



COPYRIGHT COLLECTIVE MANAGEMENT IN MUSIC

DR. ULRICH UCHTENHAGEN

COPYRIGHT
COLLECTIVE MANAGEMENT
IN MUSIC

Dr. Ulrich Uchtenhagen

PREFACE

The World Intellectual Property Organization (WIPO) has decided to publish this work posthumously. The last written contribution of Dr. Ulrich Uchtenhagen, it testifies to the legacy of the huge knowledge and immense experience of its author concerning what was his passion "Copyright collective management in music". Presented in the form of a theoretical and practical guide of great wealth, this publication is addressed both to those working in this field and to those who envisage devoting themselves to it.

Dr. Uchtenhagen was keen to write in French, which was not his mother tongue, as he wished that one of the United Nations official languages were immediately available to countries seeking assistance, pending a translation in English and Spanish. The result of this approach was a considerable amount of rereading and partial editing.

During his life, Dr. Uchtenhagen worked to improve the collective management of musical works in developing countries and the least developed countries (LDCs). At the head of the Swiss Society for Copyright in Musical Works (SUISA), he introduced the first training course on the collective management of musical works, which took place each year in cooperation with WIPO. After 28 years as the Director General of SUISA, he became a WIPO consultant and his contribution to cooperation for development programs was colossal. It was his greatest desire to see authors' societies emerge in the largest possible number of countries, even those facing a fragile economic environment, in order to provide the world of creation, in particular that of musical authors, composers and publishers, with the fruits of their creative work.

In his remarks, he wished to emphasize that the setting-up of an appropriate national infrastructure required knowledge of copyright both on a theoretical and practical level, and that reference material was essential for the purposes of establishing fees, understanding national and international documentation relating to works and rights owners, drafting distribution rules, guaranteeing the distribution of royalties and providing sound accounting management.

Thus, the creation of authors' societies or the improvement of the capacities of existing societies requires, on the part of their managers, more and more specialized mastery, since the subject has become so complex and dependent on modern technologies. The number of uses has increased with the boom in new music broadcasting technologies. The international network, consisting of copyright collective management societies, uses communication tools and standards, the parameters of which must be respected. Newly formed collective management societies are called upon to integrate themselves into this modern network, at the risk of isolation which may prove fatal to them. Access to different information and data systems and the exchanges between societies are essential to sound management. Such modernization requires a particular form of adaptation, on the fringes of which authors' societies are also obliged to carry out so-called "conventional" tasks specific to their functions.

All these aspects, supported by advice based on his experience and examples drawn from his activities on the ground, are dealt with in this manual.

PUBLISHER'S NOTE

The origin of this work lies above all in the faith which the late Dr. Ulrich Uchtenhagen devoted to the approach adopted by WIPO to helping developing countries, the least developed countries, and the countries of Central and Eastern Europe in the field of collective management. This trend is part of an integrated development program in which cultural goods and services and the copyright industries are used to create wealth for all rights owners and to reduce poverty. It was also part of the process of raising awareness of the economic importance of collective management for all these countries.

Collective management is a complex highly specialized field in which it is worth streamlining the basic management tools required to impart knowledge and to develop collective management training methods.

The preparation of this work required, on the part of Dr. Uchtenhagen, more than two years' work and intensive research, punctuated by exchanges with collective management specialists and practitioners throughout the world, notwithstanding the product of his personal reflection and immense experience.

Dr. Uchtenhagen wished that the contribution made by the following people to the completion of this work be mentioned:

- Dr. Patrick Masouyé, Acting Director of the Copyright Collective Management and Related Issues Division and Dr. Simon Ouedraogo, Senior Counselor, Economic Development Bureau for Africa, with whom the author had numerous working sessions to define the general guidelines, the choice of subjects dealt with by the work and the coordination of its presentation. These people were also responsible for the linguistic revision of the drafts which the author submitted to them, as well as for the coordination of the final edition of this manual;
- Dr. Andreas Wegelin, Deputy Director - Licenses and Distribution (SUISA), who helped Dr. Uchtenhagen in his research work and provided him with valuable assistance in terms of basic and historical documentation on collective management;
- Mr. Martin Mariscurrena, Director of the International Confederation of Societies of Authors and Composers (CISAC) for Latin America who discussed with Dr. Uchtenhagen the practices of collective management in this part of the world and helped him with documentary research;
- Mr. Samuel Ahokpa, Director of the Beninese Copyright Office (BUBEDRA), Mr. Komi A Amétépé, Director of the Togolese Copyright Office (BUTODRA), Mr. Mamadou Sidibé, Secretary General of the Malian Copyright Office (BUMDA), Mr. Serman Chavula, Director General of the Copyright Society of Malawi (COSOMA) and Mr. Elie Rivière, former Director General of the Mauritius Society of Authors (MASA) who acted as reference sources in relation to the difficulties encountered in their respective countries, as well as actions in other developing countries and the least developed countries on the African continent;
- Mrs. Nathalie Simonnet and Mrs. Nathalie Danemark who worked intensively on the first drafts of this work and helped with the final compilation of this manual.

The opinions expressed are those of the author and of certain people who participated in the design and preparation of this manual, but do not necessarily reflect those of WIPO.

TABLE OF CONTENTS

Preface

Publisher's note

Prologue

Paragraphs

CHAPTER 1 THE BASICS – AUTHORS AND PUBLISHERS

1. WHY THE NEED FOR COPYRIGHT COLLECTIVE MANAGEMENT?	1
a. The author's will	2 - 7
b. The situation of clients	8 - 10
c. The position of the State	11 - 14
d. The place of publishers	15 - 18
e. A trial definition	19 - 23
2. IT'S ONLY THE FIRST STEP THAT COUNTS	24
a. The union between authors	25 - 31
b. The clients' opinion	32 - 33
c. The rights concerned	34 - 42
d. Is a musicians' alliance necessary?	43 - 48
e. Is the game worth the candle?	49 - 51
3. THE BIG QUESTION OF THE MONOPOLY	52
a. The constraints of concentration	53 - 59
b. The disadvantage of rivalries	60 - 63
c. The risks of monopoly abuse	64 - 68
d. The freedom of association of authors	69 - 71
e. Free competition relating to copyright: mere supposition or an ideal?	72 - 75
4. GRADUAL ACHIEVEMENT	76 - 78
a. Learn to walk before you can run	79 - 81
b. An initial work plan	82 and 83
c. Caution is the mother of safety	84 - 86
d. The way forward	87
5. THE STATUTES	88 - 89
a. Legal form	90 - 92
b. The principles of collective management	93 and 94
c. The bodies	95
d. Authors' participation	115 - 119
e. The position of publishers	120 - 122
6. THE AUTHORS	123
a. The contract between the author and the collective management society	124 - 132
b. The principle of equality of treatment	133 - 136
c. The problem of pseudonyms	137 and 138
d. Social protection	139 - 143
e. The freedom of action of members	144 - 148

7. THE PUBLISHERS	149 and 150
a. Publishing contract	151 - 161
b. Importance of publishers to music	162 - 166
c. The publisher's contract with the collective management society	167
d. At what point is the work published?	168 and 169
e. The sub-publisher	170 - 182

CHAPTER 2 DOCUMENTATION – REPERTOIRE

1. NATIONAL DOCUMENTATION	186
a. Data relating to authors and publishers as members or principals	187 - 194
b. The declaration of works and the database of works	195 - 205
c. Documentary evidence	206 - 210
d. Publishing contracts	211 - 214
e. Sub-publishing contracts	215 and 216
2. INTERNATIONAL DOCUMENTATION	217 - 219
a. CAP/IPI documentation	220 - 234
b. International index cards	235 - 241
c. Cue sheets	242 - 244
d. WWL/WID documentation	245 - 251
e. The transition to the CIS	252 - 260
3. THE REPERTOIRE	261 and 262
a. The national repertoire	263 - 267
b. Foreign repertoires	268 - 272
c. The works of authors who do not belong to copyright collective management societies	273 - 281
d. The works of unknown authors	282
e. The global repertoire	283 - 286

CHAPTER 3 CLIENTS – TARIFFS – LISTS OF THE WORKS USED

1. THE BIG WIDE WORLD OF CLIENTS	293
a. Partner or subject ?	294 - 298
b. Everyone has his turn	299 and 300
c. The power of prejudice	301 - 306
d. The profitability of collective management	307 - 311
e. The search for practical solutions	312 - 317
2. CONTRACTS WITH CLIENTS	318 and 319
a. Contract or unilateral consent?	320 - 324
b. The scope of consent	325 - 326
c. The payment of royalties	327 - 333
d. Duration of contracts	334 - 338
e. Individual or collective contract?	339 - 344

3. TARIFFS – THEIR COMPONENTS	345 and 346
a. The main standard	347 - 353
b. Calculation rules	354 - 368
c. The fixed amounts of royalties	369 - 372
d. Discounts and reductions	373 - 378
e. Minimum royalties	379 - 381
4. TARIFFS – THEIR SUCCESSION STAGES	382 - 384
a. Preparations	385 - 387
b. Tariff-related negotiations	388 - 390
c. The approval of tariffs	391 - 395
d. The validity of tariffs	396 - 401
e. The duration of tariffs	402 - 404
5. THE LISTS OF WORKS USED	405 - 407
a. The unloved child	408 and 409
b. The number of lists	410 - 412
c. Which lists?	413 - 418
d. Musicians as allies	419 - 422
e. Means of fortune	423 and 424
6. CLIENT SERVICES	425
a. Centralized service or decentralized services?	426 - 430
b. The supervision of musical life	431 - 435
c. The fight against piracy	436 - 442
d. Clients' database	443 - 446
e. Cooperation with other institutions	447 - 450

CHAPTER 4 DISTRIBUTION – FINANCES

1. DISTRIBUTION PRINCIPLES	454
a. The principle of equality of treatment of all authors	455 - 462
b. "Suum cuique" or the "to each what is due" principle	463 - 469
c. The subdivision of amounts between authors and publishers	470 - 475
d. The principle of full distribution	476 - 479
e. The autonomy of distribution	480 - 486
2. DISTRIBUTION PROCESSES	487
a. The "rendez-vous" technique	488 - 496
b. Treatment of unknown works	497 - 501
c. Distribution classes	502 - 507
d. Calculation of the amount per work	508 - 514
e. Distribution keys or scales	515 - 525
3. STATEMENTS	526 - 528
a. The content of statements	529 - 534
b. Timetable of statements	535 - 541
c. Verification of statements	542 - 545
d. Payments and advances	546 - 550
e. Payment exemptions	551 and 552

4. FINANCES	553 and 554
a. The absence of profit making	555 - 557
b. Management expenses	558 - 563
c. Interest	564 - 566
d. The shares of unknown authors, composers and publishers	567 - 571
e. Balance sheets and operating accounts	572 - 574

CHAPTER 5 INTERNATIONAL RELATIONS

1. CISAC	581
a. A few words of history	582 - 589
b. The admission procedure	590 - 596
c. The reciprocal representation contract between collective management societies	597 - 616
d. Charter of the Author's Right	617 - 623
e. Cooperation and the CIS project	624 - 631
2. BIEM	632
a. A few words of history	633 - 652
b. The admission procedure	653 - 656
c. The reciprocal representation contract between collective societies managing reproduction rights	657 - 662
d. The model BIEM-iFPI contract	663 - 670
3. SISTER SOCIETIES	
a. The beginnings and development of collective management	671 - 677
b. Authors, composers and publishers wishing to move from one society to another	678 - 683
c. Disputes and the settlement thereof	684 - 687

CHAPTER 6 SOCIAL AND CULTURAL WORKS

a. The funding of social institutions and cultural promotion	690 - 697
b. Social protection models	698 - 703
c. The range of cultural promotion	704 - 708

CHAPTER 7 THE INTERNAL ORGANIZATION OF COLLECTIVE MANAGEMENT SOCIETIES

a. Organization chart	711 - 715
b. Hierarchical channels and consultation	716 and 717
c. Orders and delegations	718 - 720
d. The role of information technology	721 - 723
e. The importance of planning	724 and 725

Postface

PROLOGUE

You are an author, composer or publisher who wishes to understand better the inner workings of copyright collective management, or you have been requested to set up a copyright society: this work is for you.

Besides the conferences, round tables and training courses, it is important to have an overview of copyright collective management as it is practiced in most countries around the world. Without, however, being restricted to the description of methods and structures, an overview allows us to introduce the main aspects of a development process which has survived for almost 150 years. Collective management of non-theatrical music began in 1851.

We will deliberately refrain from presenting a legal introduction here, even if it is true that certain copyrights are the very subject of collective management. It is not, however, essential to be a legal expert to find one's way around in this field. In the world, between 15,000 and 20,000 people work in this profession and legal experts form a small minority. Even though it is recommended to reread, from time to time, the copyright law of one's own country, the Berne Convention for the Protection of Literary and Artistic Works, or even a copyright treaty, that is not a prerequisite for reading this manual.

This manual contains references to the experiments recently conducted in certain countries where copyright collective management societies have been set up. The examples of Algeria, Chile, Costa Rica, Malawi, Mauritius and Niger are recalled and illustrate the practical nature of this manual.

The expression "authors' society" encompasses all the forms of groupings or associations of authors for the joint exercise of their rights. Private societies are most often cooperative societies corresponding to the will for the joint defense of interests in the countries where the authors have taken the initiative to manage their rights collectively. They may also be State or semi-State bodies set up by the State to deal with copyright collective management. These authorities, offices or organizations are also covered by the term "authors' societies".



CHAPTER 1 THE BASICS – AUTHORS AND PUBLISHERS

1. WHY THE NEED FOR COPYRIGHT COLLECTIVE MANAGEMENT?

1. All national laws and international agreements confer private and exclusive rights on their authors. Thus, it is the author or composer alone who decides whether, when and where his work will be performed publicly, broadcast or recorded. These rights as a whole are known by the generic expression "economic rights" of the author.

a. The author's will

2. Before deciding on the different forms and methods of use of his work, the author must take a decision as to whether to take it out of his drawer. In case of publication - which corresponds to the desire of the vast majority of authors – he can present it himself in public, for example as a musician; he can also produce disks or cassettes and sell them. No one will prevent him from doing so; copyright has for more than half a century been a human right with all the guarantees that it can be exercised freely.

3. With the same freedom of action, the author may look for and choose a publisher who will take charge of producing copies of the work and placing them in circulation. For this purpose, he concludes a contract – known as a "publishing contract" – with his publisher and delivers to him the work to be published (paras 151 to 161). At this stage, let us note simply that the author and publisher are linked in that they jointly seek the success of the work among the public.

4. When the work appears on the market, the public starts to take an interest in it. The disks or cassettes sold commercially are sooner or later used for the purposes of broadcasting and/or public performance in restaurants, shops and other public places. The composer is rarely consulted; the work follows, so to speak, "the laws of the market".

5. The composers quickly realized that they were completely unable to monitor what happened to their works as soon as those works were published. They had the choice between resigning themselves to their fate – considering the uses of their works as the appendage of the success of the sales of copies – or defending their rights. The first die were cast in 1847, when three composers, Ernest Bourget, Paul Henrion and Victor Parizot, sitting at a table in the café-restaurant "Les Ambassadeurs" in Paris, heard musicians play one of their works and refused to pay for their drinks as long they were not compensated for their music being used. A trial ensued. Encouraged and supported by the music publisher, Jules Colombier, the composers won their legal case. Shortly afterwards, the Society of Authors, Composers and Music Publishers (SACEM) was founded (1851).

6. This first union of authors, composers and publishers, for the joint exercise of their right of public performance – at the time, the other economic rights were not yet known – served as an example for other authors' associations in numerous countries. Enthusiasm reigned despite very difficult beginnings, fierce opposition and the despairing indifference of the authorities. More than a century was needed before copyright collective management was affirmed as a right for music throughout the world.

7. To sum up, we note that copyright collective management depends essentially on the will of the authors. Their decision to form a union for the joint exercise of their economic rights is the very basis of authors' societies. This observation is also typical of the countries where State or semi-State bodies are established.



b. The situation of clients

8. Those who use music outside the private sphere – for the purposes of public performance, broadcasting programs or production of phonograms (disks, CDs or cassettes) – are generally designated by the term "users". This word, however, conveys a lack of respect for the thousands of promoters, experts and music lovers whose vocation is to act as intermediaries in order to offer the general public the music of their taste and choice. Despite their known financial interest, their role is nevertheless undiminished since, without their activities, music broadcasting could not take place. To emphasize this aspect, the word "client" will henceforth be used instead of "user".

9. Given the scope of music in our era, the client is unable to respect copyrights if the authors do not make this task easier for him. Here is an example: let us suppose that a radio station broadcasts annually the musical works of about 30,000 national and foreign composers – a figure which corresponds to the statistics taken from the majority of broadcasters. According to the legal provisions, this broadcasting organization is obliged to contact the 30,000 composers in advance so as to know whether, how many times and under what financial conditions the composers would consent to their works being broadcast. Leaving aside the experience which shows that most composers never respond to these contacts, it should be noted that such a method would quite simply be absurd. The use of music for the masses requires a special service where the copyrights are gathered together by one person, thereby allowing the clients to respect them more easily.

10. This need for special organization in the form of concentration of copyrights with one society explains the position of the broadcasters, hotel associations and other clients in support of collective management, when they observe the hesitation of the authors to form groups.

c. The position of the State

11. The fact that in 1851 a few authors and publishers got together to found SACEM had the same significance for the French State as creating a new transport company or building a new theatre. It was the private affair of a handful of people. A century later, in 1985, the French State had a different attitude (para. 676). What were the grounds for this change?

12. A society which manages to bring together all the authors, composers and publishers in its country and to provide representation for those abroad, and thereby owns copyrights relating to the "worldwide musical repertoire", acquires a very strong, or even dominant, market position, in accordance with anti-cartel legislation. The professional existence of important clients, such as broadcasting organizations or dance halls, depends on the authors' society's authorization. The activity of this society cannot therefore avoid the measures taken by the State concerning the control of monopolies. Is it necessary to try to avoid this surveillance or, by contrast, should the State have the right to pry, in the sense that it officially approves copyright collective management? Opinions are divided but, in this context, it is noted that nowadays there are hardly any authors' societies that are not monitored by the State. Experience shows that it is better to accept a "*modus vivendi*" with the State than to run the risk of a sudden application of general laws to combat monopolies and the abuse thereof.

13. During the past few decades, numerous States have introduced into their copyright laws remuneration for "private copying", which can be collected and distributed only by authors' societies. The legislators were of the opinion that it was not sufficient to make the payment of this remuneration compulsory but that it was also the State's responsibility to ensure its proper collection and distribution. Thus, the State began to play a definite part in copyright collective management.

14. World trade has also realized the growing economic importance of copyright in what is known as "the information age". By signing the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agree-

ment) in 1994, States undertook to guarantee copyright and the means for it to be observed. This obligation contrasted with a certain indifference on the part of States with regard to issues relating to copyright. In future, the State cannot limit itself to establishing and maintaining a form of justice which responds promptly to any copyright infringement; it must also ensure that this right is exercised with certainty and in a proper manner. This conclusion is not shared by all the interested parties, but tends to be imposed more and more. The State cannot shirk the obligation to guarantee the peaceful and risk-free exercise of all private rights. In this sense, it cannot ignore the authors who endeavor to safeguard respect for their rights by means of collective management of such rights.

d. The place of publishers

15. The author is the original owner of all the rights relating to his creation. When he signs a publishing contract with a publisher, his publication, copy production and distribution rights are passed on to the publisher. Publishers often request authors also to assign to them their public performance, broadcasting and recording rights. These rights which publishers characterize as "supplementary rights" are additional to the assignment of the right of publication. This additional assignment has become customary, to the extent that publishers often end up by owning all the economic rights for the works which they publish.

16. Broadcasters, dance halls and other clients broadcast almost exclusively published musical works; manuscript works are ever rarer on the market. Although music publishers are separate from copyright collective management, such management is limited to the insignificant part of manuscript works and is likely to encounter difficulties which may lead to failure. Authors' societies with no alliance with publishers – a phenomenon particular to Latin America – lead a difficult existence.

17. For this reason, French authors - to come back to the history of SACEM – have associated themselves since the beginning with music publishers, provided obviously that such publishers and authors assign all the public performance and broadcasting rights to SACEM and all the reproduction rights to the Society for the Administration of the Mechanical Reproduction Rights of Authors, Composers and Publishers (SDRM). A large majority of societies have followed this path.

18. The reputation of publishers has, in the opinion of certain authors, not always been the best. Their relations with authors in the joint management of economic rights have led them to share with authors the income arising from public performances, broadcasting and recordings; such sharing is done according to clearly established non-arbitrary criteria. From this perspective, authors' societies oblige their members, at the time they join as representatives or members, to recognize the shares fixed in the distribution rules as invariable and not subject to change. Such fixing of shares has, to some extent, codified the relations between authors and publishers in the collective management of economic rights and has calmed certain tensions. It has also allowed authors and publishers, during general assemblies or meetings, to examine not only subjects on the agenda, but also to settle certain differences of opinion.

e. A trial definition

19. By summarizing the above, we note that authors' societies, by exercising authors' economic rights collectively, operate as intermediaries between production (creation) and consumption in the music market. These societies have a monopoly over the economic rights relating to music which can no longer be exercised individually. This concentration of rights encourages clients to observe them.

20. Through this definition, authors' societies are included among companies which provide services. They free authors and publishers from the concern of exercising economic rights in a market with unlimited potential and offer clients the chance to use music without restriction and without the risk of coming into conflict with authors' rights.

21. It would be wrong to consider authors' societies exclusively as defenders of the interests of authors and publishers; they also serve clients. Particular attention should therefore be paid to this essential function of service provision for music broadcasting, as it is known currently. By stressing the service provision function, the authors' society sheds the reputation of being an organization with unilateral tendencies. It is recognized as an intermediate entity essential in musical life.

22. Apart from the joint exercise of their rights, authors and composers encounter other problems. In several countries, they have entrusted all their concerns to their authors' society. Thus, uniontype activities have emerged, which can scarcely be reconciled with intermediary functions linked to copyright collective management. In fact, copyright collective management could not be subject to union pressures. Faced with this situation, numerous lawmakers have decreed that State bodies would authorize only authors' societies with the sole exclusive aim of collectively managing economic rights. Even in the absence of such legislative provisions, it is recommended to follow this trend and to exclude any marginal activity of a unionist nature.

23. This recommendation in favor of a purely service provision function in copyright collective management does not mean, however, that the authors' society remains insensitive to the social and cultural problems of its members. The social protection of authors, composers and publishers, as well as the promotion of the national musical repertoire, constitute very important activities for authors' societies (paras. 689 ff.). Nevertheless, these social and cultural activities must not tarnish the relations between the society and its clients, nor cause a deterioration in the provision of services. To quote one example: an authors' society could not link the authorization to broadcast music to the condition of seeing handicapped authors find jobs with broadcasting organizations or also oblige those organizations to broadcast any newly created work in the country.

2. IT'S ONLY THE FIRST STEP THAT COUNTS

24. Let us imagine the following situation: the national economic situation is favorable to the setting up of a copyright collective management society. A group of authors decides to launch out on this path, or a minister entrusts this task to a single person. How to proceed? What is the first step and what are the following stages?

a. The union between authors

25. It goes without saying that the priority is to deal with national authors and to establish a dialogue. It is possible that those authors already have a cultural association available: this association will be the main point of contact. In the absence of such an association, it is, by experience, the heads of the musical services of broadcasting organizations who are more familiar with the spheres in which authors and composers move. In certain countries, the invitation to dialogue was issued by means of publications in the main newspapers, which allowed the initial contacts to be made.

26. How many authors and composers will enroll as members? On the basis of the statistics of collective management societies, in relation to the population, it can be deduced that an average of one or two music composers and authors of text can be counted per 1,000 people. Of course, we are unaware of whether the majority of these authors and composers will join an association quickly, even before the society has proven itself. It is therefore recommended to assess carefully the number of future members.

27. After contacting the authors and composers, it is suggested to invite them to an information and exchange of views meeting. It is customary for WIPO experts to participate in such meetings to relay their experience on the establishment of a collective management system and to analyze the particular conditions specific to the country.

28. The possible groupings of authors and composers by region, language, type of music or religion are worthy of particular attention. For example, in Europe tensions have been observed between so-called "serious" and "light" music composers. Any divergent opinion that emerges must therefore be treated with the greatest care.

29. In any country preparing for copyright collective management, authors or composers are discovered who are already members of foreign authors' societies. They are often authors and composers who have already acquired a renown which goes beyond national borders. It is strongly recommended to attract these authors and composers to the cause of the national collective management society, without requesting their withdrawal from the foreign society and allowing them, by contrast, to remain a member of the society. The territory of the author or composer's country of origin can be removed from the contract with the foreign society, thus allowing him to become a member of that territory's society (paras. 225 and 682). Such an attitude will also help to reduce the well known tensions between composers referred to as "established" and those who are starting out.

30. This period of initial contacts also includes that of moving towards music publishers. It is important to know whether the majority of national works have been published in the country or overseas. The nature and scope of the relations between national publishers and the national and international phonographic industry will provide other elements to be taken into consideration. It will, in particular, be necessary to determine whether publishing interests predominate over those of the producers of records and cassettes in the country. In addition, the presence and influence of multinational communication companies will play a role in the choice of the future national copyright collective management body.

31. All these efforts at clarification will enable us to see the limits of the cohesion between the composers, authors and publishers in the new society. If the result is not satisfactory, it is recommended – before continuing with the setting up work – to consult the competent State bodies. The State's position may consist either in affirming that the authors must manage their rights themselves, or in determining that only a single collective management society will manage the copyrights. The latter solution is tantamount to establishing a monopoly. If the State envisages a monopoly position for the young society, fewer difficulties will probably occur with a concentration of rights than in the case of freedom of creation of collective management societies.

b. The clients' opinion

32. Among the society's potential clients, it is suggested to pay particular attention to the attitude of the State broadcasting and television body. This is the number one client, not only in terms of the size of the license fee it must pay but also for the example it must set for the other clients. How can a hotel owner be obliged to pay his license fee for the public reception of works broadcast and televised in his establishment, if the powerful broadcaster of the programs does not respect the copyright? What should we think of a State that would enact a law recognizing exclusive rights for authors, with penalties in case of offences, and would tolerate ignorance of such rights by one of its great bodies? It is therefore strongly advised to analyze the national situation in depth before investing more energy and resources in the setting up of a collective management society. A statement of good intention by the broadcasting and television organization will constitute a guarantee. We may think that the position of the Ministry supervising this organization, in favor of a rapid and satisfactory settlement, will have the strength of a commitment. In the absence of such statements, thought may be given to bringing a case in the courts so as to achieve recognition of the authors' and composers' broadcasting right and to apply it, before continuing the setting up of the collective management body. A two-year delay in setting up an authors' society would appear to be less serious than establishing an authors' society which would become worthless.

33. It is essential to contact the main clients' associations quickly from the beginning in order to eliminate or overcome possible prejudices. These initial contacts transform the clients' associations into partners who

can participate in a constructive manner. The announcement of the creation of a national authors' society will be echoed in a completely different manner in relation to a clients' association informed in advance. A surprise association will not hesitate to show mistrust or, otherwise, reluctance.

c. The rights concerned

34. Where the authors' society serves as an intermediary between the production (creation) and consumption of the music market, the result is that it manages only the rights which the authors, composers and publishers are unable to exercise themselves. These rights refer, according to the examples provided, to the "trilogy" of economic rights:

- right of public performance,
- broadcasting right, and
- recording or reproduction right.

35. Must a new authors' society manage this trilogy? The response to this question depends on the situation specific to the country, i.e. whether a phonographic industry exists and, if so, whether it signs exclusive contracts with the composers. If the new collective management society must combat piracy, the management of reproduction rights proves to be essential.

36. In continental Europe, it is customary for collective management societies to deal with the whole trilogy of economic rights, either in the form of a unified administration, or through two twinned societies, such as SACEM SDRM in France, or BUMASTEMRA in the Netherlands. In the Scandinavian countries, it is the national societies that manage public performance and broadcasting rights. They have set up a joint agency, the Nordic Copyright Office (NCB), to manage reproduction rights.

37. In Britain and America, publishers have not adopted joint management for reproduction rights. They considered that this right was an integral part of their publishing activity and that it had been assigned to them by the composer within the publishing contract. Consequently, a record or cassette producer in Great Britain or the United States of America obtains the consent to use music, by means of a "license" issued by the publisher. However, given that the reproduction right is not limited to the phonographic industry and also covers, for example, radio and television recordings, and more recently the collection of remuneration for private copying, publishers and authors have established collective management societies for income of lesser importance corresponding to the reproduction right. Thus, the Mechanical Copyright Protection Society (MCPS) was set up in Great Britain and the Harry FOX Agency in the United States of America. These societies have also assumed responsibility for representing foreign repertoires – including relations with the phonographic industry – and have earned higher income. The Performing Right Society (PRS) in Great Britain, and the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) in the United States of America manage only public performance and broadcasting rights.

38. In Latin America, authors' societies lie somewhere between "the European and the North American systems". These societies manage mainly public performance and broadcasting rights in a similar manner to British and American societies. With the exception of the reproduction rights for national works that are in the hands of publishers, a few societies also partially manage these rights for foreign repertoires. The efforts to harmonize and coordinate the relations between Latin American societies in the field of reproduction rights have recently culminated in the establishment of the LATINAUTOR Foundation, a central organization in the IberoAmerican world.

39. In Frenchspeaking African countries, State or semiState bodies manage the trilogy of economic rights without exception. By contrast, in Englishspeaking African countries several authors' societies are limited, in a similar way to the PRS, to the management of public performance and broadcasting rights. In South Africa,

two nontwinned societies deal firstly with public performance rights and, secondly, with reproduction rights: they are the Southern African Music Rights Organization (SAMRO) and the South African Recording Rights Association Limited (SARRAL) respectively.

40. To sum up, it can be said that public performance and broadcasting rights form the nucleus of collective management and the reproduction right is added to it when publishers do not oppose it.

41. What is the situation with regard to the right of publication? The author is able to exercise this right himself. The current size of the music market does not prevent him from deciding freely when, how and where his work is published for the first time, nor from entrusting the publication of his work to the publisher of his choice. On the basis of the definition according to which the collective management society serves as an intermediary when the individual exercise of a copyright proves to be too difficult or impossible, it is noted that a collective management society does not deal with the right of publication and does not affect this prerogative of the author. A number of societies, in the contracts signed with the authors, have "all the economic rights" assigned to themselves. This formula is inappropriate and it is advisable to list each right which is the subject of collective management, by eliminating the right of publication.

42. Copyright consists of economic rights – which we have just discussed – and the moral right. "Moral right" means the protection of the ownership and integrity of the work. The author may claim that he is named as such in all the public performances and broadcasts of his work, and request that his name appears on all the labels of records or cassettes containing his work. He may intervene when his work has been destroyed, distorted or modified, especially when these changes damage his honor or reputation. The moral right cannot be assigned and can be exercised only personally by the author. This means that a collective management society is not obliged to intervene. However, it can, as is often the case, assist the author in his efforts to achieve respect for the ownership and integrity of his works. In addition, in all its activities relating to collective management of economic rights, a collective management society ensures that it does not authorize any use of the works in its repertoire, which might infringe the moral right.

d. Is a musicians' alliance necessary?

43. "Musicians" means all musical performers. Musicians have waged a long battle in order to obtain the rights that would protect them against the unauthorized use of their performances. This aim was achieved with the signing in Rome, in 1961, of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), and by the recognition of their rights in national laws. Musicians' rights are related to copyright and so they are called "related rights".

44. Originally, numerous national and international authors' and publishers' associations opposed the recognition of rights extended to musicians, fearing that this development might infringe their position. "The trenches of this opposition" are not yet entirely full. CISAC, for example, retained in its Statutes (Article 5 – conditions of admission) provisions which prevent an authors' society, as an ordinary member of CISAC, from managing both copyright and related rights, if the latter form of management is not limited to a "secondary activity" (para. 592).

45. However, there are numerous wellfounded arguments in favor of joint collective management of copyright and related rights. The major argument is the fact that numerous composers are professional musicians. In collective management societies in Latin America and Africa, 70 per cent of composers may be musicians. In such circumstances, it would be counterproductive to establish, for the rights of the same people, two different organizations or societies – which would be likely to clash.

46. Another argument in favor of a union stems from the attitude of the clients. Broadcasting organizations, hotels and dance halls, which receive two invoices – one for copyright and the other for related rights

– very often refuse to pay them, criticizing "twotrack" management and demanding that the payment be combined. This requirement is wellfounded, as there is no sense in setting up two organizations for the same clients and thereby neglecting any possible synergy.

47. The possible synergy also extends to the documentation sector. The management of copyright and related rights is based on the knowledge of records and cassettes produced in the country or abroad, as well as on their musical content. Should this documentation be prepared in duplicate?

48. Despite the objections based on doctrine, it should be observed that there is a gradual narrowing of the distance between the collective management of copyright and that of related rights throughout the world. The chosen solutions are different. In Colombia, the Authors and Composers Society (SAYCO) and the Association of Phonographic Producers and Industrialists (ACINPRO) were obliged by lawmakers to set up a joint collection agency, ORSA. A less complicated solution is that of the authors' society which is responsible for overall collection and pays the share relating to related rights to the musicians' society.

e. Is the game worth the candle?

49. Finally, it is essential to know whether the collective management society will obtain sufficient income to pay fees suitable for authors, composers and publishers, and also to cover its management costs. For a long time, a certain opinion led us to believe that autonomous collective management of copyright was risky in a country with fewer than five million inhabitants. Developments in information technology and international cooperation on documentation have changed this perspective. Ten years ago, Mauritius, which had 1.2 million inhabitants, began with an autonomous collective management society; this experience was a success. The basis of this success was the preparation of a rigorous management plan comprising a realistic estimate of the income anticipated by the society in Mauritius (MASA).

50. How can the probable income of a collective management society be estimated? The accounts of the State broadcasting and television organization should be examined as a priority in order to know what its income is and, if that income is treated as a State secret, the income from advertising should be estimated. A supplement of one to 1.5 per cent will be applied to the amount of the income; the product will be considered to be the copyright royalty which the organization would pay from the very beginning. If a third of this fee is sufficient to cover the costs of a small administration "being set up", a collective management society will be considered viable.

51. Where the third of the fee paid by the broadcasting and television organization is not sufficient to cover the administration costs, more precise calculations prove to be essential. The possibilities for cooperation with other authors' societies, or even other companies, should be examined. This does not mean, however, that we are advocating the establishment of a system of agencies. Of all the solutions, that of setting up a foreign society agency is by far the worst for national authors (para. 672). Such an agency still remains a foreign body in the musical life of the country. National authors do not exert any influence over the management of this agency. The fees will be considered to be "imported" and not to correspond to the economic realities of the country. Furthermore, the clients may feel frustrated and oppose collective management because they will not have been involved in that process.

3. THE BIG QUESTION OF THE MONOPOLY

52. Before continuing to examine the conditions for the establishment of a collective management society, it is necessary to answer the big question of the monopoly. This issue, already broached as part of the problem of the union between authors (para. 12), must now be dealt with in substantive terms.

a. The constraints of concentration

53. Let us come back to the example of a broadcasting and television organization which broadcasts annually the musical works of about 30,000 national and foreign composers (para. 9). This organization expects to receive a general and complete authorization from the collective management society for the broadcasting of music in all its programs. It is unaware of the kind of music that it will offer to its audience. That depends on currents in musical life, what is on offer from the phonographic industry and trends. Whether the public prefers a South American musical fashion, is fascinated by African sounds or is totally overcome by the talents and charm of a new group of musicians from the country, the authorization given by a collective management society must correspond to all these eventualities and must guarantee the broadcasting organization a free choice of music, without the emergence of difficulties caused by the rights of authors resulting from the selection of works.

54. Can a collective management society satisfy the request made by this broadcasting organization? It will not take the risk if, just next to it, other societies – either national or foreign – manage broadcasting rights related to musical works. A situation based on rivalry would oblige it to define the scope of the repertoire which it administers. Such an obligation would place it in a difficult position. Here is an example of a dilemma: let us suppose that, in a country, two societies, A and B, deal with collective management in the music sector. A composer, a member of society A, creates a song with the words of an author who is a member of a society B. Let us also imagine that the work of a composer, a member of society A, is published by a publisher who is a member of a society B. Who will deal with these songs? These examples show that it is impossible to fix a precise dividing line between the different parts of the musical repertoire. This repertoire is "one and indivisible".

55. In addition, there are problems stemming from the mobility of the repertoire. Let us imagine that a composer leaves the society A to become a member of the society B: what are the consequences of such a move? Should this transfer be announced to the broadcasting organizations? Will this change lead to a change in the fees to be paid? All that would be harmful because such transfers are made every day and in both directions. A general and complete authorization would become impossible and would have to give way to complicated, unstable and completely obscure relations. The situation would be exacerbated still further by the fact that the authorization should cover the use of the works which do not yet exist. Society A or B? It is impossible to know which one!

56. In copyright collective management, it should be realized that the repertoire administered cannot be restricted. A collective management society which authorizes a broadcasting organization to broadcast the music from its repertoire does not know the works chosen by this organization, which itself knows what they are only at the last moment. What should be done to avoid the danger of cancelling the authorization given by a collective management society owing to the lack of definition of the content? A number of societies seek to get out while the going is good by declaring that their authorization refers to "the works in our repertoire" or to "all the works in our repertoire". Such formulae are not very serious as they appear to specify the content of the authorization but in reality do not offer the client the slightest reference point in relation to the scope of the repertoire.

57. The only solution that is both valid and reasonable consists in giving an authorization for the "world music repertoire". This solution corresponds to the clients' requirements – the broadcasting organization in

our example – and to the provision of services for which a collective management society must be responsible in its role as intermediary between production (creation) and consumption on the music market. This authorization is, however, linked to the condition that the collective management society is the only body issuing such authorizations in the country, which means that it has a *de facto* or *de jure* monopoly position. In other words, collective management societies are counted among the public utility monopolies, such as those which exist in the water, railways and postal sectors.

58. This *sine qua non* of an exclusive position or monopoly for collective management societies has been recognized by a large number of lawmakers who have enshrined it in the national copyright laws. In Latin America, five countries recognize a legal monopoly for their collective management societies; they are Argentina, Bolivia, Ecuador, Paraguay and the Dominican Republic. In Africa, all State or semiState bodies enjoy a legal monopoly. In Europe, the monopoly was maintained in Italy and in several countries in the East of the continent. A particular solution exists in Brazil: faced with a plurality of collective management societies, the lawmaker – at the request of the clients – obliged all the societies to set up a joint collection and distribution body, the Collection and Distribution Central Office (ECAD), which thus enjoys a legal monopoly.

59. Opposed to any form of monopoly, numerous lawmakers have preferred less rigid solutions which have, however, produced the same result. In these countries, copyright collective management can be practiced only after obtaining a State concession. The authorities, granting only one concession by right and by category of works, thus obtain the essential concentration of copyrights so as to be able to manage them collectively.

b. The disadvantage of rivalries

60. Despite a certain understanding of the requirement for a monopoly for copyright collective management in each country, we observe two, or even three, way systems leading more often than not to failure. There is no other solution which could be cited as an example, contrary to the allegations made by those that oppose the monopoly, who demand that copyright collective management should finally be open to the benefits of the "free economy". By way of illustration, we will briefly review three examples.

61. One of the first battlefields was Switzerland, where SACEM had set up an agency. Following the enactment of a national copyright law in 1922, recognizing the right of public performance without reservation or restriction for the first time, Swiss composers and publishers made clear their intention to create a Swiss collective management society. That society, GEFA, was founded in 1924, but was opposed by SACEM which was not prepared to close its agency. Five years of "skirmishes" and rivalries ensued between the French agency and the Swiss society. During this period, concert organizers received two invoices for each concert, without being kept informed of the justification for them. The situation deteriorated to the extent that a petition by the Swiss clients – with the State broadcasting organization at its head – was sent to the government, demanding the establishment, as a matter of urgency, of a monopoly for the Swiss society which would be placed under State supervision. Subsequently, parliament approved a special law to that effect.

62. In the 1930s, in the United States of America, the society ASCAP incorporated in its proposed fees a prohibition on using music for broadcasting against broadcasters who did not accept the required royalties. This bold approach gave rise to antitrust complaints which led to the production of "consent decrees" limiting ASCAP's activities. Following that action, North American broadcasters decided to create their own copyright collective management society. Thus, BMI was founded in 1940. Since that year, the rivalries between ASCAP and BMI have played a major role in copyright collective management in the United States. Such situations are regrettable, since the tensions absorb a large part of the energies of both societies and prevent North America from providing services commensurate with its position in world politics and music.

63. The third and last example concerns Peru. Between 1977 and 1995, two collective management societies, the Peruvian Association of Authors and Composers (APDAYC) and the Peruvian Society of Authors and Composers (SPAC), clashed with each other. Their disagreement largely paralyzed the exercise of copyright in the country. Despite the quarrels, the belief gradually emerged that only a union could bring an end to the situation. Following the merger that took place in 1995, the results confirmed all expectations.

c. The risks of monopoly abuse

64. The adversaries of monopolies continue to insist that any monopoly inevitably leads to abuses. These risks exist and certain collective management societies do not escape in that they make serious mistakes, in particular by trying to request excessively high fees. Monopolies – necessary as they might be – must, in order to be recognized and maintained, be rigorously and impartially supervised.

65. It is the responsibility of the State to supervise collective management societies by monitoring the fees charged by those societies. This means that all the fees must be submitted for examination by a State authority which approves or rejects them, and can be applied only after they have been approved (para. 392 ff.). It is recommended to supplement such monitoring with a system of appeal before a national court in order to guarantee complete objectivity in the examination of said fees.

66. Which authority is competent to monitor the fees? If a certain similarity appears to exist with the monitoring of prices, we observe, however, noticeable differences between such monitoring and that of the "price of copyright". The monitoring of prices is justified by the protection of consumers against the practice of wildly exaggerated prices. By contrast, the supervision of copyright fees must take account of the fact that the royalty provides appropriate remuneration for authors, composers and publishers. Such appropriate remuneration criteria are not based on the consumer's purchasing power, but on certain basic principles and rules for fees which will be commented on later (para. 346 ff.). In other words, the consumer's portfolio is not affected by the monitoring of copyright fees.

67. The most effective monitoring of copyright fees is achieved by involving clients. They are the main parties interested in the results of such monitoring. A number of countries have introduced such methods where draft fees are submitted to a commission. Appointed by the State, this commission consists of neutral judges and representatives both of the collective management society and clients' associations, in equal numbers.

68. A number of English-speaking African countries have renounced the prior monitoring of fees; however, clients may at any time submit a complaint against the collective management society on the grounds that the fee demanded is abusive. This method, borrowed from the fight against cartels, does not, however, prove its worth in the field of copyright. Let us suppose that in a given country the national collective management society authorizes 3000 hotels and restaurants to perform music from its worldwide repertoire publicly. After two years, a hotel owner submits a complaint against the fee applied and obtains a reduction. Should the 3000 contracts therefore be amended? Should the clients be reimbursed the difference between the amount paid and the reduced amount – despite the fact that this difference has meanwhile been distributed to the authors, composers and publishers? As a result, "*post festum*" monitoring of copyright fees is not advisable.

d. The freedom of association of authors

69. Freedom of association was enshrined as a fundamental right in the Universal Declaration of Human Rights of December 10, 1948. In Latin America, this "*libertad de asociación*" (freedom of association) is often opposed to the legal or *de facto* monopoly for copyright collective management, on the grounds that authors may create as many collective management organizations as they wish.

70. It goes without saying that authors are free to found as many associations as they see fit. However, this freedom cannot be linked to the claim according to which these associations could carry out any activity that the founding authors would wish for. If, for example, the authors decided to set up an insurance company, the company should be the subject of a concession granted by the State, before it opens its doors to the clients, notwithstanding any freedom of association or firm. This concession would be granted only after a painstaking examination of the reserve capital, additional securities and professional organization of the firm. The same would be true if the authors were starting out as bankers, in hospital services or as rail transport workers. In other words, a whole series of activities or professions depends on knowhow, knowledge, relevant qualifications and other conditions necessary for the exercise thereof. A doctor deals with his patients only after he has taken his examinations and a lawyer defends his clients only after he has obtained his degree.

71. Similar conditions should be required in the field of copyright collective management. A situation should be avoided where the authors and clients fall into the hands of unqualified persons, authorizations of no value are granted to clients and the royalties collected are never paid to the authors, composers and publishers. Collective copyright management is exercised in the public interest, as stipulated by numerous national laws. It is this public interest which obliges the State to monitor strictly the people who are responsible for this important service provision, by requiring a professional level for this activity.

e. Free competition relating to copyright: mere supposition or an ideal?

72. Authors and composers are faced with limitless competition. Their works are in competition with those of other composers and authors throughout the world. They must endeavor, with the support of their publishers, not to succumb to the overwhelming choice of music on offer on a daily basis.

73. It goes without saying that broadcasting organizations, to return to our example, and other clients also practice the rules of free competition. They choose the works from the worldwide repertoire, which are best designed to achieve the aim of their activities. The general and overall authorization given by the collective management society makes an essential contribution to this share of the free market, a fact which is often ignored.

74. The guardians of free competition imagine, however, that their ideal is not achieved as long as the broadcasting organization, for example, is not in a position to negotiate the amount of the remuneration for certain works or certain catalogs of works, negotiations which could influence their choice of broadcast music. Thus, they could make clear their preference for North American music, which might be cheaper, or for the music of such and such a group, which would be subject to a substantial reduction in remuneration. However, this supposition is unrealistic. Supposing that collective management societies do not exist, no broadcasting organization would negotiate royalties and all would broadcast music without concerning themselves with copyright. It is idealistic to believe that mass consumption of music allows the price of such and such a work to be bargained. It is precisely the opposite that should be guaranteed, i.e. the free choice of works with no financial consideration.

75. Could competition between collective management societies be imagined? Such competition could be established if all the authors assigned their economic rights to all the societies with no territorial limitation. They do not do so for obvious reasons. In the international disorder that would result, all forms of control over the music market would disappear because no one would be informed any longer of the licenses granted, wherever it may be. Furthermore, any control over appropriate remuneration would become an illusion, a situation that would scarcely correspond to the interests of the clients who should benefit from a free market. In order to maintain their rights in an orderly situation, the authors assign them only to the society of their choice – more often than not, the one in their country – which assumes responsibility for this exercise.

4. GRADUAL ACHIEVEMENT

76. In addition to the differences in opinions and the various problems discussed in the previous chapters, more specific perspectives of the path to be followed to set up a collective management society are gradually emerging. Whether it is a group of authors or an *ad hoc* committee set up somewhere in a State administration, an active approach should be adopted and the first steps taken.

77. On the basis of experience, it is recommended firstly to appoint the person who will lead the collective management society. Whatever his title (director, "*chief executive*", Secretary General or administrator), a representative (referred to below as the "director") who gets down to work is of greater worth than amateur groups establishing foundations which prove to be insufficient at a later date. The construction of a collective management society requires professional skills, i.e. a well-educated and informed person.

78. Before discussing in detail the director's training, the subject of the skills and character traits that any collective management society director should possess should be broached. In principle, he must be noted for his leadership qualities, as is required for all highlevel positions in any firm or authority. He must also be in a position to combine legal considerations and conclusions with practical solutions, and possess a certain cultural flair. An "artist" must adopt the habit of spending a considerable part of his time on calculations, projects and plans; a "legal expert" will learn that authors, composers and publishers do not always follow his conclusions and persist with unrealistic ideas. Both the "artist" and the "legal expert" will discover that they are scarcely able to share their responsibilities with other people and that they will often feel lonely. Brave figures should therefore be found who are willing to meet the challenges of this profession, to demonstrate patience and persistence, while also keeping an attentive ear open to differing opinions, even in the face of a certain amount of opposition.

a. Learn to walk before you can run

79. Copyright collective management is a trade which should be learnt. This statement applies in particular to authors who see the devotion of their time and energy to the exercise of their own rights and of those of their colleagues as a calling. Collective management requires a high professional level.

80. Where can we learn the trade of collective management? There are no professional schools. Well-established collective management societies train their own staff. International governmental and nongovernmental organizations offer general introductory courses on copyright, to which should be added specialized courses for the heads of departments of collective management societies. However, all that is not sufficient for the sound basic training of a director.

81. In order to fill this gap and put in place a solid knowledge base, certain organizations such as WIPO propose, in certain cases and subject to certain conditions, courses intended for directors. These courses take place, as often as possible, with a collective management society that can serve as a model and where practical work can be done.

b. An initial work plan

82. Following his individual training, the Director should be able to prepare the initial establishment plan for the society, thereby putting in place the stages for setting up the society, taking into account the relations with the authorities, the national radio and television broadcasting organization, and the assistance which he might anticipate from international organizations such as WIPO and CISAC.

83. Here is an example of a **work plan**:

Month	Director	Board of directors	Personnel	Authors	Users/ Clients	OMPI/Partners
1		Appointment of director				
2	Training course					Director training course
3	Drawing up - draft statutes - authors contracts - decl. of works - brochure	Appointment of head of documentation	1 secretary	Consultations with authors and their professional associations	Consultations - broadcasters - hotels assoc. - phonographic industries	
4	Circular to foreign societies	Approval of - statutes - contrat auteurs	Training of head of documentation			Training of head of documentation
5	Preparation for national seminar of authors and clients	Logo decision	Print statutes, contracts, decl. of works and brochure	Invitation to national seminar	Invitation to national seminar Statistics for music in broadcasting	Participation in preparation for the national seminar
6	National seminar for authors and clients	National seminar for authors and clients		National seminar for authors and clients	National seminar for authors and clients	National seminar for authors and clients
7	Start of member recruitment campaign Draft radio tariff	Approval draft broadcasting tariff		Start of member recruitment campaign	National seminar for authors and clients	Computer installation Documentation software
8	Beginning radio tariff negotiations			First contracts signed	Beginning of broadcasting tariff negotiations	
9	Draft distribution rules		Beginning of members' contracts and declarations of works			
10	First broadcasting tariff	Approval first broadcasting tariff Approval of distribution rules			First broadcasting tariff	
11	Circular letter to foreign societies		Print distribution rules	Circular letter Results of radio tariff	Signing of broadcasting contract	
12	Draft hotel and restaurant tariff	Appointment of head of distribution				
13	Beginning of tariff negotiations with hotels and restaurants	Approval of draft hotel and restaurant tariff			Beginning of tariff negotiations with hotels and restaurants Beginning of payments of radio royalties	Training of head of distribution Distribution planning

14	First hotel and restaurant tariffs	Appointment of head of collection			First hotel and restaurant tariffs	
					First broadcasting reports	
15	Draft phonographic industry tariff	Approval draft Phonographic industry tariff	Start of distribution work		First hotel and restaurant contracts	Training of head of collection
			Organization of collection			Installing distribution software
16	First phonographic industry tariff	Appointment of head of accounting			First phonographic industry tariff	
17	Circular letter to foreign societies and authors		Organization of phonographic collection	Circular letter	First phonogram producer contracts	Training of head of accounting
18	Social welfare project			Social welfare consultations		
19	Cultural promotion project			Cultural promotion consultations		
20	First radio distribution	Approval social welfare		First radio distribution	First radio accounts	
21	Preparations first general assembly	Approval annual balance sheet				
	Draft annual report					
	First balance sheet					
22	First general assembly	First general assembly		First general assembly; approval annual report; balance sheet; social welfare		

c. Caution is the mother of safety

84. It is strongly recommended to exercise caution and, for example, to wait for the outcome of the negotiations on the main tariffs and the receipt of the first copyright payments before recruiting staff. It would be risky to equip oneself with a sophisticated and very expensive computer system when a simple personal computer could be sufficient at first for setting up databases etc.

85. The priority given to relations with clients should also be characterized by the same cautious attitude. Despite the possible overriding enthusiasm to make progress quickly, there is no need to rush things. There are several reasons in favor of making the national radio and television broadcasting body the first point of contact (para. 32). This is the most important client, whose payments will enable documentation and distribution services to be set up without being crippled by collection costs. During the "setting-up" period, this single client may suffice, and enlightened preparations for the next stages can be made with a cool head.



Should the relationship established with State radio and television be followed by negotiations with private broadcasters – also a sector without major collection costs – or by approaching the phonographic industry, which offers the advantages of a limited but powerful customer base, or by a major "campaign" to canvass hotels and restaurants? It all depends on the situation in the country concerned.

86. In any case, the last step should be the fight against piracy, as that is very expensive and has little effect if the authors' society is not supported by other organizations or authorities.

d. The way forward

87. After meticulous preparations, appropriate training and all the relevant provisions, it is time to "take the plunge". From this point onwards, the director must try to achieve his aim through his efforts and courageous spirit. Anyone who requests immediate assistance is not really helping himself. The setting-up of a collective management society is surrounded by so much skepticism and so many Cassandras that it needs a director who inspires confidence and assurance, and who gains in stature from the start. He should be surrounded and supported by a group of authors, composers and publishers, enlightened and convinced, thus going down in the first pages of the history of the young collective management society, in the image of the composers Bourget, Henrion and Parizot in France.

5. THE STATUTES

88. Once he has received specific and individual training, the director will have to draw up the statutes of the young collective management society quickly. Obviously, he will make use of the models of the cooperative societies or other examples in his own country, as well as the statutes of sister societies.

89. As a legal entity, no society may be founded without statutes. Even the State or semi-State bodies that deal with collective management are bound by this rule. Copyright collective management is an administrative activity like no other; it is necessary to establish valid principles for the collection and distribution of fees, and for the participation of authors, composers and publishers in the exercise of their rights, in a similar way to any other society.

a. Legal form

90. When selecting the appropriate legal form, it must be borne in mind that collective management societies are entirely non-profit organizations. In actual fact, under many copyright laws, these societies are defined as non-profit organizations. Consequently, the forms of joint-stock companies or corporations do not lend themselves to collective management.

91. Furthermore, copyright collective management is characterized by authors defending themselves collectively, with support from publishers. The form of a cooperative society or possibly that of an association corresponds better to unions of this kind. Moreover, most collective management societies have been set up using such forms.

92. In some countries, copyright law determines the legal form and status of the collective management society.

b. The principles of collective management

93. Is it necessary to "set in stone in the statutes" the principles of copyright collective management? There is more than one answer to this question. Some societies consider the statutes to be the only standards

for internal organization, limited to the essential and basic definition of the society's objective. Other societies attach to the statutes the importance of a "*Magna Carta*" for copyright collective management. The latter solution is preferable and contributes to a certain unity of doctrine. It enables authors, composers and publishers who wish to become members to become familiar with the characteristics of the collective management of their rights and gives clients confidence. It enhances transparency in relationships.

94. Here are some examples of the catalog of collective management principles:

- equal treatment of all the rights held by national and foreign authors;
- taking into consideration the moral right of authors (para. 42);
- the reservation that the society can abandon the exercise of the rights entrusted for social or other reasons;
- the principle that the society authorizes any client to use the music in its repertoire when the client offers assurances that the music will be used correctly and properly, and when he is solvent;
- equal treatment of all clients and the principle that all remuneration is calculated based on approved and published tariffs;
- the society's non-interference in the selection of musical works by clients;
- the principle of "*suum cuique*" distribution, meaning that each author or composer and each publisher will receive the royalties that correspond to the collection proceeds derived from the use of their works (paras. 463 to 469);
- the requirement to complete distribution as quickly as possible and to pay the fees to authors and publishers at least once a year;
- the obligation to draw up distribution rules and to enforce them to the letter;
- the absence of any profit-making;
- equal treatment of national and foreign authors, composers and publishers with regard to the percentage of royalties deducted;
- the allocation of ten per cent of the net collection proceeds to social protection and cultural promotion (paras. 690 to 708).

c. The authorities

95. A collective management society is made up of at least the following authorities:

- General assembly
- Board of directors
- Director
- Supervisory authority

The general assembly

96. The general assembly of members is the society's supreme authority. However, it is not obliged to decide on every important issue. Its power relates more to the election of the society's other bodies and its sound management. The general assembly's remit is generally to:

- elect the members of the board of directors;
- elect the members of the supervisory authority;
- approve or reject the annual report, balance sheet and operating accounts.

97. In addition, the general assembly deals with the main issues affecting the society's future, including :

- approving and amending the statutes;
- designating the rights covered by collective management;

- fixing the percentage to be deducted and allocated to social protection and cultural promotion;
- dissolving the society.

98. Is it also necessary for the general assembly to adopt the distribution rules? This question arises if it is intended for the society to have the most democratic structures possible. However, there have been some disappointing experiences in this area. When the distribution rules are discussed by the general assembly, opinions are divided, with each side fighting for the piece of the pie they are going to get. In these discussions, attempts to find notions of solidarity are made in vain and efforts at conciliation are met with failure. It is therefore strongly advisable not to discuss the distribution rules in the general assembly, but to allocate this task to the board of directors.

99. Who appoints the director? And who can dismiss him? Given that this is not a political office, but rather a qualified occupation requiring extensive knowledge of the profession, it is not advisable to have the director appointed by the general assembly. A director elected by the members will in all likelihood seek to please the majority of members. However, his task is not to serve the majority, but rather to serve each and every member and client. Furthermore, an election in the general assembly would in a way present it as being on a par with the board of directors, which would be a mistake. The director must answer to the board of directors and must implement its instructions and decisions.

100. Who can vote in the general assembly? Those collective management societies that accept as members all authors, composers or publishers from their country (para. 264) could be tempted to admit everyone to their general assembly. This approach is not recommended. Despite all the society's efforts to conduct sound copyright collective management, there are many authors and composers whose works do not arouse public interest. The general assembly would therefore become a meeting of "poor relations", dealing with the fate of a minority of fortunate composers and authors. The general assembly should comprise only those authors, composers and publishers who are really interested in the society's sound management. The status of member with the right to vote in the general assembly should be granted only after a waiting period in which the author, composer or publisher concerned has reached a minimum total amount in royalties, this total being fixed by the statutes or by the board of directors. Authors, composers and publishers who do not meet this criterion would join the collective management society as principals and their rights would be dealt with in a completely equal manner to those of members. They could be invited to attend the general assembly as observers without the right to vote.

101. In some societies, the board of directors is the one that confers the right to vote at its discretion and without transparent criteria. This method risks encouraging the formation of clans, which would lead, sooner or later, to serious unrest in the life of the society and could go so far as to break it up.

102. Some collective management societies have introduced a weighted voting system in the general assembly to ensure that the interest in the sound management of the authors' society corresponds better to the power represented by the voting right. This method is ruled out for all cooperative societies by a good many laws, because weighted voting contradicts the idea of defending rights collectively. Under these laws, each member has one vote. This weighted voting system can also turn into an oligarchy. This could happen when the members of the board of directors exercise the most voting power in the general assembly, which would lead to an imbalance in the society.

The board of directors

103. The board of directors is the society's government. It consists of members elected by the general assembly. One of its members is appointed chairman; he is appointed to this position by the general assembly or by the board of directors.

104. It is customary in many societies to allocate specific responsibilities to board members, such as board treasurer, actuary, secretary, and so on. These are relics of the past. In large and medium-sized service-provider companies, which include copyright collective management societies, the board of directors is responsible for the society's sound operation, and does not lose itself in conjectures about issues of lesser importance. Thus, financial planning for example is not the treasurer's prerogative; it is the responsibility of the entire board, including the actuary and secretary.

105. A board of directors which met frequently would not be governing. It would be a burdensome institution that absorbed the director's time and on occasions also the time of department heads. True government requires no more than four to six meetings per year, or up to one meeting per month during times of crisis.

106. A national collective management society must be deeply embedded both in the musical and cultural, and in the political and economic, life of its country. The respect it enjoys among government ministries, the radio and television broadcasting body, in the press and among public opinion is the fruit of relentless work and of a carefully prepared public relations strategy. A board of directors whose members include well-known figures in musical, literary or political life contributes to this image and reputation. Caron Vicomte de Beaumarchais, the famous author of the libretto "Le Barbier de Séville", did not hesitate to climb the barricades for his colleagues and to set up the world's first collective management society for performance rights in theatrical works, the Society of Dramatic Authors and Composers (SACD). Richard Strauss in Germany, Georges Auric in France and Ariel Ramirez in Argentina gave up their time and strength to serve the cause of copyright collective management, to cite but a few examples. It is obvious that forcing eminent figures to waste their time on weekly meetings is not the way to earn their support.

107. With regard to the members of the board of directors, some collective management societies have come up with the idea of appealing to key figures or celebrities in the country's political, cultural or legal spheres to participate in the society's government. These people are not necessarily authors, composers or publishers. In Switzerland for example, it is traditional to welcome onto SUISA's Board of Directors a "political conscience" and a "legal conscience", which are invaluable to the society's sound operation and prestige.

The director

108. The director's "profile", basic training and appointment have already been covered (paras. 77 and 78). Here we will discuss his areas of competence within the collective management society. It goes without saying that he must oversee the whole administration and be responsible for everything relating to personnel matters and to the sound running of the collective management society.

109. Faced with the tendency of some members of the board of directors to get involved in the society's everyday affairs, it should be emphasized that only the director recruits and dismisses employees. In order to avoid potential conflict, no relative of a board member should take up employment with the society unless the offer of employment comes from the director and is approved unanimously by the board of directors.

110. Responsibility towards the staff is the director's exclusive domain. It falls to him to draw up the internal guidelines on this subject. Instructions issued by the board of directors or by its members directly to department heads or to employees could really be like throwing a spanner in the workings of the society. In other words, the official channels must be respected. The board of directors must address the director and the director must address the staff. The staff inform the director and the director informs the board of directors, with no sideways communication.

111. Who conducts the negotiations on fees? There is more than one answer to this question. Generally, it is the board of directors that sets the aims and limits of the negotiations and that gives the mandate to the director. It reserves the right to approve or reject the result of those negotiations.

112. In some cases, it is perhaps advisable to put together a representative negotiating delegation including members of the board of directors, for example, to negotiate with a client such as the State radio and television broadcasting body. In such cases, the director is part of the delegation and it is his responsibility to prepare the negotiations and to assume the role of spokesperson.

The supervisory authority

113. In the economic world, it is specialized companies made up of chartered accountants that deal with the audit of balance sheets and operating accounts. These supervisory authorities are elected by the general assembly, to which they send their reports directly. Many collective management societies have adopted this audit system.

114. Following painful experiences, a sizeable number of collective management societies have also set up internal monitoring, known in Latin America as a "*comité de vigilancia*" (comparable to an auditor), consisting of members elected by the general assembly. It is recommended to specify in the society's statutes the scope of the monitoring undertaken by these internal review boards, which have a tendency to complicate the administrative work by checking the slightest accounting transaction in detail.

d. Authors' participation

115. The right to vote in the general assembly is an important part of the authors' participation in the sound collective management of their rights. In addition, authors enjoy a right of petition, which means the power to put forward changes or innovations as well as the power to criticize any drawback of the collective management. The general assembly does not vote on an issue if the proposals or petitions relating thereto are not taken up by the board of directors. Even without a formal decision, any initiative on the part of members always attracts the attention of the general assembly and may lead to other steps.

116. The author participates, above all in the area of reproduction rights, in the management of his rights. The first publication in commercial record or cassette form requires his prior consent. Some authors take that to mean that they can request consultation also on public performances and radio broadcasts of their works. The society cannot meet such a request as it is unable to restrict its repertoire (para. 54 ff.).

117. What about the author who consents to the collective management of his public performance and broadcasting rights, but opposes the collective management of his reproduction rights? This restriction is accepted by the vast majority of collective management societies. The problem of the management of public performance and broadcasting rights on the one hand, and reproduction rights on the other hand, arises above all in countries with an established tradition of exclusive phonographic production contracts between authors and publishers. Publisher-producers do not allow other producers to use the works in their catalog. Consequently, these publisher-producers ensure that the authors linked to them do not entrust the management of their reproduction rights to a collective management society.

118. What happens if a composer withdraws a previously declared work and wishes for it no longer to be used? This "right of correction" is part of the author's moral right. This right is provided for under numerous national laws. It means that the author's decision must be respected by the collective management society and the society may not oppose the withdrawal of a work. Given that the society is unable to restrict its repertoire (para. 54 ff.), it assumes no liability in the event of performances or broadcasts after the work has been withdrawn. The only assistance that the society is able to offer its members is to notify the main users of its members' decisions by means of a circular letter.

119. Does an author have to accept the distribution scales or keys laid down in the society's rules, or can he agree on other keys with the co-authors of a work or with his publisher? These scales or keys provide

protection for the author against potential disproportionate exploitation by publishers (para. 472 ff.), and collective management societies try to limit powers to make personal departures from the distribution rules. Any change to the subdivision between the author's share and the publisher's share is ruled out for the reason just mentioned. Some societies allow agreements between the composer and author of a song's lyrics, or between the composer and arranger of his music, but it must be pointed out that authors hardly ever depart from the keys laid down in the rules. These keys are enshrined in copyright collective management.

e. The position of publishers

120. The problem of tensions between authors and publishers has already been broached in the discussion of the developments relating to the setting-up of a collective management society (para. 15 ff.). Some Latin American societies do not accept publishers as members. We have already touched on that.

121. It should be noted that the effects of these tensions can also be felt in societies whose doors are open to publishers. For example, societies which do not grant publishers the right to vote in their general assembly or which hold separate general assemblies for authors and publishers. Other forms of "discrimination" revolve around the refusal to accept a publisher as president of the society, or the number of seats for publishers on the board of directors. All these restrictions are relics of the past. Nowadays, it is a question of forging links of solidarity between authors and publishers in order to consolidate their shared position in a music market that knows no bounds. Many societies accept authors, composers and publishers as members with the same rights and obligations. This solution has demonstrated its worth.

122. Publishers form a minority in all collective management societies. Everywhere, there are many more authors and composers than publishers. Do special protection measures need to be established for this minority? Some societies require decisions to be taken in the general assembly by a majority of both authors and composers, and publishers. As for the rest, protection for the minority of publishers does not prove necessary.

6. AUTHORS

123. Now that we have discussed the possibilities and limits of authors' participation in the collective management of their rights, it is necessary to examine the relations that exist between authors' societies and their members.

a. The contract between the author and the collective management society

124. People who wish to join a cooperative society generally state their intention to do so and might possibly sign a confirmation of their decision. The signing of a contract between the cooperative society and its members is not compulsory. Thus, some collective management societies only require an assignment of the rights to be managed collectively and possibly a membership statement.

125. The above method is not recommended. There is a lack of transparency in the relations between the author and the collective management society dealing with his rights, especially when the society does not provide the author with the statutes and rules. In such cases, it should not be surprising to see among members a lack of understanding of the society's activities and indignation demonstrated during general assemblies. Only a contract specifying the rights and obligations of both the authors and the society forms the basis for the trust that is essential for smooth and orderly collective management.

126. The contract includes the transfer of the performance and broadcasting rights relating to the author's musical works to the collective management society. The author may also transfer his reproduction rights (para. 34 ff.). This transfer can take the form of an assignment or transfer on a trustee basis. In both cases, it



is necessary to ensure that the transfer is limited to the term of the contract. The preference for one or the other of the two forms is influenced by national traditions. The aim is for the society to be able to exercise the rights in its own name and to go to court without a specific mandate from the author.

127. In the contract, the author states the territory in which the transfer of his rights applies. As a general rule, the transfer is effective worldwide. In case of membership of several collective management societies, the author must specify the boundary between the territories of these societies (para. 225). No society can be obliged to accept a mandate which does not cover its own national management territory.

128. By signing his contract, the author is obliged to declare to the collective management society all his musical works and to attach the requisite supporting documentation to those declarations (paras. 195 to 205). He also notes the possible consequences of not declaring his works.

129. The author informs the society of the pseudonyms he uses and under which his works are published (paras. 137 and 138). The society is obliged to exercise total discretion in handling this information.

130. The society must integrate the author's rights in to all its collective management activities, credit to him all sums collected for the use of his works, send him detailed accounts on a regular basis, and pay him the net proceeds from his management on agreed dates, at least once a year. Moreover, it declares itself willing to grant him advances, subject to the conditions stipulated in the contract or in the member's known rules.

131. If the author joins the society firstly as a principal (para. 100), the contract specifies the conditions for entry as a member with the right to vote in the general assembly.

132. Finally, the contract stipulates the length of membership – limited or not – and the procedures for terminating membership and leaving the society. In the past, societies preferred to maintain the contractual relationship as long as possible, offering little in the way of abandonment clauses. It is for this reason that some legislators have inserted into national laws fixed limits on the length of membership for authors, thus introducing a certain "freedom of domicile". Today, the requirement for a certain amount of mobility is generally recognized and authors can leave the society at the end of each year or even within shorter periods.

b. The principle of equality of treatment

133. The principle of equality of treatment of national and foreign authors is one of the linchpins – if not the main linchpin – of international copyright (para. 456).

134. The contracts that the collective management society signs with sister societies abroad – contracts which tend to correspond most often to the CISAC model – also reflect the principle of equality of treatment. No society will entrust its repertoire to another society without being sure that the other society will incorporate it in its management while ensuring equality of treatment. Foreign repertoires cannot be managed any other way.

135. Strict equality of treatment applies to all of a society's principals and all its members; any exemptions would quickly give rise to serious crises. It is not only a question of treating all principals and members equally, but also of seeing this equality of treatment prevail also among members and principals. In other words, the legal status of member, and in particular his right to vote in the general assembly, should not influence copyright collective management.

136. All the importance attached to equality of treatment and all the solemn declarations expressing a desire to respect this principle do not stop people – in authors' national environments – from often regretting being "condemned" to this principle. The issue of potential preferential treatment of the national repertoire

is omnipresent in every collective management society. There have been numerous attempts to stray from the straight and narrow to favor the national repertoire more or less slightly (paras. 460 and 564 ff.).

c. The problem of pseudonyms

137. Collective management societies do not like pseudonyms as they complicate their work. Consequently, many societies advise authors against their use, or at least seek to restrict the number, of pseudonyms by allowing only two or three per author.

138. This administrative approach reflects a misjudgment of the importance of pseudonyms for authors. The risks incurred by certain authors who create and publish politically committed songs must not be ignored. When a musical work, such as a musical opera, ends up being a fiasco in terms of public opinion, it is understandable that the author intends to use a pseudonym when launching a new work, to avoid the recollection of bad memories. Likewise, a serious music composer who – for a change or for financial reasons – creates music for a film or commercial, has no interest in revealing his "double life". These three examples illustrate the importance of being able to use pseudonyms for pertinent reasons.

d. Social protection

139. Many countries are experiencing a shortage of publishers or producers of phonograms. The radio and television broadcasting bodies in these countries remain mostly indifferent to national music and prefer the current international success stories. These countries are becoming culturally impoverished and the national repertoire is deteriorating to the point of being "on the sidelines". In such circumstances, can the collective management society be required to distribute almost all its income abroad, by way of implementation of the principle of equality of treatment?

140. To find a solution, in the middle of the last century, CISAC devised a formula for compromise between the principle of equality of treatment and specific national interests (para. 688 ff.). This was the "price of solidarity" which served to maintain the principle of equality of treatment even in extreme situations. In other words, a portion deducted from income collected can be allocated to national social welfare and this deduction corresponds to the minimum portion of the sum collected that remains in the country. The obligation to allocate this money to social objectives avoids a distortion of the principle of equality of treatment in terms of distribution.

141. This compromise has shown its worth. It has enabled all societies to provide for social protection for the benefit of their members. This is one of the best attributes of collective management and considerably strengthens the union between authors.

142. The deduction of income for national welfare also encompasses the possibility of allocating a portion of this money to the cultural promotion of the repertoire (paras. 704 to 708).

143. It should be pointed out that this compromise has not been introduced to the management of reproduction rights. Publishers were strongly opposed to this and emphasized once again the close link between the reproduction right and the right to produce copies of the work as part of a publishing contract.

e. The freedom of action of members

144. No author may be obliged to join a collective management society or to turn to the management offered by State or semi-State bodies. Given that his rights are private and exclusive, the personal exercise thereof is guaranteed in all circumstances.

145. What about the author's personal exercise of his rights after he has joined a collective management society and has assigned or transferred his rights to that society? Must the author give up the personal exercise of his rights, and can the society require him to do so? There are several responses to this question, which vary from one country to another and are influenced in part by legal provisions stipulating that membership of a collective management society does not deprive the author of the personal exercise of his rights. What does all of this mean?

146. From the point of view of the collective management society, it is preferable for the author to refrain completely from any personal exercise of his rights. This opinion corresponds to the legal situation which dictates that after assigning a right the assignee no longer owns that right and cannot therefore continue to exercise it. It must also be remembered in this context, that the society authorizes the use of its repertoire in a general and overall manner, and is unable to restrict its contents (paras. 53 to 59). It cannot therefore draw attention to any personal authorizations from the author. From this perspective, any personal exercise of the rights assigned to the society by the author would constitute interference in collective management.

147. From the author's point of view, there are differences of opinion, in particular with reference to works created to order. These works are often performed for the first time in special ceremonies in the presence of the composer and sometimes even with his participation as conductor. The composer, just like his principal, thinks that the royalty for the first performance is included in the fee paid to the author for creating the work. When the collective management society claims the royalty for this first performance, the author - and his principal - become annoyed and rightly assert that, in this case, an intermediary is not necessary to ensure that the copyright is respected.

148. The collective management society would lack understanding, if it considered only the assignment of rights. It is recommended that the society take into account as much as possible the interests of its members. An amicable solution consists in placing "in brackets" the musical performances of a composer, if these performances encompass only the works of this composer – excluding all other works – and if the composer informs the society of the performance beforehand.

7. THE PUBLISHERS

149. The right to publish a work, to make copies of it and to circulate those copies does not stem from the fact of being a publisher, but is one of the author's economic rights. The publisher therefore depends on the author's express authorization to be able to dispose of one or more of his works. Does that mean that the publisher should be considered a client in the sense of our definition (para. 298)? It is true that a publisher depends, in the same way as a broadcasting organization or a dance hall, on the author's consent to be able to use his works. However, contrary to the latter, the publisher is directly related to the author. There is no need for an intermediary between the author and the publisher. The publisher could not be considered a user (client) in the context of copyright collective management.

150. Customarily, by signing publishing contracts with authors, the publisher acquires so-called "additional rights" (para. 15) which should be the subject of collective management. Without encompassing these rights, assigned to the publishers, the collective management society would remain condemned to a precarious existence. If copyright collective management is to succeed, it is essential for publishers to become part of the collective management society and to establish a relationship with it. Before considering this relationship, the publishing contract should be examined in brief.

a. Publishing contract

151. The author could publish his works himself, have them printed or copied and circulate them. We are familiar with the example of "publication on an author's behalf" but, as a general rule, the author looks for a publisher. Why? The publication of a work is linked to a financial investment, of differing degrees; the proof is the cost of producing a CD, an hour of music with the musicians' fees, the hiring of a recording studio, the sound engineers' and technicians' fees, and the costs of manufacturing and promoting the CDs. The success of seeing a hundred or so works published is not guaranteed. One or two only may find an audience among the public such that the publisher's activity is considered "the most expensive roulette in the world".

152. In addition, the direction of the music market requires particular knowledge and experience. What are the different stages of the promotion? How can music be presented in order to interest and stimulate specific clients such as music lovers, purists or young people? Familiarity with the distribution channels is necessary, such as shops that sell music, twinning with magazines, the Internet, etc. Let us not forget either international relations with the markets on other continents. All these strategies are a long way from the profession of author.

153. The authors therefore make great efforts to find a publisher and are in a hurry to sign a publishing contract. It is often surprising how "lightly" authors sign contracts containing clauses that are unfavorable to them. At times they deal with publication issues with an excessive lack of care and assign all their economic rights for the whole of the term of protection, often for derisory sums. Certain authors often have only one aim in mind: to see their works published on the music market "whatever the cost". This attitude may facilitate the exploitation of these authors by a number of unscrupulous publishers.

154. Taking note of this situation, certain lawmakers have inserted in national copyright laws compulsory provisions to limit a number of shortcomings and to establish some kind of balance in the relationships between authors and publishers. It is recommended that both the legal and practical aspects of the publishing contract of the country where a copyright collective management entity is based should be examined carefully. A number of collective management societies have drawn up a model publishing contract for their members.

155. The publishing contract is characterized by the two following basic features:

- the author submits his work to the publisher and grants him the right of publication, the right to make copies of the work and the right to circulate them; for the most part, these are exclusive assignments;
- the publisher undertakes to assume these tasks within a certain period and to remunerate the author.

156. The most important thing for the collective management society in its relations with publishers is to observe the publisher's contractual obligation to publish the work (para. 211). It is this criterion which distinguishes the publisher – the author's partner in the publication of the work – from the client who is free to use works. Should a phonogram producer be recognized as a publisher? This question, which is often asked, gives rise to the following answer:

- First hypothesis: the phonogram producer is authorized, by the collective management society, to use the whole of the world musical repertoire. It can thus choose the works that are to its taste and incorporate them in its disks;
- Second hypothesis: the phonogram producer signs with an author a contract through which it is obliged to produce a disk containing the specific works of this author.

In the case of both hypothesis, the producer's disks may contain the same works. In the first case, the producer is the client of the collective management society and, in the second, he is the publisher. The distinction between the two lies in the fact that in the second hypothesis the producer, as a publisher, has obliged himself, in relation to the author, to publish his works.



157. The publisher's obligation described above is not complete after the first publication. The publishing contract is a contractual relationship of fixed duration; it is intended to maintain the supply of the published work on the music market. Where a print-run is exhausted, the publisher is obliged to make a new one, if the author has not limited the publishing contract to a single print-run. In both cases, exhausting the supply of copies of the work without further action would put an end to the publishing contract. Contractual clauses such as "the contract is concluded for the duration of the work's protection" do not prevent it being abandoned. The duration of the contract may not exceed the duration of "the publisher's promotion efforts".

158. As already emphasized in paras. 15 and 150, by signing the publishing contract the author assigns to the publisher, by way of "additional rights", the trilogy of economic rights. Sometimes it is said that a publisher can become a member of a collective management society only when he has actually had this trilogy of rights assigned to him. This is not true. The publisher is recognized in his office when he is obliged, in a publishing contract, to publish a work and where he has fulfilled this obligation. The assignment of additional rights does not affect the definition of publisher. In other words, a publisher may be recognized as such by a collective management society without, however, having obtained, by assignment, the trilogy of economic rights.

159. The clause of a publishing contract which would stipulate that an author will assign to his publisher the fees that he will be paid by the collective management society remains without effect. By signing the contract for membership of the collective management society, the author and publisher recognize the validity of the distribution scales or keys (paras. 472 and 516ff.). These keys prevail over any contractual clause and thus protect the authors against any possible attempt at exploitation by the publishers.

160. As a general rule, it is the publisher who decides on the publication of the musical work in the form of sound carriers or in the form of a paper edition. The collective management society does not influence this choice. It cannot therefore declare that it recognizes only the publishers who would have submitted to it a printed score of the work on sale commercially.

161. The collective management society can request the publisher to submit the publishing contract to it in order to recognize the latter's capacity. It is recommended to proceed in this manner so as to verify the publisher's obligation to publish the work.

b. The importance of the publisher in music

162. As with any market, that for music is dominated by the rules of supply and demand. Supply lies almost entirely in the hands of the publishers. As a general rule, any musical work performed, broadcast or recorded on commercial sound carriers brings into play two factors: the quality of the work and the publisher's promotion efforts.

163. This observation is confirmed by the experience of the countries where publishers are absent from musical life. Composers from these countries cannot reach their audience, other than by means of personal performances as musicians, or by seeking – with difficulty – a foreign publisher. The stimulating effects of publishers and phonogram producers on the music market have led to publishing houses, and the phonographic and cinema industries being referred to as "cultural industries".

164. How do publishers finance themselves? Traditionally, they lived on the proceeds from the sale of their paper editions, to which were added the income from the sale of records and cassettes. This income is no longer sufficient in the electronic and digital age to guarantee a prosperous future for the cultural industries. These industries can survive only by participating in the royalties for the performances and broadcasts of works in their catalogs.

165. A few statistics help to illustrate this situation. These are for the number of publishers, rounded down, registered as members or principals in collective management societies, by continent, in the year 2000:

Africa	2,600
North America	104,000
South America	1,300
Asia	2,200
Australia	300
Europe	25,400

These figures clearly show where musical publishing has developed thanks to its integration into copyright collective management. It is obvious that the work of 104,000 or 25,400 publishers on one continent offers a composer more possibilities of finding his audience than in continents where the cultural industries are fighting for their survival.

166. In other words, in musical life today authors, composers, and publishers must live in a mutually beneficial manner. Publishers depend for all their activities on talented composers who, in order to reach their audience, depend on skilful and well-established publishers. This mutually beneficial relationship is reflected in copyright collective management and corresponds to the partnership which was established on the music market and which proved to be a success.

c. The publisher's contract with the collective management society

167. This contract corresponds to that which the author signs with the collective management society. Instead of the specific rights assigned by the author, these are additional rights acquired from the author by the publisher when the publishing contract is signed. The publisher does not work under a pseudonym but sometimes publishes a series of specific titles which it declares to the society. The obligation to declare the works is placed on the publishers in the same way as it is placed on the authors; little matter whether those authors have already declared them. The publisher attaches the publishing contract and a copy of the published work to the declarations (para. 161).

d. From what point in time is a work published?

168. To answer this question, let us take an example. A composer wins a first prize for musical composition in a television competition. The successful work is broadcast often. Its success attracts a publisher who signs a publishing contract with the composer and publishes the work three months later. Will the publisher participate in the royalties for the broadcasts prior to the publication of the work? The response is negative as these broadcasts bear no relation to the publication of the work.

169. A lot more delicate is the issue of successive editions. A publisher has published the work, but has omitted to launch a new print-run after the first one has been exhausted. The author subsequently signs a publishing contract with another publisher. What is the distribution, between the two publishers, of the royalties paid by the collective management society? In this case, the society presumes that after the publication of the work by the second publisher, the performances and broadcasts take place as a result of his efforts.

e. The sub-publisher

170. Each publisher works in a certain region which often coincides with the territory of his country. When he observes that the works in his catalog are favorably received in other countries or regions, he may use a representative or an agent. He may also look for a publisher, not only to sell his publications, but also to assign the right of publication, the right to make copies of the work and the right of circulation for the territory in which the publisher operates. In this case, we refer to the "original publisher" and "sub-pub-



lisher". The original publisher is defined as the person who has signed the publishing contract with the author of the published work; and the sub-publisher as the person who has obtained, for a particular territory, the rights of publication, production of copies of the work and circulation on behalf of the original publisher. The contract between the original publisher and the sub-publisher is known as the "sub-publishing contract".

171. The development of the sub-publishing contract must be considered in the light of the rise of North American music on a world scale. Noting the growing success of their overseas catalogs, north American publishers have sought transatlantic partners, especially in Europe, and have granted European publishers the powers to sub-publish their catalogs, i.e. between 10,000 and 20,000 works. The sub-publishers who have been able to acquire such catalogs for the whole of Europe have, in turn, undertaken sub-publishing activities in different countries on the continent, known as "sub-sub-publishing". Thus, a whole network of publishing relationships has covered and still covers Europe.

172. The origin of this age of sub-publishing is due to the interest of the main publisher who wished to see new publications appear in Europe, often in the form of arrangements suited to the European taste and with a translation of the original English text in the different languages of the countries. These adaptations to the European style have gradually diminished with the marked preference of the European audience for the original American versions.

173. It was not the problem of sub-publishing, but that of documentation which was in the ascendancy. The original publisher obliged his sub-publishers to declare all the works in his catalog to the collective management societies in the sub-publishing territories (para. 216). A veritable avalanche of administrative tasks therefore rained down on Europe and was followed by rapid, even excessive, increases in the royalties in favor of the North American repertoire. This is the most prominent example of the value of documentation in the distribution of royalties.

174. It is in this form of representation of the original publisher's catalog by national publishers, before their collective management society and the national phonographic industry, that the sub-publishing system has gradually been established in Latin America and Asia. Multinational communication firms have moved, in a number of countries, to create subsidiaries also working as sub-publishers.

175. How are sub-publishers remunerated? They receive part of the royalties paid by the collective management societies in their country or their region for the use made of the works in the catalog of the original publisher, whom they represent. This share is negotiated between the original publisher and the sub-publisher as part of the sub-publishing contract, and communicated to the collective management society. Certain societies have fixed, in their distribution regulations, minimum percentages for the share of sub-publishers.

176. In relation to the above, a particular feature of the distribution systems of continental European societies should be highlighted. According to a French tradition, publishers receive one third of the royalty relating to the use made of the works in their catalog. Where there is also a sub-publisher, the publishing share of the original publisher and the sub-publisher together amount to half the royalty. Contrary to the European rule, Anglo-American publishers always receive half, either the original publisher alone, or the original publisher and the sub-publisher together, according to the principle of fifty-fifty distribution.

177. The increase in the publishing share in the case of sub-publishing has greatly enhanced the latter. Where the sub-publisher's share was below one sixth of the royalty, the original publisher earned money in relation to the share of one third which he received in the absence of a sub-publisher. Moreover, he was better represented in other countries. These benefits were such as to convince almost all North American publishers; it may be observed that all music from North America is sub-published in Europe. In other words, the import of North American music was subject to a broad application of the fifty-fifty system.

178. This "infiltration" through widespread "sub-publishing" gave rise to opposition. In its 1968 Confederal Statute on the Sub-Publishing of Musical Works, CISAC tried to grant the capacity of sub-publisher only to publishers who published a new version of the work. This restriction was not imposed. The original publisher considered it much more important for the sub-publisher to represent the catalog which he had entrusted to him and for him to document carefully the collective management society(ies) in his sub-publishing territory. Collective management societies are advised not to involve themselves in this relationship.

179. Another provision of the CISAC Statute mentioned above has also helped to "level the ground of sub-publishing". It is that which refers to the "advertising agent", defined as a sub-publisher who does not publish new versions of the works in the original publisher's catalog. Given that the advertising agent also receives a share of the royalties, the cut-off point between the agent and the sub-publisher has become useless; it is the expression "sub-publisher" which is maintained for all forms of representation of the original publisher.

180. For many years, the activity of sub-publisher of North American catalogs was lucrative. This situation encouraged original publishers to link the signing of a sub-publishing contract to the condition that sub-publishers pay them advances. Subsequently, collective management societies changed system by paying sub-publishers not only their share, as before, but also that of the original publisher. Reference was made to the function of "payment agent" of the sub-publisher.

181. A number of difficulties in the financial relations between the original publishers and their sub-publishers have led the first group to ask collective management societies to deal with the settlement of the advances paid by sub-publishers. The societies refused, with good reason, to involve themselves in the problems of publication accounting, but stated their willingness to inform the original publishers, at their request, of the payments made to the sub-publishers.

182. The volume of administrative work relating to sub-publishing has increased with the habit, acquired by original publishers, of gradually reducing the length of sub-publishing contracts, from ten to five years, or even less. Faced with this trend, it was essential to sound the "alarm". CISAC and the International Office for Publishing and Mechanical Reproduction Rights (BIEM) decided that collective management societies were no longer obliged to take into consideration sub-publishing contracts with a duration of less than three years. This minimum duration is generally respected.



CHAPTER 2 DOCUMENTATION – REPERTOIRE

183. The minimum conditions required for the creation of a collective management society have been examined in the previous chapter. The society can begin to register authors, composers and publishers as members and to establish contacts with them. What therefore are the initial administrative tasks awaiting the young society? The work plan, presented in paragraph 83, refers to documentation work. What should be understood from it?

184. The term "documentation" designates all the data and all the documents relating to authors, composers and publishers, as well as the works that have been created or published. National documentation – data and documents relating to the works and members and principals of the society – is distinguished from international documentation, consisting of all the data and documents which the society receives from abroad.

185. The concept of "repertoire" stems from documentation. Repertoire refers to all the works which are the subject of authorizations for use by the society. The composition of the repertoire – a database relating to documented and undocumented works – will be dealt with in paragraphs 261 to 286.

1. NATIONAL DOCUMENTATION

186. A collective management society which is not familiar with the people or the works it represents fails in its task. Its main duty consists in keeping and presenting detailed and precise information on the rights which it holds and the works which it administers. Documentation is therefore of prime importance.

a. Data relating to authors and publishers as members or principals

187. There is only one possible response to the relevant question "who are the beneficiaries whom you represent?": the submission of a complete and up-to-date list of the members and principals. Not so long ago these lists were printed or duplicated, with attached supplements. As a result of the progress made with computers, collective management societies periodically produce databases on their members and principals, which can be consulted by any interested person.

188. What are the data of general interest relating to authors, composers and publishers? They are restricted to first names and surnames, and possibly to the year in which membership of the society began. The year of the authors' death is important, since it serves as a basis for calculating the term of protection "post mortem auctoris". If the society has members with the same first names and surnames, i.e. "synonyms", it is recommended to add distinguishing information, such as "senior" and "junior", so as to avoid confusion.

189. The obligation to provide information on the status of members and principals does not authorize the society to disclose the secret of pseudonyms. It is not justified to reveal the identity of an author who uses a certain pseudonym in order to remain incognito. As indicated in paragraphs 137ff., the pseudonym forms part of the author's protection; this protection cannot be ignored by the collective management society.

190. It may also be specified in the reports of societies that a composer (C) or a lyric writer (A) is being referred to. These clarifications remain, however, without effect on the society's relations with a third person; it is of little importance to the society's clients to know which author creates the music and which other author creates the texts. By contrast, this distinction is very useful for the society's internal needs. This is the case where, for example, the society holds separate general assemblies for the composers and the lyric writers, or if the statutes require the administrative council to be made up of equal numbers of composers and lyric writers.

191. The collective management society must have available as much data as possible on its members and principals. This additional information is requested and obtained using questionnaires to be completed by the author, composer or publisher at the time membership begins, when new contracts are signed or in relation to periodical surveys. This additional information relates in particular to the following:

- date of birth;
- place of origin or birth;
- nationality;
- main profession and secondary activities;
- marital status, name of spouse and names of children;
- language;
- resident address and, if required, the specific addresses for:
 - sending correspondence or accounts;
 - bank account.

192. This additional information is required in particular for keeping regular and necessary relations between the society and its members, and in order to guarantee the monitoring and security of correspondence and payments. The information relating to date of birth, marital status and main profession play a role in relation to the social protection of members. All these additional data will certainly be used where it is necessary to promote an author and his works. Consequently, it is recommended to gather together all information which refers to the life and activities of members and principals, such as biographical notes, interviews, reviews of concerts, tributes, etc.

193. The society's internal organization is facilitated by the allocation to each member and principal of a code number. In order to avoid this internal number contradicting the CAE/IPI number and creating confusion (para. 231), it is recommended to use the CAE/IPI number as soon as it is allocated and to abandon for good any other rival numbering system.

194. Experience dictates in favor of the classification of all the documents of a member or principal in a single file; this concentration allows any member of the society's staff to respond in an effective and precise manner to the requests made by members or principals. Providing an author, composer or publisher with information, without consulting his file beforehand, may be a delicate and harmful issue.

b. The declaration of works and the database of works

195. By signing the membership contract, the author undertakes (para. 128) to declare all his works. This declaration relates both to the works created prior to membership and also to those which will be created during the term of the contract. The declaration of the works constitutes the foundation stone of all the documentation on the works. These declarations are made using special forms, made available by the society. The greatest attention must be given to completing the declaration form.

196. The main data relating to the works refer to the following elements:

- the title of the work;
- the subtitles of the work (para. 197);
- the year of creation;
- the duration of the work: duration of actual performance or that estimated by the composer;
- the type of work;
- the instrumentation of the work;
- the first names and surnames of all the authors and composers who have participated in the creation of the work;

- the names of all the publishers and sub-publishers who have contributed to the publication of the work;
- the date, duration and territorial scope of the publishing contract.

197. Where the title of the work is indicated in several languages or where different versions of the work have different titles, one of these titles is indicated as the original title and all the other titles appear as subtitles. Numerous works are known by the beginning of words; this beginning should also be declared as a subtitle. Where works comprise several movements, these sometimes have special titles; it is recommended to indicate them also as subtitles. The producers of records or cassettes frequently add imaginary titles; these are also subtitles which could make it easier to identify a work. A precise and detailed identification of the title of the works constitutes the ultimate aim of the all the societies' efforts; it plays a decisive role during the distribution work. It should be emphasized here that each subtitle increases the chances of being able to identify a work during the distribution stage.

198. By indicating all the authors who participate in the creation of the work declared, the person making the declaration decides on the method of distribution relating to this work. Forgetting a fellow composer, co-author, arranger or translator means that the person forgotten is deprived of the reward for his creative contribution. By contrast, mentioning a person who has not participated in the creation of the declared work gives rise to unjustified payments. The author of false declarations could run the risk of legal action. It is recommended to bring to the attention of members and principals the legal scope of the act of declaration of a work.

199. Particular mention should be made of the use of borrowings from pre-existing works or elements of folklore. Folklore tunes and melodies for example may form part of the creation of works and should be indicated in the declaration of works, with a view to the special treatment to which works based on folklore are subject in numerous copyright collective management societies.

200. All the precautions and all the opinions cannot, however, prevent composers and lyric writers from seeking to "bask in reflected glory" from time to time. Young collective management societies often have the bitter experience of musicians who, wishing to pass themselves off as composers, indicate on declarations of works all the musical pieces which they regularly perform. The discovery of this kind "of error" has led the societies concerned to submit all the declarations of works to an inspection for the purposes of authenticity or identification. This inspection is work which requires the assistance of musical experts. The administrative councils of these societies have set up small committees, known as "works' committees", consisting of three to five specialists in national music and (regional) folklore, to examine all the declarations of works and identify possible borrowings.

201. The declaration of a work must contain an annotation relating to the membership of all the authors, composers and publishers of a collective management society. This annotation, which is based on the CAE/IPI documentation (para. 220 ff.), expresses the CISAC code numbers allocated to each society.

202. The declaration of a work will also play a role in the allocation of shares to each author and each publisher. These shares correspond to the distribution keys or scales contained in the distribution rules (para. 516 to 525). Most societies have fixed keys or scales, i.e. neither authors, composers nor publishers may modify the shares imposed by the rules. This requirement is often conceived as a protection measure in support of authors and composers. In the societies where a certain freedom is given to beneficiaries in fixing their shares, the shares must be determined in the declarations of works; failing that, the society applies the regulatory keys or scales.

203. It is recommended to allocate a work number to all works. This is a simple common number with no significance as to the type of work. Within the CIS project (para. 257), it is envisaged to replace this national number with an international code number. In that regard, it would be advisable to use only the international code number and to eliminate any national number, even for a society's internal needs.

204. These data relating to the declaration of works, once complete and verified, have been written down on sheets inserted into a society's file of works. In the computer age, the file is replaced by a memory or database containing the works. The data relating to the declaration of the works must be entered as quickly as possible, since a database of works, which is constantly updated, makes distribution work considerably easier. By means of computers it is now possible to organize, in a rational manner, the search for works included in a society's database; this is the so-called "meeting" technique (para. 488 ff.).

205. Computers also contain a special heading "state of documentation", which determines for each work whether it is a duly declared work. This heading can therefore serve as a basis for the distribution work specific to each work with no further addition. The consideration of works not entered in the database of works is dealt with in paragraph 283.

c. Documentary evidence

206. The question is often asked as to whether a copyright collective management society really needs documentary evidence in support of the works declared by members. The management of a certain volume of documents sometimes leads societies to take measures designed to rationalize, or even reduce, the number of attachments to declarations of works. Such attempts may be risky and we will examine later the possible consequences of a restriction on documentation.

207. In the case of published works for example it is the declaration with deposit of a copy of the published work which allows the society to note that the publisher has fulfilled his obligation. Such a declaration, with a copy of the published work submitted, justifies the publisher's participation in distributing the proceeds from the use of the work. In addition, the submission of the published copy of the work is of particular interest in case of dispute. The deposit of a published work could allow the legal presumption to be invoked whereby the authors are considered as such, provided that the name appears on the work in the usual manner (Article 15 of the Berne Convention, Paris Act).

208. The works' committee, mentioned in paragraph 200, cannot work without scores or, where appropriate, without cassettes or records. On what basis could this committee determine whether a declared work is based on folklore tunes or contains substantial elements from works of other composers? It is also the scores or sound carriers that are consulted when the collective management society is faced with disputes between members concerning cases of plagiarism. Any investigation including that requested by a sister society abroad or involving foreign authors is also based on documentary evidence. In addition, the cultural value or significance that can be attached to the documentation of works should be emphasized. The obligation to provide a score, cassette or record allows a part of the national musical heritage to be safeguarded and its preservation to be ensured. This documentation will also enable the society to provide the composers and lyric writers with copies of their lost or misplaced works.

209. The documentation of works also has a particular cultural importance. Although composers have no real obligation to provide a score, a cassette or a record of their works, it is quite probable that a large number of composers would become lost in our age of short-term effects. The number of requests by composers and lyric writers to provide them with copies, where manuscripts have been lost or misplaced, is proof of that. It was tempting to object to this observation that a sound carrier does not have the same cultural value as a manuscript; this is an unconvincing argument because a sound carrier also allows a work to be analyzed and assessed in terms of its finer details.

210. This documentation collection, which is a real cultural treasure, increases and is enriched in proportion with the efforts made by the society to require its members to submit documentary evidence. Musicologists and researchers have always considered the archives of copyright collective management societies to be irreplaceable sources of information on countries' musical history. These archives are comparable, in the field

of literature, to national libraries. In certain countries such libraries have set up separate departments for sound carriers, which have become national sound archives. However, their holdings are still a good deal smaller than that of a copyright collective management society.

d. Publishing contracts

211. In most cases publishers do not like copyright collective management societies to deal with publishing contracts or to involve themselves with the relations between authors (or the composer) and publishers. This is not, however, interference. The society should be able to ensure that the contract signed between the author (or composer) and the publisher meets the criteria of a publishing contract. The criteria described in paragraph 155 cover above all the publisher's contractual obligation "to assume his obligations within a certain period and to remunerate the author".

212. It should not be forgotten that publishing contracts are often limited to a single print run or to a certain duration. That means the publisher ceases, once his contract with the author (or composer) expires, to share in the distribution of the proceeds from the work which is being published. It is essential for the society to be aware of such limitations and to respect them.

213. As regards mechanical reproduction rights, the collective management society must know whether the publisher can freely dispose of such rights assigned by the publishing contract as "additional rights" (para. 158) – or whether he is obliged to respect the society's rates and distribution rules. These clauses may also have an impact on the fight against piracy. For example, where the reproduction rights have been assigned to the publisher, the collective management society may not intervene with third parties that have made copies of the work, without ensuring beforehand that the publisher has not consented to said production.

214. In the same way as scores, publishing contracts may be lost or misplaced. In this case, authors, composers or publishers may refer to the collective management society in order to obtain copies of these contracts.

e. Sub-publishing contracts

215. What has been written about publishing contracts is valid, *mutatis mutandis*, for sub-publishing contracts. In this case in particular, it is essential for the collective management society to be informed of the:

- share of the sub-publisher in the proceeds from distribution of the sub-published work (para. 175);
- encashment of the share allotted to the original publisher by the sub-publisher, as a "payment agent" (para. 180);
- the scope of the sub-publishing contract (including publishing catalogues in full or in part, or limited to certain works);
- duration of the sub-publishing contract (para. 182).

216. On the basis of the sub-publishing contract, the collective management society may agree with the sub-publisher the procedures for declaring the sub-published works. In the past, the societies required the sub-publisher to make declarations work by work, which constituted an enormous amount of work for both the sub-publisher and the society. The development of information technology now offers more flexible solutions. The data concerning the original publisher contained in an electronic carrier may be memorized directly in the basic documentation on the sub-published works of the society's database.

2. INTERNATIONAL DOCUMENTATION

217. "International documentation" means the data relating to the authors, composers and publishers that are members of foreign copyright collective management societies and the data relating to their works published or otherwise. A society which exercises the rights of foreign authors in a particular country must be familiar with these authors and their works and with the publishers and sub-publishers who publish these works. The *in globo* representation of foreign authors by a society in a particular country is not justified *ipso facto*; it is not justified either by the fact that the society enjoys in that country a monopoly position *de jure* or *de facto*. In practice, it is up to the society to provide proof, for example to clients, that it has the capacity to represent all foreign authors.

218. What volume does this international documentation represent? To this question, copyright collective management societies respond in unison: "the least possible". Their motivations are obvious: the cost of documentation increases in proportion with its size, in view of the costs of storage and acquisition of computer equipment; and above all, the society is required to provide updates. The at times urgent need to contain management costs at a reasonable level obliges societies to limit themselves to what is strictly necessary and to disregard anything that appears to be superfluous. The international documentation tools, as we will see later, also respect this need. However, in the direct exchange of documentation between two societies, those societies are free to decide on the scope of the information exchanged.

219. This gives rise to a fundamental difference between national documentation and that of international scope; national documentation must be as complete as possible and international documentation reduced to what is essential. This difference highlights the particular form of cooperation between copyright collective management societies, especially in relation to distribution.

a. CAE/IPI documentation

220. "CAE" means "Composers, Authors, Publishers ("Editeurs")" and IPI, the new form of this documentation as part of the CISAC "Common Information System" (CIS) project, signifies "Interested Party Information". This is documentation which relates to the authors, composers and publishers affiliated to a copyright collective management society as members or principals. This documentation answers the question: "who are the foreign authors, composers and publishers which the collective management society represents?".

221. Before 1973, the practice of the exchange of documentation between societies consisted in sending each other the lists of members and principals, together with periodic supplements to these lists. This practice and the form of documentation which the lists contained did not suit the societies in terms of the daily processing of information relating to the authors, composers and publishers. To solve this problem, each society had to produce, for its own needs, a special file – the file of foreign authors, composers and publishers – which represented the same information as that produced for its own members. The considerable volume of work – these files provided information on more than a million foreign authors, composers and publishers – and the inaccuracies which these files contained were at the origin of a series of proposals designed to replace these files with an international documentation tool that would contain minimum data on all the authors, composers and publishers. This tool was created under the name of "CAE list" (or "CAE documentation"). This is the first CISAC documentation tool, approved by its Technical Committee on April 3, 1973. The documentation is managed, according to CISAC rules, by SUISA.

222. What are the minimum data which each copyright collective management society must possess on foreign authors, composers and publishers? The data are as follows:

- the first names and surnames of authors;
- the membership society of authors;
- the year of death for deceased authors.

The data are the same as those mentioned in paragraph 188; this therefore represents the minimum information which each society must be able to provide for its clients or for the general public. The first name, surname and membership of each author of his society form the basis of all international documentation, given that the membership of the collective management society is indicated by the CISAC code number allocated to each society.

223. However, this is the only basis since collective management differs between countries depending on the scope of copyright. In numerous countries, the societies manage the "trilogy" of economic rights (para. 34); in others, the activity of societies is limited to public performance and broadcasting rights, as is the case in the Anglo-American hemisphere (para. 37). It was therefore essential to distinguish, in the CAE/IPI documentation, between the membership of the society for performing and broadcasting rights on the one hand, and that relating to reproduction rights on the other.

224. Numerous composers create both non-theatre music and dramatic works. Certain authors write both song lyrics and other literary works. The works are collectively managed by different societies specializing in this field. Thus, for example, the Society of Dramatic Authors and Composers (SACD), which was founded before SACEM, manages theatre music, while non-theatre music is managed by SACEM, according to a "delimitation of the musical repertoires", which appears in the CAE/IPI documentation. These bodies have led to the production of the CAE documentation as a common tool for the following four sectors:

- non-theatre music (music)
- theatre music
- non-theatre literature (literature)
- theatrical literature (theatre literature).

The IPI documentation has broadened these sectors to all the categories of audiovisual works, painting, sculpture etc.

225. The reasons which may argue in favor of the membership for an author of several collective management societies, with territorial delimitation of the activities of those societies, have already been discussed in paragraph 29. This territorial delimitation must be clear from the CAE/IPI documentation. For this purpose, in order to avoid endless lists the power to manage an author's rights in a particular country, a group of particular countries or on a continent (this delimitation constitutes "a territory" which is clearly defined in the CAE/IPI documentation) is distinguished from that provided for other countries, groups of countries or continents, the delimitation of which is represented by the sign ().

226. It is difficult to imagine the number of authors who change collective management society in the course of a year. SUIA amends more than 100,000 authors' membership per year! In order to avoid a situation where the clarity of the CAE/IPI list suffers from the consequences of such mobility, the documentation is not limited to providing information on current membership but also specifies previous membership.

227. In particular cases, an author's name can be written in different ways, for example with or without a nobiliary particle, in one word or more words. A memorable example is:

MAC DONALD
 MACDONALD
 MC DONALD
 MCDONALD.

Despite a certain resemblance, these four names are processed by computers as being different with a separate classification. In order to avoid wasting time searching in various information sources, any collective management society may add references of its own choosing, which are indicated by "DS" meaning "differ-

ence in spelling". SUISA, responsible for CAE/IPI documentation, can also insert references, marked with "ST", for "standardized spelling". In the example MAC DONALD, SUISA completed each of these names (each spelling of MAC DONALD) with a standardized reference:

MAC DONALD ST

It is in this form of spelling that an overview of all the authors with this name will be found.

228. The CAE/IPI documentation contains the first names and surnames of the authors who do not or no longer belong to a copyright collective management society. This is the case in particular with authors who have left a society and have not (yet) become members of another society. The CAE/IPI documentation allows them to be traced. The reference "99" meaning "non-member" is placed in the margin to specify this particular form of membership.

229. Along the same lines, the CAE/IPI documentation also preserves the first names and surnames of deceased authors whose works no longer enjoy copyright protection. Their membership is marked with "00", which means "public domain".

230. Authors' pseudonyms are also included in the CAE/IPI documentation. A distinction is made between the pseudonyms for which the CAE/IPI documentation refers to the author's patronymic name on the one hand, and secret pseudonyms on the other; hence the following abbreviations:

PA	patronymic
PP	disclosed pseudonym (pseudonym – patronymic)
SP	secret pseudonym

As a general rule, in the relations between the collective management societies that are members of CISAC or of BIEM, pseudonyms are disclosed for practical reasons. Thus, the works published using a patronymic and those published using pseudonyms are found in the same account. However, in particular cases societies may retain the secrecy of the pseudonym, even in their contacts with other sister societies.

231. As the administrator of the CAE/IPI list, SUISA allocates a CAE/IPI number to each author's patronymic, each of his pseudonyms and any reference (marked with "DS" or "ST"). This CAE/IPI number will no longer be amended; the same is true where the author changes membership, dies or where his works enter the public domain.

232. The CAE/IPI documentation is subdivided into an authors' part and a publishers' part. What was stated regarding the authors' part applies *mutatis mutandis* to publishers. It should be noted in particular that the names of publishing houses can be written in several ways and these differences must also be indicated by the references "DS" or "ST". The same treatment will be applied to the cases where different publishing series have special titles. As for authors, SUISA allocates CAE/IPI numbers to all publishers' names and references relating thereto.

233. Special headings indicate particular situations, for example:

- the limitation of certain rights;
- the heirs of an author belonging to different copyright collective management societies;
- the disputes between societies in cases of differences in authors' membership;
- authors' collective pseudonyms;
- collective shares.

234. The updated CAE/IPI documentation is sent on a quarterly basis to all the societies within CISAC and BIEM, in most cases in the form of a CDROM. The CAE/IPI documentation is updated on the basis of the information which all the societies regularly or periodically send to SUIISA. The societies which fail to inform SUIISA regularly and quickly concerning incoming, outgoing or deceased members deprive their members and principals, and the heirs thereof, of the royalties which foreign sister societies would pay them. The CAE/IPI documentation constitutes the backbone of international documentation; the results of the distribution and transfer of the sums allocated to authors, composers and publishers depend on the quality of the documentation and its updating.

b. International index cards

235. An "international index card" is the standard CISAC and BIEM form used by copyright collective management societies to exchange data relating to works. This international index card was introduced in 1931 on the occasion of the CISAC Congress in London and amended in 1974. The new form allows such index cards to be produced using computer tools.

236. The international documentation of works is governed by the principle stated in paragraph 218: that of limitation to what is strictly necessary or to the minimum. For this purpose, the international index card provides information only on the following elements of a work:

- the title of the work and possible subtitles (para. 197);
- the duration of performance or broadcasting;
- a summary regarding the type and instrumentation of the work;
- the first names and surnames of the authors or composers who have participated in the creation of the work and the publishers who have participated in its publication, specifying their contributions in terms of the following:

C	composer
L	lyric writer
CL	composer and lyric writer
AR	arranger
P	publisher
SP	substitute publisher
SA	subauthor
SR	subarranger
SP	subpublisher.

It is recommended that in the international index card the CAE/IPI numbers of authors, composers and publishers are indicated in order to avoid any error or confusion.

The membership of authors, composers and publishers of collective management societies should be indicated in the international index card, separately for public performance and broadcasting rights, and for reproduction rights (para. 223).

The share of each author, composer and publisher in the distribution of the proceeds from the work must also be indicated, separately according to whether this refers to performance and broadcasting rights or to mechanical reproduction rights, it being understood that different distribution keys or scales are often used (para. 525).

The date on which the form is produced, the name of the dispatching society and the receiving societies are other essential references.



In the case of sub-published works, the date of entry into force of the sub-publishing contract and its duration must be indicated. Information is also required on the form of the sub-publisher's participation in the distribution proceeds which would result from the manufacture of records or cassettes; such an indication must be as follows:

- "manufacturing" clause marked with the letter "M": this is the participation of the sub-publisher relating to all the sound carriers manufactured in the sub-publishing territory;
- "sale" clause, marked with the letter "S", this is the participation of the sub-publisher relating to all the sound carriers sold in the sub-publishing territory.

237. What are the works which are dealt with in international index cards? The response once again tends towards a criterion of economy for international documentation: only that which proves to be absolutely necessary is registered. It is an illusion to believe that the exchange of a considerable mass of international index cards would lead to better identification of works.

238. By respecting this principle of an exchange of minimum documentation, CISAC and BIEM recommend the dispatch of international index cards in the case of:

- "mixed works", i.e. the works of which the original composers, lyric writers and publishers do not all belong to the same collective management society;
- works of a duration or genre which would give rise to special taxation or valuation;
- works likely to have a broad international audience.

For "mixed works", it is the society of which the original publisher is a member that sends the international index card. For unpublished works, it is the composer's society which deals with it.

239. A special system has been established for sub-published works. Where a publisher acquires a publishing catalogue which is sub-published not only for his own country, but also for other territories, the societies managing copyright in these additional territories must be informed of the sub-publishing and of the works which it includes. The exchange of international index cards in this case can be considered a laborious, or even painful, process for societies. In the digital age, societies can decide, by means of specific agreements reached between them, to replace the process with the sending of computer files.

240. In addition, it is recommended that any copyright collective management society should send international index cards relating to the works of which specific use has been, or will be, made in another country. This is the case, in particular, for touring orchestras, bands of musicians or solo artists. The society in the country from which the musicians depart should, well before the beginning of the tour, inform the sister societies in the countries of destination. They should provide them with details of the plan and program for the tour, specify in particular the dates and places of all the concerts, and attach the international index cards to the works which will be included in the program.

241. In case of subsequent modification of the documentation for a work which has been included in an international index card, the dispatching society should produce a correction form which will be sent to all the recipients of the previous index card. Example: the change of publisher of a work; the new publisher would never receive royalties if all the societies that had been familiar with the previous publication were not kept informed. The functioning of the correction sheet system requires any international index card sent to be recorded in the memory or in the database of works.

c. Cue sheets

242. The cue sheet is a document which provides information relating to copyright in a sound film or television production. For audiovisual works, it has a similar function to that of the international index card in the field of music. The form was introduced by CISAC in 1955 and reformed in 1974 so as to be adapted to computer requirements.

243. The lower part of the cue sheet corresponds exactly to the structure of the international index card; reference can therefore be made to the comments in paragraph 236. The upper part of the form contains the main information characterizing the film, such as:

- the title of the film;
- the genre of the film;
- the length of the film and duration of its projection;
- the name of the producer and the country of production;
- the name of the director;
- the names of the main actors;
- the year of production;
- the name of the distributor.

These data guarantee in fairly clear terms that films can be identified. The cue sheet can also provide information on literary and dramatic works contained in the film.

244. The dispatch of the cue sheets is governed by one or other of the following methods:

- the copyright collective management society of the country where the film is produced sends the cue sheets relating to all the national films to all the sister societies, on the assumption that these films are shown in many countries. This method may lead, in certain cases, to a real "flood" of cue sheets from certain societies.
- the collective management society of the country where the film is shown requests the relevant cue sheet from the sister society of the country of production. This method has proved its worth over the years. As local distributors often change the titles of films according to public taste, particular attention must be paid to identifying the original title of the film when its cue sheet is demanded.

d. WWL/WID documentation

245. Under the influence of the success of the CAE documentation, the CISAC Technical Committee decided, in 1976, to develop an international documentation tool similar to the CAE documentation in the field of works. In 1983, after seven years of intense study and extensive debate, the Technical Committee approved the World Works List (WWL) documentation, a world list of works. Management of the list was entrusted to the American society ASCAE.

246. The WWL documentation is fundamentally different from the CAE/IPI documentation. The latter refers, without omission or exception, to all the members and principals of all the member societies of CISAC and the BIEM. By contrast, the WWL documentation is limited to a selection of works. How can these works be selected? Based on the criteria determined for sending international index cards (para. 238), it is recommended to include in the WWL documentation only works likely to enjoy an international audience. Nevertheless, collective management societies can apply other criteria in selecting the works to be inserted in the WWL documentation.



247. Originally, it was not easy to reach agreement on the data concerning works that should be inserted in the WWL documentation. The identification of a work must be based on its title, including its possible subtitles, the first names and surnames of the main authors, composers and publishers, and also on the code number of the society issuing the information. As a documentation base for distribution work, the data inserted in the WWL documentation must, by contrast, correspond to those contained in the international index cards.

248. The WWL documentation lies more or less at the crossroads between two major needs: these are the minimum necessary for identifying works and the minimum essential basis for distribution. As regards distribution, the data relating to sub-publishers and possible sub-authors and sub-arrangers are notably lacking. In addition, the insertion of the shares allocated to the original authors, composers and publishers, in the WWL documentation, is left to the discretion of societies. These gaps do not, however, prevent the CISAC "Warsaw rule" (para. 478), according to which the total distribution proceeds, in the absence of substantive documentation, is transferred to the society of which the composer of the work is a member, from being applied to all the works contained in the WWL documentation.

249. Similarly, the documentary treatment of the CAE/IPI tool differs from that for the WWL documentation. SUIISA examines all the data from the CAE/IPI documentation, eliminates overlaps and clarifies uncertainties. Contradictory data are corrected in cooperation with all the societies concerned. Within ASCAE, the method was different and did not compare the information coming from sister societies. The treatment was limited, in particular, to achieving convergence in the data on the works provided on magnetic tapes and to classifying them in alphabetical order. Thus, if three societies registered the same work, the data on that work appeared three times in the WWL documentation. It was the responsibility of the societies which consulted the WWL documentation on this work to resolve possible contradictions.

250. The WWL documentation helps essentially to promote the identification of works. It corrects certain inadequacies in the CAE/IPI documentation, such as the treatment of synonyms (para. 188). The CAE/IPI documentation provides information on more than 5,000 authors with the name "García". In the absence of information on the works, this name alone does not allow the true composer or lyric writer García in question to be identified. In this context, the WWL documentation complements that of the CAE.

251. The WWL documentation is updated twice a year in the form of a CD-ROM. Given the experience acquired, it is strongly recommended that societies insert only works likely to enjoy an international audience. The structure of the magnetic tapes used to communicate works to ASCAP is described in detail in a specific CISAC document.

e. The transition to the CIS

252. The development of large-capacity electronic memories and communication facilities, in particular through the Internet, should be used as a benefit in accelerating and intensifying the cooperation between copyright collective management societies. Groups of experts from CISAC and the BIEM have been working for five years to devise a new documentation system more commonly known as the CIS, the broad outlines of which are summarized below.

253. Within the CIS, the CAE, rebaptized "IPI", documentation continues to retain its structure and form the basis of the international document order. The insertion of additional data facilitating the identification of authors – such as the date of birth, nationality and reference to main activities – is therefore enhanced. The greatest progress is constituted by the rapid updating and accessibility to all the data. The IPI database, managed by SUIISA, will be accessible in electronic form to all the member societies of CISAC and the BIEM. By gaining access thereto, the societies will be able to modify directly the data relating to their members and principals, and insert the data relating to new members. As mentioned in paragraph 224, the circle of benefi-

ciaries of the CAE documentation has been broadened, by adding painters, sculptors and directors. It is not excluded that one day owners of related rights, such as musicians, actors and other performers, will be added to the circle.

254. More substantive changes are being prepared in relation to the documentation of works. The international index card, a means of traditional and standardized transmission of the data relating to a work, will be maintained but its format will change from paper to electronic form. The Internet will act as the means of communication therefor. The aim of the CIS project is to make the direct insertion of data in the databases of the receiving society possible, where the databases meet certain common criteria. In relation to these innovations, it is also envisaged to establish direct and reciprocal consultation of the documentation of the works of sister societies through direct access to databases of works.

255. These perspectives will also have a considerable impact on the functions of WWL documentation. Its position as a means of identifying works and a documentation base for distribution could be subject to other developments; the new international database of works, the Works Information Database (WID), will contain all the data required for distribution work. This database may be consulted daily by the member societies of CISAC and BIEM. New works may be entered at any time, thus eliminating the waiting period of six months, which is particularly inconvenient at an age marked by the ephemeral nature of the success of a musical work.

256. Digital technologies can open up possibilities for establishing large databases which will contain musical repertoires from certain regions or whole continents. The LATINAUTOR project, the central organization for Ibero-American collective management societies, is working decisively towards establishing a common database for works from Latin America, Spain and Portugal; other regions and continents could follow. It is not idealistic to hope that one day the large multimedia companies will make up their minds to restructure their databases relating to publishing catalogues, to which collective management societies would have direct access. Such a possibility would open up the way to creating a global documentation network which would certainly reduce the percentage – currently ranging from five to seven per cent – of the works not identified at the time of distribution.

257. As part of the remodeling of the documentation of works, mention should also be made of the projects designed to replace the numbers allocated by societies to the works in their repertoire with international code numbers. These proposals are based on the success of CAE numbers which have facilitated documentation work enormously, and on the ISBN numbers for books and brochures. The CISAC and BIEM project is entitled "International Standard Work Code" (ISWC) and is based on the work and experience of the International Standardization Organization (ISO). The allocation of an ISWC number to a work should allow it to be "tattooed" so that it may be identified electronically wherever it will be used in the world.

258. Electronic transmission will relate also to the cue sheet, the documentation concerning films and television productions. As mentioned previously in relation to the international index card, the form of electronic transmission of the cue sheet will replace the current paper form. It is also necessary to mention the establishment of an international database of audiovisual works, which will resemble the WWL/WID merger. Thus, a dream which has existed for several decades would be realized since, in this area, several initiatives of the CISAC Technical Committee have not come to fruition: a number of international scope – the number the International Standard Audiovisual Number (ISAN) – will be allocated to each audiovisual work.

259. The scope of the CIS project will also embrace the documentation concerning sub-published publishing catalogues. It has been known for a long time that a number of copyright collective management societies, particularly in Europe, simultaneously manage the same large catalogues of major music publishing companies, a process which often generates considerable redundancy. One of the first attempts to eliminate this redundancy by means of joint efforts was the implementation of the General Agreements File (GAF)

documentation, the results of which were unsatisfactory. It remains to be hoped that the new Agreements and Schedules Information (ASI) project will meet societies' expectations.

260. Finally, it should be emphasized that all the efforts in relation to the CIS, which will certainly lead to substantive improvements in the exchange of documentation, do not in any way incur the liability of collective management societies as regards the accuracy of the data relating to authors, composers, publishers and works. These societies remain the source of this documentation; the transmission through the Internet of precise, fragmentary or incorrect data will reflect exclusively the quality of their work.

3. THE REPERTOIRE

261. The "repertoire" of a copyright collective management society means all the works for which the society is entitled to grant to third parties, i.e. its clients, authorizations for use. Let us say that a society holds the "global repertoire" where it is able to encompass in its authorizations the works originating from all countries and continents (para. 57). The "national repertoire" refers to the works created or published by the specific members and principals of the society.

262. As regards the monopoly position which a collective management society would hold, the impossibility (mentioned in paragraph 55) of limiting the content of a repertoire does not, however, exempt the society from its obligation to prove, in particular in case of dispute, its status and capacity to represent authors, composers and publishers. All these forms of proof are based on documentation.

a. The national repertoire

263. We come back to the fundamental question asked at the time of first contact with a copyright collective management society: "Which authors do you represent?" Depending on the response, a major client, such as a broadcasting organization, may prove to be indifferent or concerned, or feel obliged to pay attention to the proposals relating to the signing of a contract. In other words, the collective management society must concentrate all its efforts on keeping a repertoire which is as complete as possible. That is, above all, valid for the national repertoire.

264. How can the authors of a country be convinced that they should enroll with the collective management society as principals and, subsequently, become members? Authors must be aware of the existence and functions of their national society. The society should endeavor to gain and deserve their trust. The image of the society is dependent not only on the quality of the relations with clients, but also determines the scope of its repertoire. This aspect is often neglected. The society strengthens its image through a strong presence in the daily press and in specialized journals. Discreet publicity in places where composers and lyric writers might gather, such as music conservatories, may also help to mold this image. In addition, there are attractive and readable brochures, educational annual reports and possibly the publication of a special periodical to maintain and cement the relations with members and the circles of literary and artistic creation.

265. The search for composers and lyric writers, and the promotion of memberships, must accompany any documentation and distribution work. Where unknown names appear in declarations of works, the society should find out whether they are potential principals. It should do the same where it finds, in the reports on works performed, broadcast or reproduced, names of unknown composers or lyric writers who might be nationals. The procedures used to convince such "candidates" to establish links with the society are more often than not successful, especially where these invitations are accompanied by offers of payment of royalties previously accumulated in their favor.

266. However, the best publicity stems from the satisfaction of members and principals. Regular and punctual statements, submitted in a legible manner and attractive in graphic terms, periodical information on any important event, rapid responses to any consultation or demand, well-established social protection, solid and unfailing support in case of difficulties or legal action, crystal clear transparency of balance sheets and operating accounts are elements of sound management, which will have an impact on the wealth and quality of the society's national repertoire. The consideration and reputation which the society will enjoy on the national territory and in its relations with foreign sister societies will depend on the wealth of its repertoire and the quality of its management. There is a fundamental difference between a society which defends private and corporate interests, and a society whose range of activities and status make it a national institution.

267. Where a society holds a significant national repertoire, it scarcely experiences problems in proving its legitimacy in representing authors in the exercise of their rights. In case of disputes brought before the courts, it will be able to submit the contracts signed by the members concerned and the declarations of works, including attachments. In addition, it may call its members as witnesses. The documents submitted could allow the society to invoke, for the benefit of its members, the legal presumption according to which the author whose name appears on the copy of a work in the customary manner must be considered such until proven otherwise.

b. Foreign repertoires

268. The rights relating to foreign repertoires are conferred as part of the "reciprocal representation contracts" which the national collective management society signs with foreign sister societies (para. 597 to 616). These contracts are based on the CISAC and BIEM models. This gives rise to the problem mentioned on several occasions, i.e. that the national repertoire of whichever one of the societies cannot be precisely limited. The contract refers to the "... right of public performance ... assigned, transferred or granted by whatever means, for the purpose of its administration, to the society ... by its members" (Article 1 of the CISAC model contract of reciprocal representation). In other words, the reciprocal representation contract does not answer the fundamental question: "Who do you represent?". It is the international documentation (para. 217 to 244) which will serve as proof of this representation.

269. Thus, where the collective management society is obliged to provide the proof that it possesses certain rights of foreign composers or lyric writers, it will base itself firstly on the CAE/IPI documentation. The submission of this documentation may lead to the presumption that the society is invested with these rights. Consequently, by reversing the burden of proof, it will be up to the opposing party to prove that the society does not possess the rights brought into question.

270. Where the CAE/IPI documentation is not sufficient proof, the national society may turn to sister societies in order to request the membership contracts and declarations of works relating to the rights in question to be sent. This procedure is often long, laborious and costly, especially where these contracts and declarations must be recorded by notarial acts and the text translated into an official language. In other words, the difficulty of producing elements of proof in case of disputes relating to foreign repertoires is the other side of the coin of the principle of exchange between societies of minimum documentation. This difficulty, in some regards, constitutes the weak point of the whole system of reciprocal representation. Sometimes this generates the accusation that collective management societies are unscrupulous, in collecting the royalties without a legal basis. These accusations are not well founded as it is necessary to understand that the bringing together of complete documentation on foreign repertoires is prohibitively expensive. The exact proof of the legitimacy of societies should be limited to a number of specific representative cases, at the risk of causing the whole collective management system to collapse.

271. Experience has shown that the international index cards and cue sheets scarcely lend themselves to the establishment of proof; the same is true of the WWL/WID documentation. By contrast, publishing and

sub-publishing contracts, which contain an author-publisher-sub-publisher-society contractual relationship, are easily accepted as elements of proof. According to the situation, sub-publishers may obtain documentary evidence from their original publishers.

272. Finally, attention should be drawn to the need for the national collective management society to sign reciprocal representation contracts with all foreign sister societies. Unfortunately, this need is not the rule in the system. Certain societies prefer to wait for newly established societies to provide their forms of proof before signing reciprocal representation contracts. This requirement is paradoxical in nature: firstly, a society cannot "prove itself" in the absence of a substantial portion of the foreign repertoire and subsequently the risks of abuse of a repertoire abroad are much greater without a reciprocal representation agreement.

c. The works of authors who do not belong to copyright collective management societies

273. Broadcasting organizations broadcast works created by authors/composers who are not members of copyright collective management societies. As indicated previously (para. 53), this situation is unavoidable as a broadcasting organization cannot determine, with the best will in the world, who are the authors affiliated as members or principals to collective management societies. Furthermore, it may demonstrate its good faith by arguing that the authorization to broadcast the works granted by the collective management society is general in scope and covers all sorts of musical works.

274. What must the attitude be of the collective management society when it discovers, in the lists of broadcast works, works created by non-member or unknown authors? Should it remove these works on the grounds that they are not part of its documented repertoire or should it, by contrast, include them in its distribution work?

275. The failure to take into consideration works created by authors that are not members would correspond to an attitude characterized as "legalistic" or "reductionist" in collective management circles. According to this conception, the collective management society limits itself to exercising the rights which have been expressly entrusted to it. This point of view does not take into account the fact that many authors cannot become members of a collective management society quite simply because, in their country of residence, no such society exists.

276. Considering the copyright collective management society to be a firm providing services, established in the public interest, it might be desirable for the society to serve everyone and not only those who wish to use it or who are members of it. This point of view may be based on a solid legal foundation: that of business management without a mandate. This is a quasi-contractual relationship between two persons, one of which relies on the other in case of incapacity. By way of example, the case is often cited of the neighbor who alerts the police when he sees burglars breaking into an apartment during the tenant's absence.

277. The situation of the absent tenant and the non-member or unknown author have similar aspects; the author cannot know what happens to his works and he is unable to act himself, in the same way as the absent tenant. During the situation, the collective management society can intervene by carrying out business management without a mandate. This management should operate, according to the legal definitions, "in order to prevent damage with which the person is threatened", a condition which is obviously respected in the cases of representations of non-member or unknown authors. Where the collective management society carries out business management without a mandate, it should pay the author the share of royalty collected on its behalf, after administrative expenses have been deducted. The payment should not be subject to the condition that the author must join the society beforehand. The percentage of fees to be deducted must correspond to the rate applied to the management of the rights of members and principals affiliated to the society in the normal manner.

278. Where the society manages to identify the author, it is obliged to pay the royalty within the deadlines prescribed by the law. These vary between two and five years.

279. Business management without a mandate has limits: it must no longer be exercised as soon as the collective management society becomes aware of the fact that the author opposes the exercise of his rights by third parties. Such a decision, for example, would mean that the author agrees tacitly to the use of his works without authorization and without payment in return.

280. What attitude should the collective management society adopt towards the reproduction of works that do not form part of its repertoire? This assumption relates to mechanical reproduction rights, in particular in the sector of the manufacture of records and cassettes (para. 660) where authorizations are required work by work. In these cases, the society has the possibility to refuse or withdraw its authorization where the authors, composers and publishers have not consented to the reproduction of their works. This decision may be influenced by the country's legal situation, above all where the national legislation contains provisions relating to the legal license for the manufacture of sound carriers, as provided for by Article 13 of the Berne Convention.

281. The introduction of the legal license mentioned in the previous paragraph could also lead to the conclusion of a particular agreement between the collective management society and the phonographic industry. The society could apply business management without a mandate to all the works lawfully published on commercial records or cassettes, in the country or abroad, where the producers undertake to pay the royalties in force for the use of these works.

d. The works of unknown authors

282. The case of unknown authors can be assimilated to that of non-member authors. They are not in a position to exercise their rights where their works are performed in public, broadcast or reproduced. A system of business management without a mandate could safeguard their interests.

e. The global repertoire

283. To summarize what has been said, the global repertoire consists, in each country, of:

- the national repertoire or a repertoire specific to the copyright collective management society;
- the foreign repertoires entrusted to the society under reciprocal representation contracts with the sister societies of other countries;
- the works of non-member or unknown authors, included in the repertoire through the application of business management without a mandate.

284. The collective management society will be able to authorize its clients to use the global repertoire only on condition that every effort is made to be the owner or assignor of the repertoire. It is also in this regard that it will be able to play its role as an intermediary between production and consumption on the music market (para. 19).

285. Legislators may contribute to achieving this objective by providing, in copyright laws, that the trilogy of economic rights may be exercised either by the author himself or by a national copyright collective management society, authorized for this purpose and placed under State surveillance, thus excluding any form of dissent and any two-track system. Thus, the authors are aware of the alternative between the individual exercise of and the collective rules governing their rights.



286. It may also be pointed out that the efforts made by a collective management society to be the depository of the global repertoire in no way affect the freedom which authors, composers and publishers have to become members of the society of their choice. In a comprehensive system of reciprocal representation contracts between collective management societies, the author can become a member where he wishes without weakening the system. Whatever the author's place of membership, his works form part of the global repertoire. The freedom of membership corresponds to this element of free competition between the collective management societies, which affects neither their monopoly position *de jure* or *de facto*, nor the content of the global repertoire.



CHAPTER 3 CLIENTS – TARIFFS – LISTS OF THE WORKS USED

287. As soon as the repertoire of an authors' society takes shape, the society must enter the big wide world of clients and thus appear in public. This step, which is important and requires meticulous preparations, is essential since authors, composers and publishers firmly expect that the collective management of their rights will produce "striking and staggering" results. The importance of these results depends on the tariffs, the willingness of clients to pay, the quantity and quality of the lists of works used, appropriate organization of client services and of payment collection – all points which are examined in detail later on. However, it is necessary to underline here that no obstacle should exempt authors' societies from paying authors, composers and publishers fair rewards. The societies which fail to achieve this aim after a certain initial period of operation must be completely restructured or quite simply dissolved.

288. What is meant by "fair rewards"? This expression does not refer to the fact that all the members and principals of an authors' society should be able to live on the rewards which they are paid for the simple reason that the vast majority of the works created are not popular among the public. Thus, only the rewards paid to the minority of composers, lyric writers and arrangers who are truly successful can be fair. Through experience, this minority includes only two to five per cent of all members and principals.

289. This observation leads to the collective management of copyright being criticized and characterized as an "elitist issue". This is not the case. The fact that the public acclaims the works of a composer, while it remains indifferent to those of other composers has nothing to do with elitist attitudes, but corresponds to the effects of the favor, fashion and moods of an audience which the authors and publishers have sought to analyze and forecast in vain for generations. It is difficult to predict which way the wind will blow ... this saying applies also to music.

290. A better way of obtaining a more precise idea of the fairness of the rewards paid to authors, composers and publishers consists in comparing the total amount collected by the authors' society to the per capita gross income in the country. By taking into account the country's state of industrialization, its political stability and economic situation, the performance of a society can be determined.

291. A more precise idea of the fairness of rewards can be gained by comparing the tariffs charged by authors' societies. This comparison allows conclusions to be drawn, which are not limited to examining the amounts fixed by these tariffs, but to considering above all the criteria applied. It would be superfluous to want to compare radio tariffs, for example, if the volume of music broadcast by the broadcasting stations is not known.

292. Here and there, an effort was made to deduce from the comparison of tariffs that it appeared to be time to devise international or global tariffs. Care should be taken to avoid such a development. These attempts would quickly expose the authors' societies to the risk of being considered members of a cartel manipulating the prices and other conditions of their service benefits. It is because of such a threat that CISAC has always emphasized the individual nature of the tariffs of its member societies and has refrained from any interference in this area. The model contract signed between the BIEM and the International Federation of the Phonographic Industry (IFPI) does not relate to national autonomy in setting tariffs, but guarantees, through a certain uniformity in royalties and other conditions, the free export and import of records and cassettes in all the territories of member societies. This tariff-related autonomy does not provide exemption from granting authors, composers and publishers fair rewards at the national and international level.



1. THE BIG WIDE WORLD OF CLIENTS

293. The reserved attitude of clients and their mixed feelings accompanying their first contacts with an authors' society have already been discussed in paragraphs 32 and 33. However, the entry onto the stage of the authors' society is a matter of style, which may be of political scope. Radio and television organizations and the hotel industry influence public opinion much more than authors, composers and publishers of music. In other words: where the intervention of the authors' society is awkward, this can cause tensions and disagreements which will work against it. This particular subject is of the utmost importance in copyright collective management.

a. Partner or subject?

294. In the field of copyright, the author possesses absolute rights, rights "erga omnes", which allow him to decide freely where, when and what price his works can be used. Authors' societies quite often claim the same "freedom of action", i.e. whether to authorize the use of the works in their repertoire and to fix the royalties as they see fit.

295. Such a conclusion should be vigorously opposed. From the point of view of a broadcasting organization or the owner of a dance hall, the refusal to use the works of a single composer does not have the same scope as that of an authors' society managing the global music repertoire. The refusal of a composer has scarcely any weight, whereas the refusal of the society threatens the existence of the clients mentioned. All anti-trust legislation tends to dismiss what is arbitrary from the individual exercise of private rights, where this relates to firms dominating the market – this aim is also valid for authors' societies.

296. By claiming that it could or could not exercise the copyrights in its repertoire as it sees fit, the authors' society would not respect the will of its members and principals. If it thinks that an author is seeking to prohibit the use of his works, it is unaware of the true nature of the author. The author is interested above all in seeing his works published and broadcast. He wants to communicate with the public and often shows his readiness to renounce any material reward for this purpose. The society cannot oppose this willingness on the part of authors – and, obviously, publishers – without causing major tensions with its members and principals, and without harming its mission as a service provider.

297. Legislators could not subscribe either to arbitrary notions in the attitude of authors' societies. A society which would exercise, of its own free will, the rights relating to the whole of the global repertoire would run counter to its function as an intermediary on the music market (para. 19). Instead of forming a link between the production and consumption of music, it would become the unilateral agent in defense of the interests of authors, composers and publishers. In order to cut short any arbitrary attempt, a good number of legislators have stipulated a legal constraint obliging authors' societies to consent to any use of music in their repertoire, which would be requested by all clients willing to pay the fees charged. This legal constraint is a clear indication that any arbitrary consideration must be eliminated from copyright collective management.

298. All those who use music for professional or commercial purposes should be treated as partners of the authors' society in the music market – or, in other words, as "clients" and not as "users", to reiterate the arguments presented in paragraph 8. To take up that example, the fact that a broadcasting organization is reliant on the consent of the authors' society in order to be able to carry out its duties, does not nevertheless place it in a position of inferiority or submission in relation to the society. An electric power station does not seek to dominate its clients when it delivers electric current!

b. Everyone has his turn

299. "He who grasps at too much, loses all" – we come back to the saying mentioned in paragraph 85. It has been recommended to choose the State radio and television organization as one of the first clients because it is often the most important and the payment of this organization's fees should allow the first distribution work to be carried out.

300. Another reason is added to these considerations. As indicated in paragraph 32, clients are attached to equality of treatment between them. During the tariff-related negotiations, it is important to be able to counter any mistrust, on the part of suspicious clients, of favoritism, by showing good examples and by scheduling the tariff-related negotiations. This scheduling will not be the same in all countries. Apart from the importance of the client and his influence, it is the quality of relations which counts. The authors' society begins its negotiations with the most understanding clients' associations, thus accumulating good examples before dealing with more difficult clients. A reverse process can also be imagined where the society tackles people who oppose it, considering that a happy outcome will open other doors more easily. Such a process may lead to an enormous waste of time.

c. The power of prejudice

301. Whether we believe it or not, the slightest favor granted to a client or a group of clients spreads and contaminates the other clients like an epidemic. In the performances given by circuses, for example, if the intervals without music are taken into account, everybody will take advantage of such intervals and all the clients will transform themselves into a "circus". Cinemas observe everything that occurs in relation to television tariffs. Concert organizers do the same for the tariff-related negotiations conducted with military band associations.

302. The attitude of clients obliges authors' societies to respect strict equality of treatment for all clients, at the risk of giving rise to extensive disputes on the subject of tariffs and their application. What should be understood by "equality of treatment?". This does not relate to the amounts fixed in these tariffs, but to principles for setting tariffs which the authors' society applies in the country. These principles will be commented on below (para. 347 ff.).

303. However, it is not sufficient to declare the equality of treatment of clients as an aim to be achieved. The authors' society must be in a position to prove this treatment. The obligation of proof arises in the case of an examination of draft tariffs or tariffs negotiated by State bodies or other authorities, with a view to their approval or for verification purposes. It is necessary to verify whether the tariffs contain elements which could be considered to be an abuse of dominant position (para. 391 ff.). Where the authors' society can prove the equality of treatment of its clients, the tariffs must be approved or confirmed. The power of prejudice is therefore exercised in favor of the authors' society. Along the same lines, the society may dismiss any proposal or suggestion stemming from clients, which might compromise clients' equality of treatment.

304. Can the rigidity of the principle of equality of treatment of clients and the power of prejudice prevent an authors' society from taking account of the particularly precarious economic situation of certain groups of clients? Certainly not, but prior to deciding on the importance of such a situation, it should be carefully compared with that of the other sectors of clients in order to observe and prove its exceptional nature. If the hotel owners in an alpine region, for example, complain bitterly about poor weather conditions, which greatly reduce their income, it is recommended to examine the situation in other sectors, for example that of advertising, before showing proof of understanding. Failing that, all the clients will demand a "bad-weather bonus"!



305. The power of prejudice opposes any arbitrary attitude on the part of the authors' society (para. 295). A society which would claim the individual freedom of action of its members and principals would lead its clients to bring into question "of their own free will" any system of tariffs. Such a development often leads to the settling of political accounts – with in most cases a defeat for the society whose political influence is clearly less than that of the clients (para. 294).

306. To summarize, it is therefore the power of prejudice which in the first instance obliges the authors' society – and in a much more restrictive manner than any legal provision – to establish a logical and well-thought out tariff structure. This tariff structure is scarcely influenced by the members and principals. Consequently, there is no sense in submitting tariffs for approval by a general assembly of members. By wishing to amend tariff-related provisions, authors, composers and publishers are likely to disturb the equality of treatment of clients, to their detriment.

d. The profitability of collective management

307. Should tariffs ensure the profitability of collective management, i.e. be fixed depending on the size of management fees?

308. Clients remunerate authors, composers and publishers and not the collective management society. Since this remuneration is fixed, usually (para. 348 ff.) in the form of a share for authors, composers and publishers of the income which clients have obtained through the use of their music, the problem of the profitability of collective management is therefore relegated to the background and should not dominate the fixing of tariffs. It can be taken into consideration only in the case of negligible remuneration which is not worth demanding, since the costs of collection exceed the remuneration. There are numerous cases of this in contemporary musical life. Minimum remuneration levels are applied to them, calculated on the basis of the profitability of collective management. The remuneration allows the collection charges to be covered and suitable royalties to be paid to authors, composers and publishers, provided, however, that these minimum remuneration levels do not place an excessive strain on clients' budgets.

309. According to the experience acquired, copyright collective management is less expensive in cities. Could an authors' society apply higher tariffs in the countryside or provinces than in cities, justifying such a differentiation in terms of bigger overheads? The grounds are valid, but any subdivision of tariffs will be fiercely contested in support of the equality of treatment of clients. The argument raised will be that whereby a client has a harder life in the provinces than in cities. The result of these considerations shows, in most countries, the application of identical tariff-related criteria for the cities and the provinces and, consequently, different net royalties.

310. In such circumstances, the authors' society will seek with great diligence the most economical verification and collection structures (para. 327 ff. and 339 ff.). If it does not manage to establish satisfactory structures, the society must abandon the sectors in deficit and focus on the substantive parts of its collective management. Such a concentration is compatible with the function of the society as an intermediary between production and consumption on the music market - provided that it guards carefully against possible interference which may result from the power of prejudice.

311. Thus, it is noted that the position of intermediary assumed by the authors' society does not oblige it to have an unconditional presence in the whole country. The statutes of a large number of societies specify that they may refrain from exercising the rights relating to their repertoire where, for specific reasons, they consider that that is not expedient. In many countries, this faculty has led churches, hospitals, retirement homes and prisons to be exempt from any copyright claim for social reasons. However, also in these cases the power of prejudice must not be neglected.

e. The search for practical solutions

312. Relations with clients can raise interesting organizational problems. Sometimes outdated structures which have fallen into disuse and are annoying for clients are observed. Clients are never consulted in order to find out whether they are satisfied with the services of a society. It is recommended to undertake regular surveys of clients, to invite them to make suggestions and to think about the services provided.

313. Cooperation, delegation, partial autonomy... all these elements of modern organization remain alien concepts for a number of authors' societies. One of the causes of this delay is the monopoly position of the society, which leads to self-sufficiency. The exclusive nature of the task, in combination with a legal position of authority, creates the impression that all the work must be done using its own resources – whatever the cost! If the consent – or the authorization – of the society cannot be obtained by correspondence, but only through a personal approach to the agent, which alone has power to collect the royalty, paid in advance, such administrative proceedings are a long way from any idea of service provision.

314. The aim of providing services is not met if all the means of communication are not placed "at the service" of clients and authors, composers and publishers as well. In that regard, it goes without saying that the telephone, postal service, Internet and electronic mail are used. Why trouble the owner of a dance hall with two or three reminder letters concerning a list of the works used, if that can be done by a short telephone call, which is a pleasanter and quicker process?

315. Methods of payment deserve particular attention. There is no reason to refuse the payment of royalties through the post or a bank. Quite the contrary: it is necessary to make payments to clients easier, by preparing their payment forms through the post or a bank for example. This assistance "pays". A few years ago, CISAC noted, as a result of a survey of its member societies, that the "payment ethic" of clients differed appreciably between countries and societies. In certain countries, clients paid the royalties invoiced in an average period of 20 days, while in others the average period was eight months! In examining this striking difference in the periods, it was noted that the indifference of certain societies in relation to the methods of payment for clients was the cause.

316. These experiences have encouraged the society "Organización Recaudadora SAYCO – ASINPRO" (ORSA), in Colombia, to sign a cooperation contract with a bank in the country, which has the largest number of banking customers and a very large network of high-density agencies. All ORSA invoices are accompanied by the payment form for this bank. It is informed on a daily basis of all invoices, enters the amounts in its accounts and takes responsibility for sending reminders of the amounts to be collected. The experience acquired is excellent and gives good reason to examine the payment methods and possibilities for cooperation with the banking sector.

317. The progress in information technology increases the chances of better cooperation between authors' societies and their clients. The establishment of a database of clients will be dealt with in relation to the organization of client services (para. 443 to 446).

2. CONTRACTS WITH CLIENTS

318. In relation to tariffs, the enormous importance of negotiations with clients' associations should be emphasized (para. 388 to 390). From the first few words it can be seen whether the proposed contract is the result of a negotiation, an understanding with clients or the fact of an "authority". The authorization corresponds to the monopoly and consent to the service provider firm. It is therefore the term "consent" which will be preferable.

319. The contract which reflects most clearly the nature of negotiation is the model contract for the phonographic industry, signed between the BIEM and the IFPI (para. 663 to 670). It brings together all the agreements between these two organizations in relation to tariffs and contractual conditions relating to the manufacture of records and cassettes. This solid basis of a negotiated contract ensures that the "BIEM – IFPI model contract", as it is referred to below, meets with broad international acceptance. The good experience acquired from this international model leads to the recommendation to negotiate contracts and tariffs simultaneously with clients' associations. Through this combination, a situation is avoided in particular where contradictory opinions on certain tariff-related provisions again become inflamed during the discussion of the content of contracts.

a. Contract or unilateral consent?

320. For decades numerous authors' societies have not signed contracts with clients. Clients were unilaterally "authorized" and their obligations took the form of conditions for the grant of authorization. In extreme cases, the authorization was combined with the invoice issued after the royalty had been paid.

321. In addition to the unpleasant effects of an authoritarian attitude on the part of authors' societies (para. 313), this unilateral method of authorization was accompanied by legal failings. There is an appreciable difference between a client who undertakes, through its signature, to pay a tariff-related royalty and a client who does not respect an authorization condition. In the case of delayed payment, the society may, by submitting the signed contract, take legal action against the client – a simple process. In the case of a unilateral authorization, to which conditions are attached, the society must prove that the client has made use of the authorization.

322. It is also beneficial to submit royalties in return for consent and not as a condition of authorization. What are the contractual obligations of a client? Through its signature, it undertakes to:

- observe the contractual framework of consent and inform the society of any transgression thereof;
- not to distort or damage the music and thus respect the composers' moral rights;
- pay the agreed royalty within a contractual deadline;
- possibly provide the lists of the works used within an agreed deadline;
- allow the duly authorized representatives of the society access to the places of performance of the music or to the premises where records and cassettes are produced, as well as to the client's accounts, insofar as those accounts refer to the use of music;
- accept immediately a change to the royalty in line with the cost of living index in case of increased inflation (para. 336);
- abandon the contract where it ceases to use music.

In that manner, the client's obligations are clearly defined.

323. Each client lives in its own environment, and is an established part of a whole series of relationships. To take up the example, a broadcasting organization needs staff, artists, reporters, technical installations which must be built and maintained, electricity etc. All that is the subject of contracts: labor contracts, purchasing contracts, rental contracts etc. Only the broadcasting concession corresponds to an act of authority.

324. It may be asked why copyrights, which are the clearest examples of private rights, should follow a different rule and not be the subject of contracts?

b. The scope of consent

325. Each clarification of the type of use entails, however, additional cost. To take up the example of a hotel, if the contract stipulates that a single television set can be used in the bar, it should occasionally be verified whether this limit is respected. The cost of the verification imposes a certain amount of care on the society when specifying the scope of the consent.

326. Good results have been obtained with the so-called "package-deal" system. If in a country there are around 300 hotels using the music in the same way and with the same intensity (radios and television sets in the bedrooms, background music in the entrance hall, a television set in the bar, and three to four times per week a group of musicians providing entertainment and dancing), it is advisable to incorporate all that in a contract devised specially for this kind of use of music, and thus to avoid tariffs consisting of different elements. Thus, the society may offer its clients a whole series of "package deals" of their choosing, in the same way as a firm selling household items presents its range of standard, luxury and so on models. By acting in this way, in the final analysis it is the client who chooses the scope of the consent.

c. The payment of royalties

327. Comments have already been made in paragraphs 315 and 316 on payment methods. There remain to be dealt with the issues of deadlines, deposits and possible safety measures. Here again the choice exists between a monopolistic approach dictating payment methods and that of a service provider firm applying the general commercial conditions of payment.

328. What are the deadlines? It should be taken into account that numerous clients have difficulty paying royalties before they have available the income resulting from their use of music. A concert organizer, for example, will try to pay the copyright royalty after admission tickets have been sold. It is necessary to take these constraints into account during the negotiations on tariffs. The relationship between the client's income and its payments of royalties must prevail over the aspirations of societies that would like to obtain a maximum amount of interest between collection and the end of the distribution period. The distribution rules must take into account the payment procedure which is sufficiently flexible for clients, since it is this arrangement which should dictate the distribution schedule and not vice versa.

329. In this context, mention should be made of the possibility of staggered payments. According to the size of the annual royalty, a hotel could pay in four or six, or twelve monthly, installments. In this case, it is recommended that an invoice be sent to the client with the payment slip attached for each payment. The client can even be questioned in order to find out which method of payment suits him best. Thus, these methods are closer to commercial practices.

330. The punctual nature of payments is particularly enhanced by the grant of a discount, for example one or two per cent reduction according to a country's practice. The function of intermediary and service provider firm of the authors' society is not at odds with consent to such traditions.

331. The discount formula is preferable to the additional royalty or "agreed fine" method, in the case of late payment. These increases, which in a way are considered to be punishments by clients, do not improve relations between the society and its clients. If such supplements have not been accepted by the client at the time the contract is signed, it will be difficult to demand them in the courts (para. 322).

332. Should deposits or guarantees be requested from clients? Again, reference is made to a country's commercial practices. If deposits are common practice, the society may also demand them. Where clients are generally considered to be solvent, an effort should therefore be made to refrain from creating a climate of mistrust. In that case, it can be envisaged that the system of deposits for debtor clients is limited from a certain point in time or for a particular amount, as well as for those debtors with deferred payment.

333. In relation to the above, it is recommended that authors' societies introduce a "decredere" account into their system of accounts, in order to compensate for the possible losses that may result from difficulties with their clients. The supply of funds to this "decredere" account will be dealt with later (para. 573). Such an account is doubly advantageous: this reserve allows the society to become more closely involved in the commercial practices of its country and to avoid authors and publishers suffering damage in the case of losses resulting from collection from clients.

d. Duration of contracts

334. Where a contract is signed between an authors' society and a client, the question of duration arises, which corresponds to the desire for stability and the need to take account of the changes occurring. A duration of four to five years appears to be the period indicated.

335. During this period, the society is bound by its undertaking. For clients who rely, in their commercial activity, on the use of music, this presents a considerable degree of security for their existence. It goes without saying that clients feel reassured and quite willing to pay appropriate royalties during the whole period concerned.

336. This stability for a four or five-year period may be combined with a number of guarantee clauses such as that relating to the inflation rate (para. 322). The society and client can agree for example that the royalty will increase, according to a formula fixed in the contract, as soon as the inflation rate exceeds ten per cent. Such a clause presumes, however, that an official national statistic measures and records the rate of increase in a precise manner.

337. The stability of tariffs and contracts is an important factor in savings relating to administration fees for the authors' society. If the society has a portfolio of 20,000 to 50,000 contracts with clients – which corresponds to that of an average society – it is important to ascertain during what period these contracts remain unchanged. Each amendment generates additional charges before the improved royalties bear fruit. This experience is to be recalled to all those who preach unceasing mobility.

338. The importance of administration fees in relation to clients has led to a number of societies signing "envelope contracts" with clients. According to these contracts, consent for the use of music is guaranteed for an unlimited period and the possibilities of abandoning these contracts are reduced. The royalty is fixed according to the tariff in force, attached to the contract. The two parties to the contract undertake to respect the tariff-related provisions. By means of these "envelope contracts", the duration of the contractual relationship between the society and client can extend over a period of 10, 15 or even 20 years.

e. Individual or collective contract?

339. Music resounds everywhere and if the authors' society seeks to deal with each source of music one by one, a portfolio of 20,000 to 50,000 contracts is quickly reached. The costs incurred through such activity necessarily demand that all possible means are employed to replace individual contracts with each client with collective contracts.

340. What is meant by a "collective contract? As an example: if, in a country, there are 2,500 military bands, located in the towns and numerous villages, and if these military bands are grouped together in a national military band association, this association can sign a collective contract, on behalf of the 2,500 military bands, with the authors' society. The society authorizes the use of music by all the military bands that are members of the signatory association, specifying the scope of its authorization. In return, the association is obliged to collect the agreed royalty from its members and to pay the total amount to the authors' society. According to its availability, the association also deals with collecting the lists of the works used by the military bands and submitting them to the authors' society as a global package.

341. It is obvious that collective contracts make an appreciable saving on costs. Clients' associations see this form of cooperation as a chance to improve and to complement the service benefits for their members, and in particular to free them of any problems in relation to copyright. However, this altruistic trait must be supported by a financial incentive. In other words: the collective management society must be prepared to share its cost savings with the association, in the form of a discount granted as part of the collective contract.

342. To give an idea of the broad area which is open to the conclusion of collective contracts, here is a summary of the list of these contracts, signed by the Swiss society SUISA :

- all the associations devoted to any kind of musical activities, such as accordionists, yodelers, military bands, amateur orchestras, choral societies, drums, etc.
- the vast majority of sports associations, such as those for gymnastics, skiing, football, motorcycling, bicycles, etc.
- the associations of social institutions such as those for elderly people, invalids, Samaritans, Red Cross, etc.
- numerous commercial and industrial associations, such as automobile clubs, trade unions, State and private railways, navigation societies, etc.
- all churches and religious associations.

343. For the 30,000 public loudspeakers in Switzerland, a particular solution was found: the collection of a royalty has been combined with that of the copyright royalty, provided that this royalty does not vary according to the place where the loudspeaker is installed. This combined royalty facilitates copyright collective management work enormously, not to mention the fact that it eliminates any potential for friction with 30,000 clients!

344. In future copyright collective management, everything will depend on cooperation efforts, i.e. if these rights can be managed without dispute with the numerous clients and at reasonable cost. Any chance for synergy must be taken and unusual solutions should not be avoided. In dealing with the case of blank cassettes, States have provided evidence of innovation. Thought could be given for example to a small supplement on the price of electricity, in favor of authors and publishers, or in the reproduction field, to the form of a small supplement on the price of the paper. For the time being, these are only ideas but preparations should be made for changes in relation to the development of new communication and recording technologies. The preparations depend on three conditions: innovative imagination, in-depth knowledge of the inner workings of copyright collective management and a firm willingness to retain this management as a basis in the country's structures and customs. The aim does not vary: the collective management of the rights of authors, composers and publishers must provide them with fair rewards.

3. TARIFFS – THEIR COMPONENTS

345. Here we are in the "nervus rerum" of copyright collective management: tariffs. Tariff means the determination of the royalties applicable to a particular circle of clients or for a particular use of music during a particular period.

346. The power of prejudice has led a large number of countries to promote the publication of tariffs. Numerous lawmakers oblige authors' societies to operate in this way. Furthermore, it is often stipulated that the society can demand only fees which correspond to a duly published tariff. Before dealing with this point, it is necessary to comment on how tariffs are produced – component by component.

a. The main standard

347. Copyright royalties are calculated on the basis of the income obtained by the client as a result of the use of music. This is the main standard. Where the client earns a good living, the authors, compos-



ers and publishers also enjoy prosperity. Where music is unsuccessful, authors, composers and publishers share the sad fate of the clients concerned. The calculation of royalties based on the client's income therefore expresses a notion of solidarity between the client, author, composer and publisher: good fortune for all, misfortune for all.

348. CISAC described this main standard in its Charter of the Author's Right, approved in 1956 at its Hamburg Congress, as follows:

"The author must be associated with the fortune of his work, and the general principle of his participation in its economic success must be asserted in all and any relations between himself on the one hand, industry and the users on the other. Wherever possible, he should receive a percentage of the gross revenue accruing from the exploitation and utilization of his work, whatever the form and manner of expression and reproduction of the work."

349. Clients often criticize this main standard, on the grounds that no basis can be found for their gross income, but only for their net income, i.e. the income after deduction of all their expenses. This criticism ignores the fact that copyright royalties do not correspond to a share of the profits, but rather to expenses for the client. In the same way that, in the case of a concert, it pays the performers' fees, advertising costs, hire of the room, instruments etc., it is obliged to pay the copyright royalties. It would be nonsensical to see the royalties of authors, composers and publishers decrease where the client hires an extremely expensive room for his concert! It would also be inappropriate to claim that authors, composers and publishers must be the last to be paid, since in terms of priority "the fixed charges" should be settled. Emphasis should be placed on the fact that music – and the consent of the beneficiaries – is as essential for a concert as are the performers, instruments, room, lighting and all other ingredients.

350. A specific comment is necessary on the subject of taxes. Numerous countries use a system known as the "show tax", i.e. the sale price of tickets is increased by a certain additional amount as a tax. This tax does not correspond to a client's income, but to income for the State. Consequently, this show tax does not form part of the basis for calculating the copyright royalty. Some clients have tried also to deduct the taxes which they pay on the basis of their income. This is a different issue. The tax paid by the client forms part of its expenses. Just as it cannot claim to receive electricity more cheaply because it pays taxes, it could not use this argument in relation to copyright royalties.

351. A new problem arose when State authorities, public or private corporations, or also sponsors, contributed to the expenses for concerts or to the expenses for special programs intended to enliven and enrich cultural life. These were subsidies, grants or "sponsorship" sums. Should these amounts be included in the calculation of copyright royalties? The clients vehemently opposed this but in vain. It is unquestionable that these subsidies or other allowances are used to reduce the sale price of admission tickets. Let us take an extreme assumption where all concert-related expenses would be paid by a sponsor. Admission would therefore be free and the authors, composers and publishers should go hungry! These considerations led to the incorporation of subsidies and other allowances in the calculation of copyright royalties.

352. Clients frequently oppose the declaration of their gross income to the authors' society, arguing that this is a business secret. Faced with such refusals, the society can only estimate the client's gross income and calculate the copyright royalty on the basis of the presumed amount of the gross income. It is recommended to plan for this method of estimation in the tariff and to combine it with a withdrawal period for the client, offering him the possibility of a later declaration of his gross income.

353. It goes without saying that the declarations of clients' gross income must be verified by the authors' society. This need for verification is likely to create, within a number of societies, a climate of general mistrust, leading to all the declarations made by clients being brought into question and a desire to control everything. Besides the problem of expenses which such a general mistrust entails, the relations with clients deteriorate

considerably. It is therefore recommended to introduce a system of acceptance for declarations which appear plausible, without additional research, and to limit checks to really doubtful cases and periodical surveys.

b. Calculation rules

354. What is the share of clients' gross income which should be paid as a copyright royalty? In Europe, two traditions were established during the 18th and especially the 19th century. From the time when the SACD was founded, under the supervision of Caron Vicomte de Beaumarchais, it was customary for authors to receive 10 per cent of the price of the admission tickets sold for the theatrical performances of their works. In the field of literature, writers imposed themselves over their publishers by demanding a share of 10 per cent of the sale price of their books in bookshops.

355. It can be supposed – without being certain, owing to a lack of detailed research – that the origin of this share of 10 per cent relates to the tithe, i.e. to the amount which the farmer formerly paid to the sovereign for the cultivation of his land. The context should not be misinterpreted: the author can easily be compared to a sovereign who allows others to "cultivate" his music and take the profit therefrom, provided that a ten per cent share, the tithe, is paid to him.

356. This 10 per cent share rule for the client's gross income was imposed by the authors themselves. This is an important fact which should be emphasized. For generations, they have thus expressed their idea of what they consider to be a fair royalty and reward. By using the 10 per cent rule, authors' societies are merely following a tradition established a long time ago by authors and thus preserving themselves from any reproach concerning abuse of monopoly.

357. Furthermore, the "10 per cent bastion" successfully erected by authors, composers and publishers must be maintained by the authors' societies, if those societies do not wish to be exposed to criticism of being less effective than the authors themselves. Both barriers – the risks of an abuse of monopoly upwards and the loss of credibility in the eyes of the beneficiaries downwards – limit appreciably their room for maneuver by determining their tariffs. Thus, a second necessary factor arguing in favor of a logical and rectilinear system of tariffs is added to the power of prejudice.

358. The 10-per cent share rule for clients' gross income stems, as indicated, from a European tradition. Can it also be applied on other continents, such as in Africa or in Latin America? Such a transposition is not excluded, but it should not be brought into operation by imitating a European model. African and Latin-American societies should examine with great care whether other traditions have been established on their lands, which could not serve as a basis for their system of tariffs.

359. What is the applicable percentage in the case of a concert for which the program consists half of protected music and the other half of music in the public domain? In similar cases, authors' societies apply the rule of proportions. In the above example, the royalty changes from 10 per cent to five per cent of clients' gross income. Where the duration of performance of the protected music corresponds to one third of the total duration of the concert, the royalty rate is 3.3 per cent, and for a duration of one quarter, 2.5 per cent, etc.

360. One of the main applications of the proportions' rule, in combination with the ten-per cent rule, refers to broadcasting tariffs. In order to know what the appropriate percentage might be for a radio organization, the precise duration of protected music programs (para. 386) should be measured for a certain period, in most cases between one and two months, and the total amount of this duration be placed in relation to the total number of program hours. If, for example, a share of 53 per cent of program time is devoted to broadcasting protected music, the appropriate tariff corresponds to 5.3 per cent of the broadcasting organization's gross income.

361. A third rule also applies: that of ballet. It also stems from a long tradition in the world of theatre. Customarily, the music composer and choreographer divide, in equal shares, the royalty of 10 per cent of the gross income of a client that organizes ballet performances. Each party therefore receives a five-per cent royalty. This ballet rule is applied by authors' societies, not only in case of choreographies with music, but also for any sort of simultaneous use of several works producing the same income. Where this relates partially to non-musical works, which do not therefore belong to the repertoire of the society dealing with the copyrights relating to the music, this society simply collects the royalty for the musical portion.

362. By way of example, this ballet rule can be applied to the projection of documentary films where background music is used at the same time as images, photographs or drawings, which are works protected by copyright. Thus, the share of music composers and publishers is reduced by a half. The authors' society which manages the musical works does not represent the photographers or illustrators. Assuming that the background music corresponds to a duration of 62 per cent of the total length of the documentary film, here is the royalty calculation made by applying the three rules commented on previously:

Share of the gross income resulting from the projections of the documentary film:

— according to the ten-per cent rule	10 per cent
— by applying the proportions' rule	6.2 per cent
— by applying the ballet rule	3.1 per cent.

363. In relation to feature length films, three categories of works are used simultaneously and generate the same gross income:

- the picture;
- the dialogue and action;
- the music.

Through a logical application of the ballet rule, music should be allocated one third of the 10-per cent share, i.e. a share of 3.3 per cent. Assuming that feature length films contain protected music for 40 per cent of the total duration of their projection, here is the calculation of the royalty made by applying the three rules commented on above:

Share of cinemas' gross income:

— according to the 10-per cent rule	10 per cent
— by applying the ballet rule, according to the comment above	3.3 per cent
— by applying the proportions' rule	1.32 per cent.

364. The tariffs for music in television programs consist of the following:

- the part of music broadcast without other works in simultaneous broadcast, such as broadcasts of concerts, interval music, signature tunes, etc.
calculation according to the 10 per cent rule, combined with the proportions' rule, without application of the ballet rule;
- the part of background music relating to documentary programs or other series of images
calculation according to the 10 per cent rule, combined with the proportions' rule, application of the ballet rule (half);
- the part of broadcast of feature length films
calculation according to the 10 per cent rule, combined with the proportions' rule, application of the ballet rule (one third).

365. The royalties determined by the BIEM-IFPI model contract correspond largely to the 10-per cent rule. In the market for sound carriers, however, in most cases the sale price actually paid for a record or cassette is no longer known, since fixed prices are banished from free markets. The royalty is therefore calculated on the basis of the "highest price applicable to the copy considered to be published by the producer (PPD) with a view to the retail sale on the day of release from the warehouse". PPD means "proposed price for dealers". The copyright royalty corresponds to a rate of 11 per cent of the PPD price, after deduction of the usual commercial reductions such as those for quantity, discount etc. (Article IV(4) of the BIEM-IFPI model contract). The proportions' rule is also reflected in this contract. Article V(13) stipulates that...

"the society's share of royalty shall be proportional to the duration of performance: - of each of its works ... in relation to the total duration of performance of the record, tape or cassette..."

366. Since its inception, CISAC has been very reserved in relation to the recommendation of tariffs. This reserve was due not only to the tariff-related autonomy of its member societies (para. 292), but also to the care it took not to attract the attention of the anti-trust authorities which could suspect possible agreements on tariffs or prices. The 10-per cent rule, recognized internationally for a long time – well before the establishment of CISAC in 1926 – appears in CISAC documents for the first time in 1938, when at its Congress in Stockholm, in Recommendation No. 192, the Confederation addressed the Hungarian collective management society for theatrical works wishing that, in the contracts which it concludes with the theaters in its country, the percentage envisaged was never less than 10 per cent, so that Hungarian authors received the same royalties in their country as in foreign countries. This recommendation was followed, in 1947, at the London Congress, by a call, also in relation to theatrical works, for each society to undertake to apply in its country the basic minimum of 10 per cent of the gross income for copyright in each performance. This appeal was repeated in 1948, at the CISAC Congress in Buenos Aires, and in 1952 at the Amsterdam Congress.

367. In the sector of non-theater music, CISAC undertook only in 1954 to make the following recommendation:

"Traditionally, in practice authors and users are generally in agreement as regards copyright, on the basis of an average fixed percentage of 10 per cent of the proceeds from the uses of works of the mind, where those works are the essential subject matter of use. In order to justify the royalties collected for public performance, broadcasting, television and cinema projection, the common tariff of 10 per cent should therefore be adopted as a starting point, establishing sliding scales according to the nature and importance of the use of works."

368. Twelve years later, in 1966, CISAC produced a document entitled "principles for setting tariffs", as a summary of previous suggestions. The following quotation refers to the "radio-television" chapter in the document:

"broadcasting royalties, collected from broadcasting organizations, must be in proportion to the income of these organizations ... – in this regard, the application of the so-called "common 10 per cent tariff" system – the principle (prorata temporis) and implementing rules for which were approved in 1954 – must be taken as a starting point for setting tariffs."

c. The fixed amounts of royalties

369. The calculation of copyright royalties on the basis of clients' gross income and in accordance with the three rules commented on under (b) above entails considerable work and ends up generating significant costs. For these reasons, all authors' societies limit this process to important clients, i.e. concert organizers, radio and television organizations, and the producers of records and cassettes. For the others, the societies work with fixed amounts of royalties, i.e. with flat-rate amounts for certain types of use of music.

370. Similarly, authors' societies apply fixed royalties in all cases where clients' gross income remains unknown. By way of example, let us mention the case of a loudspeaker located in a waiting room. What is the income of the firm or person that has installed the loudspeaker? "No income, only expenses", respond the clients. "Certain benefits", retort the authors' societies, "because without gaining a number of benefits, loudspeakers would not be installed". In those cases, we may assume that the benefits correspond at least to the investment costs. A profit may also be taken into consideration – although it cannot be calculated.

371. The application of fixed royalty amounts does not exempt authors' societies from their obligation to justify these amounts and to prove that they are fair. The society determines them on the basis of average gross income – actual or hypothetical – of clients and in accordance with the three rules commented on under (b) above. An "intrinsic justification" is therefore necessary for each tariff-related position and it is this which protects against the power of prejudice (paras 301 to 306).

372. The fixed amounts of royalties can be staggered according to differentiation criteria. The royalty for the loudspeaker located in a waiting room, according to the example given, may depend on the area covered by the room, its capacity or the average number of people present. By creating such categories, the amount of the fixed royalty is better suited to the economic importance of the use of music. However, as the examples show, it is possible to go too far. Each differentiation must be the subject of sporadic monitoring and verification. In a fair few cases simpler tariff-related structures prove to be more beneficial for the remuneration of authors, composers and publishers, as opposed to tariffs which are too sophisticated.

d. Discounts and reductions

373. The importance of discounts and reductions is often ignored. This is an effective means of persuading clients and above all their associations to cooperate. The discounts and reductions convey the idea that clients participate in any saving resulting from sound cooperation with the authors' society (para. 341). Thus, the limit of the discounts and reductions, which cannot exceed the costs saved as a result of increased cooperation, is also defined. The different discounts and reductions will be commented on briefly below.

374. The "advance notification discount" recognizes the attitude of a client, aware of its duty to provide advance information on its uses of music and to request the authorization of the authors' society. The grant of such a discount is often criticized, as it is considered that "the normal attitude" of the client cannot be subject to a tariff-related reduction. Arguing in this way is to forget that each society must constantly monitor the musical life of its country and remind a large number of clients of their duty to respect copyright. Such monitoring is expensive and a client that follows the rules should not contribute to these costs. The same consideration has led a number of authors' societies to a different conclusion: discounts are not granted to clients that respect the rules, but an additional amount is imposed on negligent clients, as a contribution to monitoring costs. Both processes can lead to similar financial results, but the supplement procedure is accompanied by claims and protests from clients, contrary to the discount process.

375. The "discount for issue of the lists of works used" works along the same lines. Clients that send these lists within the tariff-related deadlines enjoy a reduction on the copyright royalty. The benefits for the authors' society are obvious. It saves the reminder costs for these lists, can quickly close the client's file and accelerate distribution work. The discount also helps to increase the interest generated by the sums being distributed, which are invested with a bank.

376. The "contract discount" is granted when a client decides to sign a contract with the authors' society, thus eliminating the authorizations required from the society on a case-by-case basis. The benefits of these contracts have been commented on in paragraphs 321 to 324. Finally, there remains to be described the "association discount". With all the experience acquired, there is no longer any doubt that economic, cultural and social associations are by far the best partners for authors' societies.

377. The signing of a collective contract, on behalf of all the members of an association, is to the benefit of both parties (paras 339 to 344). However, even without such a collective contract, cooperation between associations and the authors' society can be successful. Thus, for example, after negotiating a new tariff and finding common ground, an association informs its members of this result and recommends to them to sign new contracts with the authors' society. Such a recommendation can be followed by the signing of these contracts by all the clients within a period of three months. Without such a recommendation, the period would be longer.

378. Finally, another effect of the association discount should be mentioned: clients that detached themselves from the association representing their profession could be tempted to rejoin the association in order to benefit from the association discount. This affluence cements the association's position as a representative of its profession which, in this way, is also strengthened in its position as a partner of the authors' society.

e. Minimum royalties

379. The relationship between expenses and profitability of collective management within authors' societies has been commented on in paragraphs 307 to 311. The societies must put in place collection structures adapted to the circumstances.

380. Although the authors' society cannot renounce copyright collective management in barren economic sectors, it can determine minimum royalties. These are minimum amounts where payments to clients, after expenses have been deducted, leave an appropriate amount of remuneration for the authors, composers and publishers of the works used. The minimum royalties do not therefore mean that all the members or principals of the society can aspire to minimum levels of remuneration.

381. Even the minimum royalty requires intrinsic justification. Any authors' society must be able to prove its expenses in the non-profitable sectors of its management and justify the measures to remedy that situation. This calculation must be made in overall terms. The minimum royalties cannot be determined for each client individually (paras. 309 and 310).

3. TARIFFS – THEIR SUCCESSIVE STAGES

382. We will not return to the question of whether the authors' society can or cannot determine its tariffs as it deems appropriate (paras. 295 and 296). Its intermediary function, its obligation regarding equality of treatment of clients and the power of prejudice force it to establish its tariffs on well-defined foundations and to apply certain calculation rules. In numerous countries, lawmakers ensure that any arbitrary element is excluded.

383. If an authors' society respects this framework of fairness, equality and legislation, can it therefore freely determine its tariffs? The response is in the affirmative, apart from a few countries where the law may oblige authors' societies to negotiate the draft tariffs with the main clients' associations prior to their entry into force. Even without these legal provisions, it is recommended to authors' societies to enter into negotiation with their clients and, if possible, to obtain their agreement on tariffs. Experience clearly shows that the difficulties in applying a tariff essentially depend on the degree of understanding with clients. The unilateral fixing of tariffs, even while respecting the standards and rules, often leads clients to consider tariffs to be a special fee for the use of music and to condemn them vehemently. This rejection may lead to a painful and awkward collection procedure. The understanding may give rise to a dispute, especially when the main clients' association recommends to the clients that they sign the contracts drawn up with the authors' society (para. 378, association discount), or signs a collective contract with the society (paras. 339 to 344).

384. The successive stages leading to the conclusion of a tariff, based on the practical experience of numerous authors' societies, and recommendations are discussed below.

a. Preparations

385. At the beginning it is necessary to evaluate the calculation of royalties. What is the gross income of clients resulting from the use of music in the sector concerned? This question may prove to be a real headache with radio and television organizations, where such organizations refuse to communicate their income, claiming that they are bound by business secrecy. In similar cases, the authors' society is forced to base itself on estimates which are as precise as possible. It will be able to determine, for example, the approximate amount of advertising income, from the duration of the advertising broadcasts, with the aid of the prices published by the organization. If it proves to be impossible to find out clients' income, the society can refer to the cost of the use of music (para. 371). Thus, for example, the economic importance of the music in a hotel bar will depend on the fee paid to the pianist in the bar.

386. The application of the proportions' rule (paras. 360 and 361) also requires large-scale preparations. In order to know the scope of the protected music broadcast by a broadcasting organization, the duration of broadcasting should be measured using a stopwatch, for a period of one to two months, work by work, and the total should be compared as a ratio of the complete time of all broadcasts. As regards feature-length films, this statistic can be based on cue sheets (paras. 242 to 244).

387. These statistics and surveys are to be complemented by a comparison with foreign tariffs. Before producing its first draft tariff, any authors' society should study the corresponding tariffs in neighboring countries and in other States of importance. Frequently the main clients' associations highlight foreign tariffs, especially if such tariffs fix lower royalties.

b. Tariff-related negotiations

388. In order to avoid tariff-related negotiations immediately degenerating into useless verbiage, it is recommended that a draft tariff be sent with documentation relating to the preparations (paras. 385 to 387) and a letter containing comments. This dispatch will be followed by the studies of clients' associations, which verify the statistics and, in turn, familiarize themselves with the tariffs applied abroad.

389. Actual negotiations must, in order to have a chance of succeeding, be conducted calmly and be marked by a spirit of mutual understanding, as well as above all being conducted in a prevailing atmosphere of patience. There are points which must be repeated until they are well known to all participants. It is suggested that the exchanges of views be complemented by comparisons with other tariffs and other groups of clients; thus the impression of a coherent and compact system of tariff setting is created. Along the same lines, it may prove useful to involve the partners in the negotiation in the society's actual documentation and distribution work.

390. It is only during these negotiations that the authors' society will be familiar with the economic situation of the clients in question in more precise terms. It should be noted that no authors' society is bound to obtain in one go negotiating results corresponding to fair tariffs. This is a development which may extend over several stages and with a number of interim solutions. At this stage, the power of prejudice ceases and it could not lead to the failure of the tariff-related agreements. Where a tariff-related agreement is close to being concluded at the cost of one "last small concession", it is recommended not to underestimate the value of such an accord.

c. The approval of tariffs

391. In many countries – especially in those where the authors' society is placed under State supervision – tariffs can be applied only after being approved by a special body, responsible for ensuring that there is no abuse of a monopoly position. This hurdle is in general easily avoided where the society submits a tariff-related agreement produced together with clients' associations.

392. Despite that fact, it should be examined whether the tariff forms part of the tariff-related structure of the authors' society. What are the criteria applied during such an examination? These are the same criteria which have been used to produce the tariff. The main standard with clients' gross income serves as a basis (see the calculation rules commented on in paragraphs 347 to 368). If the tariff corresponds to this standard and to these rules – something which must be proved by the society – it cannot constitute an abuse of a monopoly position.

393. The application of the same standard and the same rules, when negotiating the draft tariff with clients and, later, submitting this tariff for approval, increases appreciably the authors' society's position. Clients' associations, as negotiating partners, realize that the foundations of the tariff are solid and that it would be unwise to seek to attack them head on. By accepting these foundations whatever they may be, the negotiations focus more on statistical data and the conclusions drawn therefrom, as well as on the clients' economic situation. All this constitutes factors which offer good chances of an understanding.

394. Where the tariffs submitted for approval are the result of negotiations, the examining body should restrict itself to approving or rejecting them. In the case of refusal, the authors' society and clients' associations would have to negotiate again. For such additional negotiations, it would be very useful to be able to know the reasons for the rejection. In some countries, the examining body can modify the tariff submitted autonomously, but such authority ignores the principle of negotiation, i.e. the efforts to obtain tariffs agreed between the authors' society and its clients. An authoritarian attitude, which is not advisable for the authors' society, is in those cases adopted by the examining body which dictates royalties against the opinion of the main interested parties.

395. Which examining body is responsible for approving or rejecting a copyright tariff? The best experience has been acquired with a body set up especially for this purpose, within which the authors' society and clients' associations are represented equally and where judges also participate. Such membership corresponds most closely to the principle of any negotiation. The authorities responsible for monitoring cartels are less suited to this examination task, because they are more focused on the negative effects of concentrated economic powers than on respect for standards and rules. It is not recommended that tariffs are examined by the State supervisory authority for copyright collective management, for example the ministry supervising the authors' society. In the clients' eyes, these authorities are not sufficiently objective and the authoritarian attitude is heightened instead of being diminished.

d. The validity of tariffs

396. Numerous forms of legislation stipulate that approved tariffs must be published in a country's official journal and can be applied only after such publication. These legal provisions provide clear situations both for clients' associations and authors' societies which refer to the published tariff. Each client is able to verify the society's invoices with the royalties for the published tariff.

397. In the absence of such provisions, it is recommended to the authors' society to publish its tariffs voluntarily. In addition, copies of the published tariff should be made available to all the clients concerned.

398. In case of use of music without the consent of the authors' society, it may be asked whether the courts can apply tariffs or award higher or lower compensation? This question is not often asked but is somewhat

important in cases of judgments providing damages lower than the tariff-based royalty. The court somehow risks "discrediting" the authors' society and its tariff, or even the clients' associations which have consented thereto. This judicial attitude could encourage other clients to refuse to apply the royalties fixed in the tariff, in the hope of finding a more "understanding" judge who will establish a kind of "parallel tariff".

399. Two quite different conceptions are opposed in the situation described: that of the free assessment of the judge and that of equality of treatment of all clients. The equality of treatments of clients by the authors' society, which satisfies a legal obligation, cannot be ignored by the judge. The negotiation of tariffs with clients' associations and the approval of tariffs by a special State body are characteristics of this legal obligation. In other words, the tariffs of authors' societies form part of the public order established and must therefore be respected by all case law. The laws of certain countries specify that the approved and published tariffs must be taken into consideration by the courts in the sense that the latter cannot fix damages lower than the tariff-based royalties.

400. A number of countries allow the application of anti-trust laws in the field of copyright. Under this system, each client may make a complaint at any time on the grounds that the royalty is too high and can demand that it be reduced. This process risks seriously disturbing the system of copyright collective management (para. 68).

401. This example clearly demonstrates that anti-trust legislation, with its intervention mechanisms triggered by negative economic effects, does not lend itself to be applied in the copyright sector. The examination intended to ascertain whether a tariff is fair or whether it contains elements of abuse of a dominant position must precede any application of the tariff. It could not be brought into question at any time. The anti-trust authorities should therefore respect any approved and published tariff in the same way as the courts should respect it, i.e. as forming part of the public order. The law on copyright, with its collective management provisions, should be considered a *lex specialis* in relation to anti-trust legislation. This is another aspect of the public utility monopoly (para. 57).

e. The duration of tariffs

402. When we examined the duration of the contracts signed between authors' societies and their clients, we stated that this was a happy medium between the desire for stability and the need for periodic revision (para. 334). The same problem occurs in relation to tariffs. The major work involved in preparations, negotiations, the approval process, publication and the signing of contracts with clients cannot be repeated in the short term and argues in favor of a more extended duration. By contrast, the developments and changes relating to the use of music require that authors' societies and clients' associations meet from time to time in order to update the situation. According to the experience acquired, an average duration of five years corresponds most closely to the interests in question.

403. As regards the problem of inflation, a certain flexibility can be envisaged during this duration through the insertion of an "increase clause" in the tariff, similar to that provided for in the contracts between authors' societies and their clients (paras. 322 and 336). By means of this clause, both authors' societies and their clients immediately agree on the fact that the royalties will be adapted to the cost of living starting at a certain level. This clause depends, however, on the country's official statistics, measuring the effects of the increase. Authors' societies and clients' associations must accept the results of these statistics as a basis for their agreement.

404. Finally, it should be mentioned that authors' societies and clients' associations can agree – according to the "*rebus sic stantibus*" clause – that each of them may at any time request new tariff-related negotiations, by referring to the change in circumstances. Similarly, both partners can extend the duration of validity of a tariff in the case of a stable and continuous situation.

5. THE LISTS OF WORKS USED

405. In all countries, authors' societies link their authorization to use music to the condition that clients communicate the works used. These communications will be designated in the following paragraphs by the expression "lists of works used" or by the word "lists".

406. Quite often clients are unaware of the reason for which authors' societies demand lists of works used. An incorrect opinion which is too widespread consists in stating that these lists are used to calculate royalties. These lists are often fragmentary and indicate only a minimum number of works used.

407. The lists of the works used are not therefore in general used to calculate royalties, excluding the application of the proportions' rule (para. 359) for concerts. The lists are required as an essential basis for the distribution of the royalties collected, which are required to pay authors, composers and publishers. The authors' societies must be aware of the works used in order to determine the beneficiaries of the corresponding remuneration. The treatment of the lists in relation to distribution work is commented on below (para. 489).

a. The unloved child

408. Authors' societies are unanimous: it is much simpler to collect royalties than to obtain complete and correct lists of the works used. Clients see this requirement as a headache or an administrative "aberration", especially when they are unaware of the usefulness of these lists for distribution work. Added to this is the fact that clients are unaware of "what is played". A hotel owner, for example, is scarcely interested in the works performed by the pianist in his bar. A radio organization, which broadcasts 130,000 times 30,000 to 40,000 musical works from all over the world per year, considers the obligation to keep "musical accounts" to be an excessive requirement.

409. Clarification is required! Better understanding on the part of clients of the need to provide complete and correct lists of the works used is linked, as a *sine qua non*, to cooperation between authors' societies and their clients. It is very probable that nothing happens if the legal obligation of providing such lists or having the authority to reiterate tariff-related or contractual clauses is used as a basis. It is only by demonstrating evidence of imagination, intuition and organizational talent that it is possible to succeed in obtaining these lists of use in distribution work.

b. The number of lists

410. Under the terms of the "contract of reciprocal representation" between authors' societies, Article 7(1), according to the CISAC model (para. 268), societies have the following obligation:

"Each Society undertakes to do its utmost to obtain programs of all public performances which take place in its territories and to use these programs as the effective basis for distribution".

It appears that nowadays this doctrine based on the totality of lists is difficult to put into practice. Rather, it is a question of limiting the lists to a minimum, not only owing to the possible difficulties encountered with clients, but also in view of the distribution costs.

411. What should be understood by "minimum number of the lists of works used"? This minimum is dictated by the condition that the distribution result must faithfully reflect musical life in the country. Apart from the "hits of the time, also found are the "evergreens" and the sectors of serious music, church music, military band music, choirs, etc., which must not be forgotten. Reference is made to "representative distribution".



412. According to representative distribution, authors' societies would reduce the number of lists to be obtained from broadcasting organizations. In this context, an effort has been made to define the musical broadcasts of particular significance. In other words: an effort has been made to eliminate the lists for repeated broadcasts of the same works. This reduction can be applied by using different formulae. The lists would be limited either to complete broadcasts for a number of a few days per week or per month only, or to specific music programs. The experience acquired allows us to observe that the minimum number of lists should be between 10 per cent and 20 per cent of the volume of the works used to satisfy this requirement of representative distribution.

c. Which lists?

413. State radio and television programs generally offer the broadest and most complete range of music in the country under consideration. This corresponds to the efforts made by these bodies to reach all circles of the population. Consequently, if the complete lists of the works used by State radio and television are obtained, a good basis for representative distribution is already available.

414. As a result, cooperation with State radio and television bodies is of particular importance, as indicated previously in the field of royalties (para. 299). In this context, the example of the German society GEMA should be cited. In cooperation with German broadcasters, the society has achieved a situation where the broadcasters provide the lists of the musical works broadcast in the form of magnetic tapes containing data, which corresponds to an enormous simplification of the work for both partners. The progress in information technology allows us to hope that this form of cooperation is also established in other countries. In other words: the positive developments of the electronic age lead not only to new forms of use of music, but also to new technical possibilities for capturing them. The efforts made by CISAC and the BIEM, with their project known as the CIS, incorporating International Standard Work Code (ISWC) numbers in particular (para. 257), are aimed in this direction.

415. The public reception of broadcast music and retransmission on cable networks do not require lists to be produced. Those of the broadcasting organization are sufficient.

416. In the sector of the manufacture of records and cassettes, producers have no difficulty in declaring the works contained in their products, the number of sound carriers sold and their sale price. All these data are also to be found in their accounts. Although the national production of sound carriers can be considered representative – in the sense that public performances and broadcasts are in most cases made in return for these products – manufacturers' lists can also be used as a basis for the distribution of royalties for musical performances and broadcasts.

417. It remains to be seen whether the lists of the works performed by musicians form part of the documents which are essential for distribution work. This question must be answered in the affirmative. The only lists which exist are those of musicians who bear witness to the wealth and variety of the national musical repertoire. Musical broadcasts are most often limited to the works recorded on commercial records and cassettes.

418. In certain authors' societies, only 20 per cent, or even 15 per cent (or less still) of members and principals receive royalties. This low percentage can be attributed mainly to the absence of lists of the works used by musicians.

d. Musicians as allies

419. Cooperation with musicians begins with the observation that musicians have a repertoire available. During their performances or concerts, they largely play the same works, i.e. those of which they have the best command or those which they prefer. This observation leads to the conclusion that one or two lists per year are sufficient to provide familiarity with a musician's repertoire.

420. Musicians can request assistance from authors' societies in drawing up the list of their repertoire. This first list is inserted in a society's database; after six months they receive the list in order to update it. It has been observed that the number of changes varies between 15 per cent and 25 per cent per year. With time, musicians' lists are more and more reliable and thus form an excellent basis for distribution work.

421. The value of this cooperation is worthwhile such that constant thought should be given to making it even more attractive to musicians, for example through the following measures:

- the society produces a compendium of the addresses of all the musicians communicating their repertoire; this compendium is made available to all clients, with a recommendation to use musicians who do not cause problems in relation to the lists of the works used;
- the society makes the compendium available to publishers, producers of records and cassettes, and also to suppliers of musical instruments, in order to inform them regularly of new works;
- the society sends all musicians its annual reports and its newsletters, from time to time providing in such publications portraits of musicians or groups of musicians.

A number of authors' societies have even decided to remunerate musicians for their cooperation.

422. There remain to be mentioned the synergy effects which such cooperation generates. Numerous composers also work as musicians – in Latin America and Africa there are about 70 per cent of "singer-authors" – which makes the task of convincing them of the advantages of close cooperation easier. Furthermore, by emphasizing their so-called "neighboring" rights, musicians can enjoy massive support from the copyright collective management society – one more link which strengthens cooperation.

e. Means of fortune

423. Given the increasing difficulties encountered in obtaining the lists of the works used, authors' societies have resolved to obtain these lists themselves. These societies record radio and television programs and seek to identify the works broadcast through their own musicology experts. They also send their staff to participate in concerts or other important musical events so that they note down or make a recording of the music performed.

424. Such methods must be considered to be solutions of last resort. They are generally the most costly and scarcely achieve the degree of reliability of the lists of the works used. This observation is particularly valid for the lists of radio and television organizations.

6. CLIENT SERVICES

425. An authors' society is not the only firm in its country, which is surrounded by a vast circle of clients. The manufacturers of commercial products and public service provider companies are faced with similar questions of organization of their client services. In each country the supervision of musical life causes particular problems. It is sometimes surprising to observe that authors' societies make little use of the experience acquired in other sectors in their country. Each authors' society should participate, in its country, in the development of strategies and national bodies, and be more closely involved.

a. Centralized service or decentralized services?

426. Authors' societies have moved gradually, during the past few decades, from decentralized services to the centralized client service. Previously, the most important feature was the proximity of the client – above all as part of the supervision of musical life and the music markets – while currently it is economic constraints which are on the agenda. Decentralized services unquestionably cost a lot more than a centralized service.

427. This development has been influenced by the progress made with technical communication means. Clients are much easier to contact using the telephone, fax machine or Internet than previously through the post or by visiting them only. Thus, a local agent who often serves as a link between the society and its clients, has lost its role and can be replaced by modern communication means.

428. It has also been discovered that a representative, often known as an "inspector", who has transport and based in a center, works much more effectively than a local agent. Such a mobile representative can deal with cases of friction with clients in a very broad area of activity and consequently in a clearly more competent manner. It can also participate in the fight against piracy – the local agent lacked a broad overview in this regard. Through its regular contact with the center, the mobile representative "automatically", so to speak, sticks to the contract, contrary to the local agents who had to be brought together regularly to provide them with additional training courses.

429. Has the transition from the local agent to the mobile representative not led to something of a deterioration in the good contacts with clients? Before answering this question, it should be mentioned that part of the clientele did not care so much for the traditional form of these good contacts and sometimes considered them even to be a kind of "spying". That said, a representative can just as easily maintain good contact with a client as with a local agent. A short annual courtesy visit, showing an interest in the client's wellbeing, questioning it on possible friction with the society and informing it of the latest developments in the field of copyright and that of musical life, can have much more positive effects than the local agent's weekly glass of wine.

430. Gradual centralization relates to the introduction of long-term contracts with clients (para. 321) and payments by post or through a bank instead of collection by the local agent (para. 315). Thus, the image of the centralized client service is obtained, with a clients' database, a central administration for all the contracts and a central accounting system for clients' payments, complemented by a number of mobile representatives who are responsible for personal contacts with clients, the supervision of musical life and music markets, and may also be involved in the fight against piracy.

b. The supervision of musical life

431. It is an illusion to believe that following the efforts made to provide information, the public's knowledge of copyright will reach a level leading to a reduction in the supervision of musical life. Experience shows that the public's lack of knowledge regarding anything concerning copyright persists and that no awareness-raising or information campaign will substantially change this state of affairs.

432. That said, it is essential in all copyright collective management to organize the supervision of musical life in the country in order to be able to intervene where music is used without the prior consent of the authors' society. How can such supervision be conducted? We come back to the observation that a constant presence through a network of local agents (para. 427) is the most costly solution and that it should only come into play in cases where there are no alternatives. Some of these alternatives will be described in brief.

433. In countries with a high density of daily newspapers, examining these newspapers is the least costly form of supervision. Musical events, even those on a small scale, leave traces in the local or regional press, in

the form of advertisements, reports or current affairs columns. A first musical event may escape the reader, but this is rarely the case for the second or third event. Similarly, the opening of new hotels, restaurants, bars, dance halls or other places with music, or even changes of owners, are announced in the newspapers. All these clues are such as to force the authors' society to act.

434. Good cooperation with musicians (paras 419 to 422) also facilitates the supervision of musical life. Although musicians communicate to the authors' society the places and dates of their performances, here a large part of supervision is organized.

435. In turn, mobile representatives contribute to the supervision of musical life. Visiting a client can easily be combined with a short trip through the village to see what is going on, to see whether new hotels, restaurants or dance halls are being set up or major musical events prepared.

c. The fight against piracy

436. The fight against the manufacture of sound carriers without the prior consent of the authors' society, known as "piracy", must be conducted continuously in each country. Pirated products can be compared to weeds. Where weeding is not done regularly, the saying "a weed always grows" is confirmed. It is necessary, however, to distinguish between two forms of piracy: "national", i.e. the illegal manufacture of records or cassettes within the country, and "imported", where a national market is flooded with sound carriers manufactured abroad and imported by means of smuggling.

437. The fight against pirates within the country, and work to track down and prosecute them is done by detectives. It is not necessarily the responsibility of an authors' society. This task can be allocated to the judicial police, often supported by the experts of the IFPI, which has special knowledge in this field. That does not exclude cooperation by the authors' society, especially where proof of the unlawful nature of pirates' activities should be provided.

438. By contrast, the fight against "imported" piracy scarcely occupies detectives. This is a method of surveillance of all the places where counterfeit sound carriers, which have eluded customs control and the confiscation of the counterfeit merchandise, are offered for sale. Such surveillance of points of sale fits perfectly into the activities of authors' societies. It is necessary to check shops, boutiques, stands, kiosks and itinerant salesmen periodically, attaching particular attention to the places where pirate material has already been discovered.

439. How is it possible to conclude, in a shop or other point of sale, that a record or cassette has been produced lawfully or unlawfully? In answer to this question, either the so-called "laboratory" process or "banner" process is used.

440. In the "laboratory" process, the authors' society's representative purchases, when making checks, a copy of the sound carriers which appear to be dubious, in the same way as any other buyer. The copies are then sent to a specialized laboratory so that they may be analyzed in minute detail. Where the laboratory is able to confirm that a product has been pirated, the shop can be closed with the assistance of the police and the stock seized, followed by a claim for damages and a request for the destruction of the unlawful material which has been confiscated.

441. In the "banner" process, the examination to determine whether records and cassettes have been produced lawfully or unlawfully precedes their being offered or sold to the public. This compulsory preliminary examination requires a special legal basis. The law must stipulate that sound carriers cannot be offered or sold before they have undergone the examination of their lawful production. As a result of the examination, lawful records and cassettes are tied with a special ribbon, known as a "banner". The sound carriers in

shops and other places of sale not fitted with a "banner" are considered unlawful and confiscated at the time they are discovered.

442. By way of illustration, the "banner" process was applied in Ghana, from June 1, 1992. It quickly proved its effectiveness. The proportion of unlawful records and cassettes, previously evaluated at around 90 per cent, was reduced in the space of only a few months to less than 20 per cent for foreign works and to less than 10 per cent for national works. The preliminary examination of the lawful or unlawful nature of sound carriers was entrusted to the COSGA authors' society, which is responsible for copyright collective management in Ghana. Shops, markets and other places of sale have been checked by a special national police unit.

d. Clients' database

443. As in the case of the members and principals of an authors' society (para. 194), it is recommended to classify all the documents relating to a client in a single file – contract, preliminary consent, correspondence, visit reports, notes on telephone conversations, etc. This concentration allows, within a few seconds, any file to be made available to the employee who answers a client's telephone call. It is risky to provide a client with information without consulting its file.

444. Even though the documents of the CISAC CIS project and of the BIEM do not at the moment raise the possibility of coordinated planning in the sector of clients' databases, nothing prevents the recommendation for such a database to be established. Different opinions exist as to the potential content of such a database, i.e. should it contain clients' basic data – name and address, type of use of music, contract with the authors' society etc., – or should it include additional data.

445. The Chilean SCD society has produced a full survey in its country in order to ascertain all the places where public performances of music could take place. On the basis of all this information, it has produced an inventory in the form of a database known as an "empadronamiento" (census). The experience gained appears to be encouraging.

446. Thought might be given to accumulating, in the clients' database, not only the data relating to clients, but also those for all the musical performances authorized by the authors' society. Such a measure should, however, be linked to the electronic processing of authorizations and to the examination of newspapers and declarations by musicians (paras 434 and 435).

e. Cooperation with other institutions

447. We will not come back to the cooperation with clients' associations and banks commented on in relation to clients' payments, nor to that with musicians in order to obtain the lists of works used. However, in sum, the image of a national authors' society is obtained, which is firmly based on its country's economic, cultural and social structures, dealing with all relations as a halfway house between production and consumption on the music market. This image will be completed subsequently by a number of additional final touches.

448. In some countries, in particular Latin America, public performances of music depend on a preliminary authorization from the local municipality. These municipalities have been compelled, by administrative order or even by decree, to authorize only the musical performances for which the requestor submits the authorization of the authors' society. This "link" between the municipal authorization and that of the authors' society proves to be very effective.

449. Cooperation with the police has been dealt with in relation to the "banner" process of fighting against piracy (para. 442). It can also be useful in other sectors of copyright collective management. In the countries

which have introduced a show tax (para. 350), the police is often responsible for checking the income of organizers of concerts or similar shows. The authors' society can benefit from this and refuse to make checks of its own. In difficult or delicate situations, the representatives of the authors' society can be accompanied by a police officer. It is advisable to pay attention to all forms of cooperation. It should be added that the support of the police is easier to obtain when the copyright infringements are part of *ex officio* offenses in the penal code.

450. Finally, mention should be made of the authorities carrying out border and customs checks. Their vigilance can make an appreciable contribution to detecting unlawful records and cassettes before they are available in market squares. However, the legal obligation to submit imports to customs control is not sufficient. Here again, it is the cooperation of the authors' society which makes these checks effective.

CHAPTER 4 DISTRIBUTION – FINANCES

451. The union which exists between authors, composers and publishers for the collective management of their rights means that they renounce the individual exercise of rights of public performance, broadcasting and, possibly, recording on records and cassettes of their works. Through this renunciation, authors, composers and publishers also refrain from the possibilities of fixing the prices and conditions relating to the uses of their works. Personal considerations regarding the economic value of the music are replaced by the principles of tariff setting and the results of tariff-related negotiations (commented on in the previous chapter).

452. The absence of authors, composers and publishers from the process of setting tariffs should not lead us to believe that the society can decide freely on the segments of its income which are intended for the payment of authors, composers and publishers. The mandate to manage collectively certain copyrights is linked to legal and contractual conditions which should be scrupulously respected by societies, if those societies aspire to their activities being of long duration. These legal and contractual conditions are examined in this chapter.

453. The calculations and payments of royalties to authors, composers and publishers are referred to as the "distribution" of royalties. This expression can be misleading since it can give the impression that these are payments made in accordance with the collective management society's wishes. The fact should therefore be emphasized that the calculations and payments of royalties are dictated by legal and contractual obligations, activities of the society which are unrelated to any arbitrary consideration. The societies must report to their members and to the sister societies on any distribution operation.

1. DISTRIBUTION PRINCIPLES

454. The principles of distribution evade the free assessment of collective management societies. If, for example, a society decided – by interpreting the equality of treatment of authors, composers and publishers excessively – to pay the same amount to all its members and principals as a sort of dividend to the shareholders of a stock company, it would unleash not only waves of protest, but it would also be subject to sanctions for having infringed legal and contractual obligations. These obligations will be commented on below.

a. The principle of equality of treatment of all authors

455. One of the pillars of international copyright is specified in Article 5(1) of the Berne Convention:

"Authors shall enjoy ... in the countries of the Union ... the rights which their respective laws grant ... to their nationals."

Reference is made to "assimilation" of foreign authors to national authors or to "national treatment" in Article 3 of the TRIPS Agreement. This "assimilation" and "national treatment" correspond to equality of treatment, an expression in use within CISAC and also used in this handbook.

456. CISAC often recalls this principle of the equality of treatment of all authors. Its Charter of the Author's Right includes the following passage:

"It is above all necessary in national law, in international conventions, and in the contracts of reciprocal representation binding the authors' societies of various countries, to safeguard the principle of equal treatment for national and foreign works, a principle in itself more liberal and important than that of mere reciprocity".

457. In the Declaration which it adopted at its thirty-eighth Congress (Liège/Maastricht, October 1992), CISAC reaffirms its respect for the equality of treatment of all authors:

The collective management of copyright is fundamentally based on the principle of national treatment which, in each country, guarantees foreign authors the same rights, guarantees and conditions as those recognized for national authors. This equality of treatment between both parties is of interest in relation to the authorizations to be granted, the verification of the uses of works and the collection of remuneration as well as for the production of documentation which is reasonably sufficient in relation to the works and to their beneficiaries, the deductions made as management costs or for social and cultural purposes and the distribution of royalties.

458. The equality of treatment of all authors is also to be found in the contract of reciprocal representation, according to the CISAC model hereinafter the "CISAC Contract" – Article 3(1) of which states:

"In virtue of the powers conferred by Articles 1 and 2, each of the contracting parties undertakes to enforce within the territory in which it operates the rights of the members of the other party in the same way and to the same extent as it does for its own members, and to do this within the limits of the legal protection afforded to a foreign work in the country where protection is claimed, unless, in virtue of the present contract, such protection not being specifically provided in law, it is possible to ensure an equivalent protection. Moreover, parties undertake 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."

459. The strong emphasis on the principle of equality of treatment of all authors is explained by the no less strong reluctance with regard to this principle in authors' national milieus (para. 136). In countries which neglect their national repertoire, which have no publishers or producers of sound carriers or in which radio and television organizations clearly prefer "foreign sounds", national authors are excessively frustrated and think only of "changing their approach", by allocating themselves preferential royalties in relation to those of foreign authors. Numerous attempts to "correct the fortune", which are more or less successful, clearly indicate that the equality of treatment of all authors is the Achilles heel of all copyright collective management. The rights of foreign authors are entrusted to national authors and such authors feel themselves to be disadvantaged rather than expressing solidarity.

460. But what does equality of treatment of all authors actually mean? Firstly, such equality does not allow a national or foreign author to be excluded from the distribution of royalties where his works have been used by clients. It is therefore forbidden to remove a work from the lists of the works performed, broadcast or recorded on records or cassettes, subject to works which cannot, despite all the efforts made, be identified.

461. Care should be taken not to confuse the equality of treatment of authors with that of works. Works of short and long duration, works of small-scale and large-scale instrumentation, different types of music such as serious music, entertainment music, advertising music, etc. can be distinguished. The different categories can also be marked by factors or coefficients, but in all cases provided that the same criteria are applied to national and foreign works. A collective management society which would decide to highlight for example symphonies for large orchestras, should do so for all the symphonies performed or broadcast and not only those of national origin.

462. The equality of treatment of all authors does not mean equality of the royalties paid to authors. Thus, certain authors can obtain royalties in the millions, while thousands of others can "go hungry". It is not a question of the equality of treatment of all authors as individuals, but of the same value and strength of their rights.

b. "Suum cuique" or the "to each what is due" principle

463. Authors from all countries base themselves on the fundamental requirement that the collective management society pays them the royalty which corresponds, as closely as possible, to the amount collected for the use of their works. Let us cite one example: if the works of a composer A have been broadcast for 30 minutes and those of a composer B for three minutes, in the same program by the same broadcaster, the composer A claims a radio royalty ten times higher than that of composer B. This fundamental requirement for authors corresponds to the legal obligations of a representative. It matters little whether this is an isolated mandate or global mandates: the representative is obliged to provide a report to each principal of its management at all times and to return to it everything that it has received under this heading, for whatever purpose. It goes without saying that the legal provisions relating to the mandate also apply in full to copyright collective management societies.

464. In other words: the global union of copyrights for a whole world repertoire of music, as part of collective management at the national level, does not create any solidarity between the authors, composers and publishers as regards the financial results of this management. Each author, composer or publisher claims the amount collected by the society based on the use of his works; it cannot be obliged to "share" this royalty with other beneficiaries. In no way therefore is it a question of "distribution", but a statement, which is as precise as possible, of the amounts owed to both parties. Taking into account social considerations within distribution – as is the case with the payment of a minimum royalty to all the members of a society – would contradict the "to each what is due" principle.

465. The attachment of authors, composers and publishers to the "suum cuique" is based on traditional roots. As indicated in paragraph 354, copyright collective management began in the sector of "major rights", i.e. the theatre. A share of 10 per cent of the price of the tickets sold was paid to the author of the theatrical work. It is on this basis that the idea was strengthened whereby the author participated in the success of his work. This share constituted not only the basis of the tariff for the calculation of the royalty, but also the payment to the author, in other words the basis of the distribution.

466. Inspired by this "classic" example, the tradition of the "to each what is due" principle was also maintained in the field of the rights for recordings of music on records and cassettes. The royalties for authors, composers and publishers are calculated in the form of percentages of the proceeds from the sale of sound carriers containing their works. Where a record includes the works of a single composer, the whole royalty is paid to the composer. By contrast, where the sound carrier contains works by different composers, the question arose as to whether the distribution should be made respecting exclusively the duration of recording of each work or whether it was also necessary to weigh the success of the works with the public. This is a point of discussion where opinions differ. Thus, for the time being, only the duration of the recordings is taken into account in the calculation method.

467. The duration of the broadcast of the works in the radio and television sector corresponds to the duration of the recording for the purposes of distributing the royalties resulting from the production of records and cassettes. A very similar method is used in the sector of public concerts where the royalty is distributed depending on the minutes of the duration of performances of musical works. Given the enormous number of public performances of entertainment music, the duration of performance of works is replaced, for practical reasons, by the number of performances.

468. But how should royalties be distributed which come from uses of music for which the collective management society cannot obtain the lists of works performed or broadcast? In those cases, the "suum cuique" principle requires that the royalties are allocated to those distribution classes where the closest music is dominant. The royalties collected for the public reception of radio broadcasts – a typical example of royalties not accompanied by lists of works used – will be distributed either by allocating them to the "radio" class – which refers to the broadcast works which have been the subject of public reception – or by allocating them to public performances of music by musicians – thus taking into consideration public taste – , or by allocating them partly to one and the other of these two classes.

469. It is noted that the "to each what is due" principle obliges us to take into consideration the use of each work. And the use of the work is not a completely arbitrary element; it is linked to the author's effort and talent and to the intensity of promotion made by the publisher. This aspect of use corresponds to the intrinsic justification of the "suum cuique". A successful author cannot be obliged to share his fate with all the other authors who are less successful. In other words: the equality of treatment of all authors is manifested by relying on the use of works everywhere in the same manner.

c. The subdivision of amounts between authors and publishers

470. The practice of publishers of demanding the assignment of the rights of public performance, broadcasting and recording of the works they have published has been described in paragraph 15. These are "additional rights" which are transferred to the collective management society where the publisher is registered as a member or principal. Through the transfer of "additional rights", the member or principal publisher can claim a part of the royalties resulting from the uses of the musical works it has published.

471. How can royalties be subdivided between the author and publisher? Two solutions: the author and publisher fix their shares contractually or a regulatory scale is applied. The regulatory scale has advantages, as described in paragraph 18. It guarantees the author an appropriate share of the royalties produced by the use of his works without having to fight to obtain satisfaction. Collective management therefore has a calming influence on the relations between authors and publishers, an effect which is often ignored.

472. In addition to such regulatory scales, the vast majority of societies use a principle well established by CISAC, which emerges from Article 7(d) of the CISAC model contract of reciprocal representation:

"The publisher's share of the royalties accruing to a work, or the total share of publishers or sub-publishers of a work, no matter how many, shall in no case exceed one half (50 per cent) of the total royalties accruing to the work".

473. The procedures designed to calm the appetite of publishers for the "distribution cake" of copyright collective management were dealt with by CISAC just a few years after it was founded. The discussions at the CISAC 1931 London Congress were followed, in 1936, by the insertion of a clause in the first CISAC model contract of reciprocal representation. Other discussions also took place in 1957, in particular with the increasing importance of sub-publishing. That led to a reaffirmation of the principle, as follows:

Given ...the study of the clause entitled publisher's maximum share, which was included in the former sub-publishing regulations ... considers that the scope of this clause very largely goes beyond the assumption of sub-publishing; that it corresponds to authors' need for defense and that, in this regard, it has its place in the general doctrine of distribution.

474. Certain publishers have tried to get around this limitation of the publisher's share to 50 per cent by submitting the mandates of authors authorizing them to collect their shares. This deviated path has been blocked by collective management societies; in their distribution rules they have stipulated that no authors'

share can be paid to publishers. CISAC confirmed this attitude through a resolution, adopted in 1965, regarding the attempts by a publisher to receive payment for the authors' shares.

475. The position adopted by CISAC was not followed by the BIEM which does not deal with the balance of distribution between authors and publishers. It is noted that recording and publishing rights come closer together, which deprives the BIEM of a neutral position between the interests of authors and those of publishers.

d. The principle of full distribution

476. Each collective management society is obliged to distribute to authors, composers and publishers all its income, after management costs have been deducted and a contribution to social protection and cultural promotion made (paragraphs 690 to 697). This obligation is often based on the regulations of collective management societies and corresponds to the legal imperatives linked to management without a mandate. The representative is obliged to report on its management at all times and to return to the principal everything that he has received under this heading, for whatever purpose. As regards the relations between sister societies, the CISAC model contract of reciprocal representation includes, in Article 8(iv), the following provisions:

"No part of the royalties collected by either Society for the account of the other, in consideration of the authorizations which it grants solely for the copyright works which it is authorized to administer, may be regarded as not distributable to the other Society. Therefore, the net total of the royalties collected by one of the contracting Societies for the account of the other shall be effectively and entirely distributed to the latter".

477. In addition to the obligation to include all income in the distribution operations is that of doing everything possible to identify the authors, composers and publishers of the works used and to pay them the respective shares. This obligation forces each society to make the following checks and investigations, relative to any work performed, broadcast or recorded:

- examine whether the work used has been declared by one of the members or principals, or whether it has been documented through the dispatch of an international index card or a cue sheet, on behalf of a sister society. If that is the case, these documents must serve as a basis for distribution work;
- verify whether the name of the composer, author of the text or arranger of the work appears in the CAE documentation. Where one of these persons can be identified as a member or principal of a sister society, the whole of the amount to be distributed relating to the work in question must be paid to this society, in accordance with the "Warsaw Rule", so called because it was established at the CISAC Congress held in Warsaw in 1934:

"Where the work is identified by its title and by its composer who is a member of a Society, all the royalties stemming from the work must be distributed, without any part of the income from the work remaining non-distributable. In the absence of further information, all the royalties will be sent to the composer's society;"
- verify whether the work appears in the WWL documentation. In this case, the amount allocated to the work is distributed on the basis of the scales indicated in the WWL documentation. If this information is missing, the distributing society applies the "Warsaw Rule" as described above;
- the works which cannot be found in the database of works and in the CAE and WWL documentation are to be included, as the fourth and final stage of the searches, in the inquiry list. This is a list which is sent to all sister societies in the form of a circular, inviting them to assist in the efforts made to identify works and their beneficiaries. The societies include in these lists the works not identified with a distribution value in excess of US\$20. If the searches lead to subsequent identification, the amount to be distributed is included in an additional statement.



478. The "Warsaw Rule" is based on the consideration that the composer's society, that of the author of the text or that of the arranger of the unknown work is supposed to be the best informed because its members and principals declare their works. This also means that the society receiving payments according to the "Warsaw Rule" must distribute the sums received correctly and in full, by basing itself on its documentation. The "Warsaw Rule" would lose the reason for its existence, if the receiving societies merely "swallowed" everything up.

479. Apart from its importance in the efforts made to identify works, the "Warsaw Rule" makes a huge contribution to documentation and distribution savings. Applied faithfully, this rule protects all societies against a mutual flood of documentation which would have disastrous consequences for management costs. Let us not mistake the "essential" importance of the "Warsaw Rule"; according to estimates, the sums distributed according to this simple and tested rule amount to hundreds of millions of dollars per year.

e. The autonomy of distribution

480. Each society distributes the amounts it has collected according to its own rules. This autonomy of distribution is certified in Article 7(ii) of the CISAC model contract of reciprocal representation:

"The allocation of sums collected in respect of works performed in the territories of each Society shall be made in accordance with the distribution rules of the distributing Society".

481. However, when determining its distribution rules each society is obliged to respect the equality of treatment of all authors (see paragraphs 455 to 462). Observance of the principle of "suum cuique" is also essential (see paragraphs 463 to 469), without forgetting the obligation to limit the publishers' share to 50 per cent of the sums being distributed. In addition to all that there are other constraints motivated by the composition of the world musical repertoire.

482. The distribution scales, i.e. the regulatory shares allocated to each author, composer and publisher, differ from country to country and from one society to the next. What is the applicable key when a work from country A is broadcast in country B? The society in country B, a society which distributes the broadcasting royalty, applies the scales of the society of country A, if that society has sent an international index card relating to the broadcast work or has inserted the corresponding data in the WWL documentation. In the absence of this information, the total amount for distribution is paid to the society of country A, in accordance with the "Warsaw Rule". Subsequently, this society distributes the royalties according to its own scales.

483. What are the keys relating to a work of which the composer is a member of society A and the publisher a member of society B? According to the provisions of the CISAC model contract of reciprocal representation, both society A and society B applies its own keys, each in relation to the uses of the work in question in its country. If this "mixed work" – as it is called in technical terms – is broadcast in a country C, the distributing society in this country will base itself on the international index card of society B, i.e. the publisher's society. In case of dispatch of two international index cards, coming from societies A and B and containing different keys, society C will apply its own distribution keys.

484. As is clear from the two examples cited, the CISAC model contract of reciprocal representation is based on the principle according to which each society itself distributes the royalties which it has collected. Contrary to this principle, objections have occasionally been raised that for a young collective management society it would be premature or too complicated to carry out its own distribution from the very beginning. These objections have no foundation. The distribution work is no more difficult to assume than all the other copyright collective management activities – provided that the party concerned knows its business well.

485. Let us not forget either that autonomy of distribution is linked to the defense of national interests in relation to the world musical repertoire. Numerous opportunities to correct inaccurate documentation or to settle problems with sister societies exist in the field of distribution. Distribution provides precise knowledge of the success of each work in the national repertoire.

486. In the final analysis, only a collective management society which is fully in control of its distribution work can enjoy renown in its country. Without distribution activities and statements, it is more like a simple collection agency. The satisfaction of being able to send its own statements to its members and principals, the ability to comment on and explain all the details of the inner workings of distribution, based on its actual experiences, and transparency in all its operations, from the collection of royalties to their payment to authors, composers and publishers, all that contributes to the essential need for autonomous distribution.

2. DISTRIBUTION PROCESSES

487. All the distribution processes are characterized by two stages. Firstly, the works are defined and consequently the authors, composers and publishers which form part of the distribution of royalties. This work will be described in the following paragraphs, under the headings "the rendez-vous technique" and "the treatment of unknown works". Secondly, the amounts of the royalties to be paid to each of the beneficiaries are calculated. This "three-phase" activity is commented on in the paragraphs entitled "distribution classes", "calculation of the amount per work" and "distribution keys or scales".

a. The "rendez-vous" technique

488. The distribution of all royalties is based on the actual use, in the form of public performances, broadcasts or recordings on sound carriers, of protected musical works, as explained more precisely in paragraphs 464 ff. The distribution basis therefore consists of the lists of works used, obtained from clients or musicians or producers of phonograms (records and cassettes), according to the methods indicated in paragraphs 406 ff.

489. Even though these lists of works used have been carefully drawn up and contain all the works performed, broadcast or recorded, they lack information essential for the distribution of royalties: the indication of all the beneficiaries (authors, publishers etc.) that have participated in the creation of the works and all the publishers participating in their publication and disclosure. The labels on the records and cassettes mention certain names, but this information is always fragmentary and the publishers are not always mentioned. Consequently, it is excluded to proceed with a form of distribution utilizing only the lists of works used as the sole source of documentation. These lists provide information on the uses of works, but not on their state of documentation.

490. This initial situation obliges any collective management society to go through its documentation for each work used. Royalties are distributed only and exclusively on the basis of the declarations of works submitted by authors, composers and publishers as well as international index cards or cue sheets from sister societies or also CAE and WWL (now IPI and WID respectively) documentation. Any work mentioned in a list of works used is the subject of documentation searches, as indicated in paragraph 477. In technical terms, this is the confluence of two giant rivers of data: the river of documentation data, on the one hand, and the river of the lists of works used on the other.

491. The "rendez-vous" technique for documentation data and use data corresponded, up to the middle of the last century, to an entirely manual process. Teams of employees searched, for years on end, in huge files for documentation on the works mentioned in concert programs, broadcasters' lists or record producers' reports. The continual increase in the number of works, performances, broadcasts and recordings reached

the limits of human and technical capacities. Collective management societies therefore seized information technology as a kind of safety board to extract themselves from the flows of data on documentation and use of works. Computerized methods have developed to such an extent that the manual "rendez-vous" has now disappeared. As part of the cooperation for development activities within WIPO, particular attention is given to young authors' societies, so that they may, using appropriate computer equipment and software available, resort from the beginning to the "rendez-vous" technique.

492. The application of the "rendez-vous" technique requires preparation. This consists in setting up a database of works, according to the description included in paragraph 204. It should be ensured that this is a unique and complete database, so that searches can focus on this base without being dispersed among other sources of documentation. In the past, a number of societies had produced separate files for works in the national repertoire and for foreign works. They were obliged to abandon this separation in order to avoid the repetition of documentation search work. The bell has also tolled for all documentation of works limited either to performance and broadcasting rights, or to recording rights.

493. Numerous societies have hesitated to insert immediately the complete documentation for all works declared or communicated by international index cards or by cue sheets in the database of works. This hesitation is explained by the fact that only a minority of the works declared or communicated would subsequently be used in the form of performances, broadcasts or recordings. In other words: the setting-up of a "dead" database of works should be avoided. This consideration neglects, however, the principle of complete distribution. The society is obliged to include all the works used in its distribution methods. If it does not find the appropriate documentation in its database of works, and the database does not contain the documentation for all the works declared or communicated, there follows painful, painstaking and quickly very expensive searching in all secondary or related documentation. These "searches" very quickly exceed the volume of work for the immediate and complete supply of the single database of works. An intermediate solution would consist in inserting in the database, in the first instance, only the title of the work and the names of the authors and publishers as beneficiaries; i.e. the search criteria as indicated in paragraph 496, pending the use of the work for subsequent insertion of the scales, factors, etc. Such an intermediate solution serves to slow down the distribution operations. For this reason, it is recommended to produce and maintain a complete database of works, kept constantly up to date.

494. Since this complete and up-to-date database of works is available, the "rendez-vous" can begin. With the list of the works used one after the other in front of him, the operator searches on the screen, work by work, in the database of works. In the case of a meeting – or a "rendez-vous" - the number of broadcasting minutes, number of performances or number of sound carriers produced, indicated in the list, is inserted. By "crediting" the work in this way, the "rendez-vous" is completed. The distribution operations can continue by using a computer.

495. The "rendez-vous" process is repeated numerous times; it therefore merits very great attention to avoid superfluous expenditure. The "rendez-vous" operations of a small collective management society quickly number between 100,000 and 300,000 a year. In medium-sized and large authors' societies, these figures are in the millions. In relation to management costs, it is therefore essential to know whether a "rendez-vous" occurs on average within 10 seconds, 20 seconds, one minute or even more.

496. The duration of the "rendez-vous" depends on two criteria: the speed of responses from the computer and the programming of the search process. The speed of the responses depends on the technical capacity of the machines. This aspect must be carefully examined before the equipment is purchased. When programming the search process, it should be ensured that the search is conducted with a minimum number of criteria to be inserted. Experience shows that the "rendez-vous" is obtained most quickly by inserting two or three letters of the title of the work and four or five letters of the author's name. Through this limitation of the search criteria, the barriers presented by differences in spelling are also more easily overcome.

b. Treatment of unknown works

497. The lists of works used include works not appearing in the database of works. These works are therefore unknown or, more precisely, unknown for the time being, because subsequent searching of the CAE (IPI) and WWL (WID) documentation is done in order to lead to a payment in accordance with the "Warsaw Rule". But how should we proceed "in the meantime" with these unknown works?

498. A few not very numerous societies remove unknown works from the lists of works used. They therefore save costs on subsequent searches and feel justified in their attitude, in considering that each removal of unknown works helps to increase the payments made to the authors, composers and publishers of known works. These advantages are, however, opposed by the serious shortcoming of not respecting the principle of full distribution, which obliges any society to consult international documentation. These few societies are unaware of the CISAC guidelines regarding the inquiry list.

499. The immediate insertion of unknown works in the database of works has proven to be an economical and effective measure. The title of the work and names of the authors and/or composers, as well as possibly the publishers, are indicated as they appear in the list of works used. In addition, the unknown work is credited with broadcasting minutes, performance figures or numbers of sound carriers produced. In this manner, the "rendez-vous" work is not interrupted and all the data for subsequent searches has already been inserted, without having to seek recourse once again to the lists of works used.

500. The insertion of so-called unknown works in the database of works obliges us, however, to specify, for each work, whether it is a documented or undocumented work. For this purpose, there is a heading "state of documentation" indicating whether a work:

- has been declared by a member or principal;
- has been included in an international index card or a cue sheet;
- has been created by a member or principal, but has not yet been duly declared.
(This annotation allows an invitation to be sent to the member or principal to declare its work);
- has been the subject of a payment in accordance with the "Warsaw Rule";
- has been inserted in an inquiry list;
- is to date completely unknown.

501. The process of immediate insertion of any unknown work in the database of works has proven its worth in relation to "hits". In our age of momentary and short-lived success, musical works undergo an increase in broadcasts and performances before the arrival of an international index card or a declaration by a sub-publisher. Through the immediate insertion of these works in the database of works, with an annotation of all the broadcasts and performances from the time of their appearance, it is ensured that no success is lost.

c. Distribution classes

502. The definition of distribution classes takes place at the beginning of the calculation of the royalties to be paid to any author, composer and publisher of the works used. What should be understood by "distribution class"? Reference is made to distribution classes when a collective management society decides to distribute a sum of money defined on the basis of the lists of works used also defined. By way of illustration, here are two examples. When a society decides to distribute the royalty paid by the State broadcasting organization on the basis of the lists of the works broadcast by this organization, the decision corresponds to the institution of a "State broadcasting distribution class". Similarly, where a society deposits all the royalties paid by the hotels and restaurants in its country in a single account and distributes its content on the basis of the lists of the works performed by the musicians, it creates a "public establishment distribution class".

503. How many distribution classes should be introduced by a collective management society? Traditionally, it was recommended to have only a minimum number of distribution classes, because each additional class entailed additional expenditure. Nowadays, with the advanced state of information technology, this argument has lost weight. The number of distribution classes scarcely influences management costs. However, the definition of distribution classes adversely affects the accuracy of the results of distribution, as shown by the following example. In restaurants which provide "karaoke" shows, a special kind of music is used. Should these restaurants be placed with all the other public establishments in a single distribution class or is it preferable to introduce a distribution class specific to "karaoke" restaurants? A special distribution class would mean that "karaoke" income is distributed in a precise manner to the beneficiaries of this "karaoke" music.

504. Each collective management society takes its own decisions concerning the number and scope of its distribution classes. In the CISAC model contract of reciprocal representation, a minimum number of distribution classes is, however, stipulated, according to Article 9(iii) for:

- general royalties;
- radio and television; and
- sound films.

The expression "general royalties" refers to any sort of public performance of music.

505. Should distribution classes be devised in a broad or rather narrow way? The response to this question depends on the care which is sought for each use of a work. In the sphere of theatrical performances, it has always been customary and even essential to distribute per performance. According to this tradition, numerous societies distribute royalties for large serious music concerts by concert; this process is known as "distribution by program". Each concert therefore constitutes, so to speak, its own distribution class. By referring to the definition included in paragraph 502, the royalty collected for a specific concert is distributed on the basis of the concert program.

506. "Distribution by program" also takes place in the sector of recording rights. The royalty collected for each record or cassette is paid to the authors, composers and publishers of the works recorded on the same record or same cassette.

507. "Distribution by program" is more expensive than that per major distribution class. It would therefore be rarely indicated that the royalties paid by each restaurant should be distributed on the basis of the lists of the works performed in the same restaurant. In view of the similarity of the music performed in all the restaurants – perhaps with the exception of "karaoke" restaurants, as indicated in paragraph 503 – the most economical solution is that of a single "public establishment" distribution class.

d. Calculation of the amount per work

508. This calculation tends to allocate to each work performed, broadcast or recorded the value which corresponds to its use. This calculation is done, taking the example of the State broadcasting organization mentioned in paragraph 502, as follows:

Let us suppose that:

- the organization pays an annual royalty of 200,000 dollars;
- its lists of broadcast works mention 142,027 works;
- with a total music broadcasting duration of 454,486 minutes.

These figures relating to the works and to their broadcasting duration result from the "rendez-vous" work. They allow the value to be defined per minute of music broadcasting:

$$200,000 \text{ dollars} : 454,486 = 0.44 \text{ dollars.}$$

The minute of music broadcasting therefore corresponds to a value of 0.44 dollars. Where a musical work has been broadcast five times, with a total of 17 minutes' broadcasting, the following value is allocated to it:

$$17 \times 0.44 \text{ dollars} = 7.48 \text{ dollars.}$$

The calculation of the value of each work is made using a computer program, once the "rendez-vous" activities have been completed.

509. The value of each performance of a work in hotels and restaurants is calculated in a similar manner.

Let us suppose that:

- all hotels and restaurants pay an annual royalty of 360,000 dollars;
- the lists of musicians relating to the musical works they have performed contain 42,415 works;
- with a total of 1,033,710 performances.

These figures for works and performances result from the "rendez-vous" work. They allow the value to be defined per performance of a musical work:

$$360,000 \text{ dollars} : 1,033,710 = 0.348 \text{ dollars.}$$

The value per performance of a musical work is therefore 0.348 dollars. Where a musical work has been performed 136 times according to the lists of hotels and restaurants, the following value is allocated to it:

$$136 \times 0.348 \text{ dollars} = 47.33 \text{ dollars.}$$

The calculation of the value of each work is made using a computer program, once the "rendez-vous" activities have been completed.

510. Here is the example of the calculation of the value of the work in the case of production of records or cassettes.

Let us suppose:

- a manufacturer produces 5,000 copies of a record and for this purpose pays a royalty of 8,421 dollars;
- the record contains eight musical works with the following recording duration:
 - work A: 6 minutes
 - work B: 7 minutes
 - work C: 4 minutes
 - work D: 10 minutes
 - work E: 8 minutes
 - work F: 8 minutes
 - work G: 9 minutes
 - work H: 5 minutes
 - in total: 57 minutes



There emerges a value per minute of music recording, calculated as follows, of:

$$8,421 \text{ dollars} : 57 = 147.74 \text{ dollars.}$$

On the basis of this value per minute of recording, the value of each recorded work is obtained:

work A	6 x 147.74 dollars	= 886.44 dollars
work B	7 x 147.74 dollars	= 1,034.18 dollars
work C	4 x 147.74 dollars	= 590.96 dollars
work D	10 x 147.74 dollars	= 1,477.40 dollars
work E	8 x 147.74 dollars	= 1,181.92 dollars
work F	8 x 147.74 dollars	= 1,181.92 dollars
work G	9 x 147.74 dollars	= 1,329.66 dollars
work H	5 x 147.74 dollars	= 738,70 dollars
in total		= 8,421.18 dollars

The difference of 0.18 dollars between the royalty paid by the manufacturer and that distributed corresponds to the – obvious – constraint of having to round off amounts.

511. In the three examples in paragraphs 508 to 510, no reference is made to any factor or coefficient allocated to the works, as per the comments made in paragraph 461. Such factors or coefficients form part of the calculations in order to determine the value of each work. Thus for example, numerous societies allocate a higher factor to serious musical works, in relation to entertainment music, considering that creative effort should play a certain role, without wishing to threaten the principle of the equality of treatment of all authors.

512. The fact should be emphasized that the factors or coefficients must be applied to all the works concerned in the world music repertoire and cannot be limited to promoting works in the national repertoire. In other words: factors or coefficients applying only to the national works of the distribution society would constitute a flagrant violation of the principle of the equality of treatment of all authors.

513. Coefficients can also be used to smooth out inequalities in the distribution classes. A whole series of societies allocates, for example, to programs broadcast in the evening a higher coefficient in order to take into consideration the larger audience during these hours. If a distribution class covers all the payments made to large and small hotels, it is possible, using a coefficient, to give more weight to musical performances in large hotels. By contrast, the sector of production of records and cassettes does not use such factors or coefficients.

514. To sum up, it is noted that each distribution consists of three phases:

- first phase: determination of the total amount by distribution class;
- second phase: determination of the amount per work used;
- third phase: determination of the amount per beneficiary of each work.

e. Distribution keys or scales

515. The question as to whether distribution keys are fixed contractually between the beneficiaries of a work or whether they correspond to uniform keys included in distribution rules has been dealt with in paragraph 471. The following comments are limited to regulatory keys.

516. The society SACEM has also devised the first distribution key in the sector of non-theatre music. The "SACEM key" is as follows:

1/3	composer
1/3	author of text or lyric writer
1/3	publisher.

This key is always applied in continental Europe. In the information technology age, fractions have been converted into percentages. Corresponding to SACEM's field of activity, this key refers to the distribution of royalties from public performances and broadcasts of musical works.

517. It emerges from the "SACEM key" that the composer and author of the text receive equal shares. This feature is valid throughout the world, with certain reservations for German-speaking countries where a certain propensity in favor of composers is observed.

518. When two composers, known as "joint composers", participate in the creation of a musical work, they divide the composer's share equally. A plurality of composers in no way affects the share of the author of the text. The same is true in the case of two authors of text. Here are two examples of keys:

C	16.65%	C	33.30%
C	16.65%	A	16.65%
A	33.30%	A	16.65%
E	33.40%	E	33.40%

519. When an arranger is added to these beneficiaries, his participation does not take place at the expense of the composer alone, i.e. of the sound portion – as may be presumed – but the arranger's share reduces the shares of the composer and the author of the text equally, according to the following example:

C	28.30%
A	28.30%
AR	10.00%
P	33.40%

The arranger's share varies from society to society, depending on the importance they attach to musical arrangements.

520. When the circle of beneficiaries is expanded by the entry of a sub-publisher, the original publisher and the sub-publisher together receive half of the royalties, according to the limit explained in paragraph 472. By devising Federal Regulations on Sub-Publishing, CISAC sought for a long time to impose certain conditions for the recognition of a sub-publisher as such and to introduce rules concerning the sub-division of the publishing share between the original publisher and the sub-publisher. However, collective management societies tend rather to monitor the contracts between original publishers and sub-publishers.

521. With the entry of a sub-publisher, the shares of the composer and author of the text are reduced and no longer exceed half of the royalty:

C	25%
A	25%
P	15%
SP	35%



In case of an arranged and sub-published work, the distribution key is as follows:

C	20%
A	20%
AR	10%
P	15%
SP	35%

with variants relating to the arranger's share, as indicated previously.

522. Usually the original publisher authorizes the sub-publisher to make arrangements of the sub-published work or to have the words of a song translated into the language of the sub-publishing country. The arrangers or translators commissioned by sub-publishers are known as "sub-arrangers" or "sub-authors". In those cases, an additional rule applies, according to which all the sub-beneficiaries together cannot claim more than half of the total royalty. The other half therefore remains strictly reserved for the original beneficiaries, i.e. the composer, author of the text and original publisher:

C	17.5%	C	17.5%	C	17.5%
A	17.5%	A	17.5%	A	17.5%
P	15.0%	P	15.0%	P	15.0%
SA	7.5%	SA	15.0%		
SR	7.5%			SR	15.0%
SP	35.0%	SP	35.0%	SP	35.0%

These scales are, however, "theoretical" in the sense that the sub-publisher hardly ever receives a share of 35 per cent. Consequently, these keys should be adapted to the provisions of sub-publishing contracts.

523. In the English-speaking world, the custom of "fifty-fifty" has been established, i.e. all the creators together receive half of the total royalty and all the publishers together receive the other half. Here are the examples:

C	25%	C	50%
A	25%		
P	50%	P	50%

In case of an arrangement, the arranger does not form part of the circle of distribution beneficiaries: he is considered to be an author employed or commissioned by the publisher and it is the publisher that remunerates him for his contribution.

524. The publishing share of 50 per cent remains stable when an English-speaking publisher produces a sub-publication in another country in the English-speaking world. In other words: the sub-publication in the English-speaking world does not lead to an increase in the publishing share. That means that the sub-publication in this part of the world appears to be less attractive than in Europe.

525. In the sector of recording rights – in the field of the BIEM – the rules and customs described above are scarcely applied (see paragraph 475). The collective management of recording rights has opened up quickly to the English-speaking practice of "fifty-fifty". In the case of sub-publication, the shares of the publishers and sub-publishers together often exceed half and reach levels of 60 per cent or even higher in certain cases, which disadvantages the other beneficiaries. But here again, the proximity of the right of publication – an area where ten-per cent participation of the creators is the tradition – makes itself felt.

3. STATEMENTS

526. The share of each author, composer and publisher – final result of any distribution activity, as indicated in paragraph 514 – must be paid to its recipient. Is a statement required for that or is it sufficient to make a payment to a bank account? In response to this question, it sometimes appears that certain authors are interested only in money and that producing statements would thus prove to be of no use. This is a procedure to be avoided. Beneficiaries wish to know which are the works that have found favor with the public and where they have been performed, broadcast or recorded on records or cassettes. Authors, composers and publishers seek success among the public and wish to know all the traces of goodwill and attention manifested by the public. It would therefore be inappropriate to neglect their legitimate interests.

527. The statements offer collective management societies the best opportunities to submit proof of their powers. Whether calandered paper is used for the printing of regulations or annual reports are published in four or six colors – all that is wasted effort in relation to detailed statements. Statements represent the collective management society's business card given to its members and principals – and even to sister societies. Statements represent and strengthen the links of trust between authors, composers and publishers as well as all those that deal with the collective management of their rights.

528. A good business card is reflected in the graphic effort made with good presentation of results. This remark is necessary because we often see neglected statements – with no address or date, with incomprehensible code numbers or hieroglyphics, with no comments or covering letter – in brief, with no effort made to achieve a clear and attractive presentation of the results of collective management. It is scarcely surprising that authors, composers and publishers have a bad image of their collective management society in the absence of well produced and well presented statements. This chapter therefore begins with the advice to avoid any mediocrity in relation to statements.

a. The content of statements

529. In order to measure easily the success of each work, the statements must be indicated by work, preferably in the alphabetical order of their titles. Thus for each work the distribution classes to which the work belongs, how many times it has been performed, broadcast or recorded, and the resulting amounts of the royalty will also be specified. The total amount of the royalties per work and the overall sum which is the subject of payment will be added, with an indication of the method of payment, for example a bank account. If the distribution classes or other information are designated by abbreviations, an explanatory table should be added to the statement of accounts.

530. The information mentioned in the previous paragraph constitutes a minimum. In addition, it has proved useful to mention in the statements not only the titles of works, but also the names of all the authors, composers and publishers with the percentages of their share of the distribution proceeds. This information avoids not only carrying out numerous searches of other documentation, but also draws the attention of interested parties to modifications which might have been made since the last statements, such as the end of publishing contracts. In this way, the examination of the statement leads to a periodical check of the state of documentation.

531. By experience, authors, composers and publishers demonstrate a particular interest in the broadcasts of their works by large broadcasting chains. For this reason, numerous societies attach to the statements a list which indicates, for each broadcast of each work, the following information:

- the day of broadcast;
- the name of the broadcaster;
- the title of the program in which the broadcast was contained;
- the broadcast minutes.

Such information requires a particular effort with regard to computer programming, which is worth it!

532. A similar development can be described for the collective management of recording rights. Authors, composers and publishers wish to know:

- the make of records or cassettes;
- the catalogue numbers;
- the titles of sound carriers;
- the figures for production of records or cassettes;
- the sales figures and sale territories;
- the sale prices.

533. The article of the CISAC contract of reciprocal representation obliges collective management societies only in the following manner:

"Each payment shall be accompanied by a distribution statement in the form of a list of the works used ... in the alphabetical order of the titles of the works".

534. For about 30 years, societies have sent statements in the form of magnetic tapes. The structuring of these tapes must correspond to certain standards established by CISAC. The cost of international statements has decreased considerably thanks to the use of these tapes. They are mentioned in Article 9(ii) of the CISAC model contract of reciprocal representation:

"Each payment shall be accompanied ... by a magnetic tape containing, according to the CISAC/BIEM models, the distribution results in such form as to enable the other Society to allocate to each interested party, whatever his membership or category, the royalties accruing to him."

b. Timetable of statements

535. In the past collective management societies produced annual statements, in accordance with Article 9 of the CISAC model contract of reciprocal representation:

"Each of the contracting Societies... shall remit to the other the sums due under the terms of the present contract ... at least once a year".

536. Annual statements were conditioned by their cost. The development of information technology has reduced the problem of expenses. Societies began to reduce the deadlines for dispatch of the statements and to move from an annual statement to a six-monthly statement and then a quarterly statement. The idea was also abandoned whereby statements should cover all distribution classes. Radio-television, general royalty, phono etc. statements have been created and are sent immediately after the respective distribution work. Thus, statements and payments extend over the whole calendar year.

537. This development is at the origin of the idea of considering the royalties paid to authors to be a sort of "salary" and, in that sense, to produce a system of monthly payments. Such a monthly schedule does not give rise to IT problems but risks not producing the desired effects if the database of works is not kept constantly up to date and if the declarations of works, international index cards and cue sheets experience delays in their processing.

538. At the beginning of this chapter, in paragraph 526, mention was made of the eminent interest of authors, composers and publishers in the uses of their works. In this area, it is important that the information provided is up to date, since all the parties concerned wish to be informed as quickly as possible of the fate

of their works. If the society manages to respond to the desires of its members and principals, the statements are, in the market research sector, a valuable clue in discovering the public taste at a given time and in order to guess the style currently in fashion, in other words the famous "trends". This is true in particular for publishers, for whom collective management statements, in the form of feedback from the music market, constitute support for their direction and planning.

539. This immediate interest in the uses of works is manifested less in relation to sister societies. Consequently, CISAC tolerates a situation where the statements to be sent to the members and principals of the distributing society are produced as a matter of priority and statements for overseas follow after a period which should not, however, exceed three months.

540. All the efforts to accelerate distribution work, the dispatch of statements and payments to authors, composers and publishers are quite often brought into question on the grounds that such an attitude would lead to a reduction in the interest obtained from the sums for distribution. This point of view should not be neglected, but it should be countered by the consideration that any delay in or any non-acceleration of statements and payments leads to a certain loss of interest for authors, composers and publishers! Also, the character of the collective management society's activities as a service provider forbids the consideration of the interest accumulated in the society as more important than that obtained directly by authors, composers and publishers.

541. In the past, the end of the distribution work was often unknown and statements were sent to members and principals with the accuracy of a weather forecast! With the development of information technology, the situation has changed. It is essential for each society to produce, at the beginning of the year, its plan for distribution work and statements, for the society to publish the plan, send it to all its members and principals and ... for the society to respect it!

c. Verification of statements

542. It is essential to verify the statements not only for the purposes of the distribution operations when the statements have been printed and are waiting to be sent to members and principals, but also during the three phases mentioned in paragraph 514. It is necessary to be able to reconstitute any activity, which means that a background program should underpin all the processes. One phase should not be launched before ensuring that the previous phase has been completed without error or omission. In this sense, it is strongly recommended to:

- verify whether the total of the amounts allocated to the different distribution classes actually corresponds to the sum of the royalties available for payment to the authors, composers and publishers;
- check whether the amounts calculated for each work correspond, in each distribution class, to the sum allocated to this class;
- ensure that the total of all the statements corresponds to the sum of the royalties available for payment to the authors, composers and publishers.

543. A simple plausibility check is added to these arithmetical checks. Before printing the statements, the IT service provides a list of all the members and principals, indicating for each of them the amount of the last statement and the amount of the forthcoming statement. A comparison of these two figures allows any irregularity to be noted and easily corrected, before the statements are printed.

544. The verification of the statement by the beneficiary has the same importance as internal checks. The beneficiary should be invited, by means of a covering letter, to study these statements, to devote the requisite time to comparing the results of the collective management with its own observations and experiences, and to communicate any inaccuracy to the collective management society. The processing of these communica-

tions – which may number in the hundreds – could be entrusted to a small *ad hoc* working group which would carefully examine any irregularity noted, would inform the beneficiaries of the results of this examination, would produce as appropriate additional statements, and in the final instance would analyze whether the distribution and statement processes can be improved.

545. The invitation issued to the authors, composers and publishers to participate actively in the verification of the statements is not shared by all societies. Certain societies consider that the beneficiaries should, after all, be happy to receive statements and to desist from wishing to complicate the society's life. This vision should not be encouraged and the fact should not be disregarded that very often authors, composers and publishers are perfectly familiar with the uses of their works, *inter alia* when they themselves participate in public performances, broadcasts or recordings. It is therefore necessary to benefit from this knowledge. Furthermore, the support of members and principals fosters the climate of solidarity and mutual understanding.

d. Payments and advances

546. At the very beginning of collective management, authors, composers and publishers appeared in person at the headquarters or an agency of the society in order to receive payment of the royalties in "clear and ready" cash. Societies now make use of the possibilities of transfers, in particular by bank draft or check.

547. All payments are made in the national currency of the distributing society. This goes without saying for its members and principals; for sister societies, the CISAC model contract of reciprocal representation stipulates, in Article 9(iii): "*Settlements shall be made by each Society in the currency of its country*".

548. In certain countries measures to verify or limit currency transfer can lead to delays in payments. Faced with these difficulties, CISAC drew up a sort of "code of conduct" which left its mark on the CISAC model contract of reciprocal representation, Article 9(vi) of which is worded as follows:

"So long as legislative or statutory measures impede the free exchange of international payments, or exchange control agreements have been or will be concluded in the future between the countries of the two contracting Societies, each Society shall:

(a) without delay immediately after drawing up the distribution account for the other society, take all necessary steps and comply with all formalities as required by its national authorities in order to ensure that the said payments can be effected at the earliest possible moment;

(b) inform the other society that the said steps have been taken and formalities complied with when sending to it the statements mentioned in paragraph (II) of the present Article".

The scope of these provisions has been reduced where societies have begun to provide compensation for the amounts of the statements, transferring only the surplus.

549. When, at the time of manual distribution work, statements were a long time in being produced, the payment of advances was very important for authors, composers and publishers. However – and it is interesting to note this – such importance has scarcely diminished with the acceleration of the statements. Now as before, a good number of authors, composers and publishers must resort to advances. These needs should help to eliminate the condescending attitude with which certain societies grant advances. This is a commercial relationship the same as any other between the member or principal and its society. To deal with this as with common matters, it is necessary above all for the society to fix and publish the conditions and general limits of all advances. Proceeding in this manner, it is also possible to avoid procedures considered to be humiliating for certain parties. Societies pay advances on the basis of a simple telephone call or letter.

550. Normally, the amounts of the following statements are used to pay off the advances, but in the cases of repetitive advances, the society can set up a permanent advance system, especially in the cases of publishing firms that regularly receive large sums. A number of societies seek to hamper this development by demanding interest for advances, interest which may sometimes be prohibitive. This is to forget that advances are paid from the pocket of the author, composer and publisher concerned, and that this is in no way a loan but advance payment of a debt. Consequently, it is necessary to refrain from demanding interest on advances.

e. Payment exemptions

551. "Dollars should not be spent in order to manage cents". This saying also concerns collective management societies and touches on a problem of considerable scope. Each society is continuously faced with the management of tiny amounts. This is the case for example when a work has been used only once, in modest financial conditions. According to the example described in paragraph 509, the value of a public performance is 0.348 dollars. Let us suppose that a composer, author and publisher have participated in the work performed; each of these three beneficiaries should receive a sum of 0.116 dollars or 12 cents. Is it worth writing a statement and making a payment if these beneficiaries do not receive other royalties? The response can only be negative.

552. Experience teaches us that all computer operations must be conducted whatever the size of the amounts to be processed. An operation to eliminate minimal sums would be more expensive than leaving them in the large mass of data. In our example, this means that the 12 cents will be credited to the three beneficiaries. However, the payment of these minuscule sums can be suspended. Such a suspension does not entail losses for the beneficiaries. The payment is only delayed until the time when other larger royalties are added, so that the payment threshold can be placed quite high at five or 10 dollars for example. This limit should not, however, be applied in cases of additional statements.

4. FINANCES

553. Collective management societies collect and pay amounts in the same way as thousands of firms in every country. Whether it relates to the supply of electricity, the sending of books through the post, service and maintenance contracts for heating installations or forms of consent for performance, broadcasting or recording of music, the accounts must be structured in the same way with one account per client indicating its debits and credits. The same aspects are to be found in the relationship between the society and its members and principals: one account per member or principal, similar to those of the health insurance funds for insured persons or those of firms concerning their employees and workers.

554. As regards common accounting, it appears superfluous to describe all the operations in detail. We will limit ourselves to commenting on the particular features of the financial system in copyright collective management.

a. The absence of profit making

555. The absence of profit making corresponds to the nature of the mandate agreed on with the authors, composers and publishers, obliging the society to include all the royalties it has collected in its distribution and statement work, as indicated in paragraphs 476 to 479. Any tendency towards profit making would be such as to reduce the services provided for authors and publishers; and would be contrary to its position as an intermediary between production and consumption on the music market. It would not be fair for clients to have to pay amounts not intended for beneficiaries.

556. CISAC specifies this point of view in paragraph 13 of its "Charter of the Author's Right":

"Authors' societies are not commercial organizations, nor are they actuated by motives of financial gain. They retain from what they collect only such sums as may be required to cover their expenses".

557. The requirement to renounce any profit-making purpose is also firmly based in numerous national copyright legislations, most often as a condition of the grant of an official authorization to perform collective management activities. In Europe, Article 45 of the 1992 Swiss Law stipulates:

"Management societies... shall not pursue a profit-making aim".

In South America, for example, Article 109 of the 1998 Ecuadorian Law contains the following provision:

"A collective management society shall be a legal entity under private law, with no profit-making purpose, the social aim of which is the collective management of authors' economic rights and related rights".

In Africa, such legal provisions do not exist. This is easy to understand for countries in which the collective management of authors' rights is entrusted to professional public institutions working, as a result of their status, with no profit-making purpose.

b. Management expenses

558. "Management expenses" means all the expenses that are essential for the exercise of copyright collective management. In the CISAC model contract of reciprocal representation, these expenses are defined in Article 8(i) as "effective administration expenses". The financial efforts to promote the social protection of authors, composers and publishers, and also cultural promotion, are not part of these fees (these two aims are the subject of special regulations, commented on in para 688 ff.).

559. These "effective administration expenses" are deducted from the royalties collected by the collective management society. This operation is also linked to the principle of equality of treatment of all authors (see comments in paras. 455 to 462). Consequently, this deduction must be a single percentage for all national and foreign authors and publishers. Article 8(i) of the CISAC model contract of reciprocal representation contains the following clause:

"This necessary percentage shall not exceed that which is deducted for this purpose from sums collected for members of the distributing Society and the latter Society shall always endeavor in this respect to keep within reasonable limits, having regard to local conditions in the territories in which it operates".

560. What do "reasonable limits" mean? Most societies consider that a figure of up to 30 per cent for the management of public performance and broadcasting rights fits within this limit. During the past ten years, a series of reductions in the percentage of expenses has been observed. However, the vast majority of young societies are burdened with initial investments and cannot go further than 30 per cent.

561. The same downward trend in the percentage of expenses can be observed with societies managing recording rights. Contrary to the CISAC model for the collective management of public performance and broadcasting rights, the BIEM does not base itself on actual precise service expenses, but invites companies to choose between a figure of 15, 20 or 25 per cent. The expense-related deduction cannot therefore exceed 25 per cent. In some countries, societies operate with rates of less than 15 per cent.

562. It should be pointed out that CISAC abstains from any notion of reciprocity with regard to expense percentages. If society A works with 28 per cent of expenses and society B with 22 per cent of expenses,

society B does not claim any compensation for this difference in expense percentages. In the BIEM, the situation is not very clear in this regard.

563. In the world of copyright collective management, the percentage of fees is one of the "political prices", i.e. great importance is attached to it as, in certain countries, for the price of bread, milk or petrol. Collective management societies therefore pay particular attention to presenting themselves with a percentage of fees contributing to their renown. The method of use of interest and unknown authors' shares may have a certain influence on the rate of expenses. This question will be dealt with in paragraphs 566 and 571.

c. Interest

564. A certain amount of time is necessary between the collection of royalties from clients and their payment to authors, composers and publishers, in order to carry out distribution and statement work. During that time, the sums "to be distributed" can be invested with a bank, short term or long term, in order to generate interest. Caution should be exercised with speculation operations – authors, composers and publishers do not like to risk losing part of their income – and "healthy and economical management" should be exercised, in accordance for example with the 1992 Swiss Law (Article 45). What is permitted differs between countries, according to the legal provisions governing fiduciary activities.

565. How can the interest thus obtained be used? In response to this question, it should be recalled that interest has been generated by national and foreign capital to be distributed. That excludes all unilateral use in support of the members and principals of the distributing society. In other words: the use of interest must respect the principle of equality of treatment of all authors.

566. Two possibilities exist for correct use of interest:

- the interest is added to the amounts to be distributed; or
- the interest is used to pay management expenses, thereby reducing the deduction percentage to cover management expenses, as indicated in paragraph 559.

Both solutions are used, with a preference for the use of interest to reduce management expenses. In order to avoid any misunderstanding, it is specified that the payment of a part of the management expenses by means of interest does not tend to modify the amount of the actual expenses. In the company's operating account, the actual fees and their method of coverage should be indicated. In this connection, reference is made to the comments contained in paragraph 574.

d. The shares of unknown authors, composers and publishers

567. According to the principle of complete distribution, a whole series of searches is carried out for each work, each author, composer and publisher, as was stated in paragraph 477. Despite these efforts, it is unfortunately not possible, even with the best will in the world, to identify all the works. Each distribution encounters its share of unknown works. For many years, this share has been placed, for collective management societies with a well-supplied database of works, at about five to seven per cent. This figure can rise up to 20 per cent in the distributions of young societies and can even go higher.

568. What is to be done with the amounts allocated to the works which remain unknown? In response to this question, it will be recalled that the society incorporates the rights of unknown authors in its management as a form of business management without a mandate, as specified in paragraphs 273 to 282. This form of management obliges the society to keep the shares of unknown authors available to them for a certain period. In case of subsequent identification, the society is still obliged to pay these shares to the beneficiaries. After this period, which extends in accordance with national legislation from three to five years, the collective management society may dispose of these shares.



569. This period does not, however, mean that all the shares of unknown authors remain untouchable for three to five years and are "eroded" by inflation. According to experience, the cases of subsequent identification relate to between 15 and 20 per cent of the amounts held in reserve. The vast majority of the shares are therefore available at the close of each distribution phase.

570. How should these shares be used? Let us not forget that, in response to this question, most unknown authors are probably foreign authors. This fact excludes any possibility of exclusive use of these shares in support of the members and principals of the distributing society.

571. Consequently, there remain the same possibilities for use as those described in paragraph 566 in relation to interest. It is recommended also to seize the opportunity to reduce the percentage of the deduction to cover the management fees.

e. Balance sheets and operating accounts

572. The rules for closing balance sheets – the faithful presentation of assets and liabilities at the end of the financial year – are valid for copyright collective management societies in the same way as for any other firm. The only peculiarity which may be mentioned is that, in the liabilities, all the resources without a particular allocation must be shown as amounts to be distributed. That corresponds to the principle of full distribution, described in paragraphs 476 to 479.

573. In relation to balance sheets, mention should be made, with reference to the comments in paragraph 333, of the "decredere" account. The resources in this account correspond to the problems caused by clients who do not pay their royalty invoices. In such cases, the question arises as to who will be subject to such financial lapses? Will it be the authors, composers or publishers concerned or all the beneficiaries of the global repertoire? The service provision of the collective management society usually incorporates the guarantee of payment of all the royalties due. For this purpose, a portion of the sums stemming from interest or the shares of unknown authors supplies the "decredere" account, and any amount invoiced to clients and not paid by them is removed from the account.

574. The operating account is used to show the firm's income and expenditures during the financial year. Here, collective management societies are faced with a particular problem. In the operating account, the society's income for the current year would be placed opposite the payments to authors, composers and publishers stemming from the funds collected the previous year. Such a presentation has scarcely any meaning. What should be shown is the complete operation from beginning to end, i.e. from the time of collection from the client up to the payment to the beneficiaries, with the intermediate phases such as the deduction of management fees, the use of interest and of the shares of unknown authors, etc. This form of presentation has shown its worth and has been adopted by numerous societies. CISAC also uses this model.

OPERATING ACCOUNT MODEL FOR A COLLECTIVE MANAGEMENT SOCIETY - 2002

	Fees	National income		Income from abroad
		Performance and broadcasting rights	Recording rights	
Income 2002		1,000,000	200,000	230,000
Management expenses 2002	460,000			
Interest used to pay expenses	<u>90,000</u>			
	370,000			
Unknown authors' shares used to pay expenses	<u>- 80,000</u>			
	290,000			
Deduction:				
15 % of recording rights	30,000		30,000	
25.54 % of performance and broadcasting rights	255,400	255,400		
2% of income from abroad	4,600			4,600
Allocation for social protection and cultural promotion (10%)		74,460		
	<hr/>	<hr/>	<hr/>	
To be distributed		670,140	170,000	225,400
Distributed during 2002		320,000	170,000	225,400
To be distributed in 2003		350,140		

CHAPTER 5 INTERNATIONAL RELATIONS

575. We cannot deal with the international dimension of copyright without recalling that it is the author and he alone who decides when and where he entrusts his rights to a collective management society (see paragraphs 1 to 7) and it is also he who determines whether the transfer of rights is limited to the specific territory of operation of the collective management society or whether he incorporates other countries and continents, or even the whole world.

576. This freedom on the part of the author is matched by the free assessment of any collective management society as to whether to entrust the rights of its author members to sister societies established in other countries. There is no obligation to make such a transfer. Pressure in favor of cooperation with sister societies is not legally enforceable. It stems from the impatience of beneficiaries who, after assigning their rights with effect throughout the world, are eager to see collective management organized at the international level, beginning with their own country.

577. Are sister societies guarantors of well-ordered, honest, and legally and economically competent copyright collective management? This is the main issue in the relations between collective management societies. Before entrusting the performance and broadcasting or reproduction rights for a whole national repertoire, it should be ensured that the sister society will endeavor to obtain appropriate remuneration and that it will distribute this income effectively to the authors, composers and publishers of the works used; that for this purpose it will keep well-ordered and up-to-date documentation, and finally that it will make sure its management expenses are moderate. In sum, it would be desirable to be able to rely on serious collective management, marked by the same fundamental rules, in all countries.

578. This desire to see a tried and tested copyright collective management system established across countries and continents has been the basis of the efforts to create the two most important international civil organizations in this area:

- the International Confederation of Societies of Authors and Composers (CISAC); and
- the International Bureau of Societies Managing Recording and Mechanical Reproduction Rights (BIEM).

These institutions have not been set up with the aim of acting as missionaries. The founders gave little thought to the whole world participating in the benefits of copyright or to saving the neglected authors of numerous countries who had no legal protection. The founding societies were moved by the desire to establish stable and well-ordered relations between them, an international regime which respected national autonomy, and a solid framework.

579. Both bodies have succeeded in this task. The results of these efforts are commented on subsequently, as is the question of whether two bodies were really necessary to achieve these aims. However, this duality already reveals the fact that CISAC and the BIEM were not the product of fleeting inspiration, in the style of a "grand design", but of gradual construction and tireless efforts by three generations of administrators and legal experts who deserve our respect for the work they accomplished.

580. Adopting a pragmatic approach, the international bodies were inspired by the Berne Convention. This common feature should not be mistaken. Countries joined forces, affirming the need to complement the national effort with supranational support. The fathers of the Berne Convention knowingly renounced any attempt to introduce a harmonized international copyright – considered to be idealistic – and endeavored to erect bridges between the national copyright laws, with this simple and ingenious formula of the equality of treatment of national and foreign authors. Similar bridges have been built between collective management societies, ensuring also the same treatment for the rights of foreign authors as for those of national authors.



1. CISAC

581. According to the first article of its statutes, CISAC is an international non-governmental non-profit making organization. Its legal form corresponds to that of an association. It groups together more than 200 collective management societies, located in about 110 countries on all the continents. Since it was set up, its headquarters have been in Paris.

a. A few words of history

582. Let us recall that copyright collective management, relating to non-theatre music, began in 1851 with the foundation of the French SACEM (paragraph 5). The expression "non-theatre" indicates that collective management also exists in the area of theatrical or dramatic works. Its history which is older began in 1776, the year in which the Society of Dramatic Authors and Composers (SACD) was formed. It is because of this right of seniority that the rights relating to theatrical works are often called the "major rights" and those relating to non-theatre music "minor rights".

583. The same advance in the sector of "major rights" occurred at the time CISAC was set up. The French SACD and the *Società Italiana degli Autori ed Editori* (Italian Society of Authors and Publishers) (SIAE) were the driving forces behind the union and therefore, on June 13, 1926, the International Confederation of Societies of Dramatic Authors and Composers (CISACD) was set up.

The following year, at the second congress in Rome, the SIAE proposed expanding the circle by admitting "minor rights" societies. A year later, in 1928, the amendment of the statutes was approved and the CISACD became CISAC.

584. The representatives of the following countries participated in the founding act:

Argentina, Austria, Canada, Czechoslovakia, Denmark, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Soviet Union, Spain, Sweden and United States of America.

This shows that CISAC was founded at a time when a plurality of national collective management societies existed in a good number of countries, wishing to consolidate and strengthen their position by establishing themselves internationally. Mutual support and the pursuit of common interests remained the leitmotiv of CISAC throughout its history. On the basis of the first statutes, the aims of which were formulated as follows:

"working, together with the other interested associations [...]; guaranteeing the safeguarding, respect and protection of the moral and professional interests stemming from any literary or artistic production; ensuring and contributing to respect for the economic and legal interests attached to said productions, both at the international level and in terms of national legislation...."

It is the spirit of solidarity which prevails between the member societies and it is found in the current statutes.

585. Despite the desire of "major rights" collective management societies to keep it "in the family", the societies dealing with "minor rights" moved to expand CISAC and, in 1928, two autonomous federations were established within CISAC: the Federation ...for Rights of Representation and the Federation ... for Performing Rights. In 1932, at the Vienna Congress the Federation ... for Mechanical Reproduction Rights, often referred to as the "third federation", completed the structure. Three years later, in 1935 in Seville, the Federation ... of the Societies of Men of Letters was founded. After the years of interruption caused by the second world war, the 1954 Bergen Congress in Norway established the Federation ... of Societies and Associations of Film Authors, often known as the "fifth federation".

586. The federations which have the attribute "autonomous" have led a fairly independent existence more and more regularly. These activities have led to very active self-management full of success, under the protection and aegis of CISAC. However, the same problems – in particular those linked to the progress of technologies for the dissemination and recording of works – have been dealt with in each "family", with very often diverging results. To that should be added the opinions and views expressed by the Legal and Legislation Committee, the Confederal Council and the Technical Committee. Thus, this system with multiple bodies has acquired more and more negative aspects, making the decision-making process more cumbersome. After noting in the Reform Commission report that the mechanism was too cumbersome and outdated, and that it contained too many authorities, the 1966 Prague Congress decided to abolish the federations.

587. The federations were replaced by the "International Councils of Authors". In accordance with Article 13 of the Statutes, these are the following three councils: the "Council ... of Dramatic, Literary and Audio-visual Authors", the "Council ... of Authors and Composers of Music" and the "Council ... of Authors of Graphic and Plastic and Photographic Arts".

These Councils deal with the problems of their professions, once every two years, in elite isolation. They communicate the results of their discussions, but the "family" spirit of the federations is a thing of the past.

588. The family spirit has, however, emigrated in the different regions. At the beginning of its activities, CISAC only had its headquarters in Paris. But after the years which followed the second world war and faced with the very different developments in collective management in the continents, a "Panamerican Council" was set up in 1946. It was followed, ten years later, by the "African Committee" and the "Asia-Pacific Committee". The Panamerican Council was divided into an "Ibero-American Committee" and a "Canada/USA" Committee. There remains to be mentioned the "European Committee".

589. To sum up, it can be said that CISAC, which celebrated its 75th birthday in 2001, is the "old lady" of copyright collective management. As the product of its efforts, well-established private international relations are observed between a large number of national societies in numerous countries. Its reputation is intact and its influence, even in the absence of means of compulsion, should not be underestimated.

b. The admission procedure

590. What course is to be taken if a national collective management society expresses the desire to become a member of CISAC? The conditions for admission are contained in Article 5 of the CISAC statutes and are worded as follows:

"Conditions of admission:

(a) Any Society administering copyright may be admitted to CISAC in the capacity of ORDINARY MEMBER.

By Society administering copyright is to be understood any organization which:

i) has as its aim and effectively ensures the advancement of the moral interests of authors and the defense of their material interests;

ii) has at its disposal effective machinery for the collection and distribution of copyright royalties and assumes full responsibility for the operations attaching to the administration of the rights entrusted to it.

iii) does not also manage, apart from as a secondary activity, the rights of performers, producers of phonograms, broadcasting organizations or other rights holders.

(b) any organization which fulfils the first or the second of the above-mentioned conditions may also be admitted to CISAC in the capacity of ASSOCIATE MEMBER.

(c) any organization admitted to CISAC shall be admitted firstly as a TRAINEE MEMBER for a two-year probationary period, renewable once.

The rights and obligations of TRAINEE MEMBERS shall be the same as those of ASSOCIATE MEMBERS".

591. The barricade erected against the admission of collective management societies for related rights is a relic of the times of a "cold war", dating back to the years preceding the signing of the Rome Convention on October 26, 1961. This prohibition was fed by the fears that copyright royalties would suffer from the demands of artists' unions and phonogram producers; this was the "cake theory". Furthermore, it was considered that producers as users of mechanical reproduction rights would be badly placed as beneficiaries in the same collective management society.

592. How should this statutory provision be interpreted in the light of the recommendation contained in paragraphs 44 to 48, according to which copyright collective management and that of related rights should be linked? This recommendation has lost none of its weight. Among the relevant grounds for copyright and related rights collective management, on the one hand, and CISAC's statutory opposition to such a solution, on the other, it is possible to adopt one of the following three alternatives:

- the society which decides to manage copyright and related rights collectively in its country remains, for an unlimited period, an ASSOCIATE MEMBER of CISAC. This means that, according to Article 9(a) of the statutes, the society participates in the CISAC general assemblies with an advisory vote only;
- the society managing both copyright and related rights collectively establishes, for this purpose, two administrative departments, allocating to that for copyright a major influence on the general business market, and the management of related rights is considered to be a "secondary activity", according to Article 5(a)(iii) of the CISAC statutes;
- two collective management societies are created, one dealing with copyright and the other with related rights. The society managing copyright is responsible for collecting royalties for both rights and remits the collection proceeds for related rights to the other society, as indicated in paragraph 48.

593. The admission procedure, according to Article 6 of the CISAC statutes, is as follows:

"Admission in the capacity of TRAINEE MEMBER is decided by the Administrative Council of CISAC following examination of an application for membership consisting of the following documents:

- a) an official application for admission, presented in writing and including a formal undertaking to accept and respect the Statutes of CISAC;*
- b) a copy in the original language and one copy in English, French or Spanish of the statutes and rules of the applicant;*
- c) a list of members of the organization, indicating their professional qualifications;*
- d) a detailed account of the activity of the said organization prior to its application for admission, accompanied by supporting financial documents and showing that the said organization does, in a regular and definite manner, ensure the promotion of the moral interests of those it represents, and/or that it guarantees, by an effective administration, the collection and distribution of the copyright royalties due to them, by assuming total responsibility for these transactions."*

594. These statutory provisions, in particular that contained in (d), pose a problem already raised in paragraph 272. Numerous established collective management societies sign reciprocal representation contracts only with sister societies that have proven their capacities. This attitude corresponds to the text of the statutes which requires the applicant to "present financial documents and ... guarantees, by an effective administration, the collection and distribution of the copyright royalties..." It is recalled that, according to the CISAC statutes in force, no member society of the organization shall be obliged to entrust the rights relating to its repertoire to sister societies (paragraph 578).

595. How could a young collective management society sign contracts with national radio and television organizations, the phonographic industry and other major users, if it does not hold rights, relating to foreign repertoires? This is a vicious circle: no income without the foreign repertoires and no foreign repertoires without income!

596. Without granting certain financial advances, it is not possible to establish a new collective management society. The investments essential for the creation of a society should also encompass potential for trust and management of the worldwide repertoire. The CISAC statutory provisions do not satisfy these requirements and it is therefore suggested that the procedure for establishing a collective management society should be subject to a fresh examination, by placing statutory emphasis on the support provided by national efforts and not on the guarantees of established societies.

c. The reciprocal representation contract between collective management societies

597. The most solid pillar of the international copyright collective management order consists of the CISAC model contract of reciprocal representation. The member societies of CISAC are not obliged to use this model – the CISAC statutes remain silent on the subject – but all societies have an interest in the order being maintained. The model is a bastion of defense against any kind of pressure being exerted to obtain favorable treatment for certain repertoires.

598. The efforts to produce the model contract of reciprocal representation began shortly after CISAC was founded. A broad debate during the Budapest Congress in 1930 concluded with the wish:

“that where a fully and efficiently organized society exists for the defense of the moral and material interests of authors and for the regular collection of royalties, the society may preferably represent all the other authors’ societies by means of reciprocal contracts, it being understood that each society will be free to demand guarantees and to set up inspection bodies which may be specific to it or common to several societies”

599. Subsequently, it was necessary to define what was meant by a “fully and efficiently organized society” and what could reasonably be demanded as “guarantees” and “checks”. Once again, it was the collective societies managing “major rights” which came to the forefront and the societies managing “minor rights” which followed. The CISAC Congress held in Berlin in 1936 approved the first model contract of reciprocal representation:

The Confederal Assembly approves ... the model contract between the authors’ Societies for the collection of royalties for performance of musical works.

The model was completed in 1949 in Paris and – following long preparations – fully revised in Bergen (Norway) in 1954. This version is still in force with two additions dating from 1956 and 1958.

600. The CISAC model contract consists of three parts:

- the transfer of rights,
- the conditions linked to the transfer of rights, and
- the formal provisions concerning duration, termination, etc.

601. The transfer of rights is the subject of the first article. The term “confer” does not specify whether it is a question of an assignment of rights or provision in trust. The transfer is exclusive and corresponds also to the monopoly aspects of copyright collective management.

602. The CISAC model contract is limited to the rights of public performance and broadcasting of musical works, defined precisely in Article 1(iii) of the contract. The need for a model contract relating to mechanical reproduction rights was briefly discussed in Bergen (Norway) in 1954:

"The Societies of the Federation for mechanical reproduction rights ... while expressing their recognition and admiration for the results obtained by the BIEM, in favor of the owners of mechanical reproduction rights, ... express the wish that a study be conducted forthwith of the way in which relations between on the one hand affiliated societies and the BIEM, and on the other, the BIEM and the Federation, may be regulated in the future."

The argument concerning a model contract between the collective societies managing recording rights is developed in the "BIEM" chapter (paragraph 657).

603. The transfer of rights authorizes the society to undertake all the activities relating to the collective management of the rights conferred. These activities are listed and defined in Article 2 of the model contract and include *inter alia* any judicial action:

"to commence and pursue, either in its own name or that of the author concerned, any legal action against any person or corporate body and any administrative or other authority responsible for illegal performances of the works in question",

"to transact, compromise, submit to arbitration, refer to any Court of Law, special or administrative tribunal".

604. Rights are transferred between two societies depending on their capacity as legal persons, as specified in Article 2(iii) of the model contract. This means that any alienation in favor of third parties without the consent of the conferring society does not produce any effects:

"The present contract being personal to the contracting Societies, and concluded on that basis, it is formally agreed that, without the express written authorization of one of the contracting Societies, the other contracting Society may not in any circumstances assign or transfer to a third party all or part of the exercise of the prerogatives, faculties or otherwise to which it is entitled under the said contract... Any transfer effected in spite of this clause shall be null and void without the fulfillment of any formality".

605. The territorial limitation of the transfer of rights is specified in Article 6 of the model contract. These provisions do not refer simply to the territory in which each collective management society operates, but allow a society to acquire the rights also for countries or continents where it does not carry out any direct activities. Article 6 of the model contract is therefore the place where any attempt at hegemony is manifested.

606. The catalogue of conditions linked to the transfer of rights is the subject of Articles 3 to 11 of the model contract. These conditions do not entail any legal constraint, if they are not signed by the contracting societies; without these signatures, they remain simple recommendations by CISAC. In that connection, CISAC has no decision-making or administrative power over the activities of its member societies which remain "masters of their internal organization".

607. The pressure exerted on each collective management society, with a view to achieving compliance and respect for certain basic rules in the exercise of their activities, is therefore indirect. The societies which do not accept these rules are deprived of the management of rights relating to foreign repertoires. Also, without obtaining the transfer of these rights, copyright collective management remains terribly fragmentary and consequently ineffective (paragraph 57).

608. The nature of legal constraint raises the conditions listed in Articles 3 to 11 of the model contract to the ranks of codification of CISAC's rules of conduct for copyright collective management societies. These rules will be commented on briefly below and their relationship with the different activities of the collective management societies is established by citing the corresponding figures.

609. The first of the conditions – and by far the most important – refers to the equality of treatment of national and foreign authors, in accordance with the fundamental provisions of the Berne Convention. The obligation of equality of treatment, as stated in Article 3 of the model contract, stretches very far, because it is maintained even in cases of discriminatory legal provisions:

"Moreover, the contracting parties undertake to uphold to the greatest extent possible, 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".

This obligation of equality of treatment is repeated in Article 7 of the model contract, in relation to the distribution of royalties, Article 8 relating to management expenses, and Article 9 concerning statements and payments.

610. A second group of conditions constitutes the distribution rules, gathered together in Article 7 of the model contract. Each collective management society undertakes, in particular, to respect the following obligations:

- carry out distribution work on the basis of reports on works performed or broadcast;
- cover all the royalties collected, without exception, in the distribution;
- respect, during distribution, the documentation provided by the other society;
- apply the Warsaw rule; and
- limit the publisher's share in all cases to 50 per cent.

These rules have been commented in on detail in paragraphs 455 to 486.

611. The contracting societies are mutually obliged, in accordance with the provisions of Article 8(i) of the model contract of reciprocal representation, to keep their administration expenses within reasonable limits (see paragraph 559).

612. Contracting societies mutually consent, in accordance with Article 8(ii) of the model contract of reciprocal representation, to deductions not exceeding ten per cent of the net royalties to supply the social and cultural institutions in favor of their member authors, composers and publishers (see paragraph 688ff.).

613. In Article 9 of the model contract, each society is obliged to produce statements respecting certain rules and to make payments within certain deadlines. In this regard, reference is made to the comments in the chapter entitled "statements", in paragraphs 526 to 552.

614. In Article 11 of the model contract, contracting societies undertake to respect the "Confederal clause" which contains the most widely discussed provisions in the whole contract and the subject of numerous disputes, since they relate to the accusations according to which CISAC structures appear to resemble those of a cartel. Article 11 is worded as follows:

- I. The members of each contracting Society shall be protected and represented by the other Society under the present contract, without the said members being required by the Society representing them to comply with any formalities and without their being required to join the other Society.*
- II. While this contract is in force, neither of the contracting Societies may, without the consent of the other, accept as member any member of the other Society or any natural person, firm or company having the nationality of one of the countries in which the other Society operates.*

- III. *Nevertheless, the preceding clause shall not be interpreted as prohibiting either of the contracting Societies from representing in its own territories of operation persons who enjoy refugee status in those territories, as well as, in virtue of a unilateral mandate, other performance-royalty collecting bodies existing in the territories of the other Society, when collection by a single organization is not practicable in the territories in question."*
- IV. *Each contracting Society undertakes not to communicate directly with members of the other society, but, if occasion arises, to communicate with them through the intermediary of the other Society.*
- V. *Any disputes or difficulties which may arise between the two contracting Societies relating to the membership of an interested party or assignee shall be settled amicably between them in the widest spirit of conciliation".*

Despite all the criticisms and requirements of freedom of membership of authors – a principle which exists on both sides of the Atlantic – these provisions have shown their worth. They correspond to the desire of each collective management society to gather together, within its ranks, the vast majority of authors, composers and publishers in its country and thus to have available the most complete "portfolio" from the national musical repertoire. Let us not forget that such a position casts a stain on its representative nature and thus on its reputation.

615. Finally, each society expresses its agreement to be inspected by the other society. It should be specified in this context that CISAC does not carry out any surveillance function over its member societies. All inspections are carried out exclusively in the field of contractual relations between the copyright collective management societies. These inspection-related provisions are included in Articles 4 and 5 of the model contract. In addition, there is the obligation to remain informed of the statutes and regulations, as stipulated in Article 10.

616. These inspections may be carried out by the representative of a society in relation to the other society, provided that it has agreed to be designated. Article 5(iii) of the model contract is worded as follows:

"Each contracting Society may accredit a representative to the other Society to carry out on its behalf the check provided for in paragraphs (i) and (ii) above. The choice of this representative shall be subject to the approval of the Society to which he is to be accredited. Refusal of such approval must be motivated".

d. Charter of the Author's Right

617. For 75 years, CISAC observed with great attention and keen interest all the changes occurring in the field of copyright, the living and working conditions of authors, composers and publishers, and in the technical means for dissemination and recording of works. With great passion, it witnessed and participated in four revisions of the Berne Convention – 1928 in Rome, 1948 in Brussels, 1967 in Stockholm and 1971 in Paris. It dealt very closely with the preparations for and consequences of the Universal Copyright Convention (concluded in 1952 in Geneva), without neglecting the problems of related rights, which led to the Rome Diplomatic Conference in the autumn of 1961.

618. Such active participation in the life of copyright, a fairly eventful life during the past few decades, has on occasion been mixed with the desire to pause for a moment, devote oneself to looking backwards and try to distill the essence of the experiences in the form of a summary and prospects. The greatest effort in these fundamental stances taken has led to the "Copyright Charter" which was included in a brochure produced by the Legal and Legislation Committee, placed at the time under the leadership of Mr. Valerio de Sanctis, an eminent Italian legal expert. The "Charter of the Author's Right" was adopted by the CISAC Congress in Hamburg in 1956, and stipulated that:

"this Charter is a solemn declaration of the basic doctrine of the Confederation".

619. A reading of the Charter is recommended to all those who are interested in copyright collective management. It does not need to be analyzed or commented on in terms of all its aspects, but the liberty is taken of briefly highlighting certain fundamental considerations.

620. Against all odds in the face of increasing mass consumption of music, literature and films, leading to comparisons of these works with other market products, the Charter emphasizes and confirms the absolute primacy of the author as creator of the work, who alone decides on the fate of his work. Responding to the free movement of information which digs gradually the most solid trenches of copyright, the Charter recalls the following:

"The protection of the common interest by ensuring the unhampered diffusion of culture and information must not be confused with the concept of the protection of industrial and commercial interests which are concerned with the exploitation of works of the mind. It is in the author's interest that his works should be as widely distributed as possible; and it is through the protection of intellectual creation at source that the development and spread of culture can be most effectively fostered".

621. Just as vigorous is the riposte by the Charter to all the forecasts, with a strong British-American influence, according to which the professional future of authors is as employees of large multimedia firms, prospects which should therefore be followed by the alignment of copyright. With all the force of condemnation, the Charter declares:

"Since entitlement to the author's right derives from the act of intellectual creation, it is solely in the physical person of the creator that this right can originate. A corporate entity can never be regarded as the original owner of the author's right in a work of the mind, and it is important to reject the unacceptable conception of such a work as a piece of merchandise, and the author as a mere employee of an industrial organization which owns his work".

622. The Charter also contains the most precise and condense definition of the principles governing copyright collective management, and stipulates in paragraph 9:

"The author must be associated with the fortune of his work, and the general principle of his participation in its economic success must be asserted in all and any relations between himself on the one hand, industry and the users on the other. Wherever possible, he should receive a percentage of the gross revenue accruing from the exploitation and utilization of his work, whatever the form and manner of expression and reproduction of the work".

623. The Charter was amended in 1992 by a "Declaration on the collective administration of authors' rights", which does not, however, achieve the richness and force of expression of the 1956 Charter.

e. Cooperation and the CIS project

624. As indicated on several occasions, national collective management societies join CISAC as autonomous members and remain "masters of their internal organization". CISAC even expects the applicant societies to "have an effective collection and distribution mechanism" before accepting them as members.

625. This autonomy covers all the administrative and technical processes, including information technology. The electronic processing of data has been introduced for each society independently, with no CISAC plan, and certain installations are even surrounded with great secrecy, thus preventing any exchange of data in this regard.

In the past, when a collective management society helped a sister society in relation to computerization, this was largely a transplantation of programs and methods, often devoid of standard solutions. Thus, no model software for the computer processing of data existed in relation to copyright collective management.

626. In these conditions, CISAC was limited to establishing solid links between the different national procedures in order to facilitate cooperation between member societies. This effort emerges from Article 4 of the CISAC statutes:

"to coordinate the technical activities of the Authors' and Composers' Societies, and ensure their collaboration in this field".

The points below were established very early:

- 1931 International index card (para. 235)
- 1934 Warsaw rule (para. 478)
- 1936 Contract of reciprocal representation (para. 597)
- 1955 Cue sheet (para. 242)
- 1974 Magnetic tapes for statements (para. 534).

627. They were strengthened when it proved to be useful to have joint documentation bases available and, as a result, the CAE documentation (para. 220) was introduced in 1973 and the WWL documentation in 1983 (para. 245). These joint documentation bases were not constructed by CISAC. It was decided that the CAE documentation would be established and updated by the Swiss society SUIISA and that relating to WWL by the American society ASCAP. Both series of documentation are, in principle, available to all the member societies of CISAC.

628. This role of simple coordinator, without dealing with copyright collective management processes themselves, explains the work done by CISAC in the field of training. Contrary to other international organizations – such as those in civil aviation – CISAC did not move towards specific training centers, intended to inculcate basic knowledge and know-how particular to all those who deal, as directors, division heads or specialists, with copyright collective management in the different countries. In other words: the road towards harmonious cooperation through uniform training has never been taken by CISAC. Each national society has itself dealt with the training of its managers and staff internally; they may have been sent on "training courses" with a sister society.

629. The issues relating to training were dealt with by WIPO, which for more than 20 years has organized copyright collective management initiation courses with the support of national societies.

630. In this context, mention should be made of the CISAC regional committees. According to Article 8 of the CISAC statutes, the regional committees are responsible for:

"bettering existing authors' societies and creating such societies where they do not exist".

This task covers the efforts made towards training. In South America action has been taken. Since 1994, the Ibero-American Committee of CISAC has organized in Montevideo, with the help of the society the General Association of Uruguayan Authors (AGADU), training courses with ambitious programs. More than 200 managers and specialists from Latin American societies have thus expanded their knowledge and professional skills.

631. The CISAC CIS project, as indicated in paragraphs 252 to 260, will obviously continue to establish solid links between the different national procedures. The member societies at the time of the CIS will remain

"masters of their internal organization". However, the increase in technical means for transmitting data – and above all the Internet – will lead to increased standardization requirements and any rule respected will be followed by the systems moving closer together.

2. BIEM

632. The "International Bureau of Mechanical Publishing" (BIEM) was established as a civil society according to Article 1832ff. of the French Civil Code. Its headquarters has been located in Paris since it was founded, in 1929. In 2002, it had 27 associate societies and 12 member societies with no voting rights, distributed as follows:

Continents	Associate societies	Member societies
Africa	2	1
North America	2	1
South America	2	3
Asia	2	3
Australia	-	1
Europe	19	3

a. A few words of history

633. The history of the BIEM reflects the development of sound recording technology. The dream of capturing, preserving and reproducing sounds has inspired research by several generations. This led firstly to mechanical apparatus which produced sounds using vibrating strips or pipes. These "music boxes", as they were known, were manufactured on an industrial scale, in particular in France, Switzerland and the south of Germany, towards the end of the 18th and above all in the 19th century. Governments took care to exempt such manufacture from any obligation in relation to authors, an exemption which had many different consequences. A French law, specially enacted on May 16, 1866, with the support of the music box industry, stipulated:

"The manufacture and sale of instruments used to reproduce mechanically musical tunes which are in the private domain do not constitute musical counterfeiting, as provided for and punishable by the Law of July 19, 1793, combined with Article 424ff. of the Penal Code".

634. A similar exemption is to be found in the Acts of the Conference of the 1886 Berne Convention; paragraph 3 of the "Closing Protocol" was worded as follows:

"It is understood that the manufacture and sale of instruments used to reproduce mechanically musical tunes borrowed from the private domain shall not be considered to constitute musical counterfeiting."

635. The major breakthrough in mechanical reproduction towards recording and the direct reproduction of sounds was that of Thomas Alva Edison in 1877 with the invention of the phonograph. Ten years later, Emil Berliner replaced the beaten tin cylinder with the record and invented the "gramophone". Towards the end of the century, these novelties conquered the markets and attracted the attention of the general public, in particular that of music publishers.

636. Music publishers rightly considered the record to be a "sound publication". By signing publishing contracts, authors granted to them all the rights of publication of their works. Publishers therefore turned to record producers and requested their products not to be manufactured and circulated without their consent, and demanded relevant royalties. When the producers refused, the Union Chamber of Music Publishers in

France responded by bringing a legal case which it lost for the whole line in 1898. The judges assimilated records to music boxes, i.e. they considered them to be "instruments for the mechanical reproduction of musical tunes", according to the French Law of 1866. Thus, the record producers enjoyed the copyright exemption.

637. "In 1901, a new character came onto the scene; its activity should be the inspiration for sweeping vengeance on the part of publishers against the French phonographic industry, embodied at the time by the powerful company Pathé. It was a retired official from the Indirect Taxation Authority, called Vives... One day, while looking at the shop windows in the large avenues, he was lost in thought in front of the window of a music seller who displayed phonographs and a whole repertoire of sapphire records, ranging from the opening of the "Poet and Farmer", via the music of the Republican Guard, to the ditty by Polin and the polka for two small flutes. Vives understood that it was unfair for someone to be able to take hold of protected musical works, in order to make records of them, without opening their purse strings. Curious by nature, he enquired as to the situation and found out how the Union Chamber of Music Publishers had lost the legal case it had brought. He immediately felt that the question had been asked wrongly, that the record which was already encountering very great success in terms of sales was a sound edition with no possible assimilation with the "mechanical instruments" covered by the French Law of 1866" (Philippe Parès, *History of Mechanical Reproduction Rights*, the Book Company, Paris, 1953; pages 36/37).

638. Vives obtained a mandate from the publishers, authorizing him to institute, on their behalf but at his exclusive risk, proceedings against the phonographic industry. In exchange, the publishers undertook to entrust to him the management of their phonographic reproduction rights, if those rights came to be recognized and, in that eventuality, stipulated a figure of 40 per cent of said rights as remuneration for their representatives.

639. Vives lost his case in the first instance, but won the case on appeal. "The ruling of February 1, 1905 constituted the first solid French case law, recognizing for authors or their transferees, a right of reproduction in records ..." (Philippe Parès, *op. cit.* page 38). Later, Vives was mandated by music publishers to deal with collective management of phonographic reproduction rights. However, as he was in a hurry to make an immediate profit, he quickly sold his share.

640. After a number of resales, the General Society for Phonographic and Cinematographic Publishing (EDIFO) was created and it was only from 1909, under the leadership of Georges Delavenne, that collective management "really began to function both in France and abroad" (Philippe Parès, *op. cit.*, page 57). The members were French music publishers. EDIFO began to found agencies abroad: the Mechanical Copyright Licences Company Limited (MECOLICO) in London, an EDIFO branch in Turin, the Institute for Mechanical Musical Rights (AMMRE) in Berlin, an EDIFO agency in Buenos Aires, an EDIFO office in New York, the Association for Mechanical Copyrights (MECHANLIZENZ) in Bern, the Nordisk Copyright Bureau (NCB) in Copenhagen, USMA in Belgrade, and SOBEDA in Brussels.

641. "In 1927, the EDIFO management decided to respond to the concentration undertaken by the European phonographic industry, by establishing an international body to which the main owners of mechanical reproduction rights entrusted, on their behalf, the powerful organization of producers. At the time, several hundred factories, spread in all countries, were bought using the same capital. This real trust ... constituted an extremely serious danger for authors. The formidable power of money represented suddenly by the phonographic trust could therefore remove, in one fell swoop, the local resistance which an author could impose on his debtors. This state of affairs gave rise, on January 21, 1929, to the BIEM, for the sole purposes of putting a stop to any attempted offensive by the industry; subjecting industry throughout the world to a system of exploitation favorable to authors; and giving France the initiative in the activities undertaken to defend authors" (Philippe Parès, *op. cit.*, page 58).

642. The establishment of the BIEM was the work of Alphonse Tournier, a dynamic man full of energy who previously managed the society EDIFO. That society carried out its collective management activities in France. Sister societies, offices and agencies abroad were grouped together within the BIEM which devoted itself to its main task, the negotiation of a model contract with the IFPI, thus guaranteeing for publishers and authors appropriate royalties relating to the manufacture of sound carriers. The model contract is commented on in paragraphs 663 to 670.

643. The authors remained in a state of expectation for a long time. In 1930, the SACD signed a contract of ten years duration with EDIFO, entrusting to this society the collection of royalties for the works in its repertoire. However, the authors did not feel at ease within EDIFO; above all they came up against the invariable rate of a 40 per cent deduction as administrative expenses. "A movement in opposition to EDIFO grew up within the Union for Professional Defense of Authors, Composers and Publishers (USACE), ... which undertook to set up a department for the collection of mechanical royalties on behalf of authors, with the aim of proving that such collection was possible in return for a commission of 10 per cent" (Philippe Parès, *op. cit.*, page 61).

644. "In April 1935, EDIFO was obliged to accept an amicable liquidation settlement. How had EDIFO reached that stage? Quite simply as a result of an evermore family-based, careless and costly management style, which could only lead to disaster ... The general business crisis which was rife in France and throughout the world between 1930 and 1935 particularly affected the record business; major losses in income ensued ... careful management could easily have overcome these passing difficulties, but that was not the case. EDIFO found it necessary to hand over the reins. The opportunity therefore presented itself for the authors to benefit from the dismantling of EDIFO in order to take over the general administration of a royalty which lack of care and the meanness of publishers had allowed to be monopolized by a commercial company for 25 years" (Philippe Parès, *op. cit.*, page 63).

645. The liquidation of EDIFO was accompanied by a first attempt at incorporating the collective management of reproduction rights in the activities of SACEM. A note, addressed by USACE in May 1935 to SACEM, contained the following passage:

"... that current circumstances are such as finally to introduce, for good in France, the administration of the reproduction rights of authors, composers and publishers by all interested parties, brought together in a true authors' society, and not by a single category or by some of them only or even, as has been seen in the recent past, by a commercial company" (Philippe Parès, op. cit., pages 198/199).

This integration was replaced by the establishment of the Society for the Administration of the Mechanical Reproduction Rights of Authors, Composers and Publishers (SDRM).

646. This crisis and new French orientation, in 1935, scarcely affected BIEM which remained "above the melee". However, its aspirations in support of an international collective management empire, as a counterweight to the phonographic industry, clashed with the belief of authors who considered that their rights were better safeguarded within their national societies which clearly corresponded more closely to their wishes. The "lack of influence of authors", which was transposed from the EDIFO to the BIEM constituted a significant shortcoming. BIEM did not develop as a place of refuge for authors.

647. The developments in broadcasting and the numerous public performances of music using records strengthened the positions of national collective management societies. This development was in line with the progress made with documentation and the advent of information technology. The duality between a national society and an agency of the BIEM, in the same country and for the same musical repertoire, was less and less justified. The question of incorporating the collective management of reproduction rights in that of public performance and broadcasting rights has been raised in numerous countries where a positive response was given, contrary to SACEM (paragraph 646).

648. The concentration movement led in most of the countries concerned to the merger of the BIEM daughter society with the national collective management society, as for example in Germany, Italy, Belgium, Switzerland, Hungary etc. France and the Netherlands became familiar with the "twinning" formula (SACEM-SDRM and BUMA-STEMRA), with effects similar to a merger. In Scandinavia, the NCB was taken over by the national societies of Denmark, Finland, Norway and Sweden. The only relic of the former BIEM empire, AUSTRO-MECHANA in Vienna, became a national Austrian society.

649. This development led, in 1968, to considerable reform of the BIEM. Henceforth, it recognized only national collective management societies as associates. These took up the documentation and distribution activities relating to reproduction rights. A stop was also put to the activities of the International Documentation and Distribution Centre (IDDC). Associate and member societies were entrusted with their repertoires directly through the signing of reciprocal representation contracts and the BIEM, from 1968 onwards, no longer had any rights. As a result of all these changes, the title was changed to: "International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction", while maintaining the abbreviation "BIEM".

650. In sum, it is noted that since 1968 BIEM has carried out the functions of a specialized agency working for national collective management societies. It is responsible for negotiating, with the international phonographic industry, gathered together within the IFPI, conditions and in particular copyright royalties relating to the production and sale of sound carriers (paras 663 to 670).

651. The history of the BIEM shows why this body has never been able to achieve worldwide exposure, comparable to that of CISAC. The activities of BIEM have always remained focused in countries with large phonographic industries. In addition, British and American music publishers have never acknowledged the collective management of reproduction rights, considering that this activity was part of their own area. Thus, BIEM's area of activity essentially remained limited to continental Europe, as indicated in paragraph 633.

652. Could thought be given to incorporating BIEM in CISAC? CISAC has never undertaken negotiations relating to tariffs. This abstention corresponded and still corresponds to the will of its member societies which retain complete autonomy in relation to tariffs. This autonomy, in the sector of reproduction rights, could hamper the free import and export of sound carriers. A basic international consensus relating to conditions and royalties therefore satisfies, in the opinion of collective management societies and the phonographic industry, the requirements of a borderless free market. BIEM therefore plays a special and essential role which could not be assumed by CISAC.

b. The admission procedure

653. According to Article 11 of the BIEM Statutes, applications for admission shall be sent to the Secretary General of the BIEM, then forwarded by the Secretary General to the Steering Committee. The Committee verifies whether the applicant society on the one hand manages recording and mechanical reproduction rights or, under its statutes, has the capacity to manage said rights; and on the other hand possesses an appropriate administrative mechanism.

654. By comparing these admission conditions with those of CISAC (para. 591ff.), it is noted that the admission of new societies devoted to the collective management of related rights follows a different approach for the BIEM.

655. Contrary to CISAC, the BIEM does not require financial documents serving as proof that the society guarantees, by means of effective management, the collection and distribution of royalties. That means that a young society may submit its application for admission as a preparatory measure, even before beginning its management activities. That allows it to obtain the signing of reciprocal representation contracts before launching tariff-related negotiations with the main users or clients.

656. In this context, attention should be drawn to the fact that, through Article 7(1) of its statutes, the BIEM ensures that each member society undertakes to entrust the management of its repertoire to the other member societies for their operating territories. That means that a society which is a member of the BIEM may rely on obtaining rapid representation for foreign repertoires, contrary to CISAC where the conclusion of reciprocal representation contracts may sometimes last a number of years.

c. The reciprocal representation contract between reproduction rights collective management societies

657. As indicated in paragraph 649, the reciprocal representation contracts between national collective management societies in the field of reproduction rights were introduced from 1968 onwards. Before that date, the BIEM demanded the transfer of all rights to its organization, and mandated its sister societies, offices and agencies in the different countries at a later date.

658. Numerous provisions of reciprocal representation contracts in the field of reproduction rights correspond to those in the CISAC contracts for rights of public performance and broadcasting (paragraphs 597 to 616). The following developments will therefore deal with particular features of reproduction rights.

659. In most cases, public performance and broadcasting rights are the subject of overall authorizations from national collective management societies. This is not the case with the reproduction of music. The first reproduction of a musical work, on commercial record or cassette, corresponds to the first publication and, most often, requires the express consent of the author and, where appropriate, the publisher. This consent can be obtained only by consultation on a case-by-case basis. Reciprocal representation contracts are therefore marked by the mutual obligation of consultation work by work.

660. This obligation for consultation is reduced in countries which, in their national legislation, have provided for a legal license according to Article 13(1) of the Berne Convention, worded thus:

"Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work ...".

661. The CISAC principle according to which each society decides on the percentage of deduction to cover its actual administration costs (see paragraph 611) has never been used by the BIEM. It has maintained the tradition of rate categories (see paragraph 561) and the societies engage in a system of reciprocity by applying the same rate of deduction as their partner, despite the fact that the deduction exceeds the amount necessary to cover the costs. In other words: the spirit of solidarity of CISAC is only vaguely reflected by the BIEM.

662. For the same reasons, the BIEM has always refused categorically to accept any kind of deduction intended for the social welfare of authors or cultural promotion. The "lack of influence of authors", mentioned in paragraph 646, has widespread reverberations in this sector. It is to be regretted that the social welfare of authors, in the field of collective management of their rights, is still limited, on the verge of the third millennium, to public performance and broadcasting rights only!

d. The model BIEM-IFPI contract

663. Shortly after its foundation, the BIEM negotiated with IFPI a "model contract for the phonographic industry" (para. 642). The aim of this contract is to specify the copyright conditions and to fix the royalties for the phonographic use of music in a uniform and unified manner. The first model contract was concluded in 1929, the year in which the BIEM was founded. It has been renewed, renegotiated, updated and periodically amended, and the latest version is dated June 30, 1998.



664. At base, the model contract was devised as a complete and whole contract which may be signed by each record producer, in any country, and excluding any possibility of modification. Similarly, sister societies, agencies and offices of the BIEM in all countries should comply with the formula "take it or leave it". With the entry of the national collective management societies, this "contractual diktat" was softened. The model contract gradually became a framework contract which provided for additional national negotiations.

665. The model contract is one of the most complete copyright contracts. All the questions which have been raised throughout its long life, exceeding 70 years, have left their marks in the text. It is recommended to read it often in order to understand the complexity of the collective management relating to reproduction rights. It would be too difficult a task to comment on all the provisions; we have therefore highlighted below only a few clauses of particular importance.

666. In paragraph 659, it was emphasized that the first reproduction of a musical work on commercial record or cassette requires the express consent of the author and, where necessary, of the publisher. By signing the model contract, the producer does not obtain overall authorization allowing him to draw, as he sees fit, on the worldwide musical repertoire. He obliges himself to declare the works which he has chosen to be reproduced on his records or cassettes (Article X of the model contract). The national society responds by authorizing, work by work, their use for phonographic purposes, or by reserving its decision, owing to a lack of reaction on the part of authors or publishers, or also by refusing authorization in case of opposition raised by the authors or publishers. The following abbreviations are used:

NM non-member
SCU status currently unknown
OCU owner currently unknown

667. As regards royalties, the BIEM has managed, for the whole of the duration of the model contract, to impose on the phonographic industry the principle of a share for authors, composers and publishers in the form of a percentage of the proceeds from sales of records or cassettes. This share corresponds to exactly ten per cent and is therefore close to the principle of the tenth – or tithe – commented on in paragraphs 354 to 368. The BIEM therefore forms a real and solid fortress for the defense of the financial aspirations of authors, composers and publishers. Its tenacity and untiring commitment towards obtaining fair royalties are worthy of recognition and should be emphasized.

668. The increasing liberalism in the markets has led to the fixed retail sale price of records and cassettes being abandoned. Consequently, the BIEM has lost its precise basis for the calculation of royalties. It has adopted as a new basis "the highest price applicable to the copy considered to be published by the producer (PPD) with a view to retail sale on the day of release from the deposit store". The royalty is 11 per cent gross and, after taking into consideration the usual discounts, ten per cent net.

669. Continual differences of opinion separated the BIEM and IFPI on the subject of "doctrine-related" issues, it being necessary for example to know whether the cost of the record sleeve or cassette box is to be included in or deducted from the calculation of the amount of the royalty. The disputes concerning "returns" – records and cassettes returned to the deposit store – have also required endurance. However, following hard-fought bargaining, the BIEM and IFPI regularly reached agreement on pragmatic solutions which did not complicate collective management excessively.

670. An abundant commercial supply and more rational manufacturing methods led to a reduction in sale prices. The BIEM warned at the right time against the imminent deterioration of royalties, and proposed minimum royalties fixed at two-thirds of the PPD prices used (Article VI of the model contract). These minimum royalties are also the subject of periodical negotiations and readjustments. The importance of this "dam" is proven by the fact that about one-third of phonographic production is regulated in line with these minimum royalties.

3. SISTER SOCIETIES

a. The beginnings and development of collective management

671. For decades the opinion prevailed that copyright collective management operated exclusively in the interest of authors, composers and publishers. Consequently, the collective management of their rights depended on their willingness to unite and to take this management in hand. Up to the eve of the Second World War, all collective management societies were created through the voluntary association of authors, composers and publishers.

672. When national authors hesitated to exercise the collective management of their rights, they exposed themselves to the installation of agencies of foreign societies in their country. Their effects are unsatisfactory to everyone and their management is very costly. They are unpopular in the country, considered to be a foreign intrusion, and neglect the interests of national authors, composers and publishers. The weaknesses and abuses of agencies have on occasion attracted the attention of governments. In Switzerland, for example, the Parliament helped to establish a national society and granted it a legal monopoly so that any foreign agency was obliged to close.

673. Authors from young States, born in the era of decolonization, were unable, in most cases, to establish their own national collective management societies. Thus, in French-speaking Africa, governments lent their assistance to the establishment of collective management offices. This was the case in Algeria, Benin, Burkina Faso, Côte d'Ivoire, Guinea, Mali, Niger, Senegal and Togo. Subsequently, these offices developed in order to function as authors' societies, introducing for example general assemblies of authors and administrative councils.

674. In English-speaking Africa, during a first phase, authors were abandoned to their sad fate. The national societies which were formed in certain countries remained on foreign margins and never managed to take off under their own steam. In 1990 in Mauritius, a new trend was witnessed based on the "joint ventures" model. The State and authors joined forces in order to organize copyright collective management in their country. This solution was also adopted in Malawi and Tanzania.

675. In Latin America, collective management societies were set up only at the initiative of national authors. Music publishers scarcely supported their efforts – contrary to Europe where music publishing constituted one of the driving forces of collective management. Despite the entirely private nature of Latin American collective management societies, certain States had an interventionist policy hampering their development with burdensome administrative procedures.

676. Even SACEM in Paris, which long remained the symbol of purely private copyright collective management, was obliged to accept State supervision when, in 1985, it was necessary to incorporate legal remuneration for blank cassettes in collective management.

677. The increasing interest of the authorities in copyright collective management went hand in hand with the increase in its economic importance. It is noted that authors, composers, publishers and States join forces to consider collective management to be an essential institution of benefit to the musical life of any country. Consequently, in most cases, there is a happy consolidation of the position of authors, above all in countries where they continue to enjoy, at the domestic level, a certain autonomy, and where the authorities pay careful attention to equal treatment for national and foreign authors, and oblige major users, above all State radio and television broadcasting bodies, to respect copyright to the letter.

b. Authors, composers and publishers wishing to move from one society to another

678. The importance of a national repertoire, as described in paragraphs 263 to 267, leads each collective management society to make efforts to bring together all national authors, composers and publishers in as complete a manner as possible.

679. Such compact representation of national authors, composers and publishers is opposed to their freedom of association, i.e. their freedom to decide to become a member of a collective management society or to renounce such membership, and their power to choose the authors' society of their preference.

680. CISAC has sought to bring an end to this conflict of interests by inserting, in the reciprocal representation contract, the "confederal clause" of Article 11(ii) (see paragraph 614).

681. This clause was considered to be an exaggerated expression of the monopolistic appetite of collective management societies. Through its abolition, an attempt was made to retain a modicum of competition between authors' societies. Thus, this clause has disappeared inside the common European market but the problem of the representative nature of the national society remains. A society, abandoned by most "major tenors", will have difficulty in imposing itself over its national clients, even if it is entrusted with the representation of the worldwide musical repertoire in its country.

682. An intermediate solution is provided by membership of several collective management societies, with territorial demarcation of contributions (see also paragraph 127). This method allows the collective management society in each country to bring together all national authors for the exercise of copyright in their country of birth and to provide those authors with the possibility of becoming members of the societies of their choosing for other countries. This process is particularly recommended for any young society beginning its collective management activities. Numerous national authors, already linked to foreign societies, could thus maintain their relations, simply by excluding the territory of their State of birth entrusted to their national society.

683. The BIEM does not have a "confederal clause", but the problem of membership for authors of the society of their country of birth arises in the same way. The process of the subdivision of management territories, as indicated in the previous paragraph, also applies in the field of reproduction rights.

c. Disputes and the settlement thereof

684. Differences of opinion, quarrels and disputes between collective management societies are unavoidable. It is sufficient for a case of plagiarism to arise and for each society to espouse the point of view of its member authors, composers and publishers concerned for the difference of opinion to burst out into the open.

685. In case of dispute, the member societies of CISAC may request the CISAC Administrative Council to appoint, internally, a commission performing the functions of conciliation and arbitration, according to the provisions of Article 10(b) of the Statutes. Within the BIEM, pursuant to Article 27(8) of the Statutes, it is the responsibility of the Steering Committee to establish an arbitration procedure with a view to resolving such difficulties as arise between the associate or member societies. These processes, quite often used during the years following the Second World War, have fallen into disuse.

686. Article 15 of the CISAC model contract of reciprocal representation reiterates the following statutory provisions:

"Each of the contracting Societies may seek the advice of the Confederation's Administrative Council about any difficulty which may arise between the two Societies regarding the interpretation or performance of this contract."

The two societies may, if need be, after attempting conciliation, agree to resort to arbitration by the Confederation's appropriate authority in order to settle any dispute that may arise between them with regard to the present contract.

If the two contracting societies do not think it appropriate to resort to arbitration by the Confederation or to arrange between them for arbitration, even independently of the Confederation, in order to settle their disagreement, the competent court to decide the issue between them shall be that in which the defendant Society is domiciled".

687. The settlement of disputes between societies proves to be more decisive if the following provisions of Article 7(ii)(b) of the CISAC model contract of reciprocal representation are applied:

"In the case of contradictory index cards or notifications, the distributing Society may distribute the royalties in accordance with its Rules, except where different interested parties claim the same share, when such share must be put into suspense until agreement has been reached between the Societies concerned".

By means of blocking, "short-circuit" solutions are avoided and the parties to the dispute are encouraged to find solutions allowing the sums in question to be rapidly released.



CHAPTER 6 SOCIAL AND CULTURAL WORKS

688. Can a copyright collective management society deal with the social fate of its authors and can it participate in the cultural promotion of their works or must it limit itself strictly to collection, documentation and distribution activities? Responses to this question have differed – and still do differ. Where these activities are the subject of a monopoly *de jure* or *de facto*, the supervisory authorities observe these "social and cultural deviations" warily, preferring the orthodox formula: "all income, following deduction of management expenses, is to be distributed". Publishers often share this opinion and this is the reason for which the royalties relating to reproduction rights are not in relation to social and cultural works (see paragraph 662 concerning the BIEM contract of reciprocal representation).

689. However, authors in numerous countries have spoken in favor of taking into consideration the social aspects in the collective management of their rights. As their societies satisfy as broadly as possible the self-management criteria, neither the supervisory authorities nor the publishers have been able to prevent them from introducing social welfare systems for their benefit and that of their families, or from adding cultural promotion to collective management activities. It has been noted that social and cultural works are present in all the sectors which do not suffer from a "lack of influence of authors" (see paragraph 646).

a. The funding of social institutions and cultural promotion

690. The funding of social institutions began with the decision of the SACEM members to collect an additional royalty intended to fund social welfare. If, for example, the royalty for a concert corresponded to eight per cent of the price of admission tickets sold, SACEM demanded a royalty of 8.8 per cent and allocated the share of 0.8 per cent to its social institution.

691. This additional collection for the benefit of social welfare was not limited to the works in the French musical repertoire. It also covered all the foreign works performed or broadcast in France. The authors of foreign works noted a certain anomaly in this. SACEM collected royalties for the use of their works and devoted them to the wellbeing of French authors. It was therefore necessary to balance this situation.

692. The search for a general solution was undertaken as part of a reworking of the CISAC contract of reciprocal representation, between the years 1952 and 1955. A first proposal, penned by Royce Whale, Director General of the PRS, was submitted to a special study commission "in order to produce wording based on reality". On January 19, 1955, the Office of the CISAC International Federation of Performing Rights Societies decided on the following wording for Article 8(ii) of the contract of reciprocal representation:

"each of the societies shall be entitled to deduct from the sums collected by it on behalf of the co-contracting society 10% at the maximum, which shall be allocated to the said purposes, when it does not make any supplementary collection for the purpose of supporting its members' benevolent or provident funds, or for the encouragement of the national arts, or in favor of any funds serving similar purposes".

693. This decision was discussed subsequently, on several occasions by the bodies of CISAC. The deliberations led, in 1957, to the drafting of the following comments:

"This measure (collection of a maximum of ten per cent for the purposes of social, assistance and cultural works by societies) both as intended by the drafters of the model contract and by the Bergen Congress (1954), which approved the contract in question, is essentially translated by voluntary abandonment of the share of the most important societies to allow the other societies to supply their pension, assistance and cultural funds etc., something which could be done only with difficulty without that; said abandonment constitutes in some way a return for the services provided by the societies to the societies in the

countries that are major music producers. It should also be noted that in line with the principle of assimilation of foreign authors to national authors, on which the model contract is based, the maximum of ten per cent in question may be retained by a national society only insofar as said society itself retains a percentage for the same purpose of the royalties accruing to its own members and only in the same proportion, up to a maximum limit of ten per cent.

694. What was the relationship between two societies, only one of which wished to introduce its social welfare for the benefit of authors? The CISAC comment of 1957 provides a clear response to this question:

"Article 8(ii) of the model contract introduces this collection in the form of an option, and not an obligation, for each of the contracting societies; furthermore, said article does not stipulate that the collection in question must necessarily be reciprocal or that it can be made only under a special agreement on the matter between the contracting societies.

Therefore, from what precedes, under Article 8(ii) if one of the contracting societies does not believe that it should collect said retainer for its benefit from the sums collected by it and accruing to the other Society, this attitude is not such as to prevent the society, for its part, from keeping the retainer from the sums collected by it and accruing to the first society."

695. In the same comment, it is specified that the deduction is made from the net amounts, i.e. after that covering administration expenses:

"The collection in the form of service fees, in accordance with the actual terms of Article 8(ii), must be deducted from the amounts collected on behalf of the other Society, i.e. from the gross amounts collected under the model contract before any deduction for whatever purpose."

"By contrast, as regards the maximum collection of ten per cent for social and other works by societies, this is made, in accordance with Article 8(ii), from the amounts accruing to the other society; this obviously expresses the idea that the amount is collected from the sums available after the service fees have been deducted."

696. Each society is free to decide on the use of the amounts collected for the purposes of social and cultural works, provided that these are the aims in question. Payment to members in the form of additional statements, on the grounds that any payment to authors contributes to their social security, cannot be accepted, since it goes against the principle of equality of treatment as it relates to distribution.

697. Consequently, each society may decide whether to allocate or not all the amounts for social and cultural works, and social welfare. It also decides on the priority given either to cultural promotion or to social welfare, or on the justification for sharing the money in order to satisfy both needs.

b. Social protection models

698. Social welfare must be based on the needs of authors. It is therefore recommended that planning begins with broad consultation of authors. How do they live and what are the concerns of their existence? These details can be ascertained only in direct conversation, if possible at their domicile in order to understand their level and lifestyle.

699. The consultation of authors leads fairly quickly to a first observation: the social welfare of the collective management society must complement the other social protection institutions. The vast majority of authors do not live on copyright income. The majority carry out other professions such as musicians, journalists, primary school teachers etc. All these professions have their own systems of welfare for sickness and retirement, to which are added the benefits stemming from the copyright sector.

700. Public social institutions must also be taken into consideration. Retirement annuities guaranteed by the State for each citizen guide the social works of the collective management society in directions other than that of a social void. If, in one country, the disabled and handicapped are the poor relations of public social protection, a similar weakness for authors could be corrected by the efforts undertaken by the collective management society.

701. By consulting authors, the vigor of the family cohesion and solidarity prevailing in the country is readily understood. The authors who consider themselves to be surrounded and protected by their families will respond to the questions relating to their social needs differently from those who must envisage the nightmare of abandonment and complete isolation.

702. Among the systems in force within the different collective management societies, two categories can be distinguished: those which concentrate on the existence-related conditions at the retirement age and those which emphasize assistance in the case of illness and hospitalization. In order to guarantee income in old age, a number of societies operate with individual life annuities, while other societies proceed by means of guaranteed income, according to the size of the average royalties collected.

703. Part of the resistance shown by publishers to social welfare stems from the fact that such welfare is limited most often to authors and composers. Such a limitation is unjustified. The deduction of ten per cent for social and cultural purposes is made also on the royalties paid to publishers. Their social and cultural needs must also be taken into consideration.

c. The range of cultural promotion

704. Cultural promotion is a vast field and offers an immense choice of forms of encouragement, stimulation and assistance. There also – in a manner similar to social welfare – it is recommended to take the pulse of cultural life and to consult those responsible in the sector before launching one's own projects. In this field also, it transpires that additional activities lead, in general, further than autonomous projects. The money available for cultural promotion is scarcely sufficient to finance a "cultural policy".

705. Among the many possibilities, of major note are the contributions and subsidies devoted to publication efforts. Often, the budget for a music book, for a particularly expensive record or for an especially ambitious concert is insufficient. In all these cases, "the rescue operation" of the collective management society is highly welcome and, after a certain period of time, it is recognized in the cultural life of the country as a sort of "deus ex machina".

706. From experience, these contributions or subsidies are particularly appreciated where it is necessary to open up the future to young composers. The society which accompanies its members in the first stages of their career wins their trust for ever and thus establishes the foundations of a good lifelong relationship.

707. In the musical or literary life of each country, entertainment organizers, broadcasters, publishers, producers and the general public constantly need documentation of all kinds, such as biographies, collections, list of published records, etc. By making certain information available on their repertoire and their databases of members, collective management societies may satisfy these needs and thus contribute to the cultural promotion of their country. If conductors, those responsible for radio music programming or record producers begin to seek information from authors' societies in order to become familiar with the new works and "trends", this society has achieved its aim of integration into the musical life of its country.

708. By way of illustration, the case of the Chilean Copyright Society "Sociedad Chilena de Derecho de Autor" (SCD) may be mentioned. Those in charge of this society have noted that young musicians lacked opportunities for vocational training and decided to invest their cultural wealth in a specialized school for young popular music artists. The success exceeded all expectations. Chilean popular music has experienced an extraordinary boom, both in Chile itself and abroad.



CHAPTER 7 THE INTERNAL ORGANIZATION OF COLLECTIVE MANAGEMENT SOCIETIES

709. In relation to the description of the tasks of the administrative council of collective management societies, mention was made of the threats of "dilettantism" which hangs over these bodies, taking into account the spirit of self-management of copyright by authors themselves (see paragraphs 105ff.). The capacity of author, endowed with talents though it may be, does not provide any particular qualification for managing a firm with its staff, structure and internal organization problems. The management of a collective management society is a profession which any one who undertakes it must learn, be he an author, lawyer, economist or professional from another branch. "Everyone has to learn"; this proverb is also valid in relation to copyright collective management.

710. In many respects, the management of a collective management society scarcely differs from that of other firms. These aspects are not dealt with here; they are the subject of special courses for future leaders, offered by numerous university or semi-university institutions. However, let us now comment on certain particular characteristics of copyright collective management, taking into account the experience acquired over a few decades.

a. Organization chart

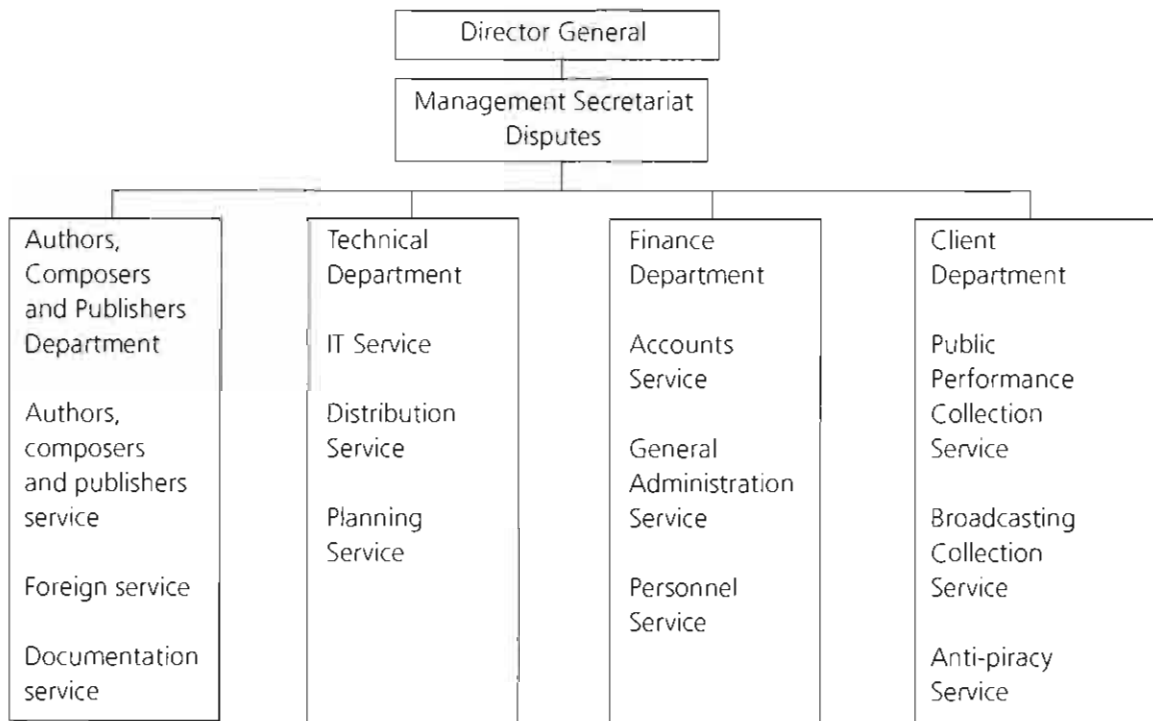
711. Any organization chart should reflect the fact that a collective management society appears to be an intermediate institution between production and consumption on the music market (see paragraph 19). That means that two departments should be created: one for relations with authors, composers, publishers and foreign sister societies (authors' and publishers' department) and the other, for relations with users or clients (client department).

712. In addition to these two caryatids there are two other service departments for collective management. One includes all the technical elements, above all information technology, and the other is devoted to financial and general administration activities such as the management of buildings, insurances, etc.

713. Where should the documentation and distribution services be placed: in the authors and publishers department or in the technical department? The societies have chosen different solutions. Some view documentation and distribution as a whole unit and place them in the technical department. Others emphasize relations between authors or publishers and their works, and place documentation in the authors, composers and publishers department, and distribution is allocated to the technical department. By proceeding in this manner, the "conventional" rule is observed, according to which documentation and distribution should remain separate in order to avoid any manipulation of documentation for distribution purposes.

714. In most cases, the disputes or legal service is placed within the society's management. It is thus "above the fray" and may, according to the volume of cases to be dealt with, be combined with a management secretariat.

715. Here is the presentation in graph form of an organization chart:



b. Hierarchical channels and consultation

716. One particular feature of the organization chart of any collective management society is a strong degree of interdependence between the different departments and services. Everybody deals with documentation and information technology. These interconnections require a clear hierarchical structure in order to avoid orders and instructions circulating in uncontrolled fashion. The tried and tested method is the system of hierarchical channels. A distribution official who discovers anomalies in the documentation of a work does not himself eliminate them without being familiar with the declarations of works, international index cards and other relevant documents. He does not contact his colleague from the documentation service directly by indicating to him the changes to be made. The hierarchical channel obliges him to address all his communications to his supervisor and it is the head of distribution who contacts the head of the documentation service. Thus, those in charge of both services are informed of what is happening and manage the measures to be taken.

717. The beneficiaries arriving at the society's headquarters with their requests and demands tend to address them to anybody in the building, without knowing whether the person to whom they are talking is competent in the matter. If this flow of visits is not channeled, there is a rapid risk of confusion. The hierarchical channel requires that the response to an identical question is given by the same person who is competent and responsible. If a beneficiary requests an advance, this request must be dealt with and decided on by a head with access to the accounts and familiar with the orders and customs by experience.

c. Orders and delegations

718. How should a declaration of works be dealt with? What is the procedure to be followed when a new dance hall opens its doors? What are the steps in the case of the death of an author who is a member of the society? In collective management, there are dozens and hundreds of operations which are repeated on numerous occasions. In a well-organized firm, all these operations are not left to the discretion of the em-

ployees who, after a rather cursory introduction, are abandoned to their fate. Each operation must be the subject of a minutely detailed planning study, leading to the drafting of a corresponding internal order.

719. These internal orders, which govern each common administrative operation, also allow the competences and their limits to be defined on a case-by-case basis. Where it is necessary, for example, to settle, in the client department, the problem of insolvent users or clients, the head of this department may be authorized to renounce payments up to a certain amount; for larger sums, he must submit the cases to his supervisor. Thus, the managers may pass on responsibility for numerous issues without losing sight of the essential points.

720. The internal orders constitute a basis for specific staff training. In training courses, these orders are presented and commented on until their provisions are well understood by staff. They must be subject to periodic revisions.

d. The role of information technology

721. The information technology relating to copyright collective management is constantly threatened by the danger of redundancy, i.e. the repeated insertion of the same data. When an author has declared 300 musical works, does his name appear 300 times in the works' memory? Such a process would be absurd. In order to prevent this occurring, particular vigilance is required.

722. The rendez-vous technique (see paragraphs 487 to 496) consists of operations which are repeated hundreds of thousands of times, or even millions of times. When the computer programs are produced for these operations, they should be optimized as far as possible and any time wasted eliminated. The following calculation illustrates this importance: with a million rendez-vous per year – the work volume of an average size collective management society – each second saved on an operation corresponds to two months' work for an employee!

723. The loss of data – on documentation, distribution or collection – can lead to collective management being paralyzed for a considerable period and with damage which is partially irreparable. It is therefore "extremely" important for the data protection system to be perfectly well organized and for data to be saved regularly and at relatively short intervals.

e. The importance of planning

724. All the sectors of the economy and administration are exposed to repeated changes and innovations. Copyright collective management is particularly exposed to all sorts of storms. Each year, the development of music recording and broadcasting technologies presents new aspects in relation to collection and – consequently – distribution. Lawmakers follow these trends at an accelerated pace and they should be constantly taken into account by adapting the collection tariffs and methods. The life span of a musical success has become shorter; "records" no longer change every month, but rather every week and force documentation to keep up with the same fast pace; without forgetting information technology with its new improved machines and software, which require a constant effort at adaptation.

725. These circumstances oblige each collective management society to accustom itself to "constant change". That means that planning, in the sense of preparation of future processes, loses its sporadic nature and is transformed into a permanent activity. That should therefore be entrusted to a special service, a "planning office" which works only for the future. It is customary to locate this office close to the information technology, in the technical department, but it is recommended to separate it from common IT work so as not to succumb to the needs of the day.



POSTFACE



Dr. Ulrich Uchtenhagen, born on July 13, 1926 in Sissach in the Canton of Zurich, was the holder of a Doctorate of Law from the University of Zurich, a city where he did all his higher studies.

He entered the Swiss Society for the Rights of Authors of Musical Works (SUISA) in 1959, and was appointed Director General in 1961, a post which he occupied until his retirement in 1989. He was Associate Professor in the Faculty of Law of the University of Zurich from 1982 to 1992.

An emblematic figure in collective management throughout the world, in 1974 Dr. Uchtenhagen founded the Swiss Society for the Rights of Authors of Literary Works (PROLITERIS), of which he was the Director General until 1980. On several occasions he was the Chairman of the Technical Committee of the International Confederation of Societies of Authors and Composers (CISAC) between 1972 and 1983, and is the inspiration behind and creator of the famous list of composers, authors and publishers, known throughout the world as the "CAE List". This fundamental instrument for the exchange of information between member societies of the CISAC network was the essential tool for the international distribution of royalties to beneficiaries. Nowadays, the Interested Parties Database (IPI Database) is the worthy successor of this fine structure, to which SUISA and Dr. Uchtenhagen devoted, tirelessly, their energies and their resources for many years.

Dr. Uchtenhagen was the pioneer of cooperation in support of developing countries in the field of collective management. With the collaboration of WIPO, CISAC and SUISA, he helped to train managers in the field of copyright and to create several societies in numerous countries requesting assistance, in particular in Africa, the Arab countries, Latin America and the Caribbean, Central and Eastern Europe, and in the countries of South East Asia.

Following his retirement from SUISA, Dr. Uchtenhagen continued to devote his time and his unfailing energy by working as a WIPO consultant. A tireless and intrepid defender of the cause of collective management and rights holders, Dr. Uchtenhagen undertook more than 150 missions on behalf of WIPO and it was during an official mission to Zimbabwe that he lost his life in a road accident on January 31, 2003.

For more information contact WIPO at www.wipo.int

World Intellectual Property Organization

34, chemin des Colombettes

P.O. Box 18

CH-1211 Geneva 20

Switzerland

Telephone:

+41 22 338 91 11

Fax:

+41 22 733 54 28