In the Supreme Court
Sitting As a Court of Civil Appeals

CA 5365/11
CA 5489/11

Before:	His Honor, Justice E. Rubinstein His Honor, Justice Z. Zylbertal Her Honor, Justice D. Barak-Erez
The Appellant in CA 5365/11 and the Ninth Respondent in CA 5489/11:	**ACUM – The Association of Composers**

v.

The Appellant in CA 5489/11 and the Ninth Respondent in CA 5365/11:	**EMI Music Publishing Ltd**

v.

The Respondents:

1. **The Director-General of the Antitrust Authority**
2. **The Association of Restaurants in Israel**
3. **Partner Communications Company**
4. **The Association of Function Hall & Garden Owners**
5. **Golden Channels**
6. **Matav Cable Communication Systems**
7. **Tevel Israel International Communications**
8. **Anana Ltd**
9. **EMI Music Publishing Ltd**

Appeals against the judgment of the Antitrust Tribunal in Jerusalem on June 2, 2011 in AC 513/04 by Her Honor Judge N. Ben-Or

Date of Session:	Nisan 3, 5773 (March 14, 2013)
On behalf of the Appellant in CA 5365/11 and the Ninth Respondent in CA 5489/11:	Adv. **Uri Sorek**, Adv. **Assaf Neuman**
On behalf of the Appellant in CA 5489/11 and the Ninth Respondent in CA 5365/11:	Adv. **Michelle Keynes**

On behalf of the First Respondent:	Adv. **Uri Schwartz**, Adv. **Yael Sheinin**, Adv. **Elad Mekdasi**
On behalf of the Third Respondent:	Adv. **Eyal Sagi**, Adv. **Amir Vang**
On behalf of the Fourth to Seventh Respondents:	Exempt from appearance and representation
On behalf of the Eighth Respondent:	Adv. **Ronit Amir-Yaniv**, Adv. **Ido Hitman**

JUDGMENT

Justice D. Barak-Erez

1. Which principles should guide the activity of ACUM with regard to the management of copyright in musical works in Israel? This question has been presented to us in full force against the background of the finding by the Director-General of the Antitrust Authority that ACUM's activity creates a cartel, in order to review the conditions prescribed for the approval of the cartel in a way that will balance the rights of authors with the general interest of works being used in public.

Background and Previous Proceedings

2. "The Association of Composers, Authors and Publishers," known as ACUM, is a corporation that operates in order to manage the copyright of its members – lyricists, composers, arrangers, translators, and others – in Israel. ACUM members transfer their rights in their works to it, whilst ACUM acts on their behalf in order to license the use of those works in consideration for royalties that it collects for its members. Ordinarily, the licenses that ACUM grants are sweeping licenses ("blanket licenses") that permit licensees to make use of the whole repertoire of works managed by ACUM (mainly by making them accessible to the public in various ways). In addition, ACUM is bound by agreements with foreign copyright collective management entities (hereinafter "affiliates"), by virtue of which it administers in Israel the rights that are managed by the affiliates abroad.

3. On April 30, 2004 the Director-General of the Antitrust Authority (hereinafter "the Director-General") published a ruling pursuant to section 34(a)(1) of the Antitrust Law, 5748-1988 (hereinafter "the Antitrust Law" or "the Law") according to which

ACUM's activity involves the creation of cartels (both between ACUM members and between ACUM and the affiliates) and a declaration under section 26(a) of the Law that ACUM's activity as a cartel creates a monopoly in the market of managing copyright in musical works (or more precisely, with regard to management of broadcasting, public performance, copying, recording, and synchronization rights in those works). The decision was made by the then Director-General, Mr. Dror Strom. However, it also reflects the position of the officers who have succeeded him, Ms. Ronit Kan and currently, Prof. David Gilo, as detailed below. Reference to the position of the Antitrust Authority will henceforth be made without specifically referring to those successors, using the general title – the Director-General.

4. At that stage, ACUM instigated legal proceedings before the Antitrust Tribunal (hereinafter "the Tribunal") – an appeal against the determination of the Director-General that its activity involves cartels (AT 512/04) or, alternatively, an application for the approval of a cartel in accordance with sections 7 and 9 of the Antitrust Law, on the grounds that the cartel's approval is necessary in the public interest (AT 513/04). Both proceedings were heard together. Subsequently, to ACUM's request, the appeal it filed was withdrawn, leaving only its application for approval of the cartel. The Director-General did not oppose the cartel's approval considering the public importance involved in ACUM's activity, as explained below, but the Tribunal was moved to set conditions to the approval so as to protect not only the public interest but also the individual rights of authors.

5. To make its continued activity possible until completion of the litigation, ACUM filed a request for a provisional permit for operation of the cartel. The Tribunal granted the request and on December 28, 2004 it granted a provisional permit for ACUM's activity subject to certain conditions (hereinafter "the Provisional Permit"). As detailed below, those conditions regulated, inter alia, situations in which authors could exclude rights in certain works from ACUM's management so that those authors, rather than ACUM, would themselves deal with granting licenses to exercise those rights (hereinafter "the Exclusion Mechanism"). Over the years the Provisional Permit was extended from time to time based on of the Director-General's recommendation, various amendments and modifications introduced to its terms. The last of those provisional permits (before the Tribunal's judgment), granted on February 24, 2009, introduced several significant changes, including making the Exclusion Mechanism "tougher," as detailed below.

6. In addition to the position of the Director-General, oppositions to the cartel's approval were filed to the Tribunal by several other entities, including the Association of Function Hall & Garden Owners, Partner Communications Company (hereinafter

"Partner"), the Association of Restaurants in Israel, and several cable companies – Golden Channels, Matav and Tevel (hereinafter "the cable companies") (whose activity has since been consolidated).

7. At a later stage, an application to join the proceedings was made by two publishers that represent authors, the publishers themselves being members of ACUM – Anana Ltd (hereinafter "Anana") and EMI Music Publishing (Israel) Ltd (hereinafter "EMI Israel"). Those applications, like the time when they were made, were explained by the changes that had been made to the Provisional Permit's conditions on February 24, 2009 as regards the Exclusion Mechanism. On December 1, 2009, the Tribunal partially allowed the applicants to join the proceedings in the sense that it permitted each of the two applicants to file a brief document with reference to the conditions that were acceptable to them and to make summations without extending the existing factual basis of the discussion.

8. In its decision of January 25, 2009, the Tribunal stated that by consent of the parties it would rule based on the parties' summations and supplemental oral arguments, without hearing evidence. The decision further stated that all of the parties agreed to ACUM's approval as a cartel, and took issue merely with regard to the terms of that approval. Consequently, the conditions of the Provisional Permit of February 24, 2009 (hereinafter "the Provisional Conditions") would serve as point of reference for the parties' positions. Accordingly, each of the parties filed its reservations regarding the Provisional Conditions in such manner that enabled the Tribunal to decide which of the conditions would be adopted as is within the permanent conditions, and which would be modified.

9. On June 2, 2011 the Tribunal approved ACUM's activity as a cartel, subject to a series of conditions (hereinafter "the Permanent Conditions"), which would remain in force for five years from the date of their approval. The Tribunal stated that the basic premise for reviewing the parties' arguments with regard to the conditions was that the anticipated benefit from the cartel substantially exceeded the damage likely to be caused by it, as required by section 10 of the Antitrust Law. In this context, it was explained that ACUM's activity benefited not only its members – copyright owners (hereinafter "the authors") but also the general public who uses the works it manages (hereinafter "the users"): on the one hand, the sweeping licenses permit the users to make use of the whole repertoire of works that ACUM holds, thereby sparing the public from having to locate the owners of various rights and to negotiate individually with each of them; on the other hand, the sweeping licenses also benefit the authors since they streamline (and, to a great extent, enable) collection of royalties and enforcement of their rights.

10. Since all parties agreed on principle to the approval of the cartel, the Tribunal hearing focused on the nature of the conditions to which the approval should be subject in order to dispel concern as to its abuse with regard to authors or users. The point of departure for the hearing was, as aforesaid, the Provisional Conditions, some of which were agreed upon by all parties, whilst others were in dispute. The disputes on which the appeal before us focuses pertain to the conditions prescribing the extent of the duty owed by ACUM to appoint external directors and the extent of ACUM members' ability to exclude their rights from its management, as detailed below.

11. Other controversies, including those concerning the definition of acts that would be construed as an abuse of ACUM's position and the way in which ACUM should act in taking legal action against users, were ultimately not considered by us since only few of the arguments concerning them were raised within the written appeal, while the arguments before us did not in fact concentrate on them.

12. *The appointment of external directors* – the position of the Director-General was that a condition should be added to the Permanent Conditions to the effect that ACUM should appoint external directors in a proportion of no less than one third of the total members of its board and those directors would be responsible for the internal plan to enforce antitrust law that ACUM is obliged to implement (in accordance with section 10 of the Provisional Conditions). ACUM objected to this requirement, on the grounds, inter alia, that it is not a public company where the appointment of external directors is necessary in order to protect minority rights, and in any event ACUM's articles of association ensure due representation for each category of its members, and even guarantee numerical balance between the categories.

13. The Tribunal accepted the Director-General's position on this matter, noting that a corporation for the collective management of copyright naturally raises concern as to the abuse of power against the authors themselves. Appointing a substantial number of external directors and entrusting them with the internal enforcement plan, it was held, would help deal with that concern, especially considering the fact that the corporation's members are dispersed and lack management expertise. The Tribunal also attributed importance to the fact that from ACUM's position in the proceedings it appeared that ACUM itself acknowledged the need to appoint external directors and was willing to do so even before the Tribunal's judgment in order to reinforce the "managerial, professional, economic character of ACUM's board of directors".

14. *The extent of ACUM members' ability to exclude rights from ACUM's management* – the Provisional Permit that ACUM had originally obtained (in 2004)

included, in section 2.3 of the Provisional Conditions, a mechanism permitting a member to give notice "at any time, of his desire to assume all or any of the copyright with regard to any of his works, with regard to all users or specific categories of users," such that the works included in the notice would cease to be part of ACUM's repertoire, and copyright ownership would revert to the notifying member (hereinafter "the broad exclusion mechanism"). Underlying this mechanism was the concept that a "liberal" option to exclude any right in a work, even specifically, would intensify competition and increase the authors' power against ACUM. Later on, based on the experience accrued from the implementation of this arrangement, the Antitrust Authority reached the conclusion that the broad exclusion mechanism was not yielding the anticipated results with regard to enhancing market competition, and in contrast was aggravating the concern for abuse of the exclusion ability. For example, it turned out, according to the Director-General, that the broad exclusion mechanism that enabled interested authors, inter alia, to exclude from ACUM's management merely the use of "new media" (such as mobile phones and the Internet) and to leave it with the power to grant sweeping licenses for broadcasting rights only in "traditional media" (like television and radio), might undermine the justification for ACUM's existence as a corporation whose purpose is to reduce the substantial transaction costs involved in individually contracting with each of the authors. Accordingly, in 2009 the exclusion mechanism in section 2.3 of the Provisional Conditions was limited in two ways: first, the Provisional Conditions provided that an exclusion notice could only be given with the consent of all joint authors in a collective work whose exclusion was sought (for example, the lyricist, the composer of the music, and the arranger); second, it was provided that partial exclusion, namely exclusion of some of the uses of the work, could only be done in accordance with four "exclusion baskets" concerning different categories of use (hereinafter "the narrow exclusion mechanism"): presentation of the work in an audio format (for example radio broadcasting); its presentation in an audio-visual format (for example in a television program); copying the work; and recording it. The narrow exclusion mechanism therefore did not permit the author to exclude the work in various formats at his discretion, as specifically chosen by him (for example, excluding the work's use only with regard to mobile phones).

15. The Director-General's position, joined by ACUM, Partner, and the cable companies on this issue, was that the narrow exclusion mechanism should be included in the Permanent Conditions. In contrast, EMI Israel and Anana believed that the broad exclusion mechanism should be adopted with regard to both aspects that distinguish it from the narrow exclusion mechanism and they challenged both the requirement for unanimous consent of all authors of a joint work and the restriction of exclusion according to "exclusion baskets."

16. EMI Israel pleaded that the narrow exclusion mechanism improperly infringed on the constitutional property rights of the authors it represented, both because the predefined "exclusion baskets" limit the prerogative of the right's owner to permit or prohibit certain uses of his work, and because the vast majority of musical works managed by ACUM are jointly owned by several authors. Under these circumstances, it was argued, making the exclusion conditional upon the consent of the other owners in fact negates the ability of a given author to permit or prohibit the use of his work. EMI Israel further asserted that adopting the narrow exclusion mechanism would compromise the competition among ACUM's members in the sense that only large corporations would be able to afford managing rights outside of ACUM, while individual authors would not be able to bear the financial and logistical burden it involves.

17. Anana pleaded that adopting the narrow exclusion mechanism would lead to infringement on its reliance interest, given the fact that, relying upon the wording of the broad exclusion mechanism, it had already excluded works it managed from ACUM's repertoire with regard to the use of "new media" that it would now have to restore. In addition, it made a series of arguments concerning the restrictions set forth in the narrow exclusion mechanism – a lack of distinction between authors whose contribution to a joint work was significant and authors whose contribution was negligible (who nevertheless obtain a de facto veto right to exclude the work); impairing the ability of authors to maximize their profits; as well as infringing on the moral aspect of the author's right (in the sense that an author who wishes to preclude the use of his work for religious, image-related, or moral reasons would find it difficult to do so under the narrow exclusion regime). Anana further contended that making the exclusion conditional upon the consent of all joint authors effectively makes it a dead letter since joint authors would frustrate any attempt to reach the necessary agreements.

18. The Tribunal held that the approval should be made conditional upon a narrow exclusion mechanism and in that respect it adopted the position of ACUM and the Director-General (joined by Partner and the cable companies). The Tribunal explained that such exclusion mechanism provided an appropriate answer to the necessary balance between enhancing market competition and protecting the individual author's proprietary right. The Tribunal went on to state that a corporation for the collective management of copyright is in any event not intended to enable its members to realize their rights in full. On the contrary, such arrangement is based upon a waiver of complete and total freedom with regard to the works in consideration for reducing the cost of managing and enforcing copyrights. EMI Israel and Anana, the Tribunal held, were in fact seeking to enjoy the benefits of belonging to a cartel without bearing the costs. The Tribunal further explained that copyright grants an author a monopoly that

may harm the general public, a concern which is intensified when authors are incorporated in a cartel. Therefore, there is no reason to avoid subjecting the cartel's approval to conditions that restrict the individual author's proprietary right in his work.

19. As aforesaid, the Tribunal ultimately approved ACUM's activity as a cartel, subject to a series of conditions, including those mentioned above. The two appeals before us – the appeal by ACUM and the appeal by EMI Israel – were filed against its said judgment – as detailed below.

The Appeals

20. ACUM's appeal (CA 5365/11) concerns, as aforesaid, only one aspect of the Tribunal's judgment – the condition regarding the duty to appoint external directors. Its arguments in this respect are directed both against the basic obligation to appoint external directors and against their number.

21. EMI Israel's appeal (CA 5489/11) originally revolved around several of the other conditions to which the Tribunal made the permanent permit subject, but at the hearing before us EMI Israel concentrated its arguments on the details of the condition regulating the rights exclusion mechanism. It should be noted that Anana, which did not appeal the Tribunal's judgment, appeared at the hearing as a respondent and in that capacity it presented arguments in support of EMI Israel's basic position.

22. Generally, EMI Israel believes that the narrow exclusion mechanism impairs the protection of the authors' rights and reinforces ACUM's monopoly. More specifically, EMI Israel pleads that implementing the narrow exclusion mechanism would lead to infringement on authors' proprietary rights and would impair the possibility of creating a competitive copyright market. According to EMI Israel, the protection of copyright necessitates both recognition of the power of each author to implement the exclusion mechanism with regard to a work he helped create, even without obtaining the other authors' consent, as well as authors' right to exclude their works outside of the "exclusion baskets" that necessitate "crude" and imprecise choices that do not express important distinctions, primarily the distinction between "old" media (like radio and television) and "new" media (such as mobile phones).

23. On the other hand, the Director-General believes that both appeals should be dismissed. He supports the Tribunal's judgment and emphasizes that the conditions it approved are required in order to protect authors and users against the monopolistic power of ACUM and in order to protect the public interest involved in the use of the works.

Our Ruling

24. Having reviewed the parties' arguments we have reached the conclusion that both appeals should be dismissed. We are convinced that, at the moment, the Permanent Conditions, including the conditions against which the appeals have been addressed, are all necessary in order to dispel the concerns raised inherently by a cartel related to the collective management of copyright. These conditions are necessary in order to ensure that the cartel's benefit to the public will exceed the perceived damage from it. Indeed, as detailed below, reviewing the parties' arguments has made it clear that the distinction between "new" and "old" media within the exclusion mechanism is an evolving issue, the regulation of which should be monitored. However, as noted, the approval and its conditions have been set for a period of five years, of which two have already passed (as the conditions relating to the narrow exclusion mechanism were approved by the Tribunal in June 2011). At the end of that period, it will be possible to revisit the conditions and the way they are being implemented in order to make decisions towards the future. In that sense, our ruling reflects the facts presented in the proceedings, including the experience accumulated in the Israeli market and its existing uses of copyright.

The Normative Framework: Between Copyright Law and Antitrust Law

25. Two normative frameworks frame our discussion: copyright law – as a framework that seeks, inter alia, to balance the author's rights in his work and the public interest to enjoy the fruit of the work for the benefit of all, in order to promote culture and knowledge; and antitrust law – which recognizes, inter alia, the possibility of approving a cartel, subject to conditions aimed at protecting the public from the abuse of monopolistic power. Copyright law is currently governed by a relatively new statute – the Copyright Law, 5768-2007 (hereinafter "the Copyright Law"), which replaced the relevant British Mandate statute, while the issues concerning the activity of cartels are regulated by the Antitrust Law.

26. The activity of ACUM should be evaluated and examined according to these two perspectives. As mentioned in the introduction to our judgment, ACUM was established for the collective management of copyright in musical works. From the perspective of copyright, that management should be for the benefit of authors and in the name of protecting their rights, but without neglecting the public's ability to enjoy the works; from the perspective of antitrust law, that management, which constitutes a cartel and monopoly, should be for the benefit of the public and should ensure that public access to the works is not unreasonably denied. More specifically, in order to

comply with the provisions of sections 9 and 10 of the Antitrust Law with regard to the approval of a cartel, it has to be ensured that the benefit to the public from such collective management substantially exceeds the damages that it might cause to all or some of the public.

27. In many ways, the controversies that have arisen before us pinpoint once again the dilemmas that underlie copyright law. Recognition of copyright is aimed at encouraging the creation and dissemination of expression but also at balancing this benefit against the costs of limiting access to protected works (cf: Guy Pesach, *The Theoretical Basis for the Recognition of Copyright*, 31 Mishpatim 359, 410 (2001)). In the words of Vice President (retired) S. Levin:

> "In Anglo-American law the basic justification for these laws is perceived as the desire to provide an incentive to the author in order to achieve maximum access to the work by the public at large. This is the heritage of Israeli copyright law" (CA 326/00 *Holon Municipality v. NMC Music Ltd*, PD 47(3) 658, 671 (2003)).

Copyright Management Corporations: ACUM as a Test Case

28. The case before us should be examined not only in light of the general principles of copyright law, on the one hand, and antitrust law, on the other hand, but also in light of the experience accumulated from copyright management through corporations established for such purpose. ACUM is a local corporation that was established back in pre-state Israel (see: Michael Birnhack, *Colonial Copyright: Intellectual Property in Mandate Palestine* 185-186 (2012)). Nevertheless, more broadly speaking it is merely one of many examples of corporations known as "copyright collection societies" or collective management organizations" (hereinafter "collective management corporations"). Such corporations operate in many countries and thereby provide an answer to a genuine need of authors who cannot routinely manage the grant of licenses to use their works, collect royalties, and enforce copyright law on those who infringe their rights. These corporations manage the rights of many authors collectively and thereby contribute to reducing the costs of negotiating with users and reducing enforcement costs. At the same time, the mechanism of collective management also benefits the public who uses the works because it allows bringing these works to the public on a regular basis. The collective management corporation typically offers users "a blanket license" in relation to the corporation's whole repertoire, thereby saving them the need to negotiate individually with each of the authors of works included in the repertoire. Such users are for the most part broadcasting stations owners, producers, hall owners, and others, through whom the works are made accessible to the public at large (see: Ariel Katz, *Monopoly and Competition in the Collective Management of*

Public Performing Rights, 2 Din Ve'Devarim 551 (2006); Guy Pesach, *Associations for the Collective Management of Rights – Another Look at Effectiveness and Fairness*, 2 Din Ve'Devarim 621 (2006) (hereinafter "Pesach"); WALTER ARTHUR COPINGER, COPINGER ON COPYRIGHT, pp 1790-1794 (16th ed., 2011) (hereinafter "COPINGER")).

29. Alongside recognizing the fact that collective management corporations are a well-known and widespread phenomenon, the concern that accompanies their activity is also acknowledged. Collective management of copyright involves a significant challenge from the perspective of antitrust law, considering the fact that it has centralized characteristics and therefore raises the concerns involved in the creation of a cartel, including the concern of acquiring and abusing monopolistic market power, either by demanding high royalties or in other ways. Against those disadvantages, we usually weigh the necessity of such activity for effectively managing copyright and it is therefore common to regard collective management corporations as "natural monopolies" (and, to a certain extent, something of a necessary evil) and to allow them to operate subject to supervisory mechanisms and regulation (see: Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, 1 J. COMP. L. & ECON. 541, 544-548, 551-553 (2005) (hereinafter "Katz"); COPINGER, pp 1798-1800). It is along these lines that the activity of the two major collective management corporations in the U.S. – the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc (BMI) – is regulated by special judicial orders ("consent decrees") as part of antitrust law. These orders, whose conditions are revised from time to time, place collective management corporations under a host of constraints in order to ensure their compliance with the competition criteria set forth in antitrust law (for a discussion of the supervisory mechanisms of collective management corporations in the U.S., see: Stanley M. Besen, *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383 (1992).) Similarly, collective management corporations that operate in Europe are under supervision, subject to the antitrust law of the European Union (see: Lucie Gaibault & Stef Van Gompe, *Collective Management in the European Union*, in *Collective Management of Copyright and Related Rights* 135 (2nd edition, Daniel Gervias ed. 2010); COPINGER, pp 1801-1808).

The Conditions in Dispute: Public Directors and the Exclusion Mechanism

30. As already mentioned, the controversy before us does not concern the basic authority for ACUM's operation as a cartel but rather the conditions that have been prescribed for its activity, or, more precisely, two of these conditions. In that sense, the discussion is based on the accepted notion, explained above, which views collective management corporations as something of a "natural monopoly," the existence of

which is essential but their activity necessitates supervision and restraint in order to protect the public from the potential negative effects of substantial market power being accumulated by a single entity. The conditions for ACUM's operation should therefore express the balance between the proprietary right of authors and the public interest in a market free of monopolistic influences, which acquires a unique aspect with regard to the market of creative works that naturally need to be accessible to the public (albeit for a fee).

31. Ultimately, the hearing in this case revolved around two matters: the requirement to appoint directors, and the scope of the rights exclusion mechanism. Both of these need to be examined from the unique point of view that combines the purposes of copyright law with those of antitrust law, paying attention to the balance that both those sets of laws seek to achieve between individual proprietary rights and economic interests, on the one hand, and the public interest, on the other hand.

The Appointment of Public Directors: Between the Public Interest and the Interest of the Rights Owners

32. The first condition that was prescribed for the approval of the cartel was to appoint public directors who will constitute a third of the total number of board members (which in practice means appointing four such directors). As aforesaid, ACUM has objected to this condition both in principle and in practice.

33. In principle, ACUM asserted that it is not a public company and therefore there is no justification to enforce on it a supervisory mechanism appropriate to public companies. In this context, it was further asserted that its board of directors includes a delicate balance between all the sectors ACUM represents, which in itself ensures protection of the public interest (article 30.2 of ACUM's current articles of association provides that the company's board of directors shall consist of nine members that include two lyricists, a writer, two easy listening composers, one composer of concert music, one publisher, and two external directors). ACUM also noted that its corporate governance is dispersed and therefore does not raise an "agency problem" of the type with which the mechanism of external directors is designed to deal. ACUM also asserted that in any event it has in place adequate mechanisms to resolve potential disputes and conflicts of interest, including an internal arbitration mechanism as well as the Permanent Conditions that prohibit ACUM from discriminating between its members. According to ACUM, the appointment of public directors would "dilute" the authors' control over their property rights. In practice, ACUM further noted the costs involved in the appointment of the requisite number of public directors, which lead ACUM to be willing to appoint no more than two public directors.

34. According to the Director-General, the need to appoint public directors stems from two factors: first, it will help ensure that ACUM serves the interests of all its member authors, taking into account the interests of individual authors rather than only the group interests of certain categories of authors. Second, the appointments will ensure that at least some of the directors have professional skills in the area of corporate management.

35. With regard to the proportion of public directors on the board, the Director-General's position is that the requirement that no less than a third of the board would be comprised of external directors is justified, since the need for external directors is specifically greater under ACUM's circumstances, where the corporate structure is dispersed and lacks a distinct controlling shareholder. In this respect the Director-General went on to explain that, in his opinion, ACUM's members need even more protection than "ordinary" shareholders, considering the fact that their livelihood depends on the corporation and they cannot sell their shares to "realize their profits."

36. Having reviewed all this, we have reached the overall conclusion that ACUM's case in this respect should be dismissed.

37. The appointment of public directors – that is, directors who are not employees or shareholders of the company – is one mechanism which allows supervising the behavior of the company, its managers, and its controlling shareholders and helps dispel the various agency problems involved in its activity (see: Irit Haviv-Segal, *Company Law*, 429, 438 (2007) (hereinafter "Haviv-Segal")). It can be said that the essential contribution of the public director lies in the "external dimension" that he brings to the board's work – as someone who reviews matters referred to the board from a broad, objective, and balanced perspective that also takes into account the public implications of its activity. The provisions of section 240(a1)(1) of the Companies Law, 5759-1999 (hereinafter "the Companies Law"), according to which a public director shall have professional skills or accounting and financial expertise, ensure that his appointment will add a professional dimension to the company that will contribute to its satisfactory management (see: Joseph Gross, *The New Companies Law*, 386-387 (Fourth Edition, 2007) (hereinafter "Gross")).

38. The mechanism of appointing public directors is typically operated in the context of the activity of public companies – section 239 of the Companies Law requires a public company to appoint at least two public directors, whilst sections 114 and 115(a) of that Law require a public company's board of directors to appoint an audit committee from amongst its members, on which all the public directors shall

serve. In addition, there are laws that impose a duty to appoint public directors to serve on the board of certain corporations whose shares are not held by the public, but whose activity has other public importance. Thus, for example, a mutual fund must appoint at least five directors to serve on its board and the proportion of public directors is the same as required of a public company (see: section 16(a) of the Joint Investments Trust Law, 5754-1994); while an insurance company, as defined in the Control of Financial Services (Insurance) Law, 5741-1981, must appoint public directors who will constitute a third of the total members of its board (see: section 2(1) of the Control of Financial Services (Insurance) (Board of Directors and Its Committees) Regulations, 5767-2007). In addition, the board of directors of a company that manages provident funds is required to appoint an investment committee for each fund it manages, the majority of committee members being qualified to serve as public directors (see: section 11(a) of the Control of Financial Services (Provident Funds) Law, 5765-2005).

39. Having reviewed the case, we are satisfied that the condition concerning the appointment of public directors to serve on ACUM's board is consistent with the purpose underlying the approval of the cartel. Although ACUM is not a public company, it does essentially manage a resource that has clear public aspects. From the point of view of the authors, ACUM provides an essential service, without which it would be difficult for them to produce financial benefit from their works. In many ways, that is also the case from the point of view of the public at large: the protected works belong to the authors (and to whoever has acquired rights in them) but it is important that they are used in such a way that will also benefit the general public. Indeed, these public aspects of ACUM's activity underlie its approval as a cartel. At the same time, ACUM's monopolistic characteristics and its status as a cartel in the domain of musical copyright grant it a public dimension in and of themselves. The requirement to appoint external directors to provide a further layer of supervision over ACUM's activity is therefore called for and inherent to the rationale of the cartel's approval in order to protect both authors and users. It should be noted that making the approval of a cartel conditional upon the appointment of external directors, even when the corporation in question is not a public corporation in the ordinary sense, is not unprecedented. Thus, for example, the approval as a cartel of the recycling corporation that was established as a joint venture of manufacturers and importers of soft drinks in Israel was made subject to a similar condition (see section 4 of the Conditions for the Operation of the Recycling Corporation, as approved in AT (J'lem) 4445/01 *Shufersal Ltd v. The Director-General of the Antitrust Authority* (November 5, 2001)). The same applies to the approval as cartels of two other collective management corporations: the Israeli Federation of Independent Record Producers Ltd. (hereinafter "PIL") (see section 11.3 of the Conditions for the Operation of the Israeli Federation of Independent Record Producers Ltd., as approved in AT (J'lem) 3574/00 *The Israeli*

Federation of Independent Record Producers Ltd. v. The Director-General of the Antitrust Authority (April 29, 2004)), and the Israeli Federation for Records and Cassettes (hereinafter "IFPI") (see: section 13.3 of the Conditions for the Operation of the Israeli Federation for Records and Cassettes Ltd, as approved in AC (J'lem) 705/07 *The Israeli Federation for Records and Cassettes Ltd. v. The Director-General of the Antitrust Authority* (February 3, 2011).

40. With regard to authors' protection, there appears to be grounds to the argument concerning the importance of protecting the common interests of ACUM's members, regardless of the "category" to which they belong. Public directors can express "cross-category" interests that concern the benefit of authors generally in their relationship with ACUM, as opposed to the benefit of particular categories of authors. Moreover, without laying out hard and fast rules, it can be said that there is prima facie grounds to the assertion that the importance of the public director institution is in fact greater in a corporation characterized by dispersed ownership, in the absence of controlling shareholders, as is the case with ACUM. The agency problem in companies of this type is characterized by interest gaps between management and shareholders (as opposed to interest gaps between the controlling shareholder and minority shareholders, which are typical of companies that have controlling shareholders). Some view the appointment of public directors as a central mechanism for dealing with such gaps (see Haviv-Segal, pp 438-439). Clear expression of this distinction can be found in the First Schedule to the Companies Law, which contains suggested provisions for the corporate governance of public companies. Paragraph 1 of the Schedule prescribes the recommended percentage of independent directors, distinguishing between companies that do and do not have controlling shareholders. With regard to the latter, the Schedule provides that a majority of the directors should be independent, whilst in the former it provides that it is sufficient for a third of the directors to be independent.

41. Furthermore, even assuming that the present structure of ACUM's board of directors faithfully represents its member authors, that structure does not prima facie guarantee that the protection of authors will also take into account the public interest more broadly. Indeed, a public director's fiduciary duty to the company is no different than that of an ordinary director, in the sense that he too must act for the benefit of the company (see: Gross, p. 406; cf: CA 610/94 *Buchbinder v. The Official Receiver*, para. 43 (May 11, 2003)). However, the public director will presumably represent a broader, more objective point of view, cognizant of the public implications of the corporation's activity.

42. Moreover, as already explained, the appointment of public directors also has great importance as regards guaranteeing a minimum number of directors with

professional managerial skills. In fact, ACUM itself acknowledged the professional advantages of appointing public directors even before the Tribunal's judgment was handed off and the revised version of ACUM's articles of association now require the appointment of two such directors. The fundamental aspect of this controversy has thus somewhat eroded and it has become a matter of extent and degree. We believe that the proportion of directors set forth in the Permanent Conditions – a third of the board members – is not excessive or unreasonable, considering ACUM's character as a corporation whose ownership is dispersed and especially given the lingering concern of abusing monopolistic power.

43. This discussion, which is "internal" and concentrates on corporate and antitrust law, can be supplemented by an "external" discussion, based on the significance that entities with public aspects have from the perspective of public law. According to this Court's case law, a private corporation whose activity has clear public aspects might be regarded as a "hybrid" entity, which places it under additional duties over and above those it is subject to in accordance with private law. Care must be taken not to overextend the category of hybrid entities in order to avoid eroding the significance of acknowledging a public status and blurring the lines between the public and private spheres. Moreover, under the current circumstances, there is no need to rule on whether ACUM should be regarded as a hybrid entity and a complete discussion of the criteria for the recognition of an entity as hybrid is unnecessary. However, it should be noted that ACUM's activity does entail many of the criteria mentioned in previous case law as characterizing a hybrid entity. Thus, for example, in HCJ 731/86 *Micro Daf v. Israel Electric Corporation Ltd* PD 41(2) 449 (1987) (hereinafter *"Micro Daf*"), where the question of hybrid entities was discussed for the first time – in the context of the Electric Corporation's activity – the factors taken into account were the monopolistic aspect of the corporation's activity, the nature of the resource it manages, and the fact that statutory powers have been entrusted to it. These factors were not considered an "exhaustive list" and since then entities which lacked those characteristics, at least to the same extent, have also been recognized as hybrid (see: CA 294/91 *Jerusalem Community Hevra Kadisha Burial Society v. Kastenbaum* PD 46(2) 464 (1992)). For further discussion, see: Daphne Barak-Erez, *Administrative Law vol. 3 - Economic Administrative Law* 463-492 (2013)). With regard to ACUM, the monopolistic aspect of its activity is beyond dispute. In Israel, although there are other collective management corporations, including the abovementioned PIL and IFPI, the product they supply – licenses for the broadcasting and public playing of sound recordings – does not substitute the product ACUM supplies. As the Director-General stated in his declaration, ACUM has no direct competitors in its relevant market and although formally nothing stops authors from managing their works themselves, few of them find such course of action practical or worthwhile, so that in fact the vast majority of

works for which royalties are paid in Israel are under the management of ACUM. The same applies to the implications that the resource managed by ACUM has on the general public. Although the licenses that ACUM offers are acquired by a relatively small category of users, those licenses feature the right to play the works in public (or make them otherwise available to the public). Hence, they have a very significant effect on public access to the works. In other words, the public aspect of ACUM's activity also derives from the fact that the product it supplies is not in fact the musical works themselves but rather the collective management mechanism, which facilitates (and to a great extent enables) playing those works in public and therefore constitutes a product of clear public importance. Finally, although ACUM does not exercise statutory powers, its approval as a cartel entrusts it with power that derives from a statutory decision established in the Antitrust Law. These characteristics, even if they are insufficient to define ACUM as a hybrid entity in the ordinary sense of the term (and, as aforesaid, we have no need to rule on this issue), do support the basic justification for the Director-General's requirement under the current circumstances. Indeed, the appointment of public directors is ordinarily not imposed on a hybrid entity. However, the fact that ACUM constitutes an entity that owes important duties to the public can serve as a factor in the Director-General's decision to subject a cartel to conditions.

The Rights Exclusion Mechanism

44. The other condition at the center of the litigation before us concerns, as aforesaid, the rights exclusion mechanism. Underlying the controversy were two questions: first, is the requirement for the consent of all joint authors of a work in order to exclude it from ACUM's repertoire justified or should that power be held by each of the authors individually? Second, how delicate and precise should the "segmentation" mechanism be with regard to the exclusion ability, as regards the distinction between different types of uses? We shall clarify those questions below.

The Rights Exclusion Mechanism: the Consent of All Authors or a Personal Right?

45. The requirement that the exclusion of the work should be conditional upon the agreement of all its authors prima facie imposes a constraint on the right of each of the authors to control the rewards of his work. For that reason it has been criticized by EMI Israel and Anana. In contrast, the position of the Director-General and ACUM is that making the exclusion conditional upon the consent of the other authors is essential to protect both users and authors. The main argument regarding the protection of users relates to the concern that a "liberal" exclusion mechanism that would give an independent exclusion right to each author would impair ACUM's ability to offer

sweeping licenses and thereby undermine the basic justification for its existence from the perspective of public interest. With regard to the protection of authors, it is asserted that the ability to exclude rights without the agreement of the other authors would encourage abuse of that power by "powerful" authors at the expense of the other authors of the work. ACUM explained that if each author of a joint work could exclude his rights from ACUM's repertoire without the agreement of the other authors, it would grant veto power to that author to prevent works from being used by those to whom other authors wish to grant permission. ACUM also emphasized that where the rights in a work are vested in several authors veto power will forever be involved and the remaining question is only which veto power is least damaging: that of an author wishing to prevent the work's exclusion and leave it with ACUM's repertoire, or that of the excluding author to prevent any use of a work contrary to the position of the other authors. According to ACUM, the former is infinitely preferable. Having reviewed the case, we have reached the overall conclusion that we accept the position of the Director-General and ACUM in this respect.

46. We accept as a starting point for our discussion the (reasonable) assumption that the rights in the type of works that ACUM manages are often shared by several authors. This can be illustrated by the typical case of a song. According to copyright law, every song is made up of several independent works, the rights in each of which are vested in different authors – the words of the song are a literary work owned by the lyricist; the music is a musical work owned by the composer. Moreover, there are also cases in which several composers or lyricists collaborate in the process of creating a work and in such cases the circle of rights owners expands even further. Considering this situation, it is easy to understand EMI Israel and Anana's grievances: making the exclusion power conditional upon the agreement of all authors undoubtedly burdens the individual author who seeks to exclude his work. However, this does not suffice. The question before us is whether this burden is *justified*, considering the purpose of the permanent permit – and our answer to that question is in the affirmative.

47. In order to discuss this question it is necessary to return to the original reasons that led to managing rights through a corporation like ACUM. The most important tool available to ACUM for the collective management of rights is the grant of a sweeping license known as a "blanket license," the advantages of which in terms of transaction costs constitute the basic reason that legitimates ACUM's activity, despite difficulties in terms of antitrust law. Extending the ability to exclude rights from ACUM's management will naturally impair its ability to offer blanket licenses and thereby reduce the public benefit from its operation as a cartel. *Over-extending* that possibility will impair the public benefit from ACUM's activity to such extent that it will no longer be the case necessarily that the benefit substantially exceeds the potential

damages to the public interest from the cartel's operation. Having considered matters, we are satisfied that the grant of a personal "exclusion right" to each author would amount to such over-extension. Considering the typical ownership structure of musical works, an exclusion mechanism that is not conditional upon the agreement of the other authors effectively means granting authority to a single author, regardless of his part in the work, to exclude the work as a whole from ACUM's blanket license regime. Thus, a user who wishes to make lawful use of the work would have to negotiate with the excluding author in addition to acquiring the sweeping license from ACUM. Such a state of affairs would greatly limit the benefit of the cartel for users to the point of raising doubts as to whether the cartel is indeed "in the public interest," as required by section 9 of the Antitrust Law whenever a cartel is approved.

48. Furthermore – accepting the position whereby the consent of all the authors of a joint work is unnecessary to exclude it would also raise difficulties for the relationship between the authors themselves as it may enable some of the authors – usually the more "powerful" ones – to exploit their exclusion power at the expense of the other authors. This may occur in situations where the user has already acquired most of the rights to use the work by means of a blanket license and merely needs to "supplement" the excluded right. This may give rise to phenomena of "extortion" and "free-riding," so that the remaining owner of the right will demand exceptionally high license fees for his share. We have already discussed the problem of such a state of affairs from the user's point of view. However, in truth, the problem also exists from the perspective of the excluding author making excess profit at the expense of the other authors. This difficulty is intensified in light of the fact that the ability to exclude rights from ACUM's management – given the complexity involved in negotiating with users individually – would essentially be of benefit to powerful rights owners, like large publishers, as opposed to individual, independent authors.

49. It should be noted that we have so far used the expression "joint authorship" in order to describe all the cases in which the rights in a particular song are shared by several authors, although in fact it is prima facie possible to distinguish between two models of joint authorship. One model, of "joint authorship in indefinite shares," relates to two or more authors who collaborated in such way that it is impossible to distinguish the share of each of them in the finished work. In such a case, the work is considered a "joint work" according to section 1 of the Copyright Law. The other model, of "joint authorship in definite shares," involves a finished product, like a song, which is made up of several units, each of which was created by a different author and is a protected work in itself (for example the words of the song, which were written by one author, constitute a literary work; while the music, which was composed by another author, constitutes a musical work). The authors in such a case are not regarded

as joint authors according to the Copyright Law, despite the fact that their relationship is substantively founded upon sharing. It is interesting to note that the American copyright law does distinguish between works where the shares of the various authors are inseparable and works where the shares of the various authors are interdependent. Nevertheless, both situations are considered "joint work" (see: Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 6.4 (2002) (hereinafter "Nimmer"). In any event, for the purpose of the present discussion concerning the ability of authors to exclude rights from ACUM's management we need not consider this distinction. In both cases, splitting the licensing authority would place practical obstacles for using the joint work.

50. In fact, the controversy before us derives not only from the different interests that the various parties represent but also from the fact that the Copyright Law does not expressly regulate the issues to which joint authorship gives rise (see: Michael Birnhack, *A Cultural Reading: the Law and the Creative Field, Authoring Rights: Readings in Copyright Law* 83, 105-106 (Michael Birnhack & Guy Pesach, Editors, 2009) (hereinafter "Birnhack"); Gilad Wexelman, *Corporate Creation and Cooperative Creation, Authoring Rights: Readings in Copyright Law*, 167, 177-178 (2009) (hereinafter "Wexelman"). Cf Margaret Chon, *New Wine Bursting from Old Bottles, Collaborative Internet Art, Joint Works and Entrepreneurship*, 75 Or. L. Rev. 257 (1996)). In fact, the only arrangement the Law establishes with regard to joint works (as defined in section 1) relates to the period of protection of the work, which is measured according to the age of the surviving joint author, plus 70 years (section 39 of the Copyright Law).

51. Additionally, reference to comparative law does not yield an unequivocal answer, considering the numerous potential approaches to this issue. Thus, for example, subject to certain restrictions, the law in the U.S. vests each of the joint authors with an independent right to permit use of their work even without the consent of the other authors, provided that they are paid their proportional share of the profit produced from the work (see: Nimmer § 6.10; Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship* 68 Brooklyn L. Rev. 123, 149-150 (2002)). In contrast, according to the approach prevailing in English law, the agreement of all authors is necessary in order to permit use (see: Copyright, Design and Patents Act 1988, section 173(2). See also: Copinger, p 334.) For the purpose of the ruling before us, we must be cognizant of the fact that the variety of existing approaches regarding copyright management of joint works attests not only to the great complexity of the matter but also to the fact that recognizing authors' proprietary rights does not inherently dictate a particular result.

52. Since there is no specific regulation of the issue of jointly owned copyright within the Copyright Law, we may turn to legislation in other contexts concerning the joint ownership of property rights. Detailed regulation of this sort exists regarding the joint ownership of land in sections 27 to 36 of the Land Law, 5729-1969 (hereinafter "the Land Law"). According to section 9(e) of the Movable Property Law, 5731-1971 (hereinafter "the Movable Property Law"), arrangements concerning joint ownership of land essentially apply to movable property too, "save as may be otherwise provided in a co-ownership agreement." By virtue of section 13(a) of the Movable Property Law, such arrangements also apply to joint ownership of "rights." Nevertheless, reference to the Land Law with regard to the legal regime governing joint authorship should be made with care. As Prof. Michael Birnhack has noted:

> "Even if a model of joint authorship is prescribed, the socio-legal institution can be designed in various ways, ranging from management based on the decisions of all owners, through consent-based management, to each author having freedom of use. Selecting the appropriate point on this range should be influenced by an understanding of the law concerning the creative process and the reciprocal relationship between joint authors, between each of them and the work, or anywhere else where the work and its significance are formed" (Birnhack, p 106).

Similarly, Dr. Gilad Wexelman has also written:

> "A joint work raises problems of a different type, when compared with the joint ownership of tangible resources and applying the doctrines that exist regarding joint ownership of tangible resources to joint authorship is therefore improper and inappropriate. These doctrines do not provide the necessary solutions for joint authorship. The inference deriving from this is that it is appropriate to adopt a broader, different conception of the joint authorship process, rather than a conception influenced by the private property model" (Wexelman, p 178).

53. One way or the other, before we seek to draw an analogy based on the arrangements relating to joint ownership of land, it is important to emphasize that we need not consider the legal regime that governs the relationship between joint authors as an independent issue. The question of joint authorship should be analyzed in the case before us merely in the particular context of a joint work's management by a collective management corporation like ACUM – which naturally goes beyond the default rules that apply to joint authorship. In any case, under the circumstances, reference to the existing legal arrangements regarding the management of joint rights should serve merely as a framework and a starting point for the discussion.

54. The arrangement prescribed in the Land Law concerning joint ownership is based on a concept of management by majority decisions, except for matters that go beyond ordinary management and use, in which unanimous agreement is required. In this respect, section 30 of the Land Law provides:

> (a) The owner of a majority of the shares in any joint property may determine all matters relating to the ordinary management and use of the property.
>
> (b) A joint owner who considers himself aggrieved by a determination under subsection (a) may apply to the Court for directions and the Court shall decide as seems just and expedient under the circumstances of the case.
>
> (c) Any matter outside the scope of ordinary management and use requires the consent of all the joint owners.

55. The joint owners of a land can agree upon a different method for the management of their rights but, as provided in section 29 of the Land Law, this is the arrangement that applies "unless otherwise provided in a joint ownership agreement" (subsection (c)) (see also: CA 810/82 *Zol Bo Ltd. v. Zeida* PD 37(4) 737 (1983); CA 663/87 *Nathan v. Greener* PD 45(1) 104 (1990)).

56. At the same time, section 31(a)(1) of the Land Law provides that each joint owner may, without the consent of the other joint owners, make reasonable use of the joint property, provided that he does not prevent another joint owner from conducting such use. In other words, none of the joint owners of land may stop his fellow owners from using the property, so long as it applies to reasonable use.

57. What can be learned from these arrangements for the case in question? Applying the arrangement prescribed in section 30, mutatis mutandis, leads to the conclusion that the requirement of a "unanimous" decision is appropriate insofar as management or use out of the ordinary is involved. It can therefore be argued that the management of copyright through an entity like ACUM is the ordinary, accepted method worldwide for the management of individual authors' rights, and departing from that arrangement therefore constitutes an "extraordinary" decision outside the ordinary realm of rights management. It should therefore be made unanimously, exactly as provided by the conditions that have been approved.

58. Indeed, as stated above, the considerations relevant to joint ownership of land are not necessarily apt with respect to joint authorship. Thus, for example, the arrangement contained in the Land Law can be seen as "hostile" to a state of joint ownership, recognizing that joint ownership of land may burden its efficient management. Section 37 of the Land Law therefore provides that "each joint owner of immovable property is entitled at any time to demand the dissolution of the joint ownership." Yet, joint authorship is not a "pathological" condition. On the contrary, the process of authorship frequently involves collaboration – either direct or indirect – between several authors and dissolving the joint authorship should not be regarded as socially desirable. It is also likely to be more difficult to appraise the value of the work for the purchase of one of the joint authors' shares than severing the joint ownership of land. Consequently, as already mentioned, the analogy from the Land Law should be drawn with all due care. However, even taking into account the difference between joint ownership of land and joint authorship, it does appear that the requirement of unanimous consent for the exclusion mechanism is proper. Particularly because joint authorship is a "natural" condition and typical of many works, it is appropriate to be apprehensive about an exclusion mechanism that is based on each of the authors having an individual right of action, reinforcing the status of strong authors and burdening public access to the works, as explained below.

59. Examining the rule with regard to the reasonable use of jointly owned land also leads, prima facie, to a similar conclusion. By drawing an analogy based on section 31(a)(1) of the Land Law it can be inferred that leaving the work under the management of ACUM constitutes reasonable use, considering the fact that it is the typical, widespread method for the collection of royalties. According to this logic, there appears no justification for adopting an exclusion mechanism that enables a joint author, who so desires, to prevent his fellow author from making reasonable use of the work, by excluding it from the collectively managed repertoire.

60. It should be noted that this Court has previously considered the question of collaboration between joint authors, in CA 1567/99 *Sivan v. Sheffer* PD 57(2) 913 (2003) (hereinafter "Sivan"). Under the circumstances of that case, we recognized the right of each of the joint authors to terminate a contract that had been made in connection with the use of the rights when the contract was breached. Can it therefore be inferred that it would be proper in the current case to permit each of the joint authors to individually decide on exclusion? Despite the apparent similarity between the situations, in fact they are quite different and the conclusion should therefore be different too. In Sivan the issue was the rescission of a contract due to its breach and ipso facto it was possible to rely on the principle that whosever right has been infringed on is not required to forgive the infringement. This result is supported by

considerations deriving from the law of obligations and in particular from the issue of multiple creditors. In contrast, in the case at hand, the question is posed for the purpose of delineating the ordinary rules of management, in the absence of any alleged breach. The relevant considerations are thus different, and so is the result that they dictate. Indeed, in Sivan the Court has made a clear distinction between these two questions. In fact, it noted that it was not ruling on the question of unilateral exercise of copyright in a joint work, which is more similar to the present case, and it went on to state that section 31(a)(1) of the Land Law prima facie makes it possible to adopt a flexible approach in such cases (Sivan p 942).

61. Taking a broader view, it appears that the position presented to us by EMI Israel and Anana does not give proper weight to the effect of high transaction costs and free-riding in the management of multiple ownership resources, a phenomenon referred to as "the tragedy of the anti-commons" alongside the better-known term "the tragedy of the common property" or "the tragedy of the commons" (see generally: Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv L. Rev 621 (1998); James Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J. L. & Econ. 1 (2000)). Indeed, the narrow exclusion mechanism that the Tribunal approved appears more suitable for dealing with these phenomena. In connection with joint authorship, “the tragedy of the anti-commons” is manifested in sub-optimal use of the work as a result of uncoordinated behavior by its owners. In a legal regime where a license to use a particular work necessitates the agreement of all its owners, each of the owners might act to maximize his own profits by claiming a high fee for agreeing to its use, without considering the negative externality that such behavior for the other owners. Ultimately many users will find it difficult to meet the overall price required of them and the work will be used to a lesser extent, thus harming both the joint authors and the public, whose access to the work has been limited. It is common to believe that the solution to this problem is one of the major advantages embodied in the activity of collective management corporations (see: Katz, p 561; Francesco Parisi & Ben Depoorter, *The Market for Intellectual Property: the Case of Complementary Oligopoly* in *The Economics of Copyright* 162, 168-169, Wendy J. Gordon & Richard Watt eds. 2003 (hereinafter "Parisi & Depoorter")). Since dealing with the market failings associated with joint authorship is one advantage that justifies the monopolistic activity of corporations like ACUM, great importance is attributed to the design of an exclusion mechanism that will not frustrate that advantage by vesting veto power in each joint author who wishes to preclude use of a joint work.

62. Ultimately, even under the narrow exclusion regime joint authors can agree in advance, contractually, on the scope of their understandings with regard to the work's exclusion from collective management. In fact, the narrow exclusion regime merely

provides the default with regard to the inclusion of a joint work in the repertoire managed by ACUM. Insofar as the authors wish to agree on a different decision-making mechanism with respect to the management of joint works, they are at liberty to do so. Presumably such an arrangement, made before any of the parties is in a position for extortion or "free-riding," will help limit the coordination difficulties asserted by EMI Israel and Anana with regard to obtaining the consents necessary for the exclusion of a joint work. In view of the aforesaid, the default mechanism prescribed – according to which in the absence of an agreement between the joint authors to the contrary, the consent of all authors is necessary to exclude the work from management by ACUM – is appropriate.

The Rights Exclusion Mechanism: the Degree of Segmentation and the Distinction between New and Old Media

63. As mentioned above, the arguments by EMI Israel and Anana also revolved around the fact that the "exclusion packages" defined in the Permanent Conditions do not distinguish between uses for the purpose of "old media" and uses for the purpose of "new media." In this respect Anana reiterated the case that it made before the Tribunal concerning the impairment of authors' ability to exhaust the full financial potential embodied in their works by excluding the works from management by ACUM solely with regard to "new media," and concerning the damage caused to Anana itself, having prima facie relied upon the previous exclusion mechanism in excluding rights that it will now have to restore to ACUM's management.

64. In contrast, the Director-General and ACUM argued before us that categorizing the necessary permissions according to types of media will allow ACUM members to abuse their power against users by forcing them to purchase specific uses (for example using the work on a cellular platform) in addition to the general fee for the license awarded through ACUM. In addition, ACUM mentioned that the adoption of a "liberal" exclusion regime enabling a precise "segmentation" of the excluded uses of any work would involve a significant logistic and financial burden on its ability to manage copyright of its repertoire.

65. Deciding between the conflicting positions in this respect has proven to be more complex than the parties' arguments revealed. In truth, as we explain below, both positions are extreme and fail to fully address the difficulties they entail. Consequently, at present, we believe that the exclusion mechanism approved by the Tribunal should be upheld, provided that the question of excluding "new media" – subject to conditions and constraints – will be comprehensively reviewed towards the renewal of the cartel's approval. We shall explain our said position.

66. The present exclusion mechanism, as expressed in section 2.3 of the Permanent Conditions, enables an author to exclude his rights completely, in respect of all their potential uses. Moreover, the mechanism allows excluding the rights in respect of some of the uses, yet solely in accordance with one of four alternatives – "the exclusion packages" that stand at the center of the discussion. Because of their importance, we shall lay them out in full below:

> "2.3.1 Excluding the rights for audiovisual broadcasting, including synchronization and recording for the purposes of such broadcasting, and including the provision of interactive and/or on demand services and any similar service, including by television, Internet, telephony or mobile phone.
>
> 2.3.2 Excluding the broadcasting rights by means of audio, including recording for the purposes of such broadcasting, and including the provision of interactive and/or on demand services and any similar service, including by television, Internet, telephony or mobile phone.
>
> 2.3.3 Excluding the right of copying. For the avoidance of doubt, it is clarified that excluding the right of copying does not include the right of copying for broadcasting purposes.
>
> 2.3.4 Excluding the right of imprinting and/or recording. For the avoidance of doubt, it is clarified that excluding the right of imprinting and/or recording does not include the right of imprinting and/or recording for broadcasting purposes".

67. The alternatives at the center of the present controversy are the first and the second (and to a limited extent also the fourth, insofar as the exercise of the right of copying is aimed at integrating a musical work in the soundtrack of an audiovisual work). These alternatives deal with uses that make the work available to the general public – its broadcasting on television or radio, making it accessible by means of "streaming" technology, which enables viewing or listening to content through the Internet without copying it to the user's computer, and the like. The main distinction that the exclusion mechanism makes in this context is between presenting the work by audiovisual means and presenting it by audio only. Thus, for example, given the present situation, an author can be represented by ACUM for the purpose of playing songs on the radio but not for using them in the format of television content.

68. Presumably, maximum protection of the author's rights and his financial interests should have enabled every author to make specific exclusion decisions as

much as possible – even with reference to a specific work in a particular use. Along these lines, ACUM's present exclusion mechanism permits, as aforesaid, limited "segmentation" by types of use. However, it has been argued before us that this does not suffice. The dispute revolved around the degree of precision required by segmentation. While the present segmentation mechanism essentially distinguishes between audio and audiovisual uses, EMI Israel (supported by Anana) also wishes to distinguish between "old media" – like television and radio – and "new media" – such as the Internet and cellular phone services. This position was presented to us as warranted by technological progress and the launching of new channels to use works, as well as the protection of the author's prerogative to manage the works he owns. However, as we explain below, this position raises fundamental and practical difficulties and thus cannot be adopted in the format in which it was presented.

69. It should be stated that the question of excluding "new media" should first be considered in light of the two perspectives that fashion the discussion as a whole – that of copyright law and that of antitrust law. However, in this context, it is important to bear in mind another point of view which relates to the interface between law and technology and focuses on the adaptation of the legal framework to technological developments as well as its implications to future technological development, for better or worse (see and compare: Dotan Oliar, *The Copyright-Innovation Trade-Off: Property Rules, Liability Rules and Intentional Infliction of Harm*, 64 Stan. L. Rev. 951 (2012)).

70. At the outset, we should consider the fact that the ability to exclude "new media" that EMI Israel seeks to adopt relies primarily on a technological distinction between "old" and "new" communication platforms. This distinction is replete with difficulties. The world of communications is characterized by constant, rapid technological development. More importantly, the technological aspect of this area is characterized by a phenomenon sometimes called "technology collapse": with the development of technology the walls that separate various media platforms gradually collapse and different types of technology "collapse" into each other, creating new interfaces. Thus, for example, a movie that is distributed through the Internet is also available for viewing on a smartphone, while traditional radio stations also broadcast songs and programs by streaming technology over the Internet. Given this technological reality, the distinction between "old media" and "new media" is not dichotomous, nor is it permanent or stable. In fact, EMI Israel and Anana did not even explain how these categories should be defined in their view, and settled for giving clear-cut examples (such as using a song as a ringtone), which were insufficient to delineate the boundaries of the distinction. Their case therefore left many practical questions unanswered. For example, no explanation was given as to whether the

transmission of television broadcasts through the Internet to be viewed on smartphones would, according to the proposed approach, require a license for "new media" or "old media" or in any event how would this example be classified to one category or the other. The rapid, constant development of new communication technology guarantees that questions of this type will not remain theoretical. In this context, we should note the interesting case of the American company MobiTV, which at the beginning of the 21st century developed technology that enabled receiving satellite or cable broadcasts and viewing them on mobile phones. A dispute (which gave rise to several legal proceedings) arose between MobiTV and ASCAP, one of the two largest collective management corporations in the U.S. The dispute concerned the purchase of a blanket license necessary to legitimate the transmissions, as a result, among other things, of MobiTV's objection to being charged a "new media" rate even though the content it offered its customers was the same as broadcast by traditional means (although ultimately the judgment did not rule on this question directly. See: *United States v. ASCAP*, 712 F. Supp. 2d 206 (SDNY 2010)). With regard to the controversy relating to the classification of MobiTV's services as "new media," see also its preliminary response in the legal proceeding it initiated (*Applicant Mobitv, Inc's Pre-Trial Memorandum at 25, United States v. ASCAP*, 712 F. Supp. 2d 206 (SDNY 2010)).

71. Insofar as the distinction between "new media" and "old media" is intended to extend to situations in which the content of radio and television programs is transmitted through the Internet to computer screens or by cellular phone services to mobile phone screens, adopting this distinction is likely to have a "chilling effect" on the use of the works in "old media" too. This is because users would presumably refrain in advance from integrating excluded works in productions intended for "old media," if only given their concern of future marketing constraints in "new media." Thus, for example, when a television program is produced, certain songs might not be included in it – as a cautionary measure – so as not to impair the possibility of broadcasting the program over the Internet too. Such indirect implications are not always clear "in real time" to an author who wishes to exclude his work, but recognizing them might also be weighed against the distinction proposed by EMI Israel and Anana.

72. Another aspect to be considered is the likely implications of the exclusion mechanism on cyberspace users. In their arguments before us EMI Israel and Anana concentrated on institutional and corporate users, such as large communications companies, thereby presenting only a partial perspective on the matter in dispute. However, the exclusion mechanism they sought to adopt is not intended to apply only to such users. In fact, a sweeping exclusion of "new media" uses is likely to lead, without distinction, to difficulties for small website operators, including, for example, Internet radio operators, for which the ability to contract with collective management

corporations constitutes a lawful, practical way for making regular use of a wide variety of works (and indeed some believe that the activity of collective management corporations is of especial importance for authorized use of musical works over the Internet. See, for example: Daniel Gervais, *The Landscape of Collective Management Schemes* 34 COLUM. J. L. & ARTS 591, 601 (2011) (hereinafter "Gervais, Landscape"). For a discussion of the importance of collectively managing works in a digital environment, see also: *Recommendation 2005/737/EC on collective cross-border management of copyright and related right for legitimate online music services* [2005] OJ L276/54 (hereinafter "the 2005 EC recommendation"); *Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market* (July 11, 2012) (hereinafter "the 2012 proposed directive"). See also Copinger, pp 1816-1826).

73. The effects of the requirement to distinguish the use of new technologies on making works accessible to the public should also be considered in view of *past experience* in similar contexts. Thus, for example, in *New York Times Co. v. Tasini* 533 US 483 (2001) (hereinafter "Tasini"), the US Supreme Court considered whether a newspaper (the New York Times) could upload articles by freelance writes to a computer database. After lengthy litigation, the US Supreme Court accepted the position of the writers who argued that the license previously given to the newspaper was merely for the purpose of printed publication, as opposed to electronic media. Following the judgment the newspaper had to acquire permission from the writers to publish their articles in the database. Yet, since the newspaper believed that taking such action would not be financially viable, the result in practice was the removal of the articles from the database, thereby denying public access to them. We do not need to go into the merits of the judicial ruling in Tasini insofar as it relates to the understandings between the newspaper and its writers at the relevant times. In fact, the ruling in Tasini is not directly relevant to the technological aspects of the publication format and is instead focused on whether uploading the articles to a general computerized database (of numerous articles from various newspapers and journals) could be construed as a newspaper publication (indeed, in another case of similar circumstances the Supreme Court of Canada held that a newspaper could copy articles published in its printed edition to digital CDs containing articles of that newspaper alone. See: *Robertson v. Thomson Corp.* 2006 SCC 43 (2006)). Nevertheless, *the results* of this case embody an important lesson. Taking the broader view it teaches us that an arrangement that does not take into account the dynamic nature of uses might prove to burden and damage the public interest. Taking a forward-looking view, it appears that experience teaches us that it is difficult to base licenses for use on a distinction between technologies as this might subsequently frustrate broad access to

cultural assets (see also: Francesco Parisi & Catherine Sevcenko, *Lessons from the Anticommons: The Economics of New York Times Co. v. Tasini*, 90 Ky. L. J. 295 (2001-2002)).

74. What is the experience of *other legal systems* regarding the exclusion of "new media"? On the face of it, this is an important question, considering the fact that the challenges of technology in the area of copyright are by no means unique to Israel. However, for the reasons detailed below, the benefit of a comparative study has proven limited at the present stage of developments in the area.

75. Truth be told, reference to legal developments in Europe and the U.S. shows that the exclusion of "new media" is often recognized as possible. Presumably, this reinforces the position of EMI Israel and Anana. However, studying matters in depth indicates that this experience has limited application to the case before us, because, among other reasons, the issue under consideration here is still in the early stages of formulation, trial, and controversy in other systems too.

76. The two major collective management corporations in the U.S. – BMI and ASCAP – recently permitted two of their members (including global EMI) to exclude the rights owned by them from collective management for the purpose of certain aspects of the works' use in "new media" (as detailed on their websites – http://www.bmi.com and http://www.ascap.com). Yet, it is important to note that the ability to do so is embodied in the decisions of the corporations themselves rather than the result of external regulation. Moreover, the American rights management corporations operate in a different way than ACUM in the sense that they manage only one type of rights – public performance rights, which concern the permission to perform the work in public, to broadcast it, or to make it available to the public (but not the permission to copy the works or integrate them in audiovisual productions). That is, the starting point for the exclusion is a market of rights that is more "split" than the market in which users and authors operate in Israel. This background is likely to influence the factors relating to the desirable exclusion mechanism. Subsequently, it should be noted that reference to the exclusion of "new media" from administration by collective management corporations in the U.S. is not made in "all or nothing" terms, and in fact includes certain restrictions. For example, BMI's most up to date announcement on the matter (as published on its website) has clarified that the ability to exclude "new media" is aimed at cases where the work's use necessitates more than one type of license, while ASCAP has emphasized in addition that exclusion is possible with regard to making works accessible to the public exclusively through "new media," and does not apply to users that are broadcasters. Finally, and this is a major point, it cannot be ignored that some of the decisions on these matters are very

recent (for example, BMI's announcement, of February 11, 2013, was published long after the litigation between the parties before the Tribunal had ended). It is therefore difficult to draw inferences from other legal systems' sustainable experience in this area. In fact, it can be said that at this stage the secondary effects of the "shock waves" that the new reforms have created for users have not yet been fully clarified, although the existence of such "shock waves" is already apparent. For example, we may point to a new development – lawsuits brought by users against management corporations to reduce the fee charged for a "blanket license," since "the blanket" no longer covers "new media" too (for instance, the claim brought against ASCAP by a large Internet radio company called Pandora at the end of 2012, which is still pending. For reports in the media about the case, see, for example: Don Jeffrey, *Pandora Media Sues ASCAP Seeking Lower Songwriter Fees* (November 6, 2012, available at http://www.bloomberg.com/news/2012-11-05/pandora-media-sues-ascap-seeking-lower-songwriter-fees.html; Ed Christman, *Pandora Files Motion to Keep Low Publishing Rates* (June 20, 2013) available at http://www.billboard.com/biz/articles/news/digital-and-mobile/1567890/pandora-files-motion-to-keep-low-publishing-rates).

77. In principle, European law permits a rights owner to join a collective management corporation even when he seeks to reserve the use of the rights on the Internet or through CDs (see: Commission Decision of August 6, 2002 in case COMP/C2/37.219 *Banghalter/Homem Christo (Daft Punk) v. SACEM*. See also: section 5(3) of the 2005 Commission recommendation and the 2012 proposed directive, mentioned above). Nevertheless, it is important to bear in mind that this arrangement is also the result of factors irrelevant to Israeli reality, primarily the desire to reach a standard, coordinated pan-European regulation where there are multiple collective management corporations.

78. Another factor that should be mentioned parenthetically involves the broader context in which the exclusion mechanism is embodied, with regard to the acceptance of the Conditions towards authors' freedom of action and freedom of choice. In this context, for example, it is significant that the Permanent Conditions ensure the right of each of ACUM's members to contract with users individually and to offer them individual licenses to use certain works alongside the management of those works by ACUM, without excluding them from its repertoire (section 2.4 of the Permanent Conditions). This is similar to the U.S. practice and different from the norm in Europe, where most collective management corporations require exclusivity from their members in respect of all rights in their work (see: Gervais, Landscape, p 598). Indeed, it is possible that this course of action will not be frequently used and it is likely to be significant mainly from the perspective of users who do not require blanket licenses but

rather individual licenses for certain works. However, from a more general perspective, this mechanism creates something of a balancing effect on ACUM's coercive power (see also and compare: Parisi & Deporter, pp 170-172).

79. More generally, it can be said that EMI Israel and Anana's requirement to allow a sweeping exclusion of "new media" uses was based on the assumption that they are entitled to enjoy the fruits of the cartel while realizing the financial potential embodied in the works they manage to its fullest. That is a mistake. Indeed, once ACUM's activity was recognized as a cartel, which raises concern of abuse of monopolistic power against the public, it can no longer be said that ACUM members are entitled to fully exercise their proprietary rights while enjoying the benefits of the cartel. Although the cartel has been approved, its approval was made subject to conditions. Those conditions bear a price that ACUM and its member authors must pay in order to balance the excess benefits such membership confers and to ensure that the public is protected against the concerns involved in the cartel's activity. In fact, what we have previously stated regarding the exclusion of a work without the consent of all joint authors is also appropriate with regard to the issue of segmentation – the adoption of a segmentation mechanism that enables the exclusion of works based on a technological distinction between new and old media, without reservation, might reduce the benefit that ACUM's activity yields for the public to such extent that may undermine the justification of its approval as a cartel.

80. We can therefore sum up and say that even if the ability to exclude "new media" uses should not be outright dismissed, EMI Israel and Anana have at present failed to lay a substantial foundation for the considerations and details of the exclusion mechanism they wish to adopt, regarding, inter alia, the ability of such a mechanism to provide an answer to the concerns indicated above. For that reason, we cannot accept their position. We should parenthetically emphasize that we have not ignored the possibility that the ability of an author to manage his works independently in the realm of "new media" might prove to be significant for some authors, including "small" or independent ones. The Internet is a flexible technological platform that is far more accessible to private agents than traditional media. It allows direct, convenient, and relatively easy communication between the rights owner and the individual user and thereby yields more direct patterns of consumption, sometimes dramatically reducing transaction costs and thus enabling "small" authors to profit from their works without the assistance of collective management mechanisms (see: Casey Rae-Hunter, *Better Mousetraps: Licensing, Access and Innovation in the New Music Marketplace*, *Journal of Business & Technology Law* 7(1) 35, 39 (2012)). However, this is merely one of many considerations and it has not been argued before us. Thus, for example, in contrast, the ability to exclude "new media" might actually be damaging to small

authors in particular given the "dilution" it would generate in the value of blanket licenses. Consequently, as a general rule and as already mentioned, the question of "new media" should be revisited comprehensively as part of the cartel's re-approval at the end of the five-year period allotted to it. This is based on the understanding that one cannot rule out in advance the possibility that a delineated and limited format of "new media" exclusion (insofar as such a format is proposed in the future) might enable interested authors greater independence in the management of their works, without impairing the interests of the public at large, to an extent that will undermine the reasons underlying the cartel's approval.

81. In other words, the precise definition of the "exclusion category" sought in respect of "new media" is likely to have a decisive impact on whether the overall exclusion mechanism yields a balanced result. An important, albeit not the only, aspect of this definition relates to the phenomena of "technology collapse" and "content leakage" that we have already considered. As previously mentioned, a sweeping, generalized definition of "new media" regarding the exclusion ability would yield uncertainty in respect of the scope of the excluded uses, might lead to many users being charged double fees (not only by ACUM but also by authors themselves), and would create a "chilling effect" from the users' perspective, as they might refrain from including an excluded work in productions intended for "old media" based on their concern that new media marketing will be limited in future. In contrast, a narrower definition of excludable uses, particularly a definition that focuses on uses designated for new media (for example the production of a ringtone based on an existing tune) would help reduce the awkwardness that numerous exclusion possibilities yield, moderate the negative effects of "content leakage" between different technological platforms from the users' perspective, and reduce the damage caused to their financial interests. In this context, we may add that part of the negative experience accumulated from the operation of the broad exclusion mechanism (in the scope of the Provisional Conditions for ACUM's activity before their 2009 amendment) resulted from the fact that it granted complete flexibility with regard to the exclusion format and did not consider the significance of the term "new media" nor did it regulate the boundaries of the exclusion options related to it.

82. To complete the picture it should be noted that the issue of excluding rights in "new media" from collective management as part of a cartel's approval in Israel has not arisen for the first time in ACUM's case. As already mentioned, the Tribunal had authorized in the past the activity of two other collective management corporations that were also considered a cartel – PIL and IFPI. In both cases the conditions for the approval regulate the corporation members' ability to exclude rights from collective management in accordance with a predetermined "exclusion basket," and include

several categories concerning various Internet and mobile phone uses (see: section 3.3 of the conditions for the operation of IFPI and section 2.2 of the conditions for the operation of PIL). Recognition of this is prima facie relevant to the discussion. However, we should consider the fact that both those entities deal with the management of producers rights (the owners of sound recordings), an area which is not identical to the area in which ACUM operates (management of composers, songwriters, and arrangers rights). We expected the parties before us to refer to this comparison – one way or the other – but they failed to do so. Each of them clung to the position of "all or nothing" and sided, respectively, either with a complete exclusion of "new media" or an absolute negation of the ability to exclude new media uses. Thus, the option of excluding "new media" and the conditions for it were not fully addressed.

83. What emerges from all the aforementioned is this: reviewing the implications of excluding "new media" shows that it is not necessarily justified to completely negate the option to exclude works for the purposes of "new media." Nevertheless, there are clear indications that this applies only to a limited exclusion mechanism, which concentrates on certain types of "new media" uses and strives to minimize the harm caused to users. Such an exclusion mechanism cannot be based merely on a technological distinction between "old media" and "new media" which allows a sweeping exclusion of all uses of the latter type – as proposed by EMI Israel and Anana. In any event, examining the possibility of another exclusion category concerning "new media" and fashioning the boundaries of that category should be done with care after studying the positions of all interested parties and all the relevant facts. As aforesaid, this matter is for the Tribunal to consider when the extension of the cartel's approval arises. Our position is also supported by the temporary nature of the approval – for only five years. At the end of that period (two years of which have already passed), the Tribunal will revisit the approval of the cartel, at which time it can also reconsider the scope of the exclusion mechanism's "segmentation," on the basis of five years' experience with the operation of a "narrow" exclusion mechanism. That experience will join with lessons already learned from the operation of an unlimited exclusion mechanism (as part of the Provisional Conditions) and will help the Tribunal evaluate the possibility of adopting a balanced, intermediate alternative that will permit the exclusion of limited uses for the purposes of "new media," without undermining ACUM's purpose as a collective management corporation. Presumably, by the time the Tribunal considers the extension of the cartel's approval, international experience on this issue will also be established which will enrich the set of facts before the Tribunal.

84. To sum up, our opinion is that the conditions for the permanent approval should be left as they are for the time being, including the issue of excluding works for the purposes of "new media," based on the assumption that the Tribunal will be able to

revisit this issue when the current conditions expire. It should be emphasized that this does not express any substantive holding regarding the result to which the Tribunal should reach on this or any other issue, beyond the general statement that the possibility of permitting a *limited*, well-defined exclusion of "new media" uses should not be ruled out. On the basis of the up-to-date facts laid out before it, the Tribunal will presumably reach a correct decision regarding the proper and most effective way to do so, insofar as it deems fit to follow such path.

Conclusion

85. The appeals before us revolved around ACUM's activity, yet they necessitated a broad discussion with regard to the collective management of copyright, considering not only the complexity of jointly owned works that derive from the talents of several authors but also the complexity of the variety of uses in a constantly changing technological world. At the present time we have reached the overall view that according to the facts before us we should not intervene in the conditions attached to the cartel's approval – from the perspective of balancing the proprietary rights of all authors against the public interest of accessibility to works that are part of the general cultural repertoire and it is therefore important to avoid placing substantial barriers to their use. We have not ruled out the possibility that in future the proper balance between authors' rights and the public interest might dictate a different result with respect to integrating the distinction between different types of "new media" and "old media" in the rights exclusion mechanism. To a great extent, this issue represents the challenge of collectively managing rights in the modern era with its changing technological and business environment, where the practice of collective management is more essential than ever but also raises more serious difficulties and complexities than ever. The answer to these challenges (both with regard to "the segmentation mechanism" and with regard to other matters discussed before us) lies in a delicate, changing balance between the relevant interests. As we have mentioned, this balance might be affected by changes in technological platforms and business practices, by studying new information, and by lessons derived from ACUM's activity in Israel and the operation of collective management corporations worldwide.

86. In conclusion, I would suggest to my fellow justices to dismiss both appeals. ACUM would bear the Director-General's costs in the amount of NIS 20,000. EMI Israel would bear the Director-General's costs in the amount of NIS 40,000 and Partner's costs in the amount of NIS 10,000.

Justice Z. Zylbertal

I concur.

Justice E. Rubinstein

A. I concur with the comprehensive opinion of my colleague, Justice Barak-Erez.

B. Without wishing to gild the lily, I would like to add brief remarks. We are dealing with ACUM, a special entity established in 1936, during the British Mandate, to protect the rights of authors and artists in their intellectual property and it is as though it has always been a fundamental Israeli institution. Indeed, perhaps if we could start over today it would have been possible to think of other ways of organization for this purpose, not necessarily a private company, but such is the situation we are facing, in which we are called upon to have our say. However, even given the current situation, the challenges of dealing with the rights of those in need of ACUM's services are ever-changing, especially with the dynamic technology, and it is not without reason that my colleague qualified the second part of her opinion with regard to the exclusion mechanism, by looking to the future.

C. With regard to public directors, the Tribunal was indeed right in its decision. In my opinion, the more the better, provided that these directors do their work faithfully as agents of the public and it is to be hoped that this is the norm, in which case the financial expense involved is justified. Regarding their duties, see Prof. J. Gross, *Directors and Officers in the Era of Corporate Governance* (Second Edition, 2011) Chapter I, p 1 et seq and the references there; and see also Amendment No. 8 to the Companies Law (2008) with regard to the possibility of appointing independent directors; I. Bahat, *Companies*, 12th edition, 5771-2011, 386. My colleague described in detail the circumstances of this case but also added notes drawn from general public law, namely when a particular entity appears to be hybrid, and as derived from this analysis – the fact that ACUM is similar to that model in view of its duties to the public, without deeming it necessary to rule that it is indeed a hybrid entity. I myself would tend to say that we are indeed dealing with a hybrid entity, whether we take a relatively narrow view of it, through the eyes of its direct beneficiaries, or a broader view of the general population of users; see also my comments in ALAA 1106/04 *Haifa Local Planning and Building Committee v. The Electric Corporation* (2006), paras. C and D.

D. The author A. Harel in his work *Hybrid Entities – Private Entities in Administrative Law* (5768) enumerates (pp 118-125) criteria for analyzing the hybrid nature of an entity, including a vital public function, providing a service to the public, not-for-profit activity, a monopoly, the concentration of great power that might be abused, and functional public funding. When dealing with a monopoly, as in the case

before us, although ACUM is incorporated as a private company, it is painted in bold colors of hybridity, in particular considering the narrow choice given to individuals (ibid, 115). Indeed, in a rapidly changing world of varied technological possibilities for using works, the interest of authors and artists, as well as the general public, is one of fairness towards everyone; see also D. Barak-Erez, *Citizen, Subject, Consumer and Government in a Changing Country* (2012), 119, 121, who characterizes an entity as hybrid, when, inter alia, it serves as an actual substitute for government involvement. In the case before us, as implied above, the matter could have presumably been dealt with through a regulatory framework and this component justifies, in my view, a thorough discussion of the issue of public representatives. Indeed, before us is a private company, yet this is merely its framework and shell while its content is significantly broader; even the name attests to its belonging to the public realm – the Association of Composers, Authors and Publishers. ACUM's articles of association (as last approved on July 21, 2013 according to its website) include external directors and the controversy consists merely of their number. According to its website, ACUM presently has approximately 7,500 author members; don't they deserve extensive protection against a potential clash of interests between various groups within the company?

E. Now a few words on the role of external directors, which is the current legal term, or public directors; as we know, the Companies Law, 5759-1999 refers to an external director (article five, sections 239 et seq) but the literature uses this expression interchangeably with public director, as it was termed in the Companies Ordinance (section 96(b)(c)). Indeed, according to the learned author J. Gross (*Directors and Officers in the Era of Corporate Governance* (2011) 92), the external director "does not represent the regulator or the general public. He owes a fiduciary duty to the company and to it alone and he only has to bear the interest of the company in mind"; and see also Dr. O. Haviv-Segal, *Company Law* (2007) 438. However, even if this narrow definition is correct in principle, without going into a comprehensive discussion, the current case involves a special instance of a "private-non-private" company, which does not strive to maximize its profits. In this context, see by analogy the statement by Haviv-Segal, ibid, about the external director's function in restraining "opportunistic behavior" by a controlling shareholder or management: "in this respect the external director can be regarded as the representative of the public shareholders on the company's board of directors." We should also mention (Gross, p 93) that the external director "brings with him knowledge, experience, and objective judgment and might balance the various views within the company, especially when the board of directors is made up of several cohesive groups"; he is "removed from the shareholders' personal interests… can express objective opinions in cases where differences have arisen between various groups in the company and balance the different interests in the

company…". By analogy, this statement is presumably consistent with the present case, despite ACUM's "private" corporate framework. Therefore, the external directors have a particularly important role from the broad, overall perspective of the interests of ACUM's members generally as well as the public at large; see also Hadara Bar-Mor, *Corporate Law III* (5769-2009) 307-309. Thus, we should not intervene in the ruling of the Tribunal on this matter.

Regarding my colleague's remarks concerning the rights exclusion mechanism and old and new media, what can be inferred from them is a lesson in complexity and arbiter humility. We are dealing with money and maximizing authors' benefit but the question is whether the baby won't be thrown out with the bathwater. My colleague pointed out the difficulties and her conclusion is that more experience and study is necessary in order to reach a proper balance (see para. 82). My sense is that this appears difficult and challenging; the technological means are constantly changing before our very eyes, along with their implications to the issue before us, and hence solutions are likely to be short-lived. *The regulator, the Director-General of the Antitrust Authority, has an extremely important role in this respect* since the Tribunal has only what its eyes can see, while the Director-General is equipped with available monitoring tools. Finally, this summer I have had the opportunity to serve as a "secondary partner" in three intellectual property decisions. Their common denominator is the complexity caused by time, complexity of different types, technological and economic. Studying the fascinating collection *Copyright – Readings in Copyright Law* (M. Birnhack & G. Pesach, 5769-2009) reveals a variety of insights that will concern us a great deal in the future. Apart from the need to plough through the specific material, the constant changes, perhaps more than in any other area of civil law, also place the courts, and equally so – the regulatory entities, under weighty responsibility. The tension between property and competition, and between the long, short and medium term, poses real challenges. The professionalism of the regulators – be it the Patent Office or, as aforesaid, the Director-General of the Antitrust Authority – helps courts in making their rulings but does not relieve them of their responsibility. In these matters comparative law may also be useful. The bottom line is that this judgment ought to be a starting point for lessons to be learned; over, but not done.

Held as per the opinion of Justice D. Barak-Erez

September 3, 2013 (Elul 28, 5773)