

4.2.1. CIMI Report

In a Report on the Caribbean Inter-Cultural Music Institute Project (CIMI) submitted more than a decade ago, a sub-regional approach to collective rights management was proposed.[425] The CIMI Report recommended the progressive transformation of PRS agencies into local collective management organisations, recognizing at the same time

[425] CIMI was a UNDP-funded Project undertaken in collaboration with UWI. It was "directed towards harnessing and giving direction and focus to the music potential of the Caribbean". See D. de Freitas, *Report*," CIMI, CARICOM/UNDP/UWI Project, December 1992, paragraph 1.

that "designing a regional set of arrangements for improving the infrastructure throughout the CARICOM territories is far from straightforward". The small size of the countries concerned and the lack of persons knowledgeable about copyright and the practical systems of administering rights were recognised as problematic.

The Report recommended a management approach based on the existence of national CMOs in Jamaica, Trinidad and Tobago and Barbados, respectively. Right-holders in the other CARICOM states would become members of one of these organisations- that is, the Jamaican CMO would also operate in Belize and the Bahamas, and the Barbadian CMO would operate in the Eastern Caribbean states. As in the PRS model,[426] these CMOs would act through agents. It was envisaged that PRS would have to be relied on for some time to provide documentation and distribution services, since it was thought that the complexities involved and the human and financial resources required to manage rights would be beyond the potential of any national CMO in the region.[427]

The CIMI recommendation was, essentially, collective management on a sub-regional basis, since some national CMOs would, as it were, be extending their territorial reach to other countries in the region. For reasons which are not entirely clear, the CIMI recommendation was never acted upon. Nevertheless, the Report was innovative in that it responded to the realities of the small CARICOM states and proposed a model that deviated somewhat from the strict traditional territorial pattern of collective management. It also made some recommendations on how members of an organisation

[426] See Chapter 2 supra, paragraph 2.2.3.1.
[427] CIMI Report, p.43.

who do not live in the country in which the CMO is established could participate in the affairs of the CMO.[428] These ideas are considered in the discussion below on a pan-Caribbean approach to collective management in CARICOM.

4.2.2. IADB Study

A study conducted by the IADB on the state of intellectual property rights in the Caribbean expressed the view that "[I]n the long term copyright collectives should aim to operate on a regional basis with a view, at least initially, to sharing administration and distribution costs and eventually enforcement costs"[429] The study did not, however, provide any guidance on a likely model for regional collective rights management. The value of the comment is that it recognised that the traditional territorial approach to collective management might not be appropriate in the region.

4.2.3. WIPO Studies

4.2.3.1. Feasibility Study

Responding to a request by Caribbean Ministers of Government responsible for intellectual property rights[430], WIPO commissioned a study to explore the feasibility of developing an infrastructure for the administration of collective rights on a regional basis. The objective of the study was to promote the increased use of the intellectual

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[428] The Report also proposed steps to be taken to ensure that the members who are not in the country in which the CMO is situated would be able to attend members meetings and to participate in the governing body of the organisation. Ibid., pp. 44-45.

[429] IADB, "Intellectual Property Rights in the Bahamas, Barbados, Guyana, Jamaica,Trinidad and Tobago", Report prepared by Gowling, Strathey and Henderson, Consultants, Ottawa, 1998, p.29.

[430] The request was made at the first WIPO Ministerial Level Meeting on Intellectual Property for Caribbean Countries, held in Port-of Spain, Trinidad and Tobago in 1997. See WIPO, "Development of a Regional System for the Collective Management of Copyright and Related Rights in the Caribbean: Progress Report" (PCIPD/2/3) 2001, paragraph 10.

property system by local creators and to maximize the benefits of the system while minimizing operating costs at the national level.[431]

The study proposed a regional strategy involving a) independent national CMOs; and b) a regional centre that would centralise documentation and distribution. The centre would also undertake regional negotiations, the development of regional policy on intellectual property legislation and collective rights management, and market development for regional right-holders.[432] A critical tool of the regional centre would be a regional database comprising documentation on the active works and sound recordings of Caribbean creators and performers. The database would incorporate documentation standards set by CISAC and IFPI. Key to the operations of the regional centre would be the use of software developed by the Spanish authors' society SGAE to facilitate regional rights management by LATINAUTOR, an umbrella organization of several South American authors' societies.[433]

The "regional" element in this proposed model of collective management was that national CMOs would be linked together in a regional network with a centre providing some common services, principally those relating to documentation and distribution. The concept underlying the model was expressed in the following way:

> "Resource sharing is the motor that drives a regional strategy for collective administration. The use of one or more elements of a collective administrative system in common by similar organizations within the same geographical region can reduce, or eliminate, duplication and redundancy in the elements and in their use. This

[431] P. Berry, "Feasibility Study Relating to Regional Collective Management of Copyright in the Caribbean", WIPO (WIPO/CCM/MBY/99/1) 1999.
[432] Ibid., paragraph 6.1.
[433] Ibid., paragraph 6.1.3. The functionality of the software is discussed *supra* at 2.4.6.

> translates into a higher level of service and lower overall administrative costs at the national level and higher net revenue for right owners of the intellectual property used."[434]

According to the study, US$200,000 should be considered the minimum required level of annual licensing income to sustain a national organisation within the regional system over the long term.

Following the acceptance of the model proposed in the Study[435] and after deliberations and refinements by the Regional Committee established by the Ministers to assist in the implementation of the proposal,[436] the Caribbean Copyright Link was established in 2000.[437]

Many problems attended the customization of the software supplied by SGAE to accommodate the requirements of the Caribbean CMOs, and some of these problems persist. However, the "back office" operations of CCL have helped to improve the distribution record of member CMOS.[438]

While CCL's "back office" is useful as part of any regional strategy for collective management of rights, it is submitted that the regionality of this model is "light" given the fact that the essence of the system remains "national" since the establishment of

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[434] Ibid., paragraph 5.1.
[435] The proposal was approved in 1999 by the Caribbean Ministers responsible for intellectual property at a WIPO-sponsored meeting held in Jamaica.
[436] The Regional Committee on Collective Management of Copyright and Related Rights was comprised of representatives from Barbados, Haiti, Jamaica, St. Lucia, Suriname and Trinidad and Tobago.
[437] CCL is discussed *supra* at 2.4.6.
[438] See Note 203
http://www.cott.org.tt/pdf/COTT%20Annual%20Report.pdf

CMOs in all Caribbean countries is envisaged, with the regional element being introduced only through the use of shared common services.

4.2.3.2. The "Cluster" Approach

A further study prepared for WIPO in 2004[439] appears to be a variant of the idea of the sub-regional approach to collective management that had been advocated in the CIMI study discussed above at paragraph 4.2.1. This Study examined the feasibility of a "cluster" approach to the establishment of CMOs in the region for managing the performing right, where the revenue base from licensing would be insufficient to sustain a conventional national CMO.

According to the Study, a "cluster" is an association of CMOs with one or more than one organisation or individuals. It should be viewed as a method of organising and distributing collective management functions or tasks across countries in an economical, efficient and democratic way.[440]

The cluster model envisages that at least one CMO within the cluster would be a legal entity with capacity to contract. A cluster could be formed around CCL or an existing CMO, or a new entity formed. In terms of cluster organisations, the Study suggested a number of options.

1) Within a cluster, one individual could constitute an independent national CMO. Enough revenue would have to be generated in the country to finance a person

[439] P. Berry "Study of the Potential Feasibility of a 'Cluster' Approach to Extending Collective Management Operations to Micro-Markets in the Caribbean Region by Means of Existing, Adapted, or New Elements of the Regional System", WIPO, 2004.
[440] Ibid., p. 4.

and an office, including the necessary technology - that is, software, hardware and Internet connection. The CMO would be a member of CCL.

2) A CMO within a cluster would extend the territory of its CMO to another country so that right-holders in the latter country would become members of the CMO. The CMO could establish a branch in any country of the cluster to which its functions are extended and perform certain functions there, or it may chose not to do so and, instead, to carry out all functions in the country in which the CMO is established.

3) CCL could be in the position of a CMO and would function as mentioned in paragraph 2) above. In this event, CCL's mandate would have to be altered to allow it to be a CMO and to enable right-holders to become CCL members directly.

4) Two or more organisations in the cluster could join together in a co-operative effort to further their common business goals.[441] Joint ventures offer scope for diversification and development, whether within an entirely new collective management cluster or between the cluster and members of the existing regional system.[442]

[441] This option is reminiscent of the MCPS/PRS Alliance formed in 1997. While both societies retained their separate legal status and operated as discrete entities, they share common services in the administration of the categories of rights for which they are responsible. (The Alliance was rebranded in 2009 as "PRS for Music") See the organisation's Website http://www.prsformusic.com/about_us/pages/default.aspx)
[442] Ibid., pp.16-18.

Underlying the quest for a regional mechanism for collective management of music in CARICOM is the realisation that the traditional territorial model of management is not serving the interests of right-holders.

Unlike the CCL model of regionalism, the sub-regional approach to collective management advocated by the CIMI Report and the cluster approach proposed in the 2004 WIPO Study both take account of the need of right-holders in countries where no performing right CMO exists, to be able to access management services through membership of a CMO in another CARICOM state. However, if it is accepted that the economic viability of a CMO is assured only if annual licence income is at least US$200, 000, then, it is doubtful whether some clusters, especially those with very small states and few members, would be able to sustain themselves.

It is submitted that the regional approach to collective management of rights in CARICOM should be extended beyond the CCL mechanism and even beyond the cluster approach. This study recommends a model of regional collective management of the rights of authors, composers and publishers of music involving a single society managing a single CARICOM repertoire. This proposal is elaborated in the section immediately following.

4.3. Pan-Caribbean Management Model

4.3.1. The Concept

This study proposes a deepening of the regional approach to the collective management of the rights of authors, composers and publishers of music in CARICOM. It advocates

the elimination of national CMOs and the establishment of a single performing right organisation to serve right-holders throughout CARICOM. This would remove redundancies from the respective systems and eliminate duplication of physical and infrastructural resources.

The regional CMO would be established as a not-for-profit company in a CARICOM state. Its Board of Directors would be comprised of representatives of right-holders from other CARICOM states. In the states other than the state in which the CMO is headquartered, the work would be carried out by agents (as in the PRS model) or if the volume of business so warrants, by a small branch. Whether there are agents or branches or a combination of both, a "cluster" approach could be adopted for administrative purposes so that, for example, an agent or branch could serve a cluster of countries that have small populations of right-holders or potential right-holders.[443] In this model, the back office functions currently undertaken by CCL could either be absorbed as a department within the single pan-Caribbean CMO or be retained as a separate entity, in either case, with strengthened capabilities.

4.3.2. Advantages

1. The establishment of a single regional CMO would eliminate the burden of establishing and maintaining a CMO in each CARICOM state- a task which has not been achieved in most CARICOM states in more than two decades.[444] As previously mentioned, economies of scale would be achieved. More

[443] For example, a small country like St. Kitts (population of approx 50,000 would likely have a very small number of right-holders and could be served by an agent or a branch in nearby Antigua.
[444] While the problem has been somewhat alleviated by the establishment of ECCO to serve the OECS, Belize does not have a functioning CMO and there is no representation in Guyana. In the Bahamas PRS maintains a strong presence and there is no indigenous CMO.

specifically, the expertise, knowledge, experience and other tangible and intangible resources gained over the years by existing CMOs would be better deployed if pooled, consolidated and directed towards a single enterprise, rather than fragmented among a multiplicity of organisations. Cost savings would result in increased amounts for distribution, assuming that the savings are not absorbed by the larger infrastructure which a single entity would require.

2. A single performing right organisation would also make for a larger body of right-holders, instead of several small organisations, each with only a few members. An organisation with a larger membership would have more negotiating clout.[445]

3. From the point of view of users, a single licence rather than a number of licences issued by several CMOs would give access to the entire Caribbean repertoire – thereby saving the time and money that would be involved if negotiations were to be held with multiple national CMOs.

4. Foreign CMOs would conclude only one reciprocal bilateral agreement with respect to the exploitation of the works of their members in CARICOM states.

5. A regional, integrated approach to collective management would be consistent with the undertaking of CARICOM states under the CARIFORUM-EU

[445] This raises competition issues – in particular, the possibility of abuse of dominant position. Only some CARICOM states have competition laws in place. Draft model legislation on competition has been prepared by the CARICOM Secretariat for adoption by member states.

Economic Partnership Agreement to deepen regional integration in IPRS and to move towards a harmonised level of protection and enforcement.[446]

4.3.3. Actions Required

A pan-Caribbean approach to the management of the performing right would require, at least the following:

a. The dismantling of existing national performing right CMOs and the creation of a new CMO in a jurisdiction agreed by members of the national CMOs. The country with the most successful organisation seems to be the logical choice-that is to say, Trinidad and Tobago, the home of COTT. COTT has had the most experience in the region in collective management and has developed a level of professionalism and expertise that would justify its selection as the CMO that should be converted into the pan-Caribbean CMO. The new organisation would have to negotiate new reciprocal agreements with sister organisations world–wide. Those organisations would have to be satisfied that the new body could adequately administer their repertoires in the Caribbean.

b. A determination would have to be made as to whether countries should be administered by agents or in clusters or directly by the CMO. The CMO could operate with an agent in a country with a small number of right-owners or through branches. Agents and branches would have membership, licensing and monitoring functions and might need to be

[446] CARIFORUM EU Economic Partnership Agreement, Official Journal of the EU, L289/1/3, 30.10.2008, Title IV, Chapter 2, Section 2 subsection 1, Article 3.

incorporated in the particular jurisdiction, if the functions assigned required corporate capacity to act.

c. Broad representation on the Board of Directors of the CMO would be necessary to ensure that the interests of the different categories of right-holders and those of right-holders of different countries are adequately safeguarded.

d. The pan-Caribbean CMO would need to seek membership of CISAC.

4.3.4. Threats and Challenges

The pan-Caribbean approach to collective management will work only if it is agreed to and supported by critical stakeholders - mainly the right-holders themselves, the leadership of the Boards of the existing national CMOs and CCL. But there could be some resistance to the idea of a single CMO. Berry reported in 1999 that many right-holders interviewed for the Study had indicated that they would not join a single Caribbean CMO and strongly supported the formation of national organisations.[447] Nationalist sentiments are firmly held in these countries, and for some right-holders, the notion of their rights being administered in another country may not be palatable. However, the study reported on the situation as it was ten years ago. Since then, it is clear that efforts to establish national CMOs in the region have not been particularly

[447] The Study, op cit., (at Note…supra) pp. 68.

successful. In fact, the recent establishment of ECRRA (an RRO)[448] and ECCO (performing right organisation)[449] suggests an acceptance that the territorial model of management has failed to respond to the needs of these small states and has strengthened the move towards regional collectivism.

Arguably, given the historical experience that demonstrates the shortcomings of the national approach to collective management, including the fact that performing right organisations which had been in the making in some states for more than a decade never materialised or, if formed, never got off the ground (as in Antigua and Barbuda and Grenada) right-holders and other stakeholders might now be more disposed to giving favourable consideration to the establishment of a single regional CMO to manage the performing right in the Caribbean.

A significant potential threat to the proposed pan-Caribbean system of management is the danger that it might become over-bureaucratic and incur high administrative costs. Also, having regard to the geographic spread of the countries involved, travel costs could be high. In order to reduce costs, the use of technology should be a key management strategy- for example, use of teleconferencing/video and web-conferencing services to conduct business, whenever this is feasible.

[448] The Eastern Caribbean Reprographic Rights Association was established in 2007 to serve the OECS countries. See D. Daley and N. Foga, "Jamaica: Progress Despite Challenges", in *Managing Intellectual Property, Supplement*: *Americas In Focus*, 4th Ed., 2008.
[449] See 2.4.5 *supra.*

4.3.5. Government and CARICOM Support

While the decision whether to move in the direction of a single pan-Caribbean regime for managing the rights of authors, composers and publishers of music will ultimately rest with the right-holders themselves, the views of Governments individually, and collectively as a community of states, and their support through policy and legislative action would be essential. It has been noted that, although copyright is a private property right, "Governments in the Caribbean have a critical role to play in overseeing the effective operation of the copyright system."[450] Further, a key recommendation of a major study on the cultural industries in the Caribbean is that Governments should institute a system of "mild regulation" of CMOs so as to ensure accountability, transparency and good governance, and should also invest in infrastructure for the establishment of CMOs.[451]

The current emphasis by Governments in the region on the development of the cultural industries[452] as part of a social and economic development strategy, offers a platform for the development of an effective system of copyright management system in CARICOM. The cultural industries discussion presents an opportunity for the possibility of a pan-Caribbean approach to rights management, as discussed in this chapter, to be included in the debate, given the centrality of the music industry to the cultural industries. COTED, the organ of CARICOM responsible for intellectual

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[450] A. Demas and R. Henry, "Entertainment Services With Special Reference to Music, Mas and the Film and Video Segments", Barbados, CRNM, 2001, p.109. http://www.bahamas.gov.bs/bahamasweb2/home.nsf/vImagesW/CRNM+Entertainment+Study/$FILE/crnmentertainmentstudy.pdf

[451] K. Nurse, "Cultural Industries in CARICOM: Trade and Development Challenges", *Report*, prepared for CRNM, 2006 (revised 2007). http://www.acpcultures.eu/pdf/The%20Cultural%20Industries%20in%20CARICOM.pdf

[452] See 2.3.1.4. and 2.3.2.4. *supra*.

property would have a key role to play in the implementation of the regional system proposed in this study.

4.4. Proposed Amendment of Art. 66 of the Revised Treaty

The provisions of the Revised Treaty of Chaguaramas that deal with intellectual property rights have already been discussed in Chapter 3.[453] Article 66 does not address the issue of rights management. However, to be successful, the regional approach to rights management advocated by this study would have to be located within the framework of the Treaty to give it weight and legitimacy among right-holders and member states. Given the entrenched national models of management in some states as well as strong nationalist sentiments, the regional approach will likely be embraced only if it is supported by policy guidelines (if not a mandate) from Governments individually, and also collectively as CARICOM.

This study, therefore, proposes that the Revised Treaty should articulate a CARICOM policy on the management of copyright, including the promotion of a regional approach to rights management. This would provide an authoritative framework within which regional rights management organisations could be established to manage cross-border rights within the common economy space of the CSME.[454]

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[453] See 3.6.2. *supra*.

[454] It is, however, recognized that COTED's authority is limited in that it can only "promote" or recommend a course of action. No organ of CARICOM or the Secretariat has authority to issue legally binding instruments such as the Directives issued by the EC; nor can CARICOM Authorities take action against member states for failure to implement or inadequate implementation of any recommended action. However, in July, 2007 the Heads of Government of CARICOM approved a proposal for the creation of a CARICOM Commission with Executive Authority in the implementation of decisions in certain defined areas. See M. de la Bastide "The Caribbean Court of Justice as a regional Court", Presentation to the Central American Court of

Within this framework, rights management should be enhanced by provisions in the Treaty that prescribe the use of compulsory collective management in certain cases[455] and authorize the use of the extended collective licensing system where the conditions exist that would accommodate that system.[456]

4.5. Regional Copyright Tribunal

A regional approach to copyright management indicates a need for a regional arbitral body to resolve conflicts between users and the regional management entity, and to ensure that the latter does not abuse its dominant position. For this purpose, it is proposed that a Regional Copyright Tribunal (RTC) should be established to hear and determine disputes between users and the regional copyright management organisation.[457]

To assure the Tribunal's stature and legitimacy as a regional entity, its establishment by or under the authority of the Revised Treaty is recommended. One way to do this

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Justice, Nicaragua, October 2007.
http://www.caribbeancourtofjustice.org/speeches/president/ccj_as_a_regional_court.pdf

[455] An example of such as a case is the cable retransmission right. In Art. 9 of the EC Satellite and Cable Directive that right can be licensed only by a CMO and a CMO may be deemed to be mandated to manage the right in the absence of an express agreement with the right-holder. See Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. See the Directive in, O.J. L 248 of 6 October 1993, 15. Hugenholtz observes that the Directive was intended "to break down national barriers and enhance trans-border broadcasting and cable re-transmisson of television programs within the European Union". See P. Hugenholtz, "Copyright without Frontiers: is there a Future for the Satellite and Cable Directive?" in *Proceedings* of a conference on 'The Future of the 'Television without Frontiers', Institute of European Media Law, Baden- Baden: Nomos Verlag, 2005. The rationale of the CSME is the breaking down of national barriers to trade, therefore compulsory collective management could be used as an instrument to break down national barriers to trading in certain types of rights.

[456] The extended collective licensing system is discussed *supra* at 3.4.1.3.

[457] The services of the Tribunal would also be available to other regional copyright management organizations such as the Regional Copyright Management Centre for Universities proposed in Chapter 5.

would be to establish the RTC as a part of an articulated policy on copyright management which should be included in an elaborated Art. 66.

As in the case of the Competition Commission established under the Revised Treaty,[458] the members of the RTC would be appointed by the Regional Judicial and Legal Services[459] and selected from suitable candidates from different states within CARICOM.

The Treaty would authorise the RTC to hear references with respect to the licensing of works by the regional CMO, using applicable provisions of the Copyright Act of the jurisdiction from which the reference was made.[460] Art. 66 would make it explicit that Member states must enact provisions to ensure that the decisions of the RTC are enforceable in their jurisdictions.[461] The appeal provisions of the national law would apply as if the decision had been made under that law.

Given CARICOM's large geographic space, it would be desirable to authorise the RTC to sit in divisions,[462] if necessary, so as to eliminate excessive travel and to respond in a

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[458] See 4.7 *infra.*
[459] Established under Art. V of the Agreement Establishing the Caribbean Court of Justice. See Agreement at *CARICOM Law* http://www.caricomlaw.org/doc.php?id=490
[460] The Act of the relevant member must apply because CARICOM has no supranational entity to which member states have transferred the competence to legislate provisions that bind them or their nationals. By comparison, in the EU the principle of supernationality operates. Further, EU has its own legal personality with its own body of laws which the courts of its member states are bound to apply. See (reference section in Chapter 3).
[461] See Article 174.5 of the Revised Treaty for a similar provision in relation to the decisions of the Competition Commission.
[462] In Jamaica, for example, the Copyright Tribunal is authorized to sit in such divisions as may be necessary. See Copyright Act, (Act 4 1993) Schedule, paragraph 5.

timely manner to references made to it. The Tribunal should be authorised to issue practice directions.

4.6. Harmonisation of Copyright Laws

The harmonisation of copyright laws within CARICOM is imperative if rights are to be managed on a regional basis. Under harmonised laws the nature and extent of rights conferred would be similar, thereby facilitating the issue of blanket licences covering the repertoire of nationals of different CARICOM states. To the extent that CARICOM copyright laws reflect the minimum standards of the Berne Convention and the TRIPS Agreement, some level of harmonisation has been achieved. However, the laws remain larger un-harmonised in many respects, despite a mandate under the Treaty that member states should harmonise their laws and administrative practices in several areas related to trade, including intellectual property rights.[463] The mandate is aimed specifically at strengthening the legislative and administrative infrastructures to support the CSME. It is submitted that a seamless regional system for managing the economic rights of authors, composers and publishers of music is consistent with the objectives of the CSME and would be a logical development in the context of the single economic space.

4.7. Competition Policy

The Revised Treaty establishes a Competition Policy that articulates rules of competition aimed at ensuring that the benefits expected from the establishment of the

[463] Revised Treaty, Art. 74.

CSME are not frustrated by anti-competitive practices.[464]

Clearly, a single CMO that manages the rights of authors, composers and publishers in the CARICOM region would enjoy a monopoly position and, *prima facie,* would appear to be anti-competitive. However, as previously discussed, despite the generally monopolistic position of CMOs, collective management of rights is generally accepted as an efficient method of rights management that is beneficial to both the right-holders and users.[465] Further, the Revised Treaty makes it clear that an enterprise that "reasonably enforces or seeks to enforce rights under or existing by virtue of a copyright…" must not be treated as abusing its dominant position.[466] However, such an enterprise would be subject to the national competition authority required to be established by each member state under a law that implements the Treaty's rules of competition.[467]

While the proposed single regional CMO would not, simply by being in a monopolistic position, be regarded as abusing its dominant position, its operation would, nevertheless, be subject to the jurisdiction of the Competition Commission established under the Treaty.[468] The Commission's main functions are a) to apply the rules of competition in respect of anti-competitive cross-border business conduct; b) to promote and protect competition in the Community, and c) to co-ordinate the implementation of

[464] Ibid., Art. 169.
[465] See 2.4 *supra* for a discussion of the collective management system in CARICOM.
[466] Revised Treaty Art. 179.3(b).
[467] Ibid., Art. 170.2. The CARICOM Secretariat provided a model law in 2003 and a revised model law two years later. See http://vlex.co.uk/vid/revised-model-bill-on-competition-449181
[468] Its members are appointed by the Regional Judicial and Legal Services Commission which is established under Article V of the Agreement Establishing the Caribbean Court of Justice. http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf

the Community Competition Policy. In respect of cross-border transactions or transactions with cross-border effects, the Commission is authorised to monitor, investigate, detect, make determinations or take action to inhibit and penalise any enterprise whose business conduct prejudices trade or prevents, restricts or distorts competition within the CSME.[469]

Thus, if an issue arose as to whether the rules of the proposed regional CMO concerning, for example, membership or distribution, had anti-competitive elements, it could be referred to the Commission for a determination, so long as the issue concerned a cross-border transaction or a transaction with cross-border effects.

4.8. Other Government Measures

As previously mentioned, the regional CMO would require strong support from CARICOM Governments. Among the urgent actions needed to be taken by member states to strengthen the copyright system in the region are: a) accession to the WCT;[470] b) concerted action against piracy; c) sensitizing the enforcement authorities on the economic significance of copyright, and d) on-going public education concerning copyright.

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[469] Revised Treaty, Arts. 173-174.

[470] As of August 29, 2009, only Jamaica, St. Lucia and Trinidad and Tobago were listed by WIPO as Contracting Parties to the WCT.
http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/wct.pdf

4.9. Conclusion

This chapter developed a regional model for the management of the rights of authors, composers and publishers of music in CARICOM states. It proposed the establishment of a single CMO that would issue a pan-Caribbean licence covering the entire Caribbean repertoire. The regional character of the model was emphasised by the recommendation that the provisions of the Revised Treaty dealing with the regional administration of intellectual property rights should be amended to include provisions on the regional collective management of rights, and the establishment of a regional arbitral tribunal to deal with disputes concerning the exploitation of those rights. The chapter signalled the importance of harmonised copyright laws and the role of the Competition Commission with respect to the operation of the regional CMO. The need for the governments of the region to take action to strengthen and safeguard copyright was highlighted.

The regional collective management model proposed in this chapter is both rational and timely. It is consistent with the thrust towards deeper regional integration exemplified by the establishment of the CARICOM Single Market and Economy[471] and also with the many regional institutions that will be established to give expression to it, for example, a single regional accreditation system to standardize qualifications in order to accommodate the free movement of skilled persons throughout the region, and a single currency.[472]

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[471] The CSME is designed to represent a single economic space where people, goods, services and capital can move freely. Within the single economic space, there will be a single travel and landing document for nationals of CARICOM states travelling within the region.

[472] The Organization of Eastern Caribbean States (OECS), the sub-regional grouping, already has its own currency and a single Central Bank.

Finally, as discussed in Chapter 3, in the EU the establishment of various one-stop-shops and the introduction of cross-border licensing regimes in the context of the licensing of online music indicates a trend towards multi-territorial licensing in the digital environment and presents a challenge to the traditional approach of using national borders to delineate boundaries within which licensing should occur. The proposal for a pan-Caribbean licence for the performing right is a further challenge to this traditional approach.

CHAPTER 5: REGIONAL MANAGEMENT OF UNIVERSITY-GENERATED COPYRIGHT

5.1. Introduction

This chapter builds on the findings of Chapter 2 that a) for a variety of reasons University-generated copyright should be protected; and b) in general, copyright management systems either do not exist or are not fully developed in Universities in CARICOM states even though they produce very valuable copyright material. The relatively small size of the student populations of most of these institutions, coupled with their limited resources suggests that they should collaborate in establishing copyright management structures. This chapter develops a model for such collaboration. The model fits seamlessly into a traditional pattern of regional co-operation in education. As Carrington points out, regional co-operation among institutions in the higher education sector has been a major activity.[473] In recent years, several regional mechanisms have been established to promote the use of, and access to, distance learning.[474]

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[473]Co-operative initiatives have included the articulation of programmes among the regional higher education institutions, the consolidation of a system of franchising of university programmes, the offering of joint degrees, and action taken towards the establishment of a common regional structure for the award of associate degrees. Tertiary institutions have established a regional mechanism that promotes co-operation in the articulation and accreditation of programmes offered by the various institutions. See L. Carrington, "Recent Reform and Development Programmes in Higher Education in the Caribbean" Paper delivered at IESALC-UNESCO Workshop on the Status and Prospects of Higher Education in the Caribbean ", Nassau, the Bahamas, October 31-November 1, 2002, p.4.

[474] For example, the Caribbean Association for Distance and Open Learning (CARADOL) a regional association whose aims are a) to promote and advance the use of Open and Distance Learning as a means of contributing to the developmental goals of the Caribbean; b) to foster an understanding of the theory and practice of Open and Distance Learning; c) to facilitate research and disseminate information within the Caribbean on Open and Distance Learning. Other regional programmes dealing with distance education are the UNESCO-UWI Project for the Enhancement of Human Resource Development in Distance Teaching, Administration and Materials Distribution which involves UWI, the University of Technology (Jamaica) the University of Guyana, the Anton de Kom University in Suriname and the University of Quisqueya, Haiti. The

As a prelude to the proposal for a regional mechanism, the chapter first discusses the key management tools that the regional system must incorporate into its operations, in particular, an institutional policy on copyright. The need for clear provisions on copyright ownership of University-generated copyright is stressed with examples given of standard approaches to ownership in an academic setting. The chapter concludes with a detailed proposal for a regional common service mechanism for managing copyright generated in Universities in CARICOM.

5.2. University-Generated Copyright

Vast quantities of copyright material are generated within Universities by various categories of persons and in different circumstances. Typically, such materials include books, scholarly papers, lecture notes, course outlines, computer programs, multimedia products, administrative studies and reports, and student essays and theses. Copyright materials may also be generated under contracts for service and sponsored research agreements. In this study the term "University-generated copyright" means copyright subsisting in works created in a University setting.

5.3. Solutions for Copyright Management

5.3.1. Copyright Policy

The basic tool for managing copyright in Universities is an institutional policy. A good policy brings clarity and order. It provides a framework within which the rights and obligations of those having proprietary or other interests in University-generated

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programme is specifically aimed at improving the delivery of distance education programmes using information and communication technologies.

material can be fairly determined, and disputes concerning copyright ownership resolved.[475] A policy must be grounded in the mission of the University, that is, to generate and disseminate knowledge through teaching, research and public service.[476] A copyright policy is a key feature of the regional copyright management mechanism proposed in this chapter. Central to an institutional copyright policy are its provisions on ownership.

5.3.1.1. Ownership

In general, effective management and exploitation of copyright require that copyright ownership in University-generated works is clear. The copyright owner is the person who has the ability to decide the means for maximising any economic or reputational benefits associated with the protected work.[477] However, in an academic setting, the application of the legal principle that work produced in the course of employment belongs to the employer is both complex[478] and controversial.[479] The need to clarify

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[475] L. Gasaway, "Developing a Faculty Copyright Ownership Policy", 2002, Technology Source Archives, University of North Carolina. http://technologysource.org/article/drafting_a_faculty_copyright_ownership_policy/

[476] Most recent University policies on copyright or on intellectual property rights, generally, especially in North America, make explicit statements about the mission and values of the University and seek to locate the policy within that context. By so doing, the policies acknowledge the need to mediate between, on the one hand, the right to control the use and dissemination of works conferred by copyright law and, on the other hand, the norms and values of the academy which support open and free exchange of ideas and promote the notion of the common ownership of intellectual goods resulting from scholarship. See AAU, "Intellectual Property and New Media Technologies: A Framework for Policy Development at AUU Institutions", 1999. www.aau.edu/reports/IPReport.html

[477] A. Monotti, "Who Owns My Research and Teaching Materials-My University or Me?" 19 SydL.Rev. 425.

[478] L. Wiseman, "Copyright in Universities", Occasional Paper Series, 99E. QUT, Department of Education, Training and Youth Affairs, paragraph 3.1.

[479] In most common law jurisdictions, one exception to the rule that the author is the first owner of copyright in the work is that the copyright in works done in the course of employment belongs to the employer unless there is an agreement to the contrary. For example, the UK, s11 (2) CPDA, provides that "[W]here a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.". A similar provision appears in some copyright laws of

ownership issues in relation to University-generated material is a primary reason for Universities to pass policies or statutes on copyright. Such clarification is essential given the absence of clear judicial guidance on the matter, and only a handful of old cases.[480]

CARICOM states, for example, s22 (2) of the Copyright Act of Barbados and s26 (4) of the Trinidadian Act, respectively. This statutory presumption in favour of the employer does not, however, appear in the copyright laws or Jamaica or St. Lucia. On the face of it, since academics are employees of the university, then absent an agreement stating otherwise, the university as employer becomes the owner of copyright in works produced by the academic within the course of employment. However, in the academic environment, there is a widely held view that academics are the owners of copyright in the materials they produce. Among the reasons suggested for this are a) that by custom and practice universities have allowed academics to exercise rights of ownership: for example, by allowing them, without institutional intervention, to hold themselves out to publishers and others as owners of copyright with the ability to contract freely with respect to the use of the work (In this regard it should be noted that the Australian Vice Chancellors' Committee has confirmed the existence of the implied term: see AVCC, "Ownership of Intellectual Property In Universities: Policy and Good Practice Guide", 2002, paragraph 3.2.2); b) that Universities may have relinquished or waived their claim to copyright over academic works; c) that, given the nature of the work produced by academics, it is difficult to determine whether such works are produced "in the course of employment". See Wiseman, op cit., paragraph 3.2.1.1. For arguments against the notion that academic work is work-for-hire under the U.S. Copyright Act see R. Dreyfuss, "The Creative Employee and the Copyright Act of 1976", (1987) 54 U. Chi.L. Rev. 590 and P. Kilby, "The Discouragement of Learning: Scholarship Made for Hire", (1994) 21 JCU&L, 455. But some support the view that academic work qualifies as work- for- hire: see, for example, S. Todd, "Faculty Writings: Are They Works Made for Hire Under the 1976 Copyright Act?", (1983) 9 J.C. & U.L. 485.

[480] English and Scottish 19th century cases suggest that a lecturer/author retains ownership in works created by him. In *Abernathy* v *Hutchinson* ((1825) 3 L.J. 209, 214, a distinguished surgeon appointed to deliver lectures on the practice of surgery was able to restrain their publication in *The Lancet*. In *Nicols* v. *Pitman* (1884) 26 Ch.374, a fellow of the Royal Geographic Society was granted an injunction to prohibit the publication of a talk that he had given to a working men's college. A professor of moral philosophy at the University of Glasgow was allowed to prevent the printing and sale, in pamphlet form, of lectures given to students enrolled in his ordinary courses. See *Caird v Sime*, (1887), 12 A. C. 326. UK courts followed a similar approach in later cases, notably *Noah v Shuba*, (1991) FSR 14, in which it was decided that an epidemiologist working for a pubic health laboratory service who had written a guide to hygienic skin-piercing practices had created the work outside the course of his employment because he had written it in the evenings and on week-ends. In a leading case, *Stephenson Jordan v McDonald and Evans* (1952) 69 RPC 10, it was held that an employee owned the copyright in the work even though he had used some of the employer's resources. Lord Evershed famously declared in this case (pg. 18) that "[L]ectures delivered, for example, by Professor Maitland to students have since become classical in the law. It is inconceivable that since Professor Maitland was in the service at the time of the University of Cambridge that anyone but himself could have claimed copyright in those lectures." U.S. judges have held views similar to their British counterparts. See for example, *William v. Wesser* (1969)78 Cal Rptr 542 which affirmed that an anthropology professor owned copyright in his lectures. In an earlier case, Cardozo J. had opined that by practice and tradition university faculty members are masters not servants. See *Hamburger v Cornell University* 148 NE 539, 541 (NY 1925). The U.S. decisions seem to have been based on the existence of a "teacher exception" to the work-for- hire principle enunciated in the Copyright Act of 1909. There is some doubt as to whether the exception was repealed, *sub silencio,* by the Copyright Act of 1976: However, after

Policy positions on copyright ownership vary considerably and seem to be dependent on 1) the circumstances in which the work was generated, including the nature and extent of resources used; 2) the classification or status of the creator; and 3) the material created.[481]

Many institutional policies allocate to their academic employees copyright ownership in traditional scholarly works (such as books, articles and lecture notes) [482] or teaching materials[483], but may claim a royalty-free licence to use the work for the purposes of the University.[484] In more recent years, some University policies have made a distinction between traditional scholarly works and "new media" or "new instructional media". The latter refer mainly to multimedia products and online courses and materials, the proprietary rights in which many Universities explicitly claim based on the considerable investment, in terms of the human and financial resources of the University, that are involved in creating such products.[485]

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the latter Act was in effect the exception was recognized by some U.S. courts, for example in *Weinstein v University of Illinois*, 811 E2d 1091, 1093-94 (7th Cir 1987). In *Hays v Sony Corporation of America*, 847 F 2d 412, (1988), Posner J. expressed the view (at p.416) that a strict interpretation of the Copyright Act "would wreak havoc with the settled practices of academic institutions". See Longdin, op cit., pp. 34 – 40. Longdin (at p. 37) cautions against using these decisions as reliable guides, arguing that these decisions "fatally muddle" the various arguments that are relevant to the issue.

[481] Monotti and Ricketson, op cit., paragraph 7.13.

[482] For example, UWI *Policy on Intellectual Property*, Part 1, paragraph2.2; Harvard, Statement of Policy in Regard to Intellectual Property, Section II, paragraph A. http://otd.harvard.edu/resources/policies/IP/

[483] For example, University College, London, *UCL Staff IPR Policy*, paragraph 2.

[484] For example, University of Glasgow, *Intellectual Property and Commercialization Policy*, paragraph 10.1.1. 2; UWI *Policy*, Part 1, paragraph 2.3 (b).

[485] See for example the claim made under the *Copyright Policy* of Columbia University,2000, paragraph E.2 a. http://www.columbia.edu/cu/provost/docs/copyright.html

It is thought that a strong case can be made for University ownership of rights in online course materials. In the main, the supporting arguments rest on the extensive use of University resources to create and deliver such courses and the fact that creating content for online delivery is not the solitary activity of a single academic employee, but a team effort involving a wide array of skilled persons some of whom the University would have employed specifically for this purpose.

A University policy may also claim ownership in a work where a) a person is employed specifically to create the work; b) resources over and above those normally provided to staff were utilised in creating the work; c) the work was created or commissioned for use by the University; d) pre-existing copyright owned by the institution was used in the creation of the work: e) the work was created by a team comprised of different categories of staff members and /or students (for example, computer software, multimedia products).[486]

Institutional policies take various approaches to the ownership of copyright by students. Many Universities do not claim copyright in works produced by students, where the materials are created as part of the academic programmes of the students or are based on research or other scholarly activity, unless there is an agreement to the contrary.[487] However, Universities claim ownership of copyright in student work if the work is created in certain circumstances set out in the policy. Commonly, such a claim is made where the work a) is generated by the student in the capacity of employee; b) is created with the use of University resources or facilities c) includes pre-existing university-owned copyright or d) is created by the student under sponsored research or other agreements.[488]

Universities also invest significant funds in course development, staff training and the establishment of the requisite technological infrastructure for distance delivery.

[486] Monotti and Ricketson, op cit., paragraph 7.191; AVCC Guide, op cit., paragraph 3.2.1.

[487] In such a case, the University may take a non-exclusive, royalty-free licence to use the work within the University. See e.g. UWI IP Policy, Part 1, paragraph 2.9. However, some Universities make a wide-ambit claim to ownership of all intellectual property rights created by students and then waive their rights in respect of certain types of works in favour of the student. Monotti and Ricketson, op cit., paragraphs 7.57 and 7.67.

[488] See for example UWI Policy, Part 1, paragraph 2.9; Oxford University Statute XVI: *Property, Contracts, and Trusts*, Part B: Intellectual Property, paragraph 5; Oxford University, Title X of the Statutes of Oxford University, effective October 2000 http://www.admin.ox.ac.uk/statutes/790-121.shtml#_Toc28143157

A copyright policy usually addresses the allocation of copyright ownership in works created under sponsored research projects, an issue that is normally covered in the research agreements between the University and the sponsor.[489]

5.3.1. 2. Other Policy Provisions

Among the standard provisions of existing copyright policies are provisions governing a) the sharing in royalties by staff and students involved in the creation of works which the University commercially exploits;[490] b) the resolution of disputes; c) the administration of the Policy;[491] and d) the extent to which an academic can use copyright material created at the University after he or she ceases to be employed to that institution.[492]

5.3.2. Other Management Tools

To be effective, a copyright policy must have a clear link between the policy and the contract of employment of University employees. This might be done explicitly in the contract or through regulations or collective bargaining agreements incorporated by reference into such contracts.[493] It would be prudent for Universities and staff members

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[489] Ibid, paragraph 7.17.
[490] See for example, UCL Policy op cit., paragraph 14; Columbia University's Policy, op cit., Appendix B.
[491] Under Harvard's Policy for example, a University Committee on Intellectual Property has the responsibility of resolving disputes, interpreting the Policy and proposing amendments to it. See Statement of Policy as amended and restated February 4, 2008, Section VI. http://www.techtransfer.harvard.edu/resources/policies/IP/ Columbia University's Copyright Policy is administered by the Technology Transfer Office and a Copyright Policy Standing Committee. See *Columbia University Copyright Policy*, op cit., paragraph 1B.
[492] This is often referred to as the "portability" of rights. Although some of the policies reviewed do not contain provisions on this point. An example of a policy that does is Columbia University's which specifies the scope and conditions of usage of Columbia works by ex-employees. See Policy op cit., paragraph E.2 (f).
[493] Bournemouth University includes specific details on ownership of intellectual property in contracts of employment. See the Policy, op cit., under "Staff".

to enter into separate contracts with clear terms on copyright, where the work is specially commissioned or where it is not entirely clear, in relation to works generated under a project, whether or not the work is being done in the course of employment.

5.3.3. Use of Digital Rights Management Systems

In addition to establishing written policies, Universities have the possibility of using DRM systems to protect their digital works, including online courses and distance education courses.[494] In this regard, it has been recommended that they take full advantage of DRM technologies.[495]

5.4. Copyright Management in Universities

5.4.1. Existing Structures

Typically, in a University setting, copyright management responsibility is assigned to a Committee operating under the leadership of a senior official such as a Pro Vice Chancellor, Vice President or Provost. In some universities, the responsibility might be assigned to a copyright officer[496] or fall within the purview of the institution's legal affairs or technology transfer office.

The increasing value of some University-generated copyright and the need to manage the rights involved in a manner that facilitates access by members of the University community, while at the same time safeguarding rights in commercially valuable

[494] A DRM system is any hardware or software that prevents access to digital materials to anyone other than authorized users. It includes encryption and authentication systems as well as systems for accepting credit card payments for access to materials. HEFC, "Intellectual Property Rights in e-Learning Programmes", Report of the Working Group, 2003, paragraph 44.
[495] Ibid.
[496] For example, under the UCL *Staff IPR Policy* (paragraph 13) a copyright officer is appointed to provide guidance to staff members.

educational materials, have led to more institutional attention to the administrative aspects of copyright. In this context, Weedon recommends the establishment of a co-ordinating centre for copyright issues,[497] and this approach has been adopted by some prominent US universities.[498] In general, the main mission of these copyright management entities is to give information and guidance on copyright to the academic community.[499] Information may be disseminated by means of various online and print publications, delivery of workshops and the giving of advice and updates on legislative developments at the national and international levels.[500]

5.4.2. Regional Solution

5.4.2.1. Establishing the Need

Like their foreign counterparts, Universities in CARICOM need to pay greater attention to managing copyright generated within their walls in order to control access to, and use of, the materials for the benefit of the academic community and to save on the costs of scholarly journals and materials and to better manage the commercial exploitation of works. Further, the scope for use of some of these works, especially in an online

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[497] R. Weedon, "Policy Approaches to Copyright in HEIs", A Study for the JISC Committee for Awareness, Liaison and Training (JCALT), Centre for Educational systems, Glasgow, 2000, paragraph 2.9 (Recommendation 8). http://www/learningservices.strath.ac/uk/docs/JCALT.pdf.

[498] Examples in the U.S. are 1) the Indiana University/Purdue University Copyright Management Center whose mission is the promotion of understanding of the US copyright law and its relationship to the University; 2) the Cornell University's Copyright Information Center which provides Cornell faculty, staff and students with Cornell-specific and general information about a copyright; 3) the Center for Intellectual Property and Copyright in the Digital Environment of the University of Maryland, University College (UMUC), which was set up "to provide resource and information for the higher education community in the areas of intellectual property and copyright and the digital environment".

[499] Some universities favour the creation of a central information point in the institution to exercise control over all IP issues, not only copyright. Higher Education Funding Council (HEFCE), "Intellectual Property Rights in e-Learning Programmes", Report of the Working Group, 2003, paragraph 21.

[500] Many Universities have web pages dedicated to providing information to staff and students on copyright issues. See e.g. Cornell Copyright Information Center http://www.copyright.cornell.edu/

environment, gives them more than academic value. In many cases, opportunities (as yet unexplored) exist for Universities to benefit financially from the production and licensing of works and to augment their income, given increasing reductions in the level of Government subventions.[501]

As already mentioned, adequate copyright management mechanisms are lacking in Universities in CARICOM states.[502] UWI has had a head-start in as much as it has a fairly comprehensive policy on intellectual property rights and an administrative system in place in the form of a Pro Vice Chancellor for Research and Innovation, supported by a broad-based advisory committee.[503] However, there is no dedicated office or staff member (for example a copyright officer or officers) in the entire University system to assist members of the community with information on copyright or to provide guidance with respect to the various, often complex, copyright management issues that constantly arise. There is, therefore, a gap in the existing institutional copyright management framework at UWI, the effect of which could be that the rights and interests of the institution and creators of copyright material, as articulated in the institution's Copyright Policy, are not being adequately safeguarded. To fill this management gap within UWI, this study proposes the establishment of a dedicated copyright centre that would manage copyright generated on all the campuses of UWI.

It is also proposed that this Centre (which could be styled the University Copyright Management Centre (UCMC) should have a larger regional remit and provide

[501] Weedon, op cit., paragraph 1.2.
[502] See 2.5.1. *supra*.
[503] Members are drawn from different faculties with representatives from the Mona, Cave Hill and St. Augustine Campuses located, respectively in Jamaica, Barbados and Trinidad and Tobago.

copyright management services to other Universities in the English-speaking Caribbean. This multi-institutional, multi-jurisdictional approach to dealing with common interests is commonplace in CARICOM, and is entirely consistent with the traditional of regional co-operation in education previously indicated.[504]

5.4.2.2. A Strategic Response

The establishment and operation of a copyright management centre that provides an innovative service in a new area, and on a region-wide basis, would fulfil some of the strategic aims of UWI articulated in its current Strategy Plan. Of particular relevance are the following:

a) Strategic Aim 3: ***"****To become internationally recognized as a Centre of Excellence in Research, Knowledge Creation and Innovation on matters related to the Caribbean and small-island developing states****"***.[505]

Among the main strategies devised to achieve this aim is the development and sustaining of an innovation and enterprise culture through supportive policies including policies on intellectual property rights. The anticipated impact of using this strategy is "New revenue streams from intellectual property (e.g. patents and copyrights)[506]

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[504] See 5.1. *supra.* The arrangement could be formalized through an inter-institutional co-operative agreement or a series of Memoranda of Understanding between UCMC and each institution.

[505] UWI, *The UWI Strategic Plan 2007-2012*, Part 1 (Revised April 2008) Part1, paragraph 71. http://www.uwi.edu/Libraries/Strategic_Plan/May_2008_Strategic_Plan_2007-2012_Part1.sflb.ashx

[506] Ibid.

b) Strategic Aim 8: *"[T]o continue to develop links with both tertiary level institutions and the private sectors in order to build human capacity and foster development in the region."*[507]

A planned strategic action to achieve this aim is "to continue to develop mechanisms to bring university-wide expertise and intellectual leadership to bear on shared regional problems and challenges of an economic, social, educational…nature" [508]

c) Strategic Aim 10: "*To strengthen and expand inter-institutional relationships to support regional development priorities through resource acquisition, capacity building and knowledge infrastructure strengthening at UWI."* [509]

Listed among the strategic actions is the utilization of more collaborative strategies for UWI to continue to provide leadership of the tertiary section in the region.[510]

5.4.2.3. Establishment and Structure

As a practical matter, it seems desirable that UCMC should be established at UWI as part of the functions of its "Centre" administration which carries out the University's regional remit.[511] The advantage of this approach is that it would be easier and quicker

[507] Ibid, paragraph 124.
[508] Ibid.
[509] Ibid., paragraph 141.
[510] Ibid.
[511] See 2.5.1.1. *supra* for an explanation of the UWI administrative structure.

to build on the existing UWI copyright infrastructure with the strategic aims articulated above providing a fillip to the development of this initiative. In the model being proposed, UCMC would offer its management services to other Universities in the region based on agreed terms.

Staffing of the unit would be appropriate to its scope of work. It is proposed that, at the outset, there should be a small staff complement which should include experts in copyright law and management with adequate administrative support.

5.4. 2.4. Functions

A. Information and Guidance

At a minimum, UCMC would be expected to provide information and guidance on copyright issues, including information on applicable law and institutional copyright policies. It would also advise on:

i) the use and disposition of copyright owned by staff and students, including the availability of options that are consistent with the educational objectives of the University community

ii) the copyright provisions of contracts and licensing agreements to which UWI or any other participating university is a party.

B. Institutional Policies and Tools

UCMC would formulate and facilitate the institutionalization, in collaborating Universities in the region, of copyright policies[512] and other copyright management tools identified above, given that these do not now exist.

C. Policy Review

UCMC would function as a resource for the University Committees charged with responsibility for copyright by undertaking research and providing the information that the Committee would need to monitor, review and amend the policy

D. Licensing

In the absence of existing mechanisms to do so, UCMC could also license University-generated materials where these are commercially exploited.[513] In this respect, UCMC

[512] The UWI *Policy* which has most of the main features of standard copyright policies could be updated, where necessary, and serve as a model.

[513] Where the material concerned does not belong to the University concerned, UCMC may manage the rights on behalf of the right holders (student, staff member or external party) for a fee.

would be exercising functions similar to those of CMOs and as such might fall under the jurisdiction of the Regional Copyright Tribunal proposed in Chapter 4.

It is unusual for a University to engage in copyright licensing as this is normally the business of collective management organisations, such as reprographic rights organisations. However, given the absence or ineffectiveness of such organisations in the region, UCMC could exercise licensing functions with respect to University-generated copyright materials until CMOs are well established and/or the volume of materials to be licensed warrants the handing over of these functions to CMOs.

G. Lobbying and Advocacy

UCMC would monitor developments relating to copyright on the national and international scenes that might affect the copyright interests of Universities whether as generators or users of material. Where appropriate, it could facilitate the efforts of the Universities to make submissions to Governments or the CARICOM Authorities, or both, on policies or legislation pertaining to copyright issues that affect higher education.

5.4.2.5. Challenges

One of the challenges to the successful implementation of this proposal is the physical distance between UWI and some of the other Universities. However, as in the case of the regional solution to the management of the performing right proposed in Chapter 4, the availability and use of information and communication technologies, in particular the Internet, teleconferencing and web-conferencing should minimize the negative

aspects of distance. UWI already has well established teleconferencing facilities established throughout the region in all of its contributing countries.[514]

Of fundamental importance is the consideration that the cost of establishing and maintaining the Centre must be defensible from the point of view of economics. Weedon cautions that the "potential revenue compared to the costs of administration could be negative".[515] The challenge would be to ensure that the returns and savings resulting from efficient management of University-generated copyright do not significantly outweigh the cost of managing the rights involved.

It is assumed that Universities in the region would welcome this initiative and readily participate. While there is no empirical evidence that this would be the case, there is no doubt that the proposed regional UCMC could fill a management gap in these institutions. The Universities in the region will likely utilise the services of UCMC if the benefits to engaging can be demonstrated and the costs of participation do not outweigh any benefits that might accrue to these institutions.

5.5. Future prospects

The organisation of the type contemplated has the potential to facilitate institutional strengthening in the area of IP management at UWI and in the region, generally. It is possible that over time, it could be "built out" into an entity that manages other intellectual property rights, including patent rights, and also licenses University

[514] See Note 218 for a list UWI contributing countries.
[515] Weedon, op cit., paragraph 2.8.

technology – areas in which serious management gaps also exist in the Universities in the region.

5.6. Conclusion

This chapter sought to develop a regional model for the management of University-generated copyright. It demonstrated that such a mechanism would fit easily into a tradition of regional co-operation among Universities in these small states. The chapter highlighted the centrality of copyright policy as the main management tool and emphasized the role of an institutional policy in solving the controversial issue of the ownership of copyright in a University setting.

Recalling the findings of chapter 2 that there was a gap in the management of copyright in the English-speaking Universities in CARICOM, the chapter proposed the establishment of a University Copyright Management Centre at UWI which would manage copyright generated within that institution and also offer its services to other universities in the region, all of whom have no management mechanisms in place. The main functions of UCMC were articulated and some potential challenges were identified. It was suggested that, in the future, the proposed body could be enlarged to assume responsibility for the management and commercialisation of intellectual property rights generally for Universities in the region.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.1. Conclusions

6.1.1. Rationales and Rights

The study found that various justificatory arguments have been advanced for the grant of copyright to works of the mind. Copyright laws of the Anglo-American tradition, including the laws of the English-speaking CARICOM states, appear to be strongly influenced by arguments based on the economic and social benefits that accrue from the grant of property rights. The economic and social arguments strengthen the case for paying greater attention to copyright management, as economic returns result only if rights are properly managed. However, the various theories provide no explicit guidance on rights management.

Copyright owners are endowed with a vast array of rights under international conventions. Rights granted in the analogue environment have been reinforced and extended in the digital environment by the WCT which also contains provisions that support the use of DRMs by right-holders

One of the instructive findings of this study is that the approach to copyright management need not be confined to the traditional approaches - that is to say, copyright management systems can be adjusted, or as the case may be, crafted to suit the circumstances of a particular environment and to respond to its demands.

6.1. 2. Copyright Management in CARICOM

6. 1. 2.1. Music

The Caribbean music industry operates within a global environment in which the digital revolution has enabled the unauthorized use of music in a way that is unprecedented, shaking the financial foundations of the music industry. Rights management organisations are also adversely affected by the unlicensed use of the works of their members. Legal downloading sites for music have been established by leading players in the music industry and new business models aimed at creating a variety of income streams have been put in place.

Music has great social and cultural significance in the Caribbean. Calypso and soca music from Trinidad and Tobago and reggae music from Jamaica are the dominant genres in the region. While the creativity and inventiveness of generations of authors, composers and performers have led to the creation of a variety of music genres, the business side of the music industry in the Caribbean is less of a success. Low levels of investment, limited facilities and small markets mean that the more successful performers, authors and composers of music operate mainly in the large metropolitan markets.

Collective management of rights, an important aspect of the music business, is adversely affected in the region in at least two ways: first, the more successful high-income musicians tend to be members of foreign CMOs, and second, the use of Caribbean music overseas is not usually captured by the sampling mechanisms used by foreign CMOs in their mainstream markets.

While the Governments of the Caribbean have, historically, shown little interest in the music industry, this could change given recent attention to the economic potential of the industry as demonstrated in recent studies aimed at identifying the value of the cultural industries to economic development.

The study found that in general, the collective management system in CARICOM is weak. The existing CMOs have relatively small memberships, small income levels and high administrative costs. Given the cost of maintaining a national CMO, the collective management of copyright on the traditional territorial basis does not seem to be appropriate for the small states of CARICOM. Regional and sub-regional initiatives taken might not go far enough to bring about a viable system for managing the rights of authors and composers of music and it appears that a more radical regional approach is necessary.

6.1.2. 2. University-generated copyright

There are good reasons why Universities should pay attention to the management of copyright. Many Universities in the UK and elsewhere have established copyright policies which are the main management tools used by Universities. Providing clarity on the ownership of copyright in a university is one of the main functions of a copyright policy.

Although they generate important works that are protected by copyright, Universities in CARICOM, with one exception, have no policy or institutional structure in place to

manage copyright. Managing University-generated copyright can help to facilitate access to and use of works within the academic community. Given their relatively small size, resource constraints and the limited expertise in the area, it would seem undesirable for each institution to establish its own management mechanism: economies of scale can be achieved by institutional co-operation and the establishment of a common regional mechanism for copyright management.

The study found that in general, there were several factors that impacted negatively on copyright management in CARICOM states. These include high levels of piracy, resistance of users to licensing and weak enforcement.

6.1.3. National, regional and international models of managing copyright

Examples abound of various collaborative mechanisms for managing copyright both at the level of states and among copyright owners. This demonstrates that copyright management systems need to be adaptable.

Where states operate within a regional grouping with a common economic space, the harmonization of copyright laws and rules governing the management of rights is logical, given the need to minimise dissimilarities among countries of the group to avoid distortions in trade in the internal market. Member states of the EU benefit from harmonised copyright laws and the EU authorities are giving a great deal of attention to the collective management of rights in the context of the requirements of the internal market. In addition, EU competition law and policy are implemented to control any abuses by monopolistic CMOs, which are also subject to the jurisdiction of local

national tribunals and competition authorities. CMOs are also subject to the jurisdiction of the ECJ and other EU authorities. The territorial licensing of rights has posed particular problems to the licensing of online music in the EU, giving rise to various EC studies and a Recommendation which favours the elimination of territorial licensing of online music in the EU.

Another regional grouping, the Andean Community, also requires its members to harmonise their copyright laws and, in addition, has issued a binding Decision containing extensive provision relating to the conduct of CMOs in the various countries comprised in the Community.

The study also found that at the level of CMOs, there is a trend towards centralization of management functions and the formation of joint ventures and alliances in the EU, many aimed at establishing "one-stop-shops" for users wishing to clear the rights that are managed by several CMOs.

The regional approach of the EU and the Andean Community to rights management provides valuable insights that have influenced the fashioning of the proposals in this study for the establishment of regional copyright management structures in CARICOM.

CARICOM is a grouping of sovereign states established by Treaty. Applying the generally accepted indicators to determine smallness, that is to say, geographic size, population and GDP, all CARICOM states are small states. Unlike the EU and the Andean community, the supernationality principle does not apply to CARICOM. As a

result, there is no CARICOM entity with capacity to make laws by which member states are bound.

While the existing Treaty provisions dealing with intellectual property rights contain provisions concerning the administration of such rights, no provisions on copyright are included, and the management of CMOs is not addressed by the Treaty.

6.1.4. Regional Management Systems: Unifying features

The regional systems proposed for the management of the performing right in music, on the one hand, and the management of University-generated copyright on the other, while proceeding on discrete parallel tracks, have common characteristics that conduce to the better management of copyright in CARICOM.

Each regional copyright management system offers:

a) a centralized regional mechanism that would eliminate duplication of effort in each of these small states and, by pooling scare human and financial resources, benefit from economies of scale;

b) a single regional entity that would be open to copyright owners throughout the region (that is, authors, composers and publishers of music, in one case and in the other, owners of University-generated material)

c) a single system of rights clearance for users rather than multiple systems in several countries.

However, the two regional systems proposed would operate within the context of an overall regional copyright management system that would:

- take account, and be consistent with, the objectives of the CARICOM Single Market and Economy which establishes a single economic space comprised of the territories of its fifteen (15) member states, and which, among other things, contemplates the free movement of goods, services, labour and capital within that space;
- have a Regional Copyright Tribunal established under the Revised Treaty of Chaguaramas, with jurisdiction over all regional copyright management entities;
- have rules prescribed in the Treaty governing the establishment and operation of any regional entity engaged in managing copyright;
- develop harmonised copyright legislation in the region ; and
- in order to foster local culture and promote the economic welfare of authors, composers and publishers of music in CARICOM states, implement a regional broadcasting policy (as part of a wider regional cultural policy) that required television and radio stations in the region to play a certain amount of domestic and regional programming[516]

[516] See footnotes 207, and text attached.

These features of the overall copyright management system would bring coherence to the regional approaches advocated in this study in that they would operate as unifying elements to the two regional models of copyright management that have been proposed.

6.2. Recommendations

6.2.1. A Regional Model for Collective Management of the Performing Right

The hypothesis of this study is that copyright management in CARICOM states will not be successful unless it is undertaken on a regional basis. Testing the hypothesis in the context of the management of the rights of authors, composers and publishers of music, the study highlighted the short-comings of the existing territorial collective management model, emphasising that the small membership, small repertoires and low levels of income of these CMOs predispose them to being weak and unsustainable.

The findings of the study support the hypothesis. This study, therefore, recommends that in place of the territorial model of collective management, a regional approach to the management of the rights of authors, composers and publishers of music in CARICOM states should be instituted involving a single CMO which would issue a pan-Caribbean licence covering a combined repertoire of right-holders in all CARICOM states.

It is recommended that the provisions of the Revised Treaty which aim to promote the protection and promotion of intellectual property rights on a regional basis should be amended to incorporate fresh provisions that support regional copyright management systems. The establishment of a Regional Copyright Tribunal under the Revised Treaty is also recommended.

6.2.2. A Regional Model for the management of University-generated copyright

Applying the hypothesis to the management of University-generated copyright was more challenging, given the very limited experience in copyright management in Universities in the region. However, certain factors reasonably support this hypothesis. All the Universities reviewed produce valuable copyright material and engage in activities that require decisions to be made regarding the ownership and disposition of copyright.. The need for copyright management mechanism in these institutions was established by the study. Given the relatively small size of most of these Universities, resource constraints and the absence of a vast pool of persons with expertise in copyright and copyright management, it is recommended that the management of University-generated copyright in CARICOM should be done on a regional basis and that a regional University management centre should be established along the lines proposed in Chapter 5.

6.2.3. Regional Copyright Tribunal: a key unifying element

It is recommended that the provisions of the Revised Treaty which aim to promote the protection and promotion of intellectual property rights on a regional basis should be amended to incorporate fresh provisions that support regional copyright management systems. The establishment of a Regional Copyright Tribunal under the Revised Treaty is also recommended. The Tribunal would be a critical player in an overall regional copyright management system with jurisdiction over all regional copyright management entities, including the two entities proposed by this study.

6.2.4. Other Recommendations

It is also recommended that in order to support right-holders in protecting, enjoying and enforcing their rights, Governments in CARICOM need to take the necessary action, including the enactment of laws were necessary, public education to foster respect for copyright, action against piracy, and the improvement of enforcement mechanisms.

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