

CAN TWO SOCIETIES EVER BE BETTER THAN ONE?¹

Lessons in collective rights management from Brazil, Turkey and the USA

– David Safir and Will Page²³ –

Introduction

A wise observer once remarked that having more than one collective management organisation for musical “small rights” in a given country is a luxury that only a wealthy economy blessed with a large, successful domestic repertoire and light-touch regulation can afford; and indeed the “multiple CMO” system prevails only in Brazil, Turkey and USA - none of which actually meets all these criteria!

It could even be argued that USA is the only “multiple CMO” country, since the core competencies of licensing, collection and distribution (or, more colloquially, “money in and money out”) have been consolidated both in Brazil through ECAD and in Turkey through collaboration by MESAM and MSG, leaving each society to attract and manage members and repertoire, provide ancillary services and advocate the cause of authors’ rights; whereas the leading US societies ASCAP (founded by authors and publishers in 1914) and BMI (founded by broadcasters in 1939) are constrained – unlike SESAC or GMR – to function under Consent Decrees originally intended to pre-empt monopolistic behaviour.

Unfortunately the “multiple CMO” model may also be promoted and nurtured by ill-informed legislators who prize competition over efficiency, by factional interests where a “single CMO” has already failed the basic test of bringing together rightsholders and putative music users; and/or by market forces who believe it is impractical and/or unnecessary to value and administer domestic and foreign musical works equally.

Is the pattern changing? Not significantly in the USA, where revisions to the Consent Decrees sought by ASCAP and BMI were – until very recently – expected to pre-empt the need to reconcile their fundamentally different cultures and operations¹. In Brazil, however, the evolution of “the multiple CMO model” reflects the size and diversity of the domestic repertoire, a historically atomised music sector and weak commercial infrastructure; so it is hardly surprising that recent (albeit stalled) economic development, burgeoning new media and “Copyleft” have intensified discussion of alternatives to ECAD.

If you wanted to get there, you wouldn’t start from here

Starting with a blank sheet of paper and trying to design and build collective management solution to solve a many-to-many problem, what obstacles exist and how would you overcome them?

Firstly, all models must be tested and qualified by rapidly changing market structure and dynamics:

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³ **Disclaimer:** This material has been prepared for information purposes only: (i) The opinions expressed by David Safir in this discussion paper are, unless otherwise indicated, his own and do not necessarily constitute the view of any past or current client and (ii) the opinions expressed by Will Page in this discussion paper are, unless otherwise indicated, the author’s own and do not necessarily constitute the view of the Management or the Board of Spotify and any affiliated companies. For further enquiries, please contact: press@spotify.com

- Cross-border licensing of digital use in Europe is still a work-in-progress
- CMO's that were resellers are becoming multi-sided platforms competing with aggregators
- Direct and source licensing by publishers undermines blanket licensing and disrupts tariffs
- Revenues from lightly-regulated neighbouring rights in the US have grown significantly
- Growth in revenue from synchronisation rights may alter the balance of power

Secondly, no model can function without access to comprehensive, accurate copyright and usage data:

- Label, publishing and related copyright data remain largely uncoordinated
- It is invariably licensees rather than licensors who initiate and fund global database projects
- Despite cross-industry initiatives hindered by divergent allegiances and objectives, Google bought RightsFlow and Google Ventures invested in Kobalt; while SOCAN acquired MediaNet
- Direct monetisation links YouTube's music to its advertising (at least for singer-songwriters)
- Accessible licensing and efficient distribution require authoritative, standardised data

Are societies obsolete in the "digital age"? While it is true that many online licensees have become wholesalers and/or aggregators retailing individual works (and demanding one-stop multi-territorial licensing of the "international" repertoire), the blanket licence remains the cornerstone of efficient and equitable administration of musical works, the largest driver of analogue revenue and the only sure way to convey the legal certainty that licensees demand. Moreover, multiple "blanket licences" are still the norm even when fragmentation of the repertoire makes them more expensive to grant (due to forgone economies of scale) and less accessible than all parties might have wishedⁱⁱ.

The following matrix illustrates a complex and ever-changing pattern, differentiating the CMO models in Brazil, Turkey and the USA as well as new entrants' proposed 'supranational' solutions. So, if you were to start with a blank sheet of paper as discussed earlier, this is a good way to cover it. Put more bluntly, if you wanted to get somewhere, why not start from here after all?

Comparing the CMO infrastructure of Brazil, Turkey and the USA				
Country	Brazil	Turkey	USA	Supranational
Finance	Subvention	Not for Profit	Not for Profit; Investors	Publishers; DSP
Governance	CMOs	Members	Members; Licensees; Shareholders	Shareholders
Rights Administered	AP, AM + N	AP + AM; N	AP; AM; N	AP + AM; N
Rights Status	Processed	Assigned exclusively	Assigned non-Exclusively; direct licensing	Processed
Licensing and collection	Independent	Joint, including Neighbouring rights	Separate	As agent
Distribution and documentation	Two-stage	Three-stage	Separate	Per client rules
Member services	By CMO	By CMO	By CMO	As contracted
International	Reciprocal and unilateral agreements	Reciprocal agreements	Reciprocal agreements	As contracted

Notes: AP, AM and N refer to Authors Performing, Authors Mechanical and Neighbouring (Producers and Performers) Rights

Some is better than none, but it doesn't necessarily follow that more is better than some

How about competition? Even where there is a “single CMO”, the need to compete for members and repertoire is assured so long as there is no barrier to prevent an author from joining a foreign society, from mandating his works to an online licensing “hub” or licensing directly. In fact, many authors who earn substantial revenue abroad will join one or more foreign societies if the perceived benefit of higher (and sooner paid) net revenue outweighs the actual cost of documenting works, monitoring their administration and filing claims far from home. Nevertheless, it is no accident that reciprocal representation by affiliated societies compliant with universal standards (and following best practice) remains the preferred way to protect and exploit music public performance rights.

Just as “multiple CMO” in Brazil, Turkey and USA compete openly to administer both domestic and foreign works and duly increase their share of domestic collections, a “single CMO” elsewhere may expect or invite “multiple CMO” in Brazil, Turkey and USA to compete to represent its repertoire. However, it is difficult to establish any sustained benefit to an entire repertoire or a catalogue (as against an individual work) of licensing via “multiple CMO” or switching between them; and the inherent confusion and additional transaction costs involved may well outweigh any illusory benefitⁱⁱⁱ.

Can the “multiple CMO” model replicate the “single CMO” model? Some benefits may still accrue if joint licensing, collection and distribution enable economies of scale (for example through creating a single Licensing team, offering a composite blanket licence and maintaining a common authoritative database), where duplicate investment in IT and HR is minimised; and where the costs associated with administering such joint ventures are ideally shared by regulators and third-party customers. The “multiple CMO” cannot however avoid the increased cost of recruiting and retaining expert (as well as discreet and loyal) staff from a self-limiting pool, the closer supervision of regulators whose brief will invariably include competition issues; or unremitting pressure to improve its services.

As monopsonistic users, intermediaries and new media become ever more powerful and the relative value and viability of the conventional blanket licence decline, the “multiple CMO” model is marginally preferable insofar as it ensures competition to administer authors' rights but no more “fit for purpose” than the “single or centralised CMO” model that new, vertically-integrated stakeholders seek to replace.

ⁱ The US Department of Justice, in the course of its three-year review of the ASCAP and BMI Consent Decrees, last year invited comments on the introduction (or enforcement) of “100% licensing”; and as recently as 30 June 2016 notified them that no amendment of the Consent Decrees would be considered until the common practice of “fractional licensing” was discontinued.

ⁱⁱ It should however be recognised that each US PRO, following the Buffalo Broadcasting decision, grants ‘per-program’ licences to broadcasters and offers adjusted tariffs to DSPs where the licence encompasses only the repertoire controlled by the PRO in question.

ⁱⁱⁱ Some CMOs have effectively abandoned and sub-contracted the administration of digital licensing; while others have come together as ‘Hubs’ in order to licence, collect and distribute cost-effectively.