

# COLLECTIVE MANAGEMENT OF MUSICAL COPYRIGHT IN A SELF-REGULATED REGIME

## Singapore's Copyright Review and the Hope for Transparency

Musical copyright has been the subject of collective rights management in Singapore for decades, conducted by what are known as collective management organisations (“CMOs”). Whereas CMOs serve the public interest by facilitating protection of copyright, they unfortunately exist in a legal void, let to self-regulate. This has resulted in opaque systems and damage to the legitimacy of copyright protection. This article provides timely insight into the flaws of the self-regulated regime of CMOs and proposes regulatory measures in response to these issues, just as the reforms following Singapore's latest copyright review are eagerly anticipated.

**TAY Eu-Yen**<sup>1</sup>

*Master of Studies in Legal Research (with Distinction)  
(Oxford University), LLB (Bristol University);  
Non-practising Barrister (England and Wales, Inner Temple);  
Advocate and Solicitor (Singapore);  
Advisory Board Member, Asia Law Network;  
Founding Member, Singapore Nightlife Business Association;  
Co-Founder, Executive Chairman and General Counsel, Coterie Dining  
Concepts Pte Ltd.*

### **I. Introduction**

#### **A. Scope of article**

1 This article discusses the activities conducted by collective management organisations (“CMOs”) managing music and music-

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1 This author participated, as a founding member of the Singapore Nightlife Business Association (“SNBA”), in the public consultation process leading up to the Singapore Copyright Review Report (17 January 2019) and is currently putting together a response from SNBA to the Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations (3 June 2020). This article was written independent and separate from the public consultation process but has been updated to deal with the latest developments, and will be submitted to the relevant agencies upon journal publication. Both the 2019 review report and the 2020 public consultation paper are discussed in this article.

related copyright, focusing mainly on royalty management and rights representation (collectively “Rights Management”). It goes on to discuss the hope for greater transparency over Rights Management; hope that has been ignited by the Singapore Copyright Review Report<sup>2</sup> (“Review Report”). While proposed reforms are underway, this article explores the regulatory direction that Singapore law could thrive toward, with particular focus on the comparative legal position in the UK, which mirrors the stance taken by the European Union (“EU”) as a whole. Since the topic of Rights Management has sparked a good amount of interest in various jurisdictions, where appropriate throughout this article, reference may also be made to other foreign case law or commentary that illuminates certain important observations.

## **B. Rationale behind CMOs**

2 The idea behind CMOs is a functional one: to establish a centralised way for music users to pay royalties for the use of music. Under the Copyright Act,<sup>3</sup> copyright subsists in lyrical works and musical works<sup>4</sup> as the exclusive right to reproduce, publish, publicly perform, communicate and adapt the work.<sup>5</sup> There also subsists copyright in sound recordings<sup>6</sup> and cinematographic films,<sup>7</sup> which include sound-tracks associated with such visual images.<sup>8</sup> Each copyright may be owned by different right holders, meaning that a single piece of music (not to mention an entire playlist) can consist of a number of right holders: primarily, the lyricist, the music composer, the performer and the record company.

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2 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019).

3 Cap 63, 2006 Rev Ed.

4 There is no statutory definition of “musical work” in the Copyright Act (Cap 63, 2006 Rev Ed). There is copyright in an original musical work, whether it is an original composition or consists in an arrangement of old music, but there is no copyright in a song as a hybrid or combination of words and music. Copyright subsists in the words and music separately: see *Halsbury’s Laws of Singapore* vol 13(3) (LexisNexis, last updated April 2020) at para 160.024.

5 Copyright Act (Cap 63, 2006 Rev Ed) s 26(1).

6 Copyright Act (Cap 63, 2006 Rev Ed) s 82(1)

7 Copyright Act (Cap 63, 2006 Rev Ed) s 83.

8 Copyright Act (Cap 63, 2006 Rev Ed) s 7(1). A sound-track associated with a film is protected as part of the cinematograph film copyright and is not regarded as a sound recording for the purpose of copyright, unless the songs and music in that sound-track are independently made into a sound recording, in which case the recording will enjoy its own distinct copyright as a sound recording: see *Halsbury’s Laws of Singapore* vol 13(3) (LexisNexis, last updated April 2020) at para 160.028.

3 The primary objective of CMOs is to eliminate the impracticality of having each right holder enforce copyright separately, by offering centralised Rights Management services. In brief, CMOs contract with right holders to collect royalties on their behalf from music users. As middlemen, they play a crucial role in ensuring that copyright protection is efficiently and effectively upheld. The UK Intellectual Property Office (“UK-IPO”) describes the main purpose of CMOs as one to facilitate remuneration to right holders for use of their copyright and, conversely, to enable music users to use a range of music without having to negotiate each copyright licence individually.<sup>9</sup> In similar vein, the Review Report recognises that CMOs are “a vital link”<sup>10</sup> between right holders seeking access to commercial markets and music users who need simplified access to music works.

4 There are three CMOs in Singapore dealing with music and music-related copyright: Composers and Authors Society of Singapore Ltd<sup>11</sup> (“COMPASS”), Music Rights (Singapore) Public Limited<sup>12</sup> (“MRSS”) and Recording Industry Music Services Singapore<sup>13</sup> (“RIMS”), established by the Recording Industry Association of Singapore. Broadly, COMPASS is responsible for the collection of royalties relating to lyricists’ and music composers’ rights,<sup>14</sup> MRSS for rights in recorded music (both in sound recordings and in music videos),<sup>15</sup> and RIMS for rights relating to cinematographic film reproduced in karaoke music videos.<sup>16</sup> These CMOs obtain the authority to represent right holders by way of direct agreement with the right holders or by signing reciprocal agreements with foreign CMOs to mutually represent one another’s interests.

### **C. Need for regulation**

5 It is important to know that CMOs are incorporated as private companies run by music industry stakeholders, such as music labels, who

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9 United Kingdom, Intellectual Property Office, “Guidance of the UK Regulations Implementing the Collective Rights Management (CRM) Directive” (February 2016) Part 1 at p 6.

10 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019), p 60, preamble.

11 Composers and Authors Society of Singapore Ltd website (hereinafter “COMPASS”) <https://www.compass.org.sg>.

12 Music Rights (Singapore) Public Limited website <https://www.mrss.org.sg>.

13 Recording Industry Music Services Singapore website <https://rimss.com.sg>.

14 COMPASS, “About Us” <https://www.compass.org.sg/about-us/> (accessed March 2020).

15 Music Rights (Singapore) Public Limited, “Licence Application” <https://www.mrss.com.sg/licence-application/> (accessed March 2020).

16 Recording Industry Music Services Singapore, “License Application” <https://rimss.com.sg/license-application/> (accessed March 2020).

have commercial reasons to protect copyright. CMOs are *not* government bodies.<sup>17</sup> In Singapore, CMOs are *not* licensed by the Government to conduct the business of Rights Management and are self-regulated, or in other words, *not* regulated by any legal framework. That there is no definition of “CMO” found under Singapore’s copyright law is testimony to how far outside legal regulation CMOs are accustomed to operate. This state of affairs where CMOs conduct their business without legal accountability has now come under scrutiny, because although CMOs pursue the object of copyright protection and are seen to exist for the public interest, their privatised nature makes it essential for them to be held to commercial standards of transparency.

6 The case for regulatory intervention is strongest when seen in light of CMOs’ monopolistic stronghold. Explained in economic terms, CMOs are generally accepted as natural monopolies<sup>18</sup> and strong governance over CMOs is thus necessary to curb potential abuse. Daniel Gervais identifies the sentiment well by observing that when “CMOs are *de facto* or *de jure* monopolies, it is not unreasonable to suggest that some governmental supervision is warranted”.<sup>19</sup> Similarly, the Max Planck Institute for Intellectual Property and Competition Law (“Max Planck Institute”) states that CMOs “are in need of state control in light of their monopoly *vis-à-vis* rightholders and users and the public interests involved”.<sup>20</sup>

7 A seminal case that spurred the exemption of CMOs from anti-trust laws is the US Supreme Court decision in *Broadcast Music, Inc v Columbia Broadcasting Systems, Inc*,<sup>21</sup> where the question arose as to whether blanket licence fees constituted price fixing by CMOs that was *per se* unlawful under antitrust laws. The US Supreme Court found

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17 On the contrary, radio broadcast rights are not managed by collective management organisations (hereinafter “CMOs”) any longer, but by the Infocomm Media Development Authority, a government statutory board.

18 “Natural monopoly” is where a monopoly supplier is able to supply the market more efficiently than if there were competition: see Martin Miernicki, “Collective Management of Copyrights between Competition, Regulation, and Monopolism” (Nomos Publishing, 2017) at p 28, fn 25. Natural monopolies are commonly associated with utilities like water supply or telecommunications.

19 Daniel Gervais, “Symposium: Collective Management of Copyright: Solution or Sacrifice? (Keynote: The Landscape of Collective Management Schemes)” (2011) 34 Colum JL & Arts 591 at 604.

20 Josef Drexler *et al*, “Comments of the Max Planck Institute for Intellectual Property and Competition Law on the 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 COM (2012)372” Max Planck Institute for Intellectual Property & Competition Law Research Paper No 13-04 (16 January 2013) at p 16, para 19.

21 441 US 1 (1979).

that they were not, holding that such a blanket licence was “an obvious necessity” for effective copyright protection.<sup>22</sup> This judgment has been regarded as having set the scene for CMOs to fall into the category of “natural monopoly”, a concept that describes the situation where due to the overwhelming benefits of administrative efficiency, “society is better served by a single seller”.<sup>23</sup> With natural monopolies, regulation, instead of competition, is the expected response. Indeed, because competition runs counter to the very purpose of a natural monopoly, keen regulation is the only way to curb monopolistic abuse in such a case.

8 In Singapore, the Copyright Tribunal<sup>24</sup> (“the Tribunal”) has affirmed that CMOs are in a position of natural monopoly and that it is therefore important for CMOs to be duly and effectively regulated. On this topic, the Tribunal held:<sup>25</sup>

*[R]egulatory control is necessary in the public interest to curb any abuse by collecting societies of collective licensing bodies, which are often in a monopolistic position as a result of their right to license the use of virtually all the works and subject-matter other than words needed in a particular sector (eg popular music in the entertainment world). [emphasis added]*

9 Apart from being a natural monopoly, CMOs might also be considered trustees of right holders’ money. Commenting in 2012, before the EU Directive on the Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market<sup>26</sup> (“EU Directive”) was finally laid down, the Max Planck Institute proposed that in setting out its framework, the European Commission ought to “highlight the role of the collecting society as a trustee of the rights it administers”<sup>27</sup> and that it was important to express “the trusteeship in the very definition of

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22 *Broadcast Music, Inc v Columbia Broadcasting Systems, Inc* 441 US 1 at 20–22 (1979).

23 Ariel Katz, “The Potential Demise of another Natural Monopoly: Rethinking the Collective Administration of Performing Rights” (2005) 1(3) *Jnl of Competition Law & Economics* 541 at 543.

24 Established under s 151(1) of the Copyright Act (Cap 63, 2006 Rev Ed).

25 *Tiananmen KTV & Lounge Pte Ltd v Innoform Entertainment Pte Ltd* [2011] SGCRT 1 at [3].

26 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (hereinafter “EU Directive”).

27 Josef Drexler *et al*, “Comments of the Max Planck Institute for Intellectual Property and Competition Law on the 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 COM (2012)372” Max Planck Institute for Intellectual Property & Competition Law Research Paper No 13-04 (16 January 2013) at p 15, para 18.

collecting societies”<sup>28</sup> The role of CMOs as collectors of royalties from users on behalf of right holders does attract the consideration that CMOs take on the personality of trustees. This is a crucial point that potentially drags in complex issues of trust law and fiduciary duties going beyond the scope of this article, but suffice it to say here that just the possibility CMOs could be regarded as trustees certainly provides another reason for subjecting CMOs to regulation.

10 Thus far, against the tide of reasons that call for regulation of CMOs, however, CMOs in Singapore have been left to self-regulate. The current landscape has left music users vulnerable to CMOs abusing their position of power as the self-instituted, self-appointed and self-regulated guardian of musical copyright.<sup>29</sup> As this article reveals, CMOs have *not* effectively self-governed. Given their privatised, monopolistic and perhaps even fiduciary personality, coupled with their inability to maintain transparency, it is necessary that CMOs are made subject to government regulation as soon as possible.

#### D. *The copyright review*

11 Singapore’s latest copyright review, captured in the Review Report, acknowledges the indispensable role of CMOs in facilitating copyright protection but cautions that this precise role makes it “imperative that they operate with high standards of transparency and governance”<sup>30</sup> With that caution, the Review Report brought the regulation of CMOs to the forefront of Singapore’s latest and most extensive copyright reform. The Ministry of Law (“MinLaw”) and Intellectual Property of Singapore (“IPOS”) issued a joint response in the Review Report recommending legal scrutiny over the conduct of CMOs, noting that “[although] there has been successful self-regulation by CMOs in overseas jurisdictions, this does not appear to be the case in Singapore”<sup>31</sup> and that “[g]iven the existing problems in the current unregulated or self-regulated

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28 Josef Drexl *et al*, “Comments of the Max Planck Institute for Intellectual Property and Competition Law on the 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 COM (2012)372” Max Planck Institute for Intellectual Property & Competition Law Research Paper No 13-04 (16 January 2013) at p 20, para 28.

29 Indeed, COMPASS proclaims on its website to be the “Guardian of Music Copyrights”.

30 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019) at p 60, preamble.

31 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019) at p 62, para 2.15.6(b).

environment, we are of the view that there is a need for external oversight of CMOs<sup>32</sup>.

12 In what is known as “Conclusion 15”,<sup>33</sup> the Review Report proposed a new class licensing scheme to be administered by IPOS, subjecting CMOs to licence conditions and a *mandatory* Code of Conduct (collectively, these licence conditions and mandatory Code of Conduct shall be referred to here as the “Licensing Scheme”). Conclusion 15 also empowers IPOS to audit CMOs for compliance with the licence conditions imposed, issue directions to CMOs to comply with these licence conditions, dish out financial penalties for non-compliance, remove and replace CMO management for persistent non-compliance, and suspend or revoke CMO licences. In addition, Conclusion 15 states that IPOS will examine the Tribunal’s proceedings to enhance the use of this dispute resolution forum by CMOs and music users (“Tribunal Review”).

13 The Review Report was published over a year ago at this time of writing and represents a new hope for the copyright protection regime: a hope that with centralised governance, CMOs can rise above board to attain the legitimacy they need. Although slated for publication in late 2019, the Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations<sup>34</sup> (“Public Consultation Paper”) was finally published on 3 June 2020. This Public Consultation Paper contains the “Proposed Licensing Scheme”<sup>35</sup> for which the views of stakeholders are sought. It also contains some suggested amendments to the Tribunal’s proceedings in relation to facilitating an efficient market.<sup>36</sup> This article will comment on the Proposed Licensing Scheme and other relevant parts of the Public Consultation Paper in its last part.<sup>37</sup>

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32 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019) at p 62, para 2.15.7.

33 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019) at p 63.

34 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020).

35 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 1.2.

36 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at paras 3.49–3.52.

37 See paras 57–79 below.



14 In the meantime, to appreciate the importance of a well-thought-out Licensing Scheme and detailed Tribunal Review, it is first necessary to understand how the self-regulated regime has failed right holders and music users. This article therefore now turns to the opaque systems of Rights Management that plague CMOs, the *reason* why the Licensing Scheme and Tribunal Review are needed in the first place.

## II. Self-regulated regime

15 The main point of objection to CMOs is that CMOs are not held accountable against any legal framework. There is no statute or by-law governing the conduct of CMOs; no obligations of accountability, transparency, corporate governance or disclosure as to their activities are imposed by Singapore law. To date, CMOs pretty much do as they please, with nothing and nobody to ensure that they stay above board. The very objective of CMOs – Rights Management – has been so far left to (ineffectual) self-regulation. This is lamentable because the very nature of CMOs is such that “rights management is not incidental to their work, as it might be for a publisher or a film company. Rights management is what CMOs do”.<sup>38</sup> The legal void in relation to CMOs’ Rights Management is therefore extremely detrimental to the very system of copyright protection that CMOs were designed to facilitate.

### A. *Royalty management*

16 Royalty management is the method by which CMOs protect copyright. It follows that how royalties are determined and distributed must be kept absolutely transparent. Such incidents such as deductions due to administration costs, or retained funds for uncontactable right holders, should also be meticulously accounted for. However, in Singapore, there is no legislation governing (or even guiding) the way in which royalties must be managed by CMOs. It is left entirely to CMOs to design their own rules or to even *have* rules at all. This part exposes the areas of self-regulated activity that have created a landscape of unaccountability, infecting the regime with mistrust.

#### (1) *Arbitrary royalty rates*

17 There is no legislated formula for determining royalty rates. Different CMOs use different bases and multipliers, and the differences

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38 David Gervais, “Symposium: Collective Management of Copyright: Solution or Sacrifice? (Keynote: The Landscape of Collective Management Schemes)” (2011) 34 Colum JL & Arts 591 at 594.



are inexplicable. Even within the same CMO, royalty rates for various music users are not determined in the same way. More than that there is no transparency, there is also no known *logic* as to how royalty rates are fixed. There is no legal obligation to offer justification for how royalty rates are determined, and to the extent that none is thus given, royalty rates appear arbitrary.

18 COMPASS bases its royalty rates on the size of a location for certain music users like shopping complexes, food courts and ice-skating rinks, and on the number of seats that can fit into a location for other music users like restaurants, bars and nightclubs.<sup>39</sup> The technical difference between the types of music users, particularly between categories like food courts and restaurants, is not apparent or explained by COMPASS. For one-off events, permits are granted with royalties based on a percentage of revenue for some types of events, such as “concerts and ticketed entertainment”, and based on a fixed rate per show (which varies with seating capacity) for others, like ticketed “circus, magic shows, and acrobatic performances”.<sup>40</sup> While the distinction could be due to the use of music as the primary revenue driver in concerts *versus* as a background component in circuses, magic shows and acrobatic performances, it heavily discounts the similarities between concerts and acrobatic performances such as Cirque du Soleil, unless such acrobatic shows are regarded instead as “ticketed entertainment” (which then begs the question of what shows fall within that vague and somewhat circular definition of “entertainment”). To add to the confusion, COMPASS charges royalties for events such as “play and drama performances” and “fashion show and beauty pageants” based on a percentage of ticket sales, even though music is as ancillary to such shows as it is to a circus. For royalties based on a percentage of receipts, the percentage also differs inexplicably between categories of events ranging from 1.25% for play and drama performances to 2.5% for concerts.

19 In an equally arbitrary manner, MRSS charges royalty rates based on fixed rates that are tiered according to seating capacity bands (for example, 1 to 39 seats) but varies these fixed rates and band sizes on the nature of the operator. Karaoke facilities in karaoke lounges or nightclubs are charged a higher fixed rate per seating capacity band as compared to karaoke facilities in community or staff recreation clubs, and seating capacity bands are tiered more narrowly in relation to the former (for example, 1 to 39 seats *versus* 1 to 60 seats in relation to the

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39 COMPASS, “Licences” <http://compass.org.sg/music-users/licences-permits-and-other-forms/licences/> (accessed March 2020).

40 COMPASS, “Permits” <http://compass.org.sg/music-users/licences-permits-and-other-forms/permits/> (accessed March 2020).

latter).<sup>41</sup> This effectively results in a higher rate charged per seat where karaoke is offered in lounges or nightclubs, as opposed to in community or staff recreation clubs. It is not clear whether the different charges are due to the private *versus* public nature of a facility. For music users falling under the category “restaurants”, MRSS charges a fixed rate regardless of seating capacity. There is also a fixed fee (albeit higher than that for restaurants) with respect to “bars, pubs and lounges” with up to three karaoke rooms. These fixed fees raise issues of how the line is drawn between “restaurants” and “bars, pubs and lounges,” and as to why there is a three-room limit for the latter category. The licence fee scheme under RIMS has a similar structure to that of MRSS, and thus poses the same questions.<sup>42</sup> Neither MRSS nor RIMS have proffered any justification for the distinctions that separate each of the royalty rates.

20 The current uncertainty as to the formulae applied by CMOs to determine royalty rates has led to scepticism among music users, which in turn damages the legitimacy of the entire copyright protection regime. The Review Report stated that:<sup>43</sup>

Users were generally *skeptical as to how the quantum of licence fees were determined* and distributed. Some pointed out that similar establishments which used approximately the same amount of music *seemed to be charged differently*, and *asked for greater transparency and rigour on how licence fees are determined*. [emphasis added]

21 Admittedly, the determination of royalty rates is “not so easily susceptible to a universal mathematical formula” and would sometimes involve “an entirely judgmental exercise”,<sup>44</sup> but there ought nonetheless to be a justifiable basis upon which rates are predicated and differentiated. Justifiability does not need to equate to uniformity; however, it does require transparency and consistency. So, while the premise for rates in relation to different music uses and users may not be the same throughout, each premise should be explicable on its own and *vis-à-vis* one another. For example, where the percentage-of-revenue model is chosen to apply, the approach could be explained as that “over the years the copyright owner has been perceived to have an interest in the success or otherwise of his work” and so “[i]f it is highly successful and substantial returns

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41 Music Rights (Singapore) Public Limited, “Tariffs/Forms” <https://www.mrss.com.sg/tariffs-forms/> (accessed March 2020).

42 Recording Industry Music Services Singapore, “License Application” <https://rimss.com.sg/license-application/> (accessed March 2020).

43 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019) at p 61, para 2.15.3(a).

44 *Singapore Broadcasting Corp v The Performing Right Society Ltd* [1991] SGCR 1 at [12.5(d)].

are yielded, he should receive more<sup>45</sup>. This model could be chosen for its suitability in relation to certain music uses, such as public performance of music in album tour concerts or because it is preferred to a fixed rate approach which has been said to involve a “high degree of arbitrariness.”<sup>46</sup> Conversely, a fixed rate approach may be more attractive for its “simplicity of operation”<sup>47</sup> or more appropriate where music is used in an ancillary way. Whatever the case, “the objective must be to find an approach which will embody a true reflection of the value of the right,”<sup>48</sup> and, as the Review Report has noted, music users want to know why certain approaches are used instead of others, and when a different premise may apply.

22 Inconsistencies such as the difference in seat capacity banding tiers and the dichotomy between royalty rates for private *versus* public entities also need to be responsibly addressed. While “there is nothing inherently objectionable to the concept of banding,”<sup>49</sup> banding should not be arbitrarily in favour of some types of users. In this regard, the European Court of Justice<sup>50</sup> has observed, in the context of Art 82 of the Treaty Establishing the European Community,<sup>51</sup> that the arbitrary distinction of rates based on the private *versus* public nature of entities could potentially be an abuse of dominant position in breach of anti-trust laws, if such a distinction puts the relevant private entities at a competitive disadvantage.<sup>52</sup>

23 Although the discussion on how CMOs interact with anti-trust laws is well beyond the scope of this article, it bears to note therefore that any differentiation in royalty rates based on the private *versus* public nature of a music user, is not in itself without issue. Where community or staff recreation clubs are not *wholly* public service undertakings, or where units in these publicly owned clubs are leased out to private entities to operate karaoke rooms (not an uncommon scenario), the lines are further blurred and the distinction in royalty rates even less logical. In fact, the Copyright Tribunal in the Australian case of *Reference by APRA*;

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45 *Reference by APRA; Re ABC* (1985) 5 IPR 449 at 479.

46 *Reference by APRA; Re ABC* (1985) 5 IPR 449 at 479.

47 *Singapore Broadcasting Corp v The Performing Right Society Ltd* [1991] SGCR 1 at [13.2(a)(2)].

48 *Singapore Broadcasting Corp v The Performing Right Society Ltd* [1991] SGCR 1 at [13.2(a)(2)].

49 *Singapore Broadcasting Corp v The Performing Right Society Ltd* [1991] SGCR 1 at [13.2(b)].

50 *Kanal 5 Ltd v Foreningen Svenska Tonsattaers Internationella Musikbyra (STIM) upa* C-52/07, EU:C:2008:703.

51 Consolidated version 2002.

52 *Kanal 5 Ltd v Foreningen Svenska Tonsattaers Internationella Musikbyra (STIM) upa* C-52/07, EU:C:2008:703 at para 48.

*Re ABC*<sup>53</sup> held that there simply ought not to be a difference at all in fees charged to entities with public service personalities, as there is no good reason for such entities to be effectively subsidised by right holders or any other private group in society.<sup>54</sup>

24 That there is inexplicable arbitrariness in the royalty rates set by CMOs points directly to the complete lack of transparency and rationality in this area of activity, which precipitates commercial unpredictability and user mistrust.

(2) *No opportunity to negotiate*

25 The arbitrariness of royalty rates is unfortunately accompanied by the lack of opportunity for music users to negotiate these fees, whether individually or by group representation. There is simply no negotiation mechanism in place. The Tribunal observed in *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd*<sup>55</sup> (“*Sunvic Productions*”), that royalty rates were set by COMPASS unilaterally and arbitrarily, yet, music users were not given any chance to negotiate these rates.<sup>56</sup> This observation is not unique to COMPASS and would apply equally to all CMOs. The absence of an avenue for negotiation means that CMOs impose royalty rates on music users in a take-it-or-leave-it fashion, which sits rather uncomfortably with traditional contractual principles of offer and acceptance.

26 Indeed, the UK Copyright Tribunal (“UK Tribunal”) warned in *ITV Network Ltd v Performing Right Society Ltd*,<sup>57</sup> that royalty rates must not be determined by considering how much a user would pay given that the only alternative would be to give up that copyright licence altogether.<sup>58</sup> In other words, royalty rates should not be set arbitrarily on the assumption that users would have no choice but to pay to avoid being in breach of copyright laws; that is, there must be room provided for genuine negotiation. Where market forces of supply and demand do not apply to determine prices, as in the case of a natural monopoly, a music user’s entitlement to negotiate would go a long way towards limiting the unchecked tyranny of CMOs in the fixing of royalty rates.

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53 (1985) 5 IPR 449.

54 Reference by APRA; *Re ABC* (1985) 5 IPR 449 at 480, cited in *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd* [1993] SGCRT 1 at [13.1].

55 [1993] SGCRT 1.

56 *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd* [1993] SGCRT 1 at [11.14]–[13.1].

57 CT 127/14 (27 June 2016).

58 *ITV Network Ltd v Performing Right Society Ltd* CT 127/14 (27 June 2016) at [14(10)].

27 It bears to note, furthermore, that lack of opportunity for music users to negotiate with CMOs, or in any other way seek to influence, royalty rates, in practice leads to music users seeking to *avoid*, rather than discuss, payment of royalties. Difficulties with royalty collection in turn undermines the primary objective of the entire copyright protection regime, spiralling the credibility of CMOs further downwards.

(3) *Limited tribunal supervision*

28 To draw some boundaries around the self-regulated regime of CMOs, it was envisaged that the Tribunal would act “as a check against licensors imposing unreasonable licensing fees and terms”.<sup>59</sup> The Tribunal indeed considers its role to be that of a watchdog over the self-regulated, naturally monopolistic position of CMOs. In *Tiananmen KTV & Lounge Pte Ltd v Innoform Entertainment Pte Ltd*<sup>60</sup> (“*Tiananmen KTV*”), the Tribunal held that:<sup>61</sup>

The Copyright Tribunal in Singapore is a creature of statute, established under the Copyright Act (Cap 63) (‘the Act’) in part to *exercise a measure of control* over the activities of organisations, commonly referred to as collecting societies ... *Such regulatory control is necessary in the public interest to curb any abuse by the collecting societies or collectives licensing bodies, which are often in a monopolistic position* as a result of their right to licence the use of virtually all the works and subject-matter other than works needed in a particular sector (eg popular music in the entertainment world). [emphasis added]

29 Thus, the Tribunal seems to have been brought into being, among other reasons, as a form of regulatory control over CMOs. Regrettably, the Tribunal is not as effective a policeman as it was hoped to be. First, the Tribunal’s jurisdiction to review *proposed* licensing schemes and to decide on their reasonableness is entirely dependent on the willingness of CMOs to refer these schemes to the Tribunal. That the law says CMOs “may refer the scheme” to the Tribunal<sup>62</sup> provides a *suggestion* rather than a legal obligation. Moreover, CMOs who do voluntarily refer proposed schemes to the Tribunal for review are entitled to withdraw any such referral from under the inspection of the Tribunal at any time before an

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59 Senior Minister of State for Law, Assoc Prof Ho Peng Kee at the second reading of the Copyright (Amendment) Bill 2009 (Bill 16 of 2009) which amended the Copyright Act (Cap 63, 2006 Rev Ed), effective 31 December 2009, to expand the scope of the Tribunal’s jurisdiction to review all types of copyright work and subject matter other than work: *Singapore Parliamentary Debates, Official Report* (15 September 2009) vol 86 at col 1499.

60 [2011] SGCRT 1.

61 *Tiananmen KTV & Lounge Pte Ltd v Innoform Entertainment Pte Ltd* [2011] SGCRT 1 at [3].

62 Copyright Act (Cap 63, 2006 Rev Ed) s 160(1) read with s 160(4).

order by the Tribunal is made.<sup>63</sup> There is no law enabling music users to refer proposed licensing schemes to the Tribunal for review before such schemes become operative. The absence of such a law is telling of the fact that no prior negotiations between CMOs and music users take place before royalty rates are fixed; therefore, music users would never have the opportunity to gain access to proposed licensing schemes to begin with. It is thus not realistic to expect the Tribunal to have any meaningful supervision over proposed licensing schemes in the current landscape.

30 Second, although the Tribunal has jurisdiction to accept applications from music users to review *operative* licensing schemes imposed by CMOs, it appears that music users may be intimidated by the legally technical nature of the whole process. It was raised in the Review Report that most music users are *unaware* of the recourse channels available to them or, if they are aware, have never used them. The Review Report states:<sup>64</sup>

The general feedback was divided into two groups – those who were *not aware of any dispute resolution mechanisms*, such as internal mechanisms of the CMOs or using the Copyright Tribunal; and those who did know about such mechanisms but *have not used them before*. [emphasis added]

31 Under the Copyright Act, s 161(1) provides that where a dispute arises as to a licensing scheme imposed by a CMO, music users (either represented by an organisation or individually) may refer the scheme to the Tribunal for review, and the Tribunal may vary or substitute those schemes where the Tribunal “considers reasonable in the circumstances”.<sup>65</sup> Section 163(2) provides that where a music user requires a licence but that the grant of such a licence would be on terms or with fees that “are not reasonable in the circumstances of the case”, the music user may refer the licensing scheme to the Tribunal. If the Tribunal determines that the referral is “well-founded, may specify new charges and conditions that it “considers reasonable in the circumstances”.<sup>66</sup> The Tribunal has ruled that “the thrust of s. 161 is to enable the parties to refer the licence scheme in general to the Tribunal in its application to the relevant class of

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63 Copyright Act (Cap 63, 2006 Rev Ed) s 160(6).

64 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019) at p 61, para 2.15.3(c).

65 Copyright Act (Cap 63, 2006 Rev Ed) s 161(1) read with s 161(5). Other music users who share the same concerns about licensing schemes referred to the Tribunal may apply to be added as a party: s 161(2)(c) read with s 161(3); and s 136(5).

66 Copyright Act (Cap 63, 2006 Rev Ed) s 163(2) read with s 163(6)(b). References may also be made to the Tribunal where a CMO refuses or fails to grant a licence: s 163(1) read with ss 163(3)(a) and 163(4)(a).

cases”<sup>67</sup> while under s 163(2), “the validity of the licence scheme is not in general terms put in issue”.<sup>68</sup> What is considered under the latter section is instead “the application of the scheme to a particular case covered by the scheme”.<sup>69</sup>

32 While a full-length discussion on the practical implications of the Tribunal’s distinction between ss 161(1) and 163(2)<sup>70</sup> is outside the scope of this article, it suffices here to say that music users, as laypersons, are unlikely to understand which section to make an application under. Moreover, the legalistic provisions<sup>71</sup> regulating service of the application to the Tribunal, formal requirements to be drafted into an application, preliminary hearings, amendment of applications, consolidation of applications, orders of the Tribunal, references to points of law to the High Court<sup>72</sup> and summonses of witnesses, all make it difficult for a layperson to navigate this course of dispute resolution. Therefore, although music users may be represented by an employee, officer or director before the Tribunal,<sup>73</sup> the legalities involved make it unrealistic to proceed without legal representation and added costs.

33 This practical difficulty caused by the lack of financial resources and knowledge expertise was pointed out by the UK Court of Appeal in *A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd*<sup>74</sup> (“A.E.I.”), where it observed the “very undesirable position” of smaller enterprises who do not have adequate means to contest a licence before the UK Tribunal.<sup>75</sup> The fact that many music users, especially small businesses and individuals, have limited resources, creates an imbalance between

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67 *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd* [1993] SGCRT 1 at [4.4].

68 *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd* [1993] SGCRT 1 at [4.2].

69 *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd* [1993] SGCRT 1 at [4.2].

70 For example, the Tribunal held that any orders made in response to an application under s 161 (but not s 163) would affect all cases in that class of licence, whether or not the parties were joined in the proceedings: at *Sunvic Production Pte Ltd v Composers and Authors Society of Singapore Ltd* [1993] SGCRT 1 at [6.2]. The Tribunal also observed that the scope of its jurisdiction to vary or substitute licensing schemes under both sections would differ: at [9.1]. See also *Singapore Broadcasting Corp v The Performing Right Society Ltd* [1991] SGCRT 1 at [4] and *Reference by APRA; Re ABC* (1985) 5 IPR 449 at 458.

71 Copyright Tribunal (Procedure) Regulations (Cap 63, Rg 6, 2010 Rev Ed).

72 Copyright Act (Cap 63, 2006 Rev Ed) s 169.

73 Copyright Act (Cap 63, 2006 Rev Ed) ss 178(a)–178(c).

74 [1999] 1 WLR 1507.

75 *A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 at 1524.



music users and CMOs that results in the Tribunal not being called on as often as it should be.

34 Third, the Tribunal appears to have painted itself into the corner of an adversarial court, instead of exercising its statutory discretion to deliver justice in a more flexible, even inquisitorial, manner. Section 173 of the Copyright Act expressly states that proceedings of the Tribunal shall follow procedures within its discretion, that the Tribunal “shall *not* be bound by the Evidence Act” [emphasis added], and that these proceedings “shall be conducted with as little formality, and with as much expedition, as requirements of this Act and a proper consideration of the matters before the Tribunal permit”. Not being bound by the Evidence Act<sup>76</sup> means that the Tribunal is permitted to depart from the evidential rules that govern the adversarial court process, to play a more investigative role in order to even the playing field between CMOs and music users. As Dr Iyer wrote,<sup>77</sup> “unlike courts, tribunals can look at the entire merit of a disputed question ... often tribunals can undertake the investigation of facts by adopting a more activist ‘inquisitorial’ mode of proceedings”.<sup>78</sup>

35 In deciding the issue of “reasonableness”, the Tribunal has broad discretion. The Tribunal in *Tiananmen KTV* considered its scope of discretion to be wide enough to consider “reasonableness” in terms of overarching principles of fairness and equity. It held in that case:<sup>79</sup>

Essentially, what is ‘reasonable’ means what is fair and equitable having regard to the particular factual matrix at hand, and entails a value judgment which cannot be arrived at through the application of a rigid mathematical formula. ... In the absence of binding precedents, commonsense is a good indicator of reasonableness. [emphasis added]

36 Yet, regardless of the scope of its discretion, and despite the express freedom given to it to disregard the Evidence Act, the Tribunal in *Tiananmen KTV* did not depart from evidential rules in order to call further evidence in an inquisitorial manner. When faced with insufficient evidence from *both* parties, the Tribunal simply gave up and declared that the music user could not establish that the licence scheme in question was “unreasonable”. In omitting to call for further evidence to decide the issue more satisfactorily, the Tribunal established that it did not have the

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76 Cap 97, 1997 Rev Ed.

77 T K K Iyer, “Accountability and Review Processes in Modern Public Administration – The Role of Tribunals” (1991) 12 Sing L Rev 274.

78 T K K Iyer, “Accountability and Review Processes in Modern Public Administration – The Role of Tribunals” (1991) 12 Sing L Rev 274 at 290–291.

79 *Tiananmen KTV & Lounge Pte Ltd v Innofarm Entertainment Pte Ltd* [2011] SGCR 1 at [36].

power to work outside the rules of evidence. It cited two foreign cases to support its view, holding that:<sup>80</sup>

In the case of *Ref by APRA; Re ABC* at 463–464, the Tribunal, in interpreting the scope of s 164 [*in pari materia* to s 173 of the Copyright Act], opined that the mere fact that it was not bound by the rules of evidence did not mean that it should not base its decisions on the material before it:

We do not sit as a court of record but as an administrative tribunal. Nevertheless, the parties have filed detailed statements of their cases and also points in support of those cases; *each has led extensive evidence. The Tribunal's power to call evidence without the consent of both parties is at least doubtful* ... In any event, it would be impractical for it to do so. ...

...

...

Similarly, in the UK case of *The British Phonographic Industry Ltd and Others v Mechanical-Copyright Protection Society Ltd and Others*, the Tribunal exercised its discretion in determining reasonableness ‘in the light of the evidence’.

Like the equivalent tribunals in Australia and the UK, this Tribunal must arrive at a determination concerning the reasonableness of the charges and conditions and by logical extension, whether the Applicant’s claim is ‘well-founded’ *based on the evidence tendered and submissions put forth* ...

[emphasis added]

37 In keeping with the view that the rules of evidence provided guidance to its proceedings, the Tribunal also held that the civil burden of proof lay on the music user to show the unreasonableness of the licensing scheme in question<sup>81</sup> and dismissed the application not on the *merits* of the CMO’s case, but rather on the music user being unable to discharge that burden of proof. It was noted throughout the judgment that there was insufficient evidence produced by either party and that “[i]f there was sufficient evidence”, it may have “come to the finding that the fees charged [by the CMOs] were unreasonable”.<sup>82</sup> The Tribunal concluded by observing that:<sup>83</sup>

Although the Applicants did not succeed in their claim, this was *not so much as result of the strength of the Respondent’s evidence, which we found lacking in*

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80 *Tiananmen KTV & Lounge Pte Ltd v Innofarm Entertainment Pte Ltd* [2011] SGCRT 1 at [44]–[47].

81 *Tiananmen KTV & Lounge Pte Ltd v Innofarm Entertainment Pte Ltd* [2011] SGCRT 1 at [26].

82 *Tiananmen KTV & Lounge Pte Ltd v Innofarm Entertainment Pte Ltd* [2011] SGCRT 1 at [88].

83 *Tiananmen KTV & Lounge Pte Ltd v Innofarm Entertainment Pte Ltd* [2011] SGCRT 1 at [102].

*cogency* in any case, but as a consequence of the Applicant's *failure to adduce sufficient evidence* to cross the necessary threshold to discharge its evidential burden, which in turn led to its failure to satisfy the legal burden of proof. [emphasis added]

38 It is a shame that the Tribunal seems to have chained itself to the confines of the adversarial process by refusing to call further evidence. It must be noted that the Australian case<sup>84</sup> cited by the Tribunal on this point saw *extensive* evidence being led by both parties on the reasonableness of the licensing scheme in question, and it was on that premise that the Australian Copyright Tribunal decided it would not have the power to call further evidence in relation to a *sub-point* raised as to the potential illegality of the scheme “[w]ithout an adequate factual foundation for the submission.”<sup>85</sup> In the case of *Tiananmen KTV*, the opposite is true in that the parties had not led sufficient evidence on the main point of contention. Yet, the Tribunal chose to accept the position that it remained bound by evidential rules of the adversarial court and upheld a questionable licensing scheme on the basis that the threshold of proof had not been crossed by the music user.<sup>86</sup> The limitations placed by the Tribunal on its own investigative discretion needs to be checked, or at least reconsidered, in order for the Tribunal to play its role to curb abuse by CMOs.

(4) *Non-transparent distribution of royalties*

39 Distribution of royalties is the last step in the process of Rights Management. The question by this time essentially is: does the money go where the CMOs say it goes? Self-regulation has led to serious doubt as to how royalties are attributed and distributed to right holders, because there are either no transparent rules as to these how these activities must be conducted or no audit system to verify compliance with any rules that may be established.

40 The complete lack of regulation in this area has led to a nonchalance toward the CMOs' address of this topic. On MRSS's website, in answer to the “frequently asked question” (“FAQ”) on what happens to the fees collected for public performance of sound recordings in karaoke videos, there is a one-liner to state (without irony) that: “Licence fees collected

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84 Reference by APRA; *Re ABC* (1985) 5 IPR 449.

85 Reference by APRA; *Re ABC* (1985) 5 IPR 449 at 464–465.

86 This unfortunate decision was made worse in *Tiananmen KTV & Lounge Pte Ltd v Innoform Entertainment Pte Ltd* [2013] SGCRT 1, where the Tribunal ruled that the music user could not make a further reference of the same licensing scheme under s 162 of the Copyright Act (Cap 63, 2006 Rev Ed), which did not expressly allow further references from s 163(2) of the Copyright Act.

are distributed among the respective copyright owners.”<sup>87</sup> Similarly on the RIMS’s website, the one-liner that “license fees are distributed amongst the respective copyright owners and/or record companies” appears in the FAQ. There is no elaboration on this statement of truism on either website, no navigation link to another part of the website to find out more, and no attempt to provide any further information whatsoever. Whether there are hidden rules governing MRSS’s and RIMS’s methods of attribution and distribution is unknown, the secrecy of which is itself an issue counting towards the lack of transparency in the conduct of their business. In 2012, the CMOs congregated to set out a Code of Conduct<sup>88</sup> as a means of self-regulation (“CMOs Code”). Code 12(a)(i) of the CMOs Code obliges CMOs to publish this document, and it is indeed found on COMPASS’s website.<sup>89</sup> It is not, however, found on MRSS’s or RIMS’s website, and this is not surprising because MRSS and RIMS are not parties to the CMOs Code. The CMOs Code was signed by their predecessors,<sup>90</sup> who are now seemingly defunct. The non-binding nature of the CMOs Code is self-evident, and falls far short of a proper legal framework.

41 Among the existing CMOs, COMPASS is possibly to most forthright in terms of the information on royalty distribution that it makes available to the public. For example, pursuant to code 7(a) of the CMOs Code, COMPASS’s website contains an elaborate document called “Performing Royalties Distribution Rules”<sup>91</sup> setting out the method in which six distinct pools of royalties<sup>92</sup> are distributed to music creators. This document contains rules on calculating nett distributable royalties,<sup>93</sup>

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87 Music Rights Singapore Public Limited, “FAQ” <https://www.mrss.com.sg/faq/> (accessed March 2020).

88 Not much is known about this but there is a joint press release by the Ministry of Law and Intellectual Property Office of Singapore commending this move by CMOs: Ministry of Law, “MinLaw and IPOS Welcome Launch of Code of Conduct by Collective Management Organisations”, press release (8 June 2012) <https://www.mlaw.gov.sg/news/press-releases/minlaw-and-ipos-welcome-launch-of-code-of-conduct-by-collective-management-organisations> (accessed March 2020).

89 Available at <http://compass.org.sg/wp-content/uploads/2016/02/Code-of-Conduct-Secured.pdf> (accessed March 2020).

90 Recording Industry Performance Singapore Pte Ltd, Horizon Music Entertainment Pte Ltd, Innoform Entertainment Pte Ltd, and K-Net Pte Ltd: Ministry of Law, “MinLaw and IPOS Welcome Launch of Code of Conduct by Collective Management Organisations”, press release (8 June 2012) <https://www.mlaw.gov.sg/news/press-releases/minlaw-and-ipos-welcome-launch-of-code-of-conduct-by-collective-management-organisations> (accessed March 2020).

91 COMPASS, “Performing Royalties Distribution Rules” (updated July 2012), available at <http://compass.org.sg/about-us/corporate-governance/> (accessed March 2020).

92 These are broadcasting, general licences, events permits, concerts, airlines and cinema: COMPASS, “Performing Royalties Distribution Rules” (updated July 2012) rule 1.

93 COMPASS, “Performing Royalties Distribution Rules” (updated July 2012) rule 4.

special allocations for unlogged performances,<sup>94</sup> and division of fees,<sup>95</sup> including references to “Points Awards Tables”<sup>96</sup> to aid with determining how fees should be distributed based on music classification.<sup>97</sup> In accordance with codes 8(b) and 8(c)(iv) of the CMOs Code, annual reports containing audited financials are published on COMPASS’s website.<sup>98</sup> COMPASS has also obtained the ISO 9000 certification from TÜV SÜD PSB Pte Ltd on achieving a “quality management system.”<sup>99</sup> Yet, there is still a general sense of unaccountability, demonstrating that self-governance, no matter how earnest, does not possess the same vigilance required to ensure transparency under the law.

42 Of particular note is the inescapable fact that there is no mechanism by which compliance with the CMOs Code can be monitored, verified or enforced. Under codes 13 and 14 of the CMOs Code, it was contemplated that an independent “Code Reviewer” “with specialist expertise in administrative law, copyright law and/or licensing practices”<sup>100</sup> would be appointed to oversee CMOs and to submit an annual compliance *report to IPOS*.<sup>101</sup> There is no evidence that any such “Code Reviewer” has ever been appointed by the CMOs, and ironically, this omission *itself* proves the point that compliance with the CMOs Code is not consistent. Code 12 of the CMOs Code also requires CMOs to make a statement of compliance in its annual reports but there is no sign of such a statement in COMPASS’s annual reports. In relation to MRSS and RIMS, their existence outside the CMOs Code only exacerbates the problem.

43 One side effect from the absence of formal supervision is that CMOs have not needed to define the specific categories of expenditure that are deductible from royalties, prior to distribution. Despite the distracting amount of information found on COMPASS’ website, and following from the dearth of detail offered by the other CMOs, there remains no clarity as to how royalties are ultimately distributed to right holders. Quoting the Review Report in relation to the issue of royalty distribution by CMOs:<sup>102</sup>

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94 COMPASS, “Performing Royalties Distribution Rules” (updated July 2012) rule 5.

95 COMPASS, “Performing Royalties Distribution Rules” (updated July 2012) rules 7 and 8.

96 COMPASS, “Performing Royalties Distribution Rules” (updated July 2012) rule 10.

97 COMPASS, “Performing Royalties Distribution Rules” (updated July 2012) rule 9.

98 COMPASS, “Annual Reports” <http://compass.org.sg/about-us/annual-reports/> (accessed March 2020).

99 See <http://compass.org.sg/about-us/iso-certification/>.

100 CMO Code of Conduct (hereinafter “CMOs Code”), code 13(a).

101 CMOs Code, code 14(f)(ii).

102 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019) at pp 60 and 61, paras 2.15.2(a) and 2.15.3(a).

## Collective Management of Musical Copyright in a Self-Regulated Regime

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... Generally, *creators wanted more transparency in how the licence fees that were eventually disbursed to them were derived, citing discrepancies between their own experience of how often their works were used and the final amount that they received.* ...

...

... Many users also asked for *greater transparency in how the licence fees were distributed.* They agreed that the fees ultimately should be used to compensate the creators of the works, but were *skeptical that the fees they paid were actually distributed to the correct creators.* A handful added that the lack of transparency on the distribution of the fees meant that the creators of the works they were using might not be compensated, and worried about the legal implication of such a situation, i.e. whether users would be considered to be infringing copyright.

[emphasis added]

44 While code 8(c)(ii) of the CMOs Code requires that CMOs keep proper financial records on the “expenses of managing and operating” the CMO, as well as other amounts authorised under its constitution, such as “the costs of promotional activities, educational programs, cultural funds, donations in support of creators and owners of copyright material, membership of industry associations, or other charitable purposes”, these categories are too vague to constitute a pre-determined list of permissible deductibles. To make matters worse, COMPASS’s memorandum of association<sup>103</sup> provides in clause 4(g) that COMPASS shall be permitted to pursue its objects by (a) granting “gratuities, donations, pensions and emoluments or make advances to any person at any time in [its] employment”; (b) supporting “funds, trusts, associations or institutions calculated to benefit Members or ex-Members ... or persons employed” by COMPASS; (c) subscribing “money for the relief of distress caused by natural disasters or other exceptional calamities”; and (d) making loans or gifts “on such terms as may be thought fit for any purpose conducive to the improvement or advancement of the writing of literature in all forms”. These widely drafted categories for which COMPASS is authorised to use royalties raise serious issues of corporate governance.

45 One immediate issue pertains to how right holders can verify that the distribution they received tallies with their entitlement, if the categories of deductible expenditure are defined so loosely, are not pre-determined in policy, and are not publicly disclosed. Code 8(c)(iii) of the CMO Code requires CMOs to provide “reasonable information” to each right holder who requests details on his royalty entitlement, but the

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103 *Memorandum of Association of the Composers and Authors Society of Singapore Limited* (updated 29 June 2015). The Music Rights (Singapore) Public Limited and Recording Industry Music Services Singapore are silent on this subject.

sentiment reflected in the Review Report<sup>104</sup> suggests that instances where such requests are fulfilled must have been few and far between. Further compounding the uncertainty in relation to royalties deducted from distribution is the authority afforded to COMPASS to invest moneys derived from royalties.<sup>105</sup> It can be seen from its annual reports that there are investments and investment income,<sup>106</sup> but no policies as to how royalties can be invested, or how investment income must be distributed, appear to be in place.

46 All in all, the financial activities of CMOs cannot be tracked and accounted for as they should be. As private entities playing a public service role in the management of moneys, it is frightening that right holders and music users alike are uncertain as to whether royalty distribution is being conducted in a proper manner.

### ***B. Rights of representation***

47 Music users should be entitled to know who CMOs represent since that is a fundamental premise from which CMOs conduct Rights Management. Importantly, music users who pay royalties to a CMO would remain in breach of copyright for use of music belonging to right holders unrepresented by the CMO. Payment to the CMO for use of its authorised repertoire does not absolve music users of the responsibility to seek permission to use music outside that repertoire. On the flip side, it is of course also essential for music users to know that the music they pay for is indeed part of the CMO's repertoire. Yet, there is no legal obligation on CMOs to disclose their repertoire of right holders to music users.

48 MRSS does furnish *some* information on rights representation to music users,<sup>107</sup> publishing on its website an A–Z list of right holders whom it represents.<sup>108</sup> There is also a list of eleven labels represented by RIMS, published on its website.<sup>109</sup> It is not clear whether these lists are exhaustive, comprehensive and updated, but at the very least, an effort

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104 Quoted at para 43 above.

105 Memorandum of Association of the Composers and Authors Society of Singapore Limited (updated 29 June 2015), clause 4(n).

106 See, for example, COMPASS, *2018 Annual Report (Part IV)* at FS18, para 6, and FS20, para 11.

107 Its predecessor, Recording Industry Performance Singapore Pte Ltd, did not, however, publish any information on the music creators who were represented by the CMO.

108 Music Rights (Singapore) Public Limited, "Artistes" <https://www.mrss.com.sg/artistes/>; "Labels" <https://www.mrss.com.sg/labels/> (accessed March 2020).

109 Recording Industry Music Services Singapore, "FAQ" <https://rimss.com.sg/faq/> (accessed March 2020).



is made to provide rights representation information. COMPASS, on the other hand, offers *absolutely* nothing on its website or any publicly available forum. COMPASS claims that music users are entitled to inspect the reciprocal agreements that it has concluded,<sup>110</sup> and the CMOs Code obliges it to make available “all agreements through which the [CMO] derives the right to licence the works being licensed” or at least “key information” pertaining to its representation rights,<sup>111</sup> yet when specifically requested for information on its repertoire of right holders, COMPASS has *repeatedly* refused to make these agreements available.

49 In a reply to an e-mail from this author requesting for information on rights representation, COMPASS said:<sup>112</sup>

COMPASS represents composers not only in Singapore but from around the world and we have been given a mandate to license their works and collect their due royalties on their behalf. This means that COMPASS administers the works of composers and lyricists, representing almost all copyright musical works in the world.

We also have Reciprocal Representation Agreements with international Societies, transferring the exclusive right to license their repertoire in Singapore to COMPASS, to name a few; societies such as ASCAP, BMI, CASH, PRS, MCSC, MUST, MACP etc.

We also administer more than 14 million works worldwide. More musical works are being written and added every day. *It is hardly possible and also not fruitful for us provide a list of the songwriters we represent* and the list of works we control due to the massive amount and the growing numbers every day.

[emphasis added]

50 In response, this author wrote back to remind COMPASS of its obligation under code 6(c)(iv) of the CMOs Code, to:<sup>113</sup>

*[M]ake available at the request of Licensees all agreements through which the CMO derive their right to licence the works being licensed, or if such documents are confidential in nature, all the key information on these agreements that fully describe how the CMO derives its right to licence or if such documents are confidential in nature, official authorisation letters from the Rights Holder expressly affirming that the CMO has the right to collect license fees for specified protected works. [emphasis added]*

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110 COMPASS, “Music Users: Frequently Asked Questions” <http://compass.org.sg/music-users/music-users-faqs/> (accessed March 2020).

111 CMOs Code, code 6(c)(iv).

112 E-mail dated 29 November 2019 from Audrey Teo, Senior Licensing Executive, COMPASS, to this author.

113 E-mail dated 11 January 2019 from this author to Audrey Teo, Senior Licensing Executive, COMPASS.

51 COMPASS ignored this reference to the CMOs Code and wrote back to reiterate that it is “near impossible and not fruitful for us to list the works and writers we represent”.<sup>114</sup> Such a stance taken by COMPASS is simply unacceptable. It may be a tedious task to produce all representation agreements<sup>115</sup> but certainly not *impossible* if proper records are kept either in physical files or electronic folders. Failure to produce representation agreements indicates either that COMPASS does not manage its affairs sufficiently well, is unwilling to make the effort to account to music users, or simply does not have these agreements in place at all. Whatever the case, COMPASS’s reluctance to honour the CMOs Code and to do what would be a show of minimal faith raises a big red flag as to its scope of rights representation and the opaque manner in which it conducts its affairs.<sup>116</sup>

52 Whereas the other CMOs have voluntarily published a list of represented right holders, it nonetheless remains to be seen if they would oblige to provide more information on representation or reciprocal agreements to music users who make such requests. The fact remains that our laws do *not* impose a legal obligation on CMOs to make all representation and reciprocal agreements available for inspection, or to make full disclosure as to who is on the list of represented music. The position taken by COMPASS goes to show that without regulatory intervention, CMOs are likely to continue withholding information on who they represent simply because they can. The Review Report notes the existence of this precise problem in a paragraph which states:<sup>117</sup>

*Concerns were also raised as to whether the CMO charging the licence fee actually had such rights of administration over the work. Feedback was received that certain CMOs were not able to prove that they had specific works in their portfolio, even after the user has contracted the CMO specifically on that matter. [emphasis added]*

53 The lack of transparency as to representation goes to the core of the whole copyright protection system, infecting it with an uncertainty

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114 E-mail dated 18 January 2019 from Audrey Teo, Senior Licensing Executive, COMPASS, to this author.

115 This author kindly narrowed it down and asked for information in a specific category, namely, “agreements (whether redacted or not to show only key information) or authorisation letters from music creators who created/produced Cantonese and Chinese music, as well as all reciprocal agreements with your counterparts in Hong Kong, China, Taiwan, and Malaysia”.

116 After a few more e-mail exchanges in which COMPASS requested sample playlists and this author obliged, asking COMPASS to in turn produce rights representation agreements for the music in the sample playlist, COMPASS fell off the grid and never responded.

117 Ministry of Law and Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 January 2019) at p 61, para 2.15.3(b).

that cannot be justified in any circumstance. After all, it must be that music users are entitled to know who they are contracting to pay royalties to, and who they owe royalties to outside of the CMOs representation, in order to avoid breaching copyright laws. That CMOs are allowed to get away with simply not answering the question of who they represent puts a large dent in the legitimacy of this whole copyright protection enterprise.

### **III. New hope for transparency**

54 Looking at the comparative UK position under the Collective Management of Copyright (EU Directive) Regulations 2016<sup>118</sup> (“UK Regulations”), which implements the EU Directive,<sup>119</sup> this part outlines some UK regulations on Rights Management that would serve as good starting points for the Licensing Scheme and Tribunal Review to correct the current flaws of the self-regulated environment. It also comments on the Proposed Licensing Scheme and other relevant parts of the Public Consultation Paper, with reference to the issues of self-regulation encapsulated in the last section and the exemplary UK Regulations discussed here.

#### **A. Royalty management**

##### *(1) Obligation to negotiate in good faith*

55 The UK Regulations recognise the importance of negotiations between two private parties in determining the agreed royalty rate. Regulation 15, implementing Art 16 of the EU Directive, requires CMOs to conduct negotiations with music users in good faith and to provide all necessary information to facilitate the negotiations.<sup>120</sup> It further obliges CMOs to ensure that “right holders receive appropriate remuneration for the use of their rights” and that the tariffs it determines are reasonable in relation to the “economic value of the use of the rights in trade” and “the

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118 SI 2016 No 221. The Collective Management of Copyright (EU Directive) Regulations remain unaffected by “Brexit” in substance: see s 32 of The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 (SI 2019 No 605) (UK): “Amendments to the Collective Management of Copyright (EU Directive) Regulations 2016”.

119 The comparative table found in Ministry of Law and Intellectual Property Office of Singapore, *Public Consultation Paper on the Copyright Collective Rights Management Ecosystem in Singapore* (May 2017) shows interest in the positions of the UK Australia, Canada, Germany, Hong Kong, Japan and Korea. The EU Directive is also implemented by Germany in the German Act of Collective Management Organisations 2016, among many other EU jurisdictions.

120 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 15(1).

economic value of the service provided” by the CMO.<sup>121</sup> CMOs must also inform music users of “the criteria used for the setting of those tariffs”.<sup>122</sup>

56 To guide CMOs, the UK Intellectual Property Office issued the “Guidance on the UK Regulations Implementing the Collective Rights Management (CRM) Directive”<sup>123</sup> (“UK Guidance”). On licence negotiations, the UK Guidance states that CMOs and users are “required to conduct licensing negotiations with one another in good faith”, and that CMOs should demonstrate such good faith by upholding the principles of honesty, fairness, impartiality, courtesy, transparency, reasonableness, proportionality, and clear disclosure of information. The UK Guidance further advises that CMOs provide full disclosure of their repertoire, licensing schemes and royalty rates to facilitate negotiations.<sup>124</sup>

57 In order to promote a co-operative environment, the Licensing Scheme similarly ought to mandate that CMOs negotiate with representative groups of music users in good faith and to provide all necessary documents for a fair negotiation. Representative groups such as the Singapore Nightlife Business Association<sup>125</sup> (“SNBA”) have reached out to the CMOs for the purpose of negotiating royalty rates, and discussions between SNBA and the CMOs were helpfully facilitated by IPOS and MinLaw. However, without the obligation to negotiate in good faith and to offer full disclosure of information, negotiations have stalled, regressed and all but evaporated. There are likely many other representative groups who would be willing to conduct negotiations with CMOs on behalf of its members who are music users, such as the Restaurant Association of Singapore, and an obligation on CMOs to do so would greatly help advance copyright protection.

58 It is regrettable, therefore, that the Proposed Licensing Scheme makes no reference to an obligation to negotiate.

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121 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) regs 15(4)(a) and 15(4)(b).

122 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 15(c).

123 February 2016.

124 UK Intellectual Property Office, “Guidance on the UK Regulations Implementing the Collective Rights Management (CRM) Directive” (February 2016) Part 2 at paras 4–12.

125 This author is a founding member and former Vice President of the Singapore Nightlife Business Association, and was involved in these talks.

(2) *Wider tribunal supervision*

59 Under s 160(1) of the Copyright Act, only a CMO may refer a proposed licensing scheme for review by the Tribunal. In contrast, s 118(1) of the UK Copyright, Designs and Patents Act 1988<sup>126</sup> provides that “an organisation claiming to be representative of persons claiming that they require licences” may refer a licensing scheme *proposed* by a CMO to the UK Tribunal to consider for reasonableness. The UK Tribunal would need to decide if it ought to entertain such a reference<sup>127</sup> and, if so, whether to vary or confirm the scheme in question.<sup>128</sup> This permissive rule presupposes that music users may gain access to proposed schemes and reflects a more interactive relationship between the parties. Empowering music users to refer proposed licensing schemes to the Tribunal may prompt CMOs to justify the bases for royalty rates before the Tribunal. This would certainly aid in minimising the arbitrariness attached to royalty rates and should be looked at during the Tribunal Review as an expansion of the Tribunal’s jurisdiction.

60 When it comes to presiding over the reasonableness of licensing schemes, it also appears that the UK Tribunal is not required to follow an adversarial methodology. The UK Court of Appeal in *A.E.I.* made clear that while a civil court would need to decide on a winner and a loser, the UK Tribunal had no such obligation, and could rule that the licensing schemes put forward by the parties were *both* unreasonable. The Court of Appeal, dealing with an issue of law in relation to the award of costs, stated the general principle that the UK Tribunal must decide only whether a given scheme is reasonable and not which party emerges victorious. The Court of Appeal held:<sup>129</sup>

... It is true that there will be some applications to the tribunal where it is possible to say that the licensing body is the winner. The tribunal may hold that the terms of payment and other conditions initially proposed by it were reasonable and that the terms of payment and conditions proposed by the user were unreasonable. Equally, there will be some applications where it is possible to say that the user is the winner of the application, because the terms initially proposed by the licensing body were unreasonable and the terms proposed by the user were reasonable. *But where, as in this case, the tribunal determines that both the licensing body and the user proposed terms ultimately held to be unreasonable, it is not correct to proceed on the basis that the outcome must produce a winner and a loser.*

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126 c 48.

127 Copyright, Designs and Patents Act 1988 (c 48) (UK) s 118(2).

128 Copyright, Designs and Patents Act 1988 (c 48) (UK) s 118(3).

129 *A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 at 1518.

...

*That is an error of principle.* It infected and vitiated the exercise of discretion in law.

[emphasis added]

61 The Tribunal in *Tiananmen KTV* had thus created “a self-imposed fetter on the discretion”<sup>130</sup> granted to it when it decided to hold itself bound to the civil burden of proof and refused to call for further evidence even though it was clear that more evidence was required to make the decision. It could even be said that that application was decided on an error of principle, given the explicit law that the Tribunal could operate outside the confines of the Evidence Act. It might have been open to the Tribunal to rule that the scheme in question was unreasonable, based on the weaknesses of the CMO’s case itself, even though the music user had not produced sufficient evidence to prove that. After all, “[o]ne purpose of having a tribunal rather than a court to determine issues of this type, is so that the tribunal can use its expertise to provide access to justice in a way in which it would be difficult for a court to do”.<sup>131</sup>

62 To enable music users to effectively challenge CMOs over royalty rates and other terms of their licensing schemes, it is important for the Tribunal Review to set the record straight on the supervisory authority of the Tribunal. Perhaps what is needed is an explicit guideline that the Tribunal may conduct investigations as it deems fit in the circumstances of the case put before it. The tendency of the Tribunal to curtail its inquisitorial function should be corrected, and it is hoped that the Tribunal Review can give it a fresh outlook.

63 The suggested revisions to the Tribunal’s proceedings in the Public Consultation Paper are limited to introducing a suspension of licence fee payments pending determination by the Tribunal on licence fee disputes, requiring the Tribunal to have regard to relevant guidelines issued by the Competition and Consumer Commission of Singapore (“CCCS”) when determining the reasonableness of licence fees, and allowing CCCS to become a party to proceedings to aid in that determination.<sup>132</sup> These proposed amendments are embedded in a section of the Public Consultation Paper which seeks to facilitate market

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130 *A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 at 1518.

131 *A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 at 1525.

132 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.52.

efficiency by encouraging competition among CMOs. It is not clear how encouraging competition, albeit not so much as to “create a fragmented market”,<sup>133</sup> will be reconciled with the notion that CMOs function best as natural monopolies. It is also uncertain how the balance between enabling competition and curtailing market fragmentation is envisaged to be played out.

64 In any case, these recommended revisions to the Tribunal’s proceedings do not address the Tribunal’s limited supervisory and inquisition powers over licence fee arrangements, which are the concerns raised in this article. The suggested revisions in the Public Consultation Paper are in fact quite redundant unless and until the Tribunal’s substantive jurisdiction is widened. It can only be hoped that the Tribunal Review is still ongoing and that a more comprehensive proposal for revision of Tribunal proceedings, both procedural and substantive, is on the way to being published as well.

(3) *Accountability in the distribution of royalties*

65 The UK Regulations provide that CMOs must convene a general assembly of CMO members (right holders admitted by the CMO into membership to be represented)<sup>134</sup> at least once a year<sup>135</sup> to decide general policies on the distribution amounts due to right holders;<sup>136</sup> general policies on the use of non-distributable amounts and the actual use of non-distributable amounts;<sup>137</sup> general policies on investment using rights revenue and use of income arising from such investment;<sup>138</sup> general policies on deductions from rights revenue and investment income;<sup>139</sup> policy on

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133 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.42.

134 Regulation 5 of the Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) requires membership admittance based on objective, transparent and non-discriminatory criteria that are included in the CMO’s statute and membership terms, and made publicly available.

135 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(a), implementing Art 8(2) of the EU Directive.

136 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(d)(i), implementing Art 8(5)(a) of the EU Directive.

137 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) regs 7(d)(ii) and 7(d)(v), implementing Arts 8(5)(b) and 8(5)(e) of the EU Directive.

138 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(d)(iii), implementing Art 8(5)(c) of the EU Directive.

139 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(d)(iv), implementing Art 8(5)(d) of the EU Directive.



risk management;<sup>140</sup> approval of any acquisition, sale or hypothecation of immovable property;<sup>141</sup> approval of mergers and alliances, subsidiaries, acquisition of shares or rights in other entities;<sup>142</sup> and approval of taking out loans, granting or providing security for loans.<sup>143</sup>

66 Under the UK Regulations, CMOs shall keep separate accounts for rights revenue and income arising from investment of rights revenue on the one hand, and for assets and income arising from those assets, management fees or other activities on the other.<sup>144</sup> CMOs are allowed only to use rights revenue and income arising from investment of rights revenue for the purpose of distribution, unless allowed to be deducted or used for any other purpose in accordance with a decision made by the general assembly of CMO members,<sup>145</sup> or, in the case of reciprocal agreements, with the express consent of the other CMO.<sup>146</sup> When investing with royalties collected, CMOs must act first and foremost in the interest of its members.<sup>147</sup> Any deductions from rights revenue must be made transparent to members from the outset<sup>148</sup> and must be reasonable in relation to the services provided by the CMO and based on objective criteria,<sup>149</sup> not exceeding the justified and documented costs incurred by the CMO.<sup>150</sup> Where funds are used for providing social, cultural or educational services, CMOs must base such provision of services on fair criteria with particular regard to access to, and the extent of, the services.<sup>151</sup> Above all these, there is a general obligation to collect

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140 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(d)(vi), implementing Art 8(5)(f) of the EU Directive.

141 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(d)(vii), implementing Art 8(5)(g) of the EU Directive.

142 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(d)(viii), implementing Art 8(5)(h) of the EU Directive.

143 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(d)(ix), implementing Art 8(5)(i) of the EU Directive.

144 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 10(b), implementing Art 11(3) of the EU Directive.

145 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 10(c), implementing Art 11(4) of the EU Directive.

146 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 14(1), implementing Art 15(1) of the EU Directive.

147 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 10(d), implementing Art 11(5) of the EU Directive.

148 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 11(1), implementing Art 12(1) of the EU Directive.

149 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) regs 11(2) and 11(4), implementing Art 12(2) of the EU Directive.

150 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 11(3), implementing Art 12(3) of the EU Directive.

151 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 11(5), implementing Art 12(4) of the EU Directive.

and manage royalties diligently,<sup>152</sup> placing on CMOs the responsibility to account for moneys held.

67 CMOs must distribute royalties “regularly, diligently and accurately”, in accordance with distribution policies decided by the general assembly and no later than nine months from the end of the relevant financial year.<sup>153</sup> Royalties for orphan works where right holders cannot be identified or located shall be kept in a separate account<sup>154</sup> and CMOs must take “all necessary measures” to identify and locate such right holders by making all information on the works available to its members and reciprocal CMOs within three months from the distribution deadline. If no results ensue from those efforts, the information must be published to the public within a year from the expiry of those three months.<sup>155</sup> In the event that the orphan works remain unclaimed after three years from the end of the relevant financial year, the royalties associated with those works shall be tagged as “non-distributable”<sup>156</sup> and the general assembly of CMO members can decide how to use these amounts.<sup>157</sup>

68 To promote further accountability, CMOs are obligated to provide information, at least once a year, to each right holder to whom it has attributed royalties or made payment.<sup>158</sup> There is a list of minimum required information from CMOs, namely, the contact details which the right holder has authorised the CMO to use for the purposes of locating the right holder;<sup>159</sup> the amount of rights revenue attributed to the right holder;<sup>160</sup> amounts paid to the right holder per category of rights managed

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152 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 10(a), implementing Art 11(2) of the EU Directive.

153 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) regs 12(1) and 12(2), implementing Arts 13(1), 15(2) and 15(3) of the EU Directive.

154 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 12(5), implementing Art 13(2) of the EU Directive.

155 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) regs 12(6), 12(7) and 12(8), implementing Art 13(3) of the EU Directive.

156 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 12(9), implementing Art 13(4) of the EU Directive.

157 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 12(10), implementing Art 13(5) of the EU Directive.

158 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 17(1), implementing Art 18(1) of the EU Directive.

159 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 17(2)(a), implementing Art 18(1)(a) of the EU Directive.

160 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 17(2)(b), implementing Art 18(1)(b) of the EU Directive.

and per type of use;<sup>161</sup> the period of attribution;<sup>162</sup> deductions made for management fees<sup>163</sup> or any other purpose;<sup>164</sup> and rights revenue attributed to the right holder which remains outstanding for any period.<sup>165</sup> These detailed regulations put in place a legal framework within which CMOs must conduct their activities, so that there is less room for abuse of dominance. The royalties collected are “ultimately due to right holders”<sup>166</sup> and these rules are established to hold CMOs accountable.

69 The Proposed Licensing Scheme goes into considerable detail to improve this area of Rights Management and encompasses the spirit of the UK Regulations, proposing for:

- (a) an annual general meeting (“AGM”) for CMO members to approve, *inter alia*, policies on royalty distribution and undistributed moneys;
- (b) these policies to contain the basis for calculating the quantum of licence fees, the manner and frequency of payment, and the nature of deductibles;
- (c) these policies to be made available to right holders;
- (d) diligent and accurate data collection on music usage;
- (e) regular, diligent and accurate distribution (no more than six months after the financial year end) based on actual music usage or a statistically valid sample;
- (f) sufficient information to be provided on how the distributed amount derived; and
- (g) ample opportunity to be given to members to raise queries after each distribution.<sup>167</sup>

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161 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 17(2)(c), implementing Art 18(1)(c) of the EU Directive.

162 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 17(2)(d), implementing Art 18(1)(d) of the EU Directive.

163 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 17(2)(e), implementing Art 18(1)(e) of the EU Directive.

164 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 17(2)(f), implementing Art 18(1)(f) of the EU Directive.

165 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 17(2)(g), implementing Art 18(1)(g) of the EU Directive.

166 EU Directive, preamble at para 26.

167 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.22.

Presumably these proposed rules will be further fleshed out after the public consultation, but it would appear that the development of these distribution rules is on the right track to ensure a level of accountability.

70 However, in so far as the Public Consultation Paper envisages that the entry barrier to the CMO market should be lowered and that “an enterprise can integrate a CMO business into a larger turnkey solution for users”<sup>168</sup> when entering the market, some thought should be given to regulations regarding the use of royalties for investment or other businesses, and the distribution of revenue made from such sources. In light of the complexities that will arise from CMOs operating under the auspices of larger businesses, and given that COMPASS appears to make investments using moneys from royalties,<sup>169</sup> the Proposed Licensing Scheme ought to include rules similar to those found in the UK Regulations pertaining to the treatment of investments made by CMOs.

(4) *Financial reporting*

71 To ensure further transparency in Rights Management, there is a legal obligation in the UK on CMOs to “draw up and make public an annual transparency report” by publishing the report on its website for at least five years.<sup>170</sup> The transparency report must be audited<sup>171</sup> and must contain specific information including financial statements such as a balance sheet and cash flow statement; rights revenue for each category of rights and each type of use; operating, managing, supervisory and financial costs; deductions made from rights revenue; the percentage of costs *versus* royalties collected; and a comprehensive break down of royalties attributed to each category of right holders.<sup>172</sup> There must also be a special report to address the moneys used to provide social, cultural and educational services, containing explanations on each type of purpose to which such funds were spent and deducted from royalties.<sup>173</sup> Needless to

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168 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.43.

169 As pointed out at para 45 above.

170 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 21(1), implementing Art 22(1) of the EU Directive.

171 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 21(2), implementing Art 22(4) of the EU Directive.

172 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 21(4), implementing Art 22(2) of the EU Directive.

173 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) regs 21(1)(a), 21(4)(g) and 21(5), implementing Art 22(3) of the EU Directive.

say, these financial reporting rules should figure in the Licensing Scheme in order to facilitate a culture of accountability from CMOs.

72 Glaringly, rules that require financial transparency are absent from the Proposed Licensing Scheme. While it is proposed that right holders must be presented at the AGM with the annual report and financial statements of the CMO,<sup>174</sup> this requirement appears almost fleetingly in the section governing CMO members' rights. There are no further requirements for the financial statements to be audited (even where a CMO is otherwise exempt from audit under corporate law) or for these materials to be made *publicly* available for a reasonable duration. There are also no regulations imposing the provision of specific information pertaining to Rights Management, use of royalties for purposes other than distribution, or any other specialised issue. Further, it is proposed that while IPOS may request for an annual audit report and financial statements from a CMO, there is no obligation on CMOs to submit these on a regular basis without receiving such a specific request. Similarly, while right holders are entitled to inspect financial records, where there are no requests to inspect, CMOs are required only to *internally* maintain proper financial records.

73 As outlined in the last part,<sup>175</sup> the financial accountability of CMOs is in need of governance if public confidence is to be restored. Yet the Proposed Licensing Scheme appears to take the stance that a "light touch approach"<sup>176</sup> is sufficient to steer CMOs in the right direction, forgetting too quickly the pitfalls of the self-regulated system. Moreover, CMOs should be accountable not only to IPOS and its right holders but also to music users. A scheme that excludes music users from scrutinising the financial records of CMOs does little to promote transparency as to where music royalties go after they are collected. Given the importance of financial accountability to the enterprise of Rights Management and the uninspiring track record that CMOs hold, it is a real pity that the Proposed Licensing Scheme did not dedicate an entire section to establishing a proper framework on this matter.

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174 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.17.3(e).

175 See paras 39–46 above.

176 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.40.

(5) *Division of power*

74 The UK Regulations restrict the monopolistic freedom of CMOs with some division of power, placing policy-making and high-level decisions in the hands of the general assembly, convened once a year,<sup>177</sup> where all members are entitled to a vote.<sup>178</sup> Apart from general policies relating to the distribution of royalties and use of funds, the general assembly also decides on amendments to a CMO statute and membership terms;<sup>179</sup> the appointment, dismissal, remuneration and other benefits of its directors;<sup>180</sup> and the appointment of the auditor and approval of the annual transparency report.<sup>181</sup> These powers were designed for members to “control the activities of the collective management organisation” and to “ensure the independence of the auditor from the persons who manage the business”.<sup>182</sup>

75 Enhancing that is the obligation to put in place a supervisory body with a “fair and balanced representation of the different categories of members” of the CMO to monitor compliance and performance of CMO management, as well as to undertake functions delegated to it by the general assembly.<sup>183</sup> This supervisory function is explained by the UK Guidelines to have “an obligation to continuously monitor the activities and performance of those who manage the business of the organisation”.<sup>184</sup> The UK Guidelines also clarify that this body “need not exclude the appointment of third parties, including persons with relevant professional expertise”, and “need not exclude right holders who do not fulfil the membership requirements or who are represented by the organisation not directly but via an entity which is a member of a CMO”, because it would be suitable for the supervisory function to

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177 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(1)(a), subject to reg 7(4), implementing Art 8(2) of the EU Directive.

178 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(1)(f), implementing Art 8(9) of the EU Directive.

179 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(1)(b), implementing Art 8(3) of the EU Directive.

180 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(1)(c), implementing Art 8(4) of the EU Directive.

181 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 7(1)(e), implementing Art 8(8) of the EU Directive.

182 EU Directive, Art 8(8).

183 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 8, implementing Art 9 of the EU Directive.

184 UK Intellectual Property Office, “Guidance on the UK Regulations Implementing the Collective Rights Management (CRM) Directive” (February 2016) at Part 2, section 5 at para 5.



“have an appropriate balance of skills, experience, independence and knowledge”.<sup>185</sup>

76 The Proposed Licensing Scheme adopts this idea of division of powers by mandating that, apart from distribution policies, amendments to membership terms shall be approved by CMO members during the AGM, and that the AGM has the power to remove a member of the governing board established to oversee the CMO.<sup>186</sup> This governing board is proposed in the likeness of the UK’s supervisory function. CMOs must establish a “fair and balanced” representative board who is “responsible for monitoring the activities of the CMO and for its compliance with the Proposed Licensing Scheme”.<sup>187</sup> All governing board members must be nominated once every three years, and non-executive members of this board cannot serve for more than three consecutive terms.<sup>188</sup> Although the CMO members in AGM do not have powers as wide as those in the UK, it is a promising start for the Proposed Licensing Scheme to hand over some decisions to right holders. The governing body, when constituted, would also play a big part in encouraging greater accountability.

77 In the UK, the role of the Secretary of State as the designated “national competent authority”<sup>189</sup> to monitor and enforce compliance (through a unit of the Intellectual Property Office)<sup>190</sup> is kept distinct

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185 UK Intellectual Property Office, “Guidance on the UK Regulations Implementing the Collective Rights Management (CRM) Directive” (February 2016) at Part 2, section 5 at para 3.

186 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at paras 3.17.3(c) and 3.17.3(d).

187 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at paras 3.40.1 and 3.40.2.

188 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.40.3.

189 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 35, implementing Art 36 of the EU Directive.

190 UK Intellectual Property Office, “Guidance on the UK Regulations Implementing the Collective Rights Management (CRM) Directive” (February 2016) Part 4 at para 10. Compliance is monitored by analysing annual transparency reports, receiving information reports from interested parties (as mandated by Art 63(2) of the EU Directive), and launching investigations to determine the appropriate enforcement action (as mandated by Art 36(3) of the EU Directive): See the UK Intellectual Property Office, “Guidance: How the IPO Regulates Licensing Bodies” (updated 18 November 2019) <https://www.gov.uk/government/publications/how-the-ipo-regulates-licensing-bodies/how-the-ipo-regulates-licensing-bodies> (accessed March 2020); UK Intellectual Property Office, *Implementing the Collective Rights Management Directive: How the IPO Will Carry out Investigation and Enforcement Activities* (April 2016).



from a CMO's supervisory body, plausibly to create an extra layer of check and balance. Similarly, the Proposed Licensing Scheme confers supervisory powers onto the IPOS to enforce compliance by requesting for information from CMOs, sitting in on AGMs and other meetings, investigating the operations of CMOs, auditing CMOs for compliance with licence conditions, requiring CMOs to provide performance bonds, referring disputes to the Tribunal, publishing information from or findings made on CMOs who are investigated or audited, issuing written directions to CMOs to rectify breaches, imposing financial penalties, suspending or revoking licences, and removing or replacing management personnel of a CMO.<sup>191</sup> Placing IPOS at the helm of supervisory control over CMOs is not only a welcomed but necessary move towards instilling a culture of transparency in the area of copyright protection.

### **B. Disclosure of rights representation**

78 Under the UK Regulations, a CMO must make publicly available a list of representation (in this case, reciprocal) agreements it has entered into, along with all the names of the relevant reciprocal CMOs.<sup>192</sup> CMOs must also provide “without undue delay” by electronic means information on the works it represents and the rights it manages in response to any “duly justified request” from right holders, users and reciprocal CMOs.<sup>193</sup> Requests are regarded as “duly justified” where they are from reciprocal CMOs, right holders or music users as long as they are not “vexatious or frivolous” requests.<sup>194</sup>

79 The Proposed Licensing Scheme requires CMOs to “allow the public to determine from their websites the portfolio of copyrighted materials they manage and administer”,<sup>195</sup> including placing on their website a list of representation (reciprocal) agreements entered into.<sup>196</sup>

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191 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at paras 3.55–3.66.

192 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 20(3), implementing Art 21 of the EU Directive.

193 Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016 No 221) (UK) reg 19, implementing Art 20 of the EU Directive.

194 UK Intellectual Property Office, “Guidance on the UK Regulations Implementing the Collective Rights Management (CRM) Directive” (February 2016) Part 2, section 9 at para 2.

195 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.27.1.

196 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.32.1(d).

Where a request is made to a CMO for information on the copyrighted materials under its repertoire or the rights that the CMO manages, a written reply must be provided within three weeks of the request.<sup>197</sup> Whereas the Proposed Licensing Scheme adopts the position under the UK Regulations, both these sets of regulations are rather too sketchy to effectively govern disclosure of rights representation. It is interesting to note that the Proposed Licensing Scheme makes no reference to the CMOs Code which, as observed earlier,<sup>198</sup> imposes more detailed obligations on the CMOs in relation to the disclosure of rights representation information. Since the CMOs Code was drafted and agreed to by CMOs themselves, it would not be too onerous to expect that CMOs are able to fulfil those obligations.

#### IV. Conclusion

80 To build the legitimacy that CMOs require to effectively protect copyright, it is imperative for the Licensing Scheme and the Tribunal Review to, at the very least, put in place accountability mechanisms resembling those found in the UK Regulations. The Proposed Licensing Scheme goes a long way towards that goal but can afford to be tuned up in certain areas. The topic of CMOs is vast and this article touches on the tip of the iceberg, excluding subjects such as user data collection, alternative dispute resolution and digital music,<sup>199</sup> which deserve papers of their own. It is hoped, however, that in relation to Rights Management, the insights provided in this article will contribute towards the effective governance of CMOs.

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197 Ministry of Law and the Intellectual Property Office of Singapore, *Public Consultation of Proposed Licence Conditions and Code of Conduct for Collective Management Organisations* (3 June 2020) at para 3.27.2.

198 See paras 48 and 50 above.

199 There exists some confusion with CMOs in relation to digital music. Statute provides that digital audio transmissions of sound recordings to the public within a business premise does not constitute infringement of copyright if the business is not predicated on making sound recordings available to the public: Copyright Act (Cap 63, 2006 Rev Ed) s 107C. Yet, CMOs like COMPASS have continued to insist (whether unwittingly or not) on music users paying royalties for streaming *background* music from digital music platforms such as Spotify. This author believes that this area of law needs to be clarified so that CMOs do not charge royalties for acts that do not constitute copyright infringements, but the discussion belongs to a much wider one encompassing the whole notion of digital music.